STATE OF MICHIGAN
CIRCUIT COURT FOR THE 3RD JUDICIAL CIRCUIT
WAYNE COUNTY

KRISTINA KARAMO, PHILIP O'HALLORAN, MD, BRADEN GIACOBAZZI, TIMOTHY MAHONEY, KRISTIE WALLS, PATRICIA FARMER, ELECTION INTEGRITY FUND AND FORCE,

Plaintiffs,

v

JANICE WINFREY, in her official capacity as Detroit City Clerk, CITY OF DETROIT BOARD OF ELECTION INSPECTORS, in their official capacity,

Defendants.

No. 22-012759

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ATTORNEY GENERAL DANA NESSEL'S AMICUS BRIEF IN SUPPORT OF DEFENDANTS' POST-HEARING BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

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INTRODUCTION

Plaintiffs challenge to the procedures the City of Detroit will use to process absent voter ballots and operate its absent voter ballot counting boards comes at the proverbial "eleventh hour." Reminiscent of the frivolous attacks leveled at the City and its election workers regarding the November 2020 presidential election, Plaintiffs claims are grounded in misinterpretations of the law and a lack of understanding as to how the law and procedures are implemented in real time. To be fair, the election laws can be complex. But all the more reason Plaintiffs should have done their homework first, rather than filing last-minute, indecipherable pleadings requesting sweeping changes to the City's procedures on the eve of an election. Indeed, the hearing in this matter demonstrated Plaintiffs' misconceptions.

But there can be no confusion that Plaintiffs' motion for injunctive relief must be denied. Laches applies to bar their claims, or at least the emergency injunctive relief they request, where Plaintiffs have offered no credible reason for their delay in filing suit. And where the City Defendants are plainly prejudiced by this request for relief that would disrupt well-established procedures with no realistic time to train workers differently.

And even if laches did not apply, Plaintiffs have not demonstrated any likelihood of succeeding on the merits of their claims. As explained in Defendants' brief and in the Attorney General's brief below, the City of Detroit's procedures comply with Michigan's election laws. Indeed, they are the same or similar procedures used by jurisdictions all over the state—yet only the City of Detroit and its' voters have been targeted. This Court should deny relief.

COUNTER-STATEMENT OF FACTS

Amicus Attorney General Nessel accepts and incorporates the facts as set forth in the brief filed by the City of Detroit Defendants.

ARGUMENT

I. Plaintiffs' motion must be denied where they fail to establish the necessary factors for granting a preliminary injunction.

Plaintiffs allege that numerous procedures the City of Detroit will follow in processing absent voter ballots and operating its absent voter counting board violate Michigan's Election Law, MCL 168.1 *et seq.* While Plaintiffs are wrong as to each and every one of their claims for the reasons stated in the City of Detroit's brief, because some of the claims implicate state election officials, and the relief Plaintiffs' request potentially seeks to disenfranchise thousands of citizens, the Attorney General offers the following arguments in support of the City of Detroit.

A. Factors to be balanced in deciding a motion for injunctive relief.

A preliminary injunction is extraordinary relief and "should issue only in extraordinary circumstances." *Mich State Emps Ass'n v Dep't of Mental Health,* 421 Mich 152, 157, 158 (1984); *Mich Coal of State Emp Unions v Civil Serv Comm'n,* 465 Mich 212, 226 n11 (2001). This relief serves only one purpose – "to preserve the status quo pending a final hearing, enabling the rights of the parties to be determined without injury to either party." *Pharm Research & Mfrs of Am v Dep't of Cmty Health*, 254 Mich App 397, 402 (2002). In order to obtain a preliminary injunction, plaintiffs must prove that: (1) they are likely to prevail on the merits; (2) they will be irreparably harmed if an injunction is not issued; (3) the harm to plaintiffs absent an injunction outweighs the harm that an injunction would cause the Defendant(s); and (4) there will be no harm to the public interest if an injunction is issued. *Detroit Fire Fighters Ass'n*

v Detroit, 482 Mich 18, 34 (2008); *MSEA v Dep't of Mental Health*, 421 Mich 152, 157-158 (1984).

When seeking injunctive relief, plaintiffs have the burden of proof on each of these factors. *Detroit Fire Fighters Ass'n*, 482 Mich at 34; MCR 3.310(A)(4).

B. Plaintiffs' claims are barred by the doctrine of laches.

As an initial matter, and one that resolves this case (or at least the request for injunctive relief), Plaintiffs' claims 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).

Here, the Court must presume that laches applies to bar Plaintiffs' claims. MCL 691.1031 expressly provides that "[i]n all civil actions brought in any circuit court of this state affecting elections, dates of elections, . . . ballots or questions on ballots, there shall be a *rebuttable presumption of laches* if the action is commenced less than 28 days prior to the date of the election affected." (Emphasis added.) Plaintiffs filed their lawsuit on October 26—only 13 days before the November 8 general election. As a result, Plaintiffs bear the burden of rebutting the presumption that laches bars their claims.

But Plaintiffs have failed in their burden. In their motion for a preliminary injunction, Plaintiffs state that their "lawsuit has been prepared expeditiously after the plaintiffs learned both that their challenges filed on August 2, 2022 (and others) were ignored and that the Detroit Clerk

was training election workers to violate the law again. This discovery occurred very recently as in days before this filing." (Plfs' Mot, ¶ 6.) Plaintiffs make a similar statement in their brief. (Plfs' Brf, PDF page 8.)[1] Although they also state that the "violation has occurred previously and so there is a reasonable expectation that the violations will occur again BUT for action." (*Id*.) Indeed, a review of Plaintiffs' complaint and motion reveal that most of the purported practices of which Plaintiffs complain are longstanding, and have been employed in prior elections, including in November 2020 and the August 2022 primary, such as the signature verification process for absent voter ballots, Detroit's use of absent voter counting boards, and its use of high-speed scanners and adjudication software. Plaintiffs' arguments that they only just discovered that Detroit will use these same procedures in the November 8 election is unpersuasive to say the least. Plaintiffs simply have not been diligent in bringing these claims.

Further, the significant delay by Plaintiffs in raising their claims and pressing their motion for injunctive relief has prejudiced the ability of the City of Detroit Defendants to respond or even to comply with the expansive (and outlandish) injunction Plaintiffs request. It is too late to change these critical processes now and retrain the thousands of election workers, including election inspectors, Detroit has appointed to administer the election.

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

[1] Plaintiffs did not include page numbers on their brief, so a reference to the page number of the brief as opened as a PDF is used here.

> 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 and procedures are inevitably prejudicial and pose special risks. *See, e.g.*, *Republican Nat'l Comm v Democratic Nat'l Comm*, ___US ___, 140 S Ct 1205, 1207 (2020) (per curiam); *Purcell v Gonzalez*, 549 US 1, 4-5 (2006)(per curiam). See also *Crookston v Johnson,* 841 F3d 396, 398 (CA 6, 2016).

Here, the relief Plaintiffs seek, although still somewhat unclear despite their November 1 filing, would constitute a deviation from the City of Detroit's established procedures and the procedures upon which all its election staff have been trained. Indeed, Mr. Daniel Baxter testified that it would be difficult if not impossible to retrain election staff. Such a disruption would plainly cause chaos on Election Day and potentially result in the disenfranchisement of Detroit voters. Under these circumstances, laches plainly bars Plaintiffs' claims or at the least their request for preliminary injunctive relief.

C. Plaintiffs fail to demonstrate a substantial likelihood of success on the merits on their claims.

Although Plaintiffs lodge numerous confusing or indecipherable claims against the operation of the City of Detroit's absent voter counting board, the Attorney General addresses the following claims that implicate state election officials or processes.

1. The City of Detroit's procedures for reviewing voter signatures on absent voter ballot return envelopes complies with the law.

In their Restatement of Relief filed November 1, 2022, Plaintiffs argue that the boards of election inspectors are the ones charged with performing signature verification and that challengers must also have the opportunity to observe and challenge voter signatures. (Plfs' Restatement, ¶ iii, pp 3-4.) Plaintiffs further assert that Detroit's use of the Relia-Vote system,

which automates envelope sorting and assists election inspectors in performing a manual, visual signature comparisons is unlawful. (*Id*.) But these arguments are without merit.

a. Statutes governing signature review on absent voter ballot applications and absent voter ballot return envelopes.

Section 759 of the Michigan Election Law generally prescribes the process for applying for an absent voter ballot. In order to receive an absent voter ballot, a voter must submit an application for a ballot to his or her local clerk. MCL 168.759(2). And an "elector shall apply in person or by mail with the clerk" of the township or city in which the elector is registered. *Id.* Voters with driver licenses or state personal identification cards may also apply online using the Department of State's portal for applying for an absent voter ballot.[2] The Election Law requires voters to sign their applications for an absent voter ballot in order to receive a ballot. MCL 168.759, 168.761.

Subsection 761(1) provides that if a voter's signature on his or her absent voter ballot application "agrees with the signature for the person contained in the qualified voter file or on the registration card as required by subsection (2)" the clerk shall issue a ballot to the voter. MCL 168.761(1). Subsection 761(2) requires that city or township clerks compare the signatures on absent voter ballot applications to the voters' signatures in the qualified voter file (QVF) or on the master registration card:

> *The qualified voter file must be used to determine the genuineness of a signature on an application for an absent voter ballot.* Signature comparisons must be made with the digitized signature in the qualified voter file. If the qualified voter file does not contain a digitized signature of an elector, or is not accessible to the

[2] See Department of State, Bureau of Elections, available at Michigan Online Absent Voter Ballot Application (state.mi.us). Voters using the online process utilize their electronic signatures on file with the Department of State to sign their online application. (*Id*.) Upon receiving the electronic application, the local clerks compare the voter's signature to the voter's signature in the QVF. This process was recently upheld by the Court of Claims in *Davis v Benson*, Court of Claims No. 20-000196.

> clerk, the city or township clerk shall compare the signature appearing on the application for an absent voter ballot to the signature contained on the master card. [MCL 168.761(2) (emphasis added.)]

Thus, under the law voter signatures on absent voter ballot applications are compared by the local clerks against the QVF upon receipt of the application. If the signatures sufficiently agree, the voter is provided an absent voter ballot either by mail or in person. If the voter obtains an absent voter ballot in person from the clerk, the voter must also show identification at that time. MCL 168.761(6).

The law likewise requires that voters sign their absent voter ballots otherwise their ballots will not be counted. See MCL 168.761(4), 168.764a.[3] After the absent voter ballot is completed, it must be returned to the clerk or his or her assistants by mail, in person, or via ballot drop box by the voter or another authorized person. See MCL 168.764a, 168.764b. The clerk must then "safely keep" the unopened absent voter ballots until election day. MCL 168.765(1).

On election day, the absent voter ballots are either delivered to the election inspectors[4] in the relevant precincts, MCL 168.765(2), or to absent voter ballot counting boards, if the jurisdiction uses counting boards, MCL 168.765a(1), (6). But in either case, the city or township clerk will have already reviewed the absent voter's return envelope and compared the voter's signature to his or her signature in the QVF or on the registration card. Section 766(2) provides:

> The qualified voter file must be used to determine the genuineness of a signature on an envelope containing an absent voter ballot. Signature comparisons must be made with the digitized signature in the qualified voter file. If the qualified voter file does not contain a digitized signature of an elector, or is not accessible to the clerk, *the city or township clerk shall compare* the signature appearing on an

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[3] The voter's signature appears on the back side of the return envelope as part of a required statement. MCL 168.761(4).

[4] Precinct election inspectors are appointed under MCL 168.673a-168.677 and include members from both major political parties.

> envelope containing an absent voter ballot to the signature contained on the master card. [MCL 168.766(2) (emphasis added).]

This process is reflected in the provisions relating to the processing of absent voter ballots at counting boards:

> Subject to section 764d, absent voter ballots received by the clerk before election day must be delivered to the absent voter counting board by the clerk or the clerk's authorized assistant at the time the election inspectors of the absent voter counting boards report for duty, which time must be established by the board of election commissioners. Except as otherwise provided in section 764d, absent voter ballots received by the clerk before the time set for the closing of the polls on election day must be delivered to the absent voter counting boards. Except as otherwise provided in section 765(6), absent voter ballots must be delivered to the absent voter counting boards or combined absent voter counting boards in the sealed absent voter ballot return envelopes in which they were returned to the clerk. *Written or stamped on each of the return envelopes must be the time and the date that the envelope was received by the clerk and a statement by the clerk that the signatures of the absent voters on the envelopes have been checked and found to agree with the signatures of the voters on the registration cards or the digitized signatures of voters contained in the qualified voter file as provided under section 766*. [MCL 168.765a(6) (emphasis added).]

If the clerk determines that the signatures do not agree, and that determination is made after 8 p.m. on the day before the election "the clerk shall mark the envelope 'rejected' and the reason for the rejection and shall place his or her name under the notation. An envelope marked 'rejected' must not be delivered to the absent voter counting board or combined absent voter counting board but must be preserved by the clerk until other ballots are destroyed in the manner provided in this act." MCL 168.765a(6). If the determination is made before that time, the clerk must give notice to the voter of the determination and the voter has an opportunity to cure his or her signature. *Id*.

All absent voter ballots that are ultimately delivered to the counting boards under § 765a(6) are then "process[ed] in as nearly as possible the same manner as ballots are processed in paper precincts." MCL 168.765a(8).

As noted above, in jurisdictions that do not use counting boards the returned absent voter ballots are sent to in-person voting precincts for tabulation:

> Before the opening of the polls on election day or as soon after the opening of the polls as possible, the clerk shall deliver the absent voter ballot return envelopes *to the chairperson or other member of the board of election inspectors in the absent voter's precinct*, together with the signed absent voter ballot applications received by the clerk from any voters of that precinct and the clerk's list or record kept relative to those absent voters. [MCL 168.765(2).][5]

But again, before ballots are sent to the precinct, the clerk of the jurisdiction has already compared the signature on the absent voter ballot return envelope to the voter's QVF signature under § 766(2) and determined the signatures agree or do not agree. If the clerk determines that the signatures do not agree, the clerk completes the statement on the return envelope to that effect. And while not entirely plain from the statutes, the clerk generally does not send mismatched signature envelopes to the precinct for review. Rather, the clerk sends only matching absent voter ballot return envelopes to the precinct along with the corresponding absent voter ballot applications. MCL 168.675(2), 168.766(2).

Under § 766(1), the precinct election inspectors are authorized to examine the signature on the absent voter ballot return envelopes received from the clerk "to see that the person has not voted in person, that he or she is a registered voter, *and that the signature on the statement agrees with the signature on the registration record*." MCL 168.766(1)(a) (emphasis added). If the precinct inspectors determine that the signature on the ballot return envelope ("statement") does not agree with the voter's QVF signature, the ballot is rejected and preserved. MCL 168.767.

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[5] Smaller jurisdictions with fewer absent voter ballots often choose to have absent voter ballots counted at in-person voting precincts, rather than establishing a counting board under §§ 764d and 765a.

Thus, in contrast to the process provided for with respect to absent voter counting boards, precinct inspectors processing absent voter ballots in paper precincts may review signatures on absent voter ballot return envelopes delivered to them by the clerk. Plaintiffs are simply wrong in their reading of the law. Election inspectors at absent voter counting boards are not authorized to re-verify signatures on absent voter ballots at absent voter counting boards.

Further, contrary to Plaintiffs' argument the law does not provide challengers with any right to "challenge signatures" at absent voter counting boards, or anywhere else for that matter. (Plfs' Restatement, ¶ iii, pp 3-4.) Plaintiffs cite MCL 168.798a for this proposition, but that statute simply states that the "public" can "observe" the "proceedings" at a "counting center." *Id.* It has nothing to do with challengers or challenges. The rights of challengers to make challenges are controlled by other statutes. See MCL 168.733(1)(c)-(d), MCL 168.727(1). None of these statutes expressly permit a challenger to challenge a voter's signature on an absent voter ballot. And express permission would be required since a voter's digitized signature – the signature against which the voter's handwritten signature must be compared – is considered confidential information. See MCL 168.509gg(1)(f) (exempting digitized signatures from disclosure under freedom of information act). In other words, challengers cannot be given access to a voter's digitized signature. Only clerks (and their staff) and election inspectors have been authorized to review a voter's digitized signature.

Finally, with respect to the City of Detroit's use of the Relia-Vote system, Mr. Thomas explained that system and clarified that it is the clerk staff that perform the manual, visual signature comparison, and the comparison is done between the signature on the absent voter ballot and the voter's signature in the QVF, as required by law. Since the clerk is performing the proper comparison the process does not violate MCL 168.766. It is true that the Election Law

does not expressly provide for the use of such automated systems to sort received absent voter ballot envelopes; but neither does the law prohibit it (the Election Law also does not expressly provide for the use of automatic letter openers). Further, because the Relia-Vote system does not constitute an "electronic voting system" for purposes of the Election Law, the Board of State Canvassers was not required to approve it for use in the State. See MCL 168.794(f), 168.795, 168.795a. Nevertheless, the Bureau of Elections worked closely with the City of Detroit to ensure that its implementation and use is consistent with the Election Law. Plaintiffs' arguments as to these issues are thus without merit.

b. The law does not, and never has, required the promulgation of signature-matching standards before clerks may perform signature comparisons.

In their Restatement of Relief filed November 1, 2022, Plaintiffs argue that there is "no standard rule promulgated for signature comparison and therefore no ability to fulfill the requirements for signature comparison pursuant to MCL 168.761(2)." (Plfs' Restatement, ¶ i, p 2.) They argue the Court must "fashion a 'standard' or require that the other alternative methods of identification be required to ensure secure access and that only legal ballots are cast." (*Id*.)

But none of the statutes discussed above require the Secretary of State to promulgate a rule providing standards for performing signature comparisons on absent voter ballot applications or absent voter ballot return envelopes. See, e.g., MCL 168.31(2) (requiring the promulgation of rules for uniform standards for petition signatures).

Under § 21 of the Election Law, the Secretary of State is "the chief election officer of the state and shall have supervisory control over local election officials in the performance of their duties under the provisions of this act." MCL 168.21. Similarly, under § 31, the Secretary of State "shall"; "(a) . . . issue instructions and promulgate rules . . . for the conduct of elections . . .

[and] (b) [a]dvise and direct local election officials as to the proper methods of conducting elections. . . ." MCL 168.31(a)-(b). The Secretary must also provide various training and accreditation opportunities for local election officials, including election inspectors. See MCL 168.31(j)-(m).

Pursuant to this authority, the Secretary, through the Bureau of Elections, has offered optional guidance to local clerks and election officials with respect to the signature review process for absent voter ballot applications and absent voter ballot return envelopes, and steps to take following a signature mismatch on an application or on a return envelope. (See Ex A, April 2021 Signature Guidance.) Clerks are presently not mandated to utilize the specific guidance for comparing signatures on absent voter ballot applications or ballots due to a prior court decision. (*Id*.) In the case of *Genetski et al v Benson et al*, Court of Claims No. 20-000216, the Court of Claims concluded that the version of the signature-matching guidance at issue there had to be promulgated as a rule because the clerks were mandated to follow the guidance. The Bureau of Elections modified the guidance – the same guidance attached here – consistent with the opinion to reflect that clerks are not mandated to follow the guidance. Although not obligated to pursue rulemaking, in July of 2021, the Department of State initiated rulemaking under the administrative procedures act, MCL 24.201 *et seq*., to promulgate signature matching standards.[6] The Legislature has declined to take any action on the rule set, so by default the rules will be eligible for filing with the Secretary of State in December 2022. See MCL 24.245a(7).

So, Plaintiffs are correct that there is presently no promulgated rule providing for signature matching standards, but the law does not require such rules to be promulgated. The Bureau has offered guidance for performing signature matching, which the City of Detroit and

[6] See Pending Rule Set 2021-61 ST, available at ARS Public - RFR Transaction (state.mi.us).

other jurisdictions may utilize to perform their duties under § 761(2). Contrary to Plaintiffs' allegations there simply is no violation of the law and thus no grounds for requiring this Court to fashion a standard or impose some type of identification requirement with respect to the thousands of absent voter ballots already cast by Detroit voters. Plaintiffs' arguments are simply without merit.

2. The City of Detroit's voting system and equipment complies with the law.

In their Restatement of Relief filed November 1, 2022, Plaintiffs appear to argue that the City of Detroit's use of adjudication software to process absent voter ballots that do not tabulate properly and the use of high-speed scanners to tabulate absent voter ballots is not authorized by law. (Plfs' Restatement, ¶ viii, p 5.) But Plaintiffs are incorrect.

Decades ago, Michigan's Legislature enacted provisions into the Michigan Election Law that clearly and expressly require that ballots be counted by a certified "electronic voting system." See, e.g., MCL 168.37, 795, 795a.[7] The Election Law provides that "a county clerk, in consultation with each city and township clerk in the county" will "determine which electronic voting system will be used in the county[.]" MCL 168.37a. The governing bodies for the local units of government are responsible for purchasing voting equipment. MCL 168.794a, 168.794b.

Before voting systems are purchased or used in Michigan, they are approved by the Board of State Canvassers, a bipartisan body that is assisted by the Bureau of Elections but is independent of the Michigan Secretary of State. Const 1963, art 7, 2, § 7, MCL 168.22. In

[7] An "electronic voting system" is defined as "a system in which votes are recorded and counted by electronic tabulating equipment." MCL 168.794(f). And "electronic tabulating equipment" means "an apparatus that electronically examines and counts votes recorded on ballots and tabulates the results." MCL 168.794(e).

2017, the Board of State Canvassers approved three voting systems for use in Michigan, including Dominion Voting Systems, as required by MCL 168.795a.[8] Prior to approval, the systems were tested by one of the federal Election Assistance Commission accredited voting systems test laboratories, and then were subject to rigorous Michigan-specific testing conducted by the Bureau of Elections. Only after Board of State Canvassers approval did county clerks determine which voting system would be used in their county. MCL 168.37, 168.795a.

Among dozens of other jurisdictions in Wayne County and across the State, the City of Detroit uses the Dominion Voting Systems, Democracy Suite 5.5/5.5s Voting System, which is the most recent tested and approved iteration of the system approved by the Board of State Canvassers in 2017. The Democracy Suite 5.5/5.5s Voting System was tested and approved for use in the State by the Board of State Canvassers in May 2019.[9] As noted in the attached "Voting System Certification Evaluation Report, State Certification Testing, Dominion Voting Systems, Democracy Suite 5.5/5.5s Voting System," this version of the system includes an "adjudication" software feature. (Ex B, Report & Certification, p 2 of Report.) As the report notes, while this feature is included in the system, it is an "optional" feature, feature[10], meaning that a jurisdiction can choose to use this software feature or not. (*Id.*) And with respect to

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[8] See Board of State Canvassers Meeting Minutes, February 28, 2017, available at Feb-28-2017-BSC-Meeting-Minutes.pdf (michigan.gov).

[9] See Board of State Canvassers Meeting Minutes, May 23, 2019, available at Canvassers Meeting Minutes 05/23/19 (michigan.gov). The Board also approved de minimus changes to that version of the voting system at the same meeting. (*Id.*) Subsequent de minimus changes were approved in June 2020, see BSC 0682020 (michigan.gov), December 2021, see Dec-10-2021-BSC-Meeting-Minutes.pdf (michigan.gov), and July 2022, see July 21 2022 BSC Meeting Minutes (michigan.gov).

[10] Jurisdictions routinely choose to utilize different optional configurations of the certified voting system. For example, many large jurisdictions use high-speed scanners in absent voter counting boards, while small jurisdictions do not.

hardware, the Democracy Suite 5.5/5.5s Voting System, including the adjudication software, is designed for use with a precinct scanner (tabulator) or a high-speed, ballot scanner for use at an absentee counting board. (*Id*., pp 3-4.)

As confirmed by the testimony of Mr. Chris Thomas at the November 3, 2022, hearing, the City of Detroit is utilizing the adjudication software feature and high-speed scanners for the operation of its absent voter counting boards. And as discussed above, both the adjudication software and the high-speed scanners have been tested and approved for use in Michigan. Mr. Thomas also testified regarding how the adjudication feature is used, which is consistent with the Election Law's provisions concerning errors on ballots, such as stray marks, overvotes, etc. See, e.g., MCL 168.803, 168.795(1)-(2). Accordingly, the City of Detroit's use of these features complies with Michigan's Election Law. See MCL 168.795a.

Plaintiffs also appear to argue that the City of Detroit is not properly preserving an audit trail by saving ballot images created through use of the adjudication software. (Plfs' Restatement, ¶ ix, p 6.) The Election Law requires that an electronic voting system provide an "audit trail." MCL 168.795(1)(k). An "audit trail" is defined as "a record of the votes cast by each voter that can be printed, recorded, or visually reviewed after the polls are closed." MCL 168.794(a). The law does not specifically require the retention of ballot images that a system may generate on election day as part of the audit trail, although a jurisdiction could choose to do so. Further, Plaintiffs appeared confused during the November 3 hearing when its counsel stated to the Court that the Secretary of State has previously directed jurisdictions to delete or destroy "audit logs" or "audit trails" after an election. The Secretary has never given such an

instruction.[11] What Plaintiffs may be referring to is the Bureau of Elections' instruction post-election to delete voter information contained on the "electronic poll book."

The electronic poll book consists of software and data programming that is downloaded to a computer, usually a laptop, before an election and is used to process voters and generate precinct reports on election day for that particular election. MCL 168.668b, 168.735. It includes a list of registered voters for the jurisdiction, which includes sensitive voter information, such as a voter's date of birth. It does not contain any records of votes cast. Before a subsequent election, clerks are directed to print a paper copy of the poll book contents for retention, then delete the previous election's information from the electronic pollbook because it contains personal information and so that the old file is not accidentally accessed during the new election. After an election, a memorandum is sent out to all county clerks releasing security of election materials pertaining to the previous election. See MCL 168.847. The memorandum simply instructs that the electronic pollbook software and associated files must be deleted unless certain circumstances exist, as shown in the memorandum regarding the August 2022 election. (Ex C, August 2022 Memo.) The laws do not require that clerks retain a record in multiple formats. Because the information from the electronic pollbook is saved in paper form, state and federal retention laws are satisfied. See, e.g., 168.811, 168.799a, R. 168.790; 52 USC 20701 *et seq*.

[11] Plaintiffs' counsel Mr. Hartman has made similar misleading claims in pleadings filed in another case as well. See, e.g., *Ickes et al v Whitmer, et al*, United States District Court No. 22-827 (WD Mich) (Maloney, J.) Indeed, Plaintiffs' counsel is making similar claims related to Detroit's use of adjudication software in that case. (Ex D, Plfs' Resp to Defs' Mot to Dis, ECF No. 22, PageID.1610-1611.) And this counsel has sent purported legal memorandums to local clerks around this State providing misleading advice regarding the use of electronic voting systems and encouraging clerks to "hand count" ballots in violation of the law. (Ex E, 10/28/22 BOE letter & Hartman Memo).

To the extent Plaintiffs are referring to the deletion of programming used in an election, the answer is the same. Programming used in an election is retained by jurisdictions along with other materials in a sealed container from which they may be released and then preserved in a different approved container for the remainder of the state and federal retention periods. See R. 168.790(18), MCL 168.799a(4). This is explained in the memorandum that is sent to the county clerks releasing the security of these materials. (Ex C.) Thus, directly contrary to Plaintiff's counsel's inaccurate claim, programs used to conduct an election with electronic voting equipment are retained by election officials, including the City of Detroit, per Secretary of State instruction. Clerks retain this data and programming by downloading it from their tabulation equipment to an external drive. The drives are then stored/retained with the other election materials according to the applicable schedule. Programming is not (and cannot) be kept for record retention purposes on the actual voting equipment itself, i.e., the scanner (tabulator) or related equipment. Even if elements of programming for individual elections temporarily remains on tabulator hardware, software, or firmware for a given election, it cannot be retained in this format. This is because the tabulation equipment is used by local clerks in every election and the equipment must be specifically programmed for each and every election. When this occurs, previous programming is overwritten. If programming was required to be retained on the equipment itself, local clerks would have to purchase new tabulating equipment for every election. So, to the extent Plaintiffs are complaining about a perceived failure to preserve programming on equipment such arguments are predicated on a fundamental misunderstanding of the laws and the practical realities of record retention.

CONCLUSION AND RELIEF REQUESTED

For the reasons stated above and in the City of Detroit Defendants' brief, this Court should deny Plaintiffs' request for a preliminary injunction.

Respectfully submitted,

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Dated: November 4, 2022

PROOF OF SERVICE

Heather S. Meingast certifies that on November 4, 2022, she served a copy of the above document in this matter on all counsel of record and parties *in pro per* via MiFILE.

/s/Heather S. Meingast
Heather S. Meingast