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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APPLICATION FOR LEAVE TO APPEAL

THIS CASE INCLUDES A CONSTITUTIONAL QUESTION

ORAL ARGUMENT REQUESTED

FILED BY WILLIAM BAILEY
(Plaintiff-Appellant)

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ORDER APPEALED AND RELIEF SOUGHT

This is a matter of first impression in Michigan and involves a legal principle of major significance of the state's jurisprudence [MCR 7.305(B)(3)] and has a significant public interest [MCR 7.305(B)(2)]. This appeal is from a ruling that a provision of the Michigan Constitution or Michigan statute is invalid [MCR 7.305(B)(4)(b)]

Appellant-Plaintiff William Bailey ("Plaintiff") appeals the per curium opinion dated April 21, 2022 **[Ex 1, Court of Appeals Opinion (4/21/2022) AT's Appx., Vol 1, pp. 1-13]**. Defendants filed a joint motion for summary disposition pursuant to MCR 2.116(C)(4) and (C)(8). Plaintiff timely filed a response **[Ex 6, AT's Appx., Vol 1, pp. 157-262; Vol 2, pp. 263-338, Vol 3, pp. 339-362]** and a supplement **[Ex 7, AT's Appx., Vol 3, pp. 363-385]**. A hearing on Defendants' Joint Motion for Summary Disposition was held on May 10, 2021 **[Ex 4, Transcript (5/10/2021) AT's Appx., Vol 1, pp. 20-134]**. The trial court issued an opinion and order from the bench on May 18, 2021 **[Ex 5, Transcript (5/19/2021) AT's Appx., Vol 1, pp. 135-156].**

Plaintiff timely filed a *Motion for Reconsideration* **[Ex 8, AT's Appx., Vol 3, pp. 386-503; Vol 4, pp. 504-524]**. The trial court denied Plaintiff's motion for reconsideration on June 24, 2021 [Ex 2]. Plaintiff filed an appeal of right on July 15, 2021 [Case No. 357838] from the trial court's Errata Order dated May 19, 2021 **[Ex 2, AT's Appx., Vol 1, pp. 14-16]** and Order Denying Motion for Reconsideration entered on June 24, 2021 **[Ex 3, AT's Appx., Vol 1, pp. 17-19]**.

Plaintiff now appeals from the Court of Appeal's April 21, 2022 opinion in Case 357838 **[Ex 1, AT's Appx., Vol 1, pp. 1-13]**. Plaintiff request this Court grant leave of this appeal in

order to right this wrong by reversing the Court of Appeals and remanding the case to the trial court in all respects.

CONSTITUTIONAL CONCERNS AT ISSUE IN THIS CASE

1. Const 1963, art 2, § 4(1)(h)

This appeal involves the question of whether the trial court properly applied the provisions of Const 1963, art 2, § 4(2), which is a self-executing provision that guarantees every citizen who votes the right to audit the state wide election. As amended, Const 1963, art 2, §4(1)(h)[1] 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.
>
> 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 subsection shall prevent the legislature from expanding voters' rights beyond what is provided herein.** This subsection and any portion hereof shall be severable. If any portion of this subsection is held invalid or unenforceable as to any person or circumstance, that invalidity or unenforceability shall not affect the validity, enforceability, or application of any other portion of this subsection. [Emphasis added]

2. MCL 168.31a

This case also involves the question of whether MCL 168.31a is constitutional. This section states:

> (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

[1] This provision was amended effective December 22, 2018.

> election audits, as set forth in the prescribed procedures. The secretary of state shall train and certify county clerks and their staffs for the purpose of conducting election audits of precincts randomly selected by the secretary of state in their counties. An election audit must include an audit of the results of at least 1 race in each precinct selected for an audit. A statewide election audit must include an audit of the results of at least 1 statewide race or statewide ballot question in a precinct selected for an audit. An audit conducted under this section is not a recount and does not change any certified election results. The secretary of state shall supervise each county clerk in the performance of election audits conducted under this section.
>
> (3) Each county clerk who conducts an election audit under this section shall provide the results of the election audit to the secretary of state within 20 days after the election audit.

3. <u>This case involves significant constitutional concerns</u>

This case is about protecting the individual constitutional rights of Plaintiff, and, by extension, every registered voter in the state of Michigan. Both the state and federal constitutions anchor the fundamental right of the people to govern themselves upon the prima facie assumption that the means by which they choose their representatives must be of ultimate purity and primary importance. If the right to vote is not protected, all other guarantees afforded by the Constitution are irrelevant because they are dependent upon the integrity of the franchise and the consecration of representative choice. The duty to protect this fundamental right must, of necessity, fall on the judiciary, for it is the only remaining barrier to degeneration of elections into mere contests of fraud rather than fair attribution of the will of the people to the designated representative of their sacred and sovereign choice. To that end, the courts have recognized that the judiciary must guarantee and protect the right to vote as *the* fundamental right preservative of all other rights. *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich 1, 16; 740 NW2d 444 (2007); *Reynolds v Sims*, 377 US 533, 562; 84 S Ct 1362; 12 L Ed 2d 506, 527 (1964).

The nation cannot survive as a constitutional republic if the government allows the transfer and adjudication of thousands of "votes" by non-delegated, unaccountable officials (without legally required oversight), the acceptance and counting of illegitimate or ghost votes, or the rank absence of *any semblance* of operational integrity in the electronic systems used to process ballots and tabulate votes. If we allow manipulation of ballots during and after they are processed, then the government cannot guarantee the fundamental constitutional rights of our citizenry are protected.

The last bastion to protect these rights is the judiciary. Justice Cooley instructed that *the manner* in which an election is conducted is "the substance of every election and a failure to comply with the law in these particulars is not generally to be treated as *a mere irregularity*." Cooley, Treatise on the Constitutional Limitations (2d ed 1871), p 619 (emphasis added). The law requires the judiciary to step in under circumstances where the two other branches of government have failed to carry out their constitutional duties to protect the rights of the citizenry. Justice Cooley stated long ago that the judiciary is the only safety net to ensure the integrity of an election.

In Michigan, the key above all is that in both theory and spirit of the Constitution and Laws only those votes which are given by qualified electors are valid. Quo warranto proceedings "may inquire into the qualifications of those who have voted . . . to test the right to a public office." *Id.* at 628. Though the election boards and canvassers might be bound in their decision by the number of votes deposited in accordance with the law regulating their actions, "where there is competent evidence that illegal votes have been admitted, the decision of the board can be challenged, because they were in such case "compelled to admit votes which they know to be illegal, and they cannot "constitute tribunals of last resort for the determination of the rights of

parties claiming an election." Cooley, *supra* at p 628 (emphasis supplied), quoting *People v Cicotte*, 16 Mich 283, 311 (1868) (Christiancy, J) (emphasis added), overruled on other grounds at *Petrie v Curtis*, 387 Mich 436, 440; 196 NW2d 761 (1972). "If this were so, and there were no legal redress . . . there would be much reason to apprehend that elections would degenerate into *mere contests of fraud*." *Id.* Indeed, where there is such evidence, Justice Christiancy "doubt[ed] the competency of the legislature, should they attempt it . . . to make the decision of inspectors or canvassers *final* under our constitution." *Id.* at 312 (emphasis added). This, of course, means that the Court must allow the citizens' challenge and refuse the attestations of the non-delegated as final arbiters with authority to ignore genuine and material evidence of abject fraud.

To these ends, the Michigan Constitution first and foremost declares that "[a]ll political power is inherent in the people" and "Government is instituted for their equal benefit, security and protection." Const 1963, art 1, § 1 (emphasis added). It next declares that "[n]o person shall be denied the equal protection of the laws . . . ." Const 1963, art 1, § 2. Both the Michigan and Federal Constitutions guarantee equal protection to all qualified voters.

The Michigan Constitution also guarantees the sanctity of the vote in elections by charging the Legislature with the duty to enact laws regulating 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." Const 1963, art 2, § 4(2). Subsection 1(h) provides for the self-executing and liberally construed right to have the results of statewide elections audited, in such manner as prescribed by law, to ensure the accuracy and integrity of elections. Const 1963, art 2, § 4(1)(h).

An action at law is guaranteed *to anyone* by virtue of the provision under which this lawsuit has been filed upon a showing of material fraud or error. MCL 600.4545(1). As such an action proceeds *quo warranto*, it is inherent in the very nature of such an action that standing resides in the complainant to challenge the fraud and abuse committed by the official defendants. MCL 600.4545(3). Indeed, standing is secondary under such an action, the focus being on the merit of the claims assuming proper and formal presentation, which no one doubts here, and the malfeasance, abuse or fraud of the official defendants and those acting on their behalf, which have been proved in this case. *Grand Rapids v Harper*, 32 Mich App 324, 329; 188 NW2d 668 (1971), citing 4 Honigman & Hawkins, Michigan Court Rules Annotated (2d Ed), Rule 715, p 237. Accord *Penn Sch Dist v Bd of Ed*, 14 Mich App 109, 117-18; 165 NW2d 464 (1968), citing Honigman, *supra*, and stating that it is well-established under MCL 600.4545(3) that "a private citizen may bring a *quo warranto* action of the nature presented in this case, without *any showing of a special personal interest in the subject matter* at hand." (emphasis added). Under the quo warranto proceedings, standing is an inherent attribute and trial courts have all the power and authority under that provision to rectify the abject fraud that occurred in the November 2020 election in Antrim County, Michigan. *Grand Rapids v Harper*, 32 Mich App at 329; *Penn Sch Dist v Bd of Ed*, 14 Mich App at 117-18; *Grand Rapids City Clerk v Judge of Superior Court*, 366 Mich 335, 340; 115 NW2d 112 (1962).

In addition to these common-law rights and remedies, the constitutional issues in this case include the right to question the purity of the November 2020 election under § 4(2), the sufficiency and scope an audit under § 4(1)(h), and the constitutionality of MCL 168.31a(2), to the extent that it is or has been interpreted as limiting or restricting the audit mandated by §

4(1)(h). Regarding this appeal, the trial court offered no substantive answers to these lingering questions of significant public importance.

Finally, the Court has the further authority vested in it as the custodian of the constitutional rights guaranteed to the citizenry in the election process. Indeed, quo warranto proceedings under MCL 600.4545 provide a clear and adequate remedy to allow the plaintiff to "*test* the constitutional issue[s]" arising from an election." *Grand Rapids City Clerk*, 366 Mich at 340 (emphasis added), citing *Millard ex rel Reuter v Bay City*, 334 Mich 514, 517; 54 NW2d 635 (1952) (stating that "a writ in the nature of a quo warranto is the proper writ to test the validity of an election" and allowing the writ to be pursued directly in the Supreme Court under authority of its general "superintending control"). The constitutional issues in this case include the purity of the November 2020 election under § 4(2), the scope of an audit under § 4(1)(h), and the constitutionality of MCL 168.31a(2), to the extent that it is or has been interpreted as limiting the scope of an audit under § 4(1)(h).

Laws protecting voters' rights have been "a part of our constitution for almost as long as Michigan has been a state." *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich at 16-18. These laws exist "*for the purpose of preventing fraudulent voting*." *Id.* (emphasis in original). legally sufficient claims in accordance with the standard required under MCR 2.116(C)(8). He may pursue full litigation of the issues and seek an appropriate remedy under Michigan law upon proof of his case. At a minimum, this requires a judicial pronouncement of Plaintiff's constitutional rights and the legitimacy of any statutory or administrative limitations that might be imposed thereon. Upon a demonstration of the fraud uncovered, it will be clear to the Court that in fact the constitution requires a full complete and

comprehensive audit to ensure the integrity of and preserve the purity of all elections, past, present and future.'

In addition to the viable constitutional and statutory claims that must be separately analyzed, Michigan law provides that the Circuit Court must exercise subject matter jurisdiction over a timely filed proceeding in quo warranto. MCL 600.4545. As Defendants conceded, Plaintiff has general standing under this provision, and according to Michigan case law, he may test and pursue his constitutional and statutory claims and relief available under the statute. *Grand Rapids City Clerk*, 366 Mich at 340; *Millard ex rel Reuter*, 334 Mich at 517. The Court's decision granting summary disposition to Defendants under (C)(4) was error. Plaintiff's claims are not moot, nor has he received all the relief sought or to which he is entitled.

STATEMENT OF JURISDICTIONAL BASIS

The Court of Appeals' opinion was issued April 21, 2022. This Court has jurisdiction to decide this appeal pursuant to MCR 7.303(B)(1) and (6). This application is filed within 42 days of the Court of Appeals decision.

STATEMENT OF QUESTIONS INVOLVED

Issue #1: THE COURT OF APPEALS SHOULD HAVE REMANDED THE CASE TO THE TRIAL COURT AFTER IT RULED THE TRIAL COURT ERRED

Appellant says:	YES
Appellees say:	NO
The Court of Appeals says:	NO

Issue #2: DID THE TRIAL COURT ERR IN ACCEPTING EVIDENCE FROM DEFENDANTS? THE COURT OF APPEALS IGNORED THIS ISSUE.

Appellant says:	YES
Appellees say:	NO
The Court of Appeals says:	NO

Issue #3: DID PLAINTIFF STATE A LEGALLY SUFFICIENT CLAIM UNDER THE "AUDITS CLAUSE" IN MICH CONST ART 2, § 4(1)(h)?

Appellant says:	YES
Appellees say:	NO
The Court of Appeals says:	NO

Issue #4: DID PLAINTIFF STATE A LEGALLY SUFFICIENT CLAIM UNDER THE "PURITY OF ELECTIONS" CLAUSE, MICH CONST ART 2, § 4(2)?

Appellant says:	YES
Appellees say:	NO
The Court of Appeals says:	NO

Issue #5: DID PLAINTIFF STATE A LEGALLY SUFFICIENT CLAIM UNDER THE "EQUAL PROTECTION" CLAUSE?

Appellant says:	YES
Appellees say:	NO
The Court of Appeals says:	NO

Issue #6: DID PLAINTIFF STATE A LEGALLY SUFFICIENT CLAIM FOR QUO WARRANTO RELIEF?

Appellant says:	YES
Appellees say:	NO
The Court of Appeals says:	NO

Issue #7: IS MCL 168.31a UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED?

Appellant says:	YES
Appellees say:	NO
The Court of Appeals says:	NO

Issue #8: DID THE TRIAL COURT ERR WHEN IT DENIED PLAINTIFF'S MOTION TO ADJOURN SUMMARY DISPOSITION IN ORDER TO ALLOW IMPORTANT AND RELEVANT DISCOVERY TO PROCEED?

Appellant says:	YES
Appellees say:	NO
The Court of Appeals says:	NO

Issue #9: DID THE TRIAL COURT ERR WHEN IT FAILED TO HEAR PLAINTIFF'S MOTION TO AMEND COMPLAINT?

Appellant says:	YES
Appellees say:	NO
The Court of Appeals says:	NO

Issue #10: DID THE TRIAL COURT ERR WHEN IT RELIED ON INADMISSABBLE EVIDENCE?

Appellant says:	YES
Appellees say:	NO
The Court of Appeals says:	NO

FACTS and INTRODUCTION

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 **[Ex 10, AT's Appx., Vol 4, pp. 528]**. 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 undervote category for adjudication. For example, in Chestonia Township 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. **[Ex 11, AT's Appx., Vol 4, pp. 529]**.

On Wednesday morning, November 4, 2020, Plaintiff was one of the concerned citizens who was shocked to see an election map showing Antrim County in bright blue. *Complaint*, ¶21. On November 5, 2020, Defendant Antrim County released amended results which showed that 18,059 residents had cast a ballot in the election (7,280 for Joe Biden and 9,783 for President Donald Trump). *Id.* On November 21, 2020, Defendant Antrim County released second amended

results which showed that 16,044 residents had cast a ballot in the election (5,960 for Joe Biden and 9,748 for President Donald Trump). *Id.* The results also showed significant discrepancies in down-ballot races, including school board races. It was clear that there was a problem with the voting machines. As of November 21, 2020, Defendant Antrim County had conducted three counts (the initial count and then two re-tabulations). Each count was different.

This lawsuit was brought pursuant to Const 1963, art 2, § 4(2), which is a self-executing provision that guarantees every citizen who votes the right to audit the state wide election.

STATEMENT of STANDARD OF REVIEW

1. Issues of Law

Issues of law are reviewed de novo. *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 477; 760 NW2d 287 (2008).

2. Abuse of Discretion

An abuse of discretion occurs when a court chooses an outcome falling outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

3. MCR 2.116(C)(4)

Summary disposition may be granted under MCR 2.116(C)(4) when "[t]he court lacks jurisdiction of the subject matter." Subject-matter jurisdiction refers to a court's power to act and authority to hear and determine a case. *Forest Hills Coop v City of Ann Arbor*, 305 Mich App 572, 617; 854 NW2d 172 (2014) (cleaned up). In reviewing a motion under (C)(4), it is proper to consider the pleadings and any affidavits or other documentary evidence submitted by the parties to determine if there is a genuine issue of material fact. *Cork v Applebee's of Michigan, Inc*, 239 Mich App 311, 315; 608 NW2d 62 (2000); see also MCR 2.116(G)(5).

4. MCR 2.116(C)(8)

All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Adair v State*, 470 Mich 105, 119; 680 NW2d 386 (2004), citing *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A (C)(8) motion tests the *legal sufficiency* of a claim based on the factual allegations in the complaint. *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006). See also MCR 2.116(G)(5). The motion may only be granted when a claim is so clearly unenforceable that no factual development could possibly justify recovery. *Adair*, *supra*. See also, *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159-60; 934 NW2d 665 (2019).

LEGAL ARGUMENTS

ISSUE #1: THE COURT OF APPEALS SHOULD HAVE REMANDED THE CASE TO THE TRIAL COURT AFTER IT RULED THE TRIAL COURT ERRED

The Court of Appeals correctly ruled that the trail court erred when it dismissed the case based on the mootness doctrine pursuant to MCR 2.116(C)(4). "Consequently, the trial court erred by determining that plaintiff's claims were moot." **[Ex 1, AT's Appx., Vol 1, p. 5]**. Indeed, the trial court only analyzed the case under MCR 2.116(C)(4). The Court of Appeals understood this and added footnote 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)." *Id.*

However, the Court of Appeals claims that despite the trial court being wrong on the only issue it decided, "[n]onetheless, we will not reverse a trial court's decision when it reaches the right result, even if for the wrong reasons." *Id.* Rather than remanding the case for the trial court to decide the issues, the Court of Appeals then spent 8 pages analyzing the case under MCR 2.116(C)(8); even though the trial court failed to do.

This decision violated MCR 7.203(A)(1)(b) which states that the appeal is "limited to the portion of the order with respect to which there is an appeal of right." Further, the Court of Appeals reliance on *Gleason v Mich Dep't of Transp*, 256 Mich App 1, 3; 662 NW2d 822 (2003) is misguided. The trial court did not reach the right result for the wrong reasons. Rather, it reached the wrong result for the wrong reason. The trial court concluded that it had no jurisdiction because the issues were moot based on MCR 2.116(C)(4). That was the wrong result for the wrong reason. To suggest and argue that the Court of Appeals can take the case entirely away from the trial court and decide the entire case on MCR 2.116(C)(8) even though the trial court never conducted any analysis under (C)(8) is error.

The Court of Appeals should have simply concluded that the trial court was wrong and remanded the case to the trial court to decide the case under MCR 2.116(C)(8). Rather than doing so, the Court of Appeals essentially took original jurisdiction of that case at that point and conducted an analysis that the trial court never attempted. The Court of Appeals committed error when it conducted this analysis and it must be reversed. The case should have been remanded to the trial court to conduct its own analysis under (C)(8).

ISSUE #2: THE TRIAL COURT ERRED IN FAILING TO APPLY MCR 2.116(C)(8) TO EACH OF PLAINTIFF'S SEPARATE CLAIMS AND IN ACCEPTING EVIDENCE FROM DEFENDANTS. THE COURT OF APPEALS IGNORED THIS ISSUE.

While Defendants' motion for summary disposition was filed pursuant to MCR 2.116(C)(4) (court lacks jurisdiction of the subject matter) and (C)(8) (failure to state a claim upon which relief can be granted), the Court's errata order, issued on May 19, 2021, states only that the Court granted summary disposition pursuant to MCR 2.116(C)(4). The Court's reasoning appears to rest on its sole conclusion that the selective process audit conducted by the Secretary

of State was constitutionally sufficient under § 4(h)(1) and MCL 168.31a. Since, according to the Court, this was all the relief Plaintiff requested and received, the remainder of his claims were moot leaving the court with no subject matter jurisdiction over the controversy.

Because of this conclusion that it lacked subject matter jurisdiction, the Court did not analyze each of the other constitutional or statutory claims, nor did it recognize the additional relief available under these provisions. Plaintiff contends this was reversible error. Each of his claims were required to be analyzed under MCR 2.116(C)(8). A motion for summary disposition under MCR 2.116(C)(8) must be decided on the pleadings alone and all factual allegations must be taken as true. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich at 154-55.

The trial court was obligated to accept evidence from Plaintiff which would have required Defendants to seek summary disposition under MCR 2.116(C)(10). In *El-Khalil*, *supra*, the Michigan Supreme Court clarified that a trial court assessing a party's motion for summary disposition under rule (C)(8) errs when it conducts what amount to analysis under another court rule, there MCR 2.116(C)(10). By requiring evidentiary support for Plaintiff's allegations beyond the pleadings, or in assessing the sufficiency of proofs or other evidence submitted by the party filing a (C)(8) motion, the trial court's decision is subject to reversal. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich at 166. "We emphasize that a motion for summary disposition under MCR 2.116(C)(8) must be decided on the pleadings alone and that all factual allegations must be taken *as true*." *Id.* at 155 (emphasis added). Considering the movant's evidence outside the pleadings or requiring evidentiary support from the non-moving party is error. Here, the circuit court went beyond the pleadings by accepting Defendants' false offering and hearsay press releases that there had been an audit and that said audit was constitutionally sufficient. Moreover,

the Court erred because it did not specifically analyze each of Plaintiff's other claims under (C)(8), nor did it consider other forms of relief available under those claims.

Putting aside its veracity for the moment, the factual evidence Defendants cited as proof of an audit raises a question of fact as to whether it was constitutionally sufficient under § 4(1)(h). These are separate inquiries. The former question is one properly assessed under MCR 2.116(C)(10) as a question of fact, and the latter presents an unresolved *legal issue* in the state of Michigan, as the Court acknowledged. **[Ex 5, AT's Appx., Vol 1, pp. 147-148]**. Plaintiff requested an audit by invoking § 4(1)(h). Clearly, a conclusion that an audit was conducted and that it was constitutionally sufficient are mixed questions of law and fact that cannot be resolved by a (C)(8) motion. Thus, to the extent the Court concluded that Plaintiff received the relief he requested because a sufficient audit had been conducted, that conclusion resulted from an analysis contrary to what is required under (C)(8) and beyond the limits imposed on that court rule by the Supreme Court in *El-Khalil*, *supra*.

The same (C)(8) analysis must apply to each separate claim. Relief other than an audit is available under Plaintiff's other constitutional and statutory claims, including the quo warranto proceedings under MCL 600.4545. The latter entitles the claimant to test the constitutional questions and challenge the holder of an office even after he or she assumes title thereto. *Lindquist v Lindholm*, 258 Mich 152, 154; 241 NW 922 (1932). Indeed, such proceedings have historically provided for a *trial* to "*test* the constitutional issue[s]" arising from an election. *Grand Rapids City Clerk v Judge of Superior Court*, 366 Mich 335, 340; 115 NW2d 112 (1962) (emphasis added), citing *Millard ex rel Reuter v Bay City*, 334 Mich 514, 517; 54 NW2d 635 (1952) (stating that "a writ in the nature of a quo warranto is the proper writ to test the validity of

an election" and allowing the writ to be pursued directly in the Supreme Court under authority of its general superintending control).

These requisite inquiries cannot be ignored in analyzing Plaintiff's claims. The Michigan Supreme Court's recent guidance on the proper analysis to be performed clearly demonstrates that the trial court is *not* to go beyond the standard of review applicable to the rule under which the moving party chooses to proceed. Interestingly, the Court in *El-Kahil* cautioned against applying the oft-cited rule that "where a party brings a summary-disposition motion *under the wrong subrule*, the trial court may proceed under the appropriate subrule as long as neither party is misled." *Id.* at 163, n 5, citing *Blair v Checker Cab Co*, 219 Mich App 667, 670-671; 558 NW2d 439 (1996). The strict limitation upon trial courts to assess only the moving party's motion under (C)(8) when that is the rule advanced in support of summary disposition clearly means that lower courts are limited in their ability to *sua sponte* discern what they might deem a more appropriate rule or analysis to proceed under. In other words, the trial court can no longer make the moving party's case for it, and indeed, must strictly abide by the analysis required. The trial court has a duty to assess only the motions brought before it. A failure to do so is reversible error, as held in *El-Kahil*. The same is true in this case, and the trial court must be reversed.

ISSUE #3: PLAINTIFF STATED A LEGALLY SUFFICIENT CLAIM UNDER THE "AUDITS CLAUSE" IN MICH CONST ART 2, § 4(1)(h)

The *legal issue* of what constitutes a constitutionally sufficient audit under § 4(1)(h) remains unresolved in the state of Michigan. See *Constantino v City of Detroit*, ___ Mich ___; 950 NW2d 707, 709 (2020). This is a mixed question of law and fact that cannot be resolved on either a (C)(4) or (C)(8) motion. Plaintiff's complaint clearly sufficed to state a legally sufficient claim under § 4(1)(h).

If the circuit court's conclusion was that Defendants performed a constitutionally sufficient audit and thus Plaintiff has received all the relief he requested, that is a *legal conclusion* that analyzes *factual sufficiency*, and thus goes beyond the limited analysis of what constitutes a sufficiently pleaded *claim* in accordance with (C)(8). While a motion for (C)(10) might have been filed by Defendants, such a motion would require full analysis of the evidence submitted in support of and against such a motion. A trial court cannot do this for the Defendants. *El-Kahil*, *supra*.

Beyond this, Plaintiff has raised an important constitutional issue regarding the precise scope of § 4(1)(h), a provision that Justice Zahra indicated is "of striking breadth added to our Michigan Constitution just two years ago through the exercise of direct democracy and the constitutional initiative process". *Constantino v City of Detroit*, ___ Mich ___; 950 NW2d 707, 709 (2020). There, at least three justices of the Michigan Supreme Court agreed that this is a significant legal issue that has yet to be resolved.

Also unresolved is the legal issue of § 4(1)(h)'s interplay, if any, with MCL 168.31a. *Id.* This legal issue has been the subject of extensive debate and analysis. After Michigan citizens added § 4(1)(h) to the Constitution, the Legislature added the first sentence to MCL 168.31a(2) *to comply with* this provision, *apart from* the normal random selective process audit that might be conducted at the discretion of the Secretary of State described in the remainder of this subsection. To comply with the as yet undetermined limits of the Constitutional right, the first sentence of subsection 2 now *requires*, at a minimum, that the audit "include" a review of *all* "documents, ballots, and procedures used during an election *as required*" in § 4(h)(1).

Use of the word "include" in a statute "connotes simply an illustrative application of the general principle." *Fed Land Bank of St Paul v Bismarck Lumber Co*, 314 US 95, 100; 62 S Ct 1;

86 L Ed 65 (1941). It "imports a general class, *some of whose particular instances* are those specified" in the statute. *Helvering v Morgan's Inc*, 293 US 121, 125 n 1; 55 S Ct 60; 79 L Ed 232 (1934) (emphasis added). It provides the antithesis to application of the rule of expression *unius est exclusio alterius* (mention of one thing excludes others). The Supreme Court of Michigan has likewise noted that the word "include" is not "a word of limitation, but, rather, of enlargement." *Skillman v Abruzzo*, 352 Mich 29, 33; 88 NW2d 420 (1958). It is viewed as such because it "conveys the conclusion that there are *other items includable*, though not specifically enumerated." *Michigan Bell Tel Co v Dep't of Treasury*, 445 Mich 470, 479; 518 NW2d 808 (1994) (emphasis added). Its use supports "a construction broad enough to encompass other items not explicitly mentioned." *Id.*

Given that the election in Antrim County utilized voting machines, the constitutional mandate, which is self-executing and, by its own command, *liberally construed in favor of voters' rights*, would necessarily *include* full examination of the computer systems and software, all attached equipment, connections and communications, ballot images, ballots, and the precise manner in which the latter were received, introduced, adjudicated, and tabulated. Const 1963, art 2, § 4(1)(h). This *broad* and *expansive* application is complemented, of course, by § 4(2)'s guarantee that the laws passed by the Legislature pursuant to § 4 (which would of course include the complimentary addition of the first sentence of MCL 168.31a(2)), *shall*, inter alia, "preserve the purity of elections, to preserve the secrecy of the ballot," and "to guard against abuses of the elective franchise."

To the extent that Defendants even conducted *any* kind of audit for Antrim County, or elsewhere, a point that Plaintiff does not concede, this by no means resolves the relief sought in Plaintiff's complaint in requesting a constitutionally sufficient audit under § 4(1)(h). Indeed,

Defendants and the trial court, like other lower courts that have addressed this issue, focus mostly on the language in MCL 168.31a that was already a part of the law *before* § 4(1)(h) was added to the Constitution and thus, before the first sentence of MCL 168.31a(2) was added. However, the remaining language of MCL 168.31a(2) merely describes the *previous* random selective process audit procedures that might have been conducted by the Secretary of State at his or her discretion. Given that the first sentence was added to comply with § 4(1)(h), the constitutional mandate giving the citizens the right to demand an audit, its plain language requires more. It certainly could not require less without suffering constitutional deficiency – a claim that was also presented by Plaintiff, but ignored by the trial court's ruling.

Perhaps Defendants' emphasis on the preexisting language in MCL 168.31a indicates its desire to ignore the complementary and expansive nature of the language added to the first sentence after the constitutional amendment. However, this is a luxury that the trial court did not have in assessing the legal sufficiency of Plaintiff's claims. *Feyz*, 475 Mich at 672. See also *El-Khalil*, 504 Mich at 159 (a (C)(8) motion tests the legal sufficiency of a claim, while a (C)(10) motion tests its factual sufficiency). And, despite what some lower courts have held, *i.e. Constantino v City of Detroit*, Wayne County Circuit Court Case No. 20-014780-AW (2020) and *Genetski, et al v Benson*, Michigan Court of Claims, Case No. 20-000216 (2020), and what Defendants have argued, the constitutional right to an audit would take precedence over and be superior to any limitation or restriction interpreted in a statutory provision that was drafted to comply with the constitutional guarantee in the first place. Indeed, the statute would be constitutionally infirm if it were interpreted to provide less. The very fact that the Supreme Court has not yet defined the scope of the audit provision means, de facto, that Plaintiff has stated a legally sufficient claim under (C)(8).

Moreover, the Constitution prevails if there is a conflict with the actuating statute. The primary rule of constitutional interpretation adhered to in Michigan is the "common understanding" described in 1 Cooley, Constitutional Limitations (8th ed), p 143. See also *Durant v State*, 456 Mich 175, 191-92; 566 NW2d 272 (1997). "A constitution is made for the people and by the people. The interpretation that should be given it is that which reasonable minds, the great mass of the people themselves, would give it. For as the Constitution does not derive its force from the convention which framed, but from the people who ratified it." Cooley, *supra* at 81. "The intent of the people . . . [was] not to enact a constitutional provision that could not be effectively enforced." *Durant*, 456 Mich at 206-07. Moreover, legislation cannot restrict or limit a right embodied in the Constitution itself, especially one that requires liberal construction to protect voters' rights.

Therefore, reference in § 4(1)(h) to "as prescribed by law" could never mean that MCL 168.31a(2) *narrows* or *restricts* this right. And indeed, in accordance with the first sentence that was added to comply with § 4(1)(h), Plaintiff has argued that at a minimum the audit *shall include* a full review and examination of the documents, ballots and procedures used to determine if there was fraud. MCL 168.31a(2) (first sentence). Liberally construed, as it must be to protect voters' rights, these items would "include," i.e., encompass, *all elements* from the election, including the ballots and the machines that were used to process them. To the extent that MCL 168.31a(2) would be interpreted as providing for anything less, it would infringe on the automatic rights and would be constitutionally infirm, which Plaintiff has also posited.

Constantino and *Genetski* offer no reprieve from this argument. In *Constantino*, Judge Kenney took the same position as Defendants, glossing over the plain language of the first sentence of subsection 2, which was the only change to MCL 168.31a after § 4(h)(1) was added

to the Constitution, and focusing instead on the selective process audits described in the remainder of the statute (which existed before § 4(h)(1)). Judge Murray, in *Genetski*, came to a similar conclusion. Skipping over the significance of the plain language of the first sentence of MCL 168.31a, and its necessary harmony with the constitutional amendment, Judge Murray assumed the Secretary of State could somehow singlehandedly and unilaterally define and limit the audit process at her discretion, despite the use of the aforementioned meaning of the word "include" in the first sentence, and the liberal interpretation required of all provisions to favor voters as commanded by the Constitution itself. See discussion, *supra*.

Plaintiff never received a forensic image of the precinct tabulators. Even if they were performed, a question that has been placed in grave doubt, partial and selective process audits conducted by the Secretary of State under her interpretation of "prescribed by law," cannot limit the citizen's right to an audit described in the first sentence of MCL 168.31a(2), just as much as that sentence cannot limit or restrict the entitlement to a full, constitutionally sufficient audit for the people that is engrained in the constitution by way of § 4(h)(1). It was not the intent of the people to enact a constitutional provision that could not be meaningfully and effectively enforced to preserve the integrity of elections and to ensure their purity. *Durant*, 456 Mich at 206-07. The Secretary of State does not fulfill this command by conducting random sample selective process audits. She cannot be the single arbiter of the constitutional rights of Michigan citizens and therefore she cannot define the scope of their rights under the audits clause, and by default the sufficiency of Plaintiff's claims.

In this regard, Defendants have demonstrated that the Secretary of State did not in fact conduct an audit in compliance even with her own guidelines, much less one that is constitutionally sufficient. Further, as alluded to *supra*, the Secretary of State, who is a defendant

in this action, who has admitted, along with Antrim County Clerk Cheryl Guy, of having withheld, secreted or destroyed evidence (source code and data, respectively), who has willfully ignored the law regarding signature verification of ballots, and who has overseen what can only be described as rank fraud in the November election, cannot be deemed a reliable source, either under law or in practical terms, to unilaterally define and approve what was or was not a constitutionally sufficient audit protective of the rights of Michigan's citizens. The perpetrators of fraud cannot be relied upon to defend their conduct.

What is appropriate at this stage based on the fraud Plaintiff has already exposed, is a full trial to allow the parties to present the evidence and litigate the case so that Plaintiff can prove his entitlement to a full forensic audit, among other relief to which he is entitled, under the several claims he has lodged. To date, the only thing that was claimed to have been done was a hand recount conducted by the Secretary of State on December 17, 2020, which Defendants admit was not an audit, *infra* at pp. 48-49, the selective process audits described in the *Genetski* case, and the press releases cited by the court and accepted as *factual evidence* of sufficiency (analysis of which could only be engaged under (C)(10), a rule which Defendants did not move under, and which a trial court is prohibited from *sua sponte* applying. *El-Kahlil*, *supra*).

Under MCR 2.116(C)(8) a trial court cannot rely on extraneous information from the moving party to support their motion, especially where such is not part of the record, but rather hearsay in the form of representations made by the Secretary of State to third parties and the news media. Even under (C)(10), where documentary evidence *can be* considered by the trial court when the moving party files the motion under that rule, see *El-Kahlil*, *supra*, "[o]pinions, conclusionary denials, unsworn averments, and inadmissible hearsay do not satisfy the court rule [MCR 2.116(C)(10)]; disputed fact (or the lack of it) must be established by admissible

evidence." *SSC Assoc v Gen Retirement Sys of Detroit*, 192 Mich App 360, 364; 480 NW2d 275 (1991).

There has been no audit. There has been no inspection of absentee ballots, the envelopes they supposedly came in, or the marks and signatures on those ballots. These ballots and the envelopes, including computer images of ballots on the machines and the data and information stored therein (*all* records) are required by state and federal law to be retained. See MCL 168.932(c) (making it a felony for any inspector of election, clerk, or other officer or person having custody of any record, election list of voters, affidavit, return, statement of votes, certificates, poll book, or of any paper, document, or vote of any description, which pursuant to this act is directed to be made, filed, or preserved, to willfully destroy, mutilate, deface, falsify, or fraudulently remove or secrete any or all of those items, in whole or in part, or fraudulently make any entry, erasure, or alteration on any or all of those items, or permit any other person to do so); 52 USC § 20701 (election officials must retain *all records* and penalizing those that willfully fail to comply with potential fines and imprisonment). Given the serious penalties imposed for these acts, which have been shown to have occurred in this case, these requirements *must exist* for a reason. Despite the nearly impenetrable wall that has been erected by Defendants (and those throughout the country aligned with them) to forbid any meaningful examination of ballots and the machines that process them, the law requires preservation of these items and punishes those who destroy, manipulate or secrete them because the citizens have a constitutional right to free and fair elections, and the only way the latter can be guaranteed is if all information about the former is made available for transparent and public examination.

How could it be otherwise? Imagine a system that allows the results on *any* paper ballot (whether authentic or not) to be completely modified, manipulated, and changed at a multitude of

points along the way once the image and data enters the machine (or even before). That is what Plaintiff has proved can and did occur. There was no integrity in this process.

Again, without conceding that *any* audit was conducted, Defendants argued below that they performed a sufficient "audit" when they conducted a "hand recount" on December 17, 2021. This is false for several reasons: (1) the hand recount only counted the presidential election and (2) it was wholly inadequate and premised on fraud. Expert reports demonstrating this were filed with the trial court.

With these uncontroverted facts and reports presented herein, the circuit court could not have granted Defendants' motion on this claim under (C)(4) or (C)(8) by concluding that he received the relief he requested under § 4(1)(h). The conclusion that what the Secretary of State did was sufficient does not take Plaintiff's allegations as true, but rather allows the Defendants' submissions and non-record evidence to suffice. The scope of the right to an audit under § 4(1)(h) has not been resolved. Nor has the constitutionality of MCL 168.31a(2) been addressed to the extent it can or has been construed or applied to *limit* that right. *Durant*, *supra*. This was a conclusion of law that the trial court made in its decision. **[Ex 5, AT's Appx., Vol 1, pp. 151-152]**. But these are purely questions of legal sufficiency, not of claim sufficiency. *El-Khalil*, *supra*. The parties can litigate this under (C)(10), but a trial court cannot avoid the moving parties' obligation to disprove the non-moving party's case by simply dismissing under (C)(8) the latter's legally sufficient and properly pleaded claims. *Id.*

ISSUE #4: PLAINTIFF STATED A LEGALLY SUFFICIENT CLAIM UNDER THE "PURITY OF ELECTIONS" CLAUSE, MICH CONST ART 2, § 4(2)

Many of these same principles apply to the trial court's analysis of Plaintiff's claim under the "purity of elections" clause. The Michigan Supreme Court has interpreted the "purity of

elections" clause to embody at least *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." *Socialist Workers Party v Secretary of State*, 412 Mich 571, 596; 317 NW2d 1 (1982) (emphasis added). The clause "unmistakably requires…fairness and evenhandedness in the election laws of this state." *McDonald v Grand Traverse Co Election Comm*, 255 Mich App 674, 692-693; 662 NW2d 804 (2003). As discussed *supra*, to the extent that MCL 168.31a(2) is construed to restrict the scope of an audit and thereby subvert the constitutional purpose to "ensure the accuracy and integrity of elections" it would be a law that adversely affects the purity of elections clause and therefore constitutionally infirm. *Socialist Workers*, *supra*.

Plaintiff stated a sufficient independent claim within the meaning of (C)(8) to contest the constitutionality of MCL 168.31a under both the "audits clause" and the "purity of elections clause."

ISSUE #5: PLAINTIFF STATED A LEGALLY SUFFICIENT CLAIM UNDER THE "EQUAL PROTECTION" CLAUSE

The equality of all citizens under the law is a lynch-pin of the modern notion of the rule of law. A revolutionary implication of this idea, well appreciated by Locke, was that to truly preserve this equality, even rulers and their magistrates had to operate under the "sovereignty of the law". Locke, Of Tyranny, Second Treatise of Civil Government, ch XVIII (1690). Locke concluded that when any member of the state exceeds his legal authority or in any way violates the law, he ceases "to be a magistrate; and, acting without authority, may be opposed, as any other man, who by force invades the right of another."

This is why the Supreme Court has referred to the "political franchise" of voting as a "fundamental political right, because preservative of all rights." *Yick Wo v Hopkins*, 118 US 356, 371; 6 S Ct 1064; 30 L Ed 220 (1886). "[T]he right . . . is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise *in a free and unimpaired manner* is preservative of other basic civil and political rights." *Harper v Va State Bd of Elections*, 383 US 663, 667; 86 S Ct 1079; 16 L Ed 2d 169 (1966) (emphasis added). Thus, "*any* alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Id.* No other rights preserved by the Constitution can be guaranteed against encroachment if the one fundamental right to choose who shall govern is destroyed, because in such a case the governed is no longer bound by the sovereign's rule, which in America is "of the people, by the people, for the people." President Abraham Lincoln, Gettysburg Address, November 19, 1863.

Equal protection of the law concerning voting rights does not just protect against voter suppression and it is not limited to racial discrimination, as Defendants asserted at oral argument. In fact, the scope of the equal protection afforded to citizens in a voting rights' case is perhaps the broadest of any that protect fundamental constitutional rights. Logically, it must be so. If a president is not legitimately elected, he exercises power that derives from something other than the will of the people, the only true sovereign in America.

What type of factual situations implicate equal protection concerns? It is more than just denial of voting rights to a class. As the Supreme Court elaborated, "the right . . . can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *South v Peters*, 339 US 276, 279; 70 S Ct 641; 94 L Ed 834 (1950), citing *United States v Classic*, 313 US 299, 315; 61 S Ct 1031; 85 L Ed 1368

(1941) (counting false ballots and certifying such count is a violation of the constitutional protections afforded and includes the right of qualified voters to both *cast their ballots* and *have them counted* properly). See also *Ex Parte Yarbrough*, 110 US 651, 657-658; 4 S Ct 152; 28 L Ed 274 (1884); *United States v Saylor*, 322 US 385, 387; 64 S Ct 1101; 88 L Ed 1341 (1944) (stating "the right to have one's vote counted is as open to protection…as the right to put a ballot in a box").

As the Supreme Court would later instruct, equal protection does not just ensure the initial equal allocation of the right to particular groups or individuals to vote, "equal protection applies as well *to the manner* of its exercise." *Bush v Gore*, 531 US 98, 104-05; 121 S Ct 525; 148 L Ed 2d 388 (2000) (emphasis added). There, only a full, hand-conducted recount of the ballots that had been incorrectly processed by machines (albeit in a much more elementary way than what we are dealing with today) was deemed to satisfy "*the minimum* requirement for non-arbitrary treatment of voters necessary to secure the fundamental right" to equal protection. *Id.* at 105-06.

The same concerns that implicate equal protection are absolutely present in the instant case. Although here, the lack of verifiable standards and *any* means to ascertain intent disappears not because discerning whether a "hanging chad" is or is not a vote reverts to human observation, but because the ballots (whether authentic or not), and their ultimate adjudication, disappears entirely into the infinite ether of unreliable and fatally compromised machines. Through "error or deliberate omission" the ballots and the ballot images have not been sufficiently analyzed to ensure a legitimate count. *Bush*, 531 US at 105. Use of varying standards to count votes, widely disparate manner in the way votes were counted across different counties, and the arbitrary way in which some votes were counted and some were ignored is just as much a violation of equal

protection as the "one person, one vote" principle so critical to the republic's continued vitality. *Id*. at 109.

In the context of modern elections (at least as of this moment) machines instead of people are used to count votes. Those machines scan an "image" of the paper ballot. Those machines have been shown to accept false, counterfeit or illegal ballots (ballots cast by non-qualified voters). Those machines have been shown to reject or otherwise divert ballots for adjudication – making an unknown third person or entity responsible, without oversight, to review the ballot image and *decide* the vote on the ballot! Those machines and their installed hardware and software have also been shown to be vulnerable to a host of problems, including malicious intervention by foreign actors, who can cause and indeed *did cause* an incorrect vote tabulation.

All of these problems *cause* a violation of the constitutional right to equal protection of the law. If this Court is delegated with the jurisdiction to protect the constitutional rights of citizens, "it must have the power to protect the elections on which [their] existence depends from violence and corruption." *Yarbrough*, *supra* at 658. If it does not, then the people are "left helpless before the two great and natural historical enemies of all republics, open violence and corruption." *Id*.

The sole basis for the circuit court's dismissal, that the audit was conducted and therefore Plaintiff received all the relief requested does not address other relief available under the law. The reasoning that this Plaintiff cannot effectuate vindication of his own fundamental rights to equal protection, and by extension, that of the citizenry at large is incorrect. Injunctive and declaratory relief are also available to restrain any acts found to violate Michigan's equal protection clause. *Sharp v City of Lansing*, 464 Mich 792, 800; 629 NW2d 873 (2001). "As the scope of the equal protection provision has expanded, it has always included the private right to

judicial remedies, whether expressly provided by statute or inferred by the judiciary." *Heurtebise v Reliable Business Computers*, 452 Mich 405, 434; 550 NW2d 243 (1996). "The right to pursue private judicial remedies has been recognized as fundamental to the enforcement of civil rights." *Id.* at 421. Thus, the Michigan Supreme Court has recognized that "whenever a particular equal protection right is recognized, whether by constitution, statute, or common law, then fused to that right is the right to pursue judicial relief." *Id.* at 422-23.

At oral argument, Defendants admitted availability of additional relief, but tried to downplay its viability. The judiciary has the authority to allow relief by way of private litigation that will result in remedial measures, *e.g.,* a full and transparent forensic audit, and an injunction to prevent future unconstitutional processes that violate the constitutional rights of plaintiffs and the citizens of Michigan, etc. *Sharp*, *supra*. Thus, Plaintiff has stated legally sufficient claims, which, if successful, entitle him to relief beyond that of a forensic audit of the November 2020 election. Moreover, where issues of public significance demand the court's relief for protection of these constitutional rights and the future integrity of elections, the prudential doctrine of mootness gives way. *Attorney Gen v Michigan Pub Service Comm*, 269 Mich App 473, 485; 713 NW2d 290 (2005).

Plaintiff's separate and independent claim under the equal protection clause of the Michigan Constitution was legally sufficient to withstand dismissal under (C)(8). *El-Khalil*, *supra*. And it is of no moment that time has passed since the election, it has been certified, and the ostensibly elected have taken up their duties within the regime. "The press of time does not diminish the constitutional concern. A desire for speed is not a general excuse for ignoring equal protection guarantees." *Bush*, 531 US at 109.

ISSUE #6: PLAINTIFF STATED A LEGALLY SUFFICIENT CLAIM FOR QUO WARRANTO RELIEF.

The Court of Appeals erred when it ruled that Plaintiff did not plead a proper *quo warranto* complaint. The Court of Appeals incorrectly argues that Plaintiff did not clearly allege that material fraud or error occurred in the election so that the outcome of the election was affected. However, Plaintiff made these allegations clearly in paragraphs 49, 50, 54, and 55.

> 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.
>
> 54. This quo warranto claim is brought to remedy fraudulent or illegal voting or tampering with ballots via Dominion. Based upon the allegations contained herein, material fraud or error occurred in this election so that the outcome of the election was affected.
>
> 55. 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, 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.

There is a misconception concerning the scope of relief and recognized causes of action under a timely filed action in quo warranto under MCL 600.4545. See also MCR 3.301 (distinguishing quo warranto as an extraordinary writ separate from mandamus, superintending, and habeas relief); MCR 3.306 (providing, inter alia, *jurisdiction* in the circuit court over quo warranto proceedings and allowing the circuit court to hear the matter or allow it to be tried by a jury).

Defendants recognized that Plaintiff has standing under MCL 600.4545. However, the claim that Plaintiff received all the relief to which he was entitled and that therefore the action is moot misconstrues the true purpose of the quo warranto proceeding, which, as the statute provides "shall conform as near as may be to that provided by law for actions for quo warranto." MCL 600.4545(3). Nowhere does the statute limit relief only to an audit, assuming for these purposes that there even was one, nor to what Plaintiff has already been afforded concerning the conduct of the November 2020 election. It refers to common-law quo warranto proceedings generally.

The original common-law writ of quo warranto was a civil writ, at the suit of the crown. *Rex v Marsden*, 3 Burr 1812, 1817. It was in the nature of a writ of right by the king against one who usurped or claimed franchises or liberties, and to inquire by what right he claimed to assume them. There is no limitation at common law that would restrict such a challenge only to a time before the contested party assumes the title. See *Ames v Kansas*, 111 US 449, 460; 4 S Ct 437; 28 L Ed 482 (1884).

In America, since the citizen replaced the crown, quo warranto actions may be brought by or on behalf of any citizen and they are pleaded "on behalf of the public at large." *Taylor v Sturgell*, 553 US 880, 895; 128 S Ct 2161; 171 L Ed 2d 155, 170 (2008) (emphasis added), citing *Richards v Jefferson County*, 517 US 793, 804; 116 S Ct 1761, 135 L Ed 2d 76 (1996). "A successful quo warranto action unseats an illegal office holder and declares the position vacant. It does not place the rightful claimant into the office. If the claimant can thereafter establish his clear right to the position, he may bring an action in mandamus to seek his own appointment." *New Haven Firebird Society v Board of Fire Commissioners of City of New Haven*, 219 Conn 432, 436; 593 A 2d 1383, 1385 (Conn 1991). Quo warranto, is "the only way to try titles to

office finally and conclusively." *Lindquist v Lindholm*, 258 Mich 152, 154; 241 NW 922 (1932) (emphasis supplied).

Modern usage retains these critical elements of quo warranto. It is a civil action to challenge the rights of public officials to hold the office to which they claim to be entitled and a means by which the public citizen can enforce civil rights "on behalf of the public at large." *Taylor*, *supra*; *Richards*, *supra*. "The right and the remedy are thus brought into harmony" in modern usage of the writ. *Ames*, *supra*.

These two points are critical. Plaintiff has standing, as Defendants acknowledge, and he has the right, on behalf of the citizenry, to challenge those claiming legitimacy in the offices they hold. Because it proceeds under the statute in the same manner as the writ at common law, quo warranto provides a conduit to all other legal remedies and claims provided by the Constitution and statutes, but certainly not limited thereby. It rather harmonizes the rights and the remedies available on behalf of the public at large. *Ames*, *supra*.

The state may not deprive rights over which it has no authority. MCL 168.846 is silent regarding quo warranto proceedings. Moreover, case law cited by the proponents of this view, e.g., *People ex rel Royce v Goodwin*, 22 Mich 496, 501-502; 2 Brown NPS 51 (1871), came well before the Constitution and MCL 168.31a were amended in harmony to empower citizens to litigate in toto the ostensible rights of one claiming title to an office by virtue of allowing an audit and seeking other available relief. See Const 1963, art 2, §4(1)(h)); MCL 168.31a(2) (first sentence).

Finally, quo warranto provides a vehicle to test the constitutional issues arising from an election. *Grand Rapids City Clerk*, 366 Mich at 340 (emphasis added), citing *Millard ex rel Reuter v Bay City*, 334 Mich 514, 517; 54 NW2d 635 (1952). This would of course include the

question concerning the scope of the right to an audit under § 4(1)(h) and the related issue of the constitutionality of MCL 168.31a(2) to the extent that is advanced as a statutory limitation on the constitutional right. In addition to requesting an audit and challenging other aspects of the election process, Plaintiff has raised these constitutional issues. Plaintiff stated an independent and sufficient legal claim under MCL 600.4545.

ISSUE #7: MCL 168.31a IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED

The Court of Appeals erred when it refused to address this issue. Instead, the Court of Appeals stated that the issue wasn't pled in the original complaint. However, it was pled in the proposed amended complaint. The amendment should have been permitted. Nevertheless, the Court of Appeals was still permitted to rule on this issue. Indeed, "appellate consideration is not precluded merely because a party makes a more developed or sophisticated argument on appeal." *Mueller v Brannigan Bros Restaurants & Taverns LLC*, 323 Mich App 566, 585; 918 NW2d 545 (2018).

Even when an issue hasn't been properly preserved for appeal, the Supreme Court has said that "the preservation requirement is not an inflexible rule; it yields to the necessity of considering additional issues when necessary to a proper determination of a case." *Klooster v City of Charlevoix*, 488 Mich 289, 310; 795 NW2d 578 (2011) (citations and internal quotations omitted). A good example of this was in *Mack v City of Detroit*, 467 Mich 186; 649 NW2d 47 (2002). One of the issues in *Mack* was whether the governmental tort liability act (GTLA), MCL 691.1407, preempted the Detroit City Charter, which purported to recognize a private cause of action for sexual orientation discrimination. *Id.* at 206. Although neither party had raised the preemption issue, the Supreme Court decided the case on that basis, holding that "[i]f the charter

creates a cause of action for sexual orientation discrimination, then it conflicts with the state law of governmental immunity." *Id.* In response to the dissent's assertion that the Court shouldn't have decided the case on an issue that was never raised, the *Mack* majority said that it "absolutely oppose[d]" the notion that "although a controlling legal issue is squarely before this Court, in this case preemption by state law, the parties' failure or refusal to offer correct solutions to the issue limits this Court's ability to probe for and provide the correct solution." *Id.* at 207. "Such an approach," the majority reasoned, "would seriously curtail the ability of this Court to function effectively." *Id.*

The Court of Appeals recently observed that "we may overlook the preservation requirements in civil cases 'if the failure to consider the issue would result in manifest injustice, if consideration is necessary for a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented.'" *George v Allstate Ins Co*, 329 Mich App 448; 942 NW2d 628 (2019). Thus, in *Toll Northville, Ltd v Northville Twp*, 272 Mich App 352; 726 NW2d 57 (2006), *vacated in part on other grounds* 480 Mich 6 (2008), the Court of Appeals addressed whether the Michigan Tax Tribunal had jurisdiction or authority to grant the relief requested by the plaintiff. In *Fisher v WA Foote Mem'l Hosp*, 261 Mich 727; 683 NW2d 248 (2004), the Court of Appeals reached the unpreserved issue of whether MCL 333.21513(e) creates a private cause of action.

Here, manifest justice has occurred when the Court of Appeals refused to address this issue. Const 1963, art 2, §4(1)(h) was amended effective December 22, 2018 and 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.
>
> 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 subsection shall prevent the legislature from expanding voters' rights beyond what is provided herein.** This subsection and any portion hereof shall be severable. If any portion of this subsection is held invalid or unenforceable as to any person or circumstance, that invalidity or unenforceability shall not affect the validity, enforceability, or application of any other portion of this subsection. [Emphasis added]

The trial court concluded that Defendant Benson has the sole authority to decide the scope of an "audit" in all respects. This ruling necessarily *limits* the ability of Plaintiff to conduct an audit. Indeed, Defendants argued 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 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 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[2] and the Michigan Supreme Court[3] 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

[2] Case No. 344443

[3] Case No. 162245

concerning the nature of their right to an audit of the election results under Const 1963, art 2, § 4(1)(h)." 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 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").

Constantino, 950 NW2d at 710-711. Simply put, Plaintiff's appeal is a case of first impression. The cases of *Genetski* and *Costantino* (although instructive) have no precedential value.

MCL 168.31a(2) is unconstitutional both on its face and as applied because it directly violates the Michigan Constitution. Indeed, MCL 168.31a(2) limits the application of Const 1963, art 2, § 4, which states that the application of Sec. 4 shall be liberally construed in favor of the vote. Section 4 also states that the legislature may expand "voters' rights beyond what is provided herein." However, MCL 168.31a(2) limits voter rights by allowing the Secretary of State of define or limit voter rights. Whereas Sec. 4 states that a voter is permitted to "audit" (meaning on the voters' terms). MCL 168.31a(2) grants authority solely to the Secretary of State to redefine and limit the voters' right.

ISSUE #8: THE TRIAL COURT ERRED WHEN IT DENIED PLAINTIFF'S MOTION TO ADJOURN SUMMARY DISPOSITION IN ORDER TO ALLOW IMPORTANT AND RELEVANT DISCOVERY TO PROCEED.

At a hearing on April 12, 2021, this Court stated that Plaintiff would amend discovery requests to include no more than 20 interrogatories and 50 requests to produce by April 19, 2021 and those responses would be due within 28 days of the date of the hearing. **[Ex 13, AT's Appx., Vol 4, pp. 644]**. At the hearing the Court resolved a number of discovery issues. Among those issues was the scheduling of several crucial depositions, which the Court held would be conducted, in the absence of an agreement by the parties to a different date, on May 15 and 22-23, 2021. **[Ex 13, AT's Appx., Vol 4, pp. 659-663, 669]** . Defendants' attorney requested that "the Court at least consider holding these discovery requests in abeyance until our motion for summary disposition that was filed on Friday is decided." **[*Id.* at 602]**. Defendants' attorney

repeated this request later in the hearing: ". . . is there any desire or interest in the Court in holding discovery until that motion is decided?" **[*Id.* at 649]**.

The Court declined this request. "I've heard it from both of you and Mr. Kazim, but, no, I think discovery needs to continue at pace. I'm not making any judgment; I have read the motion. I'm not making any judgment on the motion by saying so, but there are issues in this case that certainly deserve to be fleshed out." **[*Id.* at 649-650]**. Instead, the Court ordered that a large proportion of requests by Plaintiff be produced, modifying or limiting the scope of some requests as it deemed appropriate. **[*Id.* at 627-638]**. Thus, it does not appear that the Court deems it appropriate at this juncture to consider summary disposition prior to the substantial completion of discovery. However, the next day, on April 13, 2021, the Court scheduled the motion for summary disposition on for May 10, 2021 at 1:30 pm **[Ex 14, AT's Appx., Vol 4, pp. 675-676]**.

Plaintiff's due date to respond to the motion for summary disposition was May 3, 2021, prior to the responses to discovery. Defendants' due day for response to discovery was May 10, 2021, the same day as the scheduled hearing on the motion for summary disposition. The scheduled date was also prior to the dates for any scheduled depositions. Indeed, when Plaintiff's attorney requested dates for deposition, Defendant Benson's attorney responded with dates after the scheduled motion.[4]

On April 20, 2021, Plaintiff filed his *Motion to Adjourn Hearing on Defendants' Motion for Summary Disposition and Clarify Scheduling Order* **[Ex 15, AT's Appx., Vol 4, pp. 677-709]**. The trial court scheduled a hearing for April 26, 2021 at 1:30 PM **[Ex 16, AT's Appx., Vol**

[4] Plaintiff's attorney reminded the trial court that Plaintiff served discovery requests on Defendants on Defendants on February 26, 2021 (2nd requests), March 5, 2021 (3rd requests), and March 11, 2021 (4th requests) at a time when Defendants' time to respond was 7 days. Defendants missed the deadline for the 2nd and 3rd requests and then filed a motion for protective order on March 17, 2021.

4, pp. 710-711]. This motion was filed approximately 52 days after the 2nd discovery requests were served. It is Plaintiff's position that this matter was not ripe for summary disposition, and in any event, the testimony gathered by all parties at the depositions scheduled for May 15 and 22-23, 2021 would be indispensable to the Court in determining the appropriate resolution of Plaintiff's claims.

Accordingly, Plaintiff moved for a replacement scheduling order providing a date for the summary disposition hearing that was after May 23, 2021. MCR 2.503(B)(1) states that an adjournment must be based on good cause. Plaintiff presented good cause in this case because the trial court scheduled the motion for summary disposition for the wrong date, contrary to its statements on the record. The trial court denied the motion to adjourn:

> And that's Eaton County Board of Road Commissioners versus Schultz, 205 Mich. App. 371 (1994). And there are a series of other cases that discuss the same point. So, again, I'm looking squarely at the pleadings in looking at a (C)(4) motion. So I do believe that I've got the ability to go ahead and review that motion, regardless of the progress of discovery.
>
> And if they are cloaked (C)(10) motions, then I may not have the ability to decide those matters when we actually get to decisions on the motions. So the motion to adjourn the motion for summary disposition is denied.

[Ex 23, AT's Appx., Vol 4, pp. 976-977].

Plaintiff objected to the orders proposed because they did not conform to the dates set forth previously by the trial court. Plaintiff was overruled **[Ex 22, AT's Appx., Vol 4, pp. 938-940].** The discovery and depositions (including the deposition of Secretary of State Benson were vital to the case and the hearing on summary disposition. The trial court abused its discretion when it denied the motion to adjourn.

ISSUE #9: THE TRIAL COURT ERRED WHEN IT FAILED TO HEAR PLAINTIFF'S MOTION TO AMEND COMPLAINT

The Court of Appeals erred when it affirmed the trial court's decision to deny Plaintiff's right to amend his complaint. The Court of Appeals concluded that prejudice would have occurred if Plaintiff was allowed to add additional parties. *Opinion*, at 12. The trial court made it's decision based on MCR 2.116(C)(4). However, the Court of Appeals made its decision based on MCR 2.116(C)(8).

MCR 2.116(I)(5) permits a party to amend their pleadings "[i]f the grounds are based on subrule (C)(8), (9), and (10)." Plaintiff's motion to amend the complaint contained additional requested relief and additional findings of fact. Plaintiff would not have been able to request this relief at the time he filed the original complaint. Rather, he needed assistance from his expert witnesses (which takes time) in order to further articulate the relief requested. This was substantially delayed by Defendant Benson's failure to turn over discovery timely and by the destruction of evidence. The trial court abused its discretion when it refused to hear the motion to amend. The Court of Appeals erred when it refused to allow an amendment after it ruled based on MCR 2.116(C)(8).

ISSUE #10: THE TRIAL COURT ERRED WHEN IT RELIED ON INADMISSABLE HEARSAY.

The Court of Appeals once against has attempted to protect the trial court when it erroneously considered inadmissible evidence. Without question, the trial court relied on inadmissible hearsay in making its decision. However, the Court of Appeals now claims that it has made it's decision based on MCR 2.116(C)(8), and therefore need not consider the erroneous decision of the trial court in accepting inadmissible evidence. Indeed, but for accepting the inadmissible evidence, the trial court would never have granted Defendants' motion to dismiss.

On May 10, 2021, during oral argument, Defendant Benson's attorney admitted there was no audit.

> THE COURT: Mr. Grill, is that the reason that, when conducting the "audit" in Antrim County, the Secretary did not investigate the individual township issues that had been raised in this case, but rather addressed only the federal issue -- that was the election associated with the president?
>
> MR. GRILL: To an extent, your Honor. There's something of a misconception there, that I think probably needs to be addressed. That wasn't an audit, per se. That was a hand count that the Secretary did to try to reassure the public that the results were accurate because there was a lot of misinformation flying around at the time. But the audit itself was of the statewide results, which is a results audit with a number of clerks kind of random sampling, sending in their results and having those reviewed and tabulated, and that's what was conducted.

[Ex 4, AT's Appx., Vol 1, pp. 74-75]. Based on Mr. Grill's admission, Defendant Benson conducted no audit in Antrim County; a right to which Plaintiff was constitutionally entitled.

> [MR. DePERNO]: There's never been audit. There's not an audit provided by the county. There's never been an audit, as Mr. Grill even admitted today, not an audit provided by the Secretary of State. And -- so their argument appears to be that you just can't get an audit of a county election. Can't certainly get an audit of a downballot election -- especially when we have allegations of significant fraud.

[*Id.* at 105]. However, on May 18, 2021, the trial court considered the press releases, and in fact relied on them solely in making its determination. The trial court ignored Mr. Grill's admission and bailed Defendants out of their legally and factually deficient motion.

> In our matter, Mr. Bailey argues that no audit took place. The Secretary of State did perform two relevant reviews, however. The first is a hand recount of the Antrim County presidential votes, which occurred on or about December 15th of 2020. The defendant Secretary of State admitted at oral argument, however, that this hand recount was not an audit pursuant to the power given to the Secretary of State under 168.31a(2); rather, the defendants point to the statewide election audit discussed in the Court of Claims, as their 168.31 subway [sic] audit. A process outlined in press releases dated 2/12 of '21 and 3/2 of '21, from the Secretary of State in their argument on this motion.
>
> The plaintiff argues these releases wouldn't be admissible, as they're hearsay, but the Court believes that the record -- records would likely be admissible pursuant to 803(8) as public records, or be introduced pursuant to direct evidence from one of the state actors in this case. There is, therefore,

> evidence of an audit conducted pursuant to 168.31a. To be clear, that audit is not what the plaintiff would have liked. As indeed, the audit in Genetski was not what the Allegan County Clerk would have liked.

[Ex 5, AT's Appx., Vol 1, pp. 150-151].

Without question, the press releases at issue are defined as hearsay. MRE 801(c).[5] They are, therefore, inadmissible under MRE 802.[6] The trial court erred when it considered these press releases. Again, Mr. Grill admitted there was no audit in Antrim County. The trial court then rescued Mr. Grill by considering Defendant Benson's own self-serving press releases as proof that she conducted an audit. Clearly, the trial court erred. The trial court did not cite to an exception because none exists. This Court of Appeals cannot now fill in the blanks and rescue Defendants again. Even if there was an exception, the self-serving press releases lack trustworthiness. Second, the trial court clearly abused his discretion when it overruled Plaintiff's timely objection. *Hadley v Trio Tool Co*, 143 Mich. App. 319, 328; 372 N.W.2d 537 (1985). The press releases should not have been considered as evidence. But for this fatal error, the trial court could not have made the determination that Defendant Benson conducted an audit and the case would not have been dismissed pursuant to MCR 2.116(C)(4). Based on these fatal flaws alone the case must be reversed and remanded. The Court of Appeals erred when it looked past these fatal flaws and corrected the trial court's erroneous decision.

[5] (c) Hearsay. "Hearsay" is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. [MRE 801(c).]

[6] Hearsay is not admissible except as provided by these rules. [MRE 802.]

CONCLUSION AND RELIEF REQUESTED

For the reasons and arguments presented herein, Plaintiff requests this Honorable Court do the following:

1. As to Question 1: REVERSE the Michigan Court of Appeals based on its failure to remand the case back to the trial court to make a ruling based on MCR 2.116(C)(8) and REMAND the case back to the trial court for further proceedings.

2. As to Question 2: REVERSE the Michigan Court of Appeals based on its failure to address the clear error of the trial court when it accepted Defendants' inadmissible evidence and REMAND the case back to the trial court for further proceedings.

3. As to Questions 3-6: REVERSE the Court of Appeals and REMAND the case back to the trial court for further proceedings.

4. As to Question 7: REVERSE the Court of Appeals based on its failure to address this issue and REMAND the case back to the trial court for further proceedings or determine that MCL 168.31a is unconstitutional.

5. As to Questions 8-9: REVERSE the Court of Appeals and REMAND the case back to the trial court for further proceedings to address relevant discovery and consider Plaintiff's amended complaint.

6. As to Question 10: REVERSE the Court of Appeals and REMAND the case back to the trial court for further proceedings to address the inadmissible evidence.

7. Allow Plaintiffs to tax costs pursuant to MCR 7.319.

Respectfully submitted

DePERNO LAW OFFICE, PLLC

Dated: June 2, 2022

/s/ Matthew S. DePerno
Matthew S. DePerno (P52622)
Attorney for Plaintiff-Appellant

PROOF OF SERVICE

Matthew S. DePerno certifies that a copy of Plaintiff-Appellant's Application for Leave to Appeal and this Proof of Service was served on the attorneys of record on the date set forth below through the electronic filing system.

DATED: June 2, 2022

/s Matthew S. DePerno
Matthew S. DePerno