STATE OF MICHIGAN
IN THE COURT OF CLAIMS

DONALD J. TRUMP FOR PRESIDENT, INC., and ERIC OSTERGREN,

Plaintiffs,

v

JOCELYN BENSON, in her official capacity as Secretary of State,

Defendant.

No. 20-000225-MZ

HON. CYNTHIA STEPHENS

Mark F. (Thor) Hearne, II (P40231)
Stephen S. Davis
J. Matthew Belz
Attorneys for Plaintiffs
112 South Hanley Road, Suite 200
St. Louis, MO 63015
314.296.4000
thor@truenorthlawgroup.com

Heather S. Meingast (P55439)
Erik A. Grill (P64713)
Assistant Attorneys General
Attorneys for Defendant
PO Box 30736
Lansing, Michigan 48909
517.335.7659
meingasth@michigan.gov
grille@michigan.gov

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DEFENDANT SECRETARY OF STATE'S RESPONSE TO PLAINTIFFS' NOVEMBER 4, 2020 EMERGENCY MOTION FOR DECLARATORY JUDGMENT UNDER MCR 2.605(D)

DANA NESSEL
Attorney General

Heather S. Meingast (P55439)
Erik A. Grill (P64713)
Assistant Attorneys General

Attorneys for Defendant
PO Box 30736
Lansing, Michigan 48909
517.335.7659
grille@michigan.gov
meingasth@michigan.gov

Dated: November 5, 2020

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CONCISE STATEMENT OF ISSUE PRESENTED

1. Whether Plaintiffs have failed to establish that they are entitled to declaratory judgment?

INTRODUCTION

Plaintiffs attempt to "unring" a bell in this case. They ask this Court to halt the counting and processing of absent voter ballots throughout the State of Michigan. But the tally of unofficial county results is complete. This means that absent voter ballots have already been processed and counted in the State of Michigan. The relief they seek can no longer be granted. And regardless, Plaintiffs' substantive claims are entirely without merit, if not frivolous.

Plaintiffs argue that the Michigan Election Law and state Constitution were violated when election inspectors from each major political party was not present for the counting and processing of absent voter ballots at absent voter counting boards. But Plaintiffs do not identify any jurisdiction in which this purported irregularity occurred or set forth any facts supporting their assertions. Plaintiffs further argue that challengers should have the opportunity to review video surveillance footage of drop boxes into which absent voter ballots were placed before those ballots can be counted. But the law does not provide for any such right or opportunity, and the time for pressing this claim has long since passed.

Even a cursory review of Plaintiffs' filings demonstrates that their vague legal claims and nonexistent facts hold no water and should be dismissed.

COUNTER-STATEMENT OF FACTS

Late in day on November 4, Plaintiffs Donald J. Trump for President, Inc., and Eric Ostergren filed the instant complaint for declaratory judgment along with a motion for emergency declaratory relief under MCR 2.605(D).

Their claims revolve around the duties of election inspectors and the use of drop boxes for the return of completed absent voter ballots.

A. Election Inspectors

For Election Day, city or township election commissioners must appoint at least three election inspectors to each election precinct, and "not less than a majority of the inspectors shall be present in the precinct polling place during the time the polls are open." MCL 168.672. While three are required, a commission can appoint as many inspectors as are needed "for the efficient, speedy, and proper conduct of the election." MCL 168.674(1). This is true for the absent voter counting boards (AVCB) associated with the precincts as well, and the inspectors appointed to AVCBs have the same authority as election inspectors at in-person voting precincts. MCL 168.765a(1), (4).[1] The election commissioners "shall designate 1 appointed election inspector as chairperson," and "shall appoint at least 1 election inspector from each major political party and shall appoint an equal number, as nearly as possible, of election inspectors in each election precinct from each major political party." MCL 168.674(2). With respect to AVCBs, section 765a provides that "[a]t all times, at least 1 election inspector from each major political party must be present at the absent voter counting place and the policies and procedures adopted by the secretary of state regarding the counting of absent voter ballots must be followed." MCL 168.765a(10).

While the Secretary exercises supervisory control over local election officials, including inspectors, see MCL 168.21, election inspectors have primary supervisory authority over polling places and AVCBs on Election Day. Section 678 provides that "[e]ach board of election inspectors shall possess full authority to maintain peace, regularity and order at its polling place, and to enforce obedience to their lawful commands during any . . . election[.]" MCL 168.678.

[1] Not every jurisdiction chooses to establish AVCBs for the processing and counting of AV ballots. MCL 168.765a(1) ("if a city or township decides to use absent voter counting boards").

B. Absent voter ballot "drop boxes"

The use of a secure "drop box" for returning completed absent voter (AV) ballots to local clerks is not new in Michigan. Many jurisdictions have made such drop-boxes available for collecting AV ballots, tax returns, payments, and other government-related documents for many years. It is not significantly different from voters dropping their completed AV ballots into a mailbox for delivery by the postal service.

In October, the Michigan Legislature enacted Public Act 177 of 2020, which became immediately effective on October 7, 2020.[2] That Act amended the Election Law to include new provisions relating to drop boxes. Section 761d provides:

> (1) Except as otherwise provided in this subsection and subsection (2), if an absent voter ballot drop box was ordered or installed in a city or township before October 1, 2020, that absent voter ballot drop box is exempt from the requirements of this section. Subsection (5) applies to an absent voter ballot drop box described in this subsection.
>
> (2) If an absent voter ballot drop box was ordered, but not installed in, a city or township before October 1, 2020, the clerk of that city or township must make every reasonable effort to have that absent voter ballot drop box comply with the requirements of this section.
>
> (3) An absent voter ballot drop box must meet all of the following requirements:
>
> (a) Be clearly labeled as an absent voter ballot drop box.
>
> (b) Whether located indoors or outdoors, be securely locked and be designed to prevent the removal of absent voter ballots when locked.
>
> (c) If located in an area that is not continuously staffed, be secured to prevent the removal of the absent voter ballot drop box from its location.
>
> (4) **If an absent voter ballot drop box is located outdoors, all of the following apply:**

[2] See legislative history for PA 177 available at http://www.legislature.mi.gov/(S(efzafixkse3uambsaldsph34))/mileg.aspx?page=getObject&objectName=2020-SB-0757.

> (a) The drop box must be securely locked and bolted to the ground or to another stationary object.
>
> (b) The drop box must be equipped with a single slot or mailbox-style lever to allow absent voter ballot return envelopes to be placed in the drop box, and all other openings on the drop box must be securely locked.
>
> (c) **The city or township clerk must use video monitoring of that drop box to ensure effective monitoring of that drop box.**
>
> (d) The drop box must be in a public, well-lit area with good visibility.
>
> (e) The city or township clerk must immediately report to local law enforcement any vandalism involving the drop box or any suspicious activity occurring in the immediate vicinity of the drop box.
>
> (5) Only a city or township clerk, his or her deputy clerk, or a sworn member of his or her staff, is authorized to collect absent voter ballots from an absent voter ballot drop box. [MCL 168.761d(1)-(5) (emphasis added).]

Under these provisions, if a jurisdiction ordered or installed a drop box before October 1, the jurisdiction is not mandated to comply with the new requirements, such as the video monitoring requirement. But if a jurisdiction had not yet installed a drop box before October 1, the jurisdiction is required to make every reasonable effort to have the drop box comply with the new provisions.

Notably, the Legislature did not include any requirement that local clerks keep track of, or segregate, which AV ballots were returned via a drop box. Nor did the Legislature provide that any recording of the video monitoring of a drop box be made available to anyone, including poll challengers.

ARGUMENT

I. Plaintiffs fail to demonstrate that they are entitled to any declaratory relief against the Secretary of State and their emergency motion for such relief must be denied.

This Court should exercise its discretion and deny Plaintiffs' request for emergency declaratory relief where Plaintiffs' claims are barred by laches, Plaintiffs lack standing to bring their suit, and where Plaintiffs' constitutional and statutory claims are devoid of merit.

A. Standard of review.

MCR 2.605 governs a trial court's power to enter a declaratory judgment. The court rule provides, in pertinent part, that "[i]n a case of actual controversy within its jurisdiction, a Michigan court of record *may* declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted." MCR 2.605(A)(1) (emphasis added). The language in this rule is permissive, and the decision whether to grant declaratory relief is within the trial court's sound discretion. *P.T. Today, Inc v Comm'r of Office Fin & Ins Servs*, 270 Mich App 110, 126 (2006).

B. Plaintiffs' claims must be dismissed because they are barred by laches.

"The doctrine of laches is founded upon long inaction to assert a right, attended by such intermediate change of conditions as renders it inequitable to enforce the right." *Charter Twp of Lyon v Petty*, 317 Mich App 482, 490 (2016) (quotation marks and citation omitted). "The application of the doctrine of laches requires the passage of time combined with a change in condition that would make it inequitable to enforce the claim against the defendant." *Id.* (citation omitted). To merit relief under this doctrine, the complaining party must establish prejudice as a result of the delay. *Id*. (citations omitted). Proof of prejudice is essential to the defense of laches. *Id*. In this case, the delay by Plaintiffs in raising their claims has prejudiced the ability of the Defendants to respond or even to comply with the relief they request.

First, Plaintiffs unreasonably delayed raising their claims before this Court. AV ballots became available to voters on September 24, 2020. Const 1963, art 2, § 4(1). Since that date and through 8 p.m. on Election Day, voters could have completed and returned their AV ballots via their local jurisdiction's drop box. The polls opened at 7 a.m. on Election Day, and AVCBs began processing and counting all AV ballots at 7 a.m.,[3] whether the ballots were returned by mail, in person, or by drop box, and many AVCBs continued to do so after the polls closed at 8 p.m. and into the night and the next day, November 4.

The new requirement for video monitoring of drop boxes became effective on October 7, and Plaintiffs can be charged with notice of that enactment. If they believe that challengers should have access to surveillance video, the time to bring that claim was October 8—not the day after the election, and after the majority of AV ballots have been counted in this State.

Plaintiffs' claims regarding missing election inspectors are also untimely. Again, Plaintiffs do not identify a single jurisdiction in which an election inspector of each political party was not present at an AVCB or identify a date or time at which the alleged incidents occurred. And Plaintiffs make no effort to explain how or why their complaint was timely filed. Given that the AVCBs and the election inspectors appointed to oversee them have now completed their tasks, Plaintiffs' claims are too late.

Second, the Secretary of State has been prejudiced by the Plaintiffs' delay in bringing their claims. There is or was no way the Secretary could have directed local clerks to provide video footage of drop boxes they may have to challengers at AVCBs in their jurisdictions after the filing of Plaintiffs' complaint late in the day on November 4. Similarly, since Plaintiffs'

[3] Some jurisdictions began pre-processing AV ballots under an amendment to the Michigan Election Law that permitted limited processing activities prior to Election Day. See MCL 168.765(6). Challengers were permitted to observe these pre-processing activities. *Id.*

complaint and motion did not identify any specific AVCBs that were missing an inspector, the Secretary could not have assisted in remedying that situation. Of course, this is especially true now since the unofficial county count is complete. (Ex A, Brater Dec, ¶ 8.)

In *New Democratic Coal v Austin*, 41 Mich App 343, 356–357 (1972), the Court of Appeals observed in that apportionment case:

> We take judicial notice of the fact that elections require the existence of a reasonable amount of time for election officials to comply with the mechanics and complexities of our election laws. The state has a compelling interest in the orderly process of elections. Courts can reasonably endeavor to avoid unnecessarily precipitate changes that would result in immense administrative difficulties for election officials. In this case to grant the relief requested by the plaintiffs would seriously strain the election machinery and endanger the election process. [citation omitted.]

Federal courts have also long recognized that delays in bringing a challenge to election rules are inevitably prejudicial and pose special risks. *See, e.g.*, *Republican Nat'l Comm v Democratic Nat'l Comm*, 140 S Ct 1205, 1207 (2020) (per curiam); *Purcell v Gonzalez*, 549 US 1, 4-5 (2006)(per curiam). In *Crookston v Johnson*, 841 F3d 396, 398 (CA 6, 2016), the Sixth Circuit stayed an injunction affecting Michigan's election procedures, and the reasoning could just as readily apply in this case:

> There are many reasons to grant the stay. The first and most essential is that Crookston offers no reasonable explanation for waiting so long to file this action. When an election is "imminen[t] and when there is "inadequate time to resolve [] factual legal disputes" and legal disputes, courts will generally decline to grant an injunction to alter a State's established election procedures. See *Purcell v Gonzalez*, 549 US 1, 5-6 [ ] (2006) (per curiam). That is especially true when a plaintiff has unreasonably delayed bringing his claim, as Crookston most assuredly has. . . . Call it what you will—laches, the *Purcell* principle, or common sense—the idea is that courts will not disrupt imminent elections absent a powerful reason for doing so.

The U.S. Supreme Court recently reaffirmed that principle in *Republican Nat'l Comm*, 140 S Ct at 1207 (staying portions of an injunction modifying process for mailing ballots on eve of primary election).

Here, Plaintiffs unreasonably delayed in raising these claims before this Court, and the consequences of their delay prejudiced the Secretary of State. Plaintiffs' claims are barred by laches.[4]

C. Plaintiffs' claims must be dismissed because they lack standing to bring the claims alleged in their complaint.

The Michigan Supreme Court re-established principles of prudential standing in *Lansing Sch Educ Ass'n v Lansing Bd of Educ*, 487 Mich 349, 372 (2010), where it held:

> We hold that Michigan standing jurisprudence should be restored to a limited, prudential doctrine that is consistent with Michigan's long-standing historical approach to standing. Under this approach, a litigant has standing whenever there is a legal cause of action. Further, whenever a litigant meets the requirements of MCR 2.605, it is sufficient to establish standing to seek a declaratory judgment. Where a cause of action is not provided at law, then a court should, in its discretion, determine whether a litigant has standing. A litigant may have standing in this context 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.

So, if there is no legal cause of action, the plaintiff must meet the requirements of MCR 2.605, which provides that "[i]n a case of *actual controversy* within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment[.]"

Pursuant to MCR 2.605, "[t]he existence of an 'actual controversy' is a condition precedent to invocation of declaratory relief." *Lansing Sch Educ Ass'n v Lansing Bd of Educ*

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[4] Even if laches did not bar Plaintiffs' claims, their claims should be dismissed because they are moot. "An issue is moot if an event has occurred that renders it impossible for the court to grant relief. An issue is also moot when a judgment, if entered, cannot for any reason have a practical legal effect on the existing controversy." *Gen Motors Corp v Dep't of Treasury*, 290 Mich App 355, 386 [ ] (2010) citation omitted). Here, elections inspectors, challengers, and AVCBs have all completed their duties with respect to the November 3, general election, and AV ballots have been counted. There is no more counting of ballots for election inspectors and challengers to oversee and observe and no counting of ballots to halt. It is now impossible for the Court to grant Plaintiffs' requested relief, and any judgment would have no practical legal effect.

(*On Remand*), 293 Mich App 506, 515 (2011) (citation omitted). "An actual controversy exists when declaratory relief is needed to guide a plaintiff's future conduct in order to preserve the plaintiff's legal rights." 293 Mich App at 515 (citing *Citizens for Common Sense in Gov't v Attorney Gen*, 243 Mich App 43, 55 (2000)). "The essential requirement of the term actual controversy under the rule is that plaintiffs plead and prove facts that demonstrate an adverse interest necessitating the sharpening of the issues raised." *UAW v Central Mich Univ Trustees*, 295 Mich App 486, 495 (2012) (citation and internal quotation marks omitted). "Generally, where the injury sought to be prevented is merely hypothetical, a case of actual controversy does not exist." *Citizens for Common Sense*, 243 Mich App at 55. A litigant may also have standing in this context if they have 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 Sch Educ Ass'n*, 487 Mich at 372.

Plaintiffs here fail each of these requirements. First, they have not articulated any legal causes of action in their complaint. Second, they have not demonstrated that they meet the requirement of an actual controversy that would support a declaratory judgment. Here, Plaintiffs' complaint requests that this Court declare that the Secretary of State, herself, has violated the Constitution's Equal Protection Clause, Purity of Elections Clause, and MCL 168.765a. But Plaintiffs do not require a declaration that the Secretary "violated" the Michigan Constitution or the statute in order to guide their future conduct. Indeed, Plaintiffs have failed to pled the existence of an actual controversy in this case where they have not identified a single jurisdiction, election inspector, or challenger, that was aggrieved by any failure of the Secretary to act. The alleged harms appear hypothetical or speculative.

Plaintiffs' late-filed affidavit of Jessica Connarn does not demonstrate otherwise. Ms. Connarn affirms that she was acting as a Republican challenger at the City of Detroit's AVCB, when she was approached by an unidentified, distressed poll worker who told Connarn that she was being directed to change the received-by date on an AV ballot, and that the upset worker did, in fact, change a date on a ballot, as allegedly demonstrated by a picture of a sticky note. (Connarn Aff, ¶P 1-2.) Connarn affirms that she went to report this matter to a "supervisor," was told to get the name or picture of the poll worker, but then could not do so because the poll worker had moved to work at an adjudication table. *Id*., ¶¶ 2, 4. Setting aside the multiple factual and evidentiary infirmities that undermine the credibility of the affidavit, its substance is unrelated to the claims pending here. The affiant does not declare that election inspectors of a particular party were absent from Detroit's AVCB, nor does she allege that, as a challenger, she requested to see Detroit's drop box videos and was denied access, nor does she express any need or interest in viewing such videos. As a result, there is no case or controversy that would support a declaratory judgment.

Lastly, Plaintiffs have not identified any special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large.

The Trump committee alleges that it "has a special and substantial interest in assuring that Michigan processes the ballots of Michigan citizens [sic] according to Michigan law so that every lawful Michigan voter's ballot is fairly and equally processed and counted." (Comp., ¶ 6.) In other words, the Trump committee has an interest in Michigan following the law. But that is an interest shared by every citizen in Michigan and does not set the Trump committee apart for purposes of establishing standing.

Plaintiff Ostergren alleges that he is a registered voter of Roscommon County and is "credentialed and trained as an election 'challenger.' " (Comp., ¶ 2.) He does not allege who he is a challenger for, i.e., a major political party or some other organization. He alleges he "was excluded from the counting board during the absent voter ballot review process." *Id.* But he does not identify from which ACVB he was excluded. He further alleges that he "has a special and substantial interest under Michigan law as a credentialed election challenger to observe the processing of absent voter ballots." *Id.*, ¶ 6. But these allegations bear little relationship to the claims alleged here. Again, the claim here is that election inspectors were missing from AVCBs, not that credentialed challengers were excluded. As to the claim regarding drop box videos, like Connarn, Ostergren does not allege that, as a challenger somewhere, he requested to be shown the surveillance video and was denied. He does not even specifically allege that he is or was interested in observing videos. Ostergren has not demonstrated any special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large to support his standing to bring this complaint.

As a result, Plaintiffs lack standing to bring the claims in the complaint, and their motion for declaratory judgment should be denied.

D. Plaintiffs are not entitled to a declaratory judgment because their constitutional and statutory claims fail on the merits and must be dismissed.

Plaintiffs' complaint raises three counts, in which they allege that the lack of opportunity for challengers at AVCBs to observe security video footage of ballot drop boxes (1) violates the Equal Protection Clause of the Michigan Constitution; (2) violates "Michigan voters'" rights under the purity of elections clause of the Michigan Constitution; and (3) violates MCL 168.765a. But none of these claims has any legal merit.

Plaintiffs' minimal allegations include only two principal claims. First, they allege that, "Michigan [AVCBs] are not complying with [MCL 168.765a]" because the boards, "are being conducted without inspectors from each party being present." (Complaint, ¶11). This allegation is entirely unsupported by any factual allegations. Plaintiffs do not identify any AVCBs that allegedly do not or did not have an election inspector from each of the major parties. The only allegation that comes close to addressing this claim is that Plaintiff Ostergren was "excluded from the counting board during the absent voter ballot review process." (Complaint, ¶2). However, again, there is no allegation of what AVCB was involved, or when this allegedly occurred.

Moreover, Plaintiff Ostergren does not allege that he was an election inspector—he alleges only that he was credentialed as an election *challenger*. (Complaint, ¶2). But a challenger is not the same thing as an inspector—they are appointed in different manners and have different responsibilities. Compare e.g. MCL 168.674 and MCL 168.730. Indeed, one of a challenger's duties is to bring issues to the attention of an election inspector. MCL 168.733(1)(e). Plaintiff Ostergren's alleged exclusion, therefore, does nothing to support a violation of MCL 168.765a. As a result, there is no allegation in the complaint to support the conclusion that inspectors have been excluded from anything. In contrast, Defendant Benson has provided the declaration of Director of Elections Jonathan Brater, which states in part that election inspectors *have* been appointed and present in each precinct and that no complaints have been received by the Bureau of Elections from any election inspector asserting that they have been excluded from a counting board. (Ex A, Brater dec, ¶ 10). Plaintiffs simply fail to make allegations sufficient to state a claim under MCR 2.116(c)(8) for anything premised upon the supposed lack of election inspectors.

The second essential claim of Plaintiffs' complaint is that the Secretary has somehow violated the law and state Constitution by "allowing absent voter ballots to be processed and counted without allowing challengers to observe the video of the ballot [drop] boxes into which these ballots were placed." (Complaint, ¶18). This claim, however, is not supported by any citation to statute or case law establishing that challengers even have the authority to demand to see video footage of ballot drop boxes—let alone that ballots cannot be processed unless and until they do so. Simply put, there is no such law or requirement.

Poll challengers are appointed under MCL 168.730. And under section 733, "[t]he board of election inspectors shall provide space for each challenger, if any, at each counting board that enables the challengers to observe the counting of the ballots. A challenger at the counting board may do 1 or more of the activities allowed in subsection (1), as applicable." MCL 168.733(2). Subsection 733(1) provides, in pertinent part, for the following duties and authority of challengers:

> A challenger may do 1 or more of the following:
>
> (a) Under the scrutiny of an election inspector, inspect without handling the poll books as ballots are issued to electors and the electors' names being entered in the poll book.
>
> (b) Observe the manner in which the duties of the election inspectors are being performed.
>
> (c) Challenge the voting rights of a person who the challenger has good reason to believe is not a registered elector.
>
> (d) Challenge an election procedure that is not being properly performed.
>
> (e) Bring to an election inspector's attention any of the following:
>
> (i) Improper handling of a ballot by an elector or election inspector.
>
> (ii) A violation of a regulation made by the board of election inspectors pursuant to section 742.

> (iii) Campaigning being performed by an election inspector or other person in violation of section 744.
>
> (iv) A violation of election law or other prescribed election procedure.
>
> (f) Remain during the canvass of votes and until the statement of returns is duly signed and made.
>
> (g) Examine without handling each ballot as it is being counted.
>
> (h) Keep records of votes cast and other election procedures as the challenger desires.
>
> (i) Observe the recording of absent voter ballots on voting machines. [MCL 168.733(1).]

The Michigan Legislature included no provision in the above list regarding the inspection of ballot drop box security video.

When interpreting a statute, the goal of the courts, "is to give effect to the Legislature's intent, focusing first on the statute's plain language." *Madugula v Taub*, 496 Mich 685, 696 (2014). Courts examine the statute as a whole, reading individual words and phrases in the context of the entire legislative scheme. *Id.* "When a statute's language is unambiguous, . . . the statute must be enforced as written. No further judicial construction is required or permitted." *Id.* Plaintiffs do not identify any ambiguity in MCL 168.733(1) that would warrant judicial interpretation, and certainly none that would support the new legal entitlement to review ballot drop box video that Plaintiffs seek to inject into the statute.

Moreover, Plaintiffs are incorrect in their reading of MCL 168.761d concerning the drop box video. As an initial matter, section 761d(1) expressly provides that ballot drop boxes that were ordered or installed before October 1, 2020 are *exempt* from the requirement. Plaintiffs do not allege what drop boxes are of interest to them, and so it is not possible for Defendant Benson to determine whether such boxes are subject to the requirement. But also, there is no reference in MCL 168.761d to election challengers—or anyone else—being entitled to view the video.

Instead, MCL 168.761d(4)(c) provides only that, "the city or township clerk must use video monitoring of that drop box to ensure effective monitoring of the drop box." And there is also nothing in the statute providing that ballots deposited in a drop box are unable to be processed unless the video is viewed by a challenger, and the processing of such ballots is not contrary to any law—in fact, the processing of absent ballots is expressly required by law. See e.g. MCL 168.765(6), (7) and (8). Plaintiffs offer no other legal support for this argument. Again, Plaintiffs' allegations are so deficient that they fail to state a claim under MCR 2.116(c)(8).

1. There is no violation of the Equal Protection Clause.

The only substantive allegation in Count I states that Plaintiffs seek declaratory and injunctive relief requiring Secretary Benson to, "direct that election authorities comply with Michigan law mandating that election inspectors from each party and allowing challengers access to video of ballot boxes before counting of relevant votes takes place." (Complaint, ¶23).

Article 1, § 2 of the Michigan Constitution provides that "[n]o person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin." The Equal Protection Clause in the Michigan Constitution is coextensive with the Equal Protection Clause of the United States Constitution. *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 486 Mich 311, 318 (2010). Equal protection applies when a state either classifies voters in disparate ways or places undue restrictions on the right to vote. *Obama for America v Husted*, 697 F3d 423, 428 (6th Cir, 2012).

One fundamental problem with Plaintiffs' claim is that there is no action by the Secretary of State in this case that would be subject to equal protection analysis. The Secretary of State is *not* treating any voters disparately from any others. In fact, the Plaintiffs make no allegation about any action taken by the Secretary. She has done nothing to classify or distinguish between

or among voters. She has not prevented any party from appointing inspectors or given preferential treatment to inspectors or challengers from one party or group over another. Every qualifying party had the same opportunity to appoint inspectors without assistance or restraint from the Secretary of State. Similarly, the Secretary has not selectively allowed some challengers to view drop box security videos, while denying the same to others. Instead, Plaintiffs broadly allege only that the Secretary should be compelled to instruct local officials not to violate the law—but they fail to make allegations that would allow the Secretary to identify what local officials require such direction, or for what reason. Plaintiffs, therefore, have failed to establish that the Secretary of State has done anything to violate the Equal Protection Clause of the Michigan Constitution, and Count I fails as a matter of law.

2. There is no violation of the "purity of elections" clause.

Article 2, §4 of the Michigan Constitution provides, in part:

> Except as otherwise provided in this constitution or in the constitution or laws of the United States the legislature shall enact laws to regulate the time, place and manner of all nominations and elections, to preserve the purity of elections, to preserve the secrecy of the ballot, to guard against abuses of the elective franchise, and to provide for a system of voter registration and absentee voting. No law shall be enacted which permits a candidate in any partisan primary or partisan election to have a ballot designation except when required for identification of candidates for the same office who have the same or similar surnames.

The Michigan Supreme Court has interpreted the "purity of elections" clause to embody two concepts:

> [F]irst, that the constitutional authority to enact laws to preserve the purity of elections resides in the Legislature; and second, 'that any law enacted by the Legislature which adversely affects the purity of elections is constitutionally infirm.'" *Socialist Workers Party v Secretary of State*, 412 Mich 571, 596 (1982), quoting *Wells v Kent Co Bd of Election Comm'rs*, 382 Mich 112, 123 (1969). The phrase "purity of elections" "requires . . . fairness and evenhandedness in the election laws of this state." *Socialist Workers Party*, supra at 598. [*Taylor v Currie*, 277 Mich App 85, 96-97 (2007)].

Plaintiffs' complaint does not challenge any enactment by the Legislature, and so their challenge presumably centers on the second concept—fairness and evenhandedness.

Nothing in either Plaintiffs' complaint or their motion identifies anything unfair or uneven in the Secretary's actions. They make unspecific allegations of election inspectors being "excluded," but provide no information about the identity of the inspector, the date or location of the occurrence, or anything else that illuminates any salient details about the alleged event.

Plaintiffs do not allege that the Secretary herself excluded any inspector—or even any challenger—from a counting board, and their claim instead hinges on the Secretary being compelled to instruct unidentified clerks to follow the Michigan Election law. Likewise, Plaintiffs contend that the "purity of elections" somehow requires that challengers be able to view security footage *before* ballots can be processed, but they point to no legal authority supporting such a requirement. Plaintiffs also fail to offer any explanation how the inability of challengers to review video footage before ballots are processed results in an unfair or uneven election.

Regardless, there is no advantage given to any group over another when all parties have the same opportunities to appoint inspectors and all challengers have the same rights and privileges. Plaintiffs have failed to demonstrate that the Secretary of State has done anything to violate the Purity of Elections Clause and Count II fails as a matter of law.

3. There is no "violation" of MCL 168.765a.

Plaintiffs' Count III consists of two paragraphs. In the first, Plaintiffs' partially quote MCL 168.765a(10), but the entirety of that section provides useful context. When interpreting a statute, courts must "consider both the plain meaning of the critical word or phrase as well as 'its placement and purpose in the statutory scheme.'" *Sweatt v Dep't of Corr*, 468 Mich 172, 179 (2003). The full subsection here provides:

> The oaths administered under subsection (9) must be placed in an envelope provided for the purpose and sealed with the red state seal. Following the election, the oaths must be delivered to the city or township clerk. Except as otherwise provided in subsection (12), a person in attendance at the absent voter counting place or combined absent voter counting place shall not leave the counting place after the tallying has begun until the polls close. Subject to this subsection, the clerk of a city or township may allow the election inspectors appointed to an absent voter counting board in that city or township to work in shifts. A second or subsequent shift of election inspectors appointed for an absent voter counting board may begin that shift at any time on election day as provided by the city or township clerk. However, an election inspector shall not leave the absent voter counting place after the tallying has begun until the polls close. If the election inspectors appointed to an absent voter counting board are authorized to work in shifts, at no time shall there be a gap between shifts and the election inspectors must never leave the absent voter ballots unattended. **At all times, at least 1 election inspector from each major political party must be present at the absent voter counting place and the policies and procedures adopted by the secretary of state regarding the counting of absent voter ballots must be followed.** A person who causes the polls to be closed or who discloses an election result or in any manner characterizes how any ballot being counted has been voted in a voting precinct before the time the polls can be legally closed on election day is guilty of a felony. [Emphasis added].

Read in context, it seems more reasonable to conclude that this subsection is intended to ensure proper staffing over the course of election day, rather than to create an independent right that may be enforced by third parties (such as Plaintiffs) who are, themselves, not election inspectors.

Nonetheless, it remains entirely unclear how or when this subsection was violated in the course of the November 3, 2020 general election. The second paragraph of Count III broadly asserts that Michigan AVCBs "are not complying with this statute." But Plaintiffs neglect to allege where this took place, or when, or how, or even who was involved (was an inspector for the Republican party not present or was it an inspector for the Democratic party?). Plaintiffs have utterly failed to identify any violation of MCL 168.765a.

As discussed above, there is an inference from the pleadings that Plaintiffs may believe that MCL 168.765a is invoked through the alleged exclusion of Plaintiff Ostergren from some

unidentified counting board at some unknown time, but that would also be erroneous. Again, challengers are not inspectors, and section 765a(10) refers specifically to election inspectors, not challengers. While parties have the ability to appoint challengers, there is no statutory requirement that challengers must be present in order for counting boards to perform their work.

In the absence of any allegations establishing that any actual violation occurred, Plaintiffs' Count III fails as a matter of law as well.

E. Plaintiffs' requested relief is not properly pled.

In their complaint and motion, Plaintiffs request that this Court "*mandate* that Secretary Benson" "order all counting and processing of absentee votes cease immediately until an election inspector from each party is present at each absent voter counting board and until video is made available to challengers of each ballot box," and "order the immediate segregation of all ballots that are not being inspected and monitored as aforesaid and as is required by law." (Comp., Prayer for Relief.) But Plaintiffs' have not requested mandamus relief to compel the Secretary to exercise her supervisory control and direct local election officials to take particular action.

Michigan courts have long recognized that "mandamus is the proper remedy for a party seeking to compel election officials to carry out their duties." *Citizens Protecting Michigan's Constitution v Secretary of State*, 324 Mich App 561, 582-83 (2018), citing *Wolverine Golf Club v Secretary of State*, 24 Mich App 711, 716 (1970), *aff'd* 384 Mich 461 (1971). Even so, mandamus should not issue in this case because, in addition to Plaintiffs' failure to expressly request that relief, Plaintiffs do not have a clear legal right to request that all challengers be provided access to drop box surveillance video before AV ballots can be counted, or that the presence of election inspectors of a particular party be compelled to be present at AVCBs. Nor do Plaintiffs have a clear legal right to halt the processing and counting of AV ballots based on those perceived rights. Likewise, it is not apparent that ordering an elected official, when she

has taken no action herself, to order a county to perform a certain act is appropriate for a mandamus action. See *Berry*, 316 Mich App at 41 (describing mandamus relief, generally).

F. Plaintiffs' verification is defective.

MCL 600.6434(2) requires that a complaint in the Court of Claims must be verified. Plaintiffs' pleading fails to satisfy this requirement. A "verified complaint" means that "the individual with personal knowledge of the facts stated in the document" must swear that those facts are true. See *Russell v City of Detroit*, 321 Mich App 628, 644-64 & n 5 (2017). But here, Plaintiffs attach a "verification" from Plaintiff Ostergren which expressly states that he does *not* have personal knowledge of the facts alleged. (Complaint, p 9). Plaintiffs offer no other verification for their complaint. Consequently, their complaint is not a verified complaint and it fails to meet the requirements of MCL 600.6434, and the pleading should not be considered by this Court.

CONCLUSION AND RELIEF REQUESTED

For the reasons stated above, Defendant Secretary of State Jocelyn Benson respectfully requests that this Honorable Court deny Plaintiffs' motion for emergency declaratory judgement.

Respectfully submitted,

DANA NESSEL
Attorney General

/s/Heather S. Meingast
Heather S. Meingast (P55439)
Erik A. Grill (P64713)
Assistant Attorneys General
Attorneys for Defendant
PO Box 30736
Lansing, Michigan 48909
517.335.7659

Dated: November 5, 2020

PROOF OF SERVICE

Lisa S. Albro certifies that on November 5, 2020, she served a copy of the above document in this matter on all counsel of record and parties *in pro per* via electronic email:

Mark (Thor) Hearne, thor@truenorthlawgroup.com
Scott Eldridge, eldridge@millercanfield.com
Karyn Yoak, yoak@millercanfield.com

/s/Lisa S. Albro
Lisa S. Albro

STATE OF MICHIGAN
IN THE COURT OF CLAIMS

DONALD J. TRUMP FOR PRESIDENT, INC., and ERIC OSTERGREN,

Plaintiffs,

v

JOCELYN BENSON, in her official capacity as Secretary of State,

Defendant.

No. 20-000225-MZ

HON. CYNTHIA STEPHENS

Mark F. (Thor) Hearne, II (P40231)
Stephen S. Davis
J. Matthew Belz
Attorneys for Plaintiffs
112 South Hanley Road, Suite 200
St. Louis, MO 63015
314.296.4000
thor@truenorthlawgroup.com

Heather S. Meingast (P55439)
Erik A. Grill (P64713)
Assistant Attorneys General
Attorneys for Defendant
PO Box 30736
Lansing, Michigan 48909
517.335.7659
meingasth@michigan.gov
grille@michigan.gov

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DECLARATION OF JONATHAN BRATER

I, Jonathan Brater, state as follows:

1. I have been employed by the Secretary of State as Director of Elections since January 2, 2020 and in such capacity serve as Director of the Bureau of Elections (Bureau). See MCL 168.32.

2. I bring this declaration in support of Defendant's response in opposition to Plaintiffs' emergency motion for declaratory relief. If called as a witness, I could testify truthfully and accurately as to the information contained within this declaration.

3. I am personally knowledgeable about provisions of the Michigan Election Law that govern absent voter ballots, election inspectors, election challengers, and the tabulation of ballots.

4. Public Act 177 of 2020, enacted on October 6, 2020, provides statutory requirements for absent voter ballot drop boxes, including video surveillance, but exempts from these requirements or absent voter ballot drop boxes ordered before October 1, 2020. Although clerks can enter the locations of their drop boxes using the state Qualified Voter File, the Bureau of Elections does not possess or maintain any information that would confirms when a jurisdiction may have ordered or installed a drop box, or whether any given drop boxes used in the 2020 general election were being monitored by video surveillance.

5. There is no way for a municipal jurisdiction to determine if an absent voter ballot was delivered using a ballot drop box once it has been removed from the drop box and combined with other absent voter ballot envelopes for processing. It may be possible to determine whether or not an absent voter ballot was mailed because of a postage cancelation, but there are many non-mail ways to deliver an absent voter ballot envelope, including hand delivery and delivery by an immediate family or household member.

6. At absent voter counting boards, election inspectors review the absent voter ballot envelope to verify that the clerk has reviewed the signature and verify that the voter is on the pollbook or absent voter list. Election inspectors then open the envelope, verify that the ballot stub matches the ballot number on the envelope, and then remove the ballot secrecy sleeve from

the ballot envelope. These steps can be done on the Monday before election day at a jurisdiction utilizing pre-processing.

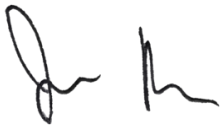
7. After the secrecy sleeve is no longer paired with the envelope, election inspectors remove the ballot number stub and remove the ballot from the secrecy sleeve, flatten it, and tabulate the ballot. One the ballot has been removed from the envelope, it can no longer be tied back to the envelope it came in and therefore can no longer be tied back to the individual voter. The only exception is challenged ballots, which include a number that is covered up; these ballots can be identified if needed. The vast majority of absent voter ballots are not challenged.

8. As of 9:00 a.m. on November 5, approximately 3.3 million absent voter ballots had been received in Michigan. The vast majority of these were tabulated, as part of the more than 5.5 million ballots total that were tabulated, during the election according to unofficial results. To my knowledge all tabulation of ballots, including tabulation of ballots at absent voter counting boards, is complete.

9. Even if it were practical or possible at this time to again review 3.3 million absent voter ballot envelopes that have already been reviewed by an election clerk and by election inspectors, and even if an issue with the envelope were discovered, it would not be possible now to connect the ballot back to that envelope. Instead, the ballot would already have had its ballot number stub removed and been tabulated with the rest of the ballots.

10. I am not aware of any complaints received by the Bureau of Elections that an election inspector was not allowed to be present at an absent voter counting board in any jurisdiction in this State.

11. I declare under the penalty of perjury that the foregoing is true and correct, based on personal knowledge.



Jonathan Brater