

STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS
(Riordan, Stephens, and Letica)

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

Plaintiffs/Appellants,

-vs-

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

Defendants/Appellees,

-vs-

**MICHIGAN DEMOCRATIC PARTY,
Intervenor Defendant/Appellee.**

**PLAINTIFFS/APPELLANTS'
APPLICATION FOR
LEAVE TO APPEAL AND
PROOF OF SERVICE**

**SC NO:
COA NO.: 355443
CIRCUIT CT. NO: 20-014780-AW**

**David A. Kallman (P34200)
Erin E. Mersino (P70886)
Jack C. Jordan (P46551)
Stephen P. Kallman (P75622)
GREAT LAKES JUSTICE CENTER
Attorneys for Plaintiff
5600 W. Mount Hope Hwy.
Lansing, MI 48917
(517) 322-3207/Fax: (517) 322-3208**

**James W. Heath (P65419)
Janet Anderson-Davis (P29499)
Attorneys for Wayne County Defendants
500 Griswold, 21st Floor
Detroit, MI 48226
(313) 347-5813/Fax: (313) 967-3532**

**Lawrence T. Garcia (P54890)
Charles N. Raimi (P29746)
James D. Nosedo (P52563)
CITY OF DETROIT LAW DEPT.
Attorneys for Detroit Defendants
2 Woodward Ave., 5th Floor
Detroit, MI 48226
(313) 237-5037**

**Marc E. Elias (DC #442007)
John M. Devaney (DC #375465)
Jyoti Jasrasaria (DC #1671527)
PERKINS COIE LLP
Attorneys for Intervenor Def.
700 Thirteenth Street NW, Ste. 800
Washington, DC 20005
(202) 654-6200**

David H. Fink (P28235)
Darryl Bressack (P67820)
FINK BRESSACK
Attorneys for Detroit Defendants
38500 Woodward Ave., Suite 350
Bloomfield Hills, MI 48304
(248) 971-2500

Kevin J. Hamilton (WA #15648)
Jonathan P. Hawley (WA #56297)
PERKINS COIE LLP
Attorneys for Intervenor Def.
1201 Third Avenue, Suite 4900
Seattle, Washington 98101
(206-359-8000)

Scott R. Eldridge (P66452)
MILLER CANFIELD
Attorneys for Intervenor Defendant
One Michigan Avenue, Suite 900
Lansing, MI 48933
(517) 483-4918

Mary Ellen Gurewitz (P25724)
CUMMINGS & CUMMINGS
Attorneys for Intervenor Def.
423 N. Main St., Suite 200
Royal Oak, MI 48067
(248) 733-3405

PLAINTIFFS/APPELLANTS' APPLICATION FOR LEAVE TO APPEAL

**THIS APPEAL INVOLVES A RULING THAT A PROVISION OF THE
CONSTITUTION, A STATUTE, RULE OR REGULATION, OR OTHER STATE
GOVERNMENTAL ACTION IS INVALID**

ORAL ARGUMENT NOT REQUESTED

TABLE OF CONTENTS

INDEX OF AUTHORITIES..... iv

ORDER APPEALED..... vi

ALLEGATIONS OF ERROR AND RELIEF SOUGHT vii

JURISTICTIONAL STATEMENT..... x

QUESTION PRESENTED..... xi

STATEMENT OF FACTS 1

STANDARD OF REVIEW 5

GROUND FOR LEAVE TO APPEAL..... 5

ARGUMENT 8

CONCLUSION..... 15

INDEX OF AUTHORITIES

CASES:

Alliance for the Mentally Ill of Mich. V Dep't of Community Health,
231 Mich App 647, 588 NW2d 133 (1998) 8

Bush v Gore, 531 US 98, 121 S Ct 525 (2000) 12

Detroit Fire Fighters Ass'n IAFF Local 344 v Detroit,
482 Mich 18, 753 NW2d 579 (2008) 8

Garner v Mich State Univ, 185 Mich App 750, 462 NW2d 832 (1990) 13

Hammel v Speaker of House of Representatives,
297 Mich App 641; 825 NW2d 616 (2012) 9

In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71,
479 Mich 1, 740 NW2d 444 (2007) 12

People v Babcock, 469 Mich 247 (2003) 5

People v Dunbar, 463 Mich 606, 615 (2001). 5

Purcell v Gonzalez, 549 US 1 (2006). 13

Tolksdorf v Griffith, 464 Mich 1 (2001) 5

Veenstra v Washtenaw Country Club, 466 Mich 155 (2002). 5

Vote v Secretary of State, ___ Mich App ___, ___ NW2d ___ (2020)
(Docket Nos. 353977, 354096) 9-11

Zablocki v Redhail, 434 US 374, 98 SCt 673 (1978) 6, 12

CONSTITUTIONS:

Const 1963, art I § 2 8

Const 1963, art II, § 4 *passim*

STATUTES:

MCL 168.31a *passim*

MCL 168.733 2

MCL 168.765a	.	.	.	.	.	.	.	.	.	4
MCL 168.765(5)	.	.	.	.	.	.	.	.	.	3
COURT RULES:										
MCR 3.310(B)	.	.	.	.	.	.	.	.	.	8
MCR 7.203(B)(1)	.	.	.	.	.	.	.	.	.	viii
MCR 7.204(C)(2)	.	.	.	.	.	.	.	.	.	vii
MCR 7.205(A)	.	.	.	.	.	.	.	.	.	viii

ORDER APPEALED

Plaintiffs/Appellants seek leave to appeal from the Court of Appeals' November 16, 2020, order denying their Application for Leave to Appeal and Motion for Peremptory Reversal. Plaintiffs/Appellants seek leave to appeal from the Wayne County Circuit Court's November 13, 2020, order denying Plaintiffs/Appellants' request for injunctive relief, protective order, and for an election audit. The Court of Appeals' order is attached as Exhibit A. The Circuit Court opinion and order is attached as Exhibit B. The register of actions is attached as Exhibit C.

ALLEGATIONS OF ERROR AND RELIEF SOUGHT

This Application asks: did the Court of Appeals err in denying Plaintiffs' constitutional rights under Article 2, section 4(1)(h) that allows citizens an audit of an election to ensure its accuracy and integrity. The Court of Appeals thought not, at least not under the standard for preemptory review; Plaintiffs emphatically disagree.

The lower court denied Plaintiffs' request for injunctive relief without any consideration of the public policy behind the referendum: the People of the State of Michigan want to be able to trust the results of their elections. The people amended Michigan Constitution's to allow a citizen to obtain a meaningful audit of an election, as is allowed in other states like Colorado, New Mexico, the District of Columbia, Rhode Island, Alaska, and West Virginia, where an audit is performed prior to the certification of election results to detect serious discrepancies and ensure election integrity and accuracy.

In the lower court, Plaintiffs presented eye-witness accounts of fraud and error in the election, such as the sworn affidavit of Mr. Larsen, a former assistant attorney general and prominent attorney who saw election workers ascribe ballots to people who did not vote by searching common names, like "Pope" in the electronic poll book, scrolling to find an elector who had not yet voted in the election by selecting a name nothing like "Pope" but in the alphabetical vicinity of the name, and then assigning the ballot to that person. Indeed, the Secretary of State for the State of Michigan who served for eight years as Michigan's Chief Election Officer reviewed the pleadings and submitted a sworn affidavit explaining that, in this case, Court intervention is necessary. Yet, without holding a hearing to listen to the testimony of the Plaintiffs' witnesses, the lower court attacked Plaintiffs' credibility and deemed that a man who used to work for our Chief

Election Officer and Secretary of State Ruth Johnson likely knows more than she about elections. The trial court opinion is fraught with error.

Likewise, the Court of Appeals' order is flawed because the Michigan Constitution now expressly recognizes a citizen's right to audit the results of an election for accuracy and integrity. The manner and scope of the audit should be ordered by the Court.

The trial court erroneously held that MCL 168.31a limits the audit process guaranteed to citizens under the Michigan Constitution. Not so. Further, the trial court provided no reasoning or analysis for why this statute would control over our newly established constitutional rights.

Plaintiffs/Appellants filed a Complaint with supporting affidavits regarding allegations of election fraud in Wayne County. It is imperative that this matter be reviewed by this Honorable Court as quickly as possible because the Wayne County Board of Canvassers are meeting at 3:00 p.m. today, November 17, 2020 to certify the election results.

Plaintiffs/Appellants filed a Motion for Temporary Restraining Order, Preliminary Injunction, Protective Order, and for a results audit of the November 3, 2020, election pursuant to Article II, Section 4(1)(h), of the Michigan Constitution. Article II, Section 4(1)(h) is a new amendment to the Michigan Constitution adopted by the people in 2018. It has never been previously applied or interpreted by a court in Michigan and this is an issue of first impression. After oral argument on November 11, 2020, all requests for relief were denied by the trial court in an opinion and order dated November 13, 2020 (Exhibit B). Plaintiffs/Appellants then filed an Application for Leave to Appeal and Motion for Peremptory Reversal in the Court of Appeals on November 16, 2020, which was denied (Exhibit A).

As outlined below, the Trial Court’s decision is constitutionally, legally and factually incorrect. Time is of the essence as the audit needs to occur prior to the election results being certified by the Wayne County Board of Canvassers.

No evidentiary hearing was held and there is no evidentiary record to transcribe in this matter. The only hearing that was held was a show cause/oral argument hearing regarding Plaintiffs/Appellants’ Motion for Temporary Restraining Order and Preliminary Injunction. The court reviewed the pleadings and filings of the parties, including affidavits from both sides, heard oral argument from attorneys, and issued its opinion without hearing from any witnesses or receiving other evidence.

Plaintiffs/Appellants seek to have Michigan’s Constitution correctly interpreted and applied. The Trial Court’s decision should be reversed and the appropriate orders entered for a results audit and for injunctive relief to bar the certification of the election results until a full audit is completed.

JURISTICTIONAL STATEMENT

The Court of Appeals entered its order on November 16, 2020 (Exhibit A). This Application for Leave to Appeal is filed within 42 days of the entry of that order. The Supreme Court, therefore, has proper jurisdiction to consider this application pursuant to MCR 7.303(B)(1) and 7.305(A).

QUESTION PRESENTED

- I. WHETHER THE TRIAL COURT ERRONEOUSLY INTERPRETED MICHIGAN'S CONSTITUTION, ARTICLE 2, SECTION 4(1)(h), THEREBY DENYING THE REQUESTED ELECTION AUDIT AND INJUNCTIVE RELIEF?**

TRIAL COURT/COURT OF APPEALS' ANSWER:	NO
APPELLANT'S ANSWER:	YES
APPELLEES' ANSWER:	NO

STATEMENT OF FACTS

The election was held on November 3, 2020 and approximately 850,000 votes were reported as cast in Wayne County, Michigan. Plaintiffs/Appellants brought this action to raise numerous issues of fraud and misconduct that occurred during the election and vote counting process in order to protect the rights of all voters in Michigan, especially Wayne County. In summary, the Complaint and affidavits attached (Exhibit D) raise numerous instances of fraud, including, but not limited to:

- a. Defendants systematically processed and counted ballots from voters whose name failed to appear in either the Qualified Voter File or electronic poll book (hereinafter “QVF”), or in the supplemental sheets. When a voter’s name could not be found, the election worker assigned the ballot to a random name already in the QVF to a person who had not voted.
- b. Defendants instructed election workers to backdate absentee ballots and to process such ballots regardless of their validity.
- c. After election officials announced the last absentee ballots had been received, another batch of unsecured and unsealed ballots arrived in trays at the TCF Center. There were tens of thousands of these absentee ballots, and apparently every ballot was counted and attributed only to Democratic candidates.
- d. Defendants instructed election workers to process ballots that appeared after the election deadline and to falsely report that those ballots had been received prior to November 3, 2020 deadline.
- e. On a daily basis leading up to the election, City of Detroit election workers and employees coached voters to vote for Joe Biden and the Democrat party. These workers and employees encouraged voters to do a straight Democrat ballot. These election workers

and employees went over to the voting booths with voters in order to watch them vote and coach them for whom to vote.

f. Defendant election officials and workers refused to record challenges to their processes and removed challengers from the site if they politely voiced a challenge.

g. After poll challengers started discovering the fraud taking place at the TCF Center, Defendant election officials and workers locked credentialed challengers out of the counting room so they could not observe the process, during which time tens of thousands of ballots were processed.

h. Defendant election officials and workers allowed ballots to be duplicated by hand without allowing poll challengers to check if the duplication was accurate. Election officials and workers repeatedly obstructed poll challengers from observing the process and fulfilling their statutory duties. Defendants permitted thousands of ballots to be filled out by hand and duplicated on site without oversight from poll challengers.

Moreover, Plaintiffs/Appellants asserted numerous statutory violations of Michigan election law. MCL 168.733 requires:

- (1) The board of election inspectors shall provide space for the challengers within the polling place that enables the challengers to observe the election procedure and each person applying to vote. 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.

Per eyewitness accounts described in the Complaint and its attached sworn affidavits, Defendants habitually and systematically failed to provide space for poll challengers from the Republican party, including Plaintiffs/Appellants, to observe election procedure, failed to allow the inspection of poll books, failed to share the names of the electors being entered in the poll books, failed to allow the examination of each ballot as it was being counted, and failed to keep records of obvious and observed fraud.

Poll challengers observed election workers and supervisors writing on ballots themselves to alter them, apparently changing spoiled ballots by hand, and then counting the ballots as valid. They also counted absentee ballots returned late, counting unvalidated and unreliable ballots, and counting the ballots of voters who had no recorded birthdates and were not registered in the State's QVF or on any supplemental sheets. Defendants violated Plaintiffs' statutory rights by prohibiting poll challengers from fulfilling their duties.

In addition, MCL 168.765(5) requires:

- a. The clerk must post before 8:00 a.m. on Election Day: 1) the number of absent voter ballots distributed to absent voters 2) the number of absent voter ballots returned before Election Day and 3) the number of absent voter ballots delivered for processing.
- b. The clerk must post before 9:00 p.m. on Election Day: 1) the number of absent voter ballots returned on Election Day 2) the number of absent voter ballots returned on Election Day which were delivered for processing 3) the total number of absent voter ballots returned both before and on Election Day and 4) the total number of absent voter ballots returned both before and on Election Day which were delivered for processing.
- c. The clerk must post immediately after all precinct returns are complete: 1) the total number of absent voter ballots returned by

voters and 2) the total number of absent voter ballots received for processing.

Defendants failed to post by 8:00 a.m. on Election Day the number of absentee ballots distributed to absent voters and failed to post before 9:00 p.m. the number of absent voters returned before on Election Day. Moreover, as outlined in the Complaint, Defendants systematically permitted ballots to be added to the voter rolls after 9:00 p.m. on November 3, 2020. Despite MCL 168.764a requiring that any ballot received after that time to not be counted, Defendants violated this requirement.

Finally, Defendants violated MCL 168.765a. The statute requires that absentee ballots must only be counted when “at all times” there is “at least 1 election inspector from each major political party.” As outlined in the Complaint, Defendants habitually and systematically denied election inspectors to be present in the voter counting place and refused access to election inspectors to be within a close enough distance from the absentee ballots to be able to see for whom the ballots were cast. These violations amount to severe statutory violations and deprived Plaintiffs and all citizens of Wayne County of having a free and fair election.

In addition to the above, Plaintiffs/Appellants filed a Supplemental Brief and Affidavit (Exhibit E) and Reply Brief and Affidavit (Exhibit F). The affidavit of Ruth Johnson (Exhibit F) is important as she is Michigan’s immediate past Secretary of State, she reviewed the fraud allegations in Plaintiffs/Appellants’ affidavits and found them concerning and credible, and urged the trial court to grant Plaintiffs/Appellants requested relief.

Defendants/Appellees, including the intervening Defendant, filed their responses and opposing affidavits. None of Defendants/Appellees affidavits directly refuted what was observed and seen by Plaintiffs/Appellants witnesses as stated in their affidavits. The trial court heard oral arguments of counsel on November 11, 2020. No witness testimony or other evidence was

presented at the hearing. Wayne County Circuit Court Judge Timothy M. Kenny issued his Opinion and Order denying all of Plaintiffs/Appellants requested relief on November 13, 2020. Plaintiffs/Appellants' Application for Leave to Appeal and Motion for Peremptory Reversal was denied by the Court of Appeals on November 16, 2020 (Exhibit A).

Plaintiffs/Appellants today file their interlocutory appeal and request for emergency relief. The facts alleged in this case outline severe fraud and/or error committed by Defendants/Appellees during the election process, which requires immediate Court intervention to protect Plaintiffs/Appellants' rights.

STANDARD OF REVIEW

Constitutional issues are reviewed *de novo*. *Tolksdorf v Griffith*, 464 Mich 1, 5 (2001); *People v Dunbar*, 463 Mich 606, 615 (2001). Moreover, statutory construction issues are also reviewed *de novo*. *People v Babcock*, 469 Mich 247, 253 (2003); *Veenstra v Washtenaw Country Club*, 466 Mich 155, 159 (2002). This case involves the constitutional provision cited and numerous statutory violations of Michigan election law.

GROUNDS FOR LEAVE TO APPEAL

This Application seeks an interpretation of the People's 2018 referendum to the Michigan Constitution expressly granting the right to audit the results of an election for accuracy and to ensure its integrity. The question Plaintiffs ask presents a matter of first impression, having never before arisen in any reported case. This application satisfies the grounds required for this Court to grant leave.

I. THE APPLICATION INVOLVES A SUBSTANTIAL QUESTION AS TO THE VALIDITY OF A LEGISLATIVE ACT. MCR 7.305(B)(1).

The trial court interpreted MCL 168.31a as limiting a citizen's right to audit an election. In passing MCL 168.31a, legislative analysis noted "all rights set forth in the [Michigan

Constitution] were self-executing, meaning that they did not require implementing legislation. However, it also states that none of the rights listed prevented the legislature from expanding voters' rights beyond those listed." Exhibit G. So, while the legislature can require the Secretary of State to perform a mandatory random audit each year expanding a citizen's right to an accurate and fair election, the legislature need not implement law concerning a citizen's right to audit an election. Further, the legislature must most implement law that curtails and limits a citizen's right under the Michigan Constitution. The Michigan Constitution did not grant its citizens the right to an audit, but only post-election and only of 1 race, in a selected precinct, in a selected race, and only if that audit does not affect the results of the election. Interpreting this legislation as a limiting force curtailing the right to audit an election for accuracy and integrity renders MCL 168.31a unconstitutional. The relief Plaintiffs seek would not be satisfied by a mandatory audit in a random precinct in a single race. Plaintiffs' harm is specific to Wayne County and seeks an audit of the races of all candidates and proposals on the ballot in that county. Plaintiffs' Application involves a substantial question of law because it asks: does MCL 168.31a limit the right granted to a citizen under the Michigan Constitution, Article II, section 4. The trial court answered yes, and the Court of Appeals denied reversal. This is an important question now properly before the Michigan Supreme Court.

II. THE APPLICATION HOLDS SIGNIFICANT PUBLIC INTEREST AND INVOLVES LEGAL PRINCIPLES OF MAJOR SIGNIFICANCE TO THE STATE'S JURISPRUDENCE. MCR 7.305(B)(2).

The sanctity of the vote and the integrity of our public elections is the lifeblood of our democracy. Voting is a fundamental right. *Zablocki v Redhail*, 434 US 374, 388, 98 S Ct 673 (1978). The Michigan Constitution seeks to protect that fundamental right by granting citizens the right to audit their elections to ensure its accuracy and integrity. Whether this right may be limited through state legislation is a matter of significant public interest. And whether a state law requiring

that the Secretary of State perform routine and random post-election audits satisfies a citizen's right to an audit under the Michigan Constitution involves legal principles of major significance to the state's jurisprudence. This Application seeks the Court's interpretation of the 2018 amendment to the Michigan Constitution that affects the right of all Michigan voters. This issue will surely arise again, and it is incumbent upon the Court to grant leave and clarify the interplay of the Michigan Constitution and MCL 168.31a now before the certification of the November 2020 election results.

III. THE LOWER COURT'S DECISION IS CLEARLY ERRONEOUS AND WILL CAUSE MATERIAL INJUSTICE AND CONFLICTS ANOTHER COURT DECISION

The text of the Michigan Constitution states that A self-executing provision of the constitution relies does not rely on any implementing statutes. Further, no statute may curtail a constitutional right of place a burden on it. *Vote v Secretary of State*, ___ Mich App ___, ___; ___ NW2d ___ (2020) (Docket Nos. 353977, 354096); slip op at 14 (Exhibit G). The trial court interpreted MCL 168.31a as defining and narrowing the right of a citizen to audit the accuracy and integrity of an election. This interpretation is clearly erroneous and cuts against the jurisprudence of this state that forbids a statute from limiting and curtailing the rights granted to its citizens under the Michigan Constitution.

If this Court does not grant leave, the results of the November 2020 election will be certified and the Plaintiffs will lose their right to audit its results, thereby losing the rights guaranteed under the Michigan Constitution. If allowed to stand, the trial court's interpretation of the Michigan Constitution and MCL 168.31a will cause Plaintiffs substantial harm. Further, the lower court's decision essentially nullifies Article II, section 4(1)(h) of the Michigan Constitution, abdicating the right to audit to not the citizen, but to the Secretary of State and limiting that right to 1 precinct, 1 race, randomly selection. That was not what the people of the State of Michigan

voted for in 2018, and this Court should grant leave now to correct this erroneous interpretation of the state's constitution.

ARGUMENT

MCR 3.310(B) allows a Court to enter a temporary restraining order or preliminary injunction upon a showing that irreparably injury, loss, or damage will result from the delay required to effect notice or that the risk that notice itself will precipitate adverse action before an order can be issued. Plaintiffs/Appellants, through their complaint and sworn affidavits, establish considerable irregularities and illegalities in the November 2020 election. Defendants/Appellees actions permeated through the election process and affected the result of thousands of ballots. Defendants/Appellees have yet to certify the results but are required to do so per Michigan Election Law between now and November 17, 2020.

The Court must immediately hear this case prior to the certification of the election results. Defendants' fraudulent actions, established by sworn testimony, including the sworn testimony of a long-time employee of Defendants, demonstrate the need for an order enjoining the certification of the election results and requiring a full audit to ensure the accuracy and integrity of the election results.

A temporary restraining order preserves the "status quo pending a final hearing regarding the parties' rights." *Alliance for the Mentally Ill of Mich. V Dep't of Community Health*, 231 Mich App 647, 655-656, 588 NW2d 133 (1998). Since the results of the November 2020 election have not been certified, the status quo will be preserved by a temporary injunction.

The standard for granting a motion for temporary restraining order and preliminary injunction are the same. The moving party "bears the burden of proving that the traditional four elements favor the issuance of a preliminary injunction." *Detroit Fire Fighters Ass'n IAFF Local 344 v Detroit*, 482 Mich 18, 34, 753 NW2d 579 (2008). Plaintiffs must establish: "(1) the

likelihood that the party seeking the injunction will 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.” *Hammel v Speaker of House of Representatives*, 297 Mich App 641, 647-648; 825 NW2d 616 (2012).

A. Plaintiffs are Likely to Succeed on the Merits.

i. Defendants’ Fraudulent Actions Trigger Mich. Const., art. 2, sec. 4, par. 1(h) to Ensure the Integrity and Accuracy of the November 2020 Election in Wayne County.

Plaintiffs/Appellants’ Complaint and attached sworn affidavits (Exhibit D, E and F) describe the systemic fraud that plagued the November 2020 election in Wayne County. Defendants committed numerous violations of law through the constitutional and statutory violations outlined in the Complaint and pleadings.

Defendants’ fraudulent actions and statutory violations challenge Plaintiffs/Appellants’ right to an accurate election and election integrity under the Michigan Constitution. A free and fair election is an essential right in America. To ensure this right, the citizens of Michigan amended the Michigan Constitution by referendum in 2018. Article II, Section 4, Paragraph 1(h) of the Michigan Constitution now states that every citizen has “[t]he right to have the results of statewide elections audited, in such a manner as prescribed by law, to ensure the accuracy and integrity of elections.” Plaintiffs have the right to ensure the accuracy and integrity of the election process in Wayne County through an audit of the election. The Court of Appeals held:

There is no dispute among the parties that the rights in Const 1963, art 2, § 4(1) are self-executing. "A constitutional provision is deemed self-executing, if it supplies a sufficient rule, by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced[.]" *League of Women Voters of Mich. v Secretary of State*, __ Mich App __, __; __ N.W.2d __ (2020) (Docket Nos. 350938,

351073); slip op at 11 (quotation marks and citation omitted). While the Legislature may not impose additional obligations on a self-executing constitutional provision, *Wolverine Golf Club v Secretary of State*, 384 Mich. 461, 466; 185 N.W.2d 392 (1971); *Durant v Dep 't of Ed* (On Second Remand), 186 Mich. App. 83, 98; 463 N.W.2d 461 (1990), it may enact laws that supplement a self-executing constitutional provision, see *Wolverine Golf Club*, 384 Mich. at 466. Statutes that supplement a self-executing constitutional provision may not curtail the constitutional rights or place any undue burdens on them. See *id*; *Durant*, 186 Mich. App. at 98. Additionally, the statutes must be in harmony with the spirit of the Michigan Constitution and their object must be to further the exercise of the constitutional rights and make them more available. *League of Women Voters of Mich*, __ Mich App at __; slip op at 11.

Vote v Secretary of State, __ Mich App __, __; __ NW2d __ (2020) (Docket Nos. 353977, 354096); slip op at 14 (Exhibit G).

Plaintiffs have a constitutional right to ensure the accuracy and integrity of elections through an independent audit. The trial court failed to enforce this constitutional right. The right to an audit is not predicated on a finding of fraud or illegality, but it is especially appropriate when there is systematic and widespread fraud as outlined in Plaintiffs' Complaint.

The Trial Court mistakenly relied upon MCL 168.31a. The statute states that “after each election the secretary of state may audit election precincts. *Id*. And the “election audit must include an audit of at least 1 race in each precinct selected for an audit.” *Id*. The statute provides an audit for: one race in one precinct, selected not by the citizen but the government official who conducted the election. Clearly, this does not satisfy the right granted to citizens under the Michigan Constitution. Could you imagine a constitutional right being treated like this in any other context? For example, what if after the Supreme Court’s ruling in *Obergefell v. Hodges*, the Michigan Legislature passed a law stating that a court may allow same-sex marriage for at least 1 couple in at least one county, selected by the government. Such a limiting interpretation is not reasonable nor proper, and yet that was the reasoning of the trial court.

Further, the lower court’s interpretation of MCL 168.31a is contrary to the principle that self-executing provisions of the state constitution, such as the right guaranteed under Article 2, section 4(1)(h), may not be curtailed by subsequently enacted state law. *Vote v Secretary of State*, ___ Mich App ___, ___; ___ NW2d ___ (2020) (Docket Nos. 353977, 354096); slip op at 14 (Exhibit G).

MCL 168.31a is often referred to as a “process audit.” This type of audit is just a review of the proceedings to see how the election could be run more efficiently in the future and if any local clerks did not follow any specific election process. However, a process audit, by definition, cannot change or effect the results of the election. The express language in MCL 168.31a mirrors this restriction because it states that “[a]n audit conducted under this section is not a recount and does not change any certified election results.”

Conversely, the new Michigan Constitutional right explicitly states that it is a “results audit.” This is a type of audit to ensure that an election was proper, the votes were properly counted, and it ensures the accuracy and integrity of the election. Article II, Section 4, Paragraph 1(h) states that all citizens have “the right to have the results of statewide elections audited.” The Constitution clearly guarantees a “results audit,” and the trial court erred by severely restricting all citizen’s rights.

The audit guaranteed by the Michigan Constitution is not a post-election audit routinely performed in 1 race in a precinct selected by the government. No, it is an audit asserted by a citizen under Article II, section 4(1)(h) to ensure the accuracy and integrity of the election. The lower court’s position severely curtailed this right and rendered it meaningless. This question must be taken up by this Court now because waiting to appeal a final decision will be inadequate. The election results are scheduled to be certified by the Wayne County Board of Canvassers later today. If Plaintiffs must wait until the normal processes of litigation are complete, this Court, nor any

other court, will be able to provide an adequate remedy retrospectively. Because the Court of Appeals improperly denied reversal and the lower court erred in its denial of immediate injunctive relief, Plaintiffs ask this Court for leave to appeal and to enjoin the Wayne County Canvassers certification of the November 2020 election prior to their meeting today, November 17, 2020 at 3:00p.m.

ii. Defendants Violate Plaintiffs’ Fundamental Right to Vote under the Equal Protection Clause.

The Michigan Constitution requires that “[n]o person shall be denied the equal protection of the laws.” Const 1963, art I, § 2. This rule of law holds especially true when governmental officials violate a fundamental right, such as the right to vote. *Zablocki v Redhail*, 434 US 374, 388, 98 SCt 673 (1978). Michigan election law requires that a person’s right to vote is not “diluted by those [votes] cast by fraudulent voters.” *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich 1, 7, 740 NW2d 444 (2007). This means that the fundamental right to vote “is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person’s vote over that of another.” *Bush v Gore*, 531 US 98, 103, 121 S Ct 525 (2000). State action that lacks a clear standard and permits unequal evaluation of ballots is unconstitutional because it fails to equally protect the rights of all voters. *Id.* at 110.

Defendants’ fraudulent actions lacked clear standards. Indeed, Defendants broadly instructed election workers not to authenticate ballots and to engage in other illegal activity. The result: an election process replete with fraud, resulting in the unequitable treatment and dilution of Plaintiffs’ fundamental right to vote.

iii. Defendants Violated Plaintiffs' Statutory Rights.

As set forth above, Defendants/Appellees violated Plaintiff/Appellants' statutory rights to a full and fair process of voting and ballot counting. For all the above reasons, Plaintiffs/Appellants have demonstrated a likelihood of success on the merits.

B. Plaintiffs Will Suffer Irreparable Harm.

Plaintiffs face a real and imminent danger of irreparable harm if injunctive relief is not granted. The "loss of a constitutional right constitutes irreparable harm which cannot be adequately remedied by an action at law." *Garner v Mich State Univ*, 185 Mich App 750, 764, 462 NW2d 832 (1990). Defendants' actions violate Plaintiffs' fundamental right to vote, the right to ensure the accuracy and integrity of an election through an audit, and right to the equal protection of the law.

C. Plaintiffs Will Suffer Greater Harm if Injunctive Relief Is Not Given Than Any Potential Harm to the State.

If injunctive relief is not granted, Plaintiffs' will sustain the sting of the loss of their constitutional freedoms. However, if the State is temporarily enjoined, then it loses little as it is preeminent that the court ensure that the election process is conducted without fraud, by clear and fair standards that conform with the Michigan Constitution and state law. As outlined above, deprivation of a constitutional right is greater than any speculated harm alleged by the State.

D. The Public Interest Weighs in Favor of Granting Temporary Injunctive Relief.

The public interest also weighs in favor of Plaintiffs. "Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." *Purcell v Gonzalez*, 549 US 1, 6 (2006). It is not in the public interest to allow Defendants' actions to continue without investigation or an independent audit.

The trial court improperly made findings on the credibility of witnesses without having heard any direct testimony or evidence. The trial court made numerous factual errors in its Opinion and order, including, but not limited to:

a. He places great emphasis on the fact that Plaintiffs/Appellants and their witnesses failed to attend a walk-through meeting for poll challengers apparently held prior to the election on October 29, 2020. However, the lower court failed to include the fact that none of the Plaintiffs/Appellants or their witnesses were informed of this meeting. It is impossible to attend a meeting that a person is not made aware of and has no knowledge that it is being held. Yet, the trial court holds their non-attendance against them in his decision (See Exhibit H).

b. The trial court places great emphasis on the fact that a large computer monitor was available for poll challengers to review the names of voters as votes were tabulated. Again, the court fails to note that these monitors are meaningless if the poll challengers are denied the right to see the actual ballots being counted so they can compare the names on the actual ballots with the names appearing on the monitor. Plaintiffs/Appellants made clear the violation of the right of poll challengers to observe the ballot counting process or to see the actual ballots. This clear violation was ignored by the trial court.

c. The trial court emphasizes that no official challenges were filed, but once more does not tell the whole story. Plaintiffs/Appellants attached numerous affidavits testifying to the fact that challenges were simply denied on site, were not accepted by Defendants/Appellees, and many of the poll challengers were denied re-entry and/or access to the counting room in order to make a challenge. They were literally locked out of the room by Defendants/Appellees.

d. The trial court claims that affiant Jacob never made a complaint prior to signing her affidavit. This is simply untrue. Her affidavit documents her attempts to talk to her supervisors, all of which were rebuffed and denied by Defendant/Appellees.

e. The trial court emphasizes an apparent short disruption of the ballot counting by other poll challengers, not the Plaintiffs/Appellants nor their witnesses. This disruption was because of Defendants/Appellees obstruction of their duties as poll challengers. However, this

event has no bearing on, and does not negate, the direct observations and violations observed by Plaintiffs/Appellants and their witnesses. They did not participate in this event, yet the trial court holds it against them in his Opinion and Order.

In denying Plaintiffs/Appellants' request for injunctive relief and for a results audit as permitted by Michigan's Constitution, the trial court merely cites to MCL 168.31a and finds that a partial audit may be conducted. However, that is not what the Constitution says. The Trial Court provided no legal analysis or reasoning as to why this statute preempts the new constitutional provision.

As stated above in the *Vote* case (Exhibit G):

Statutes that supplement a self-executing constitutional provision may not curtail the constitutional rights or place any undue burdens on them. See *id*; *Durant*, 186 Mich. App. at 98. Additionally, the statutes must be in harmony with the spirit of the Michigan Constitution and their object must be to further the exercise of the constitutional rights and make them more available. *League of Women Voters of Mich*, __ Mich App at __; slip op at 11.

MCL 168.31a cannot curtail or limit Plaintiffs/Appellants right to an audit in this matter. The request for injunctive relief and for an audit should be granted. The Constitution states that an audit shall be done in a "manner as prescribed by law." This is what Plaintiffs/Appellants are requesting. They are requesting that this Honorable Court prescribe that an results audit be done prior to certification.

CONCLUSION

All four factors for granting a Temporary Restraining Order or Preliminary Injunction weigh in Plaintiffs/Appellants favor. For all the foregoing reasons, Plaintiffs/Appellants respectfully request that this Honorable Court immediately grant leave to appeal, reverse the lower court and grant the requested peremptory reversal and grant the requested audit and injunctive relief, and grant such other appropriate relief.

Respectfully submitted,

DATED: November 17, 2020.

/s/ David A. Kallman
David A. Kallman (P34200)
Attorney for Plaintiffs/Appellants

PROOF OF SERVICE

I, David A. Kallman, hereby affirm that on the date stated below I delivered a copy of the above Application for Leave to Appeal, with supporting brief and exhibits, upon all the above-named counsel via the MiFile System, and by e-mail to counsel. I hereby declare that this statement is true to the best of my information, knowledge, and belief.

DATED: November 17, 2020.

/s/ David A. Kallman
David A. Kallman (P34200)
Attorney for Plaintiffs/Appellants