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

WILLIAM BAILEY

    Plaintiff

v.

ANTRIM COUNTY

    Defendant

SECRETARY OF STATE JOCELYN
BENSON

    Intervenor-Defendant,

Case No. 20-9238-CZ

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BRIEF IN SUPPORT OF PLAINTIFF'S RESPONSE TO JOINT MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(4) and (8)

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A.   SYNOPSIS

Defendants' motion must be dismissed for the reasons stated in this brief. Plaintiff's expert witnesses have now cracked the Dominion voting system and show how easy it is to manipulate the election. This brief details how votes can easily be transferred from Donald Trump to Joe Biden using the tools available on the Antrim County election management system ("EMS"). Our tests confirm that the vote tally errors observed in Antrim County on November 3, 2020 were most likely the result of technical manipulation of the election project file; not human error and not a computer glitch. By conducting a series of tests, Plaintiff's experts were able to replicate the vote tally errors through a method wholly contrary to the "human error" narrative proposed by Alex Halderman. These tests show the following:

1.   Ballots were fed into the tabulator at the precinct/township level [See Ex 14].

    BIDEN ballots: 2

    TRUMP ballots: 2

    JORGENSON ballots: 1

2.   Ballots were counted by the tabulator without error.

3.   The election was then closed and the tally tape printed from the tabulator. It shows the following results [See Ex 14]:

    BIDEN: 4 votes

    TRUMP: 2 votes

    JORGENSON: 1 vote

4.   But even more interesting, we can "flip" the votes in any manner within the same race. We can give all the votes to Jorgenson. We can give all of the votes to Trump. We can give all of the votes to Biden.

5.   The system and election can be entirely compromised utilizing an easy and quick bypass of all security protocol.

6.   The manipulated vote count can then be transferred to the EMS [See Ex 14].

7. This means that the "flip" will never be caught in the canvass. There will be no reason to doubt the election results because the number of votes on the printed tape will match the number of votes in the poll pad.

8. The manipulated results can then be transferred to the Secretary of State and recorded in the state vote tally.

B.   FACTS

1.   The Antrim Shuffle

On November 3, 2021, Joe Biden received 7,769 votes in Antrim County. Donald Trump received 4,509. When combined with the votes for third party candidates, a total of 12,278 votes were cast for president on November 3, 2021.

Date	Registered Voters	Total Votes Cast	Biden	Trump	Third Party	Write-In	TOTAL VOTES for President
Nov 3	22,082	16,047	7,769	4,509	145	14	12,423
Nov 5	22,082	18,059	7,289	9,783	255	20	17,327
Nov 21	22,082	16,044	5,960	9,748	241	23	15,949
Dec 17	22,082		5,959	9,759	244	20	15,962

Antrim County Clerk Sheryl Guy was ready to certify the election until local concerned citizens contacted her and demanded she review the election results. In reality, Donald Trump won Antrim County. In reality, Donald Trump received 9,759 votes and Joe Biden received 5,959 votes. When combined with the votes for third party candidates, a total of 15,962 votes were cast for president on November 3, 2021. In fact, in 9 of the 16 precincts in Antrim County the votes flipped directly from Jorgenson to Trump, Trump to Biden, and Biden's votes went into an under vote category for adjudication.

Jorgenson ▶ Trump ▶ Biden ▶ Undervote

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In the diagram below, we can see that in Chestonia Township (for example) Joe Biden received 197 votes on November 3, 2020. Simultaneously, Donald Trump received 3 votes. In reality, Joe Biden received 93 votes and Donald Trump received 197 votes. This proves there was a direct flip from Jorgenson to Trump to Biden. This same result occurred in 9 of the 16 precincts.

| | Biden | | | Trump | | | Jorgenson | | |
| | Democratic Party | | | Republican Party | | | Libertarian Party | | |
Jurisdiction	Original	Hand Count	Net	Original	Hand Count	Net	Original	Hand Count	Net
TOTAL VOTES	7769	5959	-1810	4509	9759	5250	93	190	97

TOTAL CHANGE			-1810			5250			97

Banks Township, Precint 1	349	349	0	756	758	2	11	11	0
Central Lake Township, Precinct 1	549	549	0	908	906	-2	16	16	0
Chestonia Township, Precint 1	197	93	-104	3	197	194	0	3	3
Custer Township, Precinct 1	523	240	-283	11	521	510	4	11	7
Echo Township, Precinct 1	392	198	-194	8	392	384	1	8	7
Elk Rapids Township, Precinct 1	1198	984	-214	625	1029	404	8	17	9
Forest Home Township, Precinct 1	755	610	-145	19	753	734	1	19	18
Helena Township, Precinct 1	432	306	-126	4	430	426	0	4	4
Jordan Township, Precinct 1	372	182	-190	13	369	356	1	14	13
Kearney Township, Precinct 1	744	470	-274	16	743	727	0	16	16
Mancelona Township, Precinct 1	276	277	1	835	835	0	20	20	0
Mancelona Township, Precinct 2	247	247	0	646	646	0	13	13	0
Milton Township, Precinct 1	686	767	81	484	1023	539	14	18	4
Star Township, Precinct 1	462	166	-296	10	468	458	0	10	10
Torch Lake Township, Precinct 1	527	461	-66	8	526	518	1	7	6
Warner Township, Precinct 1	60	60	0	163	163	0	3	3	0

2.   Jocelyn Benson and Sheryl Guy lie to the public

Rather than conduct an investigation into the skewed results, Guy and Benson combined forces to construct a narrative that these results were the "human error."

- November 19, 2020: Guy testified before the Joint Senate and House Oversight Committee hearing [Exhibit 1]. She made the following knowingly false statements:[1]

  - "The human errors did occur, that led to incorrect election night reports/reporting."

  - "The unofficial results posted, by the Antrim County Clerks Office, at approximately 4:09 was a result of human error facilitated after two ballot corrections."

  - "Therefore, the error caused the election night program to not load correctly."

  - "I can not express how very unfortunate it is that the human error has called into question the integrity of Antrim County's election process and placed it front and center at the national level."

  - "However, I must emphasize, that the human error did not in any way or form uhhh shape or form effect the official election results of Antrim County."

  - "I have heard things. And I would say that Michigan voting equipment is probably the safest equipment, you know, across the states."

- November 23, 2020: Benson issued a statement that "the election was fair and secure and the results accurately reflect the will of the votes." [Exhibit 2].

- She further asserted falsely that "[t]oday [our democracy and election officials] survived an unprecedented attack on its integrity . . . based in falsehoods and misinformation." *Id.*

- December 9, 2020: Benson made false statements about the extent of audits in the state [Exhibit 3].

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[1] Sheryl Guy made many false statements on November 19, 2020. The statements listed here concern the false claim that the incorrect results were "human error" and that the Dominion machines are safe.

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- December 14, 2020: Benson made the false statement the "Michigan's Nov. 3 general election in Michigan and across the country was the most secure in the nation's history." [Exhibit 4].

- Benson and Attorney General Dana Nessel falsely and recklessly attacked a report published by Allied Security Operations Group (ASOG). *Id.*

- December 15, 2020: Guy made unsubstantiated attacks against ASOG and falsely stated that "[w]hile the County is interested in knowing of any deficiencies in the election system and process, the conclusions of the preliminary report demonstrates an extreme lack of understanding of the election software and process." She also falsely stated that "Antrim County has been and will continue its dedication to transparency."

- December 18, 2020: Benson falsely claimed that a December 17, 2020 "hand recount" represented "a net gain of 12 votes for Trump, largely mirroring the machine-tabulation results from Nov. 3." [Exhibit 5].

- She further pushed the false narrative that opposition to the results on November 3, 2020 were "conspiracy theories." She falsely stated that the November 3, 2020 results only showed "slight differences" from the hand ballot counts. *Id.*

- She further made the false statement that "[t]he closeness of the results to the previously Nov. 3 totals confirms the reporting error prior to certification was not related to the tabulation equipment, depite the proliferation of meritless conspiracy theories stating otherwise." *Id.*

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- March 2, 2021: Benson stated "it is time for leaders across the political spectrum to tell their constituents the truth, that our election was the most secure in history, and the results accurately reflect the will of Michigan's voters." [Exhibit 6].

This was not "human error." The November 3, 2020 election was not the safest election in history. These statements were knowingly false or made recklessly with the intent to deceive people.

3. The ASOG Report / Sheryl Guy violates federal law and deletes files

On December 4, 2020, forensic experts obtained images of Antrim County's election management system ("EMS"). On December 14, 2020, ASOG released a report styled "*Antrim Michigan Forensics Report, Revised Preliminary Summary, v2*"[2] [Exhibit 7]. In that report, they determined"

> 2. We conclude that the Dominion Voting System is intentionally and purposefully designed with inherent errors to create systemic fraud and influence election results. The system intentionally generates an enormously high number of ballot errors. The electronic ballots are then transferred for adjudication. The intentional errors lead to bulk adjudication of ballots with no oversight, no transparency, and no audit trail. This leads to voter fraud. Based on our study, we conclude that The Dominion Voting System should not be used in Michigan. We further conclude that the results of Antrim County should not have been certified.

ASOG also found that certain log files were missing from the system.

> 15. Significantly, the computer system shows vote adjudication logs for prior years; but all adjudication log entries for the 2020 election cycle are missing. The adjudication process is the simplest way to manually manipulate votes. The lack of records prevents any form of audit accountability, and their conspicuous absence is extremely suspicious since the files exist for previous years using the same software. Removal of these files violates state law and prevents a meaningful audit, even if the Secretary wanted to conduct an audit. We must conclude that the 2020 election cycle records have been manually removed.

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[2] Any protective order regarding the redacted portions should be lifted. None of this is source code.

16. Likewise, all server security logs prior to 11:03 pm on November 4, 2020 are missing. This means that all security logs for the day after the election, on election day, and prior to election day are gone. Security logs are very important to an audit trail, forensics, and for detecting advanced persistent threats and outside attacks, especially on systems with outdated system files. These logs would contain domain controls, authentication failures, error codes, times users logged on and off, network connections to file servers between file accesses, internet connections, times, and data transfers. Other server logs before November 4, 2020 are present; therefore, there is no reasonable explanation for the security logs to be missing.

Federal law states that this information must be preserved:

52 U.S. Code § 20701 - Retention and preservation of records and papers by officers of elections; deposit with custodian; penalty for violation

Every officer of election shall retain and preserve, for a period of twenty-two months from the date of any general, special, or primary election of which candidates for the office of President, Vice President, presidential elector, Member of the Senate, Member of the House of Representatives, or Resident Commissioner from the Commonwealth of Puerto Rico are voted for, all records and papers which come into his possession relating to any application, registration, payment of poll tax, or other act requisite to voting in such election, except that, when required by law, such records and papers may be delivered to another officer of election and except that, if a State or the Commonwealth of Puerto Rico designates a custodian to retain and preserve these records and papers at a specified place, then such records and papers may be deposited with such custodian, and the duty to retain and preserve any record or paper so deposited shall devolve upon such custodian. Any officer of election or custodian who willfully fails to comply with this section shall be fined not more than $1,000 or imprisoned not more than one year, or both.

4.   Sheryl Guy admits to deleting files / Attorney General Nessel refuses to investigate

On March 4, 2021, at a board of commissions meeting, Sheryl Guy acknowledged that she directed her staff to delete the data on November 4, 2020:[3]
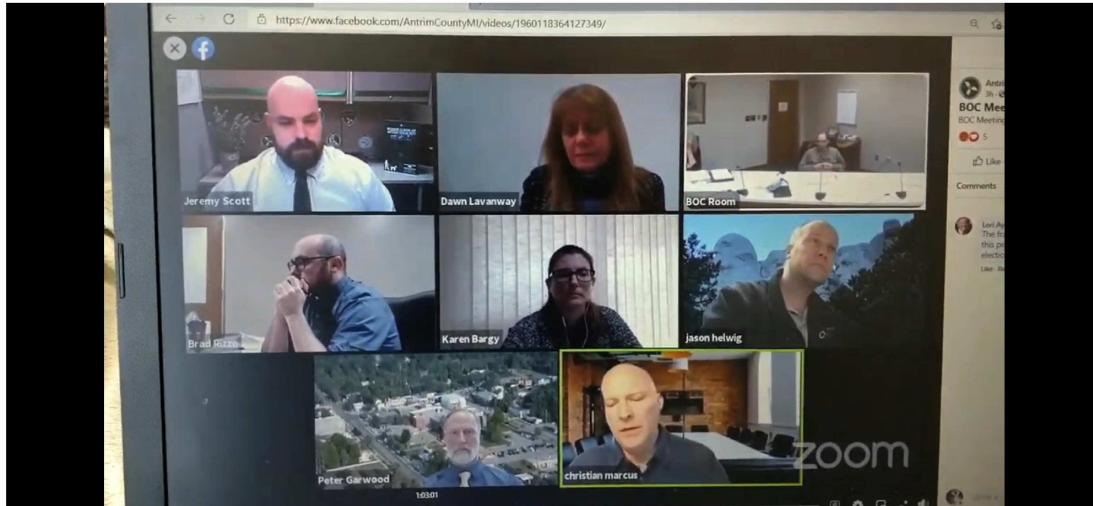
In this video segment, Commissioner Marcus asked, "Did you direct or delete yourself any files on the Dominion services? Did you direct anybody on your staff to do so?" In response, Sheryl Guy stated:

> "When you are saying who went in and worked on those files, whether they deleted them, replaced them, changed them, or corrected them, it was my office. I have never gone on to that machine. But it was my staff and it was because they were doing their job. We truly did not have correct training with the Election Source new program. Because we didn't know we had to pull all the cards back, not just the ones we had fixed. So when you are talking about who did it, I did it. My office staff did it under my authority to get those numbers right. It wasn't fraud. It was doing my job. Getting my numbers certified."

Commissioner Marcus then responded, **"Sounds like you just admitted to 1) breaking the law by making changes to the thing within the 30 day period 2) admitting that you deleted files and destroyed the integrity of the election in Antrim County. You admitted to directing your employees to do so. So basically, Antrim County's vote was completely skewed by your office and you're admitting it."**

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[3] See https://youtu.be/M8NG_m6ktD0.

Nevertheless, Attorney General Nessel has refused to investigate this crime. The fact remains that the files are gone. Sheryl Guy has admitted it that she directed her staff to do it. This is a serious problem.[4] Instead, the government has argued that nothing happened. Sheryl Guy knowingly destroyed evidence. The State of Michigan has abrogated its responsibility.

5.   Sheryl Guy improperly dismisses lawsuit

On March 3, 2021, Guy dismissed or directed her staff to dismiss this instant case, *William Bailey v. Antrim County*, case no. 2020-9238-CZ [Exhibit 8]. It was later determined by this Court that Defendant Guy had improperly dismissed *William Bailey v. Antrim County*, and the case was reinstated by this Honorable Court [Exhibit 9].

6.   Dr. Douglas G. Frank reveals the algorithm

On April 8, 2021, Plaintiff's counsel and investigative team reveal that that Dr. Frank has uncovered an algorithm at work in Michigan that can shift votes based on census data and registration data.[5] Dr. Frank looked at 9 counties: Antrim. Barry, Charlevoix, Grand Traverse, Kent, Livingston, Macomb, Oakland, and Wayne. He concludes:

- Voter registration is consistently near, or exceeding county population demographics.

- **There are over 66,000 ballots recorded that are not associated with a registered voter.**

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[4] Indeed, it may be a crime.

> (5) A person shall not do any of the following:
>
> > (a) Knowingly and intentionally remove, alter, conceal, destroy, or otherwise tamper with evidence to be offered in a present or future official proceeding.

MCL 750.483a(5)(a). The penalty if "committed in a criminal case" is "imprisonment for not more than 10 years or a fine of not more than $20,000.00, or both."

See also, MCL 750.505.

[5] See *Plaintiff's Collective Response to Defendants' and Non-Party Counties' Motions to Quash and for Protective Order*. https://www.depernolaw.com/bailey-documents.html

- The ability to predict ballot demographics with such remarkable precision (average correlation coefficient of **R = 0.997**) demonstrates the activity of a regulating algorithm.

- **This confirms, as seen in several other states, that ballots are being harvested at the precinct level, regulated at the county level, and determined at the state level.**

- The degree of precision observed confirms that algorithms had access to voting databases and voting activity before, during, and following the November 3, 2020 election.

	Wayne County	Oakland County	Macomb County	Kent County	Livingston County	Grand Traverse County	Barry County	Charlevoi x County	Antrim County
Total Population	1,749,284	1,257,532	873,922	656,900	191,938	93,030	61,489	26,089	23,266
Total 18+ Population	1,339,405	999,630	694,156	500,078	152,390	74,536	48,094	21,337	19,222
Current Registered (4/6/2021)	1,383,669	1,016,125	685,385	492,643	159,774	79,954	49,724	23,576	21,935
Total Registrations (October Database)	1,365,392	1,011,669	670,592	489,234	157,667	79,537	48,628	23,279	24,118
Total Ballots in Database	840,810	750,232	477,718	348,880	123,642	57,888	34,913	16,574	14,901
Ballots not found in October Database	20,124	17,551	13,596	8,782	3,240	1,295	914	380	312

312 of those votes come from Antrim County. The study revealed that across the 9 counties studied, there is a 0.997 average correlation.
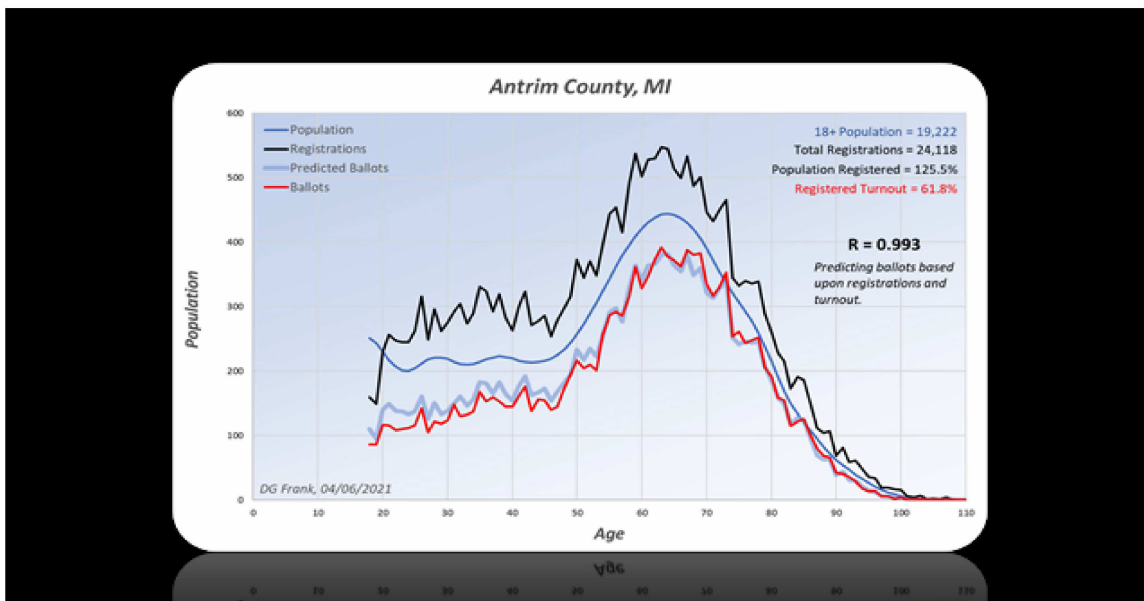
In relatively simply terms, this means that when we take the census data and the registration data and then apply the algorithm, we can predict the number of ballots cast in a county to 99.7% certainty without seeing the results. The study also showed that Antrim County has more registered voters than eligible voting population:

7.   **James Penrose and Ben Cotton reveal internet connectivity across the dedicated network**

James Penrose also explained internet connectivity on both Dominion and ES&S machines [Exhibit 10]. The Dominion Voting Systems proposal for Antrim County shows a quote for procurement of wireless transmission capabilities. Dominion representatives also confirmed performance issues with wireless transmission of vote totals and even went as far as disabling the saving of ballot images without explicit authorization during the 2020 primary. In addition, a forensic examination of a Dominion ICX machine has shown the existence of Taiwan and Germany-based IP addresses in unallocated space, implying there were international communications via the Internet. In addition, ES&S DS200 machines in Michigan utilized wireless 4G network adapters for vote transmission over the commercial Verizon network. The company that manufactures the 4G wireless modems is named Telit. Telit has recently taken investment from a major Chinese firm and according to press reporting the UK government is monitoring the situation with concern that the Chinese government is in a position to exercise influence over Telit.

Benjamin Cotton has also prepared an affidavit after review of the Antrim County system [Exhibit 11]. He states that he reviewed the forensic image of the Dominion system "utilized in the November 2020 election and discovered evidence of internet communications to a number of public and private IP addresses." One connection in particular traced back to "the Ministry of Education Computer Center, 12F, No 106, Sec 2, Hoping E. Rd., Taipei Taiwan 106." Further,

"[t]his IP address resolves to a cloud provider in Germany." Mr. Cotton's findings show that the Antrim County system was connected to the internet. Of course, Sheryl Guy deleted system files that would allow further review. For this reason, review of other systems in other counties is critical.

8.   Cyber Ninjas reveals existence of Microsoft SQL Server Management Studio on Antrim County EMS

Cyber Ninjas has also prepared a report after review of the Antrim County system [Exhibit 12]. This report includes a multitude of problems found within the system and amount to gross error by Dominion and Antrim County. One of the most important discoveries is detailed on page 15 of the report. Here, Cyber Ninjas discovered a Microsoft SQL Server Management Studio implant on the system. This piece of software is not approved by the Election Assistance Commission ("EAC") and allows a user to actually circumvent security protocol and make "direct[] edit entries within the database" which "could potentially be utilized to change vote values." Perhaps most importantly, this software is a "separate install." In other words, it should not be on the system. It is, by its very definition, a hacking tool.

9.   Plaintiff's team cracks the Dominion voting system in Antrim County and shows how easy it is to manipulate the election. This shows the Defendants complicity in the fraud perpetrated on November 3, 2020 in Antrim County

As explained at the start of the brief, Plaintiff's expert witnesses have now cracked the Dominion voting system and have shown how easy it is to manipulate the election.

a.   James Penrose new report

James Penrose has authored a new report that describes the ability to easily manipulate an election using the Dominion voting system [Exhibit 13].

b. __Jeff Lenberg new report__

Jeff Lenberg has authored a new report that describes his process on easily switching the votes on the Dominion voting system using the Antrim County configuration [Exhibit 14]. He states:

> Testing of Antrim County project files indicates that modification of the project files can replicate the election inaccuracies observed in the November 3, 2020 election. In addition, further testing revealed that selective modification of the project files resulted in tailored manipulation of the votes tallied. The manipulation can be tailored to modify a specific county, precinct, or race. The steps used to manipulate the vote tally are listed below:
>
> - Modify the specific precinct election files
>
>   o Edit the VIF_BALLOT_INSTANCE.DVD
>
>   o Note: Technical access to ElectionSource corporate resources would allow for these types of manipulations to the elections.
>
> - Burn Compact Flash cards with the configurations for the tabulators
>
> - Run the Election (Process the Ballots through the Tabulator)
>
> The results of the modifications to the project file will show vote totals changed on the tabulator's printed tape as well as modified vote totals in the Results Tally Reporting (RTR) system.
>
> In order to validate these findings; two test cases were run:
>
>   1. The swap of Trump and Jorgenson vote totals on both the paper tape and the RTR results
>
>   2. The swap of Biden and Trump (Presidential Race) and Ferguson and Bergman (Congressional) while leaving the Senate race unmodified on both the paper tape and the RTR results

Exhibit A contains photos of all the ballots that were run for test case number 2 as well as the paper tapes and RTR tallies showing the manipulations.

Both test cases were successful in that the modifications were made without any alerts or error messages being generated by the EMS or the tabulator. The test cases would not have been detected during the canvassing process because both the paper tapes and the RTR results matched.

C.   STANDARD OF REVIEW

1.   MCR 2.116(C)(4)

Dismissal under MCR 2.116(C)(4) is appropriate when the "court lacks jurisdiction of the subject matter." When presented with a motion pursuant to MCR 2.116(C)(4), the Tribunal must consider any and all affidavits, pleadings, depositions, admissions, and documentary evidence submitted by the parties.4 In addition, the evidence offered in support of or in opposition to a party's motion will "only be considered to the extent that the content or substance would be admissible as evidence to establish or deny the grounds stated in the motion." MCR 2.116(G)(6).

2.   MCR 2.116(C)(8)

"MCR 2.116(C)(8) provides for summary disposition of a claim on the ground that the opposing party has failed to state a claim on which relief can be granted. A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone." *Lakeside Oakland Development v H&J Beef Co*, 249 Mich App 517, 530 n4 (2002). When considering a motion under MCR 2.116(C)(8), "[a]ll factual allegations in support of the claim, and any reasonable inferences or conclusions that can be drawn from the facts, are accepted as true." *Id.* In addition, "[w]hen reviewing a motion under MCR 2.116(C)(10), a court must examine the documentary evidence presented and, draw all reasonable inferences in favor of the nonmoving party, and determine whether a genuine issue of material fact exists." *Qunito v Cross & Peters Co*, 451

Mich 358, 362; 547 NW2d 314 (1996). Summary disposition should only be granted pursuant to MCR 2.116(C)(8) when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Smith v Globe Life Insurance Co*, 460 Mich 446, 455 (1999).

## D.   LAW AND ARGUMENT

1.   Plaintiff's claims are not moot

Defendants' argue that Defendant Benson has already performed an audit. As support, Defendants point to self-serving press releases from her media partners. These are inadmissible hearsay. Defendants' arguments are also without merit. Plaintiff has not obtained an audit of the election. As an initial matter, we must disabuse the world of the false narrative that Benson performed a "hand recount" or "audit" of the Antrim County results or that she "conducted statewide audits." She did neither.

As to the issue of a "hand recount of the results", Defendant Benson only performed a very limited hand recount of the presidential election only. She has refused to perform a hand recount of any down-ballot elections in Antrim County. Indeed, Benson initially announced to the world that she would be performing an "audit" of the election results [Exhibit 15]. We can see from the notice dated December 15, 2020 that this was scheduled to be an "ALL COUNTY AUDIT" scheduled for 2 days. Even her email from December 15, 2020 stated that an audit was scheduled [Exhibit 16]. But at the last minute, Benson changed the time to only 1 day and only performed a hand recount of the presidential election. The results of the hand recount revealed a gross disparity of the election results as initially reported on November 3, 2020 [Exhibit 17]. In fact, the results revealed that in 9 of the 16 precincts, votes were flipped form Jorgenson to Trump, then Trump to Biden, and Biden's votes disappeared. But surprisingly, Hawkins did not

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flip to Jorgenson, Blankenship did not flip to Hawkins, and De La Fuente did not flip to Blanksenship. And how did the votes for Biden evaporate? We now know they didn't evaporate. They were put into the "undervote" category; meaning they would be adjudicated, presumably for Biden.

We must also consider what actually happened at the "hand recount" on December 15, 2020. As previously report, a Secretary of State official told two of the volunteers to count approximately 138 ballots with the very same signature in Central Lake Township.[6]
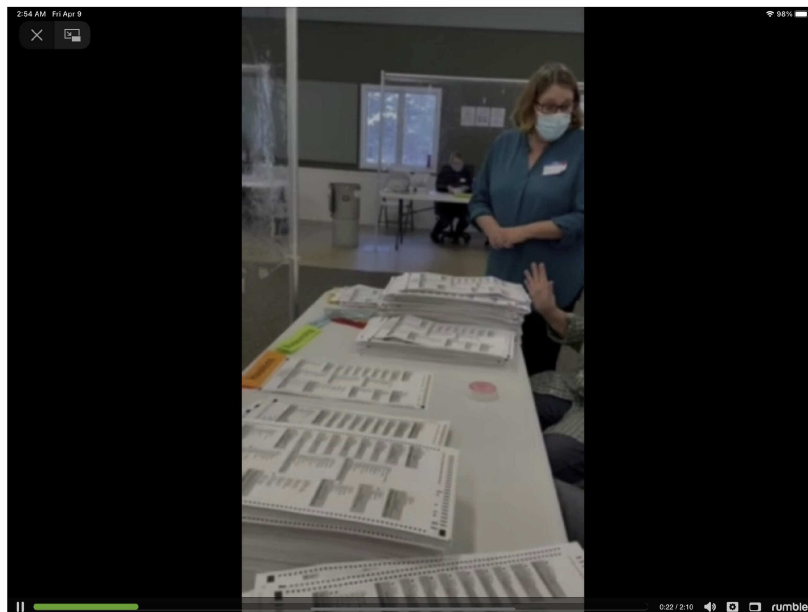
> SOS official: "So, you need to move forward with the audit, so we can get the numbers, so we can see how many ballots are here."
>
> The female counter asks, "So when we're done with the audit, there's still the opportunity to challenge the fact that we have multiple ballots with the very same signature?" she asks.

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[6] https://www.thegatewaypundit.com/2020/12/mi-sec-state-official-caught-video-telling-volunteers-count-multiple-ballots-signature-audit-votes-antrim-county/

"I don't know if 'challenge' is the right word," the SOS official says.

"But we're challenging—" the volunteer says.

The male volunteer tells the SOS, "We'll go ahead and count the ballots moving forward, but we will separate out, and count those— there's going to be an asterisk, saying 'these ballots have the same signature.'"

"And again, we know that you have a concern with this precinct," she tells them, explaining, "That's not your role at this very moment," as she continues to push for them to ignore the multiple matching signatures and only count the ballots.

"What I need you to do right now is finish the audit," she tells them again. Both of the volunteers explain that they are going to make a note of the ballots, to which the SOS official replies, "Again, that is not the process."

The SOS official implores them to continue to count the presidential ballots.

At no point does the SOS official assure them that the issue of the multiple potentially fraudulent ballots will be addressed, but instead demands that they count them as if they were all legitimate ballots.

School Board Member for Central Lake Schools (3)

	Recount 11/6	Election 11/3
Melanie Eckhardt:	852	519
Keith Shafer:	846	525
Write-in:	112	24
Total Votes:	1810	1068

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Recount 11/6   Election 11/3
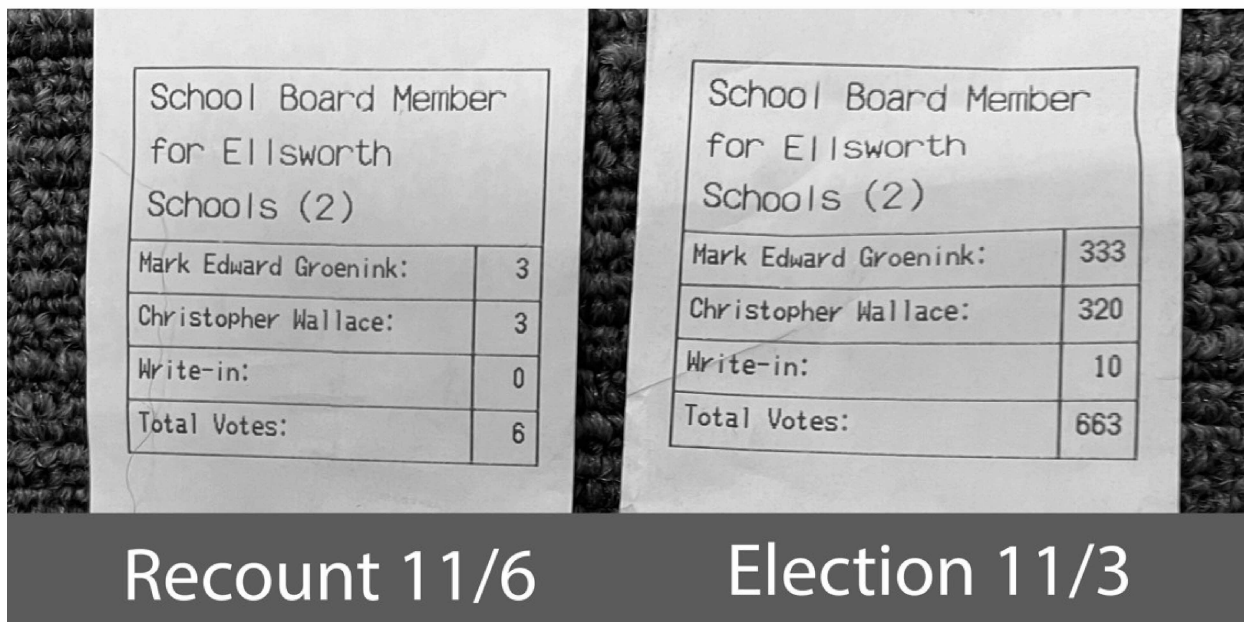
The two diagrams above demonstrate significant errors that should not occur in this system. Without a proper, scientific and nonpolitical explanation by Defendants, and based on their refusal to answer discovery, we must assume fraud.

Next, Benson never performed any "audit" in Antrim County. Her own publication titled *Post-Election Audit Manual* [Exhibit 18] details "audit" procedures:

- "Election notices, election inspector appointments and training, ePollbook security, test deck procedures, military and overseas voter applications, and a review of the *Pollbook* and ballot containers used on election day will be the primary focus of the audit. In addition, an audit of the results of up to three contests in a General election and one contest in other elections on the ballot in each precinct will be conducted." *Id*. at 3.

- "A vital component to a successful election is the conduct of the preliminary and public Logic and Accuracy Testing prior to the election." Id. at 6.

- "Review the *Voter Assist Terminal Preparation Checklist and Test Certification Form* and verify it was properly completed." *Id*. at 7. Likewise Guy never performed a VAT Test Deck.

- "Review the *Applications to Vote*. Physically count the *Applications to Vote* and determine if there is the same number of *Applications to Vote* as voters in the *Pollbook*." *Id*. at 8.

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- "If auditing an election with a state or federal office, review the absent voter information posting required to be posted before and on election day." *Id.*

- "Verify the completion of a Receiving Board checklist on election day." *Id.*

- "Finally, review the remaining components of the *Pollbook*." *Id.*

- "Review the Clerk's Preparation Certificate." *Id.* at 9.

- "Ensure all checkboxes are completed in the Election Inspectors' Preparation Certificate and that the inspectors signed." *Id.*

- "Ensure all inspectors (including the chairperson) subscribed to the Constitutional Oath of Office." *Id.*

- "Ensure the oath administrator signed in the appropriate location(s)." *Id.*

- "Compare the signatures of the election inspectors with the Election Commission appointments to ensure all that signed the oath were appointed." *Id.*

- "If applicable, ensure the write-in portion of the *Pollbook* was completed. Votes should be properly totaled after the tally marks." *Id.*

- "Ensure the tabulator tape/statement of votes (should be affixed to the Statement of Votes signature page in the back of *Pollbook*) was signed by all election inspectors." *Id.*

- "Ensure the number of ballots tabulated on the totals tape matches the number of voters listed in the *Pollbook*." *Id.*

- "Ensure the Ballot Summary (found in the *Pollbook*) is completed, balanced, and totals are accurate. The **Difference** should always be zero. If there is a valid discrepancy, was it remarked? If so, check the Remark box." *Id.*

- "Review the *Provisional Ballot Forms* with the *Pollbook* to ensure the number issued matches the number in the Ballot Summary." *Id.* at 11.

- "Determine based on the information provided on the form if the Envelope ballot was appropriately processed by the election inspector and/or the local Clerk." *Id.*

- "Ensure a master card is available for each voter issued an Affidavit or Envelope ballot verifying the voter was registered to vote after the election. Finally, if an envelope ballot was counted, verify it was sealed in an approved ballot container." *Id.*

- Does the number of spoiled ballots in the *Spoiled Ballot Envelope* equal the number of spoiled ballots listed in the *Pollbook*?" *Id.* at 12. In fact, on December

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17, 2020, we saw that the number of spoiled ballots did not match the ballots in the envelope.

We know that Antrim County never performed any pre-election "accuracy test," "stress test," or "test deck." The scope of the recount was limited to presidential race which is insufficient to validate the explanations provided by the Defendants or satisfy any criteria above. If their argument were valid, it would be evident in down ballot races not simply the presidential race. The recount also did not analyze election records with sufficient rigor to determine if the election record chain of custody (QVF, Poll Books, Ballots, Vote Tallies) was maintained. Indeed, Antrim County failed to comply with every single benchmark set forth above. According to Benson's own manual, this presents enormous complications and is most likely the reasons she converted the scheduled audit to the hand recount. In truth, based on the failures to perform the tests above and the deletion of vital election records, the Antrim County results are not auditable and decertification is required. Antrim County Clerk Sheryl Guy committed gross negligence when she failed to perform these pre and post-election tests. Instead, she just "winged it."

Defendants make no additional arguments regarding "mootness." As stated in the Opinion in *Genetski v Benson*:

> However, the Court declines to find that plaintiffs' remaining challenges are either moot or not ripe. Those issues concern the validity of guidance that is still in effect (Counts I and II), or an audit (Count IV) that, according to the plain text of art 2, § 4(1)(h) and MCL 168.31a, may be requested after the election has occurred. Moreover, defendants have not advanced a specific mootness/ripeness argument with respect to the audit claim. As a result, the Court declines to find that the issues raised in Counts I, II, and IV of the amended complaint would have no practical effect on an existing controversy or that it would be impossible to render relief. Cf. *Garrett v Washington*, 314 Mich App 436, 449-450; 886 NW2d 762 (2016) (describing the mootness doctrine).
>
> The Court also rejects defendants' contention that there is no actual controversy. As noted, plaintiffs seek declaratory relief. MCR 2.605(A)(1) requires that there be "a case of actual controversy" for the issuance of declaratory relief. "In general, 'actual controversy' exists where a declaratory judgment or decree is

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necessary to guide a plaintiff's future conduct in order to preserve his legal rights." *Shavers v Kelley*, 402 Mich 554, 588; 267 NW2d 72 (1978).

2. **Plaintiff has standing to bring this action**

This issue has already been litigated in this case. On December 4, 2020, this court determined that Plaintiff has standing.

> "A litigant has standing whenever there is a legal cause of action, but even if no legal cause of action is available, a litigant may have standing if he or she has a special injury or right or substantial interest that will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer standing on the litigant. While the Defendant argues that Plaintiff has failed to allege an injury in fact, the Court disagrees. As discussed above, assuming that Plaintiff's ballot was one of those damaged during the retabulation, failure to include his vote on the marihuana proposal potentially resulted in passage of the ordinance. Moreover, failure to include the Plaintiff's ballot would amount to the loss of his right to vote, which is an injury specific to Plaintiff. As the Court has determined that the Plaintiff has standing to bring the constitutional claims, it is unnecessary to analyze whether the Plaintiff will succeed on the merits of his statutory claims."

a. **Plaintiff has standing under MCL 168.861 and MCL 168.765**

Defendants argue that Plaintiff has no standing under MCL 168.861 because the statute creates no cause of action. Defendants are misguided. MCL 168.861 is a savings clause. It preserves the remedies of *quo warranto*. Plaintiff's Count 3 "Election Fraud" was brought under MCL 600.4545(2), not independently under MCL 168.861. Therefore, the argument of standing under MCL 168.861 is irrelevant.

Defendants also argue that Plaintiff has no standing under MCL 168.765 because he was not an absentee voter, but instead voted in person. Defendants provide no support for this argument. Rather, MCL 168.765 confers certain responsibilities on Sheryl Guy to handle absentee votes in a certain way in order to preserve the integrity of the election. Based on all Sheryl Guy's failings throughout this election and her acknowledgment that she was not properly trained (See supra; "*We truly did not have correct training with the Election Source new*

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program.") it stands to reason that Sheryl Guy failed in every way under MCL 168.765. Plaintiff requested to audit these ballots, but the Defendants filed a motion for protective order because they want to hide the fraud that was committed in Antrim County. Plaintiff has standing as a voter in Antrim County to ensure the accuracy of the procedures to count absentee votes.

> **b.**   **Plaintiff has standing to bring Constitutional claims**

The issue of whether Plaintiff is a resident of Central Lake Village is irrelevant. Contrary to Defendants' argument, the court did not premise its decision of the preliminary injunction solely on the marihuana proposal. The court also discussed the fact that three (3) ballots were destroyed in the canvas process. The ASOG verifies that these ballots were not counted:

D. CENTRAL LAKE TOWNSHIP

1. On November 27, 2020, part of our forensics team visited the Central Lake Township in Michigan to inspect the **Dominion ImageCast Precint** for possible hardware issues on behalf of a local lawsuit filed by Michigan attorney Matthew DePerno on behalf of William Bailey. In our conversations with the clerk of **Central Lake Township** Ms. Judith L. Kosloski, she presented to us "two separate paper totals tape" from Tabulator ID 2.

   • One dated "Poll Opened Nov. 03/2020 06:38:48" (Roll 1);

   • Another dated "Poll Opened Nov. 06/2020 09:21:58" (Roll 2).

2. We were then told by Ms. Kosloski that on November 5, 2020, Ms. Kosloski was notified by Connie Wing of the County Clerk's Office and asked to bring the tabulator and ballots to the County Clerk's office for re-tabulation. They ran the ballots and printed "Roll 2". She noticed a difference in the votes and brought it up to the clerk, but canvasing still occurred, and her objections were not addressed.

3. Our team analyzed both rolls and compared the results. Roll 1 had **1,494** total votes and Roll 2 had **1,491**

> votes (Roll 2 had 3 less ballots because 3 ballots were damaged in the process.)

4. "Statement of Votes Cast from Antrim" shows that only **1,491** votes were counted, and the **3** ballots that were damaged were not entered into final results.

5. Ms. Kosloski stated that she and her assistant manually refilled out the three ballots, curing them, and ran them through the ballot counting system – but the final numbers do not reflect the inclusion of those **3** damaged ballots.

Defendants make no further argument regarding lack of standing to bring the constitutional claims. As demonstrated, Plaintiff has standing.

c. **Plaintiff has standing under MCL 600.4545**

Defendants also claim Plaintiff lacks standing under MCL 600.4545. To the contrary, MCL 600.4545(1) applies whenever it appears that material fraud or error has been committed at any election at which there has been submitted any constitutional amendment, question, or proposition to the electors of the state or any county, township or municipality thereof. Defendants argue that this statute is inapplicable because any fraud or error would not have affected the outcome of the election.

Under MCL 600.4545(1), a lawsuit in the nature of a *quo warranto* action may be brought "whenever it appears that material fraud or error has been committed at any election in such county at which there has been submitted any constitutional amendment, question, or proposition to the electors of the state or any county, township, or municipality thereof." MCL 600.4545(1). MCL 600.4545(2) permits Plaintiff to bring the claim "without leave of the court." The specific statutory requirements for bringing an action under MCL 600.4545 are set forth in Subsection (2), which states:

> Such action shall be brought within 30 days after such election *by the attorney general or the prosecuting attorney of the proper county on his own relation, or*

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on the relation of any citizen of said county without leave of the court, or by any citizen of the county by special leave of the court or a judge thereof. Such action shall be brought against the municipality wherein such fraud or error is alleged to have been committed.

[MCL 600.4545(2) (emphasis added).] A person authorized to bring an action under this section may do so "without any showing of a special personal interest in the subject matter at hand." *Penn Sch Dist No 7 v Lewis Cass Intermediate Sch Dist Bd of Ed*, 14 Mich App 109, 117-118; 165 NW2d 464 (1968). Plaintiff is clearly a citizen of the county and satisfies the standing requirements.

3.   Plaintiff has stated claims under MCR 2.116(C)(8)

a.   Article 2, § 4(1)(h)

This is an issue of first impression. Defendants argue that Count 1 fails as a matter of law. Defendants argue that a citizen has no right to request an audit of the general election. As amended, Const 1963, art 2, §4(1)(h) now provides, in pertinent part:

(1) Every citizen of the United States who is an elector qualified to vote in Michigan shall have the following rights:

(h) The right to have the results of statewide elections audited, in such a manner as prescribed by law, to ensure the accuracy and integrity of elections. [Emphasis added.]

This provision was amended effective December 22, 2018. Defendants then argue that MCL 168.31a is a statute that *limits* the constitutional rights of voters in that MCL 168.31a states that "[t]he secretary of state shall prescribe the procedures for election audits that include reviewing the documents, ballots, and procedures used during an election as required in section 4 of article II of the state constitution of 1963."

According to the Michigan Constitution, there is no threshold requirement that must first be met in order for a citizen to request an audit of an election. This right is self-executing. Const 1963, art 2, § 4. Indeed, the Michigan Constitution requires that the "results" of the election be

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audited in order to ensure the "accuracy and "integrity" of the election. Under the plain language

of MCL 168.31a, it is possible to conduct such an audit so long as the procedures and parameters

of the audit are sufficiently broad enough in scope to comply with the constitutional

requirements to determine the accuracy and integrity of the election.

MCL 168.31a(2) states:

> The secretary of state shall prescribe the procedures for election audits that include reviewing the documents, ballots, and procedures used during an election as required in section 4 of article II of the state constitution of 1963. The secretary of state and county clerks shall conduct election audits, including statewide election audits, as set forth in the prescribed procedures. The secretary of state shall train and certify county clerks and their staffs for the purpose of conducting election audits of precincts randomly selected by the secretary of state in their counties. An election audit must include an audit of the results of at least 1 race in each precinct selected for an audit. A statewide election audit must include an audit of the results of at least 1 statewide race or statewide ballot question in a precinct selected for an audit. An audit conducted under this section is not a recount and does not change any certified election results. The secretary of state shall supervise each county clerk in the performance of election audits conducted under this section.

This statute requires the Antrim County clerk to perform the audit under the supervision of the

Michigan Secretary of State. It further orders the Antrim County Clerk to report the results of the

audit to the Secretary of State pursuant to MCL 168.31a(3).

A proper results audit must include a review of not only the process used for the election,

but an actual review of the "documents, ballots, and procedures used during an election as

required in section 4 of article II of the state constitution of 1963." Pursuant to the Constitution,

the documents and ballots must be audited not only for their accuracy (in being counted), but

also for their integrity (not being an illegal or fraudulent vote). While MCL 168.31a may contain

limitations that are in conflict with the Michigan Constitution, such as its limitation on an audit

changing the election's results, those issues can be resolved, if necessary, once the audit is

completed. What is clear in the meantime is that Plaintiffs are entitled to an audit and the effects

or ramifications of that audit can be resolved once the results have been obtained.

Defendants rely on the Wayne County case of *Costantino v City of Detroit* which they

attached to their brief. The Court of Appeals[7] and the Michigan Supreme Court[8] both denied

leave. However, Judge Viviano dissented and stated that he "would grant leave to answer the

critical constitutional questions of first impression that plaintiff have squarely presented

concerning the nature of their right to an audit of the election results under Const 1963, art 2, §

4(1)(h)." [Exhibit 12]. Judge Viviano further stated:

> The constitutional provision at issue in this case, which the people of Michigan voted to add in 2018 through Proposal 3, guarantees to "[e]very citizen of the United States who is an elector qualified to vote in Michigan . . . [t]he right to have the results of statewide elections audited, in such a manner as prescribed by law, to ensure the accuracy and integrity of elections." *Id*. The provision is self-executing, meaning that the people can enforce this right even without legislation enabling them to do so and that the Legislature cannot impose additional obligations on the exercise of this right. *Wolverine Golf Club v Secretary of State*, 384 Mich 461, 466 (1971).
>
> The trial court failed to provide a meaningful interpretation of this constitutional language. Instead, it pointed to MCL 168.31a, which prescribes the minimum requirements for statewide audits and requires the Secretary of State to issue procedures for election audits under Article 2, § 4. But the trial court never considered whether MCL 168.31a accommodates the full sweep of the Article 2, § 4 right to an audit or whether it imposes improper limitations on that right.
>
> In passing over this constitutional text, the trial court left unanswered many questions pertinent to assessing the likelihood that plaintiffs would succeed on the merits.[1] As an initial matter, the trial court did not ask what showing, if any, plaintiffs must make to obtain an audit. It appears that no such showing is required, as neither the constitutional text nor MCL 168.31a expressly provide for it. None of the neighboring rights listed in Article 2, § 4, such as the right to vote by absentee ballot, requires citizens to present any proof of entitlement for the right to be exercised. Yet, the trial court here ignored this threshold legal question and instead scrutinized the parties' bare affidavits, concluding that plaintiffs' allegations of fraud were not credible.[2] The trial court's factual findings have no

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[7] Case No. 344443
[8] Case No. 162245

significance unless, to obtain an audit, plaintiffs were required to prove their allegations of fraud to some degree of certainty.

> [1] The court also suggested that plaintiffs could seek a recount. But, with few exceptions, the relevant recount provisions can be invoked only by candidates for office, which plaintiffs here were not. Compare MCL 168.862 and MCL 168.879 (allowing candidates to request recounts) with MCL 168.880 (allowing any elector, in certain circumstances, to seek a recount of "votes cast upon the question of a proposed amendment to the constitution or any other question or proposition").
>
> [2] The court's credibility determinations were made without the benefit of an evidentiary hearing. Ordinarily, an evidentiary hearing is required where the conflicting affidavits create factual questions that are material to the trial court's decision on a motion for a preliminary injunction under MCR 3.310. See 4 Longhofer, Michigan Court Rules Practice, Text (7th ed, 2020 update), § 3310.6, pp 518-519. See also *Fancy v Egrin*, 177 Mich App 714, 723 (1989) (an evidentiary hearing is mandatory "where the circumstances of the individual case so require").

Simply put, because this is a case of first impression, this the cases of *Genetski* and *Costantino* have no precedential value.

b.   **Purity of elections clause**

Defendants make two arguments: (1) the allegations of the "purity of elections" clause are vague and (2) Plaintiff fails to point to any law enacted by the Legislature that "adversely affects" the purity of elections. "The phrase 'purity of elections' does not have a single precise meaning. But it unmistakably requires fairness and evenhandedness in the election laws of this state." *Barrow v. Detroit Election Comm.*, 854 N.W.2d 489, 504 (Mich. Ct. App. 2014). The purity of elections clause has been successfully raised in cases, like this one, where state officials favor one group of voters. *See Fleming v. Macomb Cty. Clerk*, 2008 Mich. App. LEXIS 1325, at *21-24 (Mich. Ct. App. June 26, 2008) ("the purity of elections has been violated in this case because the mailing of absent voter ballot applications to only a select group of eligible absent voters undermines the fairness and evenhandedness of the application of election laws in this state.").

Further, the collected errors, in connection with information gained during discovery, evince intentional misconduct designed to favor Biden rather than mere errors which happened to be convenient for Biden. Nevertheless, the amended complaint cures any defects argued by Defendants. As stated in *Ryan v Benson*, Court of Claims, Case No. 20-000198-MZ:

> Here, plaintiffs' claims are purportedly rooted in notions of "fairness and evenhandedness." As noted, plaintiffs quoted statements purportedly from defendant that could suggest that defendant encouraged private funding for the specific local jurisdictions outlined by plaintiffs (as well as for other states such as Ohio, Pennsylvania, Wisconsin and Arizona). Additionally, plaintiffs purport to quote defendant speaking about the "outcome" of the election when addressing the use of private funding of local election apparatus, which again, if true, could lend support to a purity of elections problem. But additional facts, and possibly fact-finding by the Court, is necessary before any legal conclusions can be made.

[Exhibit 19].

c.   MCL 600.4545(2) and MCL 168.861

Defendants claim that Plaintiff fails to state a claim of fraud. Defendants argue that Plaintiff must challenge ballot proposals. In this election there were two proposals: State Proposal 20-1 and 20-2. Proposal 20-1 dealt with the constitutional amendment to allow money from oil and gas mining on state-owned lands to continue to be collected in state funds for land protection and creation and maintenance of parks, nature areas, and public recreation facilities; and to describe how money in those state funds can be spent. Proposal 20-2 dealt with a proposed constitutional amendment to require a search warrant in order to access a person's electronic data or electronic communications. Plaintiff voted on both of these proposals and challenges the results of both of these proposals. Nevertheless, the amended complaint cures any defects argued by Defendants.

d.   Equal Protection Clause

Defendants argue that Plaintiff does not have standing. However, this same argument was recently rejected in *Ryan v Benson*, Court of Claims, Case No. 20-000198-MZ:

Defendant argues that plaintiff lacks standing. A litigant "may have standing . . . if the litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer standing on the litigant." *Lansing Schs Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 372; 792 NW2d 686 (2010). One injury alleged by plaintiffs is that their votes will be diluted or diminished. Defendant argues that plaintiff does not have a special injury or right that will be detrimentally affected in a manner that is different than the citizenry at large. In support, defendant cites cases concerning "vote dilution" and Article III standing in federal court, with some federal district courts explaining that generalized and speculative grievances of "vote dilution" will not suffice to confer standing. See, e.g., *Carson v Simon*, __ F Supp 3d __ (D Minn, 2020).

The difficulty with defendant's argument is that the *LSEA* Court held that Michigan standing jurisprudence is not coterminous with federal standing doctrine, *LSEA*, 487 Mich at 362, and thus the federal decisions under Article III provide no useful guidance. The standards for determining standing in a Michigan court are, for better or worse, much less stringent than the federal standard. *League of Women Voters of Michigan v Secretary of State*, __ Mich App __, __; __ NW2d __ (2020) (Docket Nos 350938 & 351073) (BOONSTRA, J., *concurring*) ("In sum, the restoration of the limited, prudential approach to standing in *Lansing Sch Ed Ass'n* made it *easier* to establish standing, or at least transformed the previously-existing *requirement* of standing into a *discretionary* consideration for the courts."). Here, because plaintiffs have a cause of action for a violation of the equal protection clause, and their rights could be substantially and detrimentally affected differently than others within the general public they have standing to bring these claims.

[Ex 19]. Therefore, the equal protection clause applies. Further, Defendants fail to recognize the case of *Village of Willowbrook v Olech*, 528 U.S. 562; 120 S. Ct. 1073 (2000). In that case, the United States Supreme Court allowed and endorsed the "class of one" theory. The Supreme Court held that individual mistreatment by local government officials could be challenged under the federal constitution regardless of the motivation behind the conduct. *Id*. at 564-565. Henceforth, a plaintiff who wishes to proceed in federal court under the Equal Protection Clause need only allege that a government official has acted arbitrarily or irrationally, and has treated the plaintiff less favorably than those similarly situated.

Nevertheless, the amended complaint cures any defects argued by Defendants.

e. **MCL 168.765(5)**

Defendants make the argument that 168.765(5) does not apply to Defendant Benson because the absentee ballots are collected by the townships. This is a red herring. Defendants suggest that Plaintiff needs to sue every precinct. The problem with that argument is that is it contrary to how Defendant Benson acted in *Daunt v. Benson*, No. 1:20-cv-522 (W.D. Mich. 2020), recently voluntarily dismissed in the U.S. District Court for the Western District of Michigan. In *Daunt*, a Michigan registered voter did name local election jurisdictions and Defendant Benson. Defendant Benson stipulated that, "Plaintiff and State Defendants agree that the County Defendants are not necessary parties to this litigation. Though the city and county clerks play a role, the Secretary of State has the ultimate responsibility for maintaining Michigan's voter rolls." ECF 27 (filed Sept. 17, 2020) [Exhibit 12]. The local election officials and jurisdictions were dismissed and the case proceeded against just Defendant Benson.

Nevertheless, the amended complaint cures any defects argued by Defendants.

E.   CONCLUSION

For the reasons stated above, Plaintiff respectfully requests this Court deny Defendants' motion for summary disposition.

Respectfully submitted

DePERNO LAW OFFICE, PLLC

Dated: May 3, 2021   */s/ Matthew S. DePerno*
                                          Matthew S. DePerno (P52622)
                                          Attorney for Plaintiff

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PROOF OF SERVICE

On the date set forth below, I caused a copy of the following documents to be served on all attorneys of record at the addresses listed above

1.   Plaintiff's Motion for Leave to Amend Complaint

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

Dated: May 3, 2021   */s/ Matthew S. DePerno*
                                                        Matthew S. DePerno (P52622)