STATE OF MICHIGAN
IN THE COURT OF APPEALS

CHERYL A. COSTANTINO and EDWARD P. MCCALL, JR.,

Plaintiffs-Appellants,

v.

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

Defendants-Appellees,

v.

MICHIGAN DEMOCRATIC PARTY,

Intervenor Defendant-Appellee.

Court of Appeals No. 355443

Circuit Court No. 20-014780-AW

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****Pro hac vice* motion forthcoming

INTERVENOR DEFENDANT-APPELLEE'S RESPONSE TO PLAINTIFFS-APPELLANTS' APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF APPELLATE JURISDICTION

Pursuant to MCR 7.203 and 7.205, the jurisdictional statement of Plaintiffs-Appellants ("Plaintiffs") is correct. However, Plaintiffs seek review only of "whether the trial court erroneously interpreted Michigan's Constitution, article 2, section 4(1)(h)." "[T]o the extent that [Plaintiffs] argue[] that the trial court otherwise improperly [denied] the injunction, [Plaintiffs] ha[ve] waived these arguments by failing to include them as issues in its statement of the questions presented." *Jewish Academy of Metropolitan Detroit v Mich High School Athletic Ass'n*, unpublished per curiam opinion of the Court of Appeals, issued June 16, 2009 (Docket No. 283885), 2009 WL 1693751, p *2, citing *Caldwell v Chapman*, 240 Mich App 124, 132; 610 NW2d 264 (2000).

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QUESTIONS PRESENTED FOR REVIEW

1. Are Plaintiffs entitled leave to file a quo warranto complaint?

    Intervenor's answer: "No."

    This Court should answer: "No."

2. Do Plaintiffs have standing?

    Intervenor's answer: "No."

    This Court should answer: "No."

3. Do Plaintiffs have a viable legal claim under the Accuracy and Integrity Clause, the Equal Protection Clause, or the Michigan Election Code?

    Intervenor's answer: "No."

    The Circuit Court's answer: "No."

    This Court should answer: "No."

4. Is the Circuit Court's finding that the factual record does not support Plaintiffs' claims clearly erroneous?

    Intervenor's answer: "No."

    This Court should answer: "No."

5. Have Plaintiffs demonstrated irreparable injury?

    Intervenor's answer: "No."

    The Circuit Court's answer: "No."

    This Court should answer: "No."

6. Do the balance of equities and public interest weigh strongly against an injunction?

    Intervenor's answer: "Yes."

    The Circuit Court's answer: "Yes."

    This Court should answer: "Yes."

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I. INTRODUCTION

On November 3, 2020, more than 5.5 million Michiganders—a new record—cast their votes in races up and down the ballot. Their votes have since been received, processed, and canvassed by a dedicated team of election officials and volunteers, operating under intense scrutiny in the midst of a public health crisis. Every major news outlet has called Michigan for former vice president Joe Biden—where he leads by nearly 150,000 votes and a margin of 2.6 percent—and, based on national election results, designated him president-elect. The U.S. Senate race, where incumbent Gary Peters was reelected, has also been called, as have other down-ballot races. The people of Michigan have spoken.

Apparently dissatisfied with this outcome, Plaintiffs filed this suit, eager to sow doubt about the results of the election. But their claims, like the baseless allegations continually lodged by their standard-bearer and party leaders, constitute mere intrigue and fantasy, divorced from reality and the successful—indeed, heroic—administration of this election by state and local officials. Supported only by flimsy evidence and rank generalizations, Plaintiffs sought extraordinary and unprecedented relief from the Circuit Court, including the wholesale rejection of more than 850,000 ballots cast in Wayne County and an entirely new election. After considering their evidence and correctly concluding that Plaintiffs' "interpretation of events is incorrect and not credible," Order at 13, the Circuit Court denied Plaintiffs' motion for preliminary injunction, protective order, and a results audit of the election.

This Court should affirm. Plaintiffs' appeal is procedurally flawed and they have failed to demonstrate that the Circuit Court erred in its interpretation of the law or the facts. Plaintiffs lack standing to bring their claims, which at any rate fail as a matter of law. Nor have they submitted *any* credible and persuasive proof of wrongdoing or fraud. Moreover, the public interest continues to counsel against an injunction, which would delay election certification, create confusion, and

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burden election officials who are doing their best to manage a general election during a global pandemic.

Furthermore, Plaintiffs seek review only of "whether the trial court erroneously interpreted Michigan's Constitution, article 2, section 4(1)(h)." "To the extent that [Plaintiffs] argue[] that the trial court otherwise improperly [denied] the injunction, [Plaintiffs] ha[ve] waived these arguments by failing to include them as issues in its statement of the questions presented." *Jewish Academy of Metropolitan Detroit v Mich High School Athletic Ass'n*, unpublished per curiam opinion of the Court of Appeals, issued June 16, 2009 (Docket No. 283885), 2009 WL 1693751, p *2, citing *Caldwell v Chapman*, 240 Mich App 124, 132; 610 NW2d 264 (2000).

This meritless appeal is just one more distraction to disrupt the timely and orderly completion of the democratic process. The opinion and order of the Circuit Court should be affirmed and certification of Michigan's returns should proceed.

II. BACKGROUND

At the time Plaintiffs filed their motion for temporary restraining order and preliminary injunction, Michigan's absent voter counting boards ("AVCBs") had been counting ballots for nearly one week. By the time the Court reads this brief, more than 98 percent of Michigan's statewide vote totals will have been publicly reported.

In Michigan, poll workers—known as "election inspectors"—are registered Michigan voters, each of whom has been deemed by the local clerk to have "a good reputation" and "sufficient education and clerical ability" to perform the necessary duties. MCL 168.677. Election inspectors shoulder the burden of ensuring polling places and counting boards run smoothly while also overseeing certain tasks, such as duplication of ballots, which might be necessary when a ballot cannot be read by a machine or a military or overseas ballot needs to be transcribed into a machine-readable ballot. Ex. A, Affidavit of David Jaffe ("Jaffe Aff"), ¶ 26.

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Election "challengers," by contrast, are volunteers appointed by political parties or other organized groups who can challenge the validity of absent voter ballots at one of two locations: a precinct or an AVCB. MCL 168.730(1). Challengers may: (1) observe the manner in which election inspectors perform their duties, (2) challenge the validity of ballots, (3) challenge election procedures not properly performed, or (4) bring various election code violations to the attention of election inspectors. MCL 168.733(1). Challengers may only challenge a voter whom they have "good reason to believe is not a registered elector." MCL 168.733(1)(c). Challengers are prohibited from engaging in "disorderly conduct" or voter intimidation. MCL 168.733(3), 168.733(4). They may not "make a challenge indiscriminately," "handle the poll books . . . or the ballots," or "interfere with or unduly delay the work of the election inspectors." MCL 168.727(3). They must also take an oath not to communicate any information about the "processing and tallying of votes . . . until after the polls are closed." MCL 168.765a(9). Challengers' misbehavior may result in criminal penalties. See MCL 168.727(3).

Michigan law limits the number of challengers at precincts to "not more than 2" and at counting boards to "not more than 1" per entity, whether a political party or other certifying group. MCL 168.730. Once challengers are duly appointed and accepted into the precinct or AVCB, election inspectors may not prevent their presence, MCL 168.734, and must provide them with a space where they may observe ballot counting, MCL 168.733(2). The Legislature further vested in the Secretary the authority to issue "instructions . . . for the conduct of absent voter counting boards or combined absent voter counting boards." MCL 168.765a(13). Pursuant to that authority, the Secretary delegated the authority to local jurisdictions to agree, for the purposes of combined AVCBs, on "how and under what conditions challengers and other individuals permitted into the

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facility will be allowed in."[1] During this past election, concerns about the conditions under which individuals were allowed into polling places were paramount in light of the COVID-19 pandemic and the social distancing required to prevent transmission of the virus.[2]

Though Plaintiffs imply there was a lack of meaningful Republican Party oversight at the TCF Center, where Detroit's ballots were processed, see, e.g., Mot at 8, there were at least *100* Republican challengers at that location on and after Election Day. See Jaffe Aff ¶ 7. Indeed, Donna MacKenzie, a credentialed challenger, attested that "there were many more Republican Party challengers than Democratic Party challengers" when she observed the count on November 4. Ex. B, Affidavit of Donna MacKenzie ("MacKenzie Aff"), ¶ 6. David Jaffe, another credentialed challenger at the facility who observed the processing of ballots on November 2, 3, and 4, has attested to his "perception that all challengers had a full opportunity to observe what was going on and to raise issues with supervisors and election officials." Jaffe Aff ¶ 10. He confirmed that the procedures in place at TCF Center "allowed the challengers from each party . . . to confirm the accuracy" of the duplication process. *Id.* ¶ 29. Ms. MacKenzie further attested that "the ballot counting process was very transparent," that challengers "were given the opportunity to look at ballots whenever issues arose," and that "[t]here were more than enough challengers to have observers at each table." MacKenzie Aff ¶¶ 4-5, 7.

Although Plaintiffs' complaint and motion are rife with allegations of fraud undertaken by election inspectors at the TCF Center, this characterization could not be further from the truth.

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[1] *Absent Voter Ballot Election Day Processing*, Mich Bureau of Elections 11 (Oct. 2020), https://www.michigan.gov/documents/sos/VIII_Absent_Voter_County_Boards_265998_7.pdf.

[2] See, e.g., Dave Boucher & Christina Hall, *Michigan Clerks Have 'Deep Concern' About Violence, COVID-19 at Polls on Election Day*, Detroit Free Press (Oct. 30, 2020), https://www.freep.com/story/news/politics/elections/2020/10/30/michigan-clerks-unrest-covid-19-election-day/6037886002.

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While Mr. Jaffe and his fellow challengers, Democratic and Republican alike, "observed minor procedural errors by election inspectors," they "called those errors to the attention of supervisors, and were satisfied that the supervisors had corrected the error and explained proper procedure to the election inspectors." Jaffe Aff ¶ 12. Indeed, Mr. Jaffe "spoke with several Republican challengers who expressed their view, and in a couple of cases their surprise, that there were no material issues in the counting." *Id.* Similarly, Ms. MacKenzie—who both observed ballot processing and spoke to other challengers about their experiences—neither witnessed nor heard of other observers challenging any of the fraudulent activities and other misconduct alleged by Plaintiffs. See MacKenzie Aff ¶¶ 8-19. Although Mr. Jaffe "received very few reports of unresolved issues from Democratic challengers," he "did receive many reports of conduct by Republican or" Election Integrity Fund ("EIF") "challengers that was aggressive, abusive toward the elections inspectors," and "clearly designed to obstruct and delay the counting of votes." Jaffe Aff ¶ 13; see also *id.* ¶¶ 18, 20, 22-25, 30; MacKenzie Aff ¶¶ 21-22. And although election officials attempted to maintain social distancing between workers and observers and ensure other preventative measures to curb the potential transmission of COVID-19, Mr. Jaffe "observed that Republican and EIF challengers repeatedly refused to maintain the mandated distance from the elections inspectors." Jaffe Aff ¶¶ 17-19. Consequently, some "Republican or EIF challengers were removed from the room after intimidating and disorderly conduct, or filming in the counting room in violation of the rules." *Id.* ¶ 24. Mr. Jaffe concluded that "while some of the Republican challengers were there in good faith, attempting to monitor the procedure, the greater number of Republican and EIF challengers were intentionally interfering with the work of the elections inspectors so as to delay the count of the ballots and to harass and intimidate election inspectors." *Id.* ¶ 25. Indeed, Joseph Zimmerman, a credentialed challenger on behalf of the Lawyers

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Committee for Civil Rights Under Law, observed Republican challengers "discussing a plan to begin challenging every single vote on the grounds of 'pending litigation'" and then "repeatedly challenging the counting of military ballots for no reason other than 'pending litigation.'" Ex. C, Affidavit of Joseph Zimmerman ("Zimmerman Aff"), ¶ 20.

III. PROCEDURAL HISTORY

Plaintiffs filed their complaint and application for special leave to file quo warranto complaint on November 9, six days *after* election day. App'x 8-28.

On November 11, the Circuit Court held oral argument, and its order followed two days later. App'x ***. After correctly articulating the applicable legal standard, Order at 2, the Circuit Court considered the evidence submitted by both Plaintiffs and Defendants. Order at 2-10. "After analyzing the affidavits and briefs submitted by the parties," the Circuit Court "conclude[d] the Defendants offered a more accurate and persuasive explanation of activity within . . . TCF Center" and "Plaintiffs' interpretation of events is incorrect and not credible." Order at 3, 13. The Circuit Court observed, given that "a results audit has been approved by the Legislature" and "Plaintiffs have multiple remedies at law," that

> [i]t would be an unprecedented exercise of judicial activism for this Court to stop the certification process of the Wayne County Board of Canvassers. . . .
>
> This Court finds that there are legal remedies for Plaintiffs to pursue and there is no harm to Plaintiffs if the injunction is not granted. There would be harm, however, to the Defendants if the injunction is granted. . . .
>
> Waiting for the Court to locate and appoint an independent, nonpartisan auditor to examine the votes, reach a conclusion and then finally report to the Court would involve untold delay. It would cause delay in establishing the Presidential vote tabulation, as well as all other County and State races. It would also undermine faith in the Electoral System.

Order at 11-13.

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IV. STANDARD

A party requesting the "extraordinary and drastic use of judicial power" that an injunction represents must satisfy the following four factors: (1) it is likely to prevail on the merits, (2) it will suffer irreparable harm without an injunction, (3) the harm it will suffer absent an injunction far outweighs any potential harm that a grant of relief may impose on the opposing party, and (4) the requested injunction would serve the public interest. *Davis v Detroit Fin Review Team*, 296 Mich App 568, 613, 821 NW 2d 896 (2012).

The Circuit Court correctly concluded that "Plaintiffs are unable to meet their burden for the relief sought" and denied "Plaintiffs' petition for injunctive relief." Order at 13. A trial court's decision to grant or deny injunctive relief is reviewed for abuse of discretion, *Schadewald v Brule*, 225 Mich App 26, 39; 570 NW2d 788 (1997), which "exists when the decision is outside the range of principled outcomes," *Davis*, 296 Mich App at 612-13. Questions of law are reviewed *de novo*. See *id.* The Circuit Court's findings of fact will only be set aside on appeal if clearly erroneous. See MCR 2.613; *Dunlop v Twin Beach Park Ass'n*, 111 Mich App 261, 266; 314 NW2d 578 (1981) ("A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been made.").

V. ARGUMENT

A. To the extent it still seeks to do so, Plaintiffs are not entitled leave to file a quo warranto complaint.

At the outset, Plaintiffs' entire action is fundamentally inappropriate. In their complaint, they seek leave to file a quo warranto complaint, as individual citizens must do when challenging elections for a specific office. See MCR 3.306(B)(2). Quo warranto actions are "brought against persons for usurpation of office." MCL 600.4505; see also *Davis v Chatman*, 292 Mich App 603, 611-612; 808 NW2d 555 (2011) ("Quo warranto is the only appropriate remedy for determining

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the proper holder of a public office."). But Plaintiffs' action—a challenge to the *entire election* that seeks rejection of all ballots and a do-over—falls well outside the scope of this limited remedy.

First, because Plaintiffs' expansive suit implicates the entire election, it challenges both state and federal offices. But the relevant court rule sets forth a specific process for such actions only when they concern *state* offices. See MCR 3.306. The rule makes no reference to federal offices, and although it does set forth a process for "all other actions" other than removal of a person who usurps a state office, that provision clearly applies only to *local* offices, as it references such actions being "brought by the prosecuting attorney *of the proper county*." MCR 3.306(B)(2) (emphasis added). Indeed, there is no history of quo warranto actions brought against federal officeholders; they are beyond the scope of the statute.

Second, to the extent that any state officeholders are the targets of Plaintiffs' election challenge, then this action is procedurally defective. The applicable rule provides that when a quo warranto action is brought to contest a state office, the action must be brought by the Attorney General in the first instance. MCR 3.306(B)(1). Accordingly, Plaintiffs could bring a quo warranto claim against state officeholders *only if* they first applied to the Attorney General and she then refused to bring the action. MCR 3.306(B)(3). Here, there is no indication that this procedure was followed, and so Plaintiffs' quo warranto action is impermissible as to both federal *and* state races.

Third, there is no precedent of quo warranto actions being used to challenge the results for *all* contests in a given election. It is most properly understood, both by the rule's text and the limited caselaw applying it, as a means of challenging the improper usurpation of office by a *specific* candidate. It should not be used as a blunt tool to invalidate an entire election's worth of

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prevailing candidates.[3] To the extent Plaintiffs rely on MCL 600.4545(2), see Compl. ¶¶ 68-69, that statutory provision "does not apply to quo warranto actions to try title to a particular office, but only to test the validity of an election with regard to a constitutional amendment, question or proposition." *Barrow v Detroit Mayor*, 290 Mich App 530, 542-543; 802 NW2d 658 (2010), quoting *Stokes v Clerk*, 29 Mich App 80, 84; 184 NW2d 746 (1970). Plaintiffs do not indicate that they seek only to contest the outcome of a constitutional amendment, question, or proposition.

Fourth, even if Plaintiffs had satisfied the jurisdictional and procedural requirements for a quo warranto action, their complaint is substantively deficient. The Michigan Supreme Court has stated that, in quo warranto actions brought by individuals, "the relator is not allowed to proceed without showing, not merely a good case in law against respondent, but also that public policy will be subserved by the proceeding." *Vrooman v Michie*, 69 Mich 42, 46-47; 36 NW 749 (1888). Plaintiffs have fallen far short of suggesting, let alone showing, that the victorious candidates from this past election have committed plausible usurpations of office. In analogous actions under MCL 600.4545, plaintiffs must specifically show "material fraud or error," which courts have interpreted to require that the plaintiff's "proofs must be sufficient to support a fact finding that *enough votes were tainted by the alleged fraud to affect the outcome*." *Barrow*, 290 Mich App at 542-543 (emphasis added), quoting *St. Joseph Twp v City of St. Joseph*, 373 Mich 1, 6; 127 NW2d 858 (1964). The same standard logically applies to other quo warranto actions as well, since such claims are premised not merely on electoral misconduct, but on the assumption that the officeholder in question was *not actually elected*. Here, Plaintiffs have at best alleged isolated

[3] Moreover, the rule suggests that the proper defendant in a quo warranto action is the allegedly unlawful winner of the contested office. See MCL 600.4505 (describing quo warranto actions as "brought against persons for usurpation of office"). It is not clear that Defendants in this action were even on the ballot during this past election, let alone that Plaintiffs' claims are intended to challenge the validity of their positions.

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instances of potential misconduct at a single vote tabulation location. Even viewed charitably, such paltry evidence does not come close to establishing that President-elect Biden or anyone else was wrongfully declared a winner.

Even at this preliminary stage, the Michigan Supreme Court has held that an application for leave to file a quo warranto action "should be so clear and positive in its statement of facts as to make out a clear case of right; and should be so framed as to sustain a charge of perjury if any material allegation is false." *Barrow*, 290 Mich App at 543, quoting *Boucha v Alger Circuit Judge*, 159 Mich 610, 611; 124 NW 532 (1910). Again, Plaintiffs have fallen far short of establishing the factual predicate for a viable quo warranto action, and they should not even be granted leave to file a quo warranto complaint.

B. Plaintiffs have shown no likelihood that their claims will prevail.

1. Plaintiffs lack standing.

To establish standing, absent a cause of action provided by law or a declaratory judgment action, plaintiffs must prove a "special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large." *Lansing Sch Educ Ass'n v Lansing Bd of Educ*, 487 Mich 349, 372; 792 NW2d 686 (2010); see also *League of Women Voters of Mich v Secretary of State*, opinion of the Court of Appeals, issued January 27, 2020 (Docket Nos. 350938 and 351073), 2020 WL 423319, p *5, citing *Lansing Sch Ed Ass'n*, 487 Mich at 378. Here, Plaintiffs assert only a generalized grievance that could be shared by *any* Michigan citizen and thus lack standing.

Though Plaintiffs might have a genuine interest in ensuring the integrity of Michigan's elections, so does *every* Michigan citizen; Plaintiffs' claimed injury is nothing more than a generalized grievance that a law has—allegedly—not been followed. Indeed, Plaintiffs have not alleged that they personally have been injured in any way by the procedures at TCF Center. To

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seek relief, "a party must establish that they have special damages different from those of others within the community." *Olsen v Chikaming Twp*, 325 Mich App 170, 193; 924 NW2d 889 (2018); see also *League of Women Voters*, 2020 WL 423319, p *6 (plaintiffs "must establish that they have been deprived of a personal and legally cognizable interest peculiar to them, individually, rather than assert a generalized grievance that the law is not being followed"). But all Plaintiffs have identified in their suit is a generalized grievance, without any assertion of particularized harm.

Critically, there is no constitutional right for any individual to serve in a poll watching capacity to challenge ballots. In *Donald J Trump for President v Boockvar*, for example, the court held that plaintiffs, including prospective poll watchers, did not have standing to assert a right to expanded opportunities to monitor the polls because "there is no individual constitutional right to serve as a poll watcher," and a theory of harm that turns on "dilution of votes from fraud caused from the failure to have sufficient poll watchers . . . . rests on evidence of vote dilution that does not rise to the level of a concrete harm." Opinion of the United States District Court for the Western District of Pennsylvania, issued October 10, 2020 (Case No. 20-cv-966), 2020 WL 5997680, pp *36-37, *67, quoting *Pa Democratic Party v Boockvar*, opinion of the Supreme Court of Pennsylvania, issued September 17, 2020 (Case No. 133 MM 2020), 2020 WL 5554644, p *30; see also *Republican Party of Pa v Cortés*, 218 F Supp 3d 396, 408 (ED Pa, 2016); *Cotz v Mastroeni*, 476 F Supp 2d 332, 364 (SDNY, 2007); *Turner v Cooper*, 583 F Supp 1160, 1161-1162 (ND Ill, 1983). Plaintiffs therefore lack standing.

2. Plaintiffs' claims fail as a matter of law.

Plaintiffs move for preliminary relief on three of their causes of action: their claims under the Michigan Constitution, see Mot at 6-7; see also Compl ¶¶ 63-66, 80-89, and their claim relating to alleged violations of their statutory rights, see Mot at 8-10; Compl ¶¶ 90-103. Ultimately,

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because each of these claims fails as a matter of law, Plaintiffs cannot succeed on the merits.

a. Plaintiffs' Accuracy and Integrity Clause claim lacks merit.

Plaintiffs' claim under Const 1963, art 2, § 4(1)(h) lacks merit. The relevant clause states: "Every citizen of the United States who is an elector qualified to vote in Michigan shall have . . . [t]he right to have the results of statewide elections audited, in such manner as prescribed by law, to ensure the accuracy and integrity of elections." Though Plaintiffs are correct that the provision is "self-executing" and that "[s]tatutes that supplement a self-executing constitutional provision may not curtail the constitutional rights or place any undue burdens on them," Mot at 6, quoting *Promote the Vote v Secretary of State*, opinion of the Court of Appeals, issued July 20, 2020 (Docket Nos. 353977 and 354096), 2020 WL 4198031, p *10, they fail to explain any curtailment of or undue burden on the right at issue, whether imposed by statute or otherwise.

Moreover, they fail to note that "[s]tatutes that supplement a self-executing provision" may 'provid[e] a more specific and convenient remedy and facilitate[e] . . . the rights secured, making every step definite, and safeguarding the same so as to prevent abuses.'" *Promote the Vote*, 2020 WL 4198031, p *10, quoting *Wolverine Golf Club v Secretary of State*, 24 Mich App 711, 730; 180 NW2d 820 (1970). Here, Plaintiffs seek the extraordinary remedy of "restrain[ing] and enjoin[ing] Defendants from certifying the Wayne County 2020 general election results until Defendants conduct an independent and non-partisan audit." Proposed Order at 1. Not only does that remedy bypass the statutory provisions that facilitate election audits, see, e.g., MCL 168.31a (implementing Const 1963, art 2, § 4(1)(h)), but it also ignores the plain text of the constitutional right it seeks to vindicate—which unequivocally states that Michigan voters have the right to an audit "*in such a manner as prescribed by law*." (Emphasis added). Plaintiffs' request for an extralegal audit that would rewrite statutory canvass and audit procedures is itself violative of the

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very constitutional right under which they purport to bring this claim.

b. Plaintiffs have not pleaded a viable equal protection claim.

Contrary to Plaintiffs' conclusory assertions, there are no equal protection violations to be found. Plaintiffs allege "an election process replete with fraud, resulting in the unequitable treatment and dilution of Plaintiffs' fundamental right to vote." Mot at 7. But this generalized statement gets them nowhere. "[T]he gravamen of an equal protection claim is differential governmental treatment." *Moore v Bryant*, 853 F3d 245, 250 (CA 5, 2017). Plaintiffs "must present evidence that s/he has been treated differently from persons who are similarly situated." *Williams v Morton*, 343 F3d 212, 221 (CA 3, 2003). Moreover, "differences in treatment raise equal-protection concerns, and necessitate heightened scrutiny of governmental interests, only if they burden a fundamental right (such as the right to vote) or involve a suspect classification based on a protected class." *Boockvar*, 2020 WL 5997680, p *74, citing *Obama for America v Husted*, 697 F3d 423, 429 (CA 6, 2012) ("If a plaintiff alleges only that a state treated him or her differently than similarly situated voters, without a corresponding burden on the fundamental right to vote, a straightforward rational basis standard of review should be used.").

Thus, although vote dilution is a recognized violation of equal protection in certain contexts—such as when laws are crafted that structurally devalue one community's or group of people's votes relative to another's, see, e.g., *Reynolds v Sims*, 377 US 533, 563-564; 84 S Ct 1362; 12 L Ed 2d 506 (1964)—courts have routinely, and appropriately, rejected vote dilution claims in circumstances like those here, where Plaintiffs have alleged no such disparate treatment. See *Minn Voters Alliance v Ritchie*, 720 F3d 1029, 1031-32 (CA 8, 2013) (rejecting vote dilution challenge to decision by election administrators to allow same-day registrants to vote before verifying their voting eligibility to satisfaction of plaintiffs); *Boockvar*, 2020 WL 5997680, pp

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*67-68 (rejecting equal protection challenge to poll watcher restrictions grounded in vote dilution theory because restrictions on voter challenges did not burden fundamental right or discriminate based on suspect classification); *Cook Co Republican Party v Pritzker*, opinion of the United States District Court for the Northern District of Illinois, issued on September 17, 2020 (Case No. 20-cv-4676), 2020 WL 5573059, p *4 (denying motion to enjoin law expanding deadline to cure votes because plaintiffs did not show how voter fraud would dilute their votes); *Cortés*, 218 F Supp 3d at 406-407 (rejecting requested expansion of poll watcher eligibility that rested on premise that voter fraud would dilute weight of plaintiffs' votes); see also *Short v Brown*, 893 F3d 671, 679 (CA 9, 2018) (rejecting equal protection challenge to California practice of permitting voters in some but not all counties to receive automatic mail ballots); *Partido Nuevo Progresista v Perez*, 639 F2d 825, 827-828 (CA 1, 1980) (rejecting challenge to purportedly invalid ballots because "plaintiffs claim that votes were 'diluted' by the votes of others, not that they themselves were prevented from voting").

At bottom, "[t]he Constitution is not an election fraud statute." *Minn Voters Alliance*, 720 F3d at 1031, quoting *Bodine v Elkhart Co Election Bd*, 788 F2d 1270, 1271 (CA 7, 1986). There is simply no authority for enlisting the judiciary to "be the arbiter of disputes over whether particular persons were or were not entitled to vote or over alleged irregularities in the transmission and handling of absentee voter ballots." *Pettengill v Putnam Co R-1 Sch Dist*, 472 F2d 121, 122 (CA 8, 1973) (per curiam); see also *Powell v Power*, 436 F2d 84, 86 (CA 2, 1970) ("Were [this Court] to embrace plaintiffs' theory, [it] would henceforth be thrust into the details of virtually every election, tinkering with the state's election machinery, reviewing petitions, registration cards, vote tallies, and certificates of election for all manner of error and insufficiency under state and federal law."); *Gamza v Aguirre*, 619 F2d 449, 453 (CA 5, 1980) ("If every state election

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irregularity were considered a federal constitutional deprivation, federal courts would adjudicate every state election dispute, and the elaborate state election contest procedures, designed to assure speedy and orderly disposition of the multitudinous questions that may arise in the electoral process, would be superseded by a [constitutional] gloss.").[4] Indeed, Plaintiffs' requested relief—halting certification and voiding the election—would *itself* be a constitutional violation, since "to refuse to count and return the vote as cast [is] as much an infringement of that personal right as to exclude the voter from the polling place." *United States v Saylor*, 322 US 385, 387-388; 64 S Ct 1101; 88 L Ed 1341 (1944).

c. Plaintiffs do not have a statutory right to the relief they seek.

Plaintiffs allege violations of various statutes regulating election administration; specifically, MCL 168.733, which enumerates what election challengers may do, see Mot at 8-9; MCL 168.765(5), which governs when officials must post absent voter ballot information; see *id.* at 9; and MCL 168.765a(10), which requires that "at least 1 election inspector from each major political party must be present at the absent voter counting place," see *id.* at 9-10. But Plaintiffs fail to demonstrate any sort of private right to action for these statutory claims, and the remedy they seek is without any statutory or precedential support.

First, Plaintiffs have not explained how these statutes provide any private right for *them* to challenge alleged violations of the election rules. MCL 163.733 governs what challengers may do, and though each Plaintiff allegedly served as "a poll challenger," Compl. ¶¶ 4-5, at no point do they allege—let alone prove—that they were deprived of the opportunity to perform any of these

[4] *Bush v Gore*, 531 US 98; 121 S Ct 525, 148 L Ed 2d 388 (2000) (per curiam), does not save Plaintiffs' claims. As an initial matter, *Bush* is "limited to [its] circumstances." *Id.* at 109. Moreover, it addressed a situation where the counting of ballots lacked even "minimal procedural safeguards." *Id.* Here, there are myriad uniform requirements in place that provide such safeguards.

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activities. Instead, they simply argue that the degree of supervision was overall insufficient—a claim for which neither this statute nor any other authority provides a cognizable right of action. See Ex. D, *Polasek-Savage v. Benson*, opinion and order of the Court of Claims, issued November 3, 2020 (Docket No. 20-000217-MM), p 3 ("[I]t is not apparent plaintiffs have a clear legal right to request that their chosen number of election challengers be permitted at an absent voter counting board."); see also, e.g., *Boockvar*, 2020 WL 5997680, p *67; Ex. E, *Kraus v Cegavske*, order of the First Judicial District Court of Nevada, entered October 29, 2020 (Case No. 20 OC 00142 1B), p 11, stay denied, order of the Supreme Court of Nevada, entered November 3, 2020 (Case No. 82018). In short, Plaintiffs have not alleged or demonstrated that they were unable to exercise the privileges of election challengers, and they can claim no greater right to election observation.

Plaintiffs' other statutory claims fare no better. They argue that Defendants "habitually and systematically denied election inspectors to be present in the voter counting place," Mot at 9, but even assuming that election inspectors have a cause of action to vindicate this requirement, Plaintiffs *are not election inspectors* and cannot assert a claim to safeguard a right that they do not have. Plaintiffs also base their statutory claim on the assertion that "Defendants failed to post by 8:00 a.m. on Election Day the number of absentee ballots distributed to absent voters and failed to post before 9:00 p.m. the number of absent voters returned before on Election Day." *Id*. But again, they cite no authority—whether from statute or caselaw—giving them a private right of action under this law.

Second, even if Plaintiffs could assert claims under these statutes, they seek a remedy totally divorced from these laws. To remedy the purported procedural violations, Plaintiffs seek to *restrain certification of Wayne County's returns*—an astonishing request, wholly unmoored from these statutes. Indeed, Michigan law provides a clear remedy for violations of the election

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challenger law, and it includes *nothing* resembling the relief Plaintiffs seek. Specifically,

> [a]ny officer or election board who shall prevent the presence of any such challenger as above provided, or shall refuse or fail to provide such challenger with conveniences for the performance of the duties expected of him, shall, upon conviction, be punished by a fine not exceeding $1,000.00, or by imprisonment in the state prison not exceeding 2 years, or by both such fine and imprisonment in the discretion of the court.

MCL 168.734. That's it. Conspicuously absent from this provision—or any other statute under which Plaintiffs assert their claims—is *any* mention of cessation of certification, and certainly nothing justifying an order from this Court "voiding the . . . election and order[ing] a new election," as requested in Plaintiffs' complaint. Compl 20. Nothing in these laws contemplates such a drastic remedy to perceived violations of these election procedures.

3. Plaintiffs' claims fail as a matter of proof.

Even if one were to accept their legal theories as viable—they are not—Plaintiffs fail to adduce sufficient proof of the factual predicate for their claims. They fail to prove noncompliance with Michigan law or any harm arising from such alleged noncompliance.

The only factual support for their claims is a handful of affidavits, which provide little to no admissible evidence. For example, the affidavit of Zachary Larsen contains inadmissible hearsay and double hearsay, since it relies on his observations about what other unnamed challengers conveyed to him about what they, in turn, had heard from and observed on the part of *other* unnamed individuals present at the AVCB. See, e.g., Larsen Aff ¶¶ 18-19, 21, 25-26. The same is true of the affidavit of Robert Cushman, where he "was told" that certain instructions "came down from the Wayne County Clerk's office." Cushman Aff ¶¶ 16-17; see also Ex. F, *Donald J Trump for President v Benson*, opinion and order of the Court of Claims, issued November 6, 2020 (Docket No. 20-000225-MZ), pp 3-5 (denying Trump Campaign's emergency motion to cease all counting and processing of absentee ballots and noting that plaintiffs provided

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no admissible evidence supporting their claims).

Other of Plaintiffs' affidavits simply communicate concerns, which, without facts, constitute mere speculation. See, e.g., Colbeck Aff ¶ 6 ("I did not confirm the presence of internet connection for Electronic Poll Books but the [undescribed] 'security incident' at 10am on 11/3 would seem to indicate that they were connected to internet via WiFi."); Larsen Aff ¶ 33 ("I was concerned that this practice of assigning names and numbers indicated that a ballot was being counted for a non-eligible voter who was not in either the poll book or the supplemental poll book."). And although some of Plaintiffs' affiants described their personal lack of access to specific observation points or the counting room at large, see, e.g., Sitto Aff ¶ 17; Larsen Aff ¶¶ 42-48, Mr. Jaffe's and Ms. MacKenzie's affidavits show that challengers were generally given access throughout the counting process and that some individuals' lack of access was explained by social distancing requirements and capacity limitations. See Jaffe Aff ¶ 31; MacKenzie Aff ¶¶ 4-5, 7, 22.

Finally, and fatally, none of Plaintiffs' affidavits "state[] with particularity" "the circumstances constituting fraud or mistake," as is necessary to meet the pleading requirements for allegations of fraud or mistake. MCR 2.112(B)(1); see, e.g., Jacob Aff ¶ 17 (failing to describe specific instructions given and "estimat[ing]" that pre-dating of ballots "was done to thousands of ballots"); Sitto Aff ¶ 10 (stating that "tens of thousands of ballots were brought in" around 4:30am); Cushman Aff ¶ 15 (stating that entire "batch" of ballots was entered fraudulently); Gustafson Aff ¶ 4 ("Large quantities of ballots were delivered to the TCF Center in what appeared to be mail bins with open tops."). All Plaintiffs have is a hunch that the counting process might have "invited" fraud. But "a hunch is not a basis upon which a court can grant declaratory and injunctive relief." *Duncan v Michigan*, 300 Mich App 176, 221; 832 NW2d 761 (2013).

C. Plaintiffs have not demonstrated irreparable injury.

To be entitled to preliminary relief, Plaintiffs must establish the "indispensable

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requirement" of showing "particularized" irreparable harm. *Mich AFSCME Council v Woodhaven-Brownstown Sch Dist*, 293 Mich App 143, 149; 809 NW2d 444 (2011). It follows that a litigant's speculative assertions cannot demonstrate the type of harm necessary for the issuance of injunctive relief. *Pontiac Fire Fighters Union v City of Pontiac*, 482 Mich 1, 9; 753 NW2d 595 (2008).

Here, Plaintiffs do not credibly demonstrate what irreparable harm they will suffer if an injunction is not issued. They assert only that "Defendants' actions violate Plaintiffs' fundamental right to vote and right to the equal protection of the law." Mot at 10. But as discussed in Part II.B.1-2 *supra*, they have not pleaded—let alone proved—any constitutional violations. Nor could the purported violations of Michigan's tabulation processes satisfy this requirement, as a pure statutory violation, without more, does not give rise to irreparable harm. See, e.g., *Davis*, 296 Mich App at 621 (in case where open records law was not followed, court noted that "caselaw [] recognizes that when the record fails to indicate that a public body has acted in bad faith, there is no real and imminent danger of irreparable injury requiring issuance of an injunction"). Moreover, other election volunteers who participated in the count at TCF Center confirmed that Republican challengers were given every opportunity to meaningfully observe the process; if there was *any* misconduct, it was on the part of those challengers who displayed disruptive behavior, not the election workers operating under intense pressure and unprecedented conditions. See Jaffe Aff ¶¶ 10, 13, 20-22, 24, 30, 32-33; MacKenzie Aff ¶¶ 4-5, 7, 21-22; Zimmerman Aff ¶¶ 6-9, 17-21.

The irreparable injury inquiry asks what injury the *movants* will suffer, not what general irreparable injury might occur to another party or process. Plaintiffs fail to establish any such injury, which is fatal to their motion.

D. The balance of equities and public interest weigh strongly against an injunction.

In their motion, Plaintiffs suggest that "if the State is temporarily enjoined, then it loses little." Mot at 10. This cavalier characterization ignores the consequences of the delay Plaintiffs

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now urge, which would have a cascading effect and significantly disrupt the election in Michigan.

The State's election procedure relies on a series of carefully choregraphed actions and deadlines following the initial vote tally. No more than two days after the election, the board of county canvassers meets and "then proceed[s] without delay to canvass the returns of votes cast." MCL 168.821-168.822. Expeditious completion of this step permits the board of state canvassers to complete their canvas by the twentieth day following the election. See MCL 168.841-168.842. In particular, the statutes contemplate the need for expeditious resolution of presidential contests. See MCL 168.842(2)-(3). Despite the understandable need for swift completion of the canvass and certification, Plaintiffs seek not merely a delay, but a *halt* in certification for an indefinite period of time.[5] The risk this poses to Defendants—and to the public—is a frustrating and costly delay that would cast a shadow over the election results *and* threaten Wayne County's ability to satisfy these statutorily mandated canvassing deadlines. The compounding delays that would result from Plaintiffs' requested relief are not merely unwarranted, but also disruptive and damaging to the public's confidence in the election.

These practical concerns underscore the fundamental inappropriateness of the request Plaintiffs seek. Supported only by flimsy suspicions of fraud and malintent, they ask this Court to enter the extraordinary remedy of enjoining the certification of lawfully cast votes. This dramatic overreaction would not serve to preserve the integrity of the election or ensure the accuracy of results; as discussed above, neither is in doubt. Instead, it would only yield a late-hour judicial intervention into an all-but-completed count, throwing into doubt both the State's timely conclusion of its canvass and the validity of its results. "A delay in counting and finalizing the

[5] Under Plaintiffs' proposed relief, the Republican Party would be able to indefinitely halt any certification if it simply decided not to send election inspectors to observe the tabulation process. That is not and cannot be the resolution if there is an election dispute.

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votes from the City of Detroit without any evidentiary basis for doing so, engenders a lack of confidence in the City of Detroit to conduct full and fair elections." Ex. G, *Stoddard v City Election Comm*, opinion and order of the Third Circuit Court, issued November 6, 2020 (Docket No. 20-014604-CZ), p 4. State and local governments "should not be harmed when there is no evidence to support accusations of voter fraud." *Id.*

Moreover, Plaintiffs' lawsuit challenges a core principle of our electoral process—that every valid vote must be counted. See *Reynolds*, 377 US at 555 n 29, quoting *South v Peters*, 339 US 276, 279; 70 S Ct 641; 94 L Ed 834 (1950) (Douglas dissenting) ("There is more to the right to vote than the right to mark a piece of paper and drop it in a box or the right to pull a lever in a voting booth. The right to vote includes the right to have the ballot counted."). More than 850,000 eligible Wayne County voters cast ballots in this election. Plaintiffs now ask that those lawful votes go uncertified—threatening to disenfranchise nearly a million Michiganders based on erroneous legal theories and no hard evidence. Nothing in Plaintiffs' complaint or motion justifies this unconscionable result, and courts have recently rejected similarly baseless and unjustified attempts to disenfranchise voters. See, e.g., Ex. H, *Stokke v. Cegavske*, order of the United States District Court for the District of Nevada, entered November 6, 2020 (Case No. 2:20-cv-02046-APG-DJA) (denying motion to halt ballot counting in Clark County, Nevada); Ex. I, *In re Enforcement of Election Laws & Securing Ballots Cast or Received After 7:00 PM on Nov 3, 2020*, order of the Superior Court of Chatham County, Georgia, entered November 5, 2020 (Case No. SPCV2000982-J3), p 1 (denying petition to segregate certain ballots and noting that "there is no evidence the ballots referenced in the petition [were invalid]" and "there is no evidence that the Chatham County Board of Elections or the Chatham County Board of Registrars has failed to comply with the law"); Ex. J, *Donald J Trump for President v Philadelphia Co Bd of Elections*,

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order of the United States District Court for the Eastern District of Pennsylvania, entered November 5, 2020 (Case No. 20-5533), p 1 (denying emergency motion to stop Philadelphia County Board of Elections from counting ballots); *Kraus*, p 9 (rejecting challenges to vote tabulation process, explaining that "[t]here is no evidence that any vote that should lawfully not be counted has been or will be counted" and "[t]here is no evidence that any election worker did anything outside of the law, policy, or procedures"). This Court should do the same.

VI. CONCLUSION

For the reasons stated, Intervenor respectfully submits that this Court affirm the Circuit Court's denial of Plaintiffs' motion for preliminary injunction.

Respectfully submitted,

Dated: November 16, 2020

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PROOF OF SERVICE

Scott Eldridge certifies that on the 16th day of November 2020, he served a copy of the above document in this matter on all counsel of record via the Court's electronic filing system and via courtesy email.

s/Scott R. Eldridge
Scott Eldridge

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