STATE OF MICHIGAN
IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS

WILLIAM BAILEY

    Plaintiff

v.

ANTRIM COUNTY

    Defendant

SECRETARY OF STATE JOCELYN
BENSON

    Intervenor-Defendant,

_____/

Supreme Court No. _____

COA Case No: 357838

LC Case No. 20-9238-CZ

APPLICATION FOR LEAVE TO APPEAL

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Respectfully submitted

DePERNO LAW OFFICE, PLLC

Dated: June 2, 2022   */s/ Matthew S. DePerno*
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                                  Attorney for Plaintiff-Appellant

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Exhibit 1

Court of Appeals Opinion

April 1, 2022

STATE OF MICHIGAN

COURT OF APPEALS

WILLIAM BAILEY,

       Plaintiff-Appellant,

v

ANTRIM COUNTY,

       Defendant-Appellee,

and

SECRETARY OF STATE,

       Intervening Defendant-Appellee.

FOR PUBLICATION
April 21, 2022
9:20 a.m.

No. 357838
Antrim Circuit Court
LC No. 2020-009238-CZ

Before: CAMERON, P.J., and CAVANAGH and GADOLA, JJ.

PER CURIAM.

Plaintiff William Bailey appeals the trial court's order granting defendant Antrim County and intervening defendant Secretary of State's joint motion for summary disposition. We affirm.

I. BACKGROUND

Plaintiff is a resident of Central Lake, Michigan, which is located in Antrim County. On November 3, 2020, plaintiff voted in person in the 2020 election at a polling location in Central Lake Township. On November 6, 2020, the Antrim County Board of Canvassers certified the Antrim County general election results. On November 23, 2020, the State Board of Canvassers certified the election results for the State of Michigan.

On November 23, 2020, plaintiff filed suit against Antrim County. Plaintiff alleged multiple constitutional claims, including a right to conduct an audit under Const 1963, art 2,

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§ 4(1)(h), and violations of MCL 600.4545(2), MCL 168.765(5), and MCL 168.861. Plaintiff requested that the trial court

> A. issue an order . . . allowing Plaintiff to take a forensic image of the 22 precinct tabulators, thumb drives, related software, the Clerk's "master tabulator," and conduct an investigation of those images.

> B. issue an order allowing Plaintiff to conduct an independent and non-partisan audit to determine the accuracy and integrity of the November 3, 2020 election.

Plaintiff also requested that the trial court issue a protective order and preliminary injunction to "preserve and protect all evidence relevant to th[e] case," including "all 'documents' and 'computer records' used to tabulate votes in Antrim County." Plaintiff also requested that he be permitted to "conduct immediate discovery through a full investigation of the 22 precinct Dominion tabulators" and that he be "permitted to take a forensic image of the 22 precinct tabulators and conduct an investigation of those images, thumb drives, related software, and the Clerk's 'master tabulator.' " Plaintiff also requested that the trial court order Antrim County to not "turn on the Dominion voting machines" or "connect any of the Dominion voting machines . . . to the internet."

Antrim County did "not object to an order requiring it to (a) preserve and protect all records in its possession used to tabulate votes in Antrim County; and (b) not turn on or connect the one (1) Dominion Voting machine (tabulator) in its possession to the internet." According to Antrim County, it was not in possession of the remaining 21 precinct tabulators because they were controlled and owned by "the individual townships." Antrim County argued that plaintiff had failed to provide "any support for his argument that in order to conduct an audit of the November 3, 2020 elections, he must be permitted to take forensic image[s] of the precinct tabulators, thumb drives, related software, and the 'master tabulator.' " Antrim County indicated that plaintiff could request "a manual recount of the paper ballots in Antrim County" and that he would not need "the requested forensic imaging" to do so. The trial court granted plaintiff's motion and held, in relevant part:

> IT IS ORDERED that Antrim County maintain, preserve and protect all records in its possession used to tabulate votes in Antrim County, to not turn on the Dominion tabulator in its possession and to not connect the Dominion tabulator in its possession to the internet.

On December 6, 2020, plaintiff's "forensic team collected forensic images of certain equipment in Antrim County's office, including CF cards, thumb drives, and [a] master tabulator."

On December 17, 2020, a hand recount of the results of the presidential election in Antrim County was conducted. The Michigan Bureau of Elections also conducted statewide audits to confirm the overall accuracy of the November 2020 general election.

The Secretary of State was permitted to intervene over the objection of plaintiff. The parties thereafter engaged in discovery and motion practice. After the close of discovery, defendants jointly moved for summary disposition under MCR 2.116(C)(4) (lack of subject matter

jurisdiction) and (C)(8) (failure to state a claim). Defendants argued that plaintiff's claims were moot, that plaintiff lacked standing to bring several of the claims, and that plaintiff's claims failed as a matter of law. Plaintiff opposed the motion and moved to amend the complaint. Plaintiff also argued that the trial court should permit further discovery before ruling on the motion for summary disposition.

After hearing oral argument, the trial court concluded that plaintiff's claims were moot because plaintiff had already been granted the relief that he sought in the complaint. The trial court further concluded that "[t]here is no right, either in [Const 1963, art 2, § 4(1)(h)] or [MCL 168.31a], for the independent audit that [plaintiff] seeks. A petitioner under Article II, Section 4 does not get to choose his own audit criteria." Rather, the trial court concluded that audits are to be conducted "according to the law" and that an audit had already been conducted. The trial court dismissed plaintiff's claims in a May 2021 order and declined to rule on plaintiff's motion to amend the complaint. This appeal followed.

II. JURISDICTIONAL ISSUE

At the outset, we must address a jurisdictional issue. Antrim County argues that this Court lacks jurisdiction because the trial court's May 2021 order was not a final order. We disagree.

MCR 7.202(6)(a)(i) defines "final order" as "the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties. . . ." In this case, the trial court's May 2021 order granted summary disposition in favor of defendants. Because there was "nothing left for the trial court to decide after it granted summary disposition. . . ," we conclude that the court's May 2021 order was a final order appealable by right. *Rooyakker & Sitz, PLLC v Plante & Moran, PLLC*, 276 Mich App 146, 148 n 1; 742 NW2d 409 (2007). The fact that the trial court may have continued to rule on motions after the May 2021 order was entered does not change the fact that the May 2021 order was a final order.

III. MOOTNESS

Plaintiff argues that the trial court erred by concluding that his claims were moot. We agree.

"Whether an issue is moot is a question of law that this Court reviews de novo." *In re Tchakarova*, 328 Mich App 172, 178; 936 NW2d 863 (2019). "Michigan Courts exist to decide actual cases and controversies. . . . A matter is moot if [a] Court's ruling cannot for any reason have a practical legal effect on the existing controversy." *Id.* (first alteration in original; quotation marks and citations omitted).

In this case, plaintiff requested that the trial court

> A. issue an order . . . allowing Plaintiff to take a forensic image of the 22 precinct tabulators, thumb drives, related software, the Clerk's "master tabulator," and conduct an investigation of those images.

B. issue an order allowing Plaintiff to conduct an independent and non-partisan audit to determine the accuracy and integrity of the November 3, 2020 election.

While the trial court granted plaintiff some of this relief, it is undisputed that plaintiff did not receive *all* the relief requested in the complaint. Indeed, plaintiff argued that he was personally entitled to perform "an independent and non-partisan audit to determine the accuracy and integrity of the November 3, 2020 election." While plaintiff is not entitled to this relief for the reasons discussed later in this opinion, the fact that plaintiff did not have viable claims does not render them moot. Indeed, a ruling that plaintiff was not permitted under the law to conduct his own independent audit would have had a practical legal effect. Consequently, the trial court erred by determining that plaintiff's claims were moot.[1] Nonetheless, we will not reverse a trial court's decision when it reaches the right result, even if for the wrong reason. *Gleason v Mich Dep't of Transp*, 256 Mich App 1, 3; 662 NW2d 822 (2003) ("A trial court's ruling may be upheld on appeal where the right result issued, albeit for the wrong reason."). For the following reasons, we conclude that summary disposition was proper under MCR 2.116(C)(8).[2]

IV. SUMMARY DISPOSITION UNDER MCR 2.116(C)(8)

A. STANDARDS OF REVIEW AND GENERAL PRINCIPLES OF LAW

"This Court . . . reviews de novo questions of constitutional law." *Promote the Vote v Secretary of State*, 333 Mich App 93, 117; 958 NW2d 861 (2020). In interpreting constitutional provisions, the primary duty of the judiciary "is to ascertain the purpose and intent as expressed in the constitutional . . . provision in question." *Adair v State*, 486 Mich 468, 477; 785 NW2d 119 (2010) (quotation marks and citation omitted). In doing so, "we are mindful that the interpretation given [to] the provision should be the sense most obvious to the common understanding and one that reasonable minds, the great mass of the people themselves, would give it." *Id*. (quotation marks and citation omitted). "When the language of a constitutional provision is unambiguous, resort to extrinsic evidence is prohibited. . . ." *Nat'l Pride at Work, Inc v Governor*, 481 Mich 56, 80; 748 NW2d 524 (2008).

"We . . . review de novo a trial court's interpretation and application of a statute." *City of Grand Rapids v Brookstone Capital, LLC*, 334 Mich App 452, 457; 965 NW2d 232 (2020). "The primary goal of statutory interpretation is to give effect to the intent of the Legislature. If the language of a statute is clear and unambiguous, the statute must be enforced as written and no further judicial construction is permitted." *Mich Head & Spine Institute, PC v Mich Assigned Claims Plan*, 331 Mich App 262, 272; 951 NW2d 731 (2019) (quotation marks and citations

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[1] Because the mootness doctrine does not apply, we need not consider whether the trial court improperly analyzed whether summary disposition under that doctrine was proper under MCR 2.116(C)(4).

[2] We question whether the relief requested by plaintiff is meaningful because the evidence that plaintiff seeks to gather would only be useful if an avenue remained open for him to challenge the election results.

PLAINTIFF-APPELLANT's Appendix 000005

omitted). "The use of the word 'shall' denotes mandatory action." *Wolfenbarger v Wright*, 336 Mich App 1, 31; 969 NW2d 518 (2021).

We also review de novo "a trial court's decision on a motion for summary disposition." *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159; 934 NW2d 665 (2019).

> A motion under MCR 2.116(C)(8) tests the *legal sufficiency* of a claim based on the factual allegations in the complaint. When considering such a motion, a trial court must accept all factual allegations as true, deciding the motion on the pleadings alone. A motion under MCR 2.116(C)(8) may only be granted when a claim is so clearly unenforceable that no factual development could possibly justify recovery. [*Id*. at 159-160 (citations omitted).]

B. ANALYSIS

1. CONSTITUTIONAL CLAIMS UNDER CONST 1963, ART 2, § 4

Const 1963, art 2, § 4(1)(h), provides that "[e]very citizen of the United States who is an elector qualified to vote in Michigan shall have" "[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." Const 1963, art 2, § 4(1) further provides:

> All rights set forth in this subsection shall be self-executing. This subsection shall be liberally construed in favor of voters' rights in order to effectuate its purposes. Nothing contained in this subjection shall prevent the legislature from expanding voters' rights beyond what is provided herein.

Plaintiff argues that § 4(1)(h) permits him to have "[a] full [and independent] forensic audit. . . ." While § 4(1)(h) is self-executing and is to be liberally construed in favor of voters' rights, the provision is not unlimited. Indeed, § 4(1)(h) provides that an audit is to be performed "in . . . a manner as prescribed by law. . . ." It does not permit an audit to be performed in the manner dictated by an individual voter, and it clearly provides that *the Legislature* may expand the rights provided in § 4(1)(h). But the Legislature did not do so.

MCL 168.31a, which was amended by 2018 PA 603 after the adoption of the aforementioned audit language, provides:

> (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

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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 Legislature required the Secretary of State to "prescribe the procedures for election audits" and required the Secretary of State and county clerks to conduct the election audits. See MCL 168.31a(2). The statutory language does not allow private citizens to conduct independent audits, and we are not permitted to read words into the plain language of a statute. *Byker v Mannes*, 465 Mich 637, 646-647; 641 NW2d 210 (2002) ("It is a well-established rule of statutory construction that this Court will not read words into a statute."). Because plaintiff is not entitled to conduct his own independent audit, plaintiff's claim under Const 1963, art 2, § 4(1)(h) fails as a matter of law.

We note that, on appeal, plaintiff challenges the constitutionality of MCL 168.31a and argues that a constitutionally sufficient audit was not performed by the Secretary of State. However, plaintiff failed to plead these claims in his complaint,[3] so we will not address plaintiff's arguments on appeal concerning the constitutionality of MCL 168.31a and whether the audit was "constitutionally sufficient. . . ." See *Lenawee Co v Wagley*, 301 Mich App 134, 160; 836 NW2d 193 (2013) ("A party is bound by [his or her] pleadings, and it is not permissible to litigate issues or claims that were not raised in the complaint. . . .") (quotation marks and citations omitted).

Plaintiff's claim under Const 1963, art 2, § 4(2) also fails. That provision provides:

> Except as otherwise provided in this constitution or in the constitution or laws of the United States the 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.

In plaintiff's complaint, he alleged that § 4(2) provided him with the right to "immediately take a forensic image of the 22 precinct tabulators, thumb drives, related software, the Clerk's 'master tabulator,' and to conduct an investigation of these images. . . ." Plaintiff alleged that this relief was proper in order to "ensure the accuracy and integrity of the election." While § 4(2) is certainly aimed at preserving the "purity of elections," it does not provide plaintiff with a cause of action. Rather, it serves as a directive to the Legislature to create laws to preserve "the purity of elections. . . ." See *Taylor v Currie*, 277 Mich App 85, 96; 743 NW2d 571 (2007) ("The Michigan

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[3] Although plaintiff later sought to add this claim, it would not have been proper for the trial court to permit plaintiff to amend the complaint for the reasons discussed later in this opinion.

Supreme Court has interpreted 'the purity of elections' clause to embody two 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.") (quotation marks and citations omitted).   Because plaintiff's complaint does not allege that the Legislature enacted laws that adversely affect the purity of elections and because Const 1963, art 2, § 4(2) does not create an individual right to conduct an audit, plaintiff's claim under Const 1963, art 2, § 4(2) fails as a matter of law.

2. QUO WARRANTO

Plaintiff next argues that the trial court erred by dismissing his quo warranto claims.[4] We disagree. The Court in *Hanlin v Saugatuck Twp*, 299 Mich App 233, 240-241; 829 NW2d 335 (2013) explained,

> Quo warranto is a " 'common-law writ used to inquire into the authority by which a public office is held or a franchise is claimed.' " *Davis v Chatman*, 292 Mich App 603, 612; 808 NW2d 555 (2011), quoting Black's Law Dictionary (9th ed). . . .   Generally such actions are brought pursuant to MCL 600.4505—which echoes the procedure of MCR 3.306(B)(2)—and are pursued against a person in public office by one who seeks to challenge that person's right to hold office, but no assertions are made of fraud or error. [*Barrow v Detroit Mayor*, 290 Mich App 530, 541; 802 NW2d 658 (2010).] MCL 600.4545(1), on the other hand, provides for an action in the nature of quo warranto "whenever 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 any county, township, or municipality thereof." This type of action is brought to challenge the validity of the election itself. *Barrow*, 290 Mich App at 543. Thus, to pursue an action for quo warranto to challenge the validity of the election, [a] plaintiff[ ] must establish that a material fraud or error was committed at the election.

Turning to the allegations in plaintiff's complaint, plaintiff alleged a violation of MCL 168.861 and asserted that an "action may be brought to remedy fraudulent or illegal voting or tampering with ballots or ballot boxes before a recount pursuant to MCL 168.861. . . ."[5] However, MCL 168.861 does not provide plaintiff with an independent cause of action. See *Hanlin*, 299 Mich App at 242 ("MCL 168.861 was intended as a saving clause rather than an independent cause

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[4] We note that a citizen must obtain leave of the trial court before proceeding with a claim for quo warranto. MCR 3.306(B)(3)(b). In this case, rather than determining whether plaintiff should be granted leave to proceed by quo warranto, the trial court decided plaintiff's claims for quo warranto under summary disposition standards.

[5] MCL 168.861 provides that, "[f]or fraudulent or illegal voting, or tampering with the ballots or ballot boxes before a recount by the board of county canvassers, the remedy by quo warranto shall remain in full force, together with any other remedies now existing."

of action."). Thus, the trial court properly dismissed plaintiff's quo warranto claim brought under MCL 168.861.

With respect to plaintiff's quo warranto claim that was brought under MCL 600.4545, MCL 600.4545(1) provides for an action in the nature of quo warranto "whenever 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 any county, township, or municipality thereof."

> The phrase "material fraud or error" in MCL 600.4545(1) "means fraud or error that 'might have affected the outcome of the election.' " *Barrow*, 290 Mich App at 542, quoting *St Joseph Twp v City of St Joseph*, 373 Mich 1, 6; 127 NW2d 858 (1964). While a "but for" showing is not necessary, the plaintiff's "proofs must be sufficient to support a fact finding that enough votes were tainted by the alleged fraud to affect the outcome." *Barrow*, 290 Mich App at 542. See also *Rosenbrock v Sch Dist No. 3, Fractional*, 344 Mich 335, 339; 74 NW2d 32 (1955) ("It has been repeatedly held by this Court that irregularities in the conducting of an election will not invalidate the action taken unless it appears that the result was, or may have been, affected thereby."). [*Hanlin*, 299 Mich App at 243.]

In this case, plaintiff's complaint repeatedly cites to the votes that were tallied in Antrim County in relation to the presidential election. As already stated, MCL 600.4545(1) provides for an action in the nature of quo warranto "whenever 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 any county, township, or municipality thereof." There are no allegations in the complaint to support that the purported irregularities in Antrim County "might have affected the outcome" of the presidential election, as the cited case law clearly requires. See *Barrow*, 290 Mich App at 542 (in order to establish a quo warranto claim, a plaintiff must establish that the purported fraud or error "might have affected the outcome of the election").

To the extent that plaintiff is challenging the results of the state, county, or township election, we agree with defendants that summary disposition was proper on those claims as well because plaintiff failed to sufficiently plead the claim.

> MCR 3.301(A)(1)(d) and (2) "govern the procedure for seeking the writs or relief formerly obtained by the writs," including a writ of quo warranto. In that regard, MCR 3.301(A)(3) provides that "[t]he general rules of procedure apply except as otherwise provided in this subchapter." MCR 2.111(A)(1) requires that allegations made in a pleading be clear, concise, and direct. MCR 2.112(B)(1) requires that fraud and mistake be pleaded with particularity. Other matters, including malice, intent, and knowledge, can be pleaded generally under MCR 2.112(B)(2). MCR 3.301 does not otherwise contain pleading requirements for a petition for leave to proceed by quo warranto. Nonetheless, our Supreme Court has held that an application for leave to file an action for quo warranto "should be so clear and positive in its statement of facts as to make out a clear case of right; and should be so framed as to sustain a charge of perjury if any material allegation is

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false." *Boucha v Alger Circuit Judge*, 159 Mich 610, 611; 124 NW 532 (1910), citing *Cain v Brown*, 111 Mich 657, 660; 70 NW 337 (1897); see also *Vrooman v Michie*, 69 Mich 42, 46; 36 NW 749 (1888). [*Barrow*, 290 Mich App at 543-544.]

In this case, plaintiff alleged in his complaint, in relevant part:

29. *There are many other questions that remain unanswered*, including but not limited to (1) whether the Dominion tabulators in Antrim County were tampered with, (2) whether they have the capacity to connect to the internet, (3) whether they had any open VPN ports during the election, (4) if connected to the internet, was the connection secure, (5) whether the machines were accessed via the use of removable media to transfer voting information, (6) whether the ballot images were preserved in every precinct per federal and state election law, (7) whether the audit logs were preserved and synchronized, (8) whether the audit logs were altered or edited by any person operating the system, (9) whether Dominion pre-loaded any algorithms and configurations on the machines that alter the results, and if so, what algorithms and configurations were pre-loaded, and (10) whether the "purge option" that is built into Dominion utilized to cancel, switch, or manipulate votes, in the same way it has historically been utilized in Venezuela and Cuba.

30. *Plaintiff and others seek to learn the answers to these questions*, including why Defendant [Antrim County] initially registered "phantom voters" for Presidential Candidate Joe Biden and why the Dominion machines altered and switched votes for him.

* * *

49. Based upon the *allegations* contained herein, material fraud or error occurred in this election so that the outcome of the election was affected.

50. Based upon the above *allegations* of fraud, statutory violations, and other misconduct, as stated herein, it is necessary to permit Plaintiff to immediately take a forensic image of the 22 precinct tabulators[,] thumb drives, related software, and the Clerk's "master tabulator," and *conduct an investigation of those images*, after which a manual recount of the election results and an independent audit of the November 3, 2020 election may be ordered to ensure the accuracy and integrity of the election. [Emphasis added.]

We conclude that plaintiff failed to allege any "clear and positive" factual allegations that "make out a clear case of right. . . ." See *Barrow*, 290 Mich App at 543-544 (quotation marks and citations omitted). Instead, plaintiff merely raised a series of questions about the election without making any specific factual allegations as required. Because plaintiff "failed to disclose sufficient facts and grounds and sufficient apparent merit to justify further inquiry by quo warranto proceedings," the trial court properly granted summary disposition. See *id*. at 550.

3. EQUAL PROTECTION CLAIM

Plaintiff next argues that the trial court erred by granting summary disposition on his equal protection claim. We disagree.

"The equal protection clauses of the Michigan and United States constitutions provide that no person shall be denied the equal protection of the law." *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 486 Mich 311, 318; 783 NW2d 695 (2010). The purpose of the equal protection guarantee is to secure every person "against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." *Village of Willowbrook v Olech*, 528 US 562, 564; 120 S Ct 1073; 145 L Ed 2d 1060 (2000).

Plaintiff alleged in the complaint that he was deprived of his constitutional right to vote in the November 2020 election due to Antrim County's "rampant and systematic fraud," which resulted in his vote not being "valued." However, plaintiff failed to plead allegations to support that he was intentionally and arbitrarily discriminated against as a result of Antrim County's "improper execution" of a statute through its "duly constituted agents," *id*., or that Antrim County failed to implement the minimum procedures necessary to protect the fundamental right of each voter, Cf. *Bush v Gore*, 531 US 98, 109; 121 S Ct 525; 148 L Ed 2d 388 (2000). Rather, as already stated, plaintiff made generalized assertions to the trial court that election fraud occurred and that he should be provided with discovery in order to determine the extent of the fraud. Additionally, plaintiff did not allege that he was treated differently than similarly situated individuals, which is necessary to establish an equal protection claim. See *Nordlinger v Hahn*, 505 US 1, 10; 112 S Ct 2326; 120 L Ed 2d 1 (1992) ("The Equal Protection Clause . . . keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike."). Consequently, plaintiff's equal protection claim fails as a matter of law.[6]

V. THE TRIAL COURT'S CONSIDERATION OF DOCUMENTARY EVIDENCE AND INADMISSIBLE HEARSAY

Plaintiff argues that the trial court improperly considered documentary evidence and inadmissible hearsay evidence when deciding the motion for summary disposition.[7] We need not consider this argument, however, given that summary disposition was proper under MCR 2.116(C)(8) for the reasons already discussed. See *El-Khalil*, 504 Mich at 159 ("A motion under

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[6] Plaintiff's complaint also contained an allegation that Antrim County violated MCL 168.765(5). Plaintiff does not argue on appeal that the trial court erred by dismissing this claim. Therefore, we will not address it.

[7] Although the trial court referenced the Secretary of State's press releases concerning the election, the trial court did so when evaluating whether plaintiff's claims were moot under MCR 2.116(C)(4).

MCR 2.116(C)(8) tests the legal sufficiency of a claim based [only] on the factual allegations in the complaint.") (emphasis omitted).

VI. THE TRIAL COURT'S ALLEGED PREMATURE GRANT OF SUMMARY DISPOSITION

Plaintiff next argues that summary disposition was premature because several depositions had not yet been conducted.[8] While it is true that a trial court is not permitted to grant summary disposition under MCR 2.116(C)(10) when the opposing party establishes that "further discovery stands a fair chance of uncovering factual support for the opposing party's position," *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 292; 769 NW2d 234 (2009), summary disposition in this case was proper under MCR 2.116(C)(8). Thus, permitting plaintiff to complete the scheduled depositions would have been futile. Based on this conclusion, it is not necessary to consider plaintiff's argument that the trial court abused its discretion when it denied plaintiff's motion to adjourn oral argument on defendants' motion for summary disposition.

VII. PLAINTIFF'S MOTION TO AMEND THE COMPLAINT

Finally, plaintiff argues that the trial court improperly failed to consider his motion to amend the complaint. We conclude that it would have been improper for the trial court to grant leave to amend the complaint.

MCR 2.116(I)(5) requires a trial court to "give the parties an opportunity to amend their pleadings as provided by MCR 2.118" if the grounds for summary disposition are based on MCR 2.116(C)(8) "unless the evidence then before the court shows that amendment would not be justified." "[L]eave [to amend] should ordinarily be denied only for particularized reasons such as undue delay, bad faith or dilatory motive, repeated failures to cure by amendments previously allowed, or futility." *Decker v Rochowiak*, 287 Mich App 666, 681-682; 791 NW2d 507 (2010) (quotation marks and citation omitted). With respect "to undue delay, delay, alone, does not warrant denial of a motion to amend. However, a court may deny a motion to amend if the delay was in bad faith or if the opposing party suffered actual prejudice as a result." *Id*. (alteration, quotation marks, and citation omitted). "Prejudice to a defendant that will justify denial of leave to amend arises when the amendment would prevent the defendant from having a fair trial." *Knauff v Oscoda Co Drain Comm'r*, 240 Mich App 485, 493; 618 NW2d 1 (2000). Importantly, "[t]he prejudice must stem from the fact that the new allegations are offered late and not from the fact that they might cause the defendant to lose on the merits." *Id*.

We conclude that prejudice would have resulted if the trial court had permitted plaintiff to amend the complaint. On November 23, 2020, plaintiff filed the original six-count complaint against Antrim County. Shortly thereafter, the trial court entered the protective order and

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[8] Although discovery had already closed at the time the trial court decided defendants' joint motion for summary disposition, plaintiff had yet to take several depositions. The trial court permitted the depositions to be conducted after the close of discovery.

preliminary injunction. The Secretary of State was permitted to intervene over the objection of plaintiff, and the parties thereafter engaged in discovery and motion practice.

On April 9, 2021, defendants jointly moved for summary disposition. Plaintiff filed a response to this motion on May 3, 2021. On that same date, plaintiff moved the trial court for leave to file a first-amended complaint. The proposed first-amended complaint was 81 pages and lists the following defendants: (1) Antrim County, (2) Jocelyn Benson, in her individual capacity and her official capacity as Secretary of State, (3) Jonathan Brater, in his individual capacity and official capacity as Michigan's Director of Elections, (4) Sheryl Guy, in her individual capacity and official capacity as the Clerk of Antrim County, (5) Miller Consultations & Elections, Inc., d/b/a Election Source, and (6) Central Lake Township. The proposed first-amended complaint contains 13 counts, including a count that challenges the constitutionality of MCL 168.31a. The proposed first-amended complaint also alleges that the proposed defendants engaged in multiple constitutional and statutory violations and that they engaged in fraud and civil conspiracy. Plaintiff also sought to challenge certain election results and to obtain injunctive relief, declaratory relief, monetary damages, fees, and costs.

Thus, plaintiff sought to add significant factual allegations and theories of liability against new parties. Not only did plaintiff seek to add new parties and new claims, plaintiff filed the motion to amend the complaint after the close of discovery and after defendants had moved for summary disposition. Also, a bench trial had been scheduled for June 2021, and the trial court had indicated that it would not grant adjournments. The record also supports that plaintiff was aware of the above-named potential defendants and the facts contained in the proposed amended complaint long before the May 2021 motion to amend was filed. Because the proposed defendants would be unable to have a fair trial, we conclude that prejudice would have resulted if plaintiff had been permitted to amend the complaint. See *Weymers v Khera*, 454 Mich 639, 659-660; 563 NW2d 647 (1997) (factors like whether the plaintiff is seeking "to add a new claim or a new theory of recovery on the basis of the same set of facts, after discovery is closed, just before trial," support a finding of prejudice). Additionally, review of the proposed first-amended complaint supports that permitting amendment of some of the claims would have been futile. Consequently, even if the trial court had considered the motion, it would have been improper for the trial court to permit amendment of the complaint.

Affirmed.

/s/ Thomas C. Cameron
/s/ Mark J. Cavanagh
/s/ Michael F. Gadola

Exhibit 2

Errata Order

May 25, 2021

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF ANTRIM

_____

WILLIAM BAILEY,

                Plaintiff,

v   File No. 2020009238CZ

                                     HON. KEVIN A. ELSENHEIMER

ANTRIM COUNTY,

                Defendant,

and

SECRETART OF STATE
JOCELYN BENSON

                Intervening Defendant.

_____/

Matthew S. DePerno (P52622)
Attorney for Plaintiff

Haider A. Kazim
Attorney for Defendant Antrim County

Heather S. Meingast (P55439)
Erik A. Grill (P64713)
Attorneys for Defendant Secretary Benson

Frank Krycia (P35383)
Attorney for Non-Party Macomb County
Assistant Corporation Counsel

Allan C. Vander Laan (P33893)
Kristen L. Rewa (P73043)
Attorneys for Non-Party Palmer

Peter R. Wendling (P48784)
Attorney for Non-Party Townships

_____

ERRATA ORDER

On May 18, 2021, the Court issued a bench decision pursuant to MCR 2.116(C)(4). The Court, at the end of the decision, stated that summary disposition was awarded to the Plaintiff. This was a misstatement. As is clear from the context of the decision, the Court granted Defendants' joint motion for summary disposition pursuant to MCR 2.116(C)(4). This Order therefore, grants summary disposition to the Defendants and dismisses Plaintiff's claims.

IT IS SO ORDERED.

05/19/2021
01:09PM

KEVIN A. ELSENHEIMER, CIRCUIT COURT JUDGE, P49293

HONORABLE KEVIN A. ELSENHEIMER
Circuit Court Judge

Exhibit 3

Order Denying Plaintiff's Motion for Rehearing or Reconsideration Under MCR 2.119(F)(3)

June 25, 2021

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF ANTRIM

_____

WILLIAM BAILEY,

            Plaintiff,

v

ANTRIM COUNTY,

            Defendant,

and

SECRETART OF STATE
JOCELYN BENSON

            Intervening Defendant.
_____/

File No. 2020009238CZ
HON. KEVIN A. ELSENHEIMER

Matthew S. DePerno (P52622)
Attorney for Plaintiff

Haider A. Kazim
Attorney for Defendant Antrim County

Heather S. Meingast (P55439)
Erik A. Grill (P64713)
Attorneys for Defendant Secretary Benson

Frank Krycia (P35383)
Attorney for Non-Party Macomb County
Assistant Corporation Counsel

Allan C. Vander Laan (P33893)
Kristen L. Rewa (P73043)
Attorneys for Non-Party Palmer

Peter R. Wendling (P48784)
Attorney for Non-Party Townships

_____

DECISION AND ORDER DENYING MOTION FOR RECONSIDERATION

On May 18, 2021, the Court issued a bench decision pursuant to MCR 2.116(C)(4) and, subsequently, on May 19, 2021, entered an Errata Order granting summary disposition to the Defendants and dismissing the Plaintiff's claims. On June 10, 2021, the Plaintiff filed a Motion for Reconsideration or, Alternatively, Rehearing Pursuant to MCR 2.119(F). The Court having now reviewed all documents submitted, dispenses with oral argument, pursuant to MCR 2.119(E)(3), and issues this written decision and order for the reasons stated herein.

The standard for reviewing motions for reconsideration is codified at MCR 2.119(F), entitled Motions for Rehearing and Reconsideration, and reads in pertinent part, as follows:

> (3) Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error.

The Court finds that the Plaintiff's Motion for Reconsideration presents the same issues previously ruled on by the Court, either expressly or by reasonable implication. The Court does not find that a palpable error has been demonstrated and that a different disposition of the motion must result from the correction of an error.[1] Therefore, for the reasons stated herein, Motion for Reconsideration or, Alternatively, Rehearing Pursuant to MCR 2.119(F) is denied.

IT IS SO ORDERED.

06/24/2021
08:25AM

KEVIN A. ELSENHEIMER, CIRCUIT COURT JUDGE, P49293

HONORABLE KEVIN A. ELSENHEIMER
Circuit Court Judge

---

[1] MCR 2.119(F)(3).

Exhibit 4

Hearing Transcript on Defendants' Motion for Summary Disposition

May 10, 2021

STATE OF MICHIGAN

THIRTEENTH CIRCUIT COURT (ANTRIM COUNTY)

WILLIAM BAILEY,

        Plaintiff,

                            Case No. 20-9238-CZ

v.

ANTRIM COUNTY,

        Defendant,

SECRETARY OF STATE JOCELYN BENSON,

        Intervenor-Defendant.

 ----------------------/

MOTIONS
(VIA ZOOM)

Before the Honorable KEVIN A. ELSENHEIMER, Circuit Judge

Bellaire, Michigan - Monday, May 10th, 2021.

APPEARANCES:

For the Plaintiff: MR. MATTHEW S. DEPERNO (P52622)
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                        P.O. Box 1595
                        Portage, Michigan 49081
                        (269) 321-5064

For the Defendant: MR. HAIDER A. KAZIM (P66146)
                        Cummings McClorey Davis & Acho PLC
                        310 West Front Street
                        Suite 221
                        Traverse City, Michigan 49684
                        (231) 922-1888

Reported By: Ms. Jessica L. Jaynes, CSR 7597, RPR
                        Official Court Reporter
                        (231) 922-4576

1

```
APPEARANCES CONTINUED:

For Intervenor-Defendant:   MR. ERIK A. GRILL (P64713)
                            Assistant Attorneys General
                            P.O. Box 30736
                            Lansing, Michigan 48909
                            (517) 335-7659

For Nonparty Townships:     MR. WILLIAM F. DERMAN (P24048)
                            William F. Derman, Jr., PLLC
                            (Jordan, Elk Rapids, Milton,
                            Forest Home)
                            101 Ames Street
                            P.O. Box 815
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                            (231) 498-2378

                            MR. BARRY COLE (P33723)
                            Barry L. Cole Attorney, PLC
                            (Star Township)
                            602 East Cayuga Street
                            P.O. Box 1107
                            Bellaire, Michigan 49615
                            (231) 533-4464

                            MR. CHRISTOPHER BZDOK (P53094)
                            MS. ABIGAIL HAWLEY (P82343)
                            Olson Bzdok & Howard PC
                            (Helena Township)
                            420 East Front Street
                            Traverse City, Michigan 49686
                            (231) 946-0044

                            MR. PETER WENDLING (P48784)
                            Young Graham & Wendling PC
                            (All Townships)
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                            P.O. Box 398
                            Bellaire, Michigan 49615
                            (231) 533-8635
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<u>WITNESSES: PLAINTIFF</u>   <u>PAGE</u>
(None)

<u>WITNESSES: DEFENDANTS</u>
(None)

<u>EXHIBITS:</u>   <u>IDENTIFIED</u>   <u>RECEIVED</u>
(None)

1   Bellaire, Michigan

2   Monday, May 10, 2021 - 1:31 PM.

3   (Court, counsel, and plaintiff present)

4   THE COURT: All right. It is the 10th of

5   May. Let's go ahead and take up Bailey versus Antrim

6   County. We have a series of motions to deal with

7   today -- and hearings. We're going to start with the

8   first matter that is on the docket today, and that is

9   the joint motion from Secretary Benson and Antrim

10   County to quash nonparty subpoenas to Dominion Voting

11   Systems and to a series of other townships.

12   Then we will take up the protective order

13   matter. We'll hear the rest of the -- the issues that

14   are presented, including the motions to quash, motion

15   to compel, objections, and then we're going to go

16   ahead and take up the motion for summary disposition.

17   So with regard to the first motion and that

18   is the joint motion to quash, let's go ahead and start

19   with appearances, beginning with plaintiff.

20   MR. DEPERNO: Matthew DePerno on behalf of

21   plaintiff, Bill Bailey.

22   THE COURT: Afternoon.

23   And defense, for the state?

24   MR. GRILL: Good afternoon, your Honor.

25   Erik Grill, Assistant Attorney General for intervening

1   defendant Secretary Benson.

2   THE COURT: And for the county?

3   MR. KAZIM: Good afternoon, your Honor.

4   Haider Kazim on behalf of Antrim County.

5   THE COURT: All right. And I assume that

6   we've got representation for the townships here as

7   well. I read a brief from Mr. Wendling. Mr. Wendling

8   is here. Are there any other township attorneys who

9   are here?

10   Mr. Bzdok, you are here on behalf of Helena

11   Township; correct?

12   MR. BZDOK: That is correct, your Honor;

13   along with my colleague, Abigail Hawley.

14   THE COURT: All right. Thank you.

15   And, Mr. Cole, you're here for Star

16   Township; correct?

17   MR. COLE: Correct, your Honor.

18   THE COURT: All right. Thank you.

19   Are there -- Mr. Derman is here.

20   Mr. Derman, you've got a series of townships

21   as well; correct?

22   MR. DERMAN: That is correct. I have

23   Jordan, Elk Rapids, Milton, and Forest Home.

24   THE COURT: All right. Thank you.

25   Mr. Wendling, why don't you go ahead and

1   identify your townships as well.

2   MR. WENDLING: Good afternoon, your Honor.

3   I think on behalf of the majority of the

4   townships, including others that are represented by

5   counsel -- so I've been asked to take the lead, so I'm

6   here -- appearing on behalf of all the townships.

7   Obviously other township attorneys are present as well

8   to supplement any argument related to the pending

9   motions.

10   THE COURT: All right. Thank you.

11   And with our primary defendants, who's going

12   to be making the argument?

13   Mr. Grill, is this going to be your argument

14   today?

15   MR. GRILL: Yes, your Honor.

16   THE COURT: Please proceed.

17   MR. GRILL: Well, your Honor, I think our

18   brief basically says it all, but from our

19   standpoints -- and I will leave it to the townships to

20   describe the burdens placed on them, but our concern

21   primarily is that, why are we doing discovery

22   subpoenas at this point in the case?

23   The discovery closed in this case on April

24   8th, the Court's been very clear about that. And why

25   we are still hearing discovery matters, it was not our

1   understanding that the Court had opened the doors for

2   additional new factual discovery, which is -- all

3   these subpoenas could possibly be. It presents a

4   burden and prejudice to us to have additional

5   information added to the case at this stage. And for

6   that basis, we moved the Court for a protective order

7   to stop these subpoenas from proceeding.

8   THE COURT: Mr. Kazim?

9   MR. KAZIM: I have nothing further to add,

10   your Honor.

11   Thank you.

12   THE COURT: All right.

13   Let's go to you, Mr. Wendling.

14   MR. WENDLING: Thank you, your Honor.

15   I may take a little bit more time, but not

16   too much here. First addressing the motion to quash,

17   it is clear that discovery has already ended in this

18   case and with respect to the nonparties, the operative

19   court rule is MCR 2.305.

20   Looking at the record of this case,

21   including plaintiff's complaint here, it appears

22   that -- first of all, most of the relief has already

23   been granted to plaintiff here. On every count of the

24   complaint it talks about the plaintiff needs to

25   "Immediately take a forensic image of the 22 precinct

7

1   tabulators -- which I'll talk about in a moment here,

2   thumb drives, related software, the clerk's master

3   tabulator, and conduct an investigation of those

4   images." That has certainly occurred already at the

5   county level, from my understanding. "After which a

6   manual recount of the election results -- which has

7   been done, and an independent audit of the November

8   3rd, 2020, election may be ordered to ensure the

9   accuracy and integrity of the election" -- also

10   already completed.

11   So it's -- I don't really understand, on

12   behalf of the townships, why there's additional

13   discovery, when, to a large extent, the relief

14   requested on every count of plaintiff's complaint has

15   already been largely granted. As far as the

16   immediacy, this complaint was filed on November 23rd

17   of last year, with the subpoenas issued to the

18   townships on April 19th of this year. So what was

19   requested to be immediate, obviously wasn't immediate

20   and wasn't requested immediately.

21   As far as the -- the second issue also

22   involves, frankly, standing as it -- as it relates to

23   the nonparty townships here. To even have the

24   discovery, there has to be some sort of suffered

25   injury in fact. I don't see what that is, since the

8

1 relief has already been largely granted -- especially

2 as it relates to the townships. There has to be some

3 sort of casual connection between the injury and the

4 conduct complained of.

5   How is that traceable to the existing

6 townships? I don't see how that's traced to them at

7 all -- again, considering what has already occurred in

8 the history of this case. And the relief must be

9 likely that -- and not speculative, that the injury

10 will be redressed by a favorable decision -- well,

11 from what I can tell from the record here, to a

12 certain extent there has been a favorable decision as

13 far as plaintiff's complaint; in that, there was a

14 manual recount and that the election results were done

15 and an accuracy and the integrity of the election has

16 been upheld. Further, there's also no case or

17 controversy, really, involving the townships at all,

18 related to this subpoena.

19   There's also some additional information --

20 and -- and this also goes to both the motion to

21 quash -- and I don't know if I can already address

22 the -- the alternative request for a protective

23 order -- may I proceed on that?

24   THE COURT: You may.

25   MR. WENDLING: Okay. Thank you.

9

 1   I received from one of my clients here a

 2   letter from Dominion dated May 6th of 2021. Part of

 3   this letter talks about the -- well, it talks about

 4   the Dominion equipment here, but the most important

 5   paragraphs are as follows:

 6   "Your Dominion software licensing agreement

 7   also provides important written guidance on

 8   permissions for who can legally access the system with

 9   the company's consent. Any unauthorized transfer of

10   voting equipment to unaccredited, noncertified vendors

11   can void this agreement and create financial impacts

12   for your jurisdiction.

13   "While Dominion does not object to audits by

14   federally accredited voting system test labs, the

15   agreement does not allow for the release of voting

16   systems to unaccredited, noncertified third parties

17   without prior written consent. Should you feel the

18   need to conduct further examination of your voting

19   equipment for any reason, please feel free to consult

20   with your legal advisors and Dominion about the

21   appropriate options that are available. Your

22   Secretary of State or state elections board can advise

23   you on the legal guidelines for the proper testing,

24   use, and auditing of voting systems and elections

25   processes" -- and then it talks about an online guide

                           10

1   from the U.S. Election Assistance Commission.

2   There's also a letter dated May 5th, 2021,

3   from the U.S. Department of Justice civil rights

4   decision that I also received, to the Honorable Karen

5   Fann, President Arizona State Senate. Although it's

6   not obviously the same case here, it involves the

7   voting system critiques here, and it talks about a

8   number of reports suggesting that the ballot election

9   systems and materials are subject to -- in this case

10   Maricopa County, where Phoenix is located, audit are

11   no longer under the ultimate control of the state or

12   local election officials and are not being adequately

13   safeguarded. And the letter goes on to refute that.

14   I'm not going to get into the details of

15   that letter, but it talks about that type of

16   equipment, and that's where it merges between the

17   motion to quash and the protective order, because I'm

18   concerned that any discovery that may be had may A,

19   void any warranties or reusefulness of the equipment

20   currently in the hands of the township. B, could

21   violate any intellectual property rights which are

22   claimed by Dominion -- and Dominion is clearly not shy

23   as far as litigating such matters, involving its

24   machines. And, therefore, if this discovery is to be

25   had, I'm requesting a very specific order from this

11

1   Court acknowledging the risks and essentially doing

2   the best job I can try to do, to exonerate my clients

3   from having any liability relating to intellectual

4   property rights, much less compromising of this

5   equipment, which could either void the warranties,

6   void the machines, or otherwise make them unusable for

7   future elections -- which is what we're trying to

8   avoid.

9   And that dovetails into who is going to be

10   looking at this? What are the qualifications of the

11   expert who would be looking at these tabulators,

12   looking at this data? Would they meet the -- the

13   qualifications outlined by Dominion? Much -- not just

14   inclusive of the letter, but also through the

15   contract, which Dominion has with the state of

16   Michigan and which in turn, the state of Michigan,

17   through grant documents, has provided to my township

18   clients on these machines.

19   I'd like the Court to have a look at --

20   and -- and basically authorizing the qualifications of

21   any expert who would be looking at this data and

22   looking at this type of equipment, should this

23   discovery, in fact, be allowed. There are also costs

24   associated with this request. The way the subpoenas

25   were issued, there was a request that all the

1   townships suddenly come out, without any notification,

2   including to Kearney Township, to meet at Kearney

3   Township a day after many of these townships -- at

4   least in the eastern part of the county had elections

5   on May 4th; and that from May 5th through the 7th,

6   they would bring all of their equipment to Kearney

7   Township, and that's extremely burdensome. It's

8   unreasonably and, frankly, even if you wanted to do

9   that, there was an opportunity -- which you would just

10   look at the Kearney Township website online, to rent

11   the township hall to -- for whatever purpose. Whether

12   it's discovery, or a wedding, or whatever the case may

13   be.

14   None of this was done. There was no contact

15   made with Kearney Township regarding this. And

16   there's no rational basis for these townships to be

17   required to meet at one specific township hall with

18   all of this equipment on the -- you know, on a

19   three-day period. It's just -- it's not rational.

20   And finally, it's not just the costs related

21   to inspecting this equipment, it's the concerns,

22   again, going back to whether this equipment is

23   rendered unusable. And whether a bond or a

24   irrevocable letter of credit would be appropriate to

25   protect the integrity of this equipment and protect

13

1   the township, should they have to purchase new

2   equipment as a result of something that either went

3   wrong with the inspections that are being conducted,

4   or otherwise rendered those -- those pieces of

5   equipment and databases unusable in future elections

6   and require replacement.

7   I know that these -- you know, from the

8   information I've looked at, that these machines are

9   worth between about 5500 and $6,000 apiece, at least

10   from the grant documents that I've reviewed. So, you

11   know, that has to be addressed as well, if this

12   discovery is to be had. But overall, I would request

13   the Court to quash the subpoenas. That the discovery

14   is unnecessary, given the language of the complaint

15   and the relief requested -- which to a great extent,

16   really to the end game, has already been granted. And

17   even as it applies to Central Lake Township, where

18   Mr. Bailey is a resident, it still will not make a

19   difference as far as changing the outcome of the

20   election, or the fact that there was a recount done

21   properly and that this election has been certified.

22   I see no basis for moving forward with this

23   discovery. It's overly burdensome, it's unnecessary,

24   and I request the Court to quash it. And in the

25   alternative, if discovery is going to be allowed, that

14

1   the costs associated with it, the integrity of -- of

2   the equipment itself and any threats, legal threats to

3   my clients as a result of the contractual obligations

4   and the statements of Dominion, be diminished to the

5   extent possible that the Court can do so as part of

6   its order.

7   Thank you.

8   THE COURT: All right. Thank you,

9   Mr. Wendling.

10   When we dealt with the nonparty subpoenas to

11   the counties -- which I think we did last month, we

12   had several attorneys and I extended an opportunity to

13   all of the attorneys to weigh in, if they had anything

14   additional. We'll do the same thing for the townships

15   in Antrim County.

16   We'll start with Mr. Bzdok. Anything

17   additional for you, sir?

18   MR. BZDOK: No, your Honor. Mr. Wendling

19   said it all very well.

20   THE COURT: All right. Thank you.

21   Mr. Derman?

22   MR. DERMAN: I have nothing new to add to

23   this, your Honor.

24   THE COURT: All right. Thank you.

25   Mr. Cole?

1   MR. COLE: Very briefly, your Honor.

2   As the Court knows, discovery like this, one

3   weighs the benefit versus the -- the cost and expense

4   and the -- the difficulty in producing what's being

5   requested. It doesn't appear to me, at least in the

6   subpoenas, that there's any indication as to how this

7   is going to be conducted, or what type of information

8   is being sought.

9   Without that, I don't know how the Court can

10   weigh the benefit versus cost as required by the court

11   rule. Other than that, I certainly concur with

12   everything Mr. Wendling said.

13   THE COURT: All right. Thank you.

14   Let's go ahead and hear from Mr. DePerno, as

15   to your subpoenas and the motion that's been brought.

16   MR. DEPERNO: Thank you, your Honor.

17   First, we have to deal with this idea that

18   the relief requested by plaintiff has already been

19   granted. In no event has plaintiff been granted the

20   relief of an audit. All we've seen so far, is a hand

21   recount conducted by the Secretary of State on

22   December 17th. That is not an audit -- it's certainly

23   not an audit by any standards set forth by the

24   Secretary of State -- and I've outlined those in our

25   briefing, including the actual documentation of the

1   Secretary of State where she defines what an audit

2   actually is and what it consists of.

3   They did none of that stuff in -- on

4   December 17th, other than look at the -- the ballots

5   regarding the presidential race. There have been no

6   review of any race below the presidential race. And

7   we haven't expected absentee ballots, we haven't

8   inspected the envelopes that come with absentee

9   ballots. We haven't looked at signatures. We haven't

10   looked at the type of paper that was used in these

11   ballots. We haven't looked at how the absentee

12   ballots were folded.

13   We haven't looked at any of that stuff to

14   actually conduct a real audit in this case. And,

15   again, those audit procedures are actually defined by

16   the Secretary of State in her own documents. The

17   second question raised is that -- there's an argument

18   that discovery has ended. But, again, we -- we didn't

19   get the Halderman report until March 26th, and right

20   after that, it took us a couple weeks to send out

21   these subpoenas to all these townships.

22   It's very important that we conduct a -- a

23   review of these townships based on the Halderman

24   report and based on his conclusions. So that's --

25   THE COURT: Well, let me -- let me stop you

17

1   there, because I want to drill down on this point a

2   little bit.

3   Your indication to me today is that you are

4   seeking this nonparty discovery based on the

5   conclusions in the Halderman report, and not the

6   independent evaluation that you made just following

7   the election, when you went to Star Township? When

8   you went to Mancelona Township -- and by you, of

9   course, I mean your -- your client, or your -- on your

10   behalf when you went to Central Lake Township.

11   So the basis, if I understand your argument,

12   is the Halderman report, for the information you're

13   seeking?

14   MR. DEPERNO: I think that's -- that's

15   certainly one basis for the information we've -- we're

16   seeking. We're also -- you know, we -- we went out

17   and we -- we retained additional experts, Jeff Lenberg

18   and -- and Jim Penrose, who have done additional work

19   in order to refute the Halderman report. So that's

20   part of the basis, but certainly the other basis

21   within which we -- we seek to do this is, the relief

22   we requested within the complaint itself.

23   The -- the relief to have an independent

24   audit conducted in this case. But the Halderman

25   report suggests that there was no problem with this

1   election. And since we received the Halderman report,

2   and the additional testing we've done, we've

3   discovered multiple problems with this election, that

4   are actually -- that actually occur at the tabulator,

5   as we showed the Court and many other people, in the

6   video released -- we released last Monday, that we

7   link -- linked to in our brief, where we can flip

8   votes at the tabulator. We show people how that can

9   be done.

10   Whether it's the presidential election, all

11   the way down to any proposal in this case, any of the

12   township elections, or any of the -- the -- the school

13   board elections, we can flip votes up and down the

14   ballot, as we choose, based only on the information

15   and the -- the programming that's available to us on

16   the Dominion system, including this unauthorized

17   Microsoft SQL database management program. So we show

18   that we can do that, and then today we filed the brief

19   with the Court where we showed exactly how the fraud

20   occurred in this case.

21   Certainly the video we released last Monday,

22   shows that there is potential for fraud. The video we

23   put out today shows the actual subversion of the vote

24   and how the fraud actually occurred within each of

25   these townships. And that's something we should be

19

1   able to look at and examine.

2   The Court has to be conscious of the idea

3   that we've been seeking discovery from the defendants

4   since February -- February 8th, 2021. And in -- and

5   in each of those requests, the second, third, fourth

6   and fifth discovery requests, the plaintiffs have

7   continuously made objections, filed motions -- we

8   still have not got answers from them regarding those

9   discovery requests. We had to submit additional or

10   amended discovery requests, which would be due today,

11   so we've done all this work, discovering what we

12   discovered, even without the help of the -- the

13   discovery responses from the Secretary of State or

14   Antrim County.

15   So really I think the -- the question is --

16   sort of is not why this has taken so long by us, but

17   we have to look at, number one, the idea that the

18   defendants have consumed almost the entire part of

19   discovery by delaying. But I think the real question

20   is, is why are we rushing this? We've -- we've

21   recognized that we've discovered so much in this very

22   short period of time, there's so many layers and

23   layers to how this fraud occurred, what happened in

24   Antrim County. And we now can definitively show the

25   Court that the fraud actually occurred, and it really

1   debunks the Halderman report. There's no way that

2   that report would be correct. There's no way that the

3   votes are transferred from Jorgensen to Trump to Biden

4   and then Biden's votes disappear. We show that now

5   forensically and through our -- our scientists who

6   say, if that happened as the Secretary of State and

7   County Clerk Sheryl Guy claims it happened on election

8   night, the system would have shutdown. There would

9   have been a critical error.

10   That didn't happen. There wasn't a critical

11   error. The results -- the election actually

12   continues, which shows behind the scenes the

13   subversion in how these -- the County, the Secretary

14   of State, and maybe even the townships, were able to

15   manipulate the transfer of those Joe Biden votes to an

16   undervote category. That does not happen in the

17   normal programming of this system, and that's the

18   subversion we've uncovered. We absolutely have to be

19   able to go in and look at the township records, look

20   at their machines, look at their ballots -- it's

21   critical to the case.

22   We shouldn't be rushing the case that is as

23   important as this case is, considering all of the

24   information that we have discovered. We also -- also

25   showed the Court that what we discovered just recently

21

1   is that, in these individual townships, we provided

2   the Court with graphs for every individual township.

3   We now show that in the age categories of 65-80, there

4   is almost a 100 percent voter turnout in those

5   categories. We don't believe that that is accurate.

6   And we also show this high rate -- 20

7   percent of absentee ballots that were mailed out, were

8   actually mailed out to P.O. Boxes, which is illegal.

9   Then in terms of the other arguments by the townships,

10   this idea that this is so burdensome to them -- they

11   already did this on December 17th, when they brought

12   their ballots to the Kearney Township Hall. No one

13   seemed to complain then, that -- that that was a

14   problem. And we've addressed their other concerns as

15   well, by providing the qualifications of these expert

16   witnesses.

17   Certainly if the Court wants to question

18   them and vet them, the Court can do so and -- and we'd

19   even provide the opportunity for these township

20   attorneys to -- to voir dire our experts. And

21   finally, in terms of the cost, as we've stated,

22   plaintiffs certainly willing to share in the cost

23   of -- that the townships would bear. We have no

24   problem with that. And then I should say finally now,

25   the other issues raised by the townships is the

1   possibility that their contracts could be voided or

2   warranties voided, or that these machines could no

3   longer be used -- that's just not true.

4   There's no indication that it -- that

5   anything would happen to the machines. We're not

6   going to decertify the machines. In fact, when these

7   experts perform any forensics on any machine, they

8   install a baffling device that doesn't permit data

9   to -- to go back upstream into the machine. So that's

10   just low-hanging fruit and not accurate.

11   And then the -- the issue of any other

12   destruction of information, it -- it's just not --

13   it's just not accurate or true. That's not going to

14   happen. So everything here can be protected. There's

15   no chance that we're going to damage anything by -- of

16   the townships, but even if it's the case, we'd be

17   willing to put up a bond to cover any potential costs

18   that they might perceive. But I don't see how it

19   would happen.

20   Any questions for me?

21   THE COURT: All right. Thank you,

22   Mr. DePerno. I don't have any additional questions.

23   Let's go back to Mr. Grill in response,

24   please?

25   MR. GRILL: There's a lot to unpack there,

23

1   your Honor, that we're -- we heard for the first time

2   today. I -- I was just scanning through Mr. DePerno's

3   response to our motion for protective order and I

4   honestly didn't see any reference to Professor

5   Halderman's report in there. But -- and I -- I have

6   to say I don't understand how any of this could be

7   responsive to Professor Halderman, since Professor

8   Halderman's report made no reference whatsoever to

9   tabulators in the townships. His review was limited

10   to the forensic image that plaintiff took of the

11   master tabulator of the county back in December.

12   So the argument there that we need this to

13   rebut Professor Halderman, well, no. You want to say

14   that Professor Halderman's methodology was wrong, you

15   have his report. You want to say that his results are

16   wrong, you already have the forensic image that he

17   used. This would be an entirely new thing to say,

18   here's some other reason, some new theory that

19   contradicts what the -- what the Halderman's report is

20   based on because of new information he didn't have.

21   That's not a rebuttal. That's a whole new thing.

22   Beyond that, I would also note that none of

23   what Mr. DePerno just talked about is anywhere located

24   in the complaint -- which is probably something we're

25   going to deal with more closely in the -- in the next

24

1   couple motions, but it certainly presents questions as

2   a basis for why we would conduct discovery on these

3   basis, in this complaint as it concurrently stands.

4   Lastly -- and if the Court needs additional

5   information on this, we're happy to provide it

6   following today's hearing, but what -- Mr. DePerno

7   says this wouldn't destroy the accreditation of the

8   machines, and I have to say that is not my

9   understanding. Access by nonaccredited persons to

10   these machines does conflict with their certification.

11   And while Mr. DePerno may be perfectly willing to

12   assert that nothing bad will happen, that's not how

13   accreditation works. That's not how certification

14   works.

15   They can promise they're not sending

16   anything back into the machines, but it's hard to know

17   for sure. It requires basically the machines to be

18   completely reformatted, taken apart, and set up brand

19   new again. Because otherwise we don't know what was

20   added to those machines when Mr. DePerno's crew took

21   look at it. We can't be sure. So that would create a

22   problem as well, that I think would -- you know, is

23   hard to redress in advance.

24   So there are a lot of problems here, but,

25   again, I kind of circle back to the idea this isn't

25

1   rebuttal. This is all stuff, that if Mr. DePerno

2   thought was important to this case, should have been

3   done way, way, way long ago -- certainly not until

4   after discovery closed. I would also note that Mr. --

5   Professor Halderman's report was released to plaintiff

6   on March 26th, I believe. Why it is that several

7   weeks later Mr. DePerno thought, well, now it's time

8   to go searching for subpoena documents. It seems to

9   me that if this were a true rebuttal to Professor

10   Halderman's report, we would have heard about it much

11   sooner.

12   THE COURT: Mr. Grill, as to the

13   decertification issue -- which is something that we

14   really haven't talked much about, except as it related

15   to the initial inspection of the county machines.

16   Were the county machines decertified as

17   well?

18   MR. GRILL: There were concerns, your Honor,

19   and that was -- that was part of a problem that we had

20   leading up to the March -- the -- to the May 5th --

21   May 5th election was, what do we do with those

22   machines? We need to use them, obviously, for the

23   election, but we also -- these machines have been

24   accessed, so we need to reformat them and the

25   reformatting would involve issues -- whether or not

1   we're destroying or, you know, documents are being

2   protected. I would yield to Mr. Kazim as to how the

3   county resolved that. But it is a problem, that when

4   you let people who are not -- especially in this

5   circumstance that since we don't know who Mr. DePerno

6   is talking about bringing in, what their

7   accreditations are.

8   And it certainly doesn't sound like they're

9   one of the federally-certified, accredited inspectors.

10   So that is kind of the problem that we run into.

11   THE COURT: All right.

12   Mr. Kazim, why don't you go ahead and

13   respond, if you would, please.

14   MR. KAZIM: Just from the issue of the

15   response to your question, your Honor, the machines,

16   to my knowledge, have not been decertified. However,

17   there were significant concerns regarding their

18   integrity going into the May 4th election, and there

19   were discussions at the county level about bringing in

20   a third-party vendor to reformat that machines, while

21   taking all the appropriate and necessary steps to

22   preserve the existing information that was on those

23   machines, in accordance with the Court's previous

24   orders.

25   Ultimately the county board decided not to

1   retain the services of that vendor. So to my

2   knowledge, the -- the machine that is under the -- in

3   the county's possession -- and I want to make that

4   clear as well, the act -- the county actually only has

5   one tabulator in -- as the Court is aware, that

6   tabulator, the county loans to other townships, if

7   they are having some equipment malfunctions or

8   problems. But the county itself doesn't have a

9   tabulator that is use -- that are -- that are being

10   used in different precincts, in different elections,

11   but -- so to that extent -- but the county does have

12   an EMS terminal that was accessed, and my -- my -- to

13   my knowledge, those -- that was not reformatted

14   because that ultimately -- the county decided that it

15   wanted to go along with the Court's previous orders of

16   preserving the evidence in this case and we didn't

17   want to be accused of any spoliation arguments down

18   the road.

19   THE COURT: All right. I appreciate that.

20   I don't want to get too far down that -- that issue,

21   but we have -- we certainly have dealt with the -- the

22   issue of Dominion being involved in notifications

23   to -- in particular, the county about whether or not

24   there would be issues regarding certification before.

25   I appreciate the parties updating me.

28

1   Let's go ahead and get a response from Mr.

2   Wendling to Mr. DePerno's argument, please.

3   MR. WENDLING: Thank you, your Honor.

4   Again, if this complaint, filed back on

5   November 23rd, asks for -- used the word "immediately"

6   to take a forensic image of the 22 precinct

7   tabulators. The first discovery subpoena received by

8   nonparty townships was April 19th. So the immediate

9   need, due to plaintiff's actions, obviously was not as

10   represented in the complaint. Also the townships are

11   looking at protecting their own equipment. They are

12   not just risk-averse, they want to eliminate any

13   possible risks related to the integrity of their

14   equipment, their ability to use it.

15   They've received these through a mixture of

16   grants, through purchases, and they don't want to have

17   something that will result in that equipment becoming

18   voided, unusable for any reason. And that's why it's

19   so important that the Court, in our -- in my request,

20   if the discovery is to be had, takes the lead, both in

21   determining what is a proper amount of a bond or

22   irrevocable letter of credit to -- to replace any of

23   this equipment, should it be destroyed as a result of

24   discovery or otherwise rendered unusable.

25   Or -- and -- and also on top of that, for

1   the Court to vet who the proper expert is to take a

2   look at this -- or experts, to look at this equipment,

3   should this discovery be had. Not just individual

4   attorneys for each of the townships. You know, this

5   letter from Dominion -- which is a customer

6   notification, makes me wonder whether Dominion really

7   should have been a necessary party to this litigation,

8   because there's a lot of keys that they hold, that can

9   cause a lot of harm potentially to the individual

10   townships here with respect to the equipment.

11   And it is -- you know, they're very clear

12   about who's supposed to be qualified and who can look

13   at these machines. And -- and, therefore, on behalf

14   of the townships, if the discovery's to be had, we

15   request that the Court vet any experts; and if

16   necessary, have contact with Dominion to ensure that

17   these experts are qualified to look at this equipment,

18   and, of course, the financial protection of the

19   townships, again, should this equipment be otherwise

20   compromised.

21   But, you know, the primary position is I

22   think given -- or given what I've seen of the case --

23   and obviously I'm a nonparty here, representing

24   nonparty townships, at this late stage, I just don't

25   see the viability or the necessity of this discovery,

1   and I would reiterate our requests that the discovery

2   be quashed.

3   Thank you.

4   THE COURT: Mr. Wendling, you had indicated

5   in your brief, I believe, that there might be a

6   difference between the positions of some of your

7   clients versus some of the other townships -- in

8   particular Central Lake Township, given that that was

9   the location of the -- the Bailey vote, maybe in a

10   different position than some of your other townships.

11   Could you -- could you elaborate on that point?

12   MR. WENDLING: Yes, your Honor.

13   I mean, I recognize that the plaintiff here

14   is a resident of Central Lake Township and voted in

15   Central Lake Township. And, of course, my client,

16   Central Lake Township, is -- is aware of that. So to

17   the extent that there's an actual connection between

18   what happened, if anything, with -- with Mr. Bailey's

19   vote that may have occurred in Central Lake Township,

20   then there's a little bit more in the way of a

21   tangible connection on discovery as to Central Lake

22   Township's equipment, as opposed to the rest of the

23   townships.

24   But I don't think that changes, necessarily,

25   the timing of the discovery, the relevancy of the

31

1   discovery, given the relief requested in the

2   complaint, I think that's an issue that's applicable

3   to all of the townships -- nonparty townships.

4   THE COURT: Thank you.

5   Let me go to the rest of the township

6   attorneys. Are there any one -- pardon me, is there

7   anyone that would like to speak?

8   Mr. Bzdok?

9   MR. BZDOK: No. Thank you for the

10   opportunity, though.

11   THE COURT: Mr. Derman? You're muted, sir,

12   I'm sorry. I think that's on your end, Mr. Derman.

13   There you go.

14   MR. DERMAN: No, your Honor.

15   THE COURT: All right. Nothing from

16   Mr. Derman.

17   Mr. Cole?

18   MR. COLE: No, thank you, your Honor.

19   THE COURT: All right. Thank you, all.

20   All right. The question before the Court is

21   the motion that's been filed jointly by the State and

22   County defendant, and supported by a brief filed by

23   the townships writ large. There are several township

24   attorneys here representing the several townships in

25   Antrim County. They've been argued by the defense

1   attorneys, who are a part of this case, and also by

2   Mr. Wendling on behalf of the nonparty subpoenas or

3   nonparty townships -- pardon me. And the goal of the

4   subpoenas was to obtain information from the nonparty

5   townships relating to the vote that occurred in

6   November.

7   The indication here today from Mr. DePerno

8   is that, that was largely the result of the

9   information that was provided by the most recent

10   iteration of expertise and expert review, and that

11   review, as we know, was conducted in response to the

12   Halderman report. However, the Court is reflecting

13   back on this case when it began, and we discussed

14   information coming from the townships -- particularly

15   as it related to the township tabulation machines or

16   voting machines, and there was a record made regarding

17   the fact that the county only had one machine --

18   that's been discussed here today, and that the actual

19   votes themselves and the tabulating machines were

20   retained by the townships that were not part of this

21   case.

22   Mr. DePerno, on behalf of his client,

23   certainly had the ability to bring them into the

24   case -- in particular to bring in Central Lake

25   Township. Mr. DePerno's team -- I should say

33

1   Mr. Bailey's team, did go to Central Lake Township,

2   did receive voluntary -- a voluntary opportunity to

3   inspect the machine in that township, along with, I

4   believe, Star Township and Mancelona Township, if

5   memory serves. So this is not a surprise to

6   Mr. DePerno or Mr. Bailey, that, if there is a

7   township issue, it was something that they certainly

8   were aware of it.

9   Discovery is closed. The plaintiff has

10   already sought to expand this case to other counties,

11   and now is seeking to expand this case within Antrim

12   County to other townships. Mr. DePerno's indicated or

13   questioned why it is that we are rushing to -- to

14   complete this discovery and complete this case --

15   well, the court rules require us to move

16   precipitously -- I think it's a six-month period of

17   time that we have to deal with a -- a 3310 motion,

18   which is what's been brought here, ultimately --

19   originally, anyway, and that's why we're moving

20   quickly on this case.

21   I advised the attorneys at the very

22   beginning of the case that we were going to move

23   expeditiously, and that meant that the onus was on

24   them to plan their discovery accordingly. There's no

25   doubt in my mind that if Mr. DePerno and Mr. Bailey

34

1   believed that there was a problem -- an issue that

2   could be developed through discovery in the other

3   townships, that that would have come in a timely way,

4   given that the case has been going on since November

5   and December of 2020. It did not come. It is now May

6   10th, we are outside of discovery and the Court

7   believes that at this point the additional expense,

8   annoyance, work associated with the -- the nonparty

9   motions would exceed the volume of the discovery that

10   they would produce; as a result, I'm going to go ahead

11   and grant the motion from the defendants to quash the

12   nonparty subpoenas from the several townships. And as

13   a result, I'm not going to take action on

14   Mr. Wendling's protective order request.

15   If I can get an order from you, Mr. Grill,

16   on that point, please? Mr. Grill, if you would --

17   apparently all of your orders are objected to, but if

18   you would please, at least, start a list, along with

19   you, Mr. DePerno, we can start working on hopefully a

20   master order or set of orders from today's hearings.

21   With that, the township attorneys are

22   welcome to stay, but you're certainly excused. Thank

23   you for your participation.

24   MR. BZDOK: Thank you, your Honor.

25   MR. WENDLING: Thank you, your Honor.

1   MR. COLE: Thank you, your Honor.

2   THE COURT: All right. Let's go ahead and

3   proceed. The next issue up is -- and we're just going

4   to proceed serially through these and we'll save

5   the -- the joint motion for summary disposition for

6   the end. But the next issue up is an objection to a

7   proposed order -- by the way, before we get to that,

8   Mr. DePerno, are we still having issues getting your

9   proposed orders filed? Are you still running into

10   issues with the filing system?

11   I ask that because my staff tells me we

12   don't have those proposed -- proposed orders that I

13   asked for from you.

14   MR. DEPERNO: Yeah. We filed them twice

15   now, we've provided them to the Court through the

16   filing system. And -- and for the record, I did get

17   an email from Tom Hansel, who is the VP of technical

18   support at ImageSoft. They are the company that

19   receives the documents when filed and then transferred

20   to the county. And this was Friday May 7th, 2021, at

21   11:23 p.m., where he advises me that the Court has now

22   been able to apply the upgraded version of the

23   conversion software, and they hope or expect that that

24   will fix issues in the future, but they will continue

25   to monitor it.

1   So apparently the Court has been working off

2   a prior version of the software, which has apparently

3   caused problems.

4   THE COURT: All right. In that case, I'll

5   go ahead and -- and review again. I -- over the

6   weekend as I was preparing for these motions, I looked

7   for those matters to try to bring some conclusion. I

8   was not able to find them, my staff was not. But that

9   doesn't mean that they weren't filed. Again, we're

10   dealing with a relatively new technology here and

11   certainly I know that there have been some issues --

12   not your fault, necessarily, Mr. DePerno, with filing.

13   And I'm glad to hear that there may be a solution out

14   there, and my staff is listening, so I'm sure that

15   they will be in touch with our technology people and

16   hopefully we can get that resolved. So thank you for

17   assisting.

18   Let's go, then, to the objection to the

19   proposed order granting the joint motion for

20   protective order. This objection came from the

21   plaintiff.

22   Mr. DePerno, if you'd like to go ahead and

23   make your argument, sir.

24   MR. DEPERNO: Yeah, thank you. The -- I --

25   I laid out just where our objections were and I -- I

1   think this is the -- the objection where we provided

2   the Court with some handwriting in terms of what we

3   thought the proposed order should look like. And the

4   pages and the line numbers from the transcripts that

5   we thought corresponded to the correct wording that

6   should be in the order. So that was Exhibit 2 of our

7   objection.

8   I -- I don't want to belabor the point, but

9   I think that lays out exactly what our arguments are.

10   THE COURT: All right. Mr. Grill, in

11   response?

12   MR. GRILL: Yes, your Honor.

13   We -- we circulated proposed drafts prior to

14   entry. I -- I'm not sure why it is that we can't find

15   out what the problems are with the order before it

16   comes in the form of an objection. Be that as it may,

17   my -- my frustration with Mr. DePerno's objections

18   stem primarily on there's a lot of unnecessarily

19   particular objections over language. For example --

20   and I think we pointed this out in our brief, but the

21   idea that plaintiff wants to change the order to read

22   that plaintiff will refile interrogatories, by and

23   with the first discovery requests total more than --

24   no more than 17 -- no more than 20. Wants to change

25   that to plaintiff will serve 17 additional

1   interrogatories to each defendant.

2   I don't know what the difference is there;

3   it's the same effect. It certainly doesn't mean that

4   our -- our proposed order was inaccurate or incomplete

5   for some reason, that would support an objection.

6   Similarly, plaintiff's objection that his prior

7   requests to produce were not struck. They were -- had

8   to have been, otherwise there was nothing for

9   plaintiff to refile.

10   That was the whole point of refiled -- in

11   discovery requests, was that these were going to be

12   the re-discovery requests that we are going to be able

13   to respond to. And I think that about covers it. Oh,

14   that -- concerning the time to respond. This is

15   something that plaintiff -- I think just said a moment

16   ago in regards to the protective order, that our --

17   our responses to his discovery are due today. Now, it

18   appears to be based on something the Court said during

19   the hearing, addressing this -- this particular

20   motion.

21   However, later on in the -- there is a

22   section of the transcript that we attached to our

23   response to this objection, the Court revisits that

24   point. Because of later rulings, the Court

25   determines, you know, that's not going to work,

1   amended this ruling on page 123 to 124 of the

2   transcript, giving the defendants until May 17th to

3   respond. And that is actually -- you know, that's

4   correct. So our proposed order is correct,

5   Mr. DePerno's objection is inaccurate, and -- so that

6   objection should not be upheld.

7   THE COURT: All right.

8   Mr. Kazim, anything further from you?

9   MR. KAZIM: Nothing further, your Honor.

10   Thank you.

11   THE COURT: Let me go back to Mr. DePerno.

12   In response?

13   MR. DEPERNO: I -- I mean, these are issues

14   for the -- I think the Court to look at as to which

15   order fits better. But I take -- I take objection to

16   Mr. Grill's statement as to why we can't work this

17   out. You know, Mr. Grill had seven days to submit a

18   proposed order to me, and routinely what he does is he

19   waits until the seventh day, sends me an email at two

20   o'clock or 2:30 in the afternoon and says here's my

21   proposed order. If I don't hear back from you within

22   the next hour, I'm going to file it.

23   So, you know, if -- if we try to re -- if

24   he's trying to place blame on me, I -- I -- I'm

25   offended by that characterization. That's all I have

1   to add.

2   THE COURT: All right. You've made a

3   record.

4   All right. I'll review these -- it looks

5   like I'm going to have a list to review. I'll review

6   and make a determination as to which I believe should

7   be entered. I -- let's go ahead and proceed to the

8   next, which is the objection to the order granting in

9   part and denying in part the plaintiff's motion to

10   extend discovery.

11   If you'd like to go ahead and make your

12   argument, Mr. DePerno.

13   MR. DEPERNO: I don't have anything to add,

14   other than what we put in the -- the objection.

15   THE COURT: Okay.

16   And that really relates to the concern

17   requiring the notice of depositions or notices of

18   deposition to be sent by April 19th; is that accurate?

19   That's what you put in the brief.

20   MR. DEPERNO: Yeah. Yeah. I think that's

21   right. I think that's right.

22   THE COURT: Okay.

23   MR. DEPERNO: That's our understanding of

24   what the Court had stated on the record.

25   THE COURT: Very good.

1   Do you have a response, Mr. Grill?

2   MR. GRILL: Yes, your Honor.

3   As we pointed out in the brief, that the

4   Court's -- the transcript shows that the Court did, in

5   fact, make that ruling. We've provided the -- the

6   quoted language in our brief. The Court said,

7   "Mr. DePerno, I'm going to expect that you file those

8   notices by the 19th."

9   With that in mind, your Honor -- and I know

10   that Mr. DePerno has had a copy of this transcript,

11   I -- I -- I see no basis or reason for this objection

12   to have been filed, and that's why in our motion -- in

13   our response to it we've asked the Court to consider

14   sanctions, that this was an unreasonable objection, it

15   should not have been filed.

16   THE COURT: All right. The Court will

17   review and execute an order or amend the order

18   appropriately. Let's go ahead and proceed to -- just

19   a moment, the next objection, which is with regard to

20   the joint motion to compel, the plaintiff has filed

21   this objection.

22   If you'd like to make your argument, Mr.

23   DePerno.

24   MR. DEPERNO: Yeah, I just stand on our

25   objection as filed.

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 1                  THE COURT:  All right.

 2                  And do you have anything further, Mr. Grill?

 3                  MR. GRILL:  Yes, your Honor.

 4                  The only objection Mr. DePerno raised to

 5        this particular order was that it -- it didn't include

 6        reference to both the plaintiff and defendants'

 7        depositions.  However, that was because the

 8        plaintiff's depositions were addressed in the proposed

 9        order we submitted regarding his motion to extend

10        discovery.  I tried to treat these orders, as I

11        drafted them, to address the matters as the Court

12        addressed them -- not any particular reason to be

13        tricky there.  But, again, I don't see any -- any

14        basis for this objection.

15                  I think it was unreasonable for Mr. DePerno

16        to file it, and we would ask the Court to consider

17        sanctions as well.

18                  THE COURT:  All right.  Thank you.

19                  And let's go ahead and move to the final

20        two.  First we have the plaintiff's objection to the

21        proposed protective order regarding discovery

22        documents.

23                  Mr. DePerno?

24                  MR. DEPERNO:  Your Honor, I think this is

25        just a continuation of a prior objection that was
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1     filed, that we had already heard and that we had
2     already talked about at a prior hearing.  And -- and
3     what happened was, when the Court asked us to resubmit
4     our proposed order, I -- I refiled what we previously
5     filed; and I think the Court just took that as another
6     objection.  But we've already argued this motion -- or
7     this objection.
8                 THE COURT:  Do you agree --
9                 MR. DEPERNO:  And the same with the next
10    one.
11                THE COURT:  -- Mr. Grill?
12                MR. GRILL:  That -- that appears to be
13    accurate, your Honor.  That was the way -- it was
14    initially confusing when we saw the objection come in,
15    but then that was the way I interpreted what
16    Mr. DePerno was filing --
17                THE COURT:  All right.
18                MR. GRILL:  -- was that the Court's request
19    for him to submit his proposed order again.
20                THE COURT:  All right.  Well, this file has
21    been complex, and it's not a surprise that we've had
22    some crossover like this from a scheduling standpoint,
23    frankly.  And, again, the court will go ahead and
24    review the matters that we have objections for today
25    and I'll sign or modify as appropriate.  I'm also
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1   going to sign or modify the two remaining objections

2   from a couple of weeks ago, for which we apparently do

3   have proposed orders from Mr. DePerno. And once I've

4   had a chance to review those -- as I've tried to again

5   this weekend, then those will be executed as well and

6   we can move past the objections -- at least until the

7   next and hopefully there won't be any more, but if

8   there are, that's fine.

9   Let's go ahead and move to the -- the other

10   motion that is before us that is not the (C)(4)/(C)(8)

11   motion. And that is -- pardon me, we do have a note

12   in the record of the nonparty township motion --

13   township's motion. That's already been resolved.

14   Are the parties in agreement that the only

15   other matter today, then, is the motion for summary

16   disposition?

17   MR. DEPERNO: Your Honor, we also filed our

18   emergency motion to -- emergency ex-parte motion for

19   status conference and to amend motion schedule, based

20   on our motion to amend the complaint, which we also

21   filed but didn't get scheduled for today.

22   THE COURT: All right. The only emergency

23   motion that I saw, gentlemen -- and this could be an

24   artifact of the -- of the machines that we deal with,

25   was to extend the brief. That's granted, by the way.

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1   Mr. Grill, you can go ahead and include that

2   in your -- your master set of orders. The -- the ex

3   parte order that -- pardon me, motion that you have

4   discussed just a moment ago, Mr. DePerno, I have not

5   seen. Let me see if I can find that, just a moment.

6   When did you file that, sir? Today?

7   MR. DEPERNO: I filed it Thursday.

8   THE COURT: Okay.

9   All right. Well, while I look for that

10   document -- and, again, we may have it here, it may

11   simply not have traveled to us -- although, we do move

12   emergency motions that are identified as emergency

13   motions, quickly to the judge for review. It simply

14   might not have gotten to me yet, given that today is

15   Monday, we had one other business day between the

16   filing and today. I'll take a look at it, and to

17   begin with, however, let's go ahead and begin start

18   with the (C)(4)/(C)(8) motion.

19   This is a motion that's been filed by the

20   defendants. The plaintiff has responded to the

21   motion. There's also been a reply. Again, that reply

22   brief exceeded the page limitation. I've allowed

23   that. And let's go ahead and start with the author of

24   the motion, and that is, I believe, Mr. Grill.

25   If you'd like to make your argument.

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1   MR. GRILL: Thank you, your Honor.

2   I know the Court has read the brief, and

3   I'll do my best not to read it back to the Court. I

4   will survey the -- the issues raised.

5   Before I begin, is there any particular

6   issue or anything the Court especially wants me to

7   address?

8   THE COURT: Go ahead and make your argument,

9   I may bring up some issues as we're going through.

10   But one reminder to you, sometimes your voice does --

11   does cut off. You're apparently, at least as far as I

12   know, the only one in this group, anyway, that -- that

13   fades out, so we might need to make sure that you're

14   close to your microphone.

15   Please proceed.

16   MR. GRILL: Okay. I will scoot up a little

17   bit here.

18   All right, your Honor, beginning first with

19   the mootness arguments. Our argument here essentially

20   reduces to a simple question; that is, what relief

21   could this Court grant to the plaintiff based on this

22   complaint? The complaint itself asks for only three

23   things. To conduct this forensic examination, a -- a

24   protective order to preserve records, and the

25   plaintiff's requests for an independent audit of

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1   election results.

2   Now, there is no question, I think, from the

3   plaintiff, that he conducted his forensic examination.

4   Similarly, this Court granted his request for a

5   protective order. So those two things have been

6   already -- he's already received that relief.

7   That leaves only the issue of the audit. Now, for --

8   as we discussed later on in our brief about what

9   plaintiff is entitled to under this, what there

10   doesn't appear to be much question, though, however,

11   is that the Secretary of State herself conducted the

12   audit -- conducted an audit of statewide election

13   results; and that is what Mr. DePerno -- excuse me,

14   what Mr. Bailey is entitled to as a citizen of the

15   State.

16   Now, the plaintiff may claim that he wants

17   his own audit, but as we've argued later, he's not

18   entitled to that relief. But, you know, if we put a

19   pin in that and we'll circle back to it when we get to

20   the -- to the audit claim, there's no other relief

21   that plaintiff requested in this case. So any other

22   claim -- all the rest of the claims in this case,

23   other than the audit claim, should all be moot.

24   There's no further relief that he's requesting.

25   Furthermore, there's no relief that this

1   Court could grant. The time for special elections to

2   be taken in response to a mechanical defect, have long

3   since passed. Similarly, the -- the election results

4   have already been certified, and the time for recounts

5   has long since passed. No candidate or committee

6   requested a recount in Antrim County.

7   The officials who were elected as a result

8   of the November 2020 election have taken office, and

9   at this point it's -- I'm something at a loss to

10   imagine what other relief the Court could provide,

11   under the circumstances, to address any of

12   Mr. DePerno's -- Mr. Bailey's claims. As a

13   consequence, the absence of the Court to grant any

14   relief, renders the plaintiff's claims moot. Moving

15   ahead to the standing arguments -- as we address in

16   our brief, there are three ways for a plaintiff to

17   establish standing.

18   The first is that they can seek declaratory

19   judgment. The second is that they can have a cause of

20   action provided for them, either expressly or

21   impliedly through statute. And then lastly, whether

22   they can articulate some special injury or right that

23   is different from the public at large. Now, in this

24   case, the plaintiff's complaint does not seek a

25   declaratory judgment.

1   So the first option is off the table.

2   Moving ahead to whether or not there is a statutory

3   cause of action -- first, as the plaintiff

4   acknowledges, Section 861 of the election code does

5   not provide a cause of action. It merely preserves

6   the remedy of quo warranto in the event of fraud. So

7   it's not a cause of action statute, so that's not --

8   there's no standing for that, under that statute.

9   Next, under Section 765 of the election code

10   that deals with whether or not the number of absent

11   ballots sent and received has been posted. That does

12   not create any cause of action -- either express or

13   implied. If the Court were to interpret it as

14   creating some type of implied cause of action ---

15   which I think no other court has yet done, the class

16   of persons to whom the statute seeks to protect is

17   clearly absent voters. Mr. Bailey alleges in his

18   complaint that he voted in person. So he -- he falls

19   outside of the class of persons who are protected by

20   Section 765; and, therefore, he has no standing to

21   bring an implied cause of action under this statute.

22   Lastly, the plaintiff lacks standing to

23   raise any of his constitutional claims, because, as

24   this Court previously ruled, the idea of his standing

25   for a constitutional claim was premised upon

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       1   Mr. Bailey having potentially one -- his ballot be one

       2   of the three that was lost or destroyed in Central

       3   Lake village. That is clearly not the case.

       4   Plaintiff alleges in his complaint that he lives in

       5   Central Lake Township, not Central Lake village. His

       6   response does not contest or argue the fact that he

       7   did not vote in Central Lake village. Ergo, his

       8   ballot could not have been one of the three ballots

       9   that was lost or destroyed in Central Lake village.

      10   And Mr. Bailey lacks the ability -- the courts have

      11   been very -- it's long held that you cannot raise

      12   constitutional claims on behalf of third parties. And

      13   as a consequence, Mr. Bailey has no standing to bring

      14   any of those constitutional claims in the case.

      15   Moving ahead to our arguments regarding the

      16   failure to state a claim, let's start with the audit

      17   claim. This is the claim that has been brought under

      18   Article II Section 4(1)h of the Constitution -- it's a

      19   relatively new provision that was added to the

      20   Constitution through Proposal 3 of 2018. Now, this

      21   particular provision provides expressly -- and I'll --

      22   it's short, so I'll just read it here, "That every

      23   citizen of the United States who is an elector

      24   qualified to vote in Michigan shall have the following

      25   rights: The right to have the results of statewide

1   elections audited, in such a manner as prescribed by

2   law, to ensure the accuracy and integrity of

3   elections."

4   So this is not an open-ended, you know,

5   invent-your-own-kind-of-an-audit situation. This is

6   clearly designed for the person -- to have a citizen

7   benefit of an audit being conducted of statewide

8   election results as prescribed by law. Now, in this

9   case, the Legislature has prescribed the methodology

10   for an audit for statewide election results, and that

11   appears under MCL 168.31(a)(2), which provides that

12   the Secretary of State shall set audit procedures and

13   conduct an audit accordingly. She has.

14   There is no reference in Section 31(a) to

15   individual citizens making up their own audit. In

16   fact, at least two other judges of the state have

17   already reached the conclusion that Section

18   4(1)(a) does not -- 4(1)h does not provide an

19   individual right to audit -- or a right to a

20   custom-made audit, anyway. The first is in the

21   <u>Genetski</u> case, which is a Court of Claims case which

22   was ruled upon by Judge Murray, in which he concluded

23   very explicitly that -- that that is not that type of

24   individual right; that the right is to have the

25   Secretary of State perform the audit as provided by

1   law. And the next case was a -- was by Judge Kenny in

2   the <u>Costantino</u> case, which addressed a lot of -- a lot

3   of the arguments that came up out of the Wayne County

4   election this past year.

5   That case, Judge Kenny determined also, does

6   not provide a individual right to a self-selected,

7   custom-made audit. That was -- that the Court of

8   Appeals and the Michigan Supreme Court both denied

9   leave in that case. And -- so as a consequence, no

10   court in this state has yet passed on the idea -- or

11   has yet determined that a individual citizen has the

12   right to make up their own audit and set their own

13   procedures -- that's just simply not how it works.

14   The plaintiff in his response quotes from

15   Judge Viviano -- Justice Viviano's dissent. But if

16   you read that dissent, what it really basically says

17   is, he was arguing why the Court should have heard it.

18   He thought that the question should have been

19   considered and reviewed by the Court, but he doesn't

20   really necessarily say how we would have ruled on the

21   matter. So there's not a lot of support, even in the

22   dissent, for the position the plaintiff stakes out in

23   this case.

24   Regardless, the dissent is just that; it's a

25   dissent. A majority of the Court, by a vote of 6-1,

1   determined that they did not see anything in

2   Judge Kenny's opinion that presented a question that

3   thought needed to be reviewed. As a consequence,

4   that -- that, I think, stands up pretty well.

5   The plaintiff's personalized audit. The

6   audit that he seeks to have in this case, according to

7   his own terms of Antrim County documents or Antrim

8   County election results, simply is not what -- simply

9   not what is provided by the state Constitution. The

10   state Constitution provides for a result of an audit

11   of statewide results, not of individual races or

12   individual procedures, and it is certainly not a

13   result -- an audit to be conducted according to their

14   own terms.

15   THE COURT: Mr. Grill, is that the reason

16   that, when conducting the "audit" in Antrim County,

17   the Secretary did not investigate the individual

18   township issues that had been raised in this case, but

19   rather addressed only the federal issue -- that was

20   the election associated with the president?

21   MR. GRILL: To an extent, your Honor.

22   There's something of a misconception there, that I

23   think probably needs to be addressed. That wasn't an

24   audit, per se. That was a hand count that the

25   Secretary did to try to reassure the public that the

1   results were accurate because there was a lot of

2   misinformation flying around at the time. But the

3   audit itself was of the statewide results, which is a

4   results audit with a number of clerks kind of random

5   sampling, sending in their results and having those

6   reviewed and tabulated, and that's what was conducted.

7   So that was -- and to -- to one extent your

8   Honor is correct, with the idea that certainly is why

9   we didn't do individual survey of the local results,

10   because that's not what the Constitution calls for.

11   It calls for results of the statewide elections, not

12   local elections. So that is -- that is certainly a

13   part of this. The other thing I think is probably

14   worth considering here about the plaintiff's request

15   for an individual custom audit is, there are over 7

16   million registered voters in the state of Michigan.

17   If every single registered voter had the

18   individual right to concoct their own audit and have

19   that performed, the -- the number -- the audits would

20   be endless. Every single person dissatisfied with the

21   results, every person who had a question could come --

22   could constitutionally compel their own audit. We

23   would never be done doing them. And instead of --

24   instead of -- of showing or preserving that the

25   results were accurate, it would have the opposite

1   effect.

2   Perpetual audits would make it impossible

3   for us to know whether the results were ever actually

4   final. That is why I think why the framers of this

5   particular amendment said that this amend -- the --

6   the audits had to be as prescribed by law. There was

7   meant to be some control here, some level of finality,

8   otherwise it becomes meaningless. Regardless, nothing

9   in the Constitution provides the plaintiff with the

10   right to the personal or custom type of audit that he

11   requests.

12   As a result, the plaintiff has failed to

13   state a claim for relief under the audit clause, and

14   that claim should be dismissed. Moving ahead to the

15   purity of elections clause. This part of the

16   Constitution, I think, really should properly be

17   viewed as articulating Legislative power. If you read

18   what it actually says, the purity of elections clause

19   actually states -- I'll just pull it up here, "Except

20   as otherwise provided in this Constitution or in the

21   Constitution or laws of the United States, the

22   Legislature shall enact laws to regulate the time,

23   place, and manner of all nominations of elections to

24   preserve the purity of elections, to preserve the

25   secrecy of the ballot, to guard against abuses of the

1   electoral franchise, and to provide for a system of

2   voter election and absentee voting."

3   Now, I recognize that in the Taylor case the

4   Court of Appeals applied this purity of elections

5   provision to the actions of the clerk in that case.

6   So I will recognize that, at least as it has been

7   applied in circumstances for how elections are

8   administered, in making sure that they're administered

9   in an evenhanded way. But I do think it's worth kind

10   of highlighting the idea here that I think this

11   particular Constitution provision may have been

12   misinterpreted, because it seems to specifically

13   address Legislative power, not actual administration

14   of elections. Regardless, even if we consider this --

15   the purity of elections as required, even --

16   evenhandedness in the administration of elections, in

17   this case the plaintiff has failed to allege any

18   Antrim County procedures that treated candidates or

19   voters differently.

20   The allegations instead concern inaccuracies

21   in the reporting of unofficial results on election

22   night and the weeks afterwards. However, even in the

23   complaint, the plaintiff acknowledges, that by the

24   time they got to certified results, that they more or

25   less tracked with 2016, and it doesn't appear that

1   plaintiff contests that the final results in which

2   President Trump carried Antrim County, were

3   essentially accurate.

4   So what we're left with here is that the

5   purity of elections clause -- claim by the plaintiff

6   in his complaint hinges on inaccuracies in the

7   reporting of unofficial results. And, frankly, your

8   Honor, I just see no basis for a purity of elections

9   clause in that. They're unofficial results. They're,

10   by their nature, not the official act of the county.

11   THE COURT: Mr. Grill, before you going on,

12   how would, then, a party who felt they were aggrieved

13   as hypothetically -- or in arguendo, a resident of

14   Central Lake village might, with regard to the

15   Dominion -- pardon me, not Dominion, with regard to

16   the vote tabulation issues -- maybe Dominion, we don't

17   know, but the vote tabulation issues that occurred in

18   Central Lake Township, and Central Lake village

19   vis-a-vis the township, how would a concerned citizen

20   go about challenging the purity of -- for example, the

21   marijuana election in that -- in that village?

22   MR. GRILL: Well, the first and most obvious

23   avenue, your Honor, would be for one of the proponents

24   of the ballot proposal to bring for -- to call for a

25   recount. That would be the first mechanism that they

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1   would have, is the ability to say, you know, hang

2   on -- obviously -- particularly in an election when

3   you're dealing with the difference of one vote, it --

4   it's surprising to me that they didn't call for a

5   recount.

6   THE COURT: And this is also the proper

7   mechanism if there's a challenge to the -- to the

8   equipment, or to the software that's used, as well?

9   Is that your argument?

10   MR. GRILL: Well, the argument -- I --

11   exactly, your Honor. Because if the argument is that

12   the equipment is -- is faulty, then you call for a

13   recount and you pull out the ballots and you start

14   going through them one, two, three, four five. Now,

15   usually -- you know, when you're doing a recount, it's

16   usually processed mechanically, but if there were a

17   good reason for showing that there were some basis or

18   some question at point, you could do it by a manual

19   count if you wanted to. There would have to be some

20   further findings on that.

21   But the argument -- at least, your Honor, in

22   answer to your question, would be -- the first step

23   would be one of the proponents would have had to

24   bring -- you know, call for a recount. Alternatively,

25   there would be the avenue under 4545 for someone to

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1   say I have a claim, but the important thing -- and I

2   was going to get to this in a minute what the 4545

3   argument will be. Number one, I think they have to

4   live in Central Lake village. They would have to

5   actually be a citizen that has a stake -- voted in the

6   election and has a stake in the outcome -- which

7   Mr. Bailey does not.

8   And then -- then the Court could address in

9   that circumstance of this hypothetical Central Lake

10   village resident, could they come forward and

11   establish a reason for the Court to grant leave for

12   them to proceed in the manner? In other words, one of

13   the things they would have to show is that they need

14   to come forward with affidavits setting forth specific

15   facts. Something to the effect of, I saw Clerk Smith,

16   or I saw an election worker stuffing ballots into

17   their jacket; and as a consequence, we need to have an

18   investigation and stop this. That's not anything like

19   what we have in this circumstance.

20   There's -- you know, the purity of elections

21   issue -- and I think, you know, if you were talking

22   about some kind of purity elections question, it would

23   have to be some type of procedure established by the

24   county that was tipping the scales. It's not

25   even what -- anything in the complaint. The complaint

1   appears to -- you know, at some point -- or at least

2   it's morphed into something, the idea that there is

3   some type of hidden mechanism in the machines

4   established by Dominion, or something. That's not a

5   procedure setting place by Antrim County, and that

6   would be the kind of thing that would be revealed by a

7   recount, had somebody called for it -- but they

8   didn't.

9   THE COURT: All right. I interrupted you,

10   please continue.

11   MR. GRILL: And -- so I'll -- I'll kind of

12   take a little bit out of order from the complaint.

13   The next thing I wanted to address was the equal

14   protection claim, because that was the other

15   constitutional argument that plaintiff raised. The

16   plaintiff fails to allege that voters were classified

17   in any disparate way, or that any undue restrictions

18   were placed on the right to vote. He simply fails to

19   allege how he or any other voters were treated any

20   differently.

21   As to the attention -- the premise of an

22   equal protection clause is disparate treatment, and

23   it's just -- there's no allegation that fits that

24   description. Plaintiff, instead, refers to his vote

25   being diluted -- which in some circumstances, as we

1   point out in the brief, the courts have considered the

2   idea of vote dilution as actionable, but in this case,

3   diluted by whom? Normally when we're talking about

4   dilution, we're talking about racial dilution. That

5   we're, you know, divide things up and we're going to

6   put you in a place where your vote is meaningless

7   because you're surrounded by a sea of people who

8   aren't like you. That's not what plaintiff alleges.

9   Instead, again, he alleges that there were

10   errors. Well, any errors in the tabulation results

11   would affect all voters equally. That's not an equal

12   protection claim. That which should be -- and, again,

13   that's the type of thing that's usually caught and

14   addressed through a recount, not through a

15   constitutional action.

16   There's another point that I think is worth

17   emphasizing here, your Honor, and that's something

18   that was brought up by the District Court in the case

19   of King versus Whitmer, again, this past year, and it

20   addresses the problem of redressability. The District

21   Court in that case noted that the plaintiff's

22   injury -- you know, even hypothetically were -- were

23   considered, doesn't entitle them to invalidate other

24   people's votes as well. In other words, the -- the

25   idea here that, well, we're going to -- you know, our

1   remedy here, our relief is to toss all of the votes

2   out; that's not the kind of redress that is

3   contemplated here.

4   At best what a claim would involve here

5   under the equal protection clause would be to say

6   discontinue the alleged unconstitutional process.

7   What process? It's not alleged in the complaint.

8   Again, the plaintiff fails to state the claim; and as

9   a result, his claim for equal protection should also

10   be dismissed.

11   Moving on to the 4545 claim, MCL 600.4545,

12   this claim -- this kind of claim requires an

13   allegation of material fraud, which the courts have

14   construed to mean something that would change the

15   outcome of the election. As the submission Supreme

16   Court held in the Rosenbrot(ph) case, which is cited

17   in our brief, irregularities in conducting the

18   election will not invalidate the election -- the

19   action taken, unless the results would have been

20   affected. So we have to have some type of allegation

21   here that something occurred -- some type of fraud

22   occurred that changed the outcome of the -- of the

23   action taken -- changed the outcome of the election.

24   This is where things get confusing, because

25   it's not entirely clear what exactly -- what action it

1   is that the plaintiff is seeking to challenge. In his

2   response to our motion, the plaintiff doesn't make any

3   reference to the Central Lake village marijuana

4   proposal. Probably, I think, recognizing that there

5   is an issue there, with him not living in that -- in

6   that municipality. Instead, the response refers to

7   statewide ballot proposals -- Proposals 1 and Proposal

8   2. Neither, of course, is mentioned in the complaint.

9   But more significantly and where we run into

10   a problem for a failure to state a claim issue, is

11   that both of those proposals passed -- you know, with

12   enormous margins. I think it was something -- they

13   were both 80 -- in the 80s; 84 percent and 88 percent.

14   Both of them had a margin of victory of well over

15   three million votes. By contrast, the number of

16   registered electors in Antrim County is less than

17   25,000.

18   So we have a material fraud problem here,

19   because there can be no material fraud, because even

20   if every vote in Antrim County were determined to be

21   fraudulent, it would not change the outcome of

22   Proposal 1 or Proposal 2. But even if we address that

23   question, we still have problems for a claim under

24   4545. The first is that plaintiff did not name

25   Central Lake village as a party to this action, which

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1   is statutory -- which is required for an action under

2   4545. And notably I point out, your Honor, this has

3   not been corrected in the amended complaint, either.

4   The amended complaint does not purport to

5   add Central Lake village as a defendant. There's a --

6   the -- moving -- additionally, there's other problems

7   as well. Even if -- there's no basis for the Court to

8   grant plaintiff leave to proceed in a 4545 claim,

9   where he does not live in Central Lake village. He

10   did not vote on this proposal. This -- this speaks of

11   the kind of vexatious action that the requirements of

12   4545 sought to avoid.

13   If nothing else, if we're going to have a

14   challenge under 4545 to this particular marijuana

15   proposal, one would expect it to come from somebody

16   who lives in the village, has a stake of what happens

17   in the village -- not Mr. Bailey. Lastly, I want to

18   point out that Mr. Bailey's claim for 4545 came

19   unaccompanied by any affidavits, which is, I think,

20   significant as well. If you look at the Barrow (ph)

21   case, the Court there, I think, was very clear about

22   what the kind of requirements that a claim under 4545

23   requires, where the Court -- Court of Appeals stated

24   that the rule is inflexible. That there must be

25   affidavits, so full and positive from persons knowing

1   the facts as to make out a clear case of right in such

2   a way that perjury might be brought if the allegation

3   is false.

4   So here, again, we need to have some type of

5   allegations from somebody who can say I saw this

6   happen. This is what occurred. This is why the

7   results are fraudulent. And we don't have that in

8   this case. Certainly not in the complaint that was

9   pleaded here. So those are very -- three very

10   significant ways in which the plaintiff has failed to

11   state a claim under 4545, and -- so we would ask the

12   Court also to dismiss that claim as well. That leaves

13   us with the final claim in the complaint, which is the

14   claim under Section 765(5).

15   This is a statute that requires clerks who

16   receive absent voter ballots to post or make public --

17   public, the number of ballots sent and received. The

18   problem with this complaint -- with this claim, your

19   Honor, and why it must be dismissed, is that the only

20   defendant in this case is Antrim County. The statute

21   places no duty on counties. It makes no reference to

22   counties.

23   The only obligation being placed here is on

24   clerks who receive those absent voter ballots, not

25   counties. And even if we were to construe this

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1   generously as referring to the county clerk as an

2   individual officer, the county clerks do not send or

3   receive absent voter ballots. That's done by the

4   local clerks. The plaintiff has not named any local

5   clerk as parties, and hasn't done so even in the

6   proposed amended complaint, so there is no -- nothing

7   in the amended complaint that would cure that either.

8   Moreover, even if the -- the plaintiff had

9   named a local clerk as a party to this action, the

10   statute provides no election-related penalty for the

11   violation of this clause. It doesn't invalidate the

12   election. At most there would be grounds for a

13   criminal prosecution, if it were shown that the -- the

14   violation here were willful. But that would be

15   something that -- a criminal prosecution is not the

16   type -- excuse me, a criminal prosecution is not

17   something the plaintiff himself could bring as a

18   private citizen.

19   As a result, your Honor, all of the

20   plaintiff's claims fail as a matter of law, and all of

21   them must be dismissed. The last thing I want to

22   touch on very briefly is just to address the effect of

23   plaintiff's motion for leave to amend. As the

24   plaintiff, I think, mentioned, he's -- he has argued

25   in an emergency motion that we shouldn't decide this

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1   until the Court has a chance to decide the motion for

2   leave. That's not really how this works.

3   The appropriate course of action would be

4   for the Court to decide this motion, and then if the

5   Court agrees with us and grants this motion, the

6   plaintiff would be given leave to amend his complaint

7   to fix any defects -- which the plaintiff has already

8   done. So in this case the -- I think the appropriate

9   procedure would be to rule on this motion and then we

10   can address the plaintiff's amended complaint as a

11   separate matter. It wouldn't -- he's not in any way

12   prejudiced by the Court deciding this motion. In

13   fact, the Court's determination of these issues, I

14   think, would be significant because it would weigh on

15   how we approach the amended complaint.

16   Does it fix claims? Are those claims valid?

17   Should they be -- is there anything that he could do

18   to fix them? Those are things that we would need to

19   know.

20   THE COURT: All right. Thank you,

21   Mr. Grill.

22   Mr. Kazim, in support of the motion?

23   MR. KAZIM: Thank you, your Honor.

24   First of all, for the record, I want to

25   state that I join and concur with the -- with the

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1   arguments made by Mr. Grill, with -- with regards to

2   all of the claims under (C)(4) and (C)(8). I just

3   want to make a few additional arguments, specific just

4   to the county and specific to the argument regarding

5   mootness and -- and that's this.

6   As the Court is aware, under (C)(4)/(C)(8)

7   we are looking at the complaint. We are not looking

8   at anything else. And for purposes of the motion, we

9   assume that -- we accept the -- well -- all

10   well-pleaded allegations in the complaint as true for

11   purposes of this motion. So as has been stated in

12   this case earlier during this hearing, the relief that

13   plaintiff has sought in this complaint has been the

14   taking of forensic images, the -- the protective

15   order -- the seeking of a protective order from this

16   Court. And then this nonpartisan independent audit.

17   There's no dispute that as -- as it pertains

18   to the county, plaintiff has obtained the relief of

19   forensic images. He has obtained forensic images of

20   the one tabulator machine that is in possession of the

21   county. He has obtained forensic images of the

22   Election Management System terminal. And he has

23   obtained forensic images of the media drives and the

24   various thumb drives that were used during the

25   November 3rd, 2020, election.

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1   Also, at -- if the Court recalls, at the

2   first time this matter came before the Court on

3   December 3rd, the county agreed to preserve all the

4   evidence and all the records that were in its

5   possession. So there is a protective order in place

6   that was subsequently vacated upon the request of the

7   plaintiff. So the relief that could have been

8   obtained from the county -- all that relief has been

9   provided to the plaintiff. So the only outstanding

10   relief sought in the complaint is this request for an

11   audit.

12   And as has been argued by Mr. Grill, under

13   this -- under the constitutional provision, that

14   particular section pertains to an audit of statewide

15   elections, not county elections. But more

16   importantly, looking at the statute, 1 --

17   MCL 168.31(a), that statute, by its plain language,

18   provides that all -- any audit has to conducted under

19   procedures prescribed by the Secretary of State. That

20   the Secretary of State trains the county clerks and

21   their staff for conducting these audits, in

22   randomly-selected precincts in their respective

23   counties.

24   So the Secretary of State randomly selects

25   the precincts in the respective counties. And the

1   Secretary of State supervises the county clerks in

2   conducting of the election audit. So no legal

3   authority has been presented to the Court that -- that

4   says that the County on its own has any legal

5   authority or ability to conduct any audit, regardless

6   of the type of audit that is being requested -- any

7   audit. The County simply does not have any authority

8   and ability to do that on its own.

9   And -- so when we are talking about what

10   relief can be afforded to plaintiff against the

11   county, all that relief has already been provided to

12   the county [sic], with the exception of the audit --

13   audit request; and regardless, notwithstanding any of

14   the arguments that have been made by Mr. Grill and

15   that will be made by Mr. DePerno on the question of

16   audit, there is no legal authority that is in either

17   the -- in plaintiff's response that requires the

18   county to be a necessary party for purposes of that

19   audit. The county simply cannot -- does not have the

20   legal authority to have that audit.

21   So if we are looking at it from that

22   standpoint, from whether -- from the mootness

23   standpoint -- and I'm not foregoing any of the other

24   arguments that have been made on standing and (C)(8)

25   motions, I want to be clear, but if we are going to

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1   get -- if you're looking at this case from the

2   county's standpoint, this Court simply cannot order

3   any further relief against the county that it already

4   hasn't done so. So for those reasons and for all the

5   other arguments that Mr. Grill has made regarding

6   standing and a failure to state claims, we are asking

7   the Court to dismiss the county with prejudice from

8   this lawsuit.

9   THE COURT: All right. Thank you,

10   Mr. Kazim.

11   MR. KAZIM: Thank you.

12   THE COURT: Mr. DePerno, let's go to you.

13   In response?

14   MR. DEPERNO: Thank you, your Honor.

15   First, I want to address the -- the

16   overarching idea or concept that the Secretary of

17   State and the county are raising, that, pursuant to

18   their arguments, there's literally no mechanism

19   available to someone like Bill Bailey to challenge the

20   results of an election in his county, when we have

21   massive evidence of fraud that occurs in the county

22   through these -- these tabulator devices, the Dominion

23   Voting System, and fraud that occurs by the Secretary

24   of State herself and the county clerk in terms of

25   their failure to properly investigate or to certify

1   what is clearly a fraudulent election. And this is

2   fraud from the top of the ballot all the way down to

3   the Proposals 20-1 and 20 -- 20-2.

4   This includes the school board elections,

5   the -- the election for Michigan Supreme Court, and

6   all of the township elections, the local elections --

7   this includes the elections for the -- the trustees of

8   the -- the universities in our state. Their

9   overarching argument is that there's literally no

10   mechanism for anyone within the county, who is not an

11   actual candidate, to challenge any election where we

12   have this type of fraud. And this is unprecedented,

13   what we're dealing with. We're dealing with a voting

14   system, where we have submitted substantial proof to

15   the Court that these voting systems are able to switch

16   votes, to manipulate votes and it is so easy to do.

17   We've shown the Court how we can do it, and

18   in our filing this morning, we've -- we've -- we've

19   shown how the actual fraud works and the subversion of

20   what actually occurred. So I want to at least give

21   the Court that as a -- as a overall wide breaching

22   argument that the -- that the Secretary of State and

23   the county are making.

24   Their first argument is the claim of

25   mootness, and we -- we certainly disagree that our

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1   claims are moot. This all hinges on the idea of an

2   audit; and whether Mr. Bailey is entitled to conduct

3   an audit in his county. Mr. Grill today, for the

4   first time -- we haven't heard him say this, but he

5   did say it today. He stated Let's be clear, the

6   December 17th hand recount was not an audit. It was

7   simply a hand recount.

8   They didn't inspect any ballots other than

9   the -- looked at the presidential election. We didn't

10   look at any of the downballot races. We didn't look

11   in any way to ensure or preserve the idea that -- that

12   Bill Bailey's actual ballot counted. And we've got

13   significant concerns, obviously, and -- and -- that

14   his ballot did not count in this election.

15   THE COURT: Can we resolve one issue?

16   Mr. Bailey was -- did he vote in the Village of

17   Central Lake? Or did he vote in Central Lake

18   Township?

19   MR. DEPERNO: He votes in the -- the Central

20   Lake Township, not in the village.

21   THE COURT: All right. So he did not vote,

22   then, in the issue that -- that I was concerned about

23   initially, which was the adoption of the marijuana

24   ordinance, given that there was a one-vote difference

25   and approximately three votes may have been spoiled in

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1   the count or recount process.

2   Is that accurate?

3   MR. DEPERNO: That is not accurate. He did

4   not vote in the village, but the three votes that were

5   spoiled are not related to the village.

6   THE COURT: Okay.

7   MR. DEPERNO: We're -- we're talking about

8   the actual township, and Judy Kosloski declares that

9   their team analyzed both rolls -- or ASOG did this,

10   based on their conversation with Judy Kosloski, and

11   determined that the vote tally in Central Lake

12   Township did not match up and that there were three

13   votes missing, after three votes were damaged.

14   THE COURT: All right.

15   MR. DEPERNO: That is a substantial issue.

16   That is not a village issue. So we have to be clear

17   about that.

18   THE COURT: Let me -- before you go on, let

19   me make sure that I have it clear in my head.

20   So Mr. Bailey's vote, by your analysis,

21   could have theoretically been one of the three votes

22   that may have been spoiled in Central Lake Township;

23   however, as a resident of Central Lake Township, he

24   did not vote with regard to the Central Lake --

25   Central Lake village marijuana ordinance; is that

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1   accurate?

2   MR. DEPERNO: That's correct.

3   THE COURT: All right. Please proceed,

4   Mr. DePerno.

5   MR. DEPERNO: So there -- Mr. Grill

6   acknowledges there was no audit in this situation.

7   He -- he speaks broadly of an audit across the state

8   of Michigan, and tries to declare that the Secretary

9   of State conducted a statewide audit. All she did in

10   reality is conduct an audit of -- or a -- excuse me,

11   she conducted a hand recount of 18,000 ballots in

12   various townships across the state of Michigan. None

13   of them being an actual audit.

14   And we -- when we look at her -- her own

15   publication titled Post Election Audit Manual, that

16   describes an actual audit procedure. And -- and --

17   and requires the examination of election notices. The

18   way people were trained -- and we've already agreed, I

19   don't think there's any dispute of fact in this case

20   that Secretary of State Benson did not train people

21   across the state on the Dominion Voting System. So

22   that would be certainly an issue.

23   We're -- we're entitled to look at the

24   e-poll book security. The test deck procedures of

25   military and oversea voter applications. All of these

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1   things are described by Secretary Benson in her manual

2   of what a post election audit is. She states that a

3   vital component to a successful election is the

4   conduct -- is the conduct of the preliminary and

5   public-lodged inaccuracy testing.

6   We've got no indication that that was

7   ever -- that ever occurred in Antrim County. We --

8   she says we should review the applications to vote.

9   We've got no indication that that was reviewed in

10   Antrim County. She says to review the completion of a

11   receiving board checklist on election day.

12   She goes on and on and on about the actual

13   audit procedures -- ensure the number of ballots

14   tabulated on the totals tape matches the number of

15   voters listed in the poll book. We've already shown

16   the Court through one of our subsequent filings that

17   the number of voters that are reported by the

18   Secretary of State as having voted in Antrim County,

19   is 1,060 people short of what actually occurred at the

20   hand recount. So we know -- and that's why we say

21   we -- we've discovered 1,060 phantom ballots. Phantom

22   ballots appear to be ballots that are not in any way

23   connected to a voter.

24   And that's significant in this 2020

25   election, because those -- we shouldn't have more

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1   people voting in the county or show up in the hand

2   recount than the Secretary of State shows actually

3   voted. So that would be part of an audit to discover

4   how that occurred or why it occurred. She goes on to

5   determine many other things to ensure a master card is

6   available for each voter. We have no indication that

7   that happened.

8   Does the number of spoiled ballots in the

9   spoiled ballot envelope equal the number of spoiled

10   ballots listed in the poll book? We know that that

11   didn't occur. We know that the spoiled ballot numbers

12   are incorrect or potentially incorrect, I should say,

13   based on what we saw at the hand recount and the video

14   that we -- that was posted, and that we linked to in

15   our response brief, where the gentleman shows that the

16   number of signatures -- about 148 signatures in

17   Central Lake Township, are all filled in by the exact

18   same handwriting.

19   The explanation we got for that at the time,

20   was that there would have been spoiled ballots and

21   that Judy Kosloski or someone on her staff would have

22   then handwrote all of those signatures in, and that's

23   why they look the same. But on further inspection

24   that day, there were not 148 spoiled ballots for

25   Central Lake Township. So that's a problem. And it

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1   would -- it would -- it demonstrates why we actually

2   need an audit. So for these reasons, we say the

3   claims are not moot.

4   Bill Bailey is entitled to an actual audit

5   of the election, but these arguments that we hear

6   today state that he's not, and that there's no

7   mechanism for a guy like Bill Bailey to -- to come to

8   this Court in any form, apparently, no matter what you

9   put into a complaint, there's no mechanism for Bill

10   Bailey to be entitled to an audit within his county to

11   challenge the election results where we have

12   significant fraud like this.

13   THE COURT: Well, Mr. DePerno, it is a

14   relatively new statute, but has any court had a chance

15   to weigh in on the issue and determine -- any

16   appellate court, and determine that the right of audit

17   is, in fact, an individual right and extends beyond

18   statewide ballots to local votes as well?

19   MR. DEPERNO: No, no, there's no appellate

20   court that has made this determination yet. The

21   Michigan Court of Appeals has not decided it. The

22   Michigan Supreme Court has not decided it. This is an

23   issue of first impression that we're dealing with,

24   when we -- when we deal with the 2018 amendment to the

25   Constitution that states that every citizen of the

1   United States who is an elector, qualified to vote in

2   Michigan, shall have the following rights -- and under

3   H, the right to have the results of statewide

4   elections audited in a manner prescribed by law, to

5   ensure the accuracy and integrity of elections.

6   That is a brand new constitutional provision

7   and the Court of Appeals has not taken any case yet.

8   Mr. Grill talked about the idea that in the Costantino

9   case, that the Court of Appeals did not -- did not

10   accept that case on appeal. And then the Michigan

11   Supreme Court did not accept that case on appeal.

12   They simply didn't take the case.

13   And as we see, I think Mr. -- or Judge

14   Viviano's dissent is so enlightening, and -- and I

15   give it much greater weight, obviously, than Mr. Grill

16   does -- although I concede that the issue that the

17   Supreme Court was dealing with was whether or not they

18   should take the case, but Mr. -- or Judge Viviano's

19   decision is so enlightening, when he states, "The

20   provision is self-executing. Meaning that the people

21   can enforce this right, even without legislation

22   enabling them to do so. And that the Legislature

23   cannot impose additional obligations on the exercise

24   of this right."

25   We read this constitutional provision to

1   give Mr. Bailey the absolute right, as a citizen, as

2   someone who voted in the election, to -- to have the

3   results of statewide elections audited in such manner

4   prescribed by law. Statewide elections means, I

5   believe, any election that's across the state. So if

6   we have the presidential election, the -- the -- the

7   election that John James was in for Senator,

8   Congressional elections -- all of these statewide

9   elections could be audited by Mr. Bailey, and it's

10   self-executing. And it simply says in a manner as

11   prescribed by law.

12   We don't know what that means, but Judge

13   Viviano seems to suggest that they can't actually

14   limit the rights given to him in the Constitution.

15   THE COURT: So, Mr. DePerno, is Mr. Grill's

16   argument that that interpretation would grant a right

17   to 10 million-plus citizens in the state of Michigan

18   to challenge an election and create chaos, perhaps, as

19   a result, if they don't like the result of a

20   particular election?

21   MR. DEPERNO: I believe it gives every

22   citizen a right to challenge the election -- the

23   statewide election. That's what the --

24   THE COURT: So the statute -- at least as

25   currently drafted and as you interpret it -- which is,

1   of course, following the -- the referendum, would --

2   would have the net effect, potentially, of creating

3   hundreds, if not thousands of lawsuits throughout the

4   Circuit Court and perhaps the Court of Claims,

5   following a general or even a lower-level election

6   that's statewide.

7   Is that a fair analysis?

8   MR. DEPERNO: I -- I believe it is. I mean,

9   I understand that that's a large number of cases, but

10   we also have to consider the practical effect of -- of

11   who would do that. I mean, who -- who can afford to

12   do it, number one? There's all kinds of practical --

13   practical effects that come into a decision like that.

14   But there's nothing within this statute that

15   limits anyone's right to challenge the election. And

16   that may be an issue for the Michigan Supreme Court to

17   deal with. But Judge Viviano is -- is quite

18   clear that --

19   THE COURT: Justice Viviano, by the way.

20   MR. DEPERNO: I'm sorry. My apology.

21   Justice Viviano would say that, "The people

22   can enforce this right even without legislation

23   enabling them to do so. And that the Legislature

24   cannot impose additional obligations on the exercise

25   of this right." People have the right to challenge

1 the election. And it's so important in this election

2 because we have so much fraud, as we've demonstrated

3 just in Antrim County.

4   We now know -- I -- I would say

5 conclusively, what happened in Antrim County on

6 election day. We know how these votes were flipped.

7 This wasn't human error. This wasn't the safest

8 election in history. This was a significant problem,

9 where -- where the Secretary of State, as we allege in

10 our amended complaint, and the county official, Sheryl

11 Guy, would have had knowledge of what was going on, or

12 at the very least, they -- they are grossly negligent

13 in their failure to investigate.

14   Because over a period of essentially six

15 months, we've discovered what happened by examining

16 these forensic images, running tests on these forensic

17 images, and -- and mock elections to show that what

18 happened on -- on November 3rd in Antrim County was

19 not human error. This is a significant problem that

20 the country faces, and to discard this case or discard

21 Mr. Bailey's constitutional rights to ensure fairness

22 and accuracy in this election, would essentially mean

23 that we're permitting fraud to occur in any election,

24 fraud as significant as this, fraud through actual

25 manipulation of voting machines. How can anyone trust

1   the system in the future?

2   Mr. Bailey didn't vote last week in -- in

3   the last election, because he no longer trusts these

4   voting machines. And -- and it's significant because

5   we've now proven how the vote manipulation happens in

6   these machines. If you have a vote transfer from

7   Jorgensen to Trump and Trump to Biden, then Biden's

8   vote has to go somewhere -- just through the

9   programming in the machine it has to fall within

10   another category.

11   And in this case it didn't. It didn't go

12   anywhere, it was zeroed out through an undervote. And

13   our test show that if that is the mechanism, or that's

14   the programming that happens -- or that's the excuse

15   given to us by the Secretary of State or the county,

16   that -- that can't happen because there would be a

17   massive error triggered by the system, which would

18   shutdown the election. And in order to stop that, the

19   vote on the back side -- in order to stop that, the

20   programming on the back side would -- dealt with

21   that, dealt with those errors and subverted the

22   election, allowed the election to continue, despite

23   these errors that should have shutdown the election.

24   That's subversion and that's fraud, and

25   people knew about it. Officials knew about it within

1   the state of Michigan -- they had to. They had to

2   know this was happening within our voting system, and

3   they failed to act. And that directly affects not

4   only everyone in the state, but certainly Mr. Bailey's

5   constitutional rights under this provision.

6   But if we read the constitutional provision

7   narrowly and say, Mr. Bailey doesn't fall within that

8   category because potentially too many people could

9   file lawsuits, then we're eliminating his right and

10   we're eliminating what all the people in the state of

11   Michigan voted for in 2018, when they passed this

12   amendment. They were clear, the language is clear,

13   they want people to be able to challenge the

14   elections, to make sure that elections are fair in

15   this state. So based on that we don't think our claim

16   is moot at all. But -- but certainly we haven't -- we

17   haven't got an audit. We don't have an audit.

18   There's never been audit. There's not an

19   audit provided by the county. There's never been an

20   audit, as Mr. Grill even admitted today, not an audit

21   provided by the Secretary of State. And -- so their

22   argument appears to be that you just can't get an

23   audit of a county election. Can't certainly get an

24   audit of a downballot election -- especially when we

25   have allegations of significant fraud.

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1   The next issues they -- they brought up deal

2   with standing. The standing under 168.861 -- we

3   recognize that's a savings clause, and -- but we -- we

4   filed that in conjunction with 4545, so I don't see

5   that as an issue. The standing under 168.765, I think

6   the -- the defendants are misguided on this argument

7   regarding the absentee ballot. There's nothing within

8   Section 765 that states that you must be an absentee

9   voter in order to bring a challenge under Section 765.

10   And then regarding the constitutional claims

11   themselves, we've -- I've already addressed that

12   Mr. Bailey was a voter in the township of Central

13   Lake. We already know there's an issue that three

14   ballots were destroyed. He has to have a mechanism in

15   order to challenge the election, where he voted and

16   his township supervisor acknowledges that three votes

17   were destroyed and they weren't -- they didn't show up

18   in the actual revote count. We know that because the

19   tape rolls show 1,494 total votes initially, and then

20   roll two says 1,491.

21   So those three votes are gone. Not -- they

22   don't appear on the next vote roll. So we know that's

23   an issue, and that has to be addressed in some way.

24   He has to be able to get clarity on whether his vote

25   counted.

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 1   THE COURT: Mr. DePerno, does it have to

 2   be -- again, your argument -- I think everyone would

 3   agree with, that every vote should be counted. We

 4   expect them to be counted, but we also recognize that

 5   sometimes things do happen where a vote is spoiled.

 6   And assuming that -- that your client's was one of

 7   those three spoiled, wouldn't the next issue be

 8   whether or not there was a material impact on one of

 9   the races in Central Lake Township, based on the

10   noncounting of a spoiled vote?

11   And then -- well, let's -- let's just leave

12   it there, based on the noncounting of a spoiled vote?

13   MR. DEPERNO: No, I -- well, first, I -- I

14   guess I take exception to the idea that everyone

15   thinks that everyone's vote should count. From what

16   I've experienced throughout this election cycle,

17   there's a lot of people don't -- that don't care if

18   everyone's vote counts. Certainly what we've proven

19   regarding the Dominion Voting System shows that

20   there's a lot of people that like these machines and

21   there's a lot of Secretary of State's out there,

22   county officials and others, who don't care if your

23   vote counts because they're willing to subvert the

24   vote, and we proved it.

25   If nothing else comes of this lawsuit,

1   people need to understand that what we've proved so

2   far -- and I -- I say it again, without getting

3   discovery from the defendants in this case, what we've

4   proved is that the vote was subverted. We know how it

5   happened in Antrim County and we know it was fraud.

6   Now, that's regardless of whether our case continues,

7   people have to know we did that.

8   So in terms of this argument that we can

9   only provide Mr. Bailey justice if -- if we can show

10   that there would be a different result, I think is the

11   question you're asking?

12   THE COURT: It is.

13   MR. DEPERNO: We don't know that. You can't

14   tell me that, the -- Mr. Grill can't tell me that. No

15   one can tell me what the actual ballots say, until we

16   look at them. Because as I've demonstrated, I can

17   show you, and my experts can show you, how to flip

18   votes at the tabulator. And how to close out an

19   election and have that tape printout -- that tabulator

20   tape printout with the wrong election results.

21   And in that situation, if everyone

22   understands how elections occur, once we close out an

23   election and print off that tabulator tape, your

24   county canvassing board takes a look at that tabulator

25   tape, they say how many people voted. And it could be

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1   a hundred, 200, whatever it is, they then compare that

2   to the poll book. If those numbers match up, they'll

3   certify the election without ever looking at the paper

4   ballots. So no one can tell me, based -- after the

5   evidence we've shown, that there wasn't a -- a change

6   in the election, or that Mr. Bailey's vote didn't

7   count one way or the other, or that there weren't 1500

8   votes subverted in any one election to change any one

9   election.

10   You can't tell me that in Proposal 20-2 or

11   20-1, where Mr. Grill says overwhelmingly across the

12   state of Michigan people voted 80 percent in favor of

13   these, roughly -- who's going to tell me, or

14   Mr. Bailey, or other citizens of this state that 80

15   percent of the -- the state of Michigan decided or

16   thought to give their rights for land and oil lease to

17   the state of Michigan under 20-1? I don't know if

18   that's true. He doesn't know if that's true. No one

19   knows what the actual votes were in this case.

20   We're assuming that these tabulators print

21   off correct paper out of the tabulator, and I've shown

22   everyone that's not true. So this argument of we can

23   only provide Mr. Bailey a remedy if we can show that

24   his vote would have somehow affected an election, once

25   we look at the grand total of -- of the number of

1   votes cast, that's a low-hanging fruit argument and it

2   assumes that everyone's playing fair and no one's

3   subverting the election through these voting machines,

4   and it's just not the case. So we just can't say

5   that. I understand the Secretary of State's across

6   the country want to make that argument and plead to

7   the people everywhere that elections were fair. And

8   we've shown just in this small little case in Antrim

9   County, it's just not the case.

10   That brings us to MCL 600.4545. That --

11   that statute allows a person like Mr. Bailey to bring

12   a lawsuit, if it -- whenever it appears that material

13   fraud or error has been committed at any election at

14   which there has been submitted any constitutional

15   amendment question or proposition to the electors.

16   And we satisfy that quite easily. Mr. -- it was --

17   this lawsuit was filed within 30 days. Mr. Bailey is

18   a citizen. And -- and there were within this

19   election, constitutional -- or propositions, at least,

20   there were Proposition 20-1 and 20-2. He satisfies

21   that under 4545.

22   The other issues come -- you know, we've

23   dealt quite a bit, I think, today with the argument of

24   the constitutional amendment under Article II. We --

25   we very clearly think that Mr. Bailey has the right

1   under that -- that constitutional provision to --

2   to -- to audit any statewide election. We know that

3   there's been no audit done in this case. We also know

4   that MCL 160.31(a)(2) actually limits the Constitution

5   in its -- in its language.

6   And that statute says the Secretary of State

7   shall prescribe the procedures for election audits --

8   a keyword, that include reviewing the documents,

9   ballots, and procedures used during an election, as

10   required by Section 4 of Article II of the

11   Constitution. It -- it's -- even that statute

12   recognizes there has to be an audit, and we would

13   review the documents, ballots, and procedures. And I

14   guarantee you that in no event has Secretary of State

15   Jocelyn Benson done anything even close to that.

16   At the very most, she's done a hand recount

17   of 18,000 ballots. She's done no audit. She's

18   reviewed no documents, no ballots, and no procedures

19   at all. It just never happened. She's also provided

20   no training.

21   The -- this statute requires -- we believe,

22   as we wrote in our brief, this statute requires the

23   Antrim County Clerk to perform the audit under the

24   supervision of the Michigan Secretary of State. It

25   further orders the Antrim County Clerk to report the

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1   results of the audit to the Secretary of State

2   pursuant to MCL 160.31(a)(3) [sic]. So if you think

3   about that, all that -- all that happened here on

4   December 17th was the Secretary of State came in to

5   Antrim County, where she first declared there would be

6   an audit by -- based on her notices to everyone,

7   there's going to be an audit. Then the day before she

8   changed that to a hand recount -- which was conducted

9   by the Secretary of State. And nothing was done by

10   the Antrim County Clerk at all. It was all done by

11   the Secretary of State.

12   So the Antrim County Clerk never performed

13   any type of audit. And certainly didn't perform any

14   audit under the supervision of the Secretary of State.

15   In fact, the -- Antrim County was just a bystander on

16   December 17th. And certainly they didn't -- the

17   Antrim County Clerk didn't report any results of the

18   audit, because there was no audit.

19   So we've even failed under 168.31, even if

20   we adopt the Secretary of State's argument that

21   somehow 168.31(a) is constitutional on its face,

22   number one. And -- and whether or not the -- the --

23   Antrim County even performed its duty under that

24   statute. So, again, we've -- we've gone through

25   Justice Viviano's dissent. I think it's so

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1   important -- again, I can't emphasize enough how we

2   have to look at that dissent that he issued to

3   understand what he's actually talking about in -- just

4   in terms of him saying that we should have taken the

5   case -- the Michigan Supreme Court. They didn't, but

6   that's why we're here as a case of first impression.

7   The purity of election clause -- it seems

8   quite easy to me that the purity of election clause

9   has been violated in this situation. Mr. Bailey's

10   constitutional rights are violated. This election is

11   a fraud. There is subversion, we've shown it.

12   We've shown it without getting discovery

13   from the Secretary of State. We've shown it just

14   through our testing of how the Dominion Voting System

15   works. There's no way a legitimate company, a

16   software company would ever write code this way.

17   This -- this system allows people too easily to

18   subvert any security protocol that might be there, go

19   directly to the Antrim County database and flip

20   elections right there, using that Microsoft SQL

21   database management program, that, by the way,

22   shouldn't even be there, it's not a certified program

23   under the election commission. Shouldn't be there.

24   That -- the use of that program on the

25   Antrim County system that we discovered, should

1   actually invalidate the Antrim County Election

2   Management System. We -- we heard a lot today,

3   interestingly enough, about how they're so concerned

4   that us -- that my team coming into Antrim County

5   would somehow do something to their equipment that

6   could invalidate warranties or -- or make elections

7   insecure. And yet, here in Antrim County, sitting on

8   their own system, is an unauthorized program called

9   the Microsoft SQL database management program, that

10   shouldn't be there. And they're criticizing us, as if

11   we are going to do something to their election.

12   They're using a machine right now and they used it in

13   the November '20 election, they're using this program

14   that decertifies their entire election.

15   Moving on to the further arguments that

16   Mr. Grill made on 600.4545 and 168.861. Mr. Grill

17   stated that any irregularities in the election would

18   be revealed by a recount of the actual ballots.

19   You -- I mean, I asked Mr. Grill, opposing counsel, or

20   the Court, or anyone, tell me -- show me one single

21   election from November 3rd, 2020, where anyone's been

22   able to actually do an audit of the ballots. There's

23   one place that that's occurred, it's happening right

24   now in Maricopa County, otherwise no one is allowed to

25   do it.

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1   These -- these Secretary of States and these

2   county officials tell us over and over again that if

3   we want to verify that there was no fraud, what we

4   need to do is just pull out to the ballots and look at

5   them. And every time anyone across the country says

6   let me look at the ballots, they immediately will

7   fight you. We even have now have talk of the

8   Department of Justice coming into Maricopa County to

9   try to shut that audit down. They don't want people

10   to look at ballots.

11   Secretary of State Benson doesn't want

12   people to look at ballots. Antrim County Clerk Sheryl

13   Guy doesn't want people to look at ballots. And they

14   don't want people to look at them, because when -- we

15   believe that when you look at them, they will prove

16   our findings. They will help prove that what we've

17   disclosed here, through our -- out investigation of

18   the forensic audits, through the testing we've done,

19   that they'll show you -- we'll show you that those

20   ballots aren't correct.

21   They don't match up to the actual results.

22   In some cases there's probably ballots that have been

23   photocopied. They're not printed on the correct

24   paper. The signatures aren't going to match up with

25   absentee envelopes. So let's -- let's abuse ourselves

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1   of the fact or the idea that if we want to -- to -- to

2   inspect an election or to verify results, we should

3   just look at the ballots. No one wants us to do that.

4   The equal protection clause, I believe, is

5   an easy argument. The same argument was rejected

6   in -- the same argument by the Secretary of State was

7   rejected in <u>Ryan versus Benson</u>, a Court of Claims case

8   where the Court of Claims stated, "Here, because

9   plaintiff has a cause of action for a violation of

10   equal protection clause and their rights could be

11   substantial and detrimentally affected, differently

12   than others within the general public, they have

13   standing." What they are talking about is the

14   dilution of votes, and Mr. Bailey certainly suffers

15   from that. He suffers from, number one, whether his

16   vote was counted in the first place and otherwise, the

17   dilution of votes.

18   He certainly has standing under the equal

19   protection clause. And more importantly as we

20   describe in our brief, the Supreme Court has readily

21   endorsed the -- the -- the -- the -- the theory or the

22   class-of-one theory. We went through that in our

23   brief, I'm not going to repeat that.

24   MCL 168.765, Mr. Grill states that -- you

25   know, there's no penalty under that provision. Even

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1   if we have a valid claim, there's just no penalty,

2   and, therefore, our claim should be dismissed. So I

3   ask what's the remedy? What's the remedy for

4   violation of the Constitution?

5   What's the remedy for violation of civil

6   rights in a case like this? Where we're using voting

7   machines that are -- are -- are -- are -- are

8   absolutely fraudulent, and where the Secretary of

9   State and the county clerk -- either unwittingly or by

10   gross negligence, or -- or -- or with knowledge,

11   actually allowed this to happen in Antrim County. You

12   know, we -- we talk about the idea of, oh, well, maybe

13   the county prosecutors might do something. I don't

14   think there's any realistic thought or idea that -- I

15   haven't seen any evidence that anyone's going to

16   prosecute anyone.

17   I mean, we've got clear violations across

18   the country of -- of -- of voting fraud. Even in

19   Antrim County, we know now that on November 4th, at

20   11:03 p.m. Sheryl Guy deleted the system files from

21   the -- the Election Management System. She's admitted

22   that she directed her staff to do that. And based on

23   what we filed today, this subversion this idea of

24   subversion falls right in line with that.

25   We -- I -- I -- I could guess that we would

1   now know why they deleted those files because it shows

2   directly how they subverted the election. Why the

3   machine didn't shutdown when there was massive error

4   rates, that should have otherwise shutdown the

5   machine. So there has to be a remedy for Mr. Bailey.

6   Finally, your Honor, we have filed a motion

7   to amend our complaint. Our amendment deals with a

8   lot of these issues that the Secretary of State and

9   Antrim County complain about. I did see -- I just

10   looked up, that we did get a notice of hearing, that

11   that ex-parte motion would have been heard today,

12   that -- that notice of hearing was issued out earlier

13   today, but our -- our motion to amend was clearly

14   filed seven days prior to this, last Monday, it should

15   have been put on the schedule today. It wasn't, it's

16   next Monday.

17   You know, I would at least request that

18   we -- we hold any decision over until next Monday, so

19   the Court can consider both motions at the same time.

20   I think that would be proper and efficient for

21   everybody.

22   Does the Court have any further questions

23   for me?

24   THE COURT: I don't. Thank you. And I did

25   locate your emergency motion, by the way, earlier. I

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1   did have a chance to review it, and I understand your

2   argument with regard to next week, we'll talk about

3   that in just a moment. But before we do so, let's go

4   ahead and get a response from Mr. Grill.

5   If you would, please.

6   MR. GRILL: Thank you, your Honor.

7   In the -- during my original argument, the

8   Court had asked what citizens could do if they felt

9   aggrieved by -- by -- by the election. I don't know

10   if my answer was complete, and I just wanted to make

11   sure the Court had the benefit of additional

12   information. Citizens -- in addition to -- I think as

13   I discussed the ideas of whether recounts occur and

14   citizens might have the option or remedy, if they had

15   an actual interest in the case, to bring an action

16   under 4545.

17   But in addition to that, citizens can also

18   petition for a special mail election, and there is

19   also the option for a special election if there is

20   a -- an occasion of machine error. That is provided

21   for under MCL 168.826. So there are -- there are

22   remedies available, but they don't neatly apply here

23   for the reasons that --

24   THE COURT REPORTER: Mr. -- Mr. Grill,

25   you're cutting out.

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 1              MR. GRILL:  I apologize.  But as I was

 2    saying, the -- the problem, your Honor, on why -- that

 3    there is an issue here, that the time for those

 4    special elections has already passed.  So that is

 5    certainly an issue for Mr. Bailey, but there are

 6    options available to citizens.

 7              I also want to clarify the -- the hand count

 8    that we did for the presidential election in -- in

 9    Antrim County, was not the entirety of an audit.  But

10    I want to be clear that it was -- there was -- that

11    Antrim County was included at a set for the entire

12    statewide audit of results.  So there has been and

13    they -- you know, Antrim County was part of that audit

14    as a whole.  But it did not could be isn't entirely of

15    that hand count, and that's why -- to whatever extent

16    Mr. DePerno wants to read the manual, about why that

17    was not an audit, it's because there's a bigger

18    picture there.  There are more pieces to that puzzle.

19              Regardless, the audit was conducted.  The

20    part about Mr. DePerno's arguments where he talked

21    about why -- what Secretary Benson did was somehow

22    inadequate as an audit under the statute, that would

23    be an argument for mandamus; to say that the Secretary

24    needs to perform her legal duty correctly.  That's not

25    what plaintiff brought here.  He's seeking to bring
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1   his own personal audit conducted by him, according to

2   his own standards; and that's simply not provided for

3   by the Constitution. In fact, that's contrary to the

4   plain language of the Constitution.

5   I read it before, I don't want to quote it

6   again, but basically -- the Constitution says you have

7   the right to the results to have state -- excuse me,

8   the results -- to have the results of statewide

9   elections audited. What the Constitution doesn't say

10   is to conduct an individual audit. The Constitution

11   doesn't say that they have a right to their audit. It

12   doesn't say that they have a right to have -- to

13   have -- that they have the right to conduct an audit.

14   It says you have the right to have

15   statewide -- the results of statewide elections

16   audited. There is a -- there is a possessive

17   difference in the language being used by the

18   Constitution, that I think is significant. And it's

19   one of the areas where Mr. DePerno's argument falls

20   apart, is because the individual citizens simply don't

21   have the right that he's trying to create.

22   Also -- and we address this in our brief,

23   but under Section 31(a), audits are not recounts.

24   They do not change the results of any election. So

25   even if the Court were to say that Mr. Bailey gets the

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1   right to his own audit, it doesn't change the outcome

2   of the November 3rd election.

3   I would also point out to the Court that --

4   and this is not really germane to our motion, but

5   there were a lot of things that Mr. DePerno brought up

6   and I do think it's worth pointing out, that, we did

7   do the hand count of presidential votes in Antrim

8   County. Mr. DePerno was present for that hand count.

9   And that the numbers of that hand count essentially

10   matched up with the official results that were

11   certified in Antrim County.

12   So to the extent that he says that, you

13   know, no one has ever validated or verified any of

14   these election results, that's patently untrue. I

15   would also point out that citizens can FOIA ballots,

16   they are public documents. Mr. DePerno -- or excuse

17   me, Mr. Bailey doesn't have that option because he's a

18   plaintiff in this lawsuit and once litigation is

19   invoked, it -- no longer FOIAable for him, but any

20   other citizen can certainly avail themselves of that

21   process if they have curiosity and wish to go through

22   and count individual ballots.

23   Mr. DePerno asked what the remedy was for a

24   violation of 765. Well, I guess potentially mandamus.

25   If you have a local clerk that's, you know, refusing

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1   to post their number of ballots sent and received, you

2   could go to the Court with an emergency motion to say

3   we want them to perform their clear legal duty.

4   Alternatively, if they're willfully reject -- refusing

5   to perform their duty, they could be subject to

6   criminal penalties. But, again, that's not for

7   Mr. Bailey, as a private citizen, to regulate.

8   But regardless, it's certainly -- nothing in

9   765 impugns or affects the validity of election

10   results. If some local clerk doesn't post the number

11   of ballots correctly -- ballots are still there. The

12   results are still the results. It doesn't invalidate

13   the election.

14   Lastly, turn -- Mr. DePerno just suggested

15   that the Court hold on this motion before -- until it

16   has a chance to review his motion to amend. Again, I

17   submit that that's not how this is supposed to work.

18   If Mr. -- if the Court were to do that, Mr. DePerno

19   could tomorrow -- or Mr. Bailey could tomorrow

20   withdraw his motion for leave to amend the complaint,

21   and none of these issues would be resolved and we

22   would be stuck still with the original complaint in

23   this case.

24   I think the appropriate course of action is

25   to have the Court Rule on our motion, make

1   determinations on the legal sufficiency of the

2   complaint. And then if, as we had maintained, the

3   entire complaint should be dismissed, the plaintiff

4   will have the opportunity to argue about why he should

5   be given leave to amend, after we've had the

6   opportunity to explain why the proposed amendment

7   would be futile. And then lastly, I know the Court

8   knows this, but I'm also cognizant of the fact that

9   there are many people watching this hearing, so I want

10   to make it abundantly clear that the plaintiff has not

11   proven anything.

12   All of the factual matters that Mr. DePerno

13   raised in his argument are disputed. But they're not

14   pertinent to this motion, because our motion is based

15   purely on legal questions and the legal sufficiency of

16   the complaint. If necessary, there will be some

17   future day where we would address the factual problems

18   with Mr. DePerno's arguments, but we're here today to

19   talk only about the legal sufficiency of the

20   complaint.

21   THE COURT: All right. Thank you,

22   Mr. Grill.

23   Mr. Kazim, do you have a response?

24   MR. KAZIM: I have nothing further to add,

25   your Honor. Thank you.

1   THE COURT: All right. Thank you.

2   My plan, ahead of the argument today, was to

3   take some time to prepare a decision, which I would

4   provide orally to the parties, most likely next week,

5   since we are all scheduled to be together -- assuming

6   that I'm able to complete my work this week, given my

7   schedule, then that is still my plan. So that's what

8   we're going to plan on doing. Expect an oral

9   decision -- again, assuming something doesn't come up

10   this week.

11   I do have a trial that I need to conduct on

12   Thursday and Friday, but I should be able to complete

13   most of this work over the next few days and hopefully

14   wrap it up over the weekend, so we will be discussing

15   it -- or you'll be receiving my decision when we next

16   meet.

17   Is there anything else that we need to

18   address for today? Let's start with the plaintiff,

19   Mr. DePerno?

20   MR. DEPERNO: Nothing from the plaintiff,

21   your Honor.

22   THE COURT: All right.

23   Mr. Grill?

24   MR. GRILL: I do -- there is a matter I do

25   think I need to raise, your Honor. We have a -- we

1   have a number of things pending this week, of -- a

2   large number of depositions related to the Court's

3   previous rulings on experts and getting those

4   depositions done. The problem that we run into now,

5   though, is that with the plaintiff's proposed amended

6   complaint it seeks to add a new party, ElectionSource;

7   for whom neither I nor Mr. Kazim would be capable of

8   representing in any of those depositions.

9   So we run into a problem now, if we're going

10   to proceed and if at some point the plaintiff were

11   given leave to amend his complaint to add that new

12   party, all of the discovery that we would be engaging

13   in this week would be rendered basically worthless,

14   because there would be new claims that aren't

15   addressed in the depositions, and a new party that

16   would want to be heard on them.

17   So my suggestion would be to the Court that

18   all matters be stayed until the Court has an

19   opportunity to review the motion to amend. Otherwise,

20   we're going to be doing all of this stuff twice, which

21   I don't think -- I think would be prejudicial and it

22   would be kind of pointless.

23   THE COURT: Mr. DePerno?

24   MR. DEPERNO: I think we -- you know, we got

25   Mr. Grill's motion -- or his deposition scheduled. If

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1   he wants to not conduct those depositions -- you know,

2   we've heard a lot about this idea that discovery's

3   over -- I don't disagree that there's expense that

4   will be involved and that people would like to avoid

5   that, I guess. But -- I don't know. I -- I would

6   leave that to the discretion of the Court.

7   I -- I -- I -- I can't really -- without

8   consulting with my plaintiff directly, I don't know

9   how to answer that.

10   THE COURT: All right. Well -- and,

11   Mr. Kazim, do you have any -- anything to add to that

12   particular request?

13   MR. KAZIM: Thank you.

14   I just want to point out, also, that in

15   addition to depositions that are scheduled this week,

16   plaintiff has also noticed the depositions of certain

17   county officials next week over two days. So I think

18   we need -- we are going to run into the same issue

19   about whether additional party -- an additional party

20   who has been named, whether they would be -- have the

21   opportunity to attend those depositions.

22   THE COURT: And with regard to the

23   settlement conference that was originally scheduled

24   for tomorrow, that's been adjourned; is that right,

25   gentlemen?

1   MR. GRILL: We have reached a stipulation on

2   that, your Honor, that we'll be filing later this

3   afternoon. We didn't have the chance to do it this

4   morning, once we got all parties consent.

5   THE COURT: All right. That stipulation is

6   what?

7   MR. GRILL: I will have to pull it up, your

8   Honor. It's been a day since I've looked at it. One

9   second, here.

10   MR. KAZIM: I would -- I would note that we

11   did receive a Zoom invitation from the Court for

12   tomorrow's settlement conference.

13   MR. GRILL: I thought -- okay. That would

14   be a final pre-trial or settlement conference for a

15   date not sooner than September 1st. And that the

16   trial would be scheduled for a date not sooner than

17   October 1st. There are some other dates for trial

18   briefs and whatnot, but I think the Court was asking

19   about the pre-trial settlement -- pre-trial

20   conference.

21   THE COURT: All right. As far as the

22   settlement conference tomorrow goes, that is adjourned

23   pending the Court's receipt of the stipulation from

24   the parties that we had discussed earlier, that's

25   number one.

1   With regard to the request from Mr. Grill, I

2   think it makes sense for us to adjourn -- let's say

3   continue the depositions that have been noticed this

4   week. There will be no need to reserve those

5   deposition notices. The deponents simply need to be

6   contacted with new dates and times. Those new dates

7   and times will be determined after we conduct the

8   hearing on the motion that's been filed by Mr. DePerno

9   to amend next week.

10   Mr. Kazim, with regard to the county

11   officials that have been set for deposition next week,

12   those depositions will stay on -- again, pending the

13   decision of the Court with regard to these motions --

14   including the motion for summary disposition, which I

15   really hope to be able to give you on Monday, and I'm

16   going to do everything I can to -- to be able to do

17   that.

18   MR. KAZIM: Your --

19   THE COURT: Does everybody understand what

20   I've just indicated?

21   Mr. Grill?

22   MR. GRILL: Yes, your Honor. I believe that

23   the depositions that we had noticed for this week,

24   will be continued at some later date, and that will be

25   consistent with the Court's prior rulings -- we've got

109

1   to get these done, but we're going to have to pick a

2   new date to do it.

3   THE COURT: Accurate.

4   Mr. Kazim, you agree with Mr. Grill, and do

5   you understand my ruling?

6   MR. KAZIM: Yes. I just want to point out

7   that the notice we received for the hearing dates is

8   Tuesday, May 18th and not Monday, May 17th. And the

9   first deps are scheduled for Tuesday, May 18th -- for

10   my clients. So I just want -- I understand the

11   Court's order that the Court at this point is saying

12   that those depositions for the county officials next

13   week are not going to be continued and will stay on.

14   But as of now, the motions have all been scheduled to

15   be heard on Tuesday, May 18th.

16   THE COURT: All right. Well, you didn't

17   tell me that, so if they are all scheduled on the same

18   day that we are expected to be back here together,

19   then those county motions will have to be continued as

20   well. Thank you for letting me know that, Mr. Kazim.

21   First, I assumed that we were going to meet

22   on Monday; it sounds like we're meeting on Tuesday.

23   And second, the depositions are going to be

24   conflicting, so there is good cause to continue those

25   to another date, and that's what we're going to go

1   ahead and do.

2   MR. GRILL: Your Honor, I've just -- I've

3   been informed that depositions of state people on the

4   17th and 19th -- I'm sorry, the 17th and 21st as

5   well -- the 21st, I suppose, could stay on, depending

6   the Court's decision, but the 17th one would have to

7   be moved as well.

8   THE COURT: That would be before my

9   decision, which we assume is going to come on the

10   18th, so as a result, that would be correct,

11   Mr. Grill.

12   MR. GRILL: All right. Thank you, your

13   Honor.

14   THE COURT: All right.

15   Mr. Kazim, you understand my ruling today on

16   these points?

17   MR. KAZIM: Yes, that the depositions

18   scheduled for Tuesday, May 18th are continued, but not

19   for Wednesday, May 19th?

20   THE COURT: That's correct.

21   Mr. DePerno, do you understand my rulings on

22   these points?

23   MR. DEPERNO: Yes. 18th are continued.

24   19th are not. 21st are still on. I -- I think --

25   okay.

1   THE COURT: That's accurate.

2   All right. Thank you all for your arguments

3   today. I will do some homework and hopefully we'll

4   have a decision for you on the 18th.

5   MR. KAZIM: Thank you.

6   MR. DEPERNO: Thank you.

7   MR. GRILL: Your Honor -- your Honor, if

8   may --

9   THE COURT: Mr. Grill?

10   MR. GRILL: -- while we have everyone

11   present. There has not been a deadline set for the

12   plaintiff's rebuttal expert reports to be produced to

13   the defendants. It's just an oversight, so I don't

14   know if the Court wants to set one of those -- set one

15   or not.

16   THE COURT: All right. Well, this is a new

17   issue.

18   Mr. DePerno, are there reports that are

19   going to be produced by your experts?

20   MR. DEPERNO: There are, I --

21   THE COURT: Your rebuttal experts.

22   MR. DEPERNO: Right. I thought they were to

23   be produced by the 24th of May, is what I thought.

24   MR. GRILL: My understanding was that was

25   the list of them to be named. But if that's the date

1   that Mr. DePerno is comfortable to produce any reports

2   to us, I think that would be okay. I just wanted to

3   make sure that there would be a date for that, because

4   otherwise it's --

5   THE COURT: Sure.

6   Mr. DePerno, does the 24th work? It

7   certainly seems to make sense, given the depositions

8   scheduled that we have out there?

9   MR. DEPERNO: Yeah, I thought -- yes, that

10   makes sense, the 24th.

11   THE COURT: All right.

12   Mr. Grill, if you could add that to your

13   list, please. Mr. Grill, I'll expect a set of orders

14   from you -- or proposed orders. And let's give

15   Mr. DePerno more than an hour to review them, please.

16   MR. GRILL: I generally do try, your Honor,

17   and I -- I will.

18   THE COURT: I understand. Let's go ahead

19   and get those in, hopefully by stipulation, if not,

20   under the Seven-Day Rule.

21   Okay. Thank you, all.

22   MR. DEPERNO: Thank you.

23   MR. GRILL: Thank you.

24   MR. KAZIM: Thank you.

25   (At 3:55 PM., proceedings concluded)

1   State of Michigan   )

2   County of Antrim   )

3

4

5

6   I, JESSICA L. JAYNES, certified Court

7   Reporter in and for the County of Antrim, State of

8   Michigan, do hereby certify that the foregoing proceedings,

9   consisting of 113 pages, held before the Honorable KEVIN A.

10   ELSENHEIMER, Circuit Court Judge, is a true and correct

11   transcript of my stenotype notes with the assistance of

12   computer-aided transcription, to the best of my ability, in

13   the matter of WILLIAM BAILEY V ANTRIM COUNTY, ET AL. File

14   No. 20-9238-CZ. Held Monday, May 10th, 2021.

15

16

17

18   Date: Friday, May 21st, 2021

19

20

21   /s/Jessica L. Jaynes
                                Jessica L. Jaynes, CSR 7597, RPR
22   Official Court Reporter
                                328 Washington Street
23   Suite 300
                                Traverse City, Michigan 49684
24   (231) 922-4576

25

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Exhibit 5

Ruling on Defendants' Motion for Summary Disposition

May 10, 2021

STATE OF MICHIGAN

THIRTEENTH CIRCUIT COURT (ANTRIM COUNTY)

WILLIAM BAILEY,

      Plaintiff,

                           Case No. 20-9238-CZ

v.

ANTRIM COUNTY,

      Defendant,

SECRETARY OF STATE JOCELYN BENSON,

      Intervenor-Defendant.

 ---------------------/

ORAL DECISION
(VIA ZOOM)

Before the Honorable KEVIN A. ELSENHEIMER, Circuit Judge

Bellaire, Michigan - Tuesday, May 18th, 2021.

APPEARANCES:

For the Plaintiff: MR. MATTHEW S. DEPERNO (P52622)
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For the Defendant: MR. ALLAN VANDER LAAN (P33893)
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Reported By: Ms. Jessica L. Jaynes, CSR 7597, RPR
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                          (231) 922-4576

1

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APPEARANCES CONTINUED:
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WITNESSES: PLAINTIFF   PAGE
(None)

WITNESSES: DEFENDANT
(None)

EXHIBITS: IDENTIFIED   RECEIVED
(None)

1   Bellaire, Michigan

2   Tuesday, May 18, 2021 - 1:31 PM.

3   (Court, counsel, and plaintiff present)

4   THE COURT: Okay. Let's go ahead and call

5   the matter of Bailey versus Antrim County. File

6   Antrim 20-9238-CZ. It's the 18th of May. The parties

7   may be able to hear that the Court has -- frankly,

8   I've had no voice for about the past four days. We

9   had a trial last week, I lost my voice during the

10   trial; that, and hay fever, I think, contributed. Had

11   it -- it was gone over the weekend. Yesterday I

12   canceled some of my hearings to try to preserve it for

13   today, and I'm running at about 50 percent, so

14   hopefully we'll be able to get through this.

15   Let's go ahead and start with appearances,

16   beginning with plaintiff, please.

17   MR. DEPERNO: Matthew Deperno on behalf of

18   plaintiff, William Bailey, who's also present.

19   THE COURT: All right. Thank you, both.

20   And let's go to defense, beginning with

21   Antrim County.

22   MR. VANDER LAAN: Allan Vander Laan on

23   behalf of Antrim County, your Honor. Good afternoon.

24   THE COURT: All right. Thank you. Good

25   afternoon.

4

PLAINTIFF-APPELLANT's Appendix 000139

1   And on behalf of the Secretary of State?

2   MR. GRILL: Good afternoon, your Honor.

3 Erik Grill, Assistant Attorney General on behalf of

4 Secretary Benson.

5   THE COURT: All right. Thank you.

6   We have -- pardon me, several matters that

7 have been set for hearing today. I'm going to start

8 with continuation of the motion for summary

9 disposition that was filed some time ago, argued a

10 week ago -- a little over a week ago, and I indicated

11 that I would be providing an oral opinion today. I'm

12 prepared to do so.

13   This is, as I indicated, file 20-9238-CZ and

14 we are here today to receive the Court's opinion on

15 the defendants' joint motion for summary disposition,

16 pursuant to 2.116 (C)(4) and (C)(8). Now, we heard

17 argument on this motion on May 10th, and the Court

18 today provides its decision, after taking this matter

19 under advisement over the last week.

20   We are on Zoom, and I recognize that there

21 are likely a large number of people who are watching

22 this decision today. It's important, therefore, I

23 think, to discuss exactly what we are addressing here

24 in court today, and, perhaps maybe even more

25 importantly, what we are not addressing. So I'll try

1   to do so in nonlegalese, and then proceed to my

2   decision.

3   This motion tests the legal sufficiency of

4   the claims that have been brought by Mr. Bailey. It

5   is not a test of the facts. The parties, through

6   their lawyers, can bring a variety of claims to court,

7   but the claims must meet certain legal criteria.

8   Circuit Courts don't give advisory opinions.

9   We do not answer questions -- even good

10   questions, even important questions, simply because

11   they've been asked. If we did, then there could be a

12   difference of opinion between each and every circuit

13   judge around the state as to what is an important

14   question. That's chaotic. There must be a legal

15   basis, therefore, that allows the Court to decide

16   issues presented to it.

17   If a complaint asks the Court to resolve an

18   issue, the Court must have the power to do so; and

19   that power would emanate from the Constitution, from

20   state statutes, or from prior decisions of the

21   appellate courts. Today I am deciding whether there

22   is a legal basis for the claims that have been made in

23   Mr. Bailey's complaint.

24   A motion for summary disposition that's

25   filed pursuant to 2.116 (C)(4) asserts that the Court

6

1   lacks jurisdiction with regard to the subject matter.

2   Whether subject matter jurisdiction -- pardon me,

3   jurisdiction exists, is always a question of law. And

4   that's <u>Feyz versus Mercy Memorial Hospital</u>, 475 Mich.

5   663 from 2006. When reviewing a (C)(4) motion, I must

6   determine whether the pleadings demonstrate that the

7   defendant is entitled to judgment as a matter of law,

8   or whether the affidavits and other proofs show there

9   was no genuine issue of material fact. Also from

10   <u>Feyz</u>.

11   Under the court rules, a determination that

12   there is no genuine issue of material fact can play a

13   part in ruling on a motion for summary disposition

14   pursuant to (C)(4). And this may, out of necessity,

15   involve the evaluation of certain factual elements of

16   the case. And that's <u>Mills versus White Castle</u>, 167

17   Mich. App. 202 (1988). Any evaluation of factual

18   elements in a ruling on a motion for summary

19   disposition based on lack of subject matter

20   jurisdiction must be made by a judge, not a jury.

21   By the way, I think I misquoted earlier by

22   citing to <u>Feyz</u>, when I meant to cite to <u>Eaton County</u>

23   <u>Board of Road Commissioners versus Schultz</u>, 205 Mich.

24   App. 371 (1994). And when I cited to <u>Mills</u>, I meant

25   to cite to <u>Weishuhn</u> -- W-E-I-S-H-U-H-N -- <u>versus</u>

7

1   Catholic Diocese of Lansing, 279 Mich. App. 150

2   (2008). Those prior citations related to the second

3   basis of the motion for summary disposition, which is

4   2.116(C)(8). That section of our court rules is with

5   regard to failure to state a claim upon which relief

6   can be granted, and it tests the legal sufficiency of

7   a claim. And that is Spiek versus Department of

8   Transportation, 456 Mich. 331 (1998).

9   Only the legal basis of a complaint is

10   examined, and that would be Feyz. The factual

11   allegations from the complaint, in looking at a (C)(8)

12   motion, are accepted as true, along with any

13   inferences that can be reasonably and fairly drawn,

14   therefrom. Also from Feyz. Unless the claim is so

15   clearly unenforceable as a matter of law that no

16   factual development could justify recovery, these

17   motions should typically be denied. And that is Mills

18   versus White Castle.

19   Now, in general, this case, as we know,

20   relates to concerns over the November 3rd, 2020,

21   election in Antrim County. Initial results from the

22   county at the presidential level showed 16,047 votes

23   cast, with 7,769 for President Biden and 4,809 for

24   former President Trump, and 145 votes for third-party

25   candidates, along with 11 write-in votes, for a total

1   of 12,423. The results were recalculated on November

2   5th and showed that there were 17,327 total votes in

3   the presidential election, out of 18,059 votes cast in

4   Antrim County. Out of that total, President Biden

5   received 7,289 votes and former President Trump

6   received 9,783 votes. Prior to certification by the

7   state board of canvassers, a new tally on November

8   21st of '20 showed, in fact, 15,949 total presidential

9   votes, out of 16,044 cast in the county; with 5,960

10   for Biden and 9,748 for Trump. These numbers are laid

11   out in the figure at Item 1 on page 2 of the

12   plaintiff's brief in response. These discrepancies

13   showed up in several downballot races, as well,

14   throughout Antrim County.

15   Now, the county clerk has advised throughout

16   the pendency of this matter that the problem with the

17   reporting of Antrim County's results was due to a

18   failure to update certain software on all precinct

19   tabulators, when a late change was made to two of the

20   township ballots in the county. On the date of the

21   state board of canvassers certification of Michigan's

22   election results, that being November 23rd of '20, the

23   plaintiff filed the instant action.

24   The Bailey complaint consists of six counts

25   against Antrim County. The first is a claim under

9

1   Article II, Section 4(1)(h) of the 1963 Constitution.

2   It is the audit provision of that section. And Item 2

3   is with regard to the purity of elections clause under

4   Article II, Section 4(2) of that Constitution. Count

5   III relates to violation of Article I, Section 2, that

6   is Michigan's equal protection clause in the Michigan

7   Constitution.

8   Item 4 is a statutory claim pursuant to MCL

9   168.861. Item 5 is a statutory claim, again, under

10   MCL 600.4545. And lastly, there is a statutory claim

11   at Item 6, pursuant to 168.765 -- 5(5). Now,

12   importantly, the plaintiff asks for the following

13   relief:

14   First, that a forensic imaging of precinct

15   tabulators associated with the November 3rd, 2020,

16   election be taken. And further, that there be a

17   nonpartisan audit regarding the November 3rd, 2020,

18   general election. Further, he asks for a protective

19   order to preserve evidence, and such other relief as

20   is equitable and just -- which is a catchall provision

21   made in almost every civil lawsuit in this county and

22   probably in this state. As indicated, these claims

23   were made against the defendant, Antrim County.

24   Now, the Court allowed the Michigan

25   Secretary of State Jocelyn Benson to intervene in the

1   case and it's fair to say that since that

2   intervention, the Secretary of State has taken on the

3   role of the primary litigator with regard to the

4   defendants' defenses and claims in this case. The

5   defendants have today -- pardon me, have filed a joint

6   motion for summary disposition, which argues three

7   main points. First, that the plaintiff's claims are

8   moot, as all requested relief has been granted; and,

9   therefore, this Court lacks jurisdiction to review

10   moot claims. And with regard to Item No. 2, that

11   plaintiff lacks standing to bring its claims into

12   court. And Item 3, that plaintiff has failed to state

13   a claim upon which relief can be granted.

14   We're going to go ahead and visit the first

15   issue. The plaintiffs, as I -- pardon me, the

16   defendants first argue that plaintiff's claims are

17   moot, as there is no case in controversy involved. In

18   other words, the Court has already granted the relief

19   sought by the plaintiff in this case, and the Court,

20   therefore, lacks subject matter jurisdiction. Now, a

21   case is moot which presents a "abstract question of

22   law, which does not rest upon existing facts or

23   rights." And that is People versus Richmond, 489

24   Mich. 29, 2010 case.

25   At the outset of this case, in deciding the

11

1   plaintiff's ex-parte motion for temporary restraining

2   order, show cause order, and preliminary injunction,

3   the Court, in its order of December 4th of 2020,

4   allowed a "forensic audit" subject to protective order

5   to -- of the tabulator in the possession of Antrim

6   County, limited the tabulator's connectivity to the

7   Internet, and required Antrim County to preserve and

8   protect records in its possession with regard to the

9   tabulation of votes on November 3rd of 2020 -- pardon

10   me, regarding that election.

11   This relief is largely what the plaintiff

12   asked for in bringing this litigation. The question

13   before the Court is whether the plaintiff's request

14   for an audit has also been resolved. The only avenue

15   for such an audit that is available is a so-called

16   constitutional audit, and the plaintiff's complaint

17   seeks such an independent audit of the November 3rd,

18   2020, election.

19   The people initiated Prop -- Proposition 3

20   of 2018, which amended the 1963 Constitution at

21   Article II, Section 4 to guarantee "Every citizen of

22   the United States who is an elector qualified to vote

23   in Michigan, the right to have the results of

24   statewide elections audited in such a manner as

25   prescribed by law, to ensure the accuracy and

1   integrity of elections." This language has not been

2   fully reviewed by any appellate court in this state,

3   although it has come up in the trial courts.

4   First, it came up in the Wayne County

5   Circuit matter of <u>Costantino versus the City of</u>

6   <u>Detroit</u>. Wayne County file 20-014780-AW. <u>Costantino</u>

7   involved a series of challenges to the process of the

8   November 3rd, 2020, election, in Wayne County, and

9   included a request from the plaintiffs for a

10   constitutional results audit under Article II, Section

11   4(1)(h).

12   Judge Kenny, from the Wayne County Circuit

13   Court wrote that, "Following the adoption of amended

14   Article II, Section 4, the Michigan Legislature

15   amended MCL 168.31a, effective December 28th of 2018.

16   MCL 168.31a provides for the Secretary of State and

17   appropriate county clerks to conduct a results audit

18   of at least one race in each audited precinct.

19   Although plaintiffs may not care for the wording of

20   the current MCL 168.31a, a results audit has been

21   approved by the Legislature. Any amendment to MCL

22   168.31a is a question for the voice of the people

23   through the Legislature, rather than action by the

24   Court."

25   The Court of Appeals denied leave, as did

13

1   the Michigan Supreme Court, to review Judge Kenny's

2   decision. In the order denying leave, there were

3   several comments that were of note. First, Justice

4   Viviano's dissent argues that the Supreme Court should

5   hear the nature of the right to an audit pursuant to

6   Article II, Section 4(1)(a). Justice Zahra, joined by

7   now-retired Justice Markman, in concurring with the

8   order, notes that the Costantino plaintiffs "raised

9   important constitutional issues regarding the precise

10   scope of constitutional -- pardon me, Article II,

11   Section 4(1)(h), and its interplay with MCL 168.31a

12   and other election laws."

13   The Supreme Court's order is -- pardon me,

14   the Supreme Court's order recognizes that a minority

15   of the Court at the time had concerns with the scope

16   of Article II, Section 4(1)(h), but is not

17   precedential and is not binding authority on this

18   Court's review. Another trial court, the Court of

19   Claims, acting -- pardon me, the Court of Appeals

20   acting as the Court of Claims in the matter of

21   Genetski versus Benson, file 20-0216-MM, per Judge

22   Christopher Murray, addressed the Allegan County

23   Clerk's request for declaratory relief regarding an

24   Article II, Section 4(1)(h) audit to evaluate the

25   process of reviewing signatures on absentee ballots

1   from the general election in November of 2020.

2   In reviewing the language of the article,

3   Judge Murray focuses on a citizen's right to audit

4   results of statewide elections in a manner provided by

5   law. Both Genetski and Benson acknowledged that

6   Article II, Section 4(1)(h) audit or an audit under

7   that section did take place, or was about to take

8   place, following the November 3rd, 20 -- of '20,

9   general election. The Legislature, using authority

10   set forth in Article II, Section 4, did adopt MCL

11   168.31a, which at (2) gives the Secretary of State the

12   authority to "prescribe procedures for election

13   audits" under this constitutional section.

14   Judge Murray, for the Court of Claims, found

15   that plaintiff Genetski had, "No support in the

16   statute for plaintiffs to demand that an audit cover

17   the subject of their choosing, or to dictate the

18   manner in which an audit is conducted. MCL 168.31a(2)

19   leaves that to the Secretary of State."

20   In our matter, Mr. Bailey argues that no

21   audit took place. The Secretary of State did perform

22   two relevant reviews, however. The first is a hand

23   recount of the Antrim County presidential votes, which

24   occurred on or about December 15th of 2020. The

25   defendant Secretary of State admitted at oral

1   argument, however, that this hand recount was not an

2   audit pursuant to the power given to the Secretary of

3   State under 168.31a(2); rather, the defendants point

4   to the statewide election audit discussed in the Court

5   of Claims, as their 168.31 subway [sic] audit. A

6   process outlined in press releases dated 2/12 of '21

7   and 3/2 of '21, from the Secretary of State in their

8   argument on this motion.

9   The plaintiff argues these releases wouldn't

10   be admissible, as they're hearsay, but the Court

11   believes that the record -- records would likely be

12   admissible pursuant to 803(8) as public records, or be

13   introduced pursuant to direct evidence from one of the

14   state actors in this case. There is, therefore,

15   evidence of an audit conducted pursuant to 168.31a.

16   To be clear, that audit is not what the plaintiff

17   would have liked. As indeed, the audit in Genetski

18   was not what the Allegan County Clerk would have

19   liked.

20   However, it did occur, and it appears to

21   have been done so, pursuant to authority set forth in

22   168.31a. I do find Judge Murray's analysis regarding

23   the availability of an Article II, Section 4(1)(h)

24   audit beyond the Secretary of State's audit, pursuant

25   to 168.31a, to be persuasive. There is no right,

16

1   either in the constitutional section or the statute,

2   for the independent audit that Mr. Bailey seeks. A

3   petitioner under Article II, Section 4 does not get to

4   choose his own audit criteria.

5   Rather, the Legislature has given that

6   authority pursuant to Article II, Section 4(1)(h) of

7   review, to the Secretary of State. So while a citizen

8   may seek to audit the results of a statewide election,

9   it must do so according to the law. That law provides

10   for performance of the audit by the Secretary of

11   State. There is no other relief available to the

12   plaintiff in this -- on this point. As the plaintiffs

13   have either received all of the requested relief from

14   this Court, or are not entitled to the relief

15   requested as a matter of law, pursuant to my previous

16   discussion, the plaintiff's claims are, in fact, moot.

17   Granting judgment to plaintiff on its claims

18   would have no practical legal effect, as the audit

19   available under Article II, Section 4(1)(h) has

20   already been done. There is no reason to do it twice.

21   As the plaintiff has no additional relief available,

22   there is no need to review the remaining counts that

23   it has brought. The plaintiff's claims in this case

24   are moot. No additional relief is available; and,

25   therefore, no claim has been stated.

17

1   Summary disposition is granted to the

2   plaintiffs, as to plaintiff's complaint under

3   2.116(C)(4). As an aside, the Court would note that

4   at its core, this case has involved, from the

5   beginning, something that we all learned to do in

6   kindergarten, and that is count. We've, over time,

7   and perhaps with good reason, in the conduct of our

8   elections, taken this very simple function and made it

9   into a complex and often computerized exercise. By

10   deciding this motion, the Court is not saying that

11   there were no problems in the way that Antrim County

12   conducted its November 2020 elections.

13   The Clerk has admitted that there were

14   challenges and problems in the elections. Although,

15   the hand count ultimately of the presidential election

16   showed results largely consistent with the canvas

17   totals that were entered by the state and reported by

18   the county. Nor am I saying that the processing of

19   election data here wasn't corrupted or corruptible. I

20   don't have the facts to make that determination.

21   The plaintiff's reports and the news of the

22   day, including a computer hack recently of a main

23   petrol fuel pipeline on the East Coast might well

24   suggest that this is something that policy makers

25   should be looking into in the future. If election

18

1   results were to be held for ransom in the future, one

2   can only imagine what would happen. I am saying that,

3   as pled, the plaintiff's request for an audit is not

4   available. Anticipating the possibility of appeal,

5   this Court will take all pending motions under

6   advisement. This Court's order with regard to the

7   preservation of ballots, et cetera, entered in

8   December is stayed.

9   I will need an order from Mr. Grill as to my

10   decision today, for the reasons that have been stated

11   on the record. All right. Thank you all very much,

12   and good luck going forward on this case.

13   MR. DEPERNO: Thank you, your Honor.

14   MR. GRILL: Just, your Honor, before

15   proceeding, just to be clear, all other matters are

16   taken under advisement. There are some discovery

17   matters open this week. Should we -- those also be

18   stayed as well?

19   THE COURT: They -- yes. It's my

20   anticipation that all matters will be stayed pending

21   the -- we'll see what the parties wish to do with

22   regard to appeal, but pending the possibility of

23   appeal.

24   MR. GRILL: Okay.

25   THE COURT: All right. Thank you, all.

19

1   MR. GRILL: Thank you, your Honor.

2   MR. VANDER LAAN: Thank you, your Honor.

3   (At 1:55 PM., proceedings concluded)

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```
1    State of Michigan                )

2    County of Antrim                 )

3

4

5

6                    I, JESSICA L. JAYNES, certified Court

7    Reporter in and for the County of Antrim, State of

8    Michigan, do hereby certify that the foregoing proceedings,

9    consisting of 20 pages, held before the Honorable KEVIN A.

10   ELSENHEIMER, Circuit Court Judge, is a true and correct

11   transcript of my stenotype notes with the assistance of

12   computer-aided transcription, to the best of my ability, in

13   the matter of WILLIAM BAILEY V ANTRIM COUNTY, ET AL.  File

14   No. 20-9238-CZ.  Held Tuesday, May 18th, 2021.

15

16

17

18   Date:   Thursday, May 27th, 2021

19

20

21                            /s/Jessica L. Jaynes
                              Jessica L. Jaynes, CSR 7597, RPR
22                            Official Court Reporter
                              328 Washington Street
23                            Suite 300
                              Traverse City, Michigan 49684
24                            (231) 922-4576

25
```

21

Exhibit 6

Plaintiff's Response to Defendants' Motion for Summary Disposition

May 3, 2021

<div align="center">

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF ANTRIM

</div>

WILLIAM BAILEY

    Plaintiff

v.

ANTRIM COUNTY

    Defendant

SECRETARY OF STATE JOCELYN
BENSON

    Intervenor-Defendant,

Case No. 20-9238-CZ

HON. KEVIN A. ELSENHEIMER

Matthew S. DePerno (P52622) DePERNO LAW OFFICE, PLLC Attorney for Plaintiff 951 W. Milham Avenue PO Box 1595 Portage, MI 49081 (269) 321-5064	Haider A. Kazim (P66146) CUMMINGS, McCLOREY, DAVIS & ACHO, PLC Attorney for Defendant 319 West Front Street Suite 221 Traverse City, MI 49684 (231) 922-1888 Heather S. Meingast (P55439) Erik A. Grill (P64713) Assistant Attorneys General Attorneys for Intervenor-Defendant Benson PO Box 30736 Lansing, MI 48909 (517) 335-7659

<div align="center">

PLAINTIFF'S RESPONSE TO JOINT MOTION FOR SUMMARY DISPOSITION
PURSUANT TO MCR 2.116(C)(4) and (8)

</div>

    For the reasons stated herein and in the accompanying brief in opposition, Plaintiff,

WILLIAM BAILEY ("Plaintiff"), by and through his attorneys, DePERNO LAW OFFICE,

PLLC, respectfully request this Court deny the joint motion for summary disposition pursuant to

MCR 2.116(C)(4) and (8) for the reasons set forth herein and in the accompanying brief.

    1.   Agreed.

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(269) 321-5064 (phone) • (269) 353-2727 (fax)

PLAINTIFF-APPELLANT's Appendix 000158

2.   Denied. The complaint asks for additional equitable relief.

3.   Denied. The court granted additional relief not mentioned by Defendants.

4.   Denied. Plaintiff has not yet been granted an independent and non-partisan audit to determine the accuracy and integrity of the November 3, 2020 election. To the contrary, Defendants have obstructed discovery, hidden documents, and delayed discovery from the outset. When Plaintiff scheduled an independent and non-partisan audit on for May 5, 6, and 7, 2021, Defendants again obstructed and filed yet another of their many motions to stop and delay discovery in order to hide the truth that the election was fraudulent and that Sheryl Guy ("Guy") and Jocelyn Benson ("Benson") committed fraud by telling the citizens of Antrim County, the State of Michigan, and the world that this was the safest election in history. Indeed, Guy and Benson worked in unison with Election Source to rig the election by manipulating the Dominion Voting System and altering data to transfer votes from Donald Trump to Joseph Biden. By committing fraud on citizens of Antrim County and the State of Michigan, the results of the Antrim County election must be decertified. Indeed, the United States Supreme Court ruled in the landmark case *United States v Throckmorton*, 98 US 61 (1878) that "fraud vitiates everything." See also *Boyce's Executors v Grundy*, 28 US 210 (1830); *Nudd v Burrows*, 91 US 416 (1875). *Grigg v Hanna*, 283 Mich 443, 278 NW 125 (1938). Further, "[a]ssuming that [a] transaction ought not to have taken place, the court proceeds as though it had not taken place, and returns the parties to that situation." *Roek v Board of Educ of Chippewa Valley School Dist*, 430 Mich 314, 422 NW2d 680 (1988), quoting *Herpolsheimer v Herpolsheimer Realty Co*, 344 Mich 657, 666, 75 NW2d 333 (1956), quoting 3 Pomeroy, Equity Jurisprudence (5th ed), § 910, p. 578.

5.   Denied.

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PLAINTIFF-APPELLANT's Appendix 000159

6.   Denied. Further, Benson has not conducted an audit.

7.   Denied.

8.   Denied.

9.   Denied.

10.   Denied.

11.   Denied.

12.   Denied.

WHEREFORE, for the reasons stated herein and in the accompanying brief, Plaintiff respectfully

requests this Court deny Defendants' joint motion for summary disposition.

Respectfully submitted

DePERNO LAW OFFICE, PLLC

Dated: May 3, 2021

/s/ Matthew S. DePerno
Matthew S. DePerno (P52622)
Attorney for Plaintiff

3

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF ANTRIM

WILLIAM BAILEY

    Plaintiff

v.

ANTRIM COUNTY

    Defendant

SECRETARY OF STATE JOCELYN
BENSON

    Intervenor-Defendant,

Case No. 20-9238-CZ

HON. KEVIN A. ELSENHEIMER

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BRIEF IN SUPPORT OF PLAINTIFF'S RESPONSE TO JOINT MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(4) and (8)

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PLAINTIFF-APPELLANT's Appendix 000161

TABLE OF CONTENTS

A.   SYNOPSIS

Defendants' motion must be dismissed for the reasons stated in this brief. Plaintiff's expert witnesses have now cracked the Dominion voting system and show how easy it is to manipulate the election. This brief details how votes can easily be transferred from Donald Trump to Joe Biden using the tools available on the Antrim County election management system ("EMS"). Our tests confirm that the vote tally errors observed in Antrim County on November 3, 2020 were most likely the result of technical manipulation of the election project file; not human error and not a computer glitch. By conducting a series of tests, Plaintiff's experts were able to replicate the vote tally errors through a method wholly contrary to the "human error" narrative proposed by Alex Halderman. These tests show the following:

1.   Ballots were fed into the tabulator at the precinct/township level [See Ex 14].

> BIDEN ballots: 2
>
> TRUMP ballots: 2
>
> JORGENSON ballots: 1

2.   Ballots were counted by the tabulator without error.

3.   The election was then closed and the tally tape printed from the tabulator. It shows the following results [See Ex 14]:

> BIDEN: 4 votes
>
> TRUMP: 2 votes
>
> JORGENSON: 1 vote

4.   But even more interesting, we can "flip" the votes in any manner within the same race. We can give all the votes to Jorgenson. We can give all of the votes to Trump. We can give all of the votes to Biden.

5.   The system and election can be entirely compromised utilizing an easy and quick bypass of all security protocol.

6.   The manipulated vote count can then be transferred to the EMS [See Ex 14].

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PLAINTIFF-APPELLANT's Appendix 000164

7.   This means that the "flip" will never be caught in the canvass. There will be no reason to doubt the election results because the number of votes on the printed tape will match the number of votes in the poll pad.

8.   The manipulated results can then be transferred to the Secretary of State and recorded in the state vote tally.

<div align="center">B.   FACTS</div>

1.   The Antrim Shuffle

On November 3, 2021, Joe Biden received 7,769 votes in Antrim County. Donald Trump received 4,509. When combined with the votes for third party candidates, a total of 12,278 votes were cast for president on November 3, 2021.

Date	Registered Voters	Total Votes Cast	Biden	Trump	Third Party	Write-In	TOTAL VOTES for President
Nov 3	22,082	16,047	7,769	4,509	145	14	12,423
Nov 5	22,082	18,059	7,289	9,783	255	20	17,327
Nov 21	22,082	16,044	5,960	9,748	241	23	15,949
Dec 17	22,082		5,959	9,759	244	20	15,962

Antrim County Clerk Sheryl Guy was ready to certify the election until local concerned citizens contacted her and demanded she review the election results. In reality, Donald Trump won Antrim County. In reality, Donald Trump received 9,759 votes and Joe Biden received 5,959 votes. When combined with the votes for third party candidates, a total of 15,962 votes were cast for president on November 3, 2021. In fact, in 9 of the 16 precincts in Antrim County the votes flipped directly from Jorgenson to Trump, Trump to Biden, and Biden's votes went into an under vote category for adjudication.

<div align="center">Jorgenson ▶ Trump ▶ Biden ▶ Undervote</div>

<div align="center">2</div>

In the diagram below, we can see that in Chestonia Township (for example) Joe Biden received 197 votes on November 3, 2020. Simultaneously, Donald Trump received 3 votes. In reality, Joe Biden received 93 votes and Donald Trump received 197 votes. This proves there was a direct flip from Jorgenson to Trump to Biden. This same result occurred in 9 of the 16 precincts.

Jurisdiction	Biden Democratic Party			Trump Republican Party			Jorgenson Libertarian Party		
	Original	Hand Count	Net	Original	Hand Count	Net	Original	Hand Count	Net
TOTAL VOTES	**7769**	**5959**	**-1810**	**4509**	**9759**	**5250**	**93**	**190**	**97**

TOTAL CHANGE			*-1810*			*5250*			*97*

Banks Township, Precinct 1	349	349	0	756	758	2	11	11	0
Central Lake Township, Precinct 1	549	549	0	908	906	-2	16	16	0
Chestonia Township, Precinct 1	197	93	-104	3	197	194	0	3	3
Custer Township, Precinct 1	523	240	-283	11	521	510	4	11	7
Echo Township, Precinct 1	392	198	-194	8	392	384	1	8	7
Elk Rapids Township, Precinct 1	1198	984	-214	625	1029	404	8	17	9
Forest Home Township, Precinct 1	755	610	-145	19	753	734	1	19	18
Helena Township, Precinct 1	432	306	-126	4	430	426	0	4	4
Jordan Township, Precinct 1	372	182	-190	13	369	356	1	14	13
Kearney Township, Precinct 1	744	470	-274	16	743	727	0	16	16
Mancelona Township, Precinct 1	276	277	1	835	835	0	20	20	0
Mancelona Township, Precinct 2	247	247	0	646	646	0	13	13	0
Milton Township, Precinct 1	686	767	81	484	1023	539	14	18	4
Star Township, Precinct 1	462	166	-296	10	468	458	0	10	10
Torch Lake Township, Precinct 1	527	461	-66	8	526	518	1	7	6
Warner Township, Precinct 1	60	60	0	163	163	0	3	3	0

2. <u>Jocelyn Benson and Sheryl Guy lie to the public</u>

Rather than conduct an investigation into the skewed results, Guy and Benson combined forces to construct a narrative that these results were the "human error."

- November 19, 2020: Guy testified before the Joint Senate and House Oversight Committee hearing [Exhibit 1]. She made the following knowingly false statements:[1]

  ➢ "The human errors did occur, that led to incorrect election night reports/reporting."

  ➢ "The unofficial results posted, by the Antrim County Clerks Office, at approximately 4:09 was a result of human error facilitated after two ballot corrections."

  ➢ "Therefore, the error caused the election night program to not load correctly."

  ➢ "I can not express how very unfortunate it is that the human error has called into question the integrity of Antrim County's election process and placed it front and center at the national level."

  ➢ "However, I must emphasize, that the human error did not in any way or form uhhh shape or form effect the official election results of Antrim County."

  ➢ "I have heard things. And I would say that Michigan voting equipment is probably the safest equipment, you know, across the states."

- November 23, 2020: Benson issued a statement that "the election was fair and secure and the results accurately reflect the will of the votes." [Exhibit 2].

- She further asserted falsely that "[t]oday [our democracy and election officials] survived an unprecedented attack on its integrity . . . based in falsehoods and misinformation." *Id.*

- December 9, 2020: Benson made false statements about the extent of audits in the state [Exhibit 3].

---

[1] Sheryl Guy made many false statements on November 19, 2020. The statements listed here concern the false claim that the incorrect results were "human error" and that the Dominion machines are safe.

- December 14, 2020: Benson made the false statement the "Michigan's Nov. 3 general election in Michigan and across the country was the most secure in the nation's history." [Exhibit 4].

- Benson and Attorney General Dana Nessel falsely and recklessly attacked a report published by Allied Security Operations Group (ASOG). *Id.*

- December 15, 2020: Guy made unsubstantiated attacks against ASOG and falsely stated that "[w]hile the County is interested in knowing of any deficiencies in the election system and process, the conclusions of the preliminary report demonstrates an extreme lack of understanding of the election software and process." She also falsely stated that "Antrim County has been and will continue its dedication to transparency."

- December 18, 2020: Benson falsely claimed that a December 17, 2020 "hand recount" represented "a net gain of 12 votes for Trump, largely mirroring the machine-tabulation results from Nov. 3." [Exhibit 5].

- She further pushed the false narrative that opposition to the results on November 3, 2020 were "conspiracy theories." She falsely stated that the November 3, 2020 results only showed "slight differences" from the hand ballot counts. *Id.*

- She further made the false statement that "[t]he closeness of the results to the previously Nov. 3 totals confirms the reporting error prior to certification was not related to the tabulation equipment, depite the proliferation of meritless conspiracy theories stating otherwise." *Id.*

5

- March 2, 2021: Benson stated "it is time for leaders across the political spectrum to tell their constituents the truth, that our election was the most secure in history, and the results accurately reflect the will of Michigan's voters." [Exhibit 6].

This was not "human error." The November 3, 2020 election was not the safest election in history. These statements were knowingly false or made recklessly with the intent to deceive people.

3.   **The ASOG Report / Sheryl Guy violates federal law and deletes files**

On December 4, 2020, forensic experts obtained images of Antrim County's election management system ("EMS"). On December 14, 2020, ASOG released a report styled "*Antrim Michigan Forensics Report, Revised Preliminary Summary, v2*"[2] [Exhibit 7]. In that report, they determined"

> 2.   We conclude that the Dominion Voting System is intentionally and purposefully designed with inherent errors to create systemic fraud and influence election results. The system intentionally generates an enormously high number of ballot errors. The electronic ballots are then transferred for adjudication. The intentional errors lead to bulk adjudication of ballots with no oversight, no transparency, and no audit trail. This leads to voter fraud. Based on our study, we conclude that The Dominion Voting System should not be used in Michigan. We further conclude that the results of Antrim County should not have been certified.

ASOG also found that certain log files were missing from the system.

> 15.   Significantly, the computer system shows vote adjudication logs for prior years; but all adjudication log entries for the 2020 election cycle are missing. The adjudication process is the simplest way to manually manipulate votes. The lack of records prevents any form of audit accountability, and their conspicuous absence is extremely suspicious since the files exist for previous years using the same software. Removal of these files violates state law and prevents a meaningful audit, even if the Secretary wanted to conduct an audit. We must conclude that the 2020 election cycle records have been manually removed.

---

[2] Any protective order regarding the redacted portions should be lifted. None of this is source code.

PLAINTIFF-APPELLANT's Appendix 000169

16.   Likewise, all server security logs prior to 11:03 pm on November 4, 2020 are missing. This means that all security logs for the day after the election, on election day, and prior to election day are gone. Security logs are very important to an audit trail, forensics, and for detecting advanced persistent threats and outside attacks, especially on systems with outdated system files. These logs would contain domain controls, authentication failures, error codes, times users logged on and off, network connections to file servers between file accesses, internet connections, times, and data transfers. Other server logs before November 4, 2020 are present; therefore, there is no reasonable explanation for the security logs to be missing.

Federal law states that this information must be preserved:

52 U.S. Code § 20701 - Retention and preservation of records and papers by officers of elections; deposit with custodian; penalty for violation

Every officer of election shall retain and preserve, for a period of twenty-two months from the date of any general, special, or primary election of which candidates for the office of President, Vice President, presidential elector, Member of the Senate, Member of the House of Representatives, or Resident Commissioner from the Commonwealth of Puerto Rico are voted for, all records and papers which come into his possession relating to any application, registration, payment of poll tax, or other act requisite to voting in such election, except that, when required by law, such records and papers may be delivered to another officer of election and except that, if a State or the Commonwealth of Puerto Rico designates a custodian to retain and preserve these records and papers at a specified place, then such records and papers may be deposited with such custodian, and the duty to retain and preserve any record or paper so deposited shall devolve upon such custodian. Any officer of election or custodian who willfully fails to comply with this section shall be fined not more than $1,000 or imprisoned not more than one year, or both.

4.   <u>Sheryl Guy admits to deleting files / Attorney General Nessel refuses to investigate</u>

On March 4, 2021, at a board of commissions meeting, Sheryl Guy acknowledged that she directed her staff to delete the data on November 4, 2020:[3]

In this video segment, Commissioner Marcus asked, "Did you direct or delete yourself any files on the Dominion services? Did you direct anybody on your staff to do so?" In response, Sheryl Guy stated:

> "When you are saying who went in and worked on those files, whether they deleted them, replaced them, changed them, or corrected them, it was my office. I have never gone on to that machine. But it was my staff and it was because they were doing their job. We truly did not have correct training with the Election Source new program. Because we didn't know we had to pull all the cards back, not just the ones we had fixed. So when you are talking about who did it, I did it. My office staff did it under my authority to get those numbers right. It wasn't fraud. It was doing my job. Getting my numbers certified."

Commissioner Marcus then responded, **"Sounds like you just admitted to 1) breaking the law by making changes to the thing within the 30 day period 2) admitting that you deleted files and destroyed the integrity of the election in Antrim County. You admitted to directing your employees to do so. So basically, Antrim County's vote was completely skewed by your office and you're admitting it."**

---

[3] See https://youtu.be/M8NG_m6ktD0.

Nevertheless, Attorney General Nessel has refused to investigate this crime. The fact remains that the files are gone. Sheryl Guy has admitted it that she directed her staff to do it. This is a serious problem.[4] Instead, the government has argued that nothing happened. Sheryl Guy knowingly destroyed evidence. The State of Michigan has abrogated its responsibility.

5.   Sheryl Guy improperly dismisses lawsuit

On March 3, 2021, Guy dismissed or directed her staff to dismiss this instant case, *William Bailey v. Antrim County*, case no. 2020-9238-CZ [Exhibit 8]. It was later determined by this Court that Defendant Guy had improperly dismissed *William Bailey v. Antrim County*, and the case was reinstated by this Honorable Court [Exhibit 9].

6.   Dr. Douglas G. Frank reveals the algorithm

On April 8, 2021, Plaintiff's counsel and investigative team reveal that that Dr. Frank has uncovered an algorithm at work in Michigan that can shift votes based on census data and registration data.[5] Dr. Frank looked at 9 counties: Antrim. Barry, Charlevoix, Grand Traverse, Kent, Livingston, Macomb, Oakland, and Wayne. He concludes:

- Voter registration is consistently near, or exceeding county population demographics.

- **There are over 66,000 ballots recorded that are not associated with a registered voter.**

---

[4] Indeed, it may be a crime.

> (5) A person shall not do any of the following:
>
> > (a) Knowingly and intentionally remove, alter, conceal, destroy, or otherwise tamper with evidence to be offered in a present or future official proceeding.

MCL 750.483a(5)(a). The penalty if "committed in a criminal case" is "imprisonment for not more than 10 years or a fine of not more than $20,000.00, or both."

See also, MCL 750.505.

[5] See *Plaintiff's Collective Response to Defendants' and Non-Party Counties' Motions to Quash and for Protective Order*. https://www.depernolaw.com/bailey-documents.html

- The ability to predict ballot demographics with such remarkable precision (average correlation coefficient of **R = 0.997**) demonstrates the activity of a regulating algorithm.

- **This confirms, as seen in several other states, that ballots are being harvested at the precinct level, regulated at the county level, and determined at the state level.**

- The degree of precision observed confirms that algorithms had access to voting databases and voting activity before, during, and following the November 3, 2020 election.

	Wayne County	Oakland County	Macomb County	Kent County	Livingston County	Grand Traverse County	Barry County	Charlevoi x County	Antrim County
Total Population	1,749,284	1,257,532	873,922	656,900	191,938	93,030	61,489	26,089	23,266
Total 18+ Population	1,339,405	999,630	694,156	500,078	152,390	74,536	48,094	21,337	19,222
Current Registered (4/6/2021)	1,383,669	1,016,125	685,385	492,643	159,774	79,954	49,724	23,576	21,935
Total Registrations (October Database)	1,365,392	1,011,669	670,592	489,234	157,667	79,537	48,628	23,279	24,118
Total Ballots in Database	840,810	750,232	477,718	348,880	123,642	57,888	34,913	16,574	14,901
Ballots not found in October Database	20,124	17,551	13,596	8,782	3,240	1,295	914	380	312

312 of those votes come from Antrim County. The study revealed that across the 9 counties studied, there is a 0.997 average correlation.

10
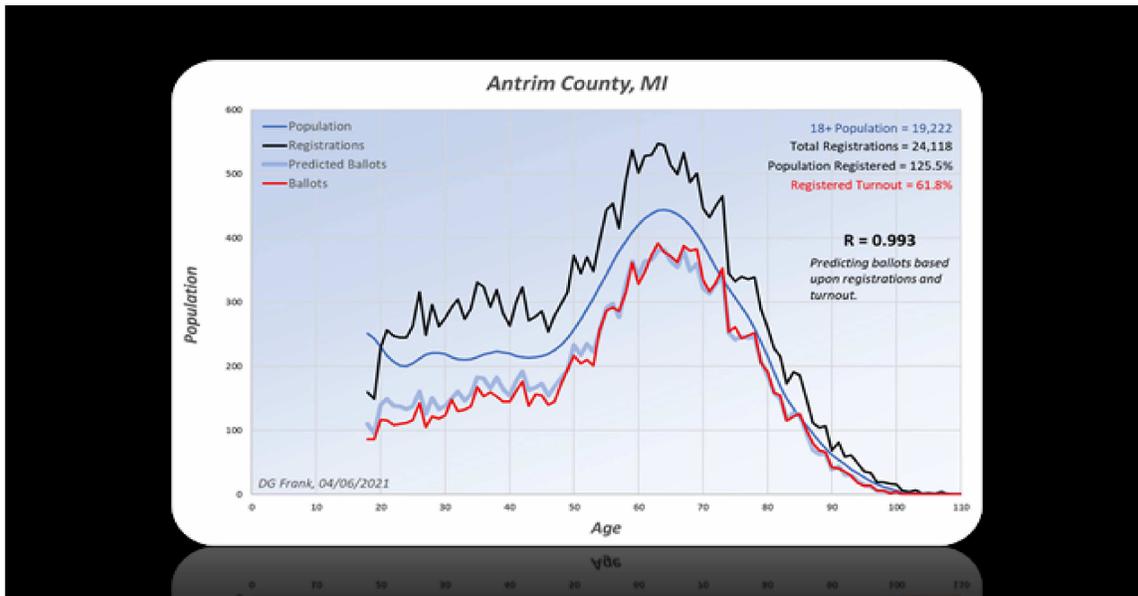
In relatively simply terms, this means that when we take the census data and the registration data and then apply the algorithm, we can predict the number of ballots cast in a county to 99.7% certainty without seeing the results. The study also showed that Antrim County has more registered voters than eligible voting population:

7.   James Penrose and Ben Cotton reveal internet connectivity across the dedicated network

James Penrose also explained internet connectivity on both Dominion and ES&S machines [Exhibit 10]. The Dominion Voting Systems proposal for Antrim County shows a quote for procurement of wireless transmission capabilities. Dominion representatives also confirmed performance issues with wireless transmission of vote totals and even went as far as disabling the saving of ballot images without explicit authorization during the 2020 primary. In addition, a forensic examination of a Dominion ICX machine has shown the existence of Taiwan and Germany-based IP addresses in unallocated space, implying there were international communications via the Internet. In addition, ES&S DS200 machines in Michigan utilized wireless 4G network adapters for vote transmission over the commercial Verizon network. The company that manufactures the 4G wireless modems is named Telit. Telit has recently taken investment from a major Chinese firm and according to press reporting the UK government is monitoring the situation with concern that the Chinese government is in a position to exercise influence over Telit.

Benjamin Cotton has also prepared an affidavit after review of the Antrim County system [Exhibit 11]. He states that he reviewed the forensic image of the Dominion system "utilized in the November 2020 election and discovered evidence of internet communications to a number of public and private IP addresses." One connection in particular traced back to "the Ministry of Education Computer Center, 12F, No 106, Sec 2, Hoping E. Rd., Taipei Taiwan 106." Further,

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"[t]his IP address resolves to a cloud provider in Germany." Mr. Cotton's findings show that the Antrim County system was connected to the internet. Of course, Sheryl Guy deleted system files that would allow further review. For this reason, review of other systems in other counties is critical.

8.   <u>**Cyber Ninjas reveals existence of Microsoft SQL Server Management Studio on Antrim County EMS**</u>

Cyber Ninjas has also prepared a report after review of the Antrim County system [<u>Exhibit 12</u>]. This report includes a multitude of problems found within the system and amount to gross error by Dominion and Antrim County. One of the most important discoveries is detailed on page 15 of the report. Here, Cyber Ninjas discovered a Microsoft SQL Server Management Studio implant on the system. This piece of software is not approved by the Election Assistance Commission ("EAC") and allows a user to actually circumvent security protocol and make "direct[] edit entries within the database" which "could potentially be utilized to change vote values." Perhaps most importantly, this software is a "separate install." In other words, it should not be on the system. It is, by its very definition, a hacking tool.

9.   <u>**Plaintiff's team cracks the Dominion voting system in Antrim County and shows how easy it is to manipulate the election. This shows the Defendants complicity in the fraud perpetrated on November 3, 2020 in Antrim County**</u>

As explained at the start of the brief, Plaintiff's expert witnesses have now cracked the Dominion voting system and have shown how easy it is to manipulate the election.

    a.   <u>**James Penrose new report**</u>

James Penrose has authored a new report that describes the ability to easily manipulate an election using the Dominion voting system [<u>Exhibit 13</u>].

b. <u>**Jeff Lenberg new report**</u>

Jeff Lenberg has authored a new report that describes his process on easily switching the votes on the Dominion voting system using the Antrim County configuration [<u>Exhibit 14</u>]. He states:

> Testing of Antrim County project files indicates that modification of the project files can replicate the election inaccuracies observed in the November 3, 2020 election. In addition, further testing revealed that selective modification of the project files resulted in tailored manipulation of the votes tallied. The manipulation can be tailored to modify a specific county, precinct, or race. The steps used to manipulate the vote tally are listed below:
>
> - Modify the specific precinct election files
>
>   o Edit the VIF_BALLOT_INSTANCE.DVD
>
>   o Note: Technical access to ElectionSource corporate resources would allow for these types of manipulations to the elections.
>
> - Burn Compact Flash cards with the configurations for the tabulators
>
> - Run the Election (Process the Ballots through the Tabulator)
>
> The results of the modifications to the project file will show vote totals changed on the tabulator's printed tape as well as modified vote totals in the Results Tally Reporting (RTR) system.
>
> In order to validate these findings; two test cases were run:
>
>   1. The swap of Trump and Jorgenson vote totals on both the paper tape and the RTR results
>
>   2. The swap of Biden and Trump (Presidential Race) and Ferguson and Bergman (Congressional) while leaving the Senate race unmodified on both the paper tape and the RTR results

<center>13</center>

Exhibit A contains photos of all the ballots that were
run for test case number 2 as well as the paper tapes
and RTR tallies showing the manipulations.

Both test cases were successful in that the
modifications were made without any alerts or error
messages being generated by the EMS or the tabulator.
The test cases would not have been detected during the
canvassing process because both the paper tapes and
the RTR results matched.

C.   STANDARD OF REVIEW

1.   MCR 2.116(C)(4)

Dismissal under MCR 2.116(C)(4) is appropriate when the "court lacks jurisdiction of the

subject matter." When presented with a motion pursuant to MCR 2.116(C)(4), the Tribunal must

consider any and all affidavits, pleadings, depositions, admissions, and documentary evidence

submitted by the parties.4 In addition, the evidence offered in support of or in opposition to a

party's motion will "only be considered to the extent that the content or substance would be

admissible as evidence to establish or deny the grounds stated in the motion." MCR 2.116(G)(6).

2.   MCR 2.116(C)(8)

"MCR 2.116(C)(8) provides for summary disposition of a claim on the ground that the

opposing party has failed to state a claim on which relief can be granted. A motion under MCR

2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone." *Lakeside Oakland*

Development v H&J Beef Co, 249 Mich App 517, 530 n4 (2002). When considering a motion

under MCR 2.116(C)(8), "[a]ll factual allegations in support of the claim, and any reasonable

inferences or conclusions that can be drawn from the facts, are accepted as true." *Id.* In addition,

"[w]hen reviewing a motion under MCR 2.116(C)(10), a court must examine the documentary

evidence presented and, draw all reasonable inferences in favor of the nonmoving party, and

determine whether a genuine issue of material fact exists." *Qunito v Cross & Peters Co*, 451

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Mich 358, 362; 547 NW2d 314 (1996). Summary disposition should only be granted pursuant to MCR 2.116(C)(8) when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Smith v Globe Life Insurance Co*, 460 Mich 446, 455 (1999).

D.   LAW AND ARGUMENT

1.   Plaintiff's claims are not moot

Defendants' argue that Defendant Benson has already performed an audit. As support, Defendants point to self-serving press releases from her media partners. These are inadmissible hearsay. Defendants' arguments are also without merit. Plaintiff has not obtained an audit of the election. As an initial matter, we must disabuse the world of the false narrative that Benson performed a "hand recount" or "audit" of the Antrim County results or that she "conducted statewide audits." She did neither.

As to the issue of a "hand recount of the results", Defendant Benson only performed a very limited hand recount of the presidential election only. She has refused to perform a hand recount of any down-ballot elections in Antrim County. Indeed, Benson initially announced to the world that she would be performing an "audit" of the election results [Exhibit 15]. We can see from the notice dated December 15, 2020 that this was scheduled to be an "ALL COUNTY AUDIT" scheduled for 2 days. Even her email from December 15, 2020 stated that an audit was scheduled [Exhibit 16]. But at the last minute, Benson changed the time to only 1 day and only performed a hand recount of the presidential election. The results of the hand recount revealed a gross disparity of the election results as initially reported on November 3, 2020 [Exhibit 17]. In fact, the results revealed that in 9 of the 16 precincts, votes were flipped form Jorgenson to Trump, then Trump to Biden, and Biden's votes disappeared. But surprisingly, Hawkins did not

flip to Jorgenson, Blankenship did not flip to Hawkins, and De La Fuente did not flip to Blanksenship. And how did the votes for Biden evaporate? We now know they didn't evaporate. They were put into the "undervote" category; meaning they would be adjudicated, presumably for Biden.

We must also consider what actually happened at the "hand recount" on December 15, 2020. As previously report, a Secretary of State official told two of the volunteers to count approximately 138 ballots with the very same signature in Central Lake Township.[6]
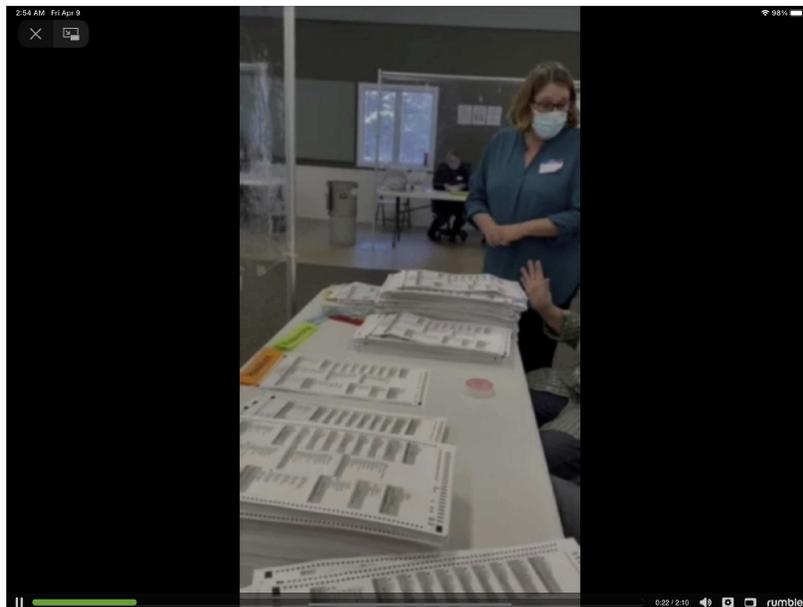
> SOS official: "So, you need to move forward with the audit, so we can get the numbers, so we can see how many ballots are here."
>
> The female counter asks, "So when we're done with the audit, there's still the opportunity to challenge the fact that we have multiple ballots with the very same signature?" she asks.

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[6] https://www.thegatewaypundit.com/2020/12/mi-sec-state-official-caught-video-telling-volunteers-count-multiple-ballots-signature-audit-votes-antrim-county/

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"I don't know if 'challenge' is the right word," the SOS official says.

"But we're challenging—" the volunteer says.

The male volunteer tells the SOS, "We'll go ahead and count the ballots moving forward, but we will separate out, and count those— there's going to be an asterisk, saying 'these ballots have the same signature.'"

"And again, we know that you have a concern with this precinct," she tells them, explaining, "That's not your role at this very moment," as she continues to push for them to ignore the multiple matching signatures and only count the ballots.

"What I need you to do right now is finish the audit," she tells them again. Both of the volunteers explain that they are going to make a note of the ballots, to which the SOS official replies, "Again, that is not the process."

The SOS official implores them to continue to count the presidential ballots.

At no point does the SOS official assure them that the issue of the multiple potentially fraudulent ballots will be addressed, but instead demands that they count them as if they were all legitimate ballots.

School Board Member for Central Lake Schools (3)	
Melanie Eckhardt:	852
Keith Shafer:	846
Write-in:	112
Total Votes:	1810

School Board Member for Central Lake Schools (3)	
Melanie Eckhardt:	519
Keith Shafer:	525
Write-in:	24
Total Votes:	1068
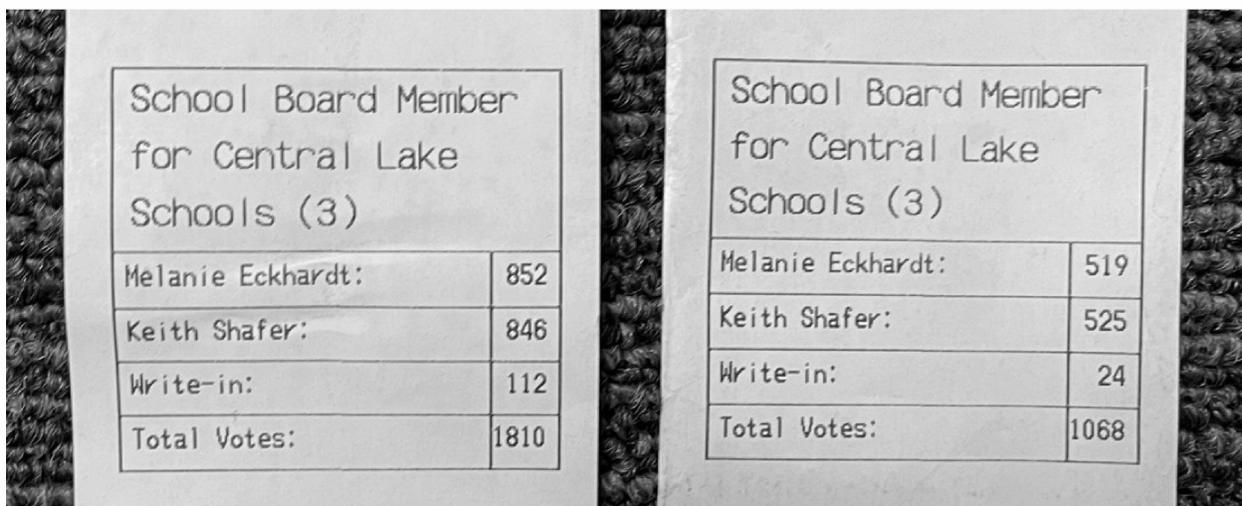
Recount 11/6   Election 11/3

School Board Member for Ellsworth Schools (2)	
Mark Edward Groenink:	3
Christopher Wallace:	3
Write-in:	0
Total Votes:	6

Recount 11/6

School Board Member for Ellsworth Schools (2)	
Mark Edward Groenink:	333
Christopher Wallace:	320
Write-in:	10
Total Votes:	663

Election 11/3

The two diagrams above demonstrate significant errors that should not occur in this system. Without a proper, scientific and nonpolitical explanation by Defendants, and based on their refusal to answer discovery, we must assume fraud.

Next, Benson never performed any "audit" in Antrim County. Her own publication titled *Post-Election Audit Manual* [Exhibit 18] details "audit" procedures:

- "Election notices, election inspector appointments and training, ePollbook security, test deck procedures, military and overseas voter applications, and a review of the *Pollbook* and ballot containers used on election day will be the primary focus of the audit. In addition, an audit of the results of up to three contests in a General election and one contest in other elections on the ballot in each precinct will be conducted." *Id.* at 3.

- "A vital component to a successful election is the conduct of the preliminary and public Logic and Accuracy Testing prior to the election." Id. at 6.

- "Review the *Voter Assist Terminal Preparation Checklist and Test Certification Form* and verify it was properly completed." *Id.* at 7. Likewise Guy never performed a VAT Test Deck.

- "Review the *Applications to Vote*. Physically count the *Applications to Vote* and determine if there is the same number of *Applications to Vote* as voters in the *Pollbook*." *Id.* at 8.

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- "If auditing an election with a state or federal office, review the absent voter information posting required to be posted before and on election day." *Id.*

- "Verify the completion of a Receiving Board checklist on election day." *Id.*

- "Finally, review the remaining components of the *Pollbook*." *Id.*

- "Review the Clerk's Preparation Certificate." *Id.* at 9.

- "Ensure all checkboxes are completed in the Election Inspectors' Preparation Certificate and that the inspectors signed." *Id.*

- "Ensure all inspectors (including the chairperson) subscribed to the Constitutional Oath of Office." *Id.*

- "Ensure the oath administrator signed in the appropriate location(s)." *Id.*

- "Compare the signatures of the election inspectors with the Election Commission appointments to ensure all that signed the oath were appointed." *Id.*

- "If applicable, ensure the write-in portion of the *Pollbook* was completed. Votes should be properly totaled after the tally marks." *Id.*

- "Ensure the tabulator tape/statement of votes (should be affixed to the Statement of Votes signature page in the back of *Pollbook*) was signed by all election inspectors." *Id.*

- "Ensure the number of ballots tabulated on the totals tape matches the number of voters listed in the *Pollbook*." *Id.*

- "Ensure the Ballot Summary (found in the *Pollbook*) is completed, balanced, and totals are accurate. The **Difference** should always be zero. If there is a valid discrepancy, was it remarked? If so, check the Remark box." *Id.*

- "Review the *Provisional Ballot Forms* with the *Pollbook* to ensure the number issued matches the number in the Ballot Summary." *Id.* at 11.

- "Determine based on the information provided on the form if the Envelope ballot was appropriately processed by the election inspector and/or the local Clerk." *Id.*

- "Ensure a master card is available for each voter issued an Affidavit or Envelope ballot verifying the voter was registered to vote after the election. Finally, if an envelope ballot was counted, verify it was sealed in an approved ballot container." *Id.*

- Does the number of spoiled ballots in the *Spoiled Ballot Envelope* equal the number of spoiled ballots listed in the *Pollbook*?" *Id.* at 12. In fact, on December

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17, 2020, we saw that the number of spoiled ballots did not match the ballots in the envelope.

We know that Antrim County never performed any pre-election "accuracy test," "stress test," or "test deck." The scope of the recount was limited to presidential race which is insufficient to validate the explanations provided by the Defendants or satisfy any criteria above. If their argument were valid, it would be evident in down ballot races not simply the presidential race. The recount also did not analyze election records with sufficient rigor to determine if the election record chain of custody (QVF, Poll Books, Ballots, Vote Tallies) was maintained. Indeed, Antrim County failed to comply with every single benchmark set forth above. According to Benson's own manual, this presents enormous complications and is most likely the reasons she converted the scheduled audit to the hand recount. In truth, based on the failures to perform the tests above and the deletion of vital election records, the Antrim County results are not auditable and decertification is required. Antrim County Clerk Sheryl Guy committed gross negligence when she failed to perform these pre and post-election tests. Instead, she just "winged it."

Defendants make no additional arguments regarding "mootness." As stated in the Opinion in *Genetski v Benson*:

> However, the Court declines to find that plaintiffs' remaining challenges are either moot or not ripe. Those issues concern the validity of guidance that is still in effect (Counts I and II), or an audit (Count IV) that, according to the plain text of art 2, § 4(1)(h) and MCL 168.31a, may be requested after the election has occurred. Moreover, defendants have not advanced a specific mootness/ripeness argument with respect to the audit claim. As a result, the Court declines to find that the issues raised in Counts I, II, and IV of the amended complaint would have no practical effect on an existing controversy or that it would be impossible to render relief. Cf. *Garrett v Washington*, 314 Mich App 436, 449-450; 886 NW2d 762 (2016) (describing the mootness doctrine).
>
> The Court also rejects defendants' contention that there is no actual controversy. As noted, plaintiffs seek declaratory relief. MCR 2.605(A)(1) requires that there be "a case of actual controversy" for the issuance of declaratory relief. "In general, 'actual controversy' exists where a declaratory judgment or decree is

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necessary to guide a plaintiff's future conduct in order to preserve his legal rights." *Shavers v Kelley*, 402 Mich 554, 588; 267 NW2d 72 (1978).

2.   **Plaintiff has standing to bring this action**

This issue has already been litigated in this case. On December 4, 2020, this court determined that Plaintiff has standing.

> "A litigant has standing whenever there is a legal cause of action, but even if no legal cause of action is available, a litigant may have standing if he or she has a special injury or right or substantial interest that will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer standing on the litigant. While the Defendant argues that Plaintiff has failed to allege an injury in fact, the Court disagrees. As discussed above, assuming that Plaintiff's ballot was one of those damaged during the retabulation, failure to include his vote on the marihuana proposal potentially resulted in passage of the ordinance. Moreover, failure to include the Plaintiff's ballot would amount to the loss of his right to vote, which is an injury specific to Plaintiff. As the Court has determined that the Plaintiff has standing to bring the constitutional claims, it is unnecessary to analyze whether the Plaintiff will succeed on the merits of his statutory claims."

a.   **Plaintiff has standing under MCL 168.861 and MCL 168.765**

Defendants argue that Plaintiff has no standing under MCL 168.861 because the statute creates no cause of action. Defendants are misguided. MCL 168.861 is a savings clause. It preserves the remedies of *quo warranto*. Plaintiff's Count 3 "Election Fraud" was brought under MCL 600.4545(2), not independently under MCL 168.861. Therefore, the argument of standing under MCL 168.861 is irrelevant.

Defendants also argue that Plaintiff has no standing under MCL 168.765 because he was not an absentee voter, but instead voted in person. Defendants provide no support for this argument. Rather, MCL 168.765 confers certain responsibilities on Sheryl Guy to handle absentee votes in a certain way in order to preserve the integrity of the election. Based on all Sheryl Guy's failings throughout this election and her acknowledgment that she was not properly trained (See supra; "*We truly did not have correct training with the Election Source new*

program.") it stands to reason that Sheryl Guy failed in every way under MCL 168.765. Plaintiff

requested to audit these ballots, but the Defendants filed a motion for protective order because

they want to hide the fraud that was committed in Antrim County. Plaintiff has standing as a

voter in Antrim County to ensure the accuracy of the procedures to count absentee votes.

  b.   <u>**Plaintiff has standing to bring Constitutional claims**</u>

  The issue of whether Plaintiff is a resident of Central Lake Village is irrelevant. Contrary

to Defendants' argument, the court did not premise its decision of the preliminary injunction

solely on the marihuana proposal. The court also discussed the fact that three (3) ballots were

destroyed in the canvas process. The ASOG verifies that these ballots were not counted:

D. CENTRAL LAKE TOWNSHIP

1.   On November 27, 2020, part of our forensics team visited the Central Lake Township in Michigan to inspect the **Dominion ImageCast Precint** for possible hardware issues on behalf of a local lawsuit filed by Michigan attorney Matthew DePerno on behalf of William Bailey. In our conversations with the clerk of **Central Lake Township** Ms. Judith L. Kosloski, she presented to us "two separate paper totals tape" from Tabulator ID 2.

   • One dated "Poll Opened Nov. 03/2020 06:38:48" (Roll 1);

   • Another dated "Poll Opened Nov. 06/2020 09:21:58" (Roll 2).

2.   We were then told by Ms. Kosloski that on November 5, 2020, Ms. Kosloski was notified by Connie Wing of the County Clerk's Office and asked to bring the tabulator and ballots to the County Clerk's office for re-tabulation. They ran the ballots and printed "Roll 2". She noticed a difference in the votes and brought it up to the clerk, but canvasing still occurred, and her objections were not addressed.

3.   Our team analyzed both rolls and compared the results. Roll 1 had **1,494** total votes and Roll 2 had **1,491**

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votes (Roll 2 had 3 less ballots because 3 ballots were damaged in the process.)

4. "Statement of Votes Cast from Antrim" shows that only **1,491** votes were counted, and the **3** ballots that were damaged were not entered into final results.

5. Ms. Kosloski stated that she and her assistant manually refilled out the three ballots, curing them, and ran them through the ballot counting system - but the final numbers do not reflect the inclusion of those **3** damaged ballots.

Defendants make no further argument regarding lack of standing to bring the constitutional claims. As demonstrated, Plaintiff has standing.

c.   **Plaintiff has standing under MCL 600.4545**

Defendants also claim Plaintiff lacks standing under MCL 600.4545. To the contrary, MCL 600.4545(1) applies whenever it appears that material fraud or error has been committed at any election at which there has been submitted any constitutional amendment, question, or proposition to the electors of the state or any county, township or municipality thereof. Defendants argue that this statute is inapplicable because any fraud or error would not have affected the outcome of the election.

Under MCL 600.4545(1), a lawsuit in the nature of a *quo warranto* action may be brought "whenever 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 any county, township, or municipality thereof." MCL 600.4545(1). MCL 600.4545(2) permits Plaintiff to bring the claim "without leave of the court." The specific statutory requirements for bringing an action under MCL 600.4545 are set forth in Subsection (2), which states:

Such action shall be brought within 30 days after such election *by the attorney general or the prosecuting attorney of the proper county on his own relation, or*

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on the relation of any citizen of said county without leave of the court, or by any citizen of the county by special leave of the court or a judge thereof. Such action shall be brought against the municipality wherein such fraud or error is alleged to have been committed.

[MCL 600.4545(2) (emphasis added).] A person authorized to bring an action under this section may do so "without any showing of a special personal interest in the subject matter at hand." *Penn Sch Dist No 7 v Lewis Cass Intermediate Sch Dist Bd of Ed*, 14 Mich App 109, 117-118; 165 NW2d 464 (1968). Plaintiff is clearly a citizen of the county and satisfies the standing requirements.

3.   **Plaintiff has stated claims under MCR 2.116(C)(8)**

a.   **Article 2, § 4(1)(h)**

This is an issue of first impression. Defendants argue that Count 1 fails as a matter of law. Defendants argue that a citizen has no right to request an audit of the general election. As amended, Const 1963, art 2, §4(1)(h) now provides, in pertinent part:

> (1) Every citizen of the United States who is an elector qualified to vote in Michigan shall have the following rights:
>
> (h) 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. [Emphasis added.]

This provision was amended effective December 22, 2018. Defendants then argue that MCL 168.31a is a statute that *limits* the constitutional rights of voters in that MCL 168.31a states that "[t]he 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."

According to the Michigan Constitution, there is no threshold requirement that must first be met in order for a citizen to request an audit of an election. This right is self-executing. Const 1963, art 2, § 4. Indeed, the Michigan Constitution requires that the "results" of the election be

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audited in order to ensure the "accuracy and "integrity" of the election. Under the plain language

of MCL 168.31a, it is possible to conduct such an audit so long as the procedures and parameters

of the audit are sufficiently broad enough in scope to comply with the constitutional

requirements to determine the accuracy and integrity of the election.

> MCL 168.31a(2) states:
>
> 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.

This statute requires the Antrim County clerk to perform the audit under the supervision of the

Michigan Secretary of State. It further orders the Antrim County Clerk to report the results of the

audit to the Secretary of State pursuant to MCL 168.31a(3).

A proper results audit must include a review of not only the process used for the election,

but an actual review of the "documents, ballots, and procedures used during an election as

required in section 4 of article II of the state constitution of 1963." Pursuant to the Constitution,

the documents and ballots must be audited not only for their accuracy (in being counted), but

also for their integrity (not being an illegal or fraudulent vote). While MCL 168.31a may contain

limitations that are in conflict with the Michigan Constitution, such as its limitation on an audit

changing the election's results, those issues can be resolved, if necessary, once the audit is

PLAINTIFF-APPELLANT's Appendix 000188

completed. What is clear in the meantime is that Plaintiffs are entitled to an audit and the effects

or ramifications of that audit can be resolved once the results have been obtained.

Defendants rely on the Wayne County case of *Costantino v City of Detroit* which they

attached to their brief. The Court of Appeals[7] and the Michigan Supreme Court[8] both denied

leave. However, Judge Viviano dissented and stated that he "would grant leave to answer the

critical constitutional questions of first impression that plaintiff have squarely presented

concerning the nature of their right to an audit of the election results under Const 1963, art 2, §

4(1)(h)." [Exhibit 12]. Judge Viviano further stated:

> The constitutional provision at issue in this case, which the people of Michigan
> voted to add in 2018 through Proposal 3, guarantees to "[e]very citizen of the
> United States who is an elector qualified to vote in Michigan . . . [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." *Id*. The provision is self-
> executing, meaning that the people can enforce this right even without legislation
> enabling them to do so and that the Legislature cannot impose additional
> obligations on the exercise of this right. *Wolverine Golf Club v Secretary of State*,
> 384 Mich 461, 466 (1971).
>
> The trial court failed to provide a meaningful interpretation of this constitutional
> language. Instead, it pointed to MCL 168.31a, which prescribes the minimum
> requirements for statewide audits and requires the Secretary of State to issue
> procedures for election audits under Article 2, § 4. But the trial court never
> considered whether MCL 168.31a accommodates the full sweep of the Article 2,
> § 4 right to an audit or whether it imposes improper limitations on that right.
>
> In passing over this constitutional text, the trial court left unanswered many
> questions pertinent to assessing the likelihood that plaintiffs would succeed on the
> merits.[1] As an initial matter, the trial court did not ask what showing, if any,
> plaintiffs must make to obtain an audit. It appears that no such showing is
> required, as neither the constitutional text nor MCL 168.31a expressly provide for
> it. None of the neighboring rights listed in Article 2, § 4, such as the right to vote
> by absentee ballot, requires citizens to present any proof of entitlement for the
> right to be exercised. Yet, the trial court here ignored this threshold legal question
> and instead scrutinized the parties' bare affidavits, concluding that plaintiffs'
> allegations of fraud were not credible.[2] The trial court's factual findings have no

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[7] Case No. 344443
[8] Case No. 162245

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significance unless, to obtain an audit, plaintiffs were required to prove their allegations of fraud to some degree of certainty.

> [1] The court also suggested that plaintiffs could seek a recount. But, with few exceptions, the relevant recount provisions can be invoked only by candidates for office, which plaintiffs here were not. Compare MCL 168.862 and MCL 168.879 (allowing candidates to request recounts) with MCL 168.880 (allowing any elector, in certain circumstances, to seek a recount of "votes cast upon the question of a proposed amendment to the constitution or any other question or proposition").

> [2] The court's credibility determinations were made without the benefit of an evidentiary hearing. Ordinarily, an evidentiary hearing is required where the conflicting affidavits create factual questions that are material to the trial court's decision on a motion for a preliminary injunction under MCR 3.310. See 4 Longhofer, Michigan Court Rules Practice, Text (7th ed, 2020 update), § 3310.6, pp 518-519. See also *Fancy v Egrin*, 177 Mich App 714, 723 (1989) (an evidentiary hearing is mandatory "where the circumstances of the individual case so require").

Simply put, because this is a case of first impression, this the cases of *Genetski* and *Costantino* have no precedential value.

b.   **Purity of elections clause**

Defendants make two arguments: (1) the allegations of the "purity of elections" clause are vague and (2) Plaintiff fails to point to any law enacted by the Legislature that "adversely affects" the purity of elections. "The phrase 'purity of elections' does not have a single precise meaning. But it unmistakably requires fairness and evenhandedness in the election laws of this state." *Barrow v. Detroit Election Comm.*, 854 N.W.2d 489, 504 (Mich. Ct. App. 2014). The purity of elections clause has been successfully raised in cases, like this one, where state officials favor one group of voters. *See Fleming v. Macomb Cty. Clerk*, 2008 Mich. App. LEXIS 1325, at *21-24 (Mich. Ct. App. June 26, 2008) ("the purity of elections has been violated in this case because the mailing of absent voter ballot applications to only a select group of eligible absent voters undermines the fairness and evenhandedness of the application of election laws in this state.").

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Further, the collected errors, in connection with information gained during discovery, evince intentional misconduct designed to favor Biden rather than mere errors which happened to be convenient for Biden. Nevertheless, the amended complaint cures any defects argued by Defendants. As stated in *Ryan v Benson*, Court of Claims, Case No. 20-000198-MZ:

> Here, plaintiffs' claims are purportedly rooted in notions of "fairness and evenhandedness." As noted, plaintiffs quoted statements purportedly from defendant that could suggest that defendant encouraged private funding for the specific local jurisdictions outlined by plaintiffs (as well as for other states such as Ohio, Pennsylvania, Wisconsin and Arizona). Additionally, plaintiffs purport to quote defendant speaking about the "outcome" of the election when addressing the use of private funding of local election apparatus, which again, if true, could lend support to a purity of elections problem. But additional facts, and possibly fact-finding by the Court, is necessary before any legal conclusions can be made.

[Exhibit 19].

c.   MCL 600.4545(2) and MCL 168.861

Defendants claim that Plaintiff fails to state a claim of fraud. Defendants argue that Plaintiff must challenge ballot proposals. In this election there were two proposals: State Proposal 20-1 and 20-2. Proposal 20-1 dealt with the constitutional amendment to allow money from oil and gas mining on state-owned lands to continue to be collected in state funds for land protection and creation and maintenance of parks, nature areas, and public recreation facilities; and to describe how money in those state funds can be spent. Proposal 20-2 dealt with a proposed constitutional amendment to require a search warrant in order to access a person's electronic data or electronic communications. Plaintiff voted on both of these proposals and challenges the results of both of these proposals. Nevertheless, the amended complaint cures any defects argued by Defendants.

d.   Equal Protection Clause

Defendants argue that Plaintiff does not have standing. However, this same argument was recently rejected in *Ryan v Benson*, Court of Claims, Case No. 20-000198-MZ:

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Defendant argues that plaintiff lacks standing. A litigant "may have standing . . . if the litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer standing on the litigant." *Lansing Schs Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 372; 792 NW2d 686 (2010). One injury alleged by plaintiffs is that their votes will be diluted or diminished. Defendant argues that plaintiff does not have a special injury or right that will be detrimentally affected in a manner that is different than the citizenry at large. In support, defendant cites cases concerning "vote dilution" and Article III standing in federal court, with some federal district courts explaining that generalized and speculative grievances of "vote dilution" will not suffice to confer standing. See, e.g., *Carson v Simon*, __ F Supp 3d __ (D Minn, 2020).

The difficulty with defendant's argument is that the *LSEA* Court held that Michigan standing jurisprudence is not coterminous with federal standing doctrine, *LSEA*, 487 Mich at 362, and thus the federal decisions under Article III provide no useful guidance. The standards for determining standing in a Michigan court are, for better or worse, much less stringent than the federal standard. *League of Women Voters of Michigan v Secretary of State*, __ Mich App __, __; __ NW2d __ (2020) (Docket Nos 350938 & 351073) (BOONSTRA, J., *concurring*) ("In sum, the restoration of the limited, prudential approach to standing in *Lansing Sch Ed Ass'n* made it *easier* to establish standing, or at least transformed the previously-existing *requirement* of standing into a *discretionary* consideration for the courts."). Here, because plaintiffs have a cause of action for a violation of the equal protection clause, and their rights could be substantially and detrimentally affected differently than others within the general public they have standing to bring these claims.

[Ex 19]. Therefore, the equal protection clause applies. Further, Defendants fail to recognize the case of *Village of Willowbrook v Olech*, 528 U.S. 562; 120 S. Ct. 1073 (2000). In that case, the United States Supreme Court allowed and endorsed the "class of one" theory. The Supreme Court held that individual mistreatment by local government officials could be challenged under the federal constitution regardless of the motivation behind the conduct. *Id*. at 564-565. Henceforth, a plaintiff who wishes to proceed in federal court under the Equal Protection Clause need only allege that a government official has acted arbitrarily or irrationally, and has treated the plaintiff less favorably than those similarly situated.

Nevertheless, the amended complaint cures any defects argued by Defendants.

e.   **MCL 168.765(5)**

Defendants make the argument that 168.765(5) does not apply to Defendant Benson because the absentee ballots are collected by the townships. This is a red herring. Defendants suggest that Plaintiff needs to sue every precinct. The problem with that argument is that is it contrary to how Defendant Benson acted in *Daunt v. Benson*, No. 1:20-cv-522 (W.D. Mich. 2020), recently voluntarily dismissed in the U.S. District Court for the Western District of Michigan. In *Daunt*, a Michigan registered voter did name local election jurisdictions and Defendant Benson. Defendant Benson stipulated that, "Plaintiff and State Defendants agree that the County Defendants are not necessary parties to this litigation. Though the city and county clerks play a role, the Secretary of State has the ultimate responsibility for maintaining Michigan's voter rolls." ECF 27 (filed Sept. 17, 2020) [Exhibit 12]. The local election officials and jurisdictions were dismissed and the case proceeded against just Defendant Benson.

Nevertheless, the amended complaint cures any defects argued by Defendants.

E.   CONCLUSION

For the reasons stated above, Plaintiff respectfully requests this Court deny Defendants' motion for summary disposition.

Respectfully submitted

DePERNO LAW OFFICE, PLLC

Dated: May 3, 2021   */s/ Matthew S. DePerno*
                                        Matthew S. DePerno (P52622)
                                        Attorney for Plaintiff

PROOF OF SERVICE

On the date set forth below, I caused a copy of the following documents to be served on all attorneys of record at the addresses listed above

1.   Plaintiff's Motion for Leave to Amend Complaint

Service was electronically using the MiFile system which will send notification of such filing of the foregoing document to all attorneys of record.

Dated: May 3, 2021   */s/ Matthew S. DePerno*
                                                            Matthew S. DePerno (P52622)

Exhibit 1

TESTIMONY OF SHERYL GUY
Joint Senate and House Oversight Committee hearing
Lansing, MI   November 19, 2020
https://misenate.viebit.com/player.php?hash=eSTYCvwj8LWA

BEGINS AT 2:44:10 on above link
Sheryl Guy via Zoom
Opening statements:

Good afternoon honourable members of the Senate and House Oversight Committee. Thank you for the opportunity to testify before you today to provide a clear and accurate report of the November 3rd 2020 elections conducted by my office.

I am dedicated to my position and responsibilities I hold as the Antrim County Clerk. The human errors did occur, that led to incorrect election night reports/reporting. (oops sorry… oops got in, no) Excuse me, um… The errors did occur, that led in election, incorrect election night reporting of the unofficial Antrim County results of the November 3rd 2020 general election. The unofficial results posted, by the Antrim County Clerks Office, at approximately 4:09 was a result of human error facilitated after two ballot corrections. The Village of Central Lake contained incorrect school board candidates and the Village of Mansilona added a trustee as we learned that his affidavit and petition had been filed properly. Umm…With the township Clerk. BUT, was never forwarded to my office. New ballots were ordered immediately, and each clerk recalled a ummm the ballot that had been sent, and provided a letter explaining the correct ballot information. We spoke with Election Source and it was discovered that we had not received a 2nd new flash drive to program the tabulator compact flash card for the Mansilona Township. Election Source overnighted a 3rd flashcard we received ummm on October 23rd. We installed the new program and reprogrammed the tabulator compact flash card for Mansilona Township. No other cards had been retrieved or reprogrammed. We were not aware that the new flash drive program because we did not realize that we had to reprogram all the tabulator compact cards for all the townships. Therefore, the error caused the election night program to not load correctly. I can not express how very unfortunate it is that the human error has called into question the integrity of Antrim County's election process and placed it front and center at the national level. Antrim County has not/nothing to hide, ummm. I received an email on 8:15am on November 4th 2020 which was my first alert, and again at 10:49am. Election Source did verify the process in which we missed. That all tabulators compact cards had not been reprogrammed to match the newest software. My staff immediately began entering numbers from tabulator tapes. And I clearly and immediately owned my error and take full responsibility. However, I must emphasize, that the human error did not in any way or form uhhh shape or form effect the official election results of Antrim County. Thank you.

Sen. Ed McBroom R 38th Dist. – Vulcan Chair (Chair hereafter):
Thank you so much Madam Clerk and I appreciate how much time you had to wait to testify today, and you provided us with a timeline and such, so thank you for the effort that went into

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appearing today. You know there has been so much, as you mentioned, national attention drawn to this that I felt it was important to have the opportunity for you to come and speak publicly on a big stage basically to assure people what happened and the work that went into rectifying the situation, how it happened. So, you're testimony is this came about due to a really a shift that ended up with had to happen with adding something additional to the ballot after it had been originally proofed and programmed, correct?

Guy: Mr Chair, Correct.

Chair: Ok, and so, why, and if you can answer this, well – first off how long have you been clerk for Antrim County?

Guy: 8 Years

Chair: So when the unofficial results came in, and they were published, what was the, what was the reason that it wasn't until the next morning that they were really called into question? I mean cause the numbers were…

Guy: Mr Chair… our last jurisdiction brought in their results after 3:30am

Chair: Would it have been, for the dramatic skewing of the results in this particular election, versus preceding elections, as far as party affiliation votes went, would it have been un ummm would it have been improper to ask why the locals who brought in those results to you didn't notice that, or why you didn't notice them being so far different from how they had been in previous times?

Guy: Mr Chair, we didn't know at the time and actually our local clerks were overwhelmed with all the AB ballots they had to process.

Chair: Ok, cause I mean it's just the congressional race it's just a really astounding change of fortune for Jack Bergman who in the previous election to this one the initial count so… I just was anybody on your staff… anybody looking at it and saying boy this is really surprising?

Guy: Mr Chair, I believe that we looked at it and we were surprised, but 2020 has been a year like no other.

Chair: (laughter)

Guy: And we honestly did not know what to expect.

Chair: So, when, who was the person? Was it just a local citizen, was it one of the candidates? Who was it that contacted you in the morning to say something's gotta be wrong with these results?

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Guy: It was an email I received ummm at I believe it was 8:14am from a citizen.

Chair: Ok. And if that email hadn't come in, what would have preceded next for your county as far as, would this error have been caught?

Guy: Mr Chair, it certainly would have been caught umm when the canvassers began their canvas.

Chair: Why?

Guy: Um they, the umm, the canvassers certify the election with the umm tabulator tape that come off our machines. Our voting machines.

Chair: So the tabulator tape, would it, so it was not corresponding with the final result?

Guy: Mr Chair, the final result and the tabulator totals matched. The difference was when we tried to do ummm upload our tabulator card (shows Sandisc SD Card) with our reader (shows device) into the night programming software.

Chair: So I wanna know, specifically when this error would have been caught. Had everybody thought, well this is the result, this is the result – because, well in your county it was so starkly different from what it might be from last year. It was very noticeable. But lets go to a different jurisdiction where it might be very close and not noticeable. How would this error have been caught if no one thought there was an error to begin with?

Guy: If the error had been brought to our attention, other than just an email, we would have started questioning it, right away.

Chair: I understand that, but you would have questioned it because something looked amiss. What I'm trying to get at is – if it hadn't looked amiss to you, how would you have known that something had gone wrong?

Guy: When the board of canvassers started canvassing, they would have definitely thrown up a red flag.

Chair: How? What would have thrown up a red flag to them?

Guy: Ummm probably when they were canvassing their first jurisdiction. They would see that huh, the totals are very different, you know than you know what they may have heard on the news.

Chair: I don't think that we are connecting I'm sorry to say Madame Clerk. If it hadn't looked so obviously wrong, how would the board of canvassers have found the error? I mean if they just started looking over the results and they had no reason to suspect them as being wrong,

what would have tipped them off to go and look and see that the programming was wrong. I mean was there an office that was just left off that didn't receive any votes? What would have happened to demonstrate that there had been a mistake made with the programming?

Guy: I believe that once we would have gotten notice that we would have actually have gone into those tapes and compared them to our unofficial election reports ummm and seen that there was a difference. We would have done that.

Chair: But if you didn't know that the software had a problem, and just cycle things through again, wouldn't you just get the same results you got on election night unofficial results?

Guy: We would go to the tabulator tapes and compare what dumped into our software program on election night. We would compare the unofficial report to the tabulator tapes.

Chair: The committee will be at ease while the committee will call a chair.

2:57:30 on tape Committee comes to order

Chair: Clerk Byrum is still on the call and feels she can help make the connection here in vernacular so, this is a reflection on the chairman, and not necessarily knowing all the terminologies of the world that you are working in so… Forgive me, but, Clerk Byrum are you still there, can you help us out?

Byrum: I am Mr Chair. As I understand it, um, of course I wasn't there, so this is only what I have read. As I understand it, when you add a candidate… well first, first problem was the filing official was the township clerk that failed to give the affidavit of identity to the local clerk. This is something I talked about earlier in my testimony, where the county clerk should be the filing official for everything. So that was the first problem. And as a result, it sounds like she contracts with Elections Source to do the programming of the election, so as a result, that candidate had to be added back. But it sounds like perhaps that all those cards, or added in, not back, just added in… Perhaps all those cards were not then reprogrammed with the new program. So they go on the tabulator. As I understand it, the tabulators tabulated the ballots properly. But it is when all of those programs that weren't updated with the new candidate, with the additional candidate, came in to the reporting software system, the big election brain computer, it didn't report it properly. So, as election officials, we do not have the luxury to who's winning and who's not winning on election night – we're too busy doing our job. So, the next day she got an email. Had she not got an email, the board of canvassers would have ABSOLUTELY caught this. Because the tapes, those tabulator tapes, would not have matched the reported results tapes. And flags would have started coming up immediately. That's why in Michigan elections we have all of these checks, all along the way. When she found out, she did exactly what she was supposed to do. She worked with her board of canvassers, I can only imagine she called the bureau of elections – because that usually that's the first thing you do, and they don't answer because they are getting all sorts of calls from people that are worried about sharpie markers! She starts calling their cell phones. So, if that maybe clears it up, Clerk

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Guy if I made anything incorrect, please correct me. But that's how I understand how this could have happened.

Chair: Right, and thank you Clerk Byrum. I think this was probably on the Chair for not asking this right, I did try to ask Sheryl, Madame Clerk for Antrim County – I can't remember your last name so please forgive me. I wanted to ask wouldn't the tapes have shown a different result than what the software was showing. That's what I tried to ask, but the answer didn't come back and we all got in this confusing morass so thank you to Clerk Byrum, and back to the Clerk from Antrim County. Is that correct then? The tapes would demonstrate the difference and so the canvassers would catch that?

Guy: It absolutely would.

Chair: Ok. So if another precinct somewhere else had not seen such large degressions and noticed something amiss, the canvassers would still take those tapes, and juxtapose them with the software reporting and see a discrepancy.

Guy: Yes

Chair: Chairman Hall, do you have questions?

Chairman Hall: I'll start out with Representative LaFave

LaFave: Madame Clerk, thank you again. All three of you, thank you for what you do. I really appreciate it. I received initial media reports, and it was stated that the problem was a software glitch. Is that true that someone from your office said that? Or, is it not true that, was that inaccurate reporting by the press?

Guy: I don't believe that we would have said that it was a software glitch. It was the tabulator tape, or the tabulator card, talking to the election night software program.

LaFave: Ok. Well, it certainly wouldn't be the first time the media got something reported wrong. I'm trying to understand, I have my name on a ballot, I don't count them – I don't know how that system works necessarily, so lets try to follow my ballot. When I vote, and I have my physical ballot, it goes into that voting machine, and it counts like a scan-tron, right?

Guy: Correct, it counts that ballot.

LaFave: Ok, now I keep hearing the word 'tabulator'. Is that machine is called a tabulator?

Guy: Yes

LaFave: Ok. We put a bunch of these ballots individually, in this machine we call a tabulator. And it counts up the various races, whether they be straight party ticket, or county clerk, or whatever it is, and it prints out a tape?

Guy: Correct

LaFave: How big is this tape?

Guy: It's probably about 30 feet long

LaFave: Ok. So we also have an electronic copy of that, that we bring to a different machine that counts it all up?

Guy: No

LaFave: Tell me how we figure out… cause we have a bunch of different tabulators with a bunch of different receipts basically. How does that information aggregate itself, so Antrim County can say, we voted for Kanye West, or whatever? How does it get aggregated?

Guy: Please clarify

LaFave: When we have all these tabulators, they are all in these different precincts across the county. How do we take that data, those numbers, and add them up so Antrim County can say this is the result of of the election in Antrim County? How does that happen?

Guy: Ok, the local clerks will bring their cards (holds up a Sandisc SD Card) in a sealed approved ballot bag, small ballot bag. And they will bring those to us. We in turn break the seal, pull this card out, we put it into the card reader (holds up card reader device), which loads into the election night programming report.

LaFave: And then that is reported to the media and the website and how us normal citizens that aren't there – to figure out what happened.

Guy: Correct

LaFave: This is probably not a great question for you, but a question I would love to know the answer to. How is it, and maybe it's something to do with software, but when I imagine inserting a candidate, in the middle of the ballot… If I'm grading a paper, like in school when you did those scantrons, if you inserted a question, but didn't tell the software, in the middle of the test, everything below that would be off – but everything above it should be fine. So why is it that inserting a name in the middle of the ballot has drastic differences between the number of people who voted straight ticket democrat, and straight ticked republican, and the President and the Senate and everything else, when it was a local official that needed to be added that was the problem causer.

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Guy: Well sir, I believe that's a programming issue. I don't know.

Chair: Ok, representative C.A. Johnson.

Johnson: Good afternoon. How are you, I hope you're well. Are you aware, Madame Clerk, of the fact that President Trump, Michigan Republican party chair Laura Cox, as well as other high profile Republicans are using this discrepancy, in your county voting results, to claim there has been wide-spread voter fraud? Are you aware of that? And what would you say to them?

Guy: I have heard things. And I would say that Michigan voting equipment is probably the safest equipment, you know, across the states.

Johnson: Thank you for that. Ummm I guess that's it. That says everything. Thank you very much.

Hall: Thank you representative. Ok, so I'm just interested, I think maybe, one of the major, just hearing you, one of the major problems that we faced, is probably the way your office has communicated this, from the time it happened, has caused a lot of the uh uproar across the state and across the country. I just want to understand the answer you gave Rep LaFave. Are you saying that your office did not say it was a software glitch?

Guy: (bewildered) Ahhh I'm saying that we didn't know what it was until we spoke with Election Source.

Hall: Ok. I'm just interested, did you make that comment though, publicly before you knew what it was? Or, did that statement come out of your office after you had consulted with Election Source?

Guy: Uhhh I don't know.

Hall: Ok. It seems that that comment is umm what spurred a lot of these theories and a lot of these concerns across the country – about Dominion, about you office, about the potential that small segments across the state or country could be somehow altered. I mean, do you think that was an irresponsible comment to say that it was a software glitch? Or do you really not remember anyone saying that? Because this was widely reported across the country.

Guy: I can tell you that we spoke to many people. Many people were trying to twist ummm (bewildered)… I don't know.

Hall: Ok. Well I would just say that I would find that to be a pretty irresponsible comment given that it was made presumably before your office had the facts. And I think we can see that this sort of thing can spiral out of control. I guess the first thing, I hope that this is something that your office takes into account in the future when you're talking about elections and the

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results, and again we see how this can get out there pretty rapidly. But, I'm interested in now in terms of the timeline you've presented us – I just want to make sure. So the software. It said that September 29th you installed the software. I don't know if you have your timeline in front of you.

Guy: I do sir.

Hall: Then it talks about October 23rd, that there was a new flash drive that came. I assume we are talking about the same thing. That would be installing the software for a second time. Is that what that new flash card means?

Guy: Correct

Hall: Ok. And then that flash drive, can you describe what was on that flash drive? Was that the updated precincts that had the new information in it? Or what was that 2nd flash drive on October 23rd?

Guy: October 23rd. It was the flash drive that contained the Village of Mansilona Trustee who was left off the ballot.

Hall: Ok. Was that installed on all of the machines?

Guy: No

Hall: And did that then create the problem, because it wasn't installed on all the machines? Is that what caused this reporting issue?

Guy: Ummm I believe it did. I'm not a computer tech, but, I believe that did – because we did not know that we had to pull back all of the jurisdictions and reprogram.

Hall: Ok. Is there any kind of training that you are required that would help you to know how to properly use your machines and software?

Guy: There may be. In 2020… we started using this software December 18 of 2019. We've had all four elections – we have not had any training. We do have the manual, but we can't find in the manual where it tells us to reprogram all cards, all jurisdictions.

Hall: Ok. It's kind of concerning when you come to the committee, and you had noticed that you were coming here. And then to understand what happened in your county, we need the Ingham County Clerk to tell us. It seems you still don't have a full understanding of what happened in your county. Is that fair? Or do you think you understand what happened?

Guy: I do think I understand what happened. I believe that when we got a new flash, we should have pulled all of our jurisdictions back and reprogrammed. We did not.

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Hall: Ok. I guess I would ask. On October 24th, according to your timeline, you ran a public accuracy test. Can you tell us what that entails?

Guy: The public accuracy tests are run by the local clerks. They run their own public accuracy test in their halls. We publicize the date, the time, the public accuracy test is going to be held. Mansilona ran theirs on the 24th, because they did not have that, the tabulator card did not come in time for them to keep their normal scheduled date. So they postponed it and noticed it. So they ran their public accuracy test on the 24th. And the process in which you do that, you have test ballots. You test your machine to your ballots. You run every scenario through that machine. It's quite lengthy. Some of them have 50-70 ballots, depending on how many ballot styles. So they run through their public accuracy test. They do a print out just like they do on election day from the tabulator. Then they score that to the programming detail sheet to make sure all of their ballots were registered as they had been programmed with the different issues or different umm ballot scenarios. And, that is what the public accuracy test is.

Hall: So you ran this public accuracy test on the 24th, after you installed the new flash drive on the 23rd of October. Do you know why this didn't catch this problem that would occur on election day that effected your reporting?

Guy: Uhhh the Mansilona WAS reprogrammed. Because that was on that flash drive – the second flash drive.

Hall: So you ran a test that didn't identify what was going to happen on election day. So was that because there was another flash drive that you needed to install?

Guy: Sir, I do not run the public accuracy tests. It is the local clerk that runs the public accuracy test. It's their jurisdiction, it's their election, within our overall election. That is their responsibility.

Hall: Are you aware of any other test that could have been run by a local clerk or the county clerk that would have identified this problem before election day?

Guy: No. I'm not aware.

Hall: Ok. Thank you. I'll turn it over to Representative LaGrand

Someone: Mr Chair, I'm just trying to help you out here. The public accuracy test is on the individual voting machines and the glitches, that disconnect between, those individual voting machine results, and that macro result. So, no amount of testing of the individual machines would have showed you that glitch as I'm understanding it. Just if that helps.

Hall: Ok thank you Representative. Before I turn it back over to the Senate, I'll just say it seems as though there's, I don't know if it's a communication problem or if it's just a management

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problem – but there's certainly some kind of problem going on in your office, and I think that it would be good to seek some additional training on how these machines work and how this software works so that you can fix this in the future. Lastly, perhaps you could look in to see if there are any other tests that your county could perform, or local clerks, to pro… to catch this in the future. I think that would benefit your county a lot. With that, I'll turn it back to you Chairman.

Chairman: Thank you Rep Hall. Do any members of the committee have a question? Senator Theis.

Theis: Thank you Mr Chairman. And thank you for your testimony today. I just wanna clarify, you had one… how many precincts do you have? In your jurisdiction?

Guy: Sixteen

Theis: Sixteen. Ok so one of them had a ballot change and that effected the entirety of the feed off from the Dominion Software Tabulators that you have?

Guy: If you look at my timeline, we have had many changes in our ballots.

Theis: After you locked the election, you had many changes after the lock? So after you finalized everything and programmed everything, you had many changes? Or one change?

Guy: We had two changes. We had the Central Lake and then we had the Mansilona village trustee.

Theis: So how many precincts would those changes have effected?

Guy: Both of them only effect villages that are non-partisan

Theis: Ok thank you. When they are programming, who does the programming? Is that the local clerk? Or is that somebody from the IT? How does that work?

Guy: The program comes from Election Source

Theis: But when you talked about them needing to be reprogrammed. Who would have done that reprogramming?

Guy: One of my staff.

Theis: Ok thank you. And the last questions is… Who found the reason for the irregularity in the reporting? I know that you were made aware that there was an irregularity, but who was it that identified the problem, the reason for the problem?

Guy: We called Election Source. And they reported that all those tabulators, ummm compact cards needed to be reprogrammed.

Theis: Thank you.

Chair: Thank you Senator Theis. Clerk Guy, I just want to get an additional clarity here on your timeline. October 5th, says the Antrim County Clerk submitted error involving a school board on the Central Lake Township ballot. Correct?

Guy: Correct

Chair: And then October 7th, Antrim County Clerk discovered missing Boyne Falls proposal, which had not been provided. And also Mansilona Township provided the Antrim County Clerk with an affidavit of identity for a candidate missing from the ballot. Correct?

Guy: Correct

Chair: So those were three corrections to your ballot submitted October 5th and 7th all together. Correct?

Guy: Correct

Chair: It says then that you submitted those corrections to Election Source. It says they provided you with a new flash drive for an updated program on October 23rd. Antrim County installed the new program reburned the CF card for Mansilona Township. Did you also have to reburn cards for Central Lake Township for the school board issue and Boyne Falls for the ballot proposal?

Guy: Central Lake Township was retabulated in front of the board of canvassers, because that is what Election Source requested that we do. And that's the process. If you have bad numbers, you re-tabulate all those ballots cast. And that's exactly what we did. Boyne Falls – we never received any information from that clerk or the school that put that on. Our equalization director found that and then immediately we made contact to get the language to get it put on. We were not aware.

Hall: So, this is your paper ballots that you utilized. I mean if these corrections are coming in on the 5th and 7th, you were making corrections to the actual ballots within the 45 day window, correct?

Guy: Correct

Hall: Ok. Do any other members have any other questions for the clerk?

LaFave: I want to be clear for everyone involved here. We found that there was a problem. What did you do to make sure that what you reported now is accurate?

Guy: Sir we went through every precinct tape. Tabulator tape from every total of the election and we manually entered it.

LaFave: And when you say you entered it, what did you enter it into? A google document, a calculator, a whiteboard?

Guy: To the election night results program provided to us.

LaFave: And who provides that?

Guy: Election Source provides that to us and we put it in our dummy computer, which is not connected to any internet or any network. It is a stand alone and it is only used for elections. So we hand… we took that tape and we had one read and we had one enter. And we did all those townships just like that. Very time consuming. As I said, they can be 30 to 50 feet long.

LaFave: So what you did then is take the tape. We didn't actually take the physical ballots and…

Guy: No they're under seal. They're under seal. The tabulator tape goes to the county clerk, the local clerk, and the board of canvassers in their envelope sealed. So I have access only to mine, that comes to the county clerk on election night.

LaFave: So you have nothing but confidence that the results that you published now are the true votes of the people of Antrim County?

Guy: Correct. We have spent days and hours. Our board of canvassers did certify our election and our certification of election was sent to the Bureau of Elections.

LaFave: Thank you Madame Clerk. Mr Chair, I still have many questions – but I think I'm done at this time.

Hall: Ok with that and there being no further business before the committee, House Oversight Committee is adjourned.

Exhibit 2

The Office of
Secretary of State Jocelyn Benson

SOS   ABOUT

Statement from Secretary of State Jocelyn Benson on the Board of State Canvassers certification of Nov. 3 election

NOVEMBER 23, 2020

"Democracy has prevailed.

Today's vote of the State Board of Canvassers to certify Michigan's November election confirms the truth: the election was fair and secure, and the results accurately reflect the will of the voters.

A record breaking 5.5 million Michigan citizens cast ballots in this election, more than ever before in our state's history. Their will is clear and unequivocal.

Now we turn to the important work of implementing a statewide risk limiting audit and local procedural audits to affirm the integrity of the process and identify opportunities for improvement. And we will continue working with lawmakers at the state and federal level to strengthen our elections even further in the months ahead.

Our democracy, like the election officials who administer it, is resilient. Today it and they survived an unprecedented attack on its integrity. There will no doubt be more similar attacks in the future, based in falsehoods and misinformation. But then, as now, we will be ready to respond as always with facts, data, and the truth."

# # #
For media questions, contact
Tracy Wimmer at 517-281-1876.

We welcome questions and comments at the **Contact the Secretary of State page**.

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speak to a customer-service representative at 888-SOS-MICH (767-6424).

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Exhibit 3

The Office of
Secretary of State Jocelyn Benson

SOS / ABOUT

Bureau of Elections announces most comprehensive post-election audits in state history

DECEMBER 9, 2020

Statewide audit will be paired with audits in more than 200 jurisdictions

Election News
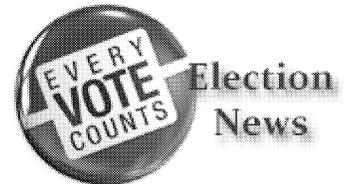
The Michigan Bureau of Elections released preliminary plans for the most comprehensive post-election audits of any election in state history, including a statewide risk-limiting audit, a complete zero-margin risk-limiting audit in Antrim County, and procedural audits in more than 200 jurisdictions statewide, including absentee ballot counting boards.

"I am a longstanding proponent of post-election audits to review election procedure and affirm public confidence in our elections," said Secretary of State Jocelyn Benson. "By conducting the most comprehensive set of audits in our state's history, the Bureau of Elections and Michigan's more than 1,600 local election clerks are demonstrating the integrity of our election."

To confirm the accuracy of ballot tabulation machines, the Bureau and clerks will conduct a long-planned statewide risk-limiting audit of the presidential election. This entails hand-counting thousands of randomly selected ballots statewide. Initial steps are already underway and the audit should be finished by mid-January. A pilot statewide risk-limiting audit demonstrated the accuracy of the machines after the March 10, 2020 presidential primary.

Additionally, a zero-margin risk-limiting audit of the presidential election will be conducted by the Bureau and county officials in Antrim County in December. This is essentially a hand tally of every ballot, which can be compared with the machine-tabulated results.

The Bureau also published a **preliminary list of precincts and absentee ballot counting boards in more than 200 jurisdictions** that will undergo procedural audits conducted by either counties or the state. Many of these audits are ongoing or commencing upon the completion of recounts. Election officials will review election processes, machines and ballots.

"Clerks across the state carried out an extremely successful election amidst the challenges created by record-breaking turnout and more than double the absentee ballots ever before cast in our state, a global pandemic, and the failure of the Michigan Legislature to provide more than 10 hours for pre-processing of absentee ballots," said Benson. "As Attorney General William Barr, the FBI and CISA all have confirmed, this was most secure election in our nation's history and we are confident these audits will continue to affirm that truth."

Numerous other states provide multiple days, if not weeks, for absentee ballot pre-processing.

# # #
For media questions, contact
Aneta Kiersnowski at **KiersnowskiA@Michigan.gov**

We welcome questions and comments at the **Contact the Secretary of State page**.

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speak to a customer-service representative at 888-SOS-MICH (767-6424).

Exhibit 4

The Office of
Secretary of State Jocelyn Benson

SOS / ABOUT

AG, SOS: Plaintiff's report in Antrim County election lawsuit demonstrates lack of credible evidence of widespread fraud or wrongdoing

DECEMBER 14, 2020

LANSING – Attorney General Dana Nessel and Secretary of State Jocelyn Benson, in an Antrim County court hearing today, did not object to the public release of a report on Dominion software from the partisan organization Allied Security Operations Group (ASOG), in order to demonstrate the "report" is actually another in a long stream of misguided, vague and dubious assertions designed to erode public confidence in the November presidential election.
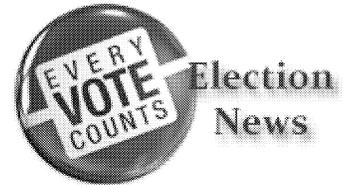
"Let's be clear: Michigan's Nov. 3 general election in Michigan and across the country was the most secure in the nation's history," said Secretary Benson upon the release of the report. "There continues to be no evidence of widespread fraud, as affirmed by state and federal agencies including Attorney General William Barr, the Federal Bureau of Investigation, and the Cybersecurity and Infrastructure Security Agency. If the Trump campaign had any actual evidence of wrongdoing – or genuine suspicion thereof – they could have requested a hand recount of every ballot in the state. They did not, instead choosing to allow shadowy organizations claiming expertise to throw around baseless claims of fraud in an effort to mislead American voters and undermine the integrity of the election. Their actions are a corruption of the courts and the rule of law, as the release of today's report clearly demonstrates."

A lawsuit filed in 13th Circuit Court, Bailey v Antrim County, seeks to challenge Antrim County's election results, **posing false claims of fraud** and accompanied with a report filled with errors and clear bias.

"Oftentimes, a party will hire an expert witness to support the conclusion that the party wants or needs to reach. It's why we give the other parties in a lawsuit a chance to depose the expert and challenge their qualifications in court," Attorney General Nessel said. "Anyone can have an opinion, but it doesn't necessarily mean the opinion is based on fact or science."

ASOG authored the "preliminary forensic audit," which was made public by the judge today. The group, however, has no apparent expertise in election administration and technology. Their work is limited to the previous release and amplification of other false information and fake documents. **As expected,** the plaintiff's most recent report on Antrim County is similarly critically flawed, filled with dramatic conclusions without any evidence to support them.

Today's activity comes on the heels of last week's announcement from the Department of State that the Bureau of Elections is planning the most comprehensive set of election audits in the state's history. This will include a statewide risk-limiting audit, several local procedural audits, and a zero-margin risk-limiting-audit of all ballots in Antrim County. The latter, which will be conducted on Thursday, Dec. 17, is expected to confirm that votes cast for president were machine-tabulated correctly. A similar statewide risk-limiting audit demonstrated the accuracy of the state's voting machines following the March 10 presidential primary.

In response to a previously unsigned version of the ASOG report, Michigan Bureau of Elections Director Jonathan Brater made a **preliminary declaration** under oath for the court. In his statement, Brater said it was apparent to him "… that the report makes a series of unsupported conclusions, ascribes motives of fraud and obfuscation to processes that are easily explained as routine election procedures or error corrections, and suggests without explanation that elements of election software not used in Michigan are somehow responsible for tabulation or reporting."

There are several legal concerns with the report and testimony submitted in Bailey v Antrim County, including the portions provided by Russell Ramsland, one of the "expert" witnesses in the case. A **Detroit Free Press story from Nov. 21** quotes Rudy Giuliani as saying Michigan has "over-votes in numerous precincts of 150%, 200% and 300%." Giuliani's source was an affidavit from Ramsland, who is a former Republican congressional candidate. All 19 of the precincts cited in his affidavit are in Minnesota, not Michigan. Ramsland has also **inaccurately stated the voter turnout rate in Detroit**, saying it was nearly three times higher than it actually was.

The qualifications of those who authored the report are suspect, with no evidence or credentials provided to back up their "expertise." Authors in the report also make unverified and unsupported claims that "fraud," "intentional errors" and "bad faith" decisions made by election officials led them to their conclusions in the report. Moreover, many of their assertions are unsupported by evidence, with some even constituting hearsay and clearly show that the authors lack first-hand knowledge of events.

Michigan Rule of Evidence 702 states that if the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case. That has not happened in this case yet.

Past court rulings have found that the trial court has a fundamental duty to ensure that all expert testimony is reliable (Gilbert v DaimlerChrysler Corp), and that the knowledge of the testimony must be more than "subjective belief or unsupported speculation" (Daubert v Merrell Dow Pharmaceuticals). At the conclusion of discovery, the Department of Attorney General will have the opportunity to request that the plaintiff's report be stricken from use in these proceedings.

The public will be able to view the Department of State's official audit of the Antrim County presidential election. Details will be announced prior to the audit's commencement on Thursday,

Dec. 17.

Follow this link to view a copy of Brater's declaration.

# # #
For media questions, contact
Tracy Wimmer at 517-281-1876.

We welcome questions and comments at the **Contact the Secretary of State page**.

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Exhibit 5

The Office of
Secretary of State Jocelyn Benson

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Final numbers from Antrim County audit continue to affirm accuracy of election results

DECEMBER 18, 2020

The finalized numbers released today from the Antrim County hand-tallied audit yesterday continue to affirm the accuracy of the Nov. 3 general election certified results. The final numbers — 9,759 for Donald Trump and 5,959 for Joe Biden — represent a net gain of 12 votes for Trump, largely mirroring the machine-tabulation results from Nov. 3.
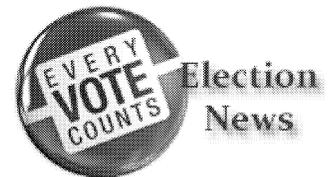
"With these final numbers, we again have conclusive proof of the safety, security and accuracy of the election results in Antrim," said Secretary of State Jocelyn Benson. "The time has come for those in positions of authority to live up to their obligation to put conspiracy theories about the election outcome thoroughly to bed. We will continue to conduct audits throughout the state, and I am confident they will be to the same end — to reinforce that the Nov. 3 election was the most secure election in Michigan's history."

Slight differences in counts were in line with what is typically seen in hand ballot counts, as human counters may not award a vote to a pen mark on a ballot oval, where the machine counted it as a vote, or vice-versa. Human counters may also identify invalid write-in votes that need to be awarded to a different candidate. Only one precinct saw a candidate vote total change by more than three votes, which may have been partially a result of a hand counting error.

The closeness of the results to the previously certified Nov. 3 totals confirms the reporting error prior to certification was not related to the tabulation equipment, despite the proliferation of meritless conspiracy theories stating otherwise.

A copy of the full results by precinct is available here.

# # #

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Exhibit 6

The Office of
Secretary of State Jocelyn Benson
SOS

More than 250 audits confirm accuracy and integrity of Michigan's election

MARCH 2, 2021

Audit finds workers counted ballots accurately, state Legislature
needs to allow more time for pre-processing, canvass

ELECTION NEWS

Secretary of State Jocelyn Benson today announced that all of the state's more than **250 election audits are complete**, and every one of them confirmed the integrity and accuracy of the 2020 general election. The audit process drew tremendous support and complete transparency from county, city and township clerks. In all, more than 1,300 Republican, Democrat and nonpartisan clerks, as well as the state Bureau of Elections, participated in at least one audit.

"Over the last several months, the state Bureau of Elections has worked with local clerks to conduct more audits than ever before in our state's history, and each has reaffirmed the accuracy, security and integrity of the November 2020 election," said Benson. "We've responded to every question and claim and the evidence is clear. It is time for leaders across the political spectrum to tell their constituents the truth, that our election was the most secure in history, and the results accurately reflect the will of Michigan's voters."

In addition to the hundreds of audits of local election precincts – the majority of which were conducted by county clerks of both parties – officials also audited every ballot cast for president in Antrim County and **found that the Dominion machines used there accurately counted ballots** throughout the county. Officials also conducted a statewide audit exercise, by hand-counting votes cast for president on more than 18,000 ballots randomly selected across the state, which **affirmed the outcome of the presidential election as previously determined by tabulation machines**.

An audit of Detroit's absentee ballot counting board, which has been attacked repeatedly with lies, baseless conspiracy theories and the misleading claims of people lacking knowledge of election procedure, found that while clerical errors had occurred, election workers supervised by the clerk's office properly counted 174,000 valid ballots that corresponded to signed envelopes that were submitted by registered voters and reviewed by the clerk's office.

Further, auditors found that 83 percent of the counting boards were balanced or explained, up from 27 percent at the close of the county canvass. This means that in each of those boards the number of ballots matched the number of names in the poll book, or that the imbalance could be explained in such a way that the counting board would be recountable. Auditors also found that the net number of ballots out of balance for the entire board was just 17 out of the 174,000 absentee ballots counted in Detroit.

Auditors made similar findings in audits of other cities' absentee ballot counting boards, including:

- In Grand Rapids, 87 percent were balanced or explained, compared to 62 percent at the end of the canvass. The final net number of ballots out of balance was eight.
- In Livonia, 77 percent were balanced or explained, compared to 34 percent at the end of the canvass. The final net number of ballots out of balance was one.
- In Sterling Heights, 71 percent were balanced or explained, compared to 58 percent at the end of the canvass. The final net number of ballots out of balance was four.

Further, the Sterling Heights audit was the first absentee ballot counting board ever audited in the state. Valuable lessons were learned throughout the counting board audit process, and it is expected that auditors would have balanced or explained more boards at Sterling Heights if that audit was conducted later in the process. The Bureau of Elections is drafting a final report on audit findings, which will be made available publicly.

Out-of-balance precincts are common across the state and nation, and essentially represent clerical errors where an election official failed to note that a voter at the polls checked in and then left with their ballot in hand, or a couple mailed their two absentee ballots in one envelope. Such errors are often corrected or explained in the county canvass, but time constraints make that more difficult, especially in high-population jurisdictions. This was demonstrated by all four audits of absentee voter counting boards, where auditors were able to balance or explain numerous boards that cities were not able to resolve in the short window of time available after closing of the counting boards, and which county canvassers could not reconcile in the less than two weeks available for the county canvass.

"If state lawmakers truly want to affirm faith in our elections, they will provide more time to election officials to process absentee ballots before Election Day, and canvass them afterwards, just as I've proposed in my legislative agenda to advance the vote and protect democracy," said Benson. "Had they done this prior to November, after clerks and I asked them to for more than a year, they could have pre-emptively debunked many of the lies that have since attacked our democracy."

Secretary Benson announced her legislative agenda for elections – **Advancing the Vote, Protecting Democracy** – last month. In addition to calling for two weeks for election officials to process ballots before Election Day, and an additional week to canvass afterwards, she

proposed changing the law that prevents precincts that are out of balance without explanation from being recounted. Michigan is one of the only states in the country with such a restriction in place.

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Aneta Kiersnowski at 517-342-4592.

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Exhibit 7

Allied Security Operations Group

Antrim Michigan Forensics Report

REVISED PRELIMINARY SUMMARY, v2

Report Date 12/13/2020

Client: **Bill Bailey**

Attorney: **Matthew DePerno**

A. WHO WE ARE

1. My name is Russell James Ramsland, Jr., and I am a resident of Dallas County, Texas. I hold an MBA from Harvard University, and a political science degree from Duke University. I have worked with the National Aeronautics and Space Administration (NASA) and the Massachusetts Institute of Technology (MIT), among other organizations, and have run businesses all over the world, many of which are highly technical in nature. I have served on technical government panels.

2. I am part of the management team of Allied Security Operations Group, LLC, (ASOG). ASOG is a group of globally engaged professionals who come from various disciplines to include Department of Defense, Secret Service, Department of Homeland Security, and the Central Intelligence Agency. It provides a range of security services, but has a particular emphasis on cybersecurity, open source investigation and penetration testing of networks. We employ a wide variety of cyber and cyber forensic analysts. We have patents pending in a variety of applications from novel network security applications to SCADA (Supervisory Control and Data Acquisition) protection and safe browsing solutions for the dark and deep web. For this report, I have relied on these experts and resources.

B. PURPOSE AND PRELIMINARY CONCLUSIONS

1. The purpose of this forensic audit is to test the integrity of Dominion Voting System in how it performed in Antrim County, Michigan for the 2020 election.

2. We conclude that the Dominion Voting System is intentionally and purposefully designed with inherent errors to create systemic fraud and influence election results. The system intentionally generates an enormously high number of ballot errors. The electronic ballots are then transferred for adjudication. The intentional errors lead to bulk adjudication of ballots with no oversight, no transparency, and no audit trail. This leads to voter or election fraud. Based on our study, we conclude that The Dominion Voting System should not be used in Michigan. We further conclude that the results of Antrim County should not have been certified.

3. The following is a breakdown of the votes tabulated for the 2020 election in Antrim County, showing different dates for the tabulation of the same votes.

Date	Registered Voters	Total Votes Cast	Biden	Trump	Third Party	Write-In	TOTAL VOTES for President
Nov 3	22,082	16,047	7,769	4,509	145	14	12,423
Nov 5	22,082	18,059	7,289	9,783	255	20	17,327
Nov 21	22,082	16,044	5,960	9,748	241	23	15,949

4. The Antrim County Clerk and Secretary of State Jocelyn Benson have stated that the election night error (detailed above by the vote "flip" from Trump to Biden, was the result of human error caused by the failure to update the Mancelona Township tabulator prior to election night for a down ballot race. We disagree and conclude that the vote flip occurred because of machine error built into the voting software designed to create error.

5. Secretary of State Jocelyn Benson's statement on November 6, 2020 that "[t]the correct results always were and continue to be reflected on the tabulator totals tape . . . ." was false.

6. The allowable election error rate established by the Federal Election Commission guidelines is of 1 in 250,000 ballots (.0008%). We observed an error rate of 68.05%. This demonstrated a significant and fatal error in security and election integrity.

7. The results of the Antrim County 2020 election are not certifiable. This is a result of machine and/or software error, not human error.

8. The tabulation log for the forensic examination of the server for Antrim County from December 6, 2020consists of 15,676 individual events, of which 10,667 or 68.05% of the events were recorded errors. These errors resulted in overall tabulation errors or ballots being sent to adjudication. This high error rates proves the Dominion Voting System is flawed and does not meet state or federal election laws.

9. These errors occurred after The Antrim County Clerk provided a re-provisioned CF card with uploaded software for the Central Lake Precinct on November 6, 2020. This means the statement by Secretary Benson was false. The Dominion Voting System produced systemic errors and high error rates both prior to the update and after the update; meaning the update (or lack of update) is not the cause of errors.

10. In Central Lake Township there were 1,222 ballots **reversed** out of 1,491 total ballots cast, resulting in an 81.96% rejection rate. All reversed ballots are sent to adjudication for a decision by election personnel.

11. It is critical to understand that the Dominion system classifies ballots into two categories, 1) normal ballots and 2) adjudicated ballots. Ballots sent to adjudication can be altered by administrators, and adjudication files can be moved between different Results Tally and Reporting (RTR) terminals with no audit trail of which administrator actually adjudicates (i.e. votes) the ballot batch. This demonstrated a significant and fatal error in security and election integrity because it provides no meaningful observation of the adjudication process or audit trail of which administrator actually adjudicated the ballots.

12. A staggering number of votes required adjudication. This was a 2020 issue not seen in previous election cycles still stored on the server. This is caused by intentional errors in the system. The intentional errors lead to bulk adjudication of ballots with no oversight, no transparency or audit trail. Our examination of the server logs indicates that this high error rate was incongruent with patterns from previous years. The statement attributing these issues to human error is not consistent with the forensic evaluation, which points more correctly to systemic machine and/or software errors. The systemic errors are intentionally designed to create errors in order to push a high volume of ballots to bulk adjudication.

13. The linked video demonstrates how to cheat at adjudication:

     https://mobile.twitter.com/KanekoaTheGreat/status/1336888454538428418

14. Antrim County failed to properly update its system. A purposeful lack of providing basic computer security updates in the system software and hardware demonstrates incompetence, gross negligence, bad faith, and/or willful non-compliance in providing the fundamental system security required by federal and state law. There is no way this election management system could have passed tests or have been legally certified to conduct the 2020 elections in Michigan under the current laws. According to the National Conference of State Legislatures – Michigan requires full compliance with federal standards as determined by a federally accredited voting system laboratory.

15. Significantly, the computer system shows vote adjudication logs for prior years; but all adjudication log entries for the 2020 election cycle are missing. The adjudication process is the simplest way to manually manipulate votes. The lack of records prevents any form of audit accountability, and their conspicuous absence is extremely suspicious since the files exist for previous years using the same software. Removal of these files violates state law and prevents a meaningful audit, even if the Secretary wanted to conduct an audit. We must conclude that the 2020 election cycle records have been manually removed.

16. Likewise, all server security logs prior to 11:03 pm on November 4, 2020 are missing. This means that all security logs for the day after the election, on election day, and prior to election day are gone. Security logs are very important to an audit trail, forensics, and for detecting advanced persistent threats and outside attacks, especially on systems with outdated system files. These logs would contain domain controls, authentication failures, error codes, times users logged on and off, network connections to file servers between file accesses, internet connections, times, and data transfers. Other server logs before November 4, 2020 are present; therefore, there is no reasonable explanation for the security logs to be missing.

17. On November 21, 2020, an unauthorized user unsuccessfully attempted to zero out election results. This demonstrates additional tampering with data.

18. The Election Event Designer Log shows that Dominion ImageCast Precinct Cards were programmed with new ballot programming on 10/23/2020 and then again after the election on 11/05/2020. These system changes affect how ballots are read and tabulated, and our examination demonstrated a significant change in voter results using the two different programs. In accordance with the Help America Vote Act, this violates the 90-day Safe Harbor Period which prohibits changes to election systems, registries, hardware/software updates without undergoing re-certification. According to the National Conference of State Legislatures – Michigan requires full compliance with federal standards as determined by a federally accredited voting system laboratory.

19. The only reason to change software after the election would be to obfuscate evidence of fraud and/or to correct program errors that would de-certify the election. Our findings show that the Central Lake Township tabulator tape totals were significantly altered by utilizing two different program versions (10/23/2020 and 11/05/2020), both of which were software changes during an election which violates election law, and not just human error associated with the **Dominion Election Management System.** This is clear evidence of software generated movement of votes. The claims made on the **Office of the Secretary of State** website are false.

20. The Dominion ImageCast Precinct (ICP) machines have the ability to be connected to the internet (see Image 11). By connecting a network scanner to the ethernet port on the ICP machine and creating Packet Capture logs from the machines we examined show the ability to connect to the network, Application Programming Interface (API) (a data exchange between two different systems) calls and web (http) connections to the Election Management System server. Best practice is to disable the network interface card to avoid connection to the internet. This demonstrated a significant and fatal error in security and election integrity. Because certain files have been deleted, we have not yet found origin or destination; but our research continues.

4

21. Because the intentional high error rate generates large numbers of ballots to be adjudicated by election personnel, we must deduce that bulk adjudication occurred. However, because files and adjudication logs are missing, we have not yet determined where the bulk adjudication occurred or who was responsible for it. Our research continues.

22. Research is ongoing. However, based on the preliminary results, we conclude that the errors are so significant that they call into question the integrity and legitimacy of the results in the Antrim County 2020 election to the point that the results are not certifiable. Because the same machines and software are used in 48 other counties in Michigan, this casts doubt on the integrity of the entire election in the state of Michigan.

23. DNI Responsibilities: President Obama signed Executive Order on National Critical Infrastructure on 6 January 2017, stating in Section 1. Cybersecurity of Federal Networks, "The Executive Branch operates its information technology (IT) on behalf of the American people. The President will hold heads of executive departments and agencies (agency heads) accountable for managing cybersecurity risk to their enterprises. In addition, because risk management decisions made by agency heads can affect the risk to the executive branch as a whole, and to national security, it is also the policy of the United States to manage cybersecurity risk as an executive branch enterprise." President Obama's EO further stated, effective immediately, each agency head shall use The Framework for Improving Critical Infrastructure Cybersecurity (the Framework) developed by the National Institute of Standards and Technology." Support to Critical Infrastructure at Greatest Risk. The Secretary of Homeland Security, in coordination with the Secretary of Defense, the Attorney General, the Director of National Intelligence, the Director of the Federal Bureau of Investigation, the heads of appropriate sector-specific agencies, as defined in Presidential Policy Directive 21 of February 12, 2013 (Critical Infrastructure Security and Resilience) (sector-specific agencies), and all other appropriate agency heads, as identified by the Secretary of Homeland Security, shall: (i) identify authorities and capabilities that agencies could employ to support the cybersecurity efforts of critical infrastructure entities identified pursuant to section 9 of Executive Order 13636 of February 12, 2013 (Improving Critical Infrastructure Cybersecurity), to be at greatest risk of attacks that could reasonably result in catastrophic regional or national effects on public health or safety, economic security, or national security (section 9 entities);

This is a national security imperative. **In July 2018, President Trump strengthened President Obama's Executive Order to include requirements to ensure US election systems, processes, and its people were not manipulated by foreign meddling, either through electronic or systemic manipulation, social media, or physical changes made in hardware, software, or supporting systems.** The 2018 Executive Order. Accordingly, I hereby order:

5

Section 1. (a) Not later than 45 days after the conclusion of a United States election, the Director of National Intelligence, in consultation with the heads of any other appropriate executive departments and agencies (agencies), shall conduct an assessment of any information indicating that a foreign government, or any person acting as an agent of or on behalf of a foreign government, has acted with the intent or purpose of interfering in that election. The assessment shall identify, to the maximum extent ascertainable, the nature of any foreign interference and any methods employed to execute it, the persons involved, and the foreign government or governments that authorized, directed, sponsored, or supported it. The Director of National Intelligence shall deliver this assessment and appropriate supporting information to the President, the Secretary of State, the Secretary of the Treasury, the Secretary of Defense, the Attorney General, and the Secretary of Homeland Security.

We recommend that an independent group should be empaneled to determine the extent of the adjudication errors throughout the State of Michigan. This is a national security issue.

24.   Michigan resident Gustavo Delfino, a former professor of mathematics in Venezuela and alumni of University of Michigan, offered a compelling affidavit [Exhibit 2] recognizing the inherent vulnerabilities in the SmartMatic electronic voting machines (software which was since incorporated into Dominion Voting Systems) during the 2004 national referendum in Venezuela (see attached declaration). After 4 years of research and 3 years of undergoing intensive peer review, Professor Delfino's paper was published in the highly respected "Statistical Science" journal, November 2011 issue (Volume 26, Number 4) with title "Analysis of the 2004 Venezuela Referendum: The Official Results Versus the Petition Signatures." The intensive study used multiple mathematical approaches to ascertain the voting results found in the 2004 Venezuelan referendum. Delfino and his research partners discovered not only the algorithm used to manipulate the results, but also the precise location in the election processing sequence where vulnerability in machine processing would provide such an opportunity. According to Prof Delfino, the magnitude of the difference between the official and the true result in Venezuela estimated at 1,370,000 votes. Our investigation into the error rates and results of the Antrim County voting tally reflect the same tactics, which have also been reported in other Michigan counties as well. This demonstrates a national security issue.

C.   PROCESS

We visited Antrim County twice: November 27, 2020 and December 6, 2020.

On November 27, 2020, we visited Central Lake Township, Star Township, and Mancelona Township. We examined the Dominion Voting Systems tabulators and tabulator roles.

On December 6, 2020, we visited the Antrim County Clerk's office. We inspected and performed forensic duplication of the following:

1. **Antrim County Election Management Server** running **Dominion Democracy Suite** 5.5.3-002;

2. **Compact Flash** cards used by the local precincts in their **Dominion ImageCast Precinct;**

3. **USB memory sticks** used by the **Dominion VAT** (Voter Assist Terminals); and

4. **USB memory sticks** used for the Poll Book.

Dominion voting system is a Canadian owned company with global subsidiaries. It is owned by Staple Street Capital which is in turn owned by UBS Securities LLC, of which 3 out of their 7 board members are Chinese nationals. The Dominion software is licensed from Smartmatic which is a Venezuelan owned and controlled company. Dominion Server locations have been determined to be in Serbia, Canada, the US, Spain and Germany.

D. CENTRAL LAKE TOWNSHIP

1. On November 27, 2020, part of our forensics team visited the Central Lake Township in Michigan to inspect the **Dominion ImageCast Precint** for possible hardware issues on behalf of a local lawsuit filed by Michigan attorney Matthew DePerno on behalf of William Bailey. In our conversations with the clerk of **Central Lake Township** Ms. Judith L. Kosloski, she presented to us "two separate paper totals tape" from Tabulator ID 2.

    •   One dated "Poll Opened Nov. 03/2020 06:38:48" (Roll 1);

    •   Another dated "Poll Opened Nov. 06/2020 09:21:58" (Roll 2).

2. We were then told by Ms. Kosloski that on November 5, 2020, Ms. Kosloski was notified by Connie Wing of the County Clerk's Office and asked to bring the tabulator and ballots to the County Clerk's office for re-tabulation. They ran the ballots and printed "Roll 2". She noticed a difference in the votes and brought it up to the clerk, but canvasing still occurred, and her objections were not addressed.

3. Our team analyzed both rolls and compared the results. Roll 1 had **1,494** total votes and Roll 2 had **1,491** votes (Roll 2 had 3 less ballots because 3 ballots were damaged in the process.)

4. "Statement of Votes Cast from Antrim" shows that only **1,491** votes were counted, and the **3** ballots that were damaged were not entered into final results.

5.   Ms. Kosloski stated that she and her assistant manually refilled out the three ballots, curing them, and ran them through the ballot counting system - but the final numbers do not reflect the inclusion of those **3** damaged ballots.

6.   This is the most preliminary report of serious election fraud indicators. In comparing the numbers on both rolls, *we estimate 1,474 votes changed* across the two rolls, between the first and the second time the exact same ballots were run through the County Clerk's vote counting machine - *which is almost the same number of voters that voted in total.*

   •   *742 votes were added to* **School Board Member for Central Lake Schools (3)**

   •   *657 votes were removed from* **School Board Member for Ellsworth Schools (2)**

   •   **7** votes were added to the total for **State Proposal 20-1 (1)** and out of those there were **611** votes moved between the Yes and No Categories.

7.   There were incremental changes throughout the rolls with some significant adjustments between the 2 rolls that were reviewed. This demonstrates conclusively that votes can be and were changed during the second machine count after the software update. That should be impossible especially at such a high percentage to total votes cast.

8.   For the **School Board Member for Central Lake Schools (3)** [Image 1] there were **742 votes** added to this vote total. Since multiple people were elected, this did not change the result of both candidates being elected, but one does see a change in who had most votes. If it were a single-person election this would have changed the outcome and demonstrates conclusively that votes can be and were changed during the second machine counting. That should be impossible.

   [Image 1]:

8

9.   For the **School Board Member for Ellsworth Schools (2)** [Image 2]

   •   Shows *657 votes being removed* from this election.

   •   In this case, only **3** people who were eligible to vote actually voted. Since there were **2** votes allowed for each voter to cast.

   •   The recount correctly shows **6** votes.

But on election night, there was a major calculation issue:

[Image 2]:

10.   In **State Proposal 20-1 (1)**, [Image 3] there is a major change in votes in this category.

   •   There were **774 votes for YES** during the election, to **1,083 votes for YES** on the recount a change of **309 votes**.

   •   **7** votes were added to the total for **State Proposal 20-1 (1)** out of those there were **611** votes moved between the Yes and No Categories.

[Image 3]:

State Proposal 20-1 (1)

Recount 11/6 — Yes: 1083, No: 206, Total Votes: 1289

Election 11/3 — Yes: 774, No: 508, Total Votes: 1282
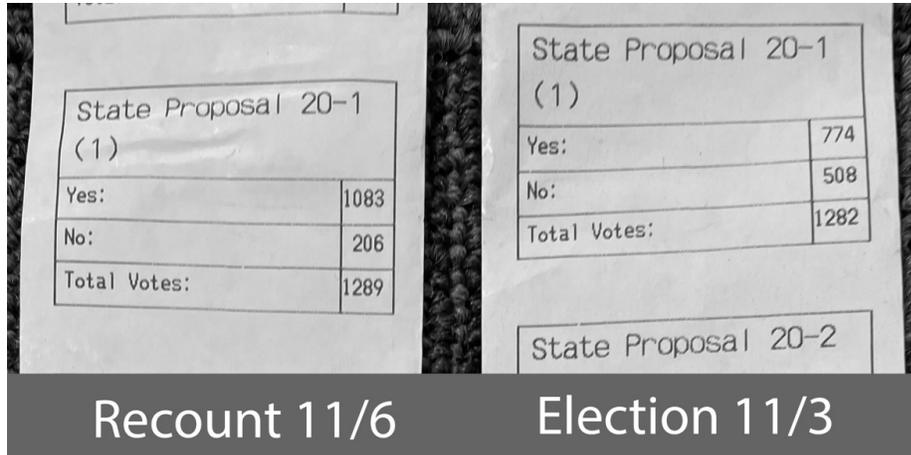
State Proposal 20-2

11.   **State Proposal 20-1 (1)** is a fairly technical and complicated proposed amendment to the Michigan Constitution to change the disposition and allowable uses of future revenue generated from oil and gas bonuses, rentals and royalties from state-owned land. Information about the proposal: https://crcmich.org/publications/statewide-ballot- proposal-20-1-michigan-natural-resources-trust-fund

12.   A Proposed Initiated **Ordinance to Authorize One (1) Marihuana (sic) Retailer Establishment Within the Village of Central Lake (1)**. [Image 4]

- On election night, it was a tie vote.

- Then, on the rerun of ballots 3 ballots were destroyed, but only one vote changed on the totals to allow the proposal to pass.

When **3 ballots were not counted** and **programming change on the tabulator was installed** the proposal **passed with 1 vote being removed from the No** vote.

[Image 4]:

10

| | Recount 11/6 | Election 11/3 |
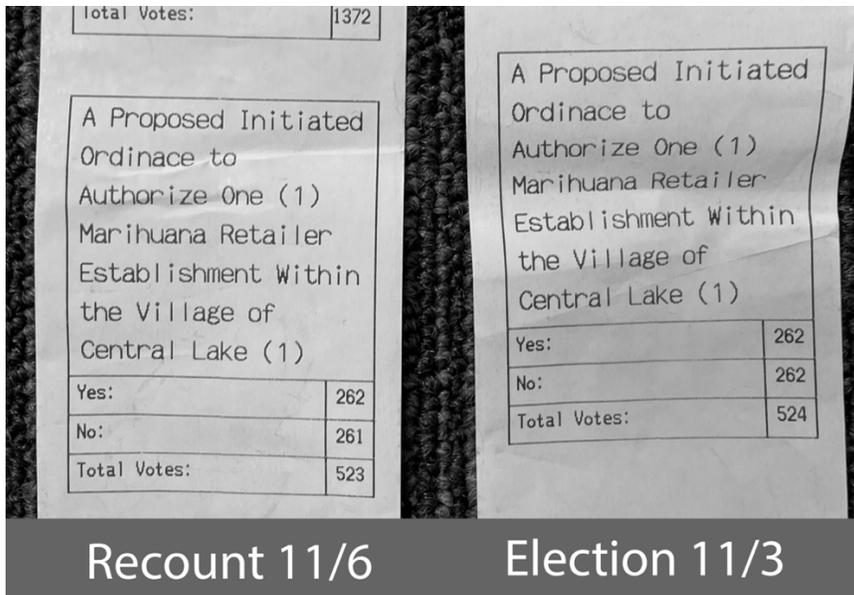
13. On Sunday December 6, 2020, our forensics team visited the Antrim County Clerk. There were two USB memory sticks used, one contained the software package used to tabulate election results on November 3, 2020, and the other was programmed on November 6, 2020 with a different software package which yielded significantly different voting outcomes. The election data package is used by the **Dominion Democracy Suite** software & election management system software to upload programming information onto the Compact Flash Cards for the **Dominion ImageCast Precinct** to enable it to calculate ballot totals.

14. This software programming should be standard across all voting machines systems for the duration of the entire election if accurate tabulation is the expected outcome as required by US Election Law. This intentional difference in software programming is a design feature to alter election outcomes.

15. The election day outcomes were calculated using the original software programming on November 3, 2020. On November 5, 2020 the township clerk was asked to re-run the Central Lake Township ballots and was given no explanation for this unusual request. On November 6, 2020 the Antrim County Clerk, Sheryl Guy issued the second version of software to re-run the same Central Lake Township ballots and oversaw the process. This resulted in greater than a 60% change in voting results, inexplicably impacting every single election contest in a township with less than 1500 voters. These errors far exceed the ballot error rate standard of 1 in 250,000 ballots (.0008%) as required by federal election law.

   • The original election programming files are last dated 09/25/2020 1:24pm

   • The updated election data package files are last dated 10/22/2020 10:27 am.

16. As the tabulator tape totals prove, there were large numbers of votes switched from the November 3, 2020 tape to the November 6, 2020 tape. This was solely based on using different software versions of the operating program to calculate votes, not tabulate votes. This is evidenced by using same the Dominion System with two different software program versions contained on the two different USB Memory Devices.

17. The Help America Vote Act, Safe Harbor provides a 90-day period prior to elections where no changes can be made to election systems. To make changes would require recertification of the entire system for use in the election. The Dominion User Guide prescribes the proper procedure to test machines with test ballots to compare the results to validate machine functionality to determine if the **Dominion ImageCast Precinct** was programmed correctly. If this occurred a ballot misconfiguration would have been identified. Once the software was updated to the 10/22/2020 software the test ballots should have been re-run to validate the vote totals to confirm the machine was configured correctly.

18. The November 6, 2020 note from **The Office of the Secretary of State Jocelyn Benson** states: "The correct results always were and continue to be reflected on the tabulator totals tape and on the ballots themselves. Even if the error in the reported unofficial results had not been quickly noticed, it would have been identified during the county canvass. Boards of County Canvassers, which are composed of 2 Democrats and 2 Republicans, review the printed totals tape from each tabulator during the canvass to verify the reported vote totals are correct."

   • Source: https://www.michigan.gov/sos/0,4670,7-127-1640_9150-544676--,00.html

19. The **Secretary of State Jocelyn Benson's** statement is false. Our findings show that the tabulator tape totals were significantly altered by utilization of two different program versions, and not just the **Dominion Election Management System.** This is the opposite of the claim that the **Office of the Secretary of State** made on its website. The fact that these significant errors were not caught in ballot testing and not caught by the local county clerk shows that there are major inherent built-in vulnerabilities and process flaws in the **Dominion Election Management System**, and that other townships/precincts and the entire election have been affected.

20. On Sunday December 6, 2020, our forensics team visited the Antrim County Clerk office to perform forensic duplication of the **Antrim County Election Management Server** running **Dominion Democracy Suite** 5.5.3-002.

21. Forensic copies of the **Compact Flash** cards used by the local precincts in their **Dominion ImageCast Precinct** were inspected, **USB memory sticks** used by the **Dominion VAT** (Voter Assist Terminals) and the **USB memory sticks** used for the Poll Book were forensically duplicated.

22. We have been told that the ballot design and configuration for the **Dominion ImageCast Precinct** and VAT were provided by **ElectionSource.com** which is which is owned by MC&E, Inc of Grand Rapids, MI.

E. MANCELONA TOWNSHIP

1. In Mancelona township, problems with software versions were also known to have been present. Mancelona elections officials understood that ballot processing issued were not accurate and used the second version of software to process votes on 4 November, again an election de-certifying event, as no changes to the election system are authorized by law in the 90 days preceding elections without re-certification.

2. Once the 10/22/2020 software update was performed on the Dominion ImageCast Precinct the test ballot process should have been performed to validate the programming. There is no indication that this procedure was performed.

F. ANTRIM COUNTY CLERK'S OFFICE

1. Pursuant to a court ordered inspection, we participated in an onsite collection effort at the Antrim County Clerk's office on December 6, 2020. [Image 5]:

Among other items forensically collected, the Antrim County Election Management Server (EMS) with Democracy Suite was forensically collected. [Images 6 and 7].

13

The EMS (Election Management Server) was a:

Dell Precision Tower 3420.

Service Tag: 6NB0KH2

The EMS contained 2 hard drives in a RAID-1 configuration. That is the 2 drives redundantly stored the same information and the server could continue to operate if either of the 2 hard drives failed. The EMS was booted via the Linux Boot USB memory sticks and both hard drives were forensically imaged.

At the onset of the collection process we observed that the initial program thumb drive was not secured in the vault with the CF cards and other thumbdrives. We watched as the County employees, including Clerk Sheryl Guy searched throughout the office for the missing thumb drive. Eventually they found the missing thumb drive in an unsecured and unlocked desk drawer along with multiple other random thumb drives. This demonstrated a significant and fatal error in security and election integrity.

G.   FORENSIC COLLECTION

We used a built for purpose Linux Boot USB memory stick to boot the EMS in a forensically sound mode. We then used Ewfacquire to make a forensic image of the 2 independent internal hard drives.

Ewfacquire created an E01 file format forensic image with built-in integrity verification via MD5 hash.

We used Ewfverify to verify the forensic image acquired was a true and accurate copy of the original disk. That was done for both forensic images.

H.   ANALYSIS TOOLS

X-Ways Forensics: We used X-Ways Forensics, a commercial Computer Forensic tool, to verify the image was useable and full disk encryption was not in use. In particular we confirmed that Bit locker was not in use on the EMS.

Other tools used: PassMark – OSForensics, Truxton - Forensics, Cellebrite – Physical Analyzer, Blackbag-Blacklight Forensic Software, Microsoft SQL Server Management Studio, Virtual Box, and miscellaneous other tools and scripts.

I. SERVER OVERVIEW AND SUMMARY

1. Our initial audit on the computer running the Democracy Suite Software showed that standard computer security best practices were not applied. These minimum-security standards are outlined the 2002 HAVA, and FEC Voting System Standards – it did not even meet the minimum standards required of a government desktop computer.

2. The election data software package USB drives (November 2020 election, and November 2020 election updated) are secured with bitlocker encryption software, but they were not stored securely on-site. At the time of our forensic examination, the election data package files were already moved to an unsecure desktop computer and were residing on an unencrypted hard drive. This demonstrated a significant and fatal error in security and election integrity. Key Findings on Desktop and Server Configuration: - There were multiple Microsoft security updates as well as Microsoft SQL Server updates which should have been deployed, however there is no evidence that these security patches were ever installed. As described below, many of the software packages were out of date and vulnerable to various methods of attack.

    a) Computer initial configuration on 10/03/2018 13:08:11:911

    b) Computer final configuration of server software on 4/10/2019

    c) Hard Drive not Encrypted at Rest

    d) Microsoft SQL Server Database not protected with password.

    e) Democracy Suite Admin Passwords are reused and share passwords.

    f) Antivirus is 4.5 years outdated

    g) Windows updates are 3.86 years out of date.

    h) When computer was last configured on 04/10/2019 the windows updates were 2.11 years out of date.

    i) User of computer uses a Super User Account.

3. The hard drive was not encrypted at rest – which means that if hard drives are removed or initially booted off an external USB drive the files are susceptible to manipulation directly. An attacker is able to mount the hard drive because it is unencrypted, allowing for the manipulation and replacement of any file on the system.

4. The Microsoft SQL Server database files were not properly secured to allow modifications of the database files.

5. The Democracy Suite Software user account logins and passwords are stored in the unsecured database tables and the multiple Election System Administrator accounts share the same password, which means that there are no audit trails for vote changes, deletions, blank ballot voting, or batch vote alterations or adjudication.

6. Antivirus definition is 1666 days old on 12/11/2020. Antrim County updates its system with USB drives. USB drives are the most common vectors for injecting malware into computer systems. The failure to properly update the antivirus definition drastically increases the harm cause by malware from other machines being transmitted to the voting system.

7. Windows Server Update Services (WSUS) Offline Update is used to enable updates the computer – which is a package of files normally downloaded from the internet but compiled into a program to put on a USB drive to manually update server systems.

8. Failure to properly update the voting system demonstrates a significant and fatal error in security and election integrity.

9. There are 15 additional updates that should have been installed on the server to adhere to Microsoft Standards to fix known vulnerabilities. For the 4/10/2019 install, the most updated version of the update files would have been 03/13/2019 which is 11.6.1 which is 15 updates newer than 10.9.1

   This means the updates installed were 2 years, 1 month, 13 days behind the most current update at the time. This includes security updates and fixes. This demonstrated a significant and fatal error in security and election integrity.

   • Wed 04/10/2019 10:34:33.14 - Info: Starting WSUS Offline Update (v. 10.9.1)

   • Wed 04/10/2019 10:34:33.14 - Info: Used path "D:\WSUSOFFLINE1091_2012R2_W10\cmd\" on EMSSERVER (user: EMSADMIN)

   • Wed 04/10/2019 10:34:35.55 - Info: Medium build date: 03/10/2019

- Found on c:\Windows\wsusofflineupdate.txt

- *WSUS Offline Update (v.10.9.1) was created on 01/29/2017

*WSUS information found here https://download.wsusoffline.net/

10. Super User Administrator account is the primary account used to operate the **Dominion Election Management System** which is a major security risk. The user logged in has the ability to make major changes to the system and install software which means that there is no oversight to ensure appropriate management controls – i.e. anyone who has access to the shared administrator user names and passwords can make significant changes to the entire voting system. The shared usernames and passwords mean that these changes can be made in an anonymous fashion with no tracking or attribution.

J.   ERROR RATES

1. We reviewed the Tabulation logs in their entirety for 11/6/2020. The election logs for Antrim County consist of 15,676 total lines or events.

- Of the 15,676 there were a total of 10,667 critical errors/warnings or a 68.05% error rate.

- Most of the errors were related to configuration errors that could result in overall tabulation errors or adjudication. These 11/6/2020 tabulation totals were used as the official results.

2. For examples, there were 1,222 ballots **reversed** out of 1,491 total ballots cast, thus resulting in an 81.96% rejection rate. Some of which were reversed due to "Ballot's size exceeds maximum expected ballot size".

- According to the NCSL, Michigan requires testing by a federally accredited laboratory for voting systems. In section 4.1.1 of the Voluntary Voting Systems Guidelines (VVSG) Accuracy Requirements a. **All systems shall achieve a report total error rate of no more than one in 125,000**.

- https://www.eac.gov/sites/default/files/eac_assets/1/28/VVSG.1.1.VOL.1.FINAL1.pdf

- In section 4.1.3.2 Memory Stability of the VVSG it states that **Memory devices used to retain election management data shall have demonstrated error free data retention for a period of 22 months**.

- In section 4.1.6.1 Paper-based System Processing Requirements sub-section a. of the VVSG it states "The ability of the system to produce and receive electronic signals from the scanning of the ballot, perform logical and numerical operations upon these data, and reproduce the contents of memory when required **shall** be sufficiently free of **error** to enable

17

satisfaction of the system-level accuracy requirement indicated in Subsection 4.1.1."

- These are not human errors; this is definitively related to the software and software configurations resulting in error rates far beyond the thresholds listed in the guidelines.

3. A high "error rate" in the election software (in this case 68.05%) reflects an algorithm used that will weight one candidate greater than another (for instance, weight a specific candidate at a 2/3 to approximately 1/3 ratio). In the logs we identified that the RCV or Ranked Choice Voting Algorithm was enabled (see image below from the Dominion manual). This allows the user to apply a weighted numerical value to candidates and change the overall result. The declaration of winners can be done on a basis of points, not votes. [Image 8]:

choice voting results are evaluated on a district per district basis and each district has a set number of points (100). Elimination and declaration of winners is done on basis of points, not votes.

Figure 11-3: RCV Profile screen

4. The Dominion software configuration logs in the Divert Options, shows that all write-in ballots were flagged to be diverted automatically for adjudication. This means that all write-in ballots were sent for "adjudication" by a poll worker or election official to process the ballot based on voter "intent". Adjudication files allow a computer operator to decide to whom to award those votes (or to trash them).

5. In the logs all but two of the Override Options were enabled on these machines, thus allowing any operator to change those votes. [Image 9]:

6.   In the logs all but two of the Override Options were enabled on these machines, thus allowing any operator to change those votes. This gives the system operators carte blanche to adjudicate ballots, in this case 81.96% of the total cast ballots with no audit trail or oversight. [Image 10]:
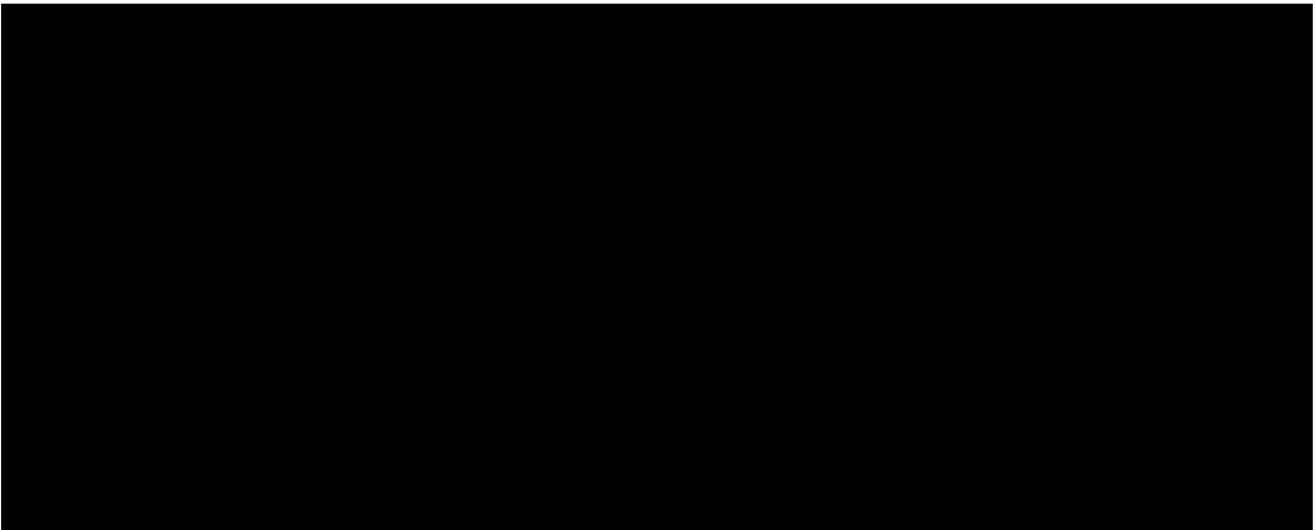
7.   On 12/8/2020 Microsoft issued 58 security patches across 10+ products, some of which were used for the election software machine, server and programs. Of the 58 security fixes 22, were patches to remote code execution (RCE) vulnerabilities. [Image 11]:
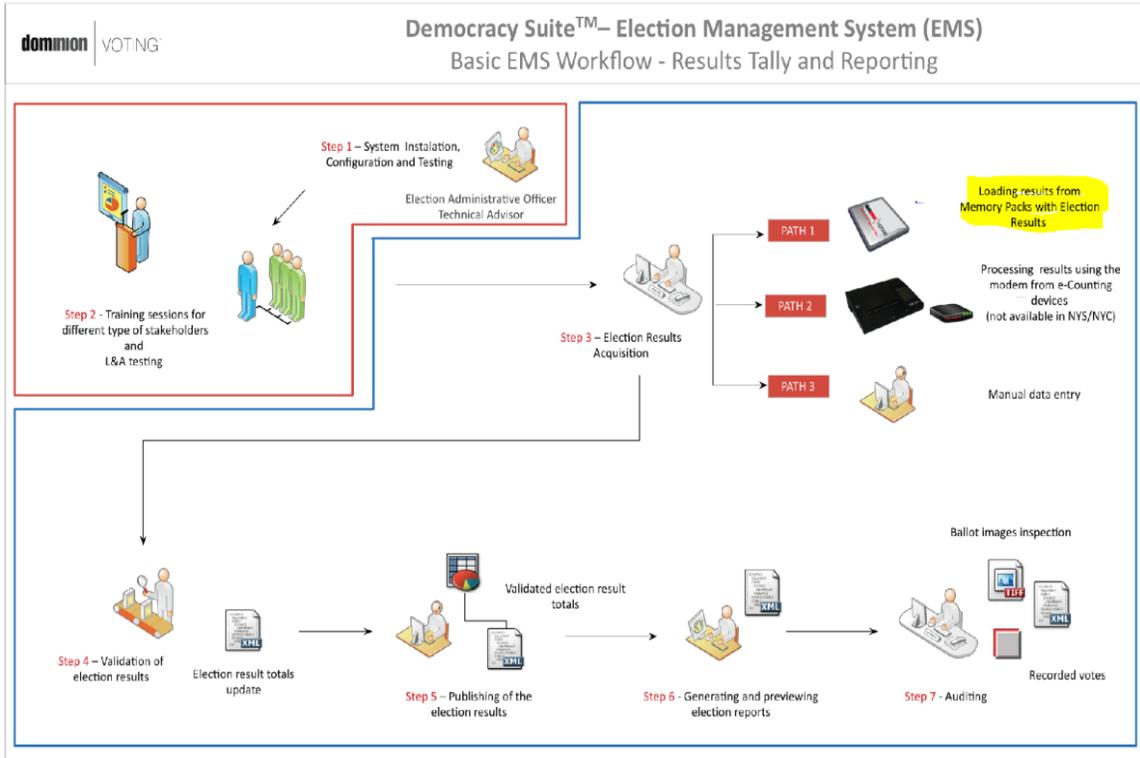
8. We reviewed the Election Management System logs (EmsLogger) in their entirety from 9/19/2020 through 11/21/2020 for the Project: Antrim November 2020. There were configuration errors throughout the set-up, election and tabulation of results. The last error for Central Lake Township, Precinct 1 occurred on 11/21/2020 at 14:35:11 System.Xml.XmlException System.Xml.XmlException: The ' ' character, hexadecimal value 0x20, cannot be included in a name. Bottom line is that this is a calibration that rejects the vote (see picture below). [Image 12]:

20
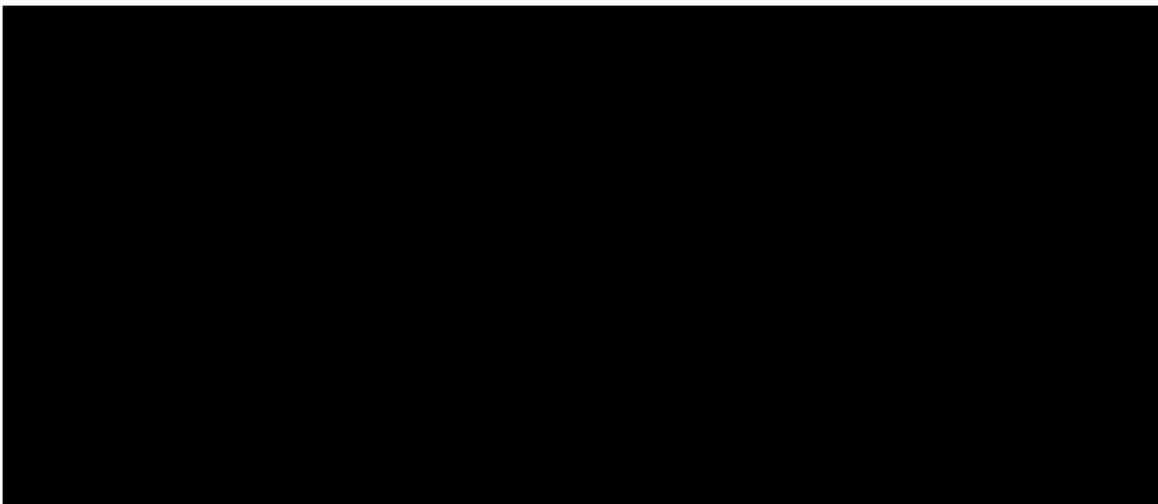
Notably 42 minutes earlier on Nov 21 2020 at 13:53:09 a user attempted to zero out election results. Id:3168 EmsLogger - There is no permission to {0} - Project: User: Thread: 189. This is direct proof of an attempt to tamper with evidence.

9.   The Election Event Designer Log shows that Dominion ImageCast Precinct Cards were programmed with updated new programming on 10/23/2020 and again after the election on 11/05/2020. As previously mentioned, this violates the HAVA safe harbor period.

Source: C:\Program Files\Dominion Voting Systems\Election Event Designer\Log\Info.txt

- Dominion Imagecast Precinct Cards Programmed with 9/25/2020 programming on 09/29/2020, 09/30/2020, and 10/12/2020.

- Dominion Imagecast Precinct Cards Programmed with New Ballot Programming dated 10/22/2020 on 10/23/2020 and after the election on 11/05/2020

Excerpt from 2020-11-05 showing "ProgramMemoryCard" commands.

21
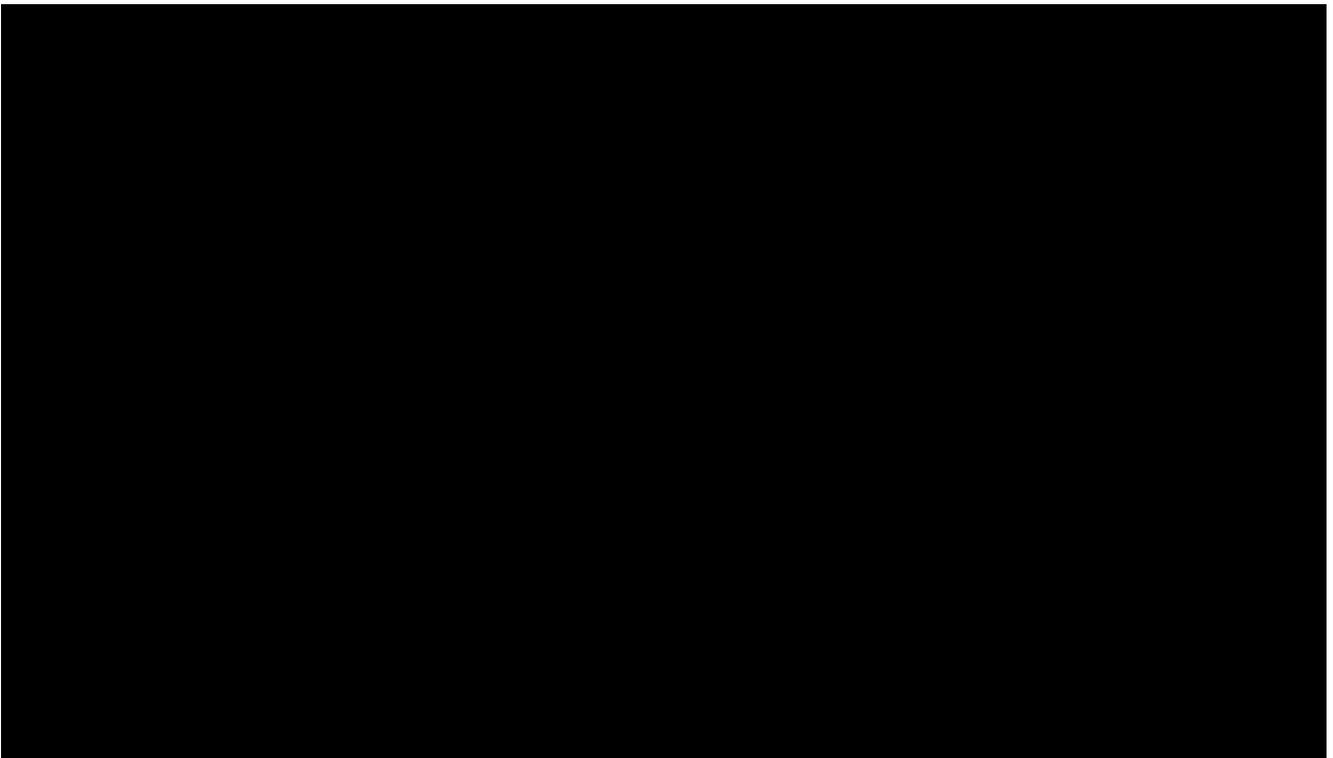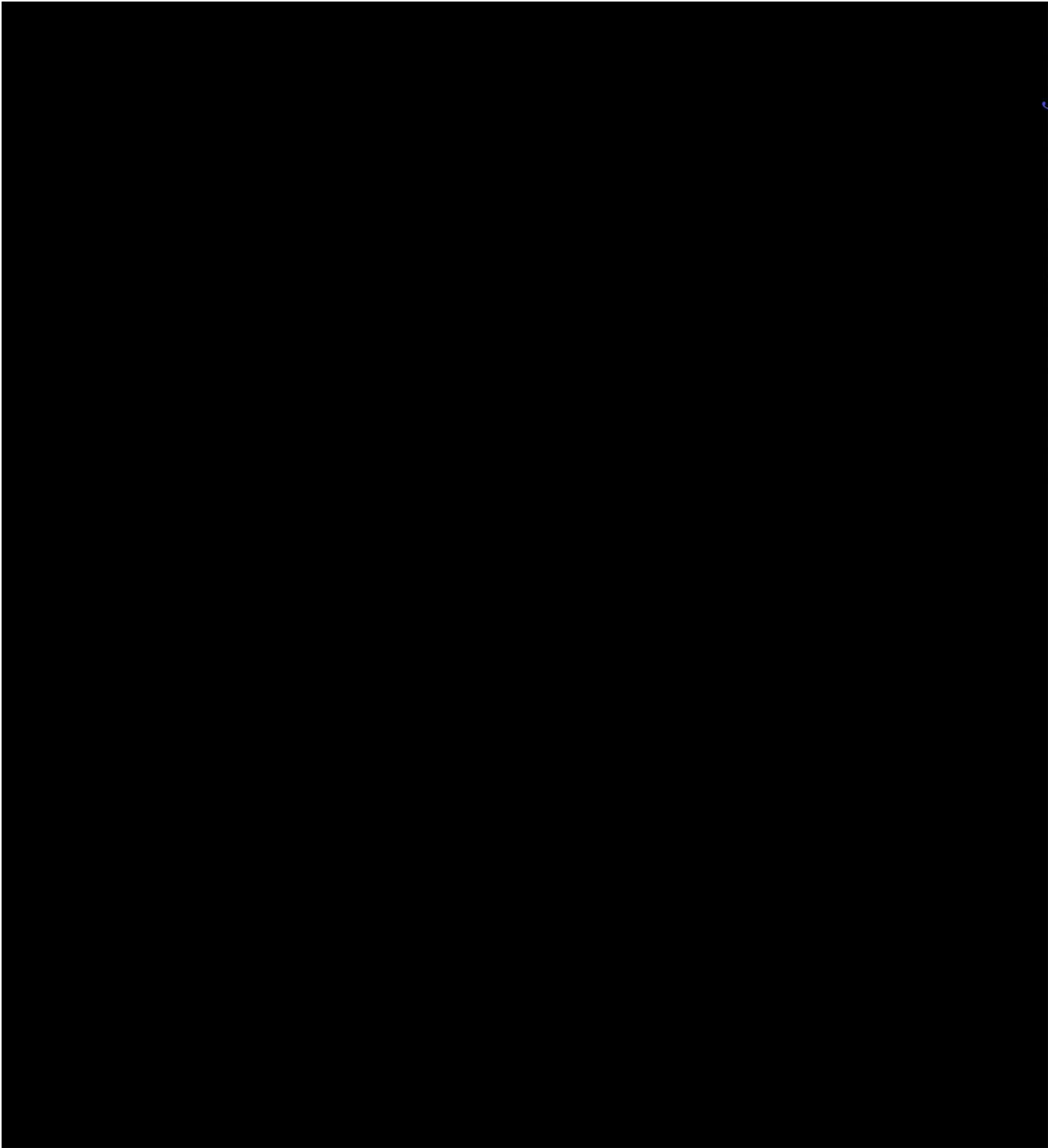
10.   Analysis is ongoing and updated findings will be submitted as soon as possible. A summary of the information collected is provided below.

10|12/07/20 18:52:30| Indexing completed at Mon Dec 7 18:52:30 2020
12|12/07/20 18:52:30| INDEX SUMMARY
12|12/07/20 18:52:30| Files indexed: 159312

22

12|12/07/20 18:52:30| Files skipped: 64799
12|12/07/20 18:52:30| Files filtered: 0
12|12/07/20 18:52:30| Emails indexed: 0
12|12/07/20 18:52:30| Unique words found: 5325413
12|12/07/20 18:52:30| Variant words found: 3597634
12|12/07/20 18:52:30| Total words found: 239446085
12|12/07/20 18:52:30| Avg. unique words per page: 33.43
12|12/07/20 18:52:30| Avg. words per page: 1503
12|12/07/20 18:52:30| Peak physical memory used: 2949 MB
12|12/07/20 18:52:30| Peak virtual memory used: 8784 MB
12|12/07/20 18:52:30| Errors: 10149
12|12/07/20 18:52:30| Total bytes scanned/downloaded: 1919289906

Dated: December 13, 2020

_____
Russell Ramsland

Exhibit 8

Approved, SCAO

STATE OF MICHIGAN

13th	JUDICIAL DISTRICT	DISMISSAL	CASE NO.
	JUDICIAL CIRCUIT	Non Service/No Progress	20-9238-CZ
	COUNTY PROBATE		

Court address
205 E CAYUGA, PO BOX 520, BELLAIRE MI 49615

Court telephone no.
231-533-6353

Plaintiff's/Petitioner's name(s) and address(es)		Defendant's/Respondent's name(s) and address(es)
WILLIAM BAILEY 1592 N INTERMEDIATE LAKE RD CENTRAL LAKE, MI 49622	v	ANTRIM COUNTY 203 E CAYUGA ST BELLAIRE MI 49615

Plaintiff's/Petitioner's attorney, bar no., address, and telephone no.	Defendant's/Respondent's attorney, bar no., address, and telephone no.
MATTHEW DEPERNO P52622 951 W MILHAM AVE, PO BOX 1595 PORTAGE, MI 49081	HAIDER KAZIM P66146 319 W FRONT ST STE 221 TRAVERSE CITY, MI 49684

RECEIVED AND FILED
ANTRIM COUNTY CLERK

MAR 03 2021

BY

☐ **Probate**   In the matter of _____

☐ **Juvenile**   In the matter of _____

ORDER TO DISMISS

☑ 1. The court records disclose that defendant(s)/respondent(s) have not been timely served with process according to court rule.

☐ 2. Progress has not occurred as specified in the notice of intent to dismiss.

☐ 3. There has been no progress in this case since _____ and the parties have been notified by
     _{Date}

_____ to appear on _____ and did not appear.
Method of notification   Date and time

IT IS ORDERED that this case is dismissed without prejudice as to:

☑ all parties.

☐ the following defendant(s)/respondent(s):

DIVORCE ACTIONS: Child support, if any, owing to the state on the date of this order is preserved.

3/3/2021
Date

Michelle Hoot. Dep.
Judge/Court clerk/Register   Bar no.

NOTICE OF DISMISSAL

Notice of dismissal without prejudice in this case is filed. A copy of this notice has been provided to the parties in this case as specified by court rule.

3/3/2021
Date

Michelle Hoot. Dep.
Judge/Court clerk/Register   Bar no.

MC 09a (4/14) **DISMISSAL, Non Service/No Progress**

MCR 2.102(E), MCR 2.502, MCR 3.209(B)

PLAINTIFF-APPELLANT's Appendix 000249

Original - Court
1st copy - Plaintiff/Petitioner
Other copies - Defendant(s)/Respondent(s)
PROBATE JIS CODE: DSM

Approved, SCAO

STATE OF MICHIGAN	**DISMISSAL**	**CASE NO.**
13th JUDICIAL DISTRICT / JUDICIAL CIRCUIT / COUNTY PROBATE	Non Service/No Progress	20-9238-CZ

Court address
205 E CAYUGA, PO BOX 520, BELLAIRE MI 49615

Court telephone no.
231-533-6353

Plaintiff's/Petitioner's name(s) and address(es)
WILLIAM BAILEY
1592 N INTERMEDIATE LAKE RD
CENTRAL LAKE, MI 49622

v

Defendant's/Respondent's name(s) and address(es)
SECRETARY OF STATE-JOCELYN BENSON

Plaintiff's/Petitioner's attorney, bar no., address, and telephone no.
MATTHEW DEPERNO P52622
951 W MILHAM AVE, PO BOX 1595
PORTAGE, MI 49081

Defendant's/Respondent's attorney, bar no., address, and telephone no.
HEATHER MEINGAST
ERIK GRILL
PO BOX 30736
LANSING, MI 48909

RECEIVED AND FILED
ANTRIM COUNTY CLERK
MAR 03 2021
BY_____

☐ Probate   In the matter of _____

☐ Juvenile   In the matter of _____

ORDER TO DISMISS

☑ 1. The court records disclose that defendant(s)/respondent(s) have not been timely served with process according to court rule.

☐ 2. Progress has not occurred as specified in the notice of intent to dismiss.

☐ 3. There has been no progress in this case since _____ and the parties have been notified by
Date

_____ to appear on _____ and did not appear.
Method of notification   Date and time

IT IS ORDERED that this case is dismissed without prejudice as to:

☑ all parties.

☐ the following defendant(s)/respondent(s): _____

DIVORCE ACTIONS: Child support, if any, owing to the state on the date of this order is preserved.

3/3/2021
Date

Michelle Hess, Dep.
Judge/Court clerk/Register   Bar no.

NOTICE OF DISMISSAL

Notice of dismissal without prejudice in this case is filed. A copy of this notice has been provided to the parties in this case as specified by court rule.

3/3/2021
Date

Michelle Hess, Dep.
Judge/Court clerk/Register   Bar no.

MC 09a (4/14) **DISMISSAL, Non Service/No Progress**   MCR 2.102(E), MCR 2.502, MCR 3.209(B)

PLAINTIFF-APPELLANT's Appendix 000250

Exhibit 9

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF ANTRIM

WILLIAM BAILEY,

          Plaintiff,

v

ANTRIM COUNTY,

          Defendant,

and

SECRETARY OF STATE JOCELYN
BENSON,

          Intervenor Defendant.

_____/

File No. 2020009238CZ
HON. KEVIN A. ELSENHEIMER

Matthew S. DePerno (P52622)
Attorney for Plaintiff

Haider A. Kazim (P66146)
Attorney for Defendant

Heather S. Meingast (P55439)
Erik A. Grill (P64713)
Attorneys for Intervenor Defendant

_____

ERRATA – ORDER SETTING ASIDE DISMISSAL

On March 3, 2021, the Clerk of the Court filed a Non-Service Dismissal on behalf of Antrim County. After review of MCR 2.102, the Court has determined that service on parties who submit to the Court's jurisdiction do not need to be served. The Clerk's Non-Service dismissal was improper.

Therefore, the Clerk of the Court's Non-Service Dismissal on behalf of Defendant Antrim County is set aside.

IT IS SO ORDERED.

03/04/2021
12:37PM

KEVIN A. ELSENHEIMER, CIRCUIT COURT JUDGE, P49293

HONORABLE KEVIN A. ELSENHEIMER
Circuit Court Judge

PLAINTIFF-APPELLANT's Appendix 000252

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF ANTRIM

WILLIAM BAILEY,

                Plaintiff,

v   File No. 2020009238CZ
                                         HON. KEVIN A. ELSENHEIMER
ANTRIM COUNTY,

                Defendant,
and

SECRETARY OF STATE JOCELYN
BENSON,

                Intervenor Defendant.

_____ /

Matthew S. DePerno (P52622
Attorney for Plaintiff

Haider A. Kazim (P66146)
Attorney for Defendant

Heather S. Meingast (P55439)
Erik A. Grill (P64713)
Attorneys for Intervenor Defendant

_____

ERRATA – ORDER SETTING ASIDE DISMISSAL

On March 3, 2021, the Clerk of the Court filed a Non-Service Dismissal on behalf of Intervenor Defendant Jocelyn Benson. After review of MCR 2.102, the Court has determined that service on parties who submit to the Court's jurisdiction do not need to be served. The Clerk's Non-Service dismissal was improper.

Therefore, the Clerk of the Court's Non-Service Dismissal on behalf of Intervenor Defendant Jocelyn Benson is set aside.

IT IS SO ORDERED.

                                      03/04/2021
                                      12:37PM

KEVIN A. ELSENHEIMER, CIRCUIT COURT JUDGE, P49293

HONORABLE KEVIN A. ELSENHEIMER
Circuit Court Judge

PLAINTIFF-APPELLANT's Appendix 000253

Exhibit 10

Analyst: James Thomas Penrose, IV
Report Title: Preliminary Assessment of Wireless Communications Technology for Michigan Voting Systems

Executive Summary

Two versions of Michigan voting systems both Dominion and ESS have been found to have utilized wireless technology. The Dominion Voting Systems proposal for Antrim County shows a quote for wireless transmission capabilities, see Figure 1. Dominion representatives also confirmed issues with wireless transmission of vote totals and even went as far as disabling the saving of ballot images without explicit authorization.

The ESS Model DS200 was found to have an internal wireless card, that has a private network address that was designed to communicate with an ES&S Primary Host Server. These devices and servers are ostensibly designed to operate on a virtual private network (VPN) that does not allow routing to the Internet. While each of the devices do have private network Internet Protocol (IP) addresses, testing revealed that the SIM card used for the DS200 could be utilized in a generic device 4G wireless device and allow for access to the same access point name (APN). There is substantial risk to the ES&S APN connected machines from malicious actors that have access to any SIM card with pre-programmed access to the APN.

The manufacturer of the wireless 4G card used in the ES&S DS200 is a company named Telit. Telit is an internet of things company that has recently taken major investment from a Chinese investment fund that has ties to the Chinese Communist Party according to UK media reporting.

Antrim County Proposal for Wireless Results Transmission
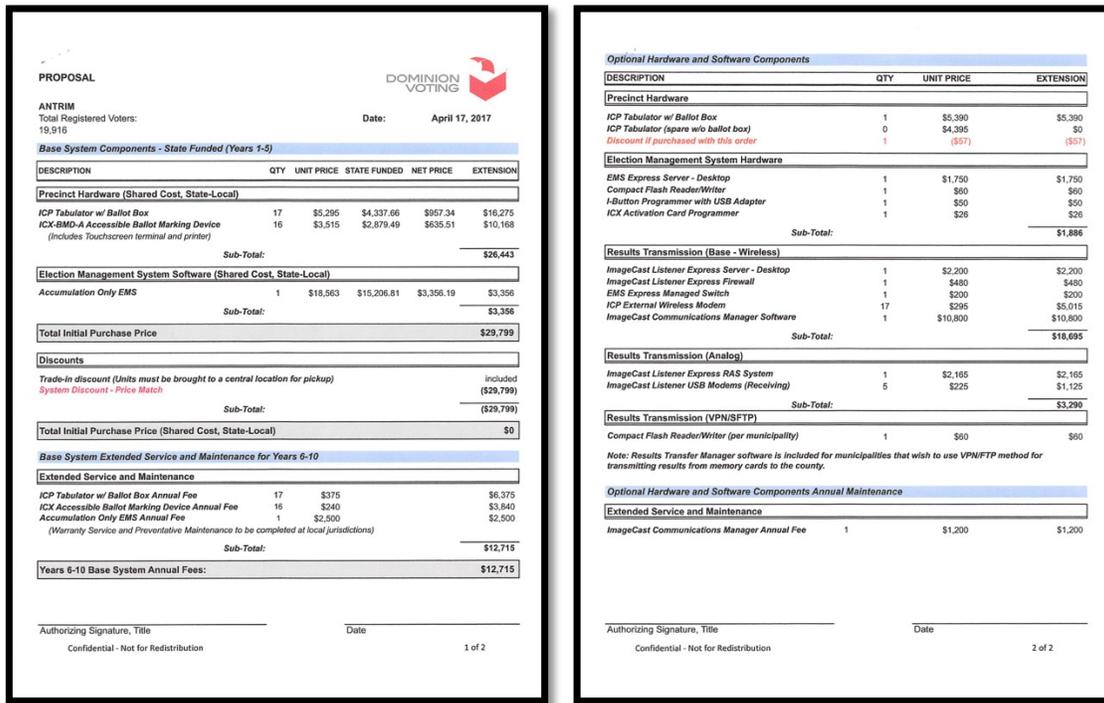
Figure 1

Dominion Voting Systems ICX

In Michigan, the Dominion Voting Systems ICX is used to allow for touchscreen voting for disabled voters. During the forensics examination of an ICX machine there were two IP addresses discovered in unallocated space on the hard drive of the Linux operating system. The existence of these IPs in unallocated space implies the ICX had previous communication with one or both of the IPs.

The first IP address was: 120.125.201.101. This IP address is registered to Ministry of Education Computer Center located in Taipei, Taiwan.

The second IP address was: 62.146.7.95. This IP address is registered to EDV-BV GmbH QSC Subkunde located in Nurenberg, Germany.

The ICX machine itself appears to be manufactured in Taiwan and shipped to the United States via airfreight using China Airlines. See the photos of the shipping box in Figure 2.

Figure 2

2

The ICX machine may also utilize an external wireless for communications modem with the central listener server for Dominion Democracy Suite. See the previously listed proposal from Dominion to Antrim County. The manual for the ICX also shows an Ethernet port for wired connectivity, see Figure 3.
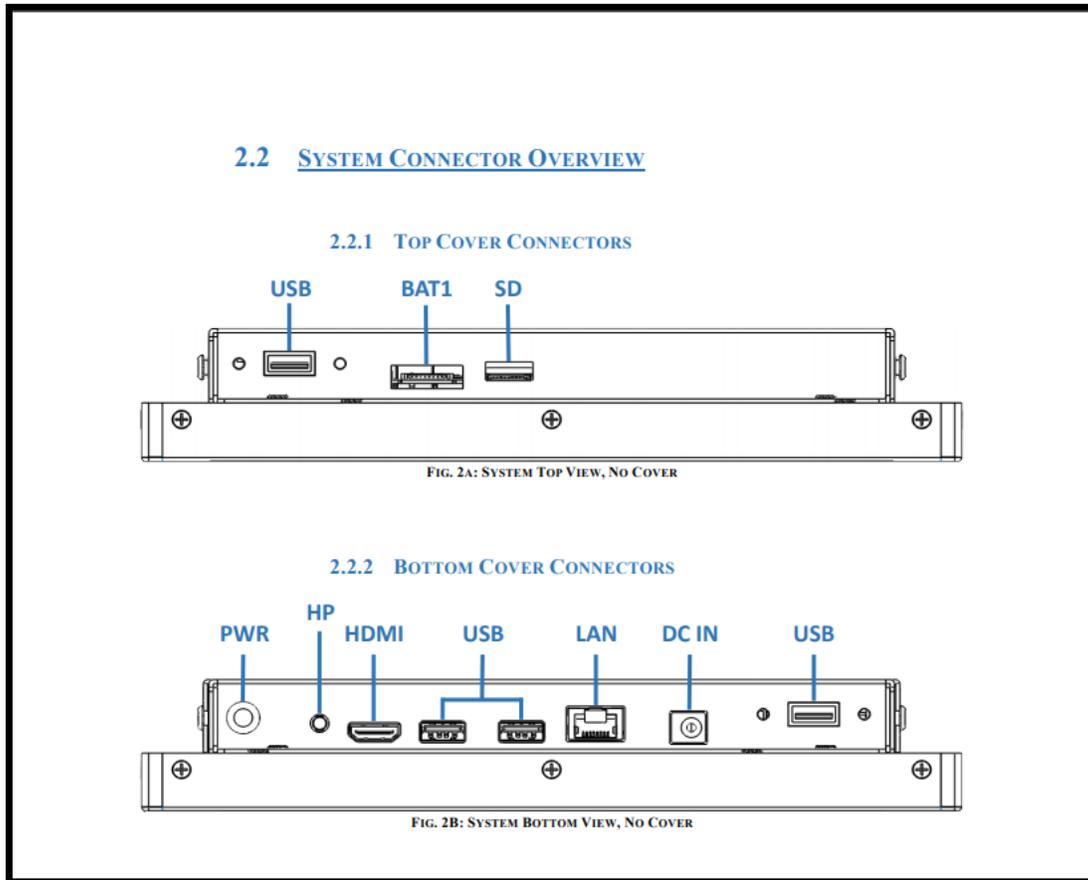
Figure 3

Dominion Summary Email to Michigan Counties

Dominion sent a summary email dated August 25, 2020 (Figure 4) after the primaries describing how the process of running the election went. Notably in this summary email from Cheryl Homes of Dominion Voting Systems she describes the following issues related to the transmission of vote totals via modems. In addition, Dominion turned off image saving without any authorization from the Secretary of State noted in the communication.

> *"Modem transmission this election were (sic) terrible in some areas! Failures and timing out due to the weaker 3G signal and cellular network issues meant that some of your precincts weren't able to transmit but instead brought the cards in to tally. We turned off image saving which will improve the transmission by a few seconds. We are testing the maximum time out setting for receipt of the transmission on the servers to*

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see if that will improve the success rate. We will also be doing some testing In the county to see if there are any ways to improve the process."

> From: Cheryl Holmes <cheryl.holmes@dominionvoting.com>
> Sent: Tuesday, August 25, 2020 9:23 AM
>
> Bailey v Antrim County   MDOS_0000980
> No. 20-9238-CZ
>
> Cc: Tim Baumbach <tim.baumbach@dominionvoting.com>; David Stahl <david.stahl@dominionvoting.com>; Cheryl Holmes <cheryl.holmes@dominionvoting.com>
> Subject: Michigan Post Election Follow up & Pre-Election Prep
>
> Hello Everyone,
>
> Congratulations on the success of your election and surviving the Primaries! I hope that you are well, safe and catching up on all the things that got set aside in the rush of absentee applications, mailings, inspector recruiting, training and election readiness.
>
> This election we saw a higher than usual report of ballots jamming at the tabulator. This was partially due to the very long ballot, greater number of folds in the ballots at the AVCB. The rain on election day made it worse as the humidity made the ballot tear more easily. Dominion is actively working with our engineers to determine the cause of the jamming and a resolution to improve performance. To reduce the ballot exposure to moisture, we recommend that you keep your ballots in the protective shrink-wrap until needed and only remove the pads or stacks that you need.
>
> Modem transmission this election were terrible in some areas! Failures and timing out due to the weaker 3G signal and cellular network issues meant that some of your precincts weren't able to transmit but instead brought the cards in to tally. We turned off image saving which will improve the transmission by a few seconds. We are testing the maximum time out setting for receipt of the transmission on the servers to see if that will improve the success rate. We will also be doing some testing In the county to see if there are any ways to improve the process.
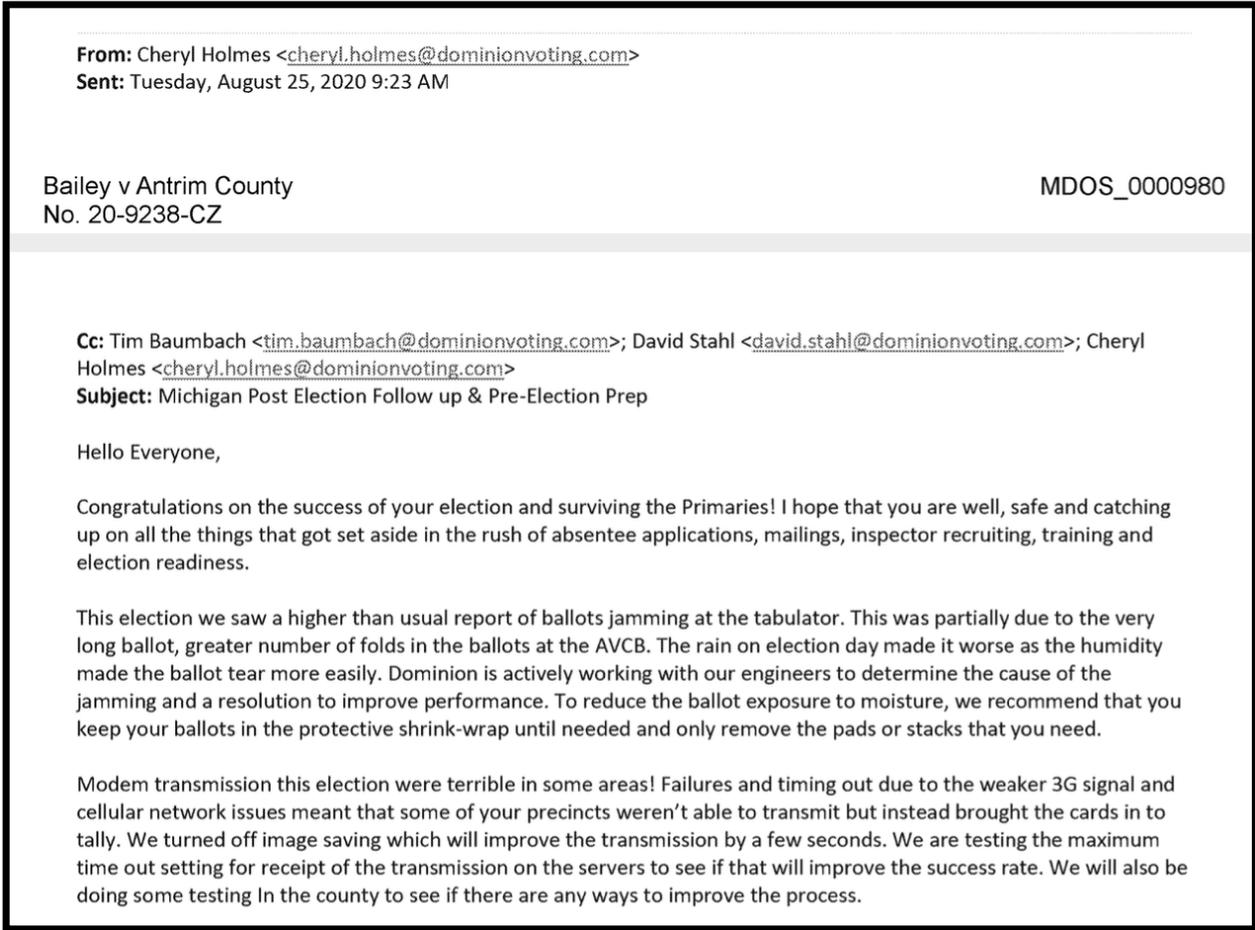
Figure 4

ESS DS200 Machine

The DS200 machine was found to have a wireless 4G modem installed internally within the enclosure of the machine. The printed tapes that summarize the activity during the election show that the 4G modem was used to send the results to a central listener server via secure file transfer. The Telit LE910-SV1 in Figure 5 was found within the ES&S enclosure.

Figure 5

The printed summary tape from the ES&S machines also indicate that the submission of the vote totals occurred using the wireless 4G modem, see Figure 6.
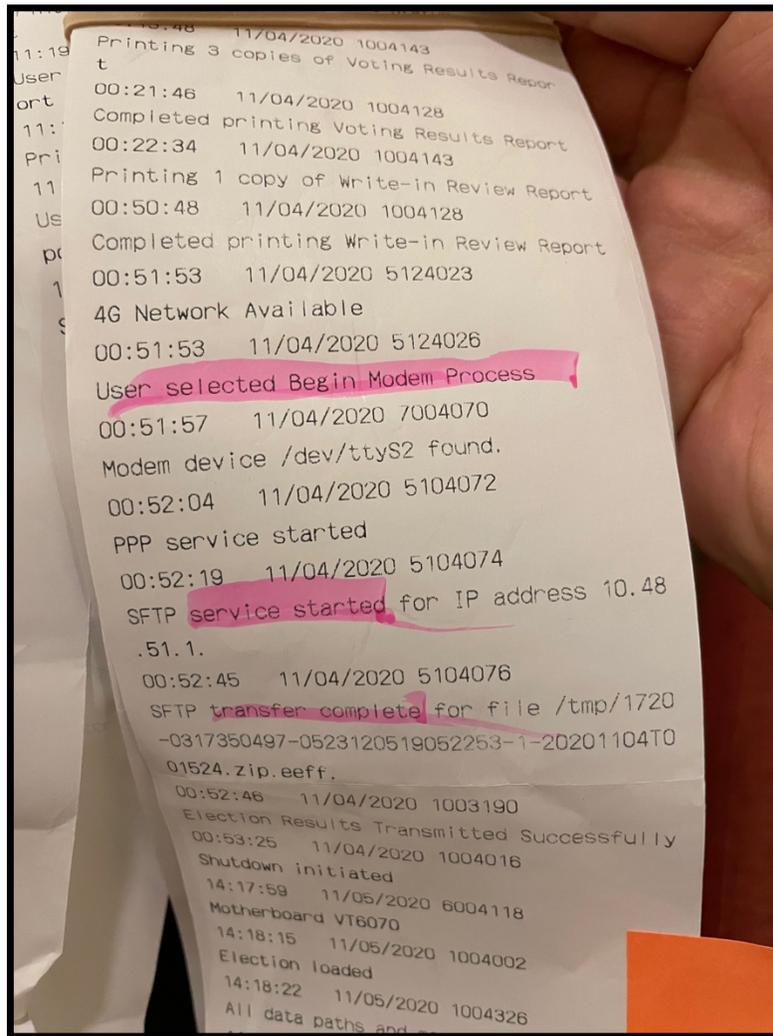
Figure 6

The Telit LE910-SV1 card installed in the ES&S device was utilizing a commercial Verizon SIM card with an APN configuration specific to the ES&S DS200 provisioning. Testing revealed that the same SIM card could be utilized in a separate wireless hotspot device and the device could then join the same APN as the ES&S voting machines. An unauthorized user could gain access to this APN by an extra SIM card pre-provisioned for this APN, or by removing a SIM from an operational device and using it in another device.

Telit LE910-SV1 Hardware Summary

According to the hardware summary specifications datasheet from Telit, the LE910-SV1 comes standard with "Internet friendly integrated TCP/IP and UDP/IP stacks, as well as HTTP, SMTP,

FTP, SSL." (Figure 7) These features are very useful to application programmers, but are also ripe for abuse by unauthorized users of the APN devoted to the ES&S machines.

Figure 7

Background on Telit

Telit is a publicly traded company Internet of Things (IoT) and Machine to Machine (M2M) company headquartered in London, UK with an operations unit in Trieste, Italy.
In late 2017, Run Liang Tai Management in Hong Kong built a 14 percent stake in Telit. Mr. Yuxiang Yang sits on the board of directors for Telit (see Figure 8) and is CEO of Run Liang Tai Management Limited.

🔒 talent4boards.com/telit-communications-welcomes-yuxiang-yang-to-its-board-as-non-executive-director/

Telit Communications welcomes Yuxiang Yang to its Board as Non-Executive Director

June 25, 2020 by Talent4Boards Feed Up

– UK, London – **Telit Communications PLC** (LON: TCM), a global enabler of the Internet of Things, announced the appointment of **Yuxiang Yang** to its Board as a Non-Executive Director effective immediately.

> *"On behalf of the Board, I am delighted to welcome Yuxiang Yang as a Director of Telit. We have got to know him well in recent years and are confident that his considerable knowledge of the sector, as well as some of our key markets, will add substantial value to the Board's activities and to the Company as a whole,"* said Board Chairman, Simon Duffy.

Following this appointment, the Board comprises six non-executive and two executive directors.

About Yuxiang Yang

Mr. Yang brings considerable experience from a career in investment and financial markets and is founder and CEO of China Fusion Capital, a Chinese investment management group. As part of this, Mr. Yang is the CEO of Run Liang Tai Management Limited, a significant shareholder of Telit, holding approximately 15.1 per cent of the Company's shares. Mr. Yang is also CEO of Yidian Zixun a leading news aggregation platform. Prior to founding China Fusion Capital, Mr. Yang served as Chairman and CEO of Ping'an Securities (a China-focused investment bank) amongst other roles and is currently also a board member of Sunsea AIoT Technology Co. Ltd.

Figure 8

A media report from August 15, 2020 from the UK online publication *Financial Mail on Sunday* indicated that there were concerns raised about Chinese influence of the Telit firm within the UK government. Here is an excerpt from the news story located here: https://www.thisismoney.co.uk/money/markets/article-8630685/Chinese-close-UK-internet-things-pioneer.html

> ***…The maneuvering by powerful investors comes after secretive Chinese multi-millionaire banker Yuxiang Yang joined Telit's board earlier this summer.***

His appointment may raise concern in Westminster that a Chinese businessman with ties to his country's Communist government could be seeking to gain influence over the business.

Yang runs China Fusion Capital, the parent company of Run Liang Tai Management, a mysterious investment fund that has built a 15 per cent stake in Telit to become its largest shareholder.

Sources said some of the firms that have invested in Run Liang are giant Chinese companies, such as coal mining group Wintime Energy and Jiangsu Shuangliang, a manufacturer of air conditioners and boilers.

Run Liang also owns a stake in Sunsea Telecommunications, a Shenzhen-listed 'internet of things' provider that recently raised around $200million (£1.5million) by issuing shares to Zhjzgroup, a state-backed tourism firm. Yang also sits on the board of Sunsea. Speculation has been mounting that Run Liang is hoping to engineer a merger of some or all of Telit with China-based Sunsea.

Run Liang's move on Telit, which is listed on AIM, follows a period in which several other London-listed businesses have been bought by China-linked firms.

Imagination Technologies was bought by Canyon Bridge – a private equity fund bankrolled by Beijing – in 2017 for £550million. Concerns rose in the spring when Canyon Bridge tried to place four directors from China Reform Holdings on to Imagination's board.

Conservative MPs Tom Tugendhat, who now leads the China Research Group, and David Davis warned that Imagination's intellectual property could be shifted to China.

When asked about Telit, Bob Seely, chairman of the Foreign Affairs Select Committee, said: 'We do need a thorough review of investment security and we need an oversight board for purchases by high-risk vendors or from higher risk states.' Telit, which is due to unveil figures next week, declined to comment.