**STATE OF MICHIGAN**
**IN THE COURT OF CLAIMS**

DAN RYAN, PAUL DRISCOLL,
JOELLEN M. PISARCZYK, and
MYRON ZOLKEWSKY,

Plaintiffs,

v.

JOCELYN BENSON, in her official
Capacity as SECRETARY OF STATE,

Defendants.

Case No: 20-000198-MZ

Hon. Christopher M. Murray

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## INTRODUCTION

The Michigan Constitution and Michigan law do not allow private interests to fund the conduct of Michigan elections, direct how election officials will spend the money and demand that local election officials report back to the private special interest how Michigan election officials spent the money and conducted the election.

The Plaintiffs, Dan Ryan, Paul Driscoll, Joellen M. Pisarczyk and Myron Zolkewsky, are registered Michigan electors and citizens eligible to vote in the forthcoming presidential election. These Michigan voters seek to protect their constitutional right to participate in a fair and lawful election conducted in a manner that guarantees their constitutional right to due process and is conducted in conformity with the constitutional guarantee of equal protection.

These Michigan electors provided a comprehensive statement of why this Court should order the relief they request in their verified complaint. In brief, their complaint is that outside special interest groups are giving money to local election officials and election jurisdictions in urban Michigan jurisdictions that historically vote overwhelmingly for Democrat candidates and that, as a condition of accepting these outside private funds, the election officials spend the money for only certain activities including, inter alia, "getting-out-the-vote," printing ballots and locating ballot drop boxes in these predominantly Democrat jurisdictions.

These Michigan electors ask this Court to order a simple remedy. The Secretary of State must either order the local election officials (who are under her authority) to (a) return the money to those special interest groups or other private individuals or organizations; or alternatively, (b)

pay these funds to the Secretary of State who this Court will then order to equitably distribute these funds (on a pro rata basis determined by the number of eligible voters in each election jurisdiction) equally to all Michigan election jurisdictions.

## STATEMENT OF ISSUES

1. Can outside special interests fund Michigan elections with private funds and direct how election officials use the money and require Michigan election officials to account for how the election officials spent the money?

2. Can election officials use private funds to locate ballot drop boxes funded by private special interest groups that do not comply with Michigan law, particularly MCL 168.24j and recently-enacted Senate Bill 757, that establish very strict requirements for "ballot containers" to protect the integrity of Michigan elections?

3. Do Secretary Benson's procedural objections have any merit when (a) the doctrine of *laches* does not bar these Michigan electors constitutional right to equally participate in a fair and honest election, (b) eligible, registered Michigan voters and citizens do have *standing* to sue the Secretary of State when she is conducting a Michigan election in violation of Michigan's Constitution and laws, and (c) as Michigan's "chief election official" with the responsibility to oversee how all local election officials conduct elections, is Secretary of State Benson the proper defendant or is it necessary to include each of Michigan's 1,520 local election officials and clerks in every village, city, township and county that conducts the election under the direction and oversight of the Secretary of State?

## ARGUMENT[1]

### I. Secretary Benson violated Michigan electors' constitutional right to Equal Protection and Purity of Elections clauses by allowing urban and heavily-Democrat election jurisdictions to accept private money from outside special interest groups and dictate how these local election authorities will conduct the Presidential election.

#### A. Michigan's Constitution guarantees all Michigan electors equal protection and the right to "purity of elections."

Michigan's Constitution guarantees all Michigan citizens the right of equal protection, due process, and "the purity of elections." Const. 1963, art 1, §2; art. II, §4(2) (reprinted in Appendix to Verified Complaint). Every Michigan citizen who is an "elector … qualified to vote in any election" is guaranteed the right to cast a ballot. *Id.*

Michigan does not allow private individuals or interest groups (no matter their partisan affiliation) to fund the cost of conducting an election. Rather, the cost of conducting an election in Michigan is to be paid with public funds allocated to local election jurisdictions as provided by Michigan law. This includes the cost of printing ballots, buying ballot containers and other election expenses. *See, e.g.*, MCL 168.666, 168.669 (reprinted in Appendix to Complaint). Michigan's Constitution and Michigan election law make no provision allowing private partisan or ideologically-oriented organizations funded by out-of-state (or even in-state) billionaires to pay money to local Michigan election officials and direct how those jurisdictions conduct the election.

[1] Although Secretary Benson claims to be unfamiliar with emergency motions for declaratory relief (Response Brief, at 2), such a motion is expressly authorized by the Michigan Court Rules. See MCR 2.605(D) ("The court may order a speedy hearing of an action for declaratory relief and may advance it on the calendar."). These motions are not uncommon in Michigan jurisprudence. *See, e.g., Davis v. City of Detroit Fin. Review Team*, No. 310653, 2012 Mich. App. LEXIS 2601, at *3 (Mich. Ct. App. Dec. 18, 2012); *Beaubien LLC v. Centurion Place on Ferry St. Condo. Ass'n*, No. 335571, 2017 Mich. App. LEXIS 2035, at *5 (Mich. Ct. App. Dec. 14, 2017).

The constitutional Equal Protection violation arises when election officials allow private individuals and organizations to separately pay certain local election officials to favor voters opportunity to cast a ballot when voters in other election jurisdictions are not provided this additional opportunity to cast a ballot. The Purity of Elections violation arises when, among other things, as a condition of being paid these funds, a private organization can direct how the election officials conduct the election and demand the election officials to report back after the election.

### B. Secretary of State Benson is Michigan's "chief elections officer" and has the constitutional duty to assure that local election authorities conduct Michigan elections according to the Constitution and state law.

In 2018, Jocelyn Benson was elected Michigan's Secretary of State. Secretary Benson is Michigan's "chief elections officer" responsible for overseeing the conduct of Michigan elections. MCL 168.21 ("The secretary of state shall be 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."); 168.31(1)(a) (the "Secretary of State shall … issue instructions and promulgate rules … for the conduct of elections and registrations in accordance with the laws of this state"). Local election officials must follow Secretary Benson's instructions regarding the conduct of elections. Michigan law provides that Secretary Benson "[a]dvise and direct local election officials as to the proper methods of conducting elections." MCL 168.31(1)(b). *See also Hare v. Berrien Co Bd. of Election*, 129 N.W.2d 864 (Mich. 1964); *Davis v. Sec'y of State*, 2020 Mich. App. LEXIS 6128, at *9 (Mich. Ct. App. Sep. 16, 2020).

Secretary Benson is responsible for overseeing Michigan elections and assuring that Michigan's local election officials conduct elections in a fair, just, and lawful manner. *See* MCL 168.21; 168.31; 168.32. *See also League of Women Voters of Michigan v. Secretary of State*, 2020 Mich. App. LEXIS 709, *3 (Mich. Ct. App. Jan. 27, 2020); *Citizens Protecting Michigan's*

*Constitution v. Secretary of State*, 922 N.W.2d 404 (Mich. Ct. App. 2018), *aff'd* 921 N.W.2d 247 (Mich. 2018); *Fitzpatrick v. Secretary of State*, 440 N.W.2d 45 (Mich. Ct. App. 1989).

Secretary Benson has an affirmative constitutional and statutory duty to oversee the administration of Michigan elections and she has an affirmative duty to make sure local election officials conduct elections in conformity with the Michigan constitution and law. Secretary Benson is the "bank guard" charged with protecting Michigan citizens' constitutional right of equal protection, and their right of suffrage and due process in the conduct of elections. This is so whether the Michigan citizen lives in the rural Upper Peninsula or on Jefferson Avenue in Detroit. This is so whether the Michigan citizen lives in a predominantly Democratic jurisdiction like Wayne County or a predominantly Republican jurisdiction like Oscoda County.

### C. Secretary Benson has failed to oversee Michigan elections and has violated these Michigan citizens' constitutional right to equal protection and Michigan's purity of elections clause.

Secretary Benson argues this Court should reject these individual Michigan voters' equal protection claim because "there is no state action that would be subject to equal protection analysis. The Secretary, in fact, has not taken any action at all – she is not involved in applying for, awarding, or distributing any of the grant funds alleged in the Plaintiffs' complaint." Response Brief, p. 13.

In other words, Secretary Benson argues she cannot be sued because she abdicated her explicit constitutional and statutory duty and fail to discharge what is her most important responsibility under Michigan's constitution – conducting fair and honest elections by overseeing local election officials. As these Michigan voters explained in their verified complaint, Secretary Benson's failure to fulfill her duty and Secretary Benson's complicitly in a scheme whereby outside special interest could influence and direct how local officials in certain urban,

predominantly Democrat districts conducted the presidential election *is* a violation of these Michigan citizens' constitutional rights.

Secretary Benson argues she hasn't violated Michigan citizens' constitutional right to equal protection because – contrary to her constitutional and statutory duty – Secretary Benson claims she just stood by and allowed special interests to fund and direct the conduct of Michigan's local election officials. She claims she is off the hook because she took no "affirmative action" to obtain this special interest private funding and, therefore, she cannot be held responsible even though she stood by while local election officials did. But under Michigan's Constitution Secretary Benson is the executive official with the obligation to oversee how local election officials conduct the election.

Secretary Benson's claim that "Plaintiffs have not named as Defendants any local officials who received grant funds," and therefore, plaintiffs are not entitled to relief, is wrong. Response brief, p. 2. As noted, Secretary Benson is Michigan's chief election officer responsible for overseeing the conduct of local election officials. It is not necessary to name as a separate defendant every one of Michigan's eighty-three local election jurisdictions or Michigan's more than 1,520 election officials. *See Daunt v. Benson*, No. 1:20-cv-522 (W.D. Mich. 2020), pending before Federal District Judge Jonker in the U.S. District Court for the Western District of Michigan. In *Daunt*, a Michigan registered voter did name local election jurisdictions and Secretary Benson. Secretary Benson stipulated that, "Plaintiff and State Defendants agree that the County Defendants are not necessary parties to this litigation. Though the city and county clerks play a role, the Secretary of State has the ultimate responsibility for maintaining Michigan's voter rolls." ECF 27 (filed Sept. 17, 2020). The local election officials and jurisdictions were dismissed and the case proceeded against just Secretary Benson.

Secretary Benson's argument that she has no responsibility for local election jurisdictions accepting private funds to conduct Michigan elections fails for two reasons. *First*, Secretary Benson's claim that she didn't violate these citizens' right to equal protection – because it was the *local* election officials, and not Secretary Benson, who took the private money – makes as much sense as a bank guard saying, "I have no responsibility for the bank being robbed. I was just standing in the lobby when it happened."

By doing nothing (which is how Secretary Benson describes her role in this matter) and allowing a privately-funded outside organization with a partisan agenda to fund and direct the conduct of local election authorities including mandating get-out-the-vote efforts in urban and predominantly Democrat precincts, Secretary Benson has violated the Michigan Constitution and Michigan election law. Secretary Benson has diminished the voting rights of one group of Michigan citizens (those who are registered to vote in rural and non-Democrat jurisdictions) and enhanced the voting rights of another group of Michigan voters (those living in urban, progressive, and predominantly Democrat jurisdictions). This unequal treatment of Michigan voters violates the Michigan Constitution's guarantee of equal protection.

Secretary Benson claims she is not responsible because she "has not prevented any jurisdictions from applying for grant funds or given preferential treatment to voters in one district over another." Response Brief, p. 13. This entirely misses the point. *The point is that Michigan elections are not for sale.* Period, full stop. Michigan elections are to be funded with public money appropriated according to state law by the legislature and state and local jurisdictions and are to be conducted in a bi-partisan manner according to the Michigan constitution and election law.

The *second* reason Secretary Benson's defense fails is that, in fact, Secretary Benson was *not* a "neutral bystander." Secretary Benson stated in her response, "But, again, the Secretary has nothing to do with the application or award of these grant funds." Response brief, p. 15. But Secretary Benson was, in fact, encouraging exactly the private funding of elections by wealthy individuals and special interests. For months, Secretary Benson has been actively recruiting wealthy Democrat donors to contribute private funds to predominantly Democrat Michigan election jurisdictions – specifically Detroit and Flint. Secretary Benson also encouraged wealthy Democrats to pay money to election officials in other battleground states.

For example, on April 22 of this year, Secretary Benson spoke on a webinar sponsored by the Democracy Fund and Arabella Advisors, well-known Democratic fundraisers, to persuade attendees to donate to the Trusted Elections Fund. Donated funds would be allocated to election authorities to supplement their budgets to expand mail-in ballot collection. Speaking to an affluent group of Democrat donors, Secretary Benson said that she wanted these donors to contribute private funds to election officials to:

> send[] everyone either a ballot or an application to request a ballot. … [T]here is a significant amount of things that private philanthropy can do, not just in Michigan, but in states like Arizona and Ohio, Wisconsin, and Pennsylvania. One is the ballot – how we send out the ballots, so that's the absentee ballot request form or the ballots themselves. Again, that's going to cost upwards of $8-10 million for us in Michigan.
>
> Exhibit A (transcript of Secretary Benson's remarks).

Secretary Benson continued,

> And then there's other things like drop-boxes that could be placed, for example, on every college campus. ….
>
> This is a priority for me – again not just in Michigan – but nationwide and particularly in a number of states where the need is the greatest, and just know that that federal money is critical – we got 11.2 in Michigan. That's going to help us significantly. It's about a quarter of what we need, so we do need more, but there

> are many other states where that money because we have so much latitude and discretion for how we allocate those dollars. There are many states where those dollars won't get to where they need to be from the perspective of myself and many of us on this call. …
>
> *"We have a menu in Michigan and there are specific needs for Detroit, Flint, and others*, that other communities don't have in our state. So, happy to do that deeper dive with anyone and enable that deeper dive in any other state. But all that to say is that we can't – that we must have a successful election this November. There are forces and who for personal and political reasons don't want us to – that's always been the case – it's even more so now. But I can't underscore that the importance of that state and local investment for getting to where we need to be because what we do in November won't just impact the outcome of that election, it will define how we as a country protect democracy in times like this.
>
> Exhibit A (emphasis added).

Secretary Benson then offered to personally and individually contact any private donor to raise private money to give to local election officials in Detroit and Flint, Michigan and other battleground states. If the purpose of Secretary Benson's fundraising efforts was in fact to privately fund the conduct of elections so that all citizens could participate equally and fairly, why did she expressly single out the presidential battleground states of "Arizona and Ohio, Wisconsin, and Pennsylvania" and why did she single out only the predominantly Democratic cities of Detroit and Flint?

Finally, Secretary Benson argues "there is no allegation that voting behavior was even a factor considered by CTCL in awarding its grants," and "Plaintiffs have not offered a complete list of Michigan jurisdictions receiving CTCL funds, and so it is not possible to determine a pattern based on Plaintiffs' minimal factual allegations." This is not an accurate characterization of the verified complaint.

The complaint clearly states that the private money was paid to election jurisdictions based upon a partisan intention of funding a get-out-the-vote effort in urban jurisdictions where the vote was historically predominantly for Democrat candidates. The Verified Complaint states:

> CTCL is not a "nonpartisan" organization interested in enhancing voter participation. Rather CTCL is an activist organization seeking to promote the election of Democrat candidates, including Joe Biden and Kamala Harris, and CTCL is managed and operated by former Democrat party operatives who are using the funds to further a Democrat "get-out-the-vote" effort in Democrat precincts. … CTCL then used these funds to pay local election authorities in predominantly Democrat election jurisdictions to increase the votes casts in urban, historically Democrat jurisdictions.
>
> Complaint ¶¶ 26, 28.

As for the second allegation, these Michigan voters do not have a "complete list of Michigan jurisdictions receiving CTCL funds" but have researched the grants in Michigan and elsewhere enough to support their allegations. If such a list existed, and it showed that CTCL's private funds have equally funded historically Republican jurisdictions and historically Democrat jurisdictions, it undoubtedly would have been provided by Secretary Benson or CTCL. It has not. What is known is that CTCL has paid at least $3,512,000 to Wayne County-Detroit, $467,625 to the City of Flint, $417,000 to the City of Ann Arbor, $443,000 to the City of Lansing, $433,580 to the City of Muskegon, $402,878 to the City of Saginaw, $218,869 to the City of Kalamazoo, and $8,500 to the City of East Lansing, for a total of at least $5,903,452.

Secretary Benson recycles the same defense to her violation of the Purity of Elections clause as she does in her defense to the Equal Protection violation. Namely, "the Secretary has nothing to do with the application or award of these grant funds." Response Brief, p. 15. Our response is the same as above. These Michigan voters' verified complaint is clear that Secretary Benson has a duty to oversee Michigan elections and see that they are fairly and evenhandedly

administered. By allowing an outside special interest organization to give selected predominantly Democrat and urban election jurisdictions millions of dollars and direct how they will spend the money and demand that they report back after the election, Secretary Benson failed her constitutional obligation to maintain the purity of Michigan elections. But regardless of partisan outcome or intention, Secretary Benson has failed to ensure the purity of Michigan's presidential election by allowing funding to be distributed inequitably. *See* MCL 168.21; 168.31; 168.32. *See also League of Women*, 2020 Mich. App. LEXIS 709 at *3.

## II. Unsecured privately paid for ballot drop boxes violate Michigan law.

Michigan has a profound interest in protecting the integrity of Michigan elections and securing Michigan citizens' ballots. MCL 168.24j provides very specific requirements for a "ballot container" and requires that ballots only be deposited into these approved "ballot containers" that are "procured" by the local election jurisdiction and must have been "inspected by the county board of canvassers" before June 1, 2018. The boxes must be sealed with specified seals and only handled by election officials.[2] The Secretary of State's Manual for Boards of

[2] MCL 168.24j, requires:

> **(1)** A ballot container includes a ballot box, transfer case, or other container used to secure ballots, including optical scan ballots and electronic voting systems and data.
>
> **(2)** A manufacturer or distributor of ballot containers shall submit a nonmetal ballot container to the secretary of state for approval under the requirements of subsection (3) before the ballot container is sold to a county, city, township, village, or school district for use at an election.
>
> **(3)** A ballot container shall not be approved unless it meets both of the following requirements:
>
> > **(a)** It is made of metal, plastic, fiberglass, or other material, that provides resistance to tampering.
> >
> > **(b)** It is capable of being sealed with a metal seal.

County Canvassers provides an entire chapter governing the requirements for ballot containers. *See* Appendix to the Verified Complaint. Recently-adopted Senate Bill 757 expanded the location of ballot drop-boxes but reiterated the requirements of MCR 168.24j and the requirement that the boxes must be secure, sealed, and only the election official may handle the ballots. Senate Bill 757 also reiterates the requirement that ballots only be kept in "ballot containers" defined in MCR 168.24j. *See* §761(d).

Proliferating ballot drop-boxes during an election in only some areas of the disrupts the uniformity and the fair administration of the election. Recently, civil rights organizations and Ohio voters filed a complaint arguing the Ohio Secretary of State's directive, which prohibits the installation of ballot drop-boxes at locations other than board of elections offices, should be enjoined as an "unconstitutional infringement on Ohioans' right to vote." *A. Philip Randolph Inst. of Ohio v. LaRose*, 2020 U.S. App. LEXIS 32173, *3 (6th Cir. Oct. 9, 2020). The plaintiffs wanted to force the Ohio Secretary of State to install additional ballot drop-boxes at many other locations. The district court granted the plaintiffs' request and issued an order enjoining the Secretary of State from enforcing this limitation of placement of ballot drop-boxes.

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**(4)** Before June 1 of 2002, and every fourth year after 2002, a county board of canvassers shall examine each ballot container to be used in any election conducted under this act. The board shall designate on the ballot container that the ballot container does or does not meet the requirements under subsection (3). A ballot container that has not been approved by the board shall not be used to store voted ballots.

**(5)** A city, village, or township clerk may procure ballot containers as provided in section 669 and as approved under this section.

**(6)** A clerk who uses or permits the use of a ballot container that has not been approved under this section is guilty of a misdemeanor.

But last week, the Sixth Circuit stayed the district court's injunction. The Sixth Circuit stated:

> The Supreme Court has repeatedly emphasized that lower federal courts should ordinarily not alter election rules on the eve of an election. *Republican Nat'l Comm. v. Democratic Nat'l Comm*., 140 S.Ct. 1205, 1207 (2020) (per curiam).
>
> Here, the district court went a step further and altered election rules *during* an election. The district court enjoined Ohio Secretary of State Frank LaRose from enforcing his directive that absentee ballot drop boxes be placed only at the offices of the county boards of elections.

*LaRose*, 2020 U.S. App. LEXIS 32173 at *2 (emphasis in original).

The Sixth Circuit held the Secretary of State's drop-box limitation "easily pass[ed] constitutional muster" because "limiting drop boxes to one location per county promotes the accuracy of the election" and "promotes the security of the election." *LaRose*, 2020 U.S. App. LEXIS 32173 at *7. The court explained that "Ohio has never before used off-site drop boxes. Implementing off-site drop boxes now would thus require on-the-fly implementation of new, untested security measures." *Id.* The Sixth Circuit further explained that the limitation on drop-box installation "promotes uniformity, which in turn promotes the fair administration of elections," and that it "promotes the state's efficiency interests in administering elections." *Id.* at *6-*7. The court stated that "[t]his efficiency interest is particularly important where, as here, voting is already in progress." *Id.* at *7. As the Sixth Circuit Court of Appeals explained, changing the rules and proliferating ballot drop-boxes during the election violates the uniform and fair administration of the election.

## III. Secretary Benson's laches argument is nonsensical.

### A. Seriously? The Doctrine of laches?

Secretary Benson makes the absurd argument that the doctrine of laches bars Plaintiffs' claims because they "waited as long as two weeks" to bring their action. Secretary Benson argues:

> [T]he CTCL website with information about the grants states that applications could be submitted beginning on September 8, and approved after "about 2 weeks." This action, however, was not filed until October 5, 2020. Plaintiffs, therefore, waited as long as two weeks to bring an action that seeks to upend funding decisions for some of the busiest local jurisdictions.
>
> Response Brief, p. 6.

Michigan voters are not automatically notified when cities and counties officially accept private funds from CTCL. This information comes to Michigan voters through, for instance, news articles and other sources on the internet as well as word of mouth. Arriving at and processing this information takes time.

These voters expedited this process as much as possible. News articles for the CTCL grants to Muskegon and Saginaw, for instance, were posted on September 24.[3] Eleven days later—not even the "two weeks" complained of by Secretary Benson—Plaintiffs filed a 25-page complaint supported by exhibits and affidavits.

To the best of our knowledge, CTCL continues to provide private funds to local election authorities. Three days ago, on October 13, the Washington Post reported that "Mark Zuckerberg and Priscilla Chan donate $100 million more to election administrators, despite conservative

[3] https://www.mlive.com/news/saginaw-bay-city/2020/09/city-of-saginaw-gets-400k-grant-for-safe-election-process-in-november-election.html;
https://www.mlive.com/news/muskegon/2020/09/drive-thru-voting-in-muskegon-a-possibility-with-433k-elections-grant.html.

pushback."[4] The threat to fair and just elections is exacerbated daily, as private funds continue to be distributed to select jurisdictions. Secretary Benson cannot blame these voters for moving slowly – conceiving of and filing a lawsuit in less than two weeks – while the scheme we complain of continues to move and compound at light speed. Defendant complains "[a]t the time they filed this lawsuit, the election was already less than a month away." Response Brief, p. 6. But these Michigan voters did not create this timing issue – the private grants came in very recently and Secretary Benson, who is charged with overseeing Michigan elections authorities, assented. Secretary Benson cannot insulate herself from liability by noting that her actions/inactions occurred so close to an election that a lawsuit would be disruptive.

Secretary Benson cites *Crookston v Johnson*, 841 F3d 396 (6th Cir. 2016), wherein, about a month before the 2016 election, a voter challenged a Michigan law that forbade him from taking a photo of his ballot. Other than the challenge's close proximity to the election, there is nothing in common between *Crookston* and the case at bar. The Sixth Circuit noted that the ballot challenged ballot exposure laws were "not new. Michigan's ban on ballot exposure dates to 1891, and today's version of these laws has been on the books since 1996." *Id*. at 398-99. The plaintiff in *Crookston* apparently had as much as *125 years* in advance of the 2016 election to challenge the ballot exposure law but chose to do so in September of 2016; conversely, Secretary Benson here complains that these voters had far less than 125 years – "two weeks" – to make their challenge. Response Brief, p. 6.[5]

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[4] https://www.washingtonpost.com/politics/zuckerberg-chan-elections-facebook/2020/10/12/0e07de94-0cba-11eb-8074-0e943a91bf08_story.html

[5] The court in *Crookston* also noted, as Secretary Benson cites, that "courts will generally decline to grant an injunction to alter a State's established election procedures." *Crookston*, 841 F3d at 398. It is not the plaintiffs who seek to "alter a State's established election procedures," it is the

**B. These Michigan electors have standing to vindicate their constitutional rights.**

Secretary Benson argues these Michigan electors do not have standing, claiming that they "have no real adverse interest in the claims they seek to raise. As a result, there is no case or controversy that would support a declaratory judgment." Response Brief, p. 10. Further, Secretary Benson argues, "Plaintiffs have not identified any special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large." *Id*.

Michigan courts have rejected these arguments. In *Helmkamp v Livonia City Council*, 160 Mich. App. 442, 445; 408 N.W.2d 470 (Mich. Ct. App. 1987), the court cited the following "accepted statement of law:"

> It is generally held, in the absence of a statute to the contrary, that a private person as relator may enforce by mandamus a public right or duty relating to elections **without showing a special interest distinct from the interest of the public**. [26 Am Jur 2d, Elections, § 367, p 180, see also 52 Am Jur 2d, Mandamus, § 390, pp 712-713.]….
>
> Consequently, defendants' assertions and citations to the contrary, plaintiffs were not required to show a substantial injury distinct from that suffered by the public in general.

*See also Thompson v. Sec'y of State,* 192 Mich. 512, 522, 159 N.W. 65, 68 (Mich. 1916) ("The relators are electors of this State interested in the proper administration of the law; and, under the circumstances of this case and the public importance of the questions raised, the objection to their instituting these proceedings will not be sustained.").

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defendant in allowing the radical plan of privately-funded election procedures. Secretary Benson also cites *Republican Nat'l Comm. v. Democratic Nat'l Comm*., 140 S.Ct. 1205, 1207 (2020), which similarly involved resistance by the Court to "chang[e] the election rules so close to the election date." These Michigan voters have not changed the rules, Secretary Benson has.

Further, the Court of Appeals has noted that general standing rules aside, "[e]lection cases are special [] because without the process of elections, citizens lack their ordinary recourse. For this reason we have found that ordinary citizens have standing to enforce the law in election cases." *Deleeuw v. Bd. of State Canvassers*, 263 Mich. App. 497, 505-06, 688 N.W.2d 847, 853 (Mich. Ct. App. 2004).

In an unpublished decision, the Court of Appeals of Michigan analyzed a similar standing question. In *Fleming v. Macomb Cty. Clerk*, No. 279966, 2008 Mich. App. LEXIS 1325, at *1 (Mich. Ct. App. June 26, 2008), three Michigan voters filed equal protection and purity of elections claims against a county clerk who mailed unsolicited absent voter ballot applications only to voters age 60 and older. *Id*. at *6. The court found that "the purity of elections has been violated in this case because the mailing of absent voter ballot applications to only a select group of eligible absent voters undermines the fairness and evenhandedness of the application of election laws in this state." *Id*. at *23-24. The court then addressed Secretary Benson's standing argument, similar to this case:

> Defendant contends that even if the mass mailing violated state law or the constitution, plaintiffs are not entitled to relief because they failed to show any injury or harm. However, plaintiffs are not required to show a substantial injury distinct from that suffered by the public in general in order to establish standing in an election case. *Helmkamp v Livonia City Council*, 160 Mich. App. 442, 445; 408 N.W.2d 470 (1987). "[T]he right to vote is an implicit fundamental political right that is preservative of all rights." *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich. 1, 16; 740 N.W.2d 444 (2007) (internal quotations omitted). Although the right to vote is constitutionally protected, our Supreme Court has noted that the "equal right to vote is not absolute." *Id.* (internal quotations omitted). Instead, the Legislature must "preserve the purity of elections" and "guard against abuses of the elective franchise." Const 1963, art 2, §4. **Defendant's actions undermined the constitutional right of the public to participate in fair, evenhanded elections and, therefore, constituted an injury. Consequently, plaintiffs had standing to bring a cause of action to remedy this injury.**
>
> *Id*. at *24-25 (emphasis added).

Although *Fleming* is unpublished, the sources it cites are not, and its logic applies perfectly to the case at bar.

Secretary Benson cites *Carson v. Simon*, No. 20-CV-2030 (NEB/TNL), 2020 U.S. Dist. LEXIS 188454, at *1 (D. Minn. Oct. 11, 2020), for the proposition that these voters' claim of vote dilution is not a sufficient injury to provide standing. As all the cases above state, however, the only injury required in an election law or purity of elections case is a violation of the election process and these voters' right to a fair, evenhanded election. These Michigan voters have clearly pled this violation.

That issue aside, *Carson* does not provide the support Secretary Benson seeks. There, Minnesota electors claimed that counting of absentee ballots received after Election Day would injure them by diluting the value of their votes. *Id*. at *21. The electors' theory was that votes received after Election Day are invalid and unlawful, and thus counting those votes would increase the total amount of votes cast, which will in turn render their own lawful votes less influential. *Id*. at *21-22. The electors, however, did not allege that this would result in any disadvantage to them: "The Electors allege that their votes will be diluted, but such dilution affects all Minnesota voters equally, giving no disadvantage to the Electors." *Id*. at *22.

Here, these Michigan electors make it clear that by allowing selected predominantly Democrat election jurisdictions to receive and spend millions to conduct the election while Michigan voters in jurisdictions that are not predominantly Democrat do not receive the benefit of these additional recourses, Secretary Benson has diminished the voting rights of one disfavored group of citizens (Michigan voters living in Republican-leaning counties) and enhanced the access

to the ballot for another favored group of voters (those in progressive and heavily-Democrat counties).

The court in *Carson* recognized this difference.

> There is little dispute that, in certain cases, vote dilution can be a cognizable injury that confers standing. *E.g., United States v. Hays*, 515 U.S. 737, 744-45, 115 S. Ct. 2431, 132 L. Ed. 2d 635 (1995) ("Where a plaintiff resides in a racially gerrymandered district [and has therefore had his or her vote diluted], . . . the plaintiff has been denied equal treatment because of the legislature's reliance on racial criteria, and therefore has standing to challenge the legislature's action.")…. In *Gill v. Whitford*, the Supreme Court recognized that plaintiffs in past vote-dilution cases had standing when their claimed injuries were "individual and personal in nature," and the plaintiffs had alleged "facts showing disadvantage to themselves as individuals."

*Carson*, 2020 U.S. Dist. LEXIS 188454 at *22.

Just as those in racially gerrymandered districts have their votes diluted and have standing to challenge applicable laws, the Michigan electors seeking declaratory relief in this case live in districts disfavored by Secretary Benson and their right to a meaningful vote is inhibited. These Michigan voters have standing.

## CONCLUSION

Secretary Benson violated these Michigan citizens' constitutional rights under Michigan's Equal Protection clause and Purity of Elections clause. Allowing a private special interest group to pay money to local Michigan election officials in only certain election jurisdictions and direct how those local officials conduct the election and requiring the election officials to report back violates Michigan election law.

He who pays the piper calls the tune. Secretary of State Benson allowing this scheme whereby private special interest organizations may pay local election officials in only certain favored – generally urban and Democrat – election jurisdictions while not equally funding

suburban and rural and Republican election jurisdictions undermines the integrity of the election process and public confidence in the outcome of the election.

This Court should order those jurisdictions that received this private money to return it. Or, if not return the money, to pay it to the Secretary of State who can distribute it equally to all Michigan election jurisdictions *pro rata* based upon the number of registered voters in each jurisdiction.

Dated: October 16, 2020

Respectfully submitted,

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**PROOF OF SERVICE**

Mark F. (Thor) Hearne certifies that on October 16, 2020, he served a copy of the foregoing document in this matter on all counsel of record via electronic mail, including:

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# EXHIBIT A

**Transcript of remarks by Michigan Secretary of State**

**Jocelyn Benson**

**"Preventing Election Crises During the COVID-19 Pandemic"**

**Webinar hosted by Democracy Fund and Arabella Advisors**

**April 22, 2020**

In a nutshell we want to create an election this Fall where everyone who wants to vote from home can do so, everyone who wants to vote in person on Election Day has the tools to do so but that those are limited numbers and frankly for the communities that need it most. The way we get there, first and foremost, is by, we believe, sending everyone either a ballot or an application to request a ballot. That would cost us $8.5 million to do so once in advance of our August election. Included on our absentee request form is a check-box to receive a ballot in every election this year, so we can send it once, and that could, again, cost us $8 million, which is a significant amount of our $11.2 million that we're allocated by the federal government. Or another entity could send that and that frees us up for a number of other things. We see our costs, really, in three categories, voter education — we see our infrastructure costs in three categories. There's the voter education piece, which we would like to do but that is really where private philanthropy can fill a lot of gaps. On the infrastructure side, however, there is a significant amount of things that private philanthropy can do, not just in Michigan, but

in states like Arizona and Ohio, Wisconsin, and Pennsylvania. One is the ballot – how we send out the ballots, so that's the absentee ballot request form or the ballots themselves. Again, that's going to cost upwards of $8-10 million for us in Michigan. Second is ballot return – making sure there are people who can receive it, there are machines to process them – machines, high-speed tabulators for us cost upwards of $30-40,000, and then, or course, we need two workers to manage them. And then there's other things like drop-boxes that could be placed, for example, on every college campus and monitored. So there are a number of ballot-return options also which private philanthropy could fund with a lower price tag. … And the third is efforts to track the ballot and enable signature curing, meaning communication with voters after they've mailed-in their ballot or returned their ballot to make sure that it's actually counted. So there are a number of pieces there too, and I could go into more detail on all three, but in addition to voter ed, that's how we're breaking it down, and it's essentially – we don't have funds to cover everything, but we hope that there are partners out there, and again, this would hold true for several other states as well, that would enable us to achieve all these things and really live-up to an opportunity to demonstrate exactly how elections can be run during a pandemic.

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This is a priority for me — again not just in Michigan — but nationwide and particularly in a number of states where the need is the greatest, and just know that that federal money is critical — we got 11.2 in Michigan. That's going to help us significantly. It's about a quarter of what we need, so we do need more, but there are many other states where that money because we have so much latitude and discretion for how we allocate those dollars. There are many states where those dollars won't get to where they need to be from the perspective of myself and many of us on this call. So, one, advocacy needs to include standards and accountability as well as support for locals. And in addition to all that money — I don't believe in a blank check, although many of my colleagues at the secretary of state level do — but that said, you can go directly to states as well and I would encourage you to do so and to target a few that perhaps have the most needs and where you can have the greatest impact. We have a menu in Michigan and there are specific needs for Detroit, Flint, and others, that other communities don't have in our state. So, happy to do that deeper dive with anyone and enable that deeper dive in any other state. But all that to say is that we can't — that we must have a successful election this November. There are forces and who for personal and political reasons don't want us to — that's always been the case — it's even more so now. But I can't underscore that the importance of that state and local investment for getting

to where we need to be because what we do in November won't just impact the outcome of that election, it will define how we as a country protect democracy in times like this.