STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF ANTRIM

WILLIAM BAILEY Plaintiff	Case No. 20-9238-CZ
v.	
ANTRIM COUNTY Defendant	HON. KEVIN A. ELSENHEIMER
SECRETARY OF STATE JOCELYN BENSON Intervenor-Defendant,	

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BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR RECONSIDERATION OR, ALTERNATIVELY, REHEARING PURSUANT TO MCR 2.119(F)

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> ***[F]or that cannot be called an election or the expression of the popular sentiment where a part only of the electors have been allowed to be heard, and the others, without being guilty of fraud or negligence, have been excluded.***[1]

1. <u>Reconsideration or rehearing</u>.

MCR 2.119(F)(3) provides guidance to courts in stating that reconsideration is appropriate if there is a "palpable error by which the court and the parties have been misled and show that a different disposition of the [order] must result from correction of the error." MCR 2.119(F)(3). The palpable error provision is not mandatory; rather, it "only provides guidance to a court about when it may be appropriate to consider a motion for rehearing or reconsideration" *People v Walter*, 266 Mich App 341, 350; 700 NW2d 424 (2005). A trial court possesses considerable discretion in granting reconsideration to correct mistakes, to preserve judicial economy, and to minimize costs to the parties." *Kolu v Bylenga*, 24l Mich App 655, 659; 617 NW2d 368 (2000). Indeed, nothing in MCR 2.119(F)(3) restricts this court's discretion to grant a motion for reconsideration. *Smith v Sinai Hospital of Detroit*,152 Mich App 716, 723; 394 NW2d 82 (1986) ("If a trial court wants to give a 'second chance' to a motion it has previously denied, it has every right to do so, and this court rule does nothing to prevent this exercise of discretion. All this rule does is provide the trial court with some guidance on when it may wish to deny motions for rehearing."). Thus, "[a]s a general matter, courts are permitted to revisit issues they previously decided, even if presented with a motion for reconsideration that offers nothing new to the court." *Hill City of Warren*, 276 Mich App 299, 307; 740 NW2d 706 (2007).

2. <u>The December 17, 2020 "hand recount" was insufficient and premised on fraud; Plaintiff has new evidence which the court must consider that could not have been obtained sooner due to discover responses delivered after oral argument</u>.

[1] Cooley, Treatise on the Constitutional Limitations (2d ed 1871) pp 614-15.

The Michigan Constitution [Const 1963, art 2] § 4(1)(h) permits a 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. Defendants argued that they have performed an "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. We know this based on previous expert reports filed with the Court. We also know this based on new information included within this motion.

Expert witness Jeffrey Lenberg has prepared a report dated June 9, 2021 titled "*Case Study Banks Township – Antrim County Election Management Server Found to be Subverted*" [Exhibit 2]. This report details a case study that "was performed on Banks Township to show the results of the manipulation of the project files on the EMS and how the EMS handled the errors introduced." *Id*. at 1. In this case, the Dominion software:

> "The software would typically show an error if the vote selections were shifted outside of a single contest, moreover, when all of the votes for all of the contests on the ballot are moved outside the indexes on that individual ballot the software would be expected to throw what is called an exception in software engineering. When an exception occurs, it must be handled by a programming routine that is designed for error handling (aka exception handling); if this does not occur, the result is typically a crash of the program, and immediate termination of the application."

Id. In this test, 210 ballots were fed into the tabulator. "The objective of the test was to illustrate that the paper tapes would accurately convey the totals of the vote while the EMS would show undervotes for all contests, the result is the categorical loss of all the votes due to the subversion." The results show that all the votes on the EMS went to undervotes, which should not happen. This is significant because all down ballot races are incorrectly tallied.

> In the case of the Antrim County EMS it does not produce any errors on the EMS because the exception is handled in a fashion to create an undervote and disregard the authentic vote. The subversion intentionally suppresses the errors that would likely occur in order to allow manipulation of the votes without detection.

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Id. The report clearly states that all down ballot races, including Proposal 20-1,[2] went to an undervote and had results shifted [Exhibit 3]. It is incredible unlikely that these results are correct considering the subversion because no votes were counted in down ballot races as reflected in the report. For this reason, an audit of all down ballot races is required.

Expert witness Jeffrey Lenberg has prepared another report dated June 9, 2021 titled "*Centralized Subversion of Election Vote Totals and Paper Tapes*" [Exhibit 4]. Simply editing this "file and modifying the mapping of the bullets on the ballots (vote selections) to the candidates allows for manipulation of the vote results." *Id.* at 3. Figure 4 of the report shows the *actual* "manipulation of the raw binary data that creates the modification of both the paper tapes and the results file." The output creates fraudulent paper tapes that do not match the ballots. "The results files on the compact flash cards are also fraudulent and will be processed normally by the EMS showing the same fraudulent vote totals matching the paper tape." *Id.* "This subversion is undetectable in the current canvassing process, as the paper tapes and the vote totals reported on the EMS will precisely match despite the fact they have been fraudulently manipulated." *Id.* The report details how the "VIF_BALLOT_INSTANCE.DVD" file can also be modified. The combination of modifications will "allow for an attacker to choose a variation where either paper tape of the results file [or] modified alone." *Id.* at 6. Essentially one modification to a single file can change the results of the paper tape and electronic total. The votes can be manipulated by a third-party actor, i.e. Election Source, at a central location remotely.

Expert witness Jeffrey Lenberg has prepared another report dated June 9, 2021 titled "*Central Lake Township Reversals Make Ballots Impossible to Count, Helena Township 21%*

[2] A proposed 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.

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Ballot Reversal Rate, 20% Higher Reversal Rate for Republican voters and Mancelona Late Night Ballot Processing" [Exhibit 5]. This report reveals actual manipulation of a file named "VIF_CHOICE_INSTANCE.DVD." Simply put, Central Lake Township had an 82% reversal rate. This occurred because "there were modifications made to the ballots outer markers that led to specific ballots being reversed by the ICP tabulator." *Id.* at 1. This means these ballots were *tampered with*. "Those tampered ballots are never actually counted because they always reverse, and therefore never record votes."

> Forensic analysis of the slog.txt file for Central Lake Township show there are specific irregularities found on outer markers on the physical ballots. The external markings along the edges of the ballots showed modification on blocks 15, 18, 28, 41, and 44. These irregularities were found on both the right and left side of the ballots. The physical ballots and the associated blocks around the perimeter of the ballot were tampered/modified, with either a pen, or some other marker to distort the shape of the block and make the ICP reverse the ballot instead of processing it normally.

Id. at 2-3.

This is the township in which Plaintiff Bill Bailey votes

We now know there is an 82% chance his vote did not count. Recall, Judy Koslowski stated that she was instructed to bring her tabulator and ballots to the county building on November 5, 2020 [Exhibit 6]. "Given the fact that the Central Lake Township ballots were re-processed on November 6, 2020 (three days after election day), this high reversal rate indicates an intentional injection of these tampered ballots in order to overshadow the ambient reversal rate of twenty percent." Plaintiff Bill Bailey is entitled to have his vote counted correctly and have an audit to ensure nobody's vote is disenfranchise because someone modified blocks 15, 18, 28, 41, and 44 on the ballots, causing an 82% reversal rate.

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Expert witness Ben Cotton has prepared an additional report [Exhibit 7] on June 8, 2021 that reveals the Antrim County EMS server was remotely logged into by an anonymous logon on November 5, 2020 and November 17, 2020.

> Antrim EMS failed to maintain windows security event logs before 4 November 2020. Consequently a full user logon activity analysis was not possible to perform. However, within the logs that were present on the system there were at least two successful logins to the EMS server by an Anonymous user. The first occurred on 11/5/2020 at 5:55:56 PM and the second occurred on 11/17/2020 at 5:16:49 PM EST. Both of these logons appeared to have escalated privileges at the time of logon. Given that this computer was supposed to be on a private network, this is very alarming. One would expect that any network logon, if authorized by the accreditation authority, would require specific usernames and passwords to be utilized, not anonymous users. Given the vulnerable state of the operating system and antivirus protections, this apparent unauthorized access is particularly alarming and certainly would not have been authorized on an accredited system.

Id. at 7. Interestingly, the CF card for Central Lake Township was programmed on November 5, 2020 at 10:22 AM. See [Ex 4] at 7. But rather than run the recount at that time, they allowed some anonymous user to remote into the system at 5:56 PM to change data. And then Defendants re-ran the election the next morning on November 6, 2020 at 9:18 AM. Taken as a whole, these reports show that a "hand recount" of just the presidential election is meaningless. Plaintiff is entitled to an audit of the entire ballot from top to bottom. Indeed, the hand recount conducted by Defendant Benson did not satisfy Plaintiff's requested relief in the original complaint, let alone the amended complaint.

Finally, expert witness Jeffrey Lenberg has prepared another report dated June 9, 2021 titled "*Missing Evidence for Evaluation of Antrim County Election, Official Ballots are Easily Fabricated, and Official Ballot PDFs Flawer Making for Errors in Processing.*" [Exhibit 8]. This report states that information is missing that must be turned over in order for the experts to complete their work. Therefore, Plaintiff's claims are not moot.

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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, and 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 who can guarantee that 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

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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.

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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

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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 this Court has 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).

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

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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.'

MCR 2.119(F)(3) provides a trial court with unrestricted discretion to consider a motion for reconsideration and such is warranted where palpable error is shown by which the court and the parties have been misled, and a different disposition is required to correct the error. The Court erred in dismissing *all* of Plaintiff's sufficiently pleaded claims under MCR 2.116(C)(4) or MCR 2.116(C)(8) without analyzing each of those claims and the relief that may be sought thereunder.

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.

3. <u>The Court erred when it stated Plaintiff received the relief requested; What happened, what didn't happen, and what should happened</u>.

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In its ruling from the bench the Circuit Court recited the counts pleaded in Plaintiff's complaint: (1) a right to an audit under Const 1963, art 2, § 4(1)(h) (the audits clause); (2) a claim for preserving the purity of elections under Const 1963, Jeffrey Lenberg has prepared another report dated June 9, 2021 titled "*Central Lake Township Reversals Make Ballots Impossible to Count, Helena Township 21% Ballot Reversal Rate, 20% Higher Reversal Rate for Republican voters and Mancelona Late Night Ballot Processing*"_art 2, § 4(2); (the purity of elections clause); (3) an equal protection claim under Const 1963, art 1, §2 (the equal protection clause); (4) a statutory claim under MCL 168.861 (retention of quo warranto remedies where fraudulent voting is discovered before recount); (5) an action in quo warranto under MCL 600.4545 (providing for filing of an action within 30 days where material fraud or error has been committed in an election and for such action to proceed in the nature of common law quo warranto); and (6) a statutory claim under MCL 168.765 (regarding the handling and processing of absentee ballots). (Transcript of Court's Ruling from the Bench (RTR), 05/18/21, pp. 9-10).

The Court concluded that the relief sought in Plaintiff's complaint was that a forensic image be taken of the precinct tabulators; that there be a non-partisan audit of the November 3, 2020 general election; that a protective order be issued for Defendants to preserve evidence; and such other relief that is equitable and just, which the Court described as "a catch all provision made in almost every civil lawsuit." (RTR, p. 10). Plaintiff never received a forensic image of the precinct tabulators. Defendants continuously blocked Plaintiff's efforts to schedule and collect forensic images of the tabulators. Plaintiff also never received all of the Antrim County equipment owned by the county. See [Ex 7]. Ben Cotton sums this up when he states that the following items were not produced:

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(a) ImageCast Listener Express Server

(b) ImageCast Express Firewall

(c) EMS Express Managed Switch

(d) ICP Wireless Modems (17)

(e) Image Cast Communications Manager Server

(f) ImageCast Listener Express RAS (remote access server) System

(g) ImageCast USB Modems (5)

(h) Network Netflow Data

(i) Router Configuration Data and Logs

The Court then addressed Defendants' "three main points" that Plaintiff's claims were moot, because all requested relief had been granted, and therefore the court stated that Plaintiff lacked standing; and that Plaintiff failed to state a claim upon which relief could be granted. (RTR, p. 11).

Regarding the first argument, the Court summarized that because the relief sought by Plaintiff had been granted, there was no longer a case or controversy, and Plaintiff's claims were moot. As such, as the argument goes, the Court lacked subject matter jurisdiction over the entire case. (RTR, p. 11).

After an incomplete recitation of the mootness doctrine, the Court concluded that it had allowed "a 'forensic audit' subject to protective order of the tabulator in the possession of Antrim County, limited the tabulator's connectivity to the Internet, and required Antrim County to preserve and protect records in its possession with regard to the tabulation of votes on November 3rd of 2020 . . . regarding that election." (RTR, p. 12). The Court concluded "[t]his relief is largely what the plaintiff asked for in bringing this litigation." *Id.*

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The Court essential ignored Plaintiff's remaining constitutional and statutory claims, and the additional relief sought and available thereunder. Rather, the Court questioned whether Plaintiff's request for an audit under the Constitution had been resolved. *Id.* The Court considered the selective process audits provided for in the latter sentences of MCL 168.31a(2), which were described in *Genetski, et al v Benson*, Michigan Court of Claims, Case No. 20-000216 (2020), and several press releases issued by the Secretary of State, as admissible evidence and proof that a constitutionally sufficient audit under § 4(1)(h) had occurred. (RTR, p. 16). These press releases were not admissible and were not sworn under oath. These audits, according to the Court, having been done so "pursuant to the authority set forth in 168.31a," satisfied the constitutional requirement. Without analyzing the events that were proffered by the Secretary of State as evidence of constitutionally sufficient "audits", the Court stated that "[t]here is no right either in the constitutional section or the statute, for the independent audit that [Plaintiff] seeks." (RTR, pp. 16-17). The Court concluded:

> There is no other relief available to the plaintiff in this – on this point. As the plaintiffs have either received all of the requested relief from this Court, or are not entitled to the relief requested as a matter of law, pursuant to my previous discussion, the plaintiff's claims are, in fact, moot. The Court granting judgment to plaintiff on its claim would have no practical legal effect, as the audit available under Article II, Section 4(1)(h) has already been done. There is no reason to do it twice. As the plaintiff has no additional relief available, there is no need to review the remaining counts that it has brought. The plaintiff's claims in this case are moot. No additional relief is available; and, therefore, no claim has been stated.

Id. The Court reasoned that because the Plaintiff's claims were moot, it had no subject matter jurisdiction within the meaning of MCR 2.116(C)(4). *Id.* The Court did not address any of the other specific constitutional or statutory claims pleaded in the Complaint under either MCR 2.116(C)(4) or MCR 2.116(C)(8), nor any other forms of relief pleaded or available thereunder.

The Court erred when it stated granting judgment to Plaintiff would have no legal effect. As stated herein, Plaintiff did not receive all the relief he requested. Additionally, the Court has

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to have a trial on whether fraud occurred. The hand recount does not address whether Defendants destroyed or modified ballots; whether results files were deleted; or whether the election was subverted up and down the ballot. Most definitely, these are issues that must be resolved by a trier of fact.

4. The court erred when it stated Plaintiff's claims are moot.

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.

Summary disposition may be granted under (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 MCR 2.116(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).

"As a general rule, a case becomes moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome. However, MCR 2.116(C)(4) does not apply to moot claims. "A court does not *lose jurisdiction* over a case that has become moot.

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Instead, mootness reflects a policy of judicial self-restraint which prevents the litigation of issues whose outcome has ceased to be of any importance." *Smolen v Dahlmann Apartments, Ltd*, 127 Mich App 108, 119-20; 338 NW2d 892 (1983) (cleaned up) (emphasis supplied). Moreover, even if one claim is moot, the court must consider the remaining claims in light of the relief and remedies sought and available thereunder, respectively. Plaintiff's claims for permanent and other relief are still pending.

There are also important qualifications to the question of mootness. As is consistent with the general standing a citizen has in quo warranto to challenge an election, test the constitutional issues arising therefrom, and question its results, such claims are not moot becuase they fall within the "capable of repetition yet evading review exception." *Attorney Gen v Michigan Pub Service Comm*, 269 Mich App 473, 485; 713 NW2d 290 (2005). Thus, even if there is no way to change election results or grant this Plaintiff retroactive relief, a point not conceded, a moot issue must still be reviewed "if it is publicly significant and is likely to recur, yet . . . evade judicial review." *Id.*

Plaintiff has revealed massive deficiencies in the conducting of elections in the state of Michigan. Without resolution, these issues remain of significant public interest and concern. A complete and comprehensive audit, which Plaintiff believes is required by § 4(1)(h) is the only way to guarantee that potential future elections will have adequate protections in place to remedy these deficiencies and protect the citizens of this state. *Id.* This includes, but is not limited to access to complete discovery; complete forensic analysis of Antrim equipment including routers, modems, and poll books; a recount of all races in the ballots; expert analysis of ballot paper to examine for photocopied ballots; and examination of voter role and poll books. The Secretary of

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State claims to have done a hand recount of only the presidential election which deprives Plaintiff of his constitutional rights under § 4(1)(h).

At oral argument, the Court appeared to at least be aware of this public significance when it asked "how would a concerned citizen go about challenging the purity" regarding "vote tabulation issues" or "the equipment" or "software that's used"? (Hearing Transcript on Defendants Motion for Summary Disposition (HTR), 05/10/21, pp 58-59, pp 58-59). Plaintiff's claims seeking relief in the way of requesting a complete and comprehensive audit to determine the accuracy and integrity of the election; and enforcing the constitution's promise to all Michigan citizens of fair elections free from corruption are the precise avenues for a court to pronounce prospective relief to ensure this mandate.

Because of its conclusion that it lacked subject matter jurisdiction on the basis that all relief had been granted and Plaintiff's claims were moot, the Court did not go on to analyze each of the other constitutional or statutory claims, nor did it recognize the additional relief available under these provisions. Plaintiff contends this was 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 152, 154-55; 934 NW2d 665 (2019). 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

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when a claim is so clearly unenforceable that no factual development could possibly justify recovery. *Adair*, *supra*. See also, *El-Khalil*, 504 Mich at 159-60.

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 (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 on this basis. *El-Khalil*, 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 Court went beyond the pleadings by accepting Defendants' false offering that there had been an audit and that said audit was constitutionally sufficient, and that this constituted the limits of the relief requested or allowed. 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 claim

Putting aside its veracity, 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. See RTR, pp. 12-13. 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

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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 to 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*, 366 Mich at 340 (emphasis added).

These requisite inquiries cannot be ignored in analyzing Plaintiff's motion for reconsideration. 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 Court's 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

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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*.

5. <u>The Court erred when it concluded that Defendant Benson (as a defendant and accused of fraud) can be the person in charge of defining the audit</u>.

The 2018 Constitutional amendment did not contemplate that Defendant Benson (as Secretary of State) could intervene as a party defendant in order to dictate the terms of discovery and the definition of an audit, especially when she has been accused of knowingly conducting a fraudulent election. This is not what the people of the State of Michigan intended when they voted for this amendment. Plaintiff is requesting an audit where the terms are not dictated by the same government agent who is violating the law and destroying evidence. Indeed, on May 14, 2021, Defendant Benson responded to discovery and stated that she does not possess the source code that she is required to maintain pursuant to MCR 168.797c

> 2. Produce a copy of Dominion voting system source code held in trust by the State of Michigan.
>
> RESPONSE: Neither Defendant Benson, the Michigan Department of State, the Bureau of Elections nor any employee, officer, or agent of the same, possess the requested information. Under MCL 168.797c and

The person who is accused of fraud cannot be permitted to be in charge of defining the audit in order to control whether she is granted to the keys to release herself from the jail cell.

6. <u>Plaintiff Stated a Legally Sufficient Claim Under the "Audits Clause"</u>.

The *legal issue* of what constitutes a constitutionally sufficient audit under § 4(1)(h) is unresolved in the state of Michigan. This is a purely legal question. Plaintiff's complaint clearly sufficed to state a legally sufficient claim under § 4(1)(h). If the Court's conclusion is that Defendant's performed a constitutionally sufficient audit and thus Plaintiff has received all the

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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 be filed by Defendants, such a motion would require full analysis of the evidence submitted in support of and against such a motion. The Court cannot do that for Defendants. *El-Kahil*, *supra*.

Beyond this, Plaintiff has raised an important constitutional issue regarding the precise scope of Const 1963, art 2, § 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

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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 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, to be *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 in Antrim County, or elsewhere, 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 Court, like the 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

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sentence of MCL 168.31a(2) was added. See Defendants' Brief, p. 7. However, the remaining language of MCL 168.31a(2) merely describes the *previous* random selective process audit procedures that might be conducted by the Secretary of State. Given that the first sentence was added to comply with § 4(1)(h), its plain language requires more. It certainly could not require less without suffering constitutional deficiency – a claim that is also presented in Plaintiff's complaint, but glossed over by the Court's ruling.

Perhaps Defendants' emphasis on the preexisting language indicates its desire to ignore the complementary and expansive nature of the language in the first sentence, a luxury this Court does 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

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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) "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* reviewing the documents, ballots and procedures used. 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, and did not consider 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

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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*. 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.

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 Sheryl 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

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practical terms, to unilaterally define and approve what was or was not a constitutionally sufficient audit protective of the rights of Michigan's citizens.

What is appropriate at this stage based on the fraud Plaintiff has already exposed, is a hearing to allow the parties to present the evidence and litigate the case so that Plaintiff can prove his entitlement to a complete and comprehensive 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 of the presidential election conducted by the Secretary of State on December 17, 2020, which Defendants admit was not an audit, 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 this Court cannot *sua sponte* apply. *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 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*

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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? Conceptualize a system that allows the results on *any* paper ballot (whether authentic or not) to be completely modified, manipulated, changed at a multitude of points along the way once the image and data enters the machine (or even before), and remotely subverted. That is what Plaintiff has proved can and did occur. There was no integrity in this process.

Thus, the 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

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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 is a conclusion of law that this Court makes in its decision. (RTR, pp. 16-17). But these are purely questions of legal sufficiency, not of claim sufficiency. *El-Khalil*, *supra*. The parties can litigate this under (C)(10), but the Court cannot avoid Defendants' obligation to disprove Plaintiff's case by simply dismissing Plaintiff's legally sufficient and properly stated claims under (C)(8). *Id.*

7. <u>Plaintiff Stated a Legally Sufficient Claim Under the "Purity of Elections" Clause</u>.

Many of the same principles apply to the 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 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*.

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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."

8. 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.

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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). 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.

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The same concerns that implicate equal protection of the law 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 is reverted to human observation, but because the ballots (whether authentic or not), and their ultimate adjudication disappears entirely in to 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. *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

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helpless before the two great and natural historical enemies of all republics, open violence and corruption." *Id.*

The sole basis for 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 absolutely has the authority to allow relief by way of private litigation that will result in remedial measures, e.g., a complete and comprehensive audit, and an injunction to prevent future unconstitutional processes that violate the constitutional rights of plaintiff and citizens of Michigan. *Sharp*, *supra*. Plaintiff has stated legally sufficient claims, which, if successful, entitle him to relief beyond that of a complete and comprehensive 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

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prudential doctrine of mootness gives way. *Attorney Gen v Michigan Pub Service Comm*, 269 Mich App at 485.

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.

9. Plaintiff Stated a Legally Sufficient Claim for Quo Warranto Relief Under MCL 600.4545.

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 recognize 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.

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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*, 258 at 154 (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

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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 has stated an independent and sufficient legal claim under MCL 600.4545.

10. <u>The Court erred when it failed to consider the amended complaint</u>.

The court erred by failing to consider and rule on Plaintiff's motion to amend complaint which 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

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requested. This was substantially delayed by Defendant Benson's failure to turn over discovery timely and by the destruction of evidence.

11. Conclusion and relief requested.

For the reasons stated herein, the Court's dismissal under MCR 2.116(C)(4) on grounds that *all of Plaintiff's* claims were moot ignored the still viable constitutional and statutory claims and relief available thereunder. The Court's order granting summary disposition was palpable error that warrants reinstatement of all of Plaintiff's claims. Therefore, Plaintiff respectfully requests that this Honorable Court grant Plaintiff's motion for reconsideration, or in the alternative grant a rehearing, and reinstate all of the claims in his complaint

Respectfully submitted

DePERNO LAW OFFICE, PLLC

Dated: June 9, 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 Brief in Support of Motion for Reconsideration or, in the alternative, Rehearing Pursuant to MCR 2.119(F)

Service was electronically using the MiFile system which will send notification of such filing of the foregoing document to all attorneys of record.

Dated: June 9, 2021

/s/ Matthew S. DePerno
Matthew S. DePerno (P52622)

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