

STATE OF MICHIGAN

IN THE THIRD JUDICIAL CIRCUIT COURT FOR THE COUNTY OF WAYNE

KRISTINA KARAMO; PHILIP
O'HALLORAN, MD; BRANDEN
GIACOBZAAI; TIMOTHY MAHONEY;
KRISTIE WALLS; PATRICIA FARMER;
and ELECTION INTEGRITY FUND AND
FORCE,

Plaintiff,

v.

Case No. 22-012759-AW
Hon. Timothy M. Kenny

JANICE WINFREY, in her official capacity
As the CLERK OF THE CITY OF DETROIT;
CITY OF DETROIT BOARD OF
ELECTION INSPECTORS, in their official
capacity.

Defendants.

OPINION & ORDER

At a session of this Court
Held on: November 7, 2022
In the Coleman A. Young Municipal Center
County of Wayne, Detroit, MI

PRESENT: Honorable Timothy M. Kenny
Chief Judge
Third Judicial Circuit Court of Michigan

INTRODUCTION

On October 26, 2022, thirteen days before the November 8th general election,
Plaintiffs filed a complaint for mandamus, preliminary injunction, declaratory judgment,

and other relief against Janice Winfrey in her official capacity as the Detroit City Clerk and the City of Detroit Board of Election Inspectors in their official capacity. Plaintiffs sought expedited scheduling and an emergency hearing on their motion for preliminary injunction. A motion to disqualify all 58 members of the Third Circuit Court bench was also filed but resolved on October 31, 2022.

The Court held multiple status conferences on November 1 and November 2 in order to provide both Plaintiffs and Defendants the opportunity to facilitate the expedited hearing in this case. Discussion included the exchange of witness lists and exhibits in advance of the November 3, 2022 evidentiary hearing on Plaintiffs' motions for injunctive relief. Plaintiffs submitted a "restatement of relief requested" with supporting statements at a status conference. There was no indication whether Plaintiffs intended to abandon the relief requested in the October 26, 2022 complaint.

During the November 3, 2022 evidentiary hearing, Plaintiffs did not testify nor introduce any substantive exhibits into evidence. In this case, Plaintiffs' hearing witnesses consisted solely of Christopher Thomas, former Michigan State Elections Director for over 30 years and Daniel Baxter, Director of Absentee Voting Operations for the Detroit City Clerk.

On November 4, 2022, final argument was conducted. This followed the all-day November 3 evidentiary hearing on Plaintiffs' injunctive relief request. During the final argument, Plaintiffs' counsel was unwilling to indicate what relief Plaintiffs were seeking. Instead, counsel indicated the relief sought would be shared with the Court and opposing counsel only when Plaintiffs submitted their brief later that day.

During the 48 hours between November 2nd and November 4th, Plaintiffs' relief requests changed three times. Despite Plaintiffs' arguments to "shed light in a dark place", they have failed dramatically. Over an eight-hour evidentiary hearing, no evidence of election law violations for the November 8, 2022 election was produced.

In recognition of the failure to sustain their burden of proof, Plaintiffs now seek a third form of relief – one that has been rejected by Michigan appellate courts since 1974.

Rejecting Plaintiffs' claims does also require this Court to examine the alleged twelve election law violations. As noted below, in the Preliminary Injunction section, all twelve allegations are unsubstantiated and/or misinterpret Michigan election law.

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PRELIMINARY INJUNCTION

Plaintiffs originally sought a preliminary injunction that would mandate all eligible Detroit voters vote in person or, alternatively, if seeking an absentee ballot would be required to go to the Detroit City Clerk's Office to obtain the ballot. Late on Friday, the Court received *Plaintiffs' Findings of Facts, Conclusions of Law and Request for Relief*. In this document, for the first time, Plaintiffs modified their request for injunctive relief and sought to enjoin various alleged violations after the November 8, 2022 election. Plaintiffs also seek an injunction to require the City of Detroit's Clerk's Office to comply with State Election Law regarding validating signatures on absentee ballots.

In *Davis v City of Detroit Financial Review Team*, 296 Mich. App. 568, 613; 821 N.W.2d 896, (2012) (citation omitted), a Court considers the following factors in determining whether to grant a preliminary injunction:

1) the likelihood that the party seeking the injunction would prevail on the merits, 2) the danger that the party seeking the injunction will suffer irreparable harm if the injunction is not issued, 3) the risk that the party seeking the injunction would be harmed more by the absence of an injunction than the opposing party would be by the granting of the relief, and 4) the harm to the public interest if the injunction is issued.

The Court finds Plaintiffs are not likely to prevail on the merits. The relief sought specifically requiring eligible Detroit voters to vote in person or to pick up absentee ballots at the Clerk's Office is a clear violation of Const. 1963, Art. II, §4. The Court also finds, as stated in detail below, that Plaintiffs have failed to establish the twelve alleged violations of Michigan election law regarding the counting of absentee ballots in the City of Detroit.

Plaintiff called Christopher Thomas and Daniel Baxter regarding this issue. No testimony received by the Court established any such violation. Indeed, the Court finds

that the extensive testimony elicited from Mr. Thomas and Mr. Baxter clarified the implementation of very complex sections of the Michigan Election Code. This includes the intersection of MCL 168.766 and MCL 168.765a regarding signature verification for absentee ballots when an Absentee Voter Counting Board (AVCB) is used. Ultimately, the Court finds that Plaintiffs presented no evidence in support of their allegations and Plaintiffs' interpretation does not accurately interpret or apply these sections.

The Court finds that Plaintiffs have not met their burden of establishing irreparable harm if the injunction is not issued. Plaintiffs present argument, but not evidence, in support of the alleged election code violations. If violations of Michigan election law on or related to the November 8, 2022 election occur or are subsequently established regarding the validity of absentee votes, Plaintiffs may pursue their available remedies. There is no irreparable harm at this time.

The Court further finds that to grant relief at this time would egregiously harm the eligible voters of the city of Detroit. Absentee voting had been in effect for weeks before Plaintiffs filed their lawsuit. As of November 3, 2022, approximately 60,000 absentee ballots have been returned to the Detroit City Clerk's Office. The preliminary injunction would serve to disenfranchise tens of thousands of eligible voters in the city of Detroit. Additionally, the city of Detroit would be the only community in Michigan to suffer such an adverse impact. Such harm to the citizens of the city of Detroit, and by extension the citizens of the state of Michigan, is not only unprecedented, it is intolerable.

The harm to the public interest if the injunction is issued is incalculable. The idea that the Court would single out one community in the state to be treated adversely when

Plaintiffs have provided no evidence in support of their allegation simply cannot be allowed to occur.

Finally, regarding the amended request for injunctive relief, the Court finds the prospective nature of the relief troubling. The law limits the use of injunctive relief to extraordinary circumstances. Thus the inclusion of injunctive relief in Subchapter 3.300 of the Michigan Rules of Court. “[I]t is well settled that an injunction will not lie upon the mere apprehension of future injury or where the threatened injury is speculative or conjectural. *Dunlap v City of Southfield*, 54 Mich App 398, 403; 221 NW2d 237 (1974). As Plaintiffs no longer seek injunctive relief regarding the November 8, 2022 election, the Court finds that Plaintiffs’ waived the present request for relief. The Court further finds that Plaintiffs offer no basis for this Court to order injunctive relief for future elections. As Plaintiffs now present no claim for injunctive relief on this issue, the Court dismisses the claim as moot.

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(i) Voter Signature Comparison Standard

Plaintiffs claim Defendants cannot carry out their absentee voter signature comparison requirements under MCL 168.761(2) in the absence of a standard set by the Court or any alternative method of identification. Plaintiffs assert the Clerk's Office present comparison of signature is a violation of Michigan election law.

MCL 168.761(2) does not require the Secretary of State to establish and distribute a standard for absentee voter signature comparison.

As revealed in the evidentiary hearing testimony, the Detroit City Clerk's office utilizes a "reasonable agreement" signature comparison standard, not a "presumption of validity" one.

In the absence of a constitutional, statutory or case law obligation to develop a statewide standard, or at this late date, impose a new identification requirement, Plaintiffs' claim fails.

(ii) Effective Monitoring of Drop Boxes

The following was asserted in Plaintiffs' second requested relief:

Plaintiffs request declaratory relief that effective monitoring include a review of the depositing of absentee ballots to monitor against a person 'stuffing' multiple ballots at one time or depositing a solitary ballot multiple times (sic). As the statute does not require real time monitoring, the monitoring can be of a recording.

Plaintiffs offer no legal or factual support for the request for a declaratory ruling to monitor for individuals "stuffing" the ballot box during the absentee voting period for the November 8, 2022 general election. Plaintiffs presented no testimony in support of "stuffing the ballot box"; however, during the evidentiary hearing, Daniel Baxter testified that the city of Detroit provides for video monitoring for each of its twenty drop boxes in accordance with MCL 168.761d(2)(c). In addition, Mr. Baxter testified that the City maintains the recordings for at least thirty days. Thus, no factual basis exists for the requested declaratory relief.

In addition, Michigan law provides for individuals, other than the absentee voter, to return the absentee ballot. See MCL 168.761 and MCL 168.764. Plaintiffs' request for declaratory relief presents the City with the impossible challenge of discerning an individual properly returning one or more absentee ballots to the drop box as provided by law from the unproven illegal fraudster stuffing the ballot box. Plaintiffs' burden consists of more than articulating a fear or possible illegal conduct. The Court finds no legal basis for declaring the proposed relief on the record before it.

(iii) Absentee Ballot Signature Comparison at the Absentee Voting Counting Board

Plaintiffs contend Defendants are violating MCL168.766 by not requiring signature comparisons to be conducted by the “board of election inspectors”. The claim lacks merit.

MCL 168.766 relates to voting precincts rather than AVCB as exist in the city of Detroit. MCL 168.765a controls the signature comparison responsibilities at the counting board. MCL 167.765a(6) clearly places the responsibility for comparing the signatures on the envelopes with the signatures on the Qualified Voter File (QVF) with the Clerk’s Office and not with election inspectors.

Because the law supports the practice used by the city of Detroit, Plaintiffs’ claim fails.

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(iv) Ballot Rejection

Plaintiffs assert that for the November 8th election, the Clerk's Office will not reject ballots as required under MCL 168.797a.

At the evidentiary hearing, Daniel Baxter testified the Detroit City Clerk's Office has rejected between 100 -1,500 ballots per election in the past and will continue to do so for the November 8th election if the Michigan election laws require.

The statute Plaintiffs rely on, MCL 168.797a, refers to in-person voting at a polling station and does not apply to the absentee voting process.

Plaintiffs' argument is without merit.

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(v) Absentee Ballot Information Posting

Plaintiff's assertion that there is no evidence to indicate compliance with MCL 168.765 (5) fails. The section relied upon requires the Clerk's Office to post the number of absentee ballots mailed and returned at 8:00 a.m. on Election Day and before 9:00 p.m. on Election Night.

Witness Christopher Thomas testified the Clerk's Office intends to comply with all election law requirements, including MCL 168.765 (5).

Plaintiffs' allegation speculates about a future event. Preliminary injunction relief is not available for future, speculative events. *Dunlap v City of Southfield*, 54 Mich. App. 398; 221 N.W.2d 237 (1974).

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(vi) Rejection of Ballots That Do Not Match

Plaintiffs claim the Detroit City Clerk's Office violates MCL 168.765a(6) by failing to reject absentee ballots with ballot numbers that do not match with the ballot numbers sent to voters by the Clerk's Office. Plaintiffs argue the non-matching ballots are merely counted along with ballots matching the numbers sent by the Clerk's Office. No evidentiary hearing evidence supports Plaintiffs' claim.

Christopher Thomas testified that when a non-matching absentee ballot is received, it is marked as a challenged ballot and segregated from the ballots counted. The Clerk's Office preserves all non-matching ballots for any future audit purposes.

In addition, Mr. Thomas testified that voters within the same household have mistakenly inserted their absentee ballot into the security envelope of another member of the household. Election staff with minimal effort can identify, match, and cure this defect when processing absentee ballots, thereby preserving both votes with no harm to the voting process.

(vii) Duplication of Ballots in Special Circumstances

Plaintiffs' contention that duplication of ballots, for overseas military personnel, and registered voters temporarily residing overseas, disregards Michigan election law MCL 168.798b permitting duplication. In fact, Michigan law clearly permits this process. "Absentee votes cast on paper ballots may be recorded by election inspectors on ballot cards for counting by tabulating equipment." MCL 168.798C(1).

Mr. Thomas testified established procedure throughout the state permits duplication of ballots for the above described groups, because ballots for overseas voters are incompatible with those used in high-speed tabulators.

Duplicate ballots are made at the Counting Board, and approved by Republican and Democratic election inspectors where election challengers are present.

Plaintiffs have established no statutory violation.

(viii) High-Speed Tabulators and (x) Ballot Adjudication

Plaintiffs contend the Detroit City Clerk is using uncertified high-speed tabulators to count votes. They also claim there is no uniform state procedure for the use of tabulators and MCL 168.765a(8) precludes their use. Plaintiffs state the use of the high-speed tabulators to adjudicate the absentee ballot is a "manipulation" of them and unlawful under Michigan election law.

MCL 168.37, 168.795 and 168.795a indicate ballots are to be counted by use of an electronic voting system. An "electronic voting system" is defined under MCL 168.794(f) as "a system in which votes are recorded and counted by electronic tabulating equipment". MCL 168.794(e) defines "electronic tabulating equipment" as "an apparatus that electronically examines and counts votes recorded on ballots and tabulates the results".

Testimony at the evidentiary hearing revealed the City of Detroit uses the Dominion Voting Systems. Christopher Thomas testified the Dominion system was adopted by the City of Detroit after the 2019 Dominion approval by the Board of State canvassers. Mr. Thomas testified the approval came after testing by a federal government agency.

The approved Dominion Voting System contains an optional "adjudication" software component. The adjudication feature is used by the City of Detroit to process issues of over-votes, tiny marks or spots on the ballots or stray marks. As indicated in Mr. Thomas' evidentiary hearing testimony, the adjudication process complies with the requirements of MCL 168.803 and is not used as a mechanism for election workers to guess about voter intent.

Ballot Image Preservation

Plaintiffs assert the high-speed scanners “create a ballot image that is altered by the adjudication process.” Hearing evidence failed to support this claim.

During the evidentiary hearing, Christopher Thomas testified that any new image created is retained together with the original image by means of special tape in the event a dispute about the ballot ever arises. In addition, Mr. Thomas testified that the Clerk retains the original ballot which would be used in the case of any review of recount.

The Court finds that Plaintiffs failed to carry its burden on this point.

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(xi) Ballots Rejection

Plaintiffs claim that MCL 168.792(2) requires the rejection of an over-vote ballot is incorrect.

Christopher Thomas testified that when a tabulator rejects a ballot, the ballot must be examined consistent with the requirements of MCL 168.803. An identifiable over-vote is not counted; however, to the extent possible, the Clerk preserves the unspoiled portions of the ballot and counts those votes. A stray mark, however, can be corrected to permit the vote to be counted.

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(xii) Platform Access

Plaintiff asserts MCL 168.733 entitles election challengers to be present on the Detroit Counting Board platform. The platform contains computer equipment used by a number of Detroit City Clerk supervisors, the IT vendor and Mr. Christopher Thomas. The hearing evidence indicated the platform has seating for four or five people only.

Plaintiffs' reliance on MCL 168.733 is incorrect. No ballot processing occurs on the platform. No ballot tabulation of specific precincts occurs there either.

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DECLARATORY JUDGMENT

Plaintiffs' third relief request made on November 4th stated:

In recognition that the city of Detroit promotes honest, open and transparent government, the Plaintiffs request injunctive relief prospectively after the November 8, 2022 election to 1) stream the camera for public access to the video feed allowing the public to assist in monitoring; 2) to require that there is sufficient storage to preserve this duration of the drop boxes for the 24 months required for preservation of election records; and (3) to ensure that the recording is disclosed under FOIA to interested parties to review.

The Court conducted an expedited evidentiary hearing on Plaintiffs' complaint and motion for a preliminary injunction in this matter on November 3, 2022. The parties returned the next morning to present summary closings in support of their respective positions. Plaintiffs' counsel, despite a direct question from this Court, either could not articulate or refused to identify the specific relief sought. Only after 5:00 p.m. on Friday, November 4, 2022 did the Court learn that Plaintiffs had modified its original request for relief to request prospective injunctive relief regarding the processing of signatures on ballot applications. This change directly impacts the Plaintiffs standing to bring this case for declaratory relief, as MCR 2.605(A)(1) requires an actual controversy. As Plaintiffs relief may be addressed by the Supreme Court in *O'Halloran v Secretary of State*, __ Mich __; __ N.W.2d __ (2022)(Docket No. 164955), the Court finds Plaintiffs' action premature, as any injury at this point is hypothetical or anticipated. *League of Women Voters v Secretary of State*, 506 Mich 561, 586; 957 N.W.2d 731 (2020). As Plaintiffs now present no claim for relief on this issue, the Court dismisses the claim.

WRIT OF MANDAMUS

In *Committee to Ban Fracking in Michigan v. Board of State Canvassers*, 335 Mich. App. 384, 394; 966 N.W.2d 742 (2021) the Michigan Court of Appeals held “Mandamus is a discretionary writ and an extraordinary remedy.” In seeking the writ, the plaintiff bears the burden of demonstrating entitlement to it. *Citizens for the Protection of Marriage v Board of State Canvassers*, 263 Mich. App. 487; 688 N.W.2d 538 (2004).

To obtain the extraordinary remedy of a writ of mandamus, the plaintiff must show:

1) the plaintiff has a clear, legal right to performance of the specific duty sought, 2) the defendant has a clear, legal duty to perform, 3) the act is ministerial and 4) no other adequate legal or equitable remedy exists that might achieve the same result.

Rental Properties Owners Association of Kent County v Kent County Treasurer, 308 Mich. App. 498, 518; 866 N.W.2d 817 (2014).

Michigan appellate courts have defined a clear legal right as “one clearly founded in, or granted by, law; a right which is inferable as a matter of law from uncontroverted facts regardless of the difficulty of the legal questions to be decided.” *Rental Properties Owners Association of Kent County v Kent County Treasurer*, supra. Additionally, the Courts have defined a ministerial act as one in which the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment.” *Hillsdale County Senior Services Inc. v Hillsdale County*, 494 Mich. 46, 58 n 11; 832 N.W.2d 728 (2013).

In the present case, Plaintiffs claim the validity of absentee voter signatures can only be established by having the Election Inspectors view each ballot and either agree or disagree about the identity of the person signing the absentee ballot envelope. In the event of a dispute, Plaintiffs contend the City Board of Canvassers would be required to resolve the signature validity dispute. Plaintiffs’ claim clearly involved acts of analysis,

hence discretion on the part of those evaluating the signatures of the ballot envelopes. Defendants cannot establish that the comparison evaluation constitutes a ministerial act because it does involve a duty that requires the exercise of discretion or judgment. For this reason alone, Plaintiff's mandamus writ application fails.

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LACHES

Plaintiffs' complaint and request for declaratory judgment, preliminary injunction, and mandamus were filed 13 days before the November 8, 2022 General Election. MCL 691.1031 states:

"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."

Clearly, the rebuttable presumption applies in the present case.

In *Home-Owners Ins. Co. v Perkins*, 328 Mich. App. 570, 589; 939 N.W.2d 705 (2019) the Court of Appeals held "A party guilty of laches is estopped from asserting a right it could have and should have asserted earlier."

In the present case, Plaintiffs contend they waited for more than two months after filing challenges arising out of the August 2, 2022 Primary Election without receiving information from the Detroit City Clerk's Office regarding election practices in the City of Detroit's August 2, 2022 primary election.

The Federal and State Appellate Courts have consistently held that delays in filing complaints in election matters, until shortly before the election date or the time for sending out absentee ballots, is grounds for denying relief. In *O'Brien v Skinner*, 409 U.S. 1240; 92 S. Ct 79; 34 L.Ed.2d 211 (1972) on an application to Justice Marshall to Stay State Court judgment involving voting rights of State Jail inmates, Justice Marshall noted:

"Voting rights are fundamental, and alleged disfranchisement of even a small group of potential voters is not to be taken lightly. But the very importance of the rights at stake militates against hasty or ill-considered action. This Court cannot operate in the dark, and it cannot require state officials to do the impossible. With the

case in this posture, I conclude that effective relief cannot be provided at this late date.”

Michigan Courts have ruled similarly in *Bigger v City of Pontiac*, 390 Mich. 1, 4:210 N.W.2d 1 (1973) (citation omitted) involving bond funding for the Pontiac Silverdome, the Michigan Supreme Court held:

“In cases where because of the nature of the subject matter absolute time-limits must be observed, the law requires a speedy resort to the Courts by those who wish to prevent or modify contemplated transactions or procedures.”

Similarly in *Schwartz v Secretary of State*, 393 Mich. 42, 50; 222 N.W.2d 517 (1974), the Supreme Court noted: “Waiting until the eleventh hour to challenge some aspect of the electoral process has served as grounds for denying relief.” Similar rulings are found in *Kuhn v Secretary of State*, 228 Mich. App. 319; 579 N.W.2d 101 (1998) and *New Democratic Coalition v Austin*, 41 Mich. App. 343; 200 N.W.2d 749 (1972).

This Court finds the reason given by Plaintiffs fails to rebut the statutory presumption of laches. As explained in *Home-Owners Insurance Company* case and *Nykoriak v Napoleon*, 334 Mich. App. 370; 964 N.W.2d 895 (2020), Plaintiffs did not have to wait two months in order to take legal action regarding the conduct of an August 2, 2022 election. The delay is unjustified. Indeed, nothing prevented Plaintiffs from pursuing any available administrative or legal remedy regarding the Department of Elections’ alleged failure to address and resolve challenges arising out of the August 2, 2022 primary election prior to filing this complaint.

Plaintiffs now seek injunctive relief to prevent alleged future violations of Michigan election law. Plaintiffs argue that they waited on information from the resolution of the challenges arising out of the August 2, 2022 alleged election law violations before filing

this action. Plaintiffs fail to establish how these alleged violations justify their requested relief in the present action regarding a separate election.

The Court looks to see whether there has been prejudice to the Defendants caused by the delay when considering applying the doctrine of laches. In the present case, the delay impacts approximately 60,000 absentee ballots that have been returned to the City of Detroit's Clerk's Office by the time the November 3, 2022 injunctive hearing occurred. The Court believes that it is reasonable to assume that additional ballots have arrived since the conclusion of that hearing. The prejudice to the city of Detroit, and by extension the voters who have submitted absentee ballots, is enormous. Tens of thousands of city of Detroit voters would be disenfranchised unless the doctrine of laches is applied in this eleventh-hour challenge.

Testimony at the injunctive hearing also indicated that the City of Detroit has expended tremendous time and resources training approximately 1,200 volunteer workers for the November 8, 2022 election. Daniel Baxter testified that the City could not prepare and present additional training, even if justified, to the volunteer workers by November 8th.

The present case represents the quintessential example of the application of the laches doctrine. Plaintiffs sat on their hands for months before bringing a complaint claiming violations of Michigan statutory election law in the August, 2022 primary and the relief sought would create the potential harm of disenfranchising tens of thousands of Detroiters in the November 8, 2022 general election. This is unacceptable and cannot be permitted.

CONCLUSION

On numerous occasions Plaintiffs have asserted the Detroit City Clerk's procedures for the November 8, 2022 election violate Michigan election laws and are reflective of corruption in our state's largest city. While it is easy to hurl accusations of violations of law and corruption, it is another matter to come forward and produce the evidence our Constitution and laws require. Plaintiffs failed, in a full day evidentiary hearing, to produce any shred of evidence. No exhibits, no testimony from any of the Plaintiffs, no evidence from Mr. Thomas or Mr. Baxter indicate the procedures for the November 8, 2022 election violate Michigan election laws.

Plaintiffs have raised a false flag of election law violations and corruption concerning Detroit's procedures for the November 8th election. This Court's ruling takes down that flag.

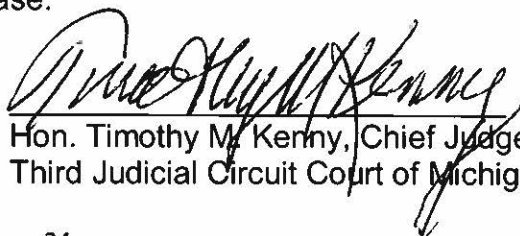
Plaintiffs' failure to produce any evidence that the procedures for this November 8th election violate state or federal election law demonizes the Detroit City Clerk, her office staff, and the 1,200 volunteers working this election. These claims are unjustified, devoid of any evidentiary basis and cannot be allowed to stand.

Plaintiffs' motions for mandamus, preliminary injunction, and declaratory judgment are DENIED.

For the reasons stated in this Court's opinion, Plaintiffs' complaint is DISMISSED.

This is a final order and closes the case.

November 7, 2022
Date


Hon. Timothy M. Kenny, Chief Judge
Third Judicial Circuit Court of Michigan