



**MEMORANDUM:
Facts & Law Relevant to the Michigan Board of State Canvassers Meeting
November 23, 2020**

1. Overview

- On Monday November 23, 2020, the four-member bipartisan Michigan Board of State Canvassers meets to canvass (count) the election results.
- Under MCL 168.841, the Board’s duty is to “canvass the returns and determine the results of all elections for electors of president and vice president of the United States.”
- Michigan law is clear that the State Board does not investigate or look behind the results it receives from the counties with respect to certification. It is bound by those returns – its duties are purely ministerial.
- Once the Board has “ascertained the result of the election,” the Governor is required by MCL 168.36 to certify the electors according to the results of the state’s popular vote.
- This Memorandum outlines anticipated factual and legal arguments that may be advanced at the November 23, 2020 meeting, and factual and legal responses to those questions.

2. Facts about the Michigan Results

a. Statewide

- The result of the election in the State of Michigan is not in doubt.
 - According to the [unofficial results](#) reported to the Secretary of State, Joe Biden received 2,804,040 votes (50.63%) and Donald Trump 2,649,852 votes (47.85%). This 154,188 vote margin far exceeds the 25,000 vote margin that triggers an expedited recanvass under [MCL 168.842](#).
- The State Board unanimously certified the results in 2016 even though that election was much closer.
 - In 2016, less than three weeks after Election Day, the Michigan Board of State Canvassers [unanimously certified](#) the state’s election results with Donald Trump winning the state popular vote by a [10,704-vote margin](#) over Hillary Clinton (two-

tenths of a percentage point). The margin in this 2020 election is nearly 15 times that of 2016.

- The statewide Michigan results are consistent with prior results and do not suggest any negligence or fraud that would call into question the election results.
 - The unofficial results and margins indicate a higher overall voter turnout than previous years, not widespread fraud. This is also reflected in the fact that just three Michigan counties [flipped](#) from red to blue (Kent County, Saginaw County, and Leelanau County).

b. Wayne County

- The Wayne County results, the timing of their release, and the margin between the Republican and Democratic candidates were completely consistent with prior elections.
 - Wayne County [reported](#) on November 18, 2020, that Donald Trump received 264,553 votes (30.27%) and Joe Biden 597,170 votes (68.32%). The percentage difference is within one point of the difference between Donald Trump and Hillary Clinton in 2016, results that were announced four days later in 2016 than this year. In 2016, Donald Trump received 228,993 votes (29.26%) and Hillary Clinton 519,444 votes (66.36%) in Wayne County, [reported](#) on November 22, 2016. In 2012, Mitt Romney received 213,814 votes (26.13%) and Barack Obama received 595,846 votes (72.83%) in Wayne County, [reported](#) on November 21, 2012.
- The Wayne County Board of Canvassers' certification was proper.
 - The four members of the Wayne County Board voted unanimously to certify, and that vote is effective. *See* MCL 164.24e(1) (“Any 3 members constitute a quorum,” and an action becomes effective if at least “1 member from each political party represented concurs in the action.”).
 - There is no legal mechanism for the county canvassers to rescind their votes. Rather, after a county board votes to certify, a statement of votes is transferred to the secretary of state, and the secretary of state will lay those statements before the board of state canvassers, MCL 168.843, who “shall canvass the returns and determine the results.” MCL 168.841.
- The purported “rescissions” of Wayne County canvassing board members Monica Palmer and William Hartmann (reportedly after receiving calls from President Trump) are irrelevant.
 - County board canvassers Palmer and Hartmann voted to certify the county results, and their late efforts to rescind their certification votes have no legal effect, as Wayne County Corporation Counsel Janet Anderson-Davis has [made clear](#).

3. The State Board’s Role Under the Law

- The nonpartisan staff of the Michigan Board of Elections has recommended that the Board of State Canvassers certify the results of the November 3, 2020 election, and provided the vote totals based on the official results of Michigan’s 83 counties.
- It is clear that the state canvassers’ role in the certification process is a ministerial task that they are required to carry out by law: their job is to sum up the county votes. The state canvass requirements are defined in Sections 168.841-848.
 - “It is the settled law of this state that canvassing boards *are bound by the return*, and cannot go behind it, especially for the purpose of determining frauds in the election. Their duties are purely ministerial and clerical.” *McLeod v. Kelly*, 304 Mich. 120, 127, 7 N.W.2d 240, 243 (1942) (emphasis added); *Keeler v. Robertson*, 27 Mich. 116, 122, 122–23 (1873).
 - In late November 1950, Attorney General Stephen J. Roth opined that “[i]t is the duty of the board of state canvassers to proceed to determine and certify the result of the recent election for state officers as soon as it receives the returns pertaining thereto from the several counties.” 1950 Op. Mich. Att’y Gen. 1330.

4. The Call for an Audit

- Certain partisans have called for a delay in certification and an audit of the results, citing “out-of-balance” precincts in Wayne County. “Balancing” issues happen in every election, were less pronounced in Wayne County than in other counties, and were less pronounced in this election than in prior ones.
 - According to the Michigan [Secretary of State](#): “Out-of-balance precincts are common in Michigan and across the nation. They essentially represent clerical errors where the number of people who were checked into each poll book does not exactly match the number of votes counted or ballots submitted. There are many reasons why this can occur: for example, a voter being checked in at the right polling place but the wrong precinct, or a voter checking in but leaving with their ballot if the line was long.”
 - In the vast majority of unbalanced Wayne County precincts in 2020, five or fewer votes were involved. Ultimately, the total number of votes implicated [about 450](#) out of 872,469 – or .05 percent of all votes cast in the county.
 - Wayne County’s Board of Canvassers itself certified results in [November 2016](#) and just [this August](#) despite similar balancing issues. And whereas, [in November 2016, 58% of Detroit’s precincts were unbalanced](#), that number [shrunk](#) to 28% this November. It is well accepted that “unbalanced” precincts are a result of human error, not widespread fraud.
 - Several of Michigan’s largest counties had unbalanced results were also certified without drama, including Ottawa ([won by Trump](#)) and Saginaw ([won by Biden](#)).

- “Balancing” issues in Wayne County are immaterial and irrelevant to the election result.
 - [MCL 168.871](#) expressly prohibits a recount where a precinct is “unbalanced,” rendering this issue immaterial and irrelevant. In any event, most of the “unbalanced” Wayne County precincts in this election were off by only [three or four votes](#), with the largest reported discrepancy being in Livonia, where 27 more ballots were counted than what was on record.
 - The disclosure requirement for out-of-balance precincts, MCL 168.824a, specifically refers to disclosing the out-of-balance precincts in a statement that is to be prepared per MCL 168.824, *upon the completion of the canvass* as provided in MCL 168.822.
- Certifying the results does not prevent but instead allows for an audit, which Secretary Benson has already committed to conducting.
 - On November 19, Secretary Benson issued a [statement](#) stating that her office is “on track to perform a statewide risk-limiting audit of November’s general election, which [they have] been building towards and planning for over the last 22 months, as well as local procedural audits of individual jurisdictions.”
 - Under [MCL 168.847](#), the audit can only take place after statewide certification of the results, which allows for the release of all ballots and voting equipment.

5. Legal Questions & Answers

- *Isn’t it true that two of the four members of the Wayne County Board revoked their yes votes, thus nullifying the certification?*

Absolutely not.

What is true is that after voting to certify, two of the four members of the Wayne County Board reportedly received phone calls from President Trump, after which they signed affidavits saying they regretted their decisions to certify. **These post-session remarks have zero legal impact on the actual vote, which had long since concluded.**

As explained by Wayne County Corporation Counsel Janet Anderson-Davis, canvassers were not able to rescind their votes for at least three independent reasons: (1) The board had already concluded the canvass; (2) The board voted not to reconsider the motion, thus cementing the decision; and (3) Any motion to rescind must be made at a meeting.

This, of course, is in line with how all voting is done, as the alternative – willy-nilly rescissions outside of any formal meeting context – would be impossible to administer.

- *What about the claims of fraud or negligence? Doesn’t the State Board have a duty to investigate?*

There are no such credible claims. Moreover, not only does the Board not have a duty to investigate – it lacks any authority to do so. Simply put, Michigan law makes clear that the State Canvassing Board’s role is purely ministerial:

- Other than to “canvass the returns and determine the result,” there is no role for the state board to play in conducting an audit, asking questions, or investigating discrepancies. *See* MCL 168.841.
- The statute governing the choosing of electors establishes that the only role of the board at this stage is to ascertain the result of an election so the governor can certify the results. *See* MCL 168.846.

Again: “In the absence of a recount, the legal duty imposed upon the board of canvassers is purely ministerial **It is the clear legal duty of the board of State canvassers to certify the result of the election as shown by the returns.**” *McLeod v. Kelly*, 304 Mich. 120, 127, 7 N.W.2d 240, 243 (1942). **That is so even in the face of claims that there were “mistakes and irregularities in the election.”** *Id.* at 129 (emphasis added). Such allegations are “issues of fact to be determined only by a recount.” *Id.*; *see also Keeler v. Robertson*, 27 Mich. 116, 122, 122–23 (1873) (“The board of canvassers has no authority to go behind the statements returned by the election boards, and inquire into the qualifications of persons whose votes are returned. They have to proceed in making their count upon the data furnished by the returns or statements, and are compelled to assume that the votes returned as having been given were legal votes. As then the board do not and cannot go into the question whether the votes returned were cast by qualified persons, their decision cannot involve or decide that question” (emphases added)).

Analogously, in *Coll v. City Bd. of Canvassers of Election*, the Michigan Supreme Court addressed the actions of a majority of a board of city canvassers that voted against certification and noted that the “duty [of the board of city canvassers] is purely clerical to foot up the returns of the board of inspectors and declare the result and issue certificates accordingly.” 83 Mich. 367, 370, 47 N.W. 227, 228 (1890). Instead:

the majority of the [city board of canvassers] . . . **turned the canvassing board into a pretended court for the purpose of trying a question of fraud This conduct** on the part of a majority of the respondents **finds not even a shadow of law or decency to support it. It was wholly wrong in law and in morals.** The respondents did not require the advice of an attorney to inform them of their duty and of the illegality of their action. . . . [A statement that] they believed their action justifiable . . . if true, would be an impeachment of their intelligence. . . . **Their action was a willful attack upon the rights and liberties of the people, and a most wicked attempt to defeat the will of the people as expressed by their votes.**

83 Mich. at 370–71, 47 N.W. at 228 (emphases added). The Court noted that the candidates elected on the face of the returns “are entitled to their certificates . . . until a better right

thereto shall be established in some of the proceedings provided by law for that purpose, in which both parties can be heard.” (emphasis added)).

- ***How do the State Board’s duties differ from those of the County Boards?***

As discussed, the State Board’s role is ministerial in nature.

As for the counties, *May v. Wayne County Canvassers*, 94 Mich. 505, 512 (1893) (discussing Wayne County), clearly states: “The powers of the committee are ministerial, and not judicial.” This has been reiterated consistently, including in an Attorney General Opinion from the 1980s which provides: “A board of county canvassers has the responsibility and duty to canvass the votes, prepare a statement of votes cast, and declare the results pursuant to 1954 PA 116, *supra*, § 826, the only section dealing with local offices. It is well established that the duty to canvass an election imposed upon the board of county canvassers is purely ministerial and clerical.” 1983-1984 Mich. Op. Att’y Gen. 320 (1984).

- ***Why shouldn’t there be an audit right now/before certification?***

The law does not allow it. The statutory scheme is clear that any such audits, if appropriate, should happen after the certification is complete. [Costantino v. City of Detroit, No. 20-014780-AW \(3rd Cir. Court Wayne, Cty Mich. Nov. 13, 2020\)](#). Again, what is taking place now is the purely ministerial function of canvassing the returns and certifying the results.

Recounts, not audits, are the procedures provided by law to challenge the election result, and even recounts do not delay certification.

- ***What about the request for an adjournment?***

The James Campaign, and the Republican National Committee and Michigan GOP, jointly have sent letters requesting a 14-day adjournment. This request should be denied because it serves no proper purpose and only delays what the law requires to be done expeditiously. See MCL 168.841(1) (“Upon making the determination,” the Board must “*immediately* prepare a certificate of determination.” (emphasis added)).

Such request for adjournment can be denied by two of the four board members. In order to adjourn there would need to be a vote. Assuming a 2-2 deadlock along party lines, the result would be that the board would not be adjourned. See MCL 168.22d(2).

Of course, all four members should vote against an adjournment, but not all four votes are necessary. The fundamental principle here is that the State Board must respect the will of the voters by counting the votes from the county canvasses. Attempting to delay that process thwarts democracy.