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**SENT VIA EMAIL ONLY**

The Members of the Wayne Board of County Canvassers  
c/o County Clerk Cathy Garrett  
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To the Members of the Wayne Board of County Canvassers:

As the 2024 general election nears, we write to respectfully remind you of the constitutional and legal duties shared by members of every board of county canvassers in Michigan, and to apprise you of recent litigation in which the ACLU of Michigan has been involved regarding a member of the Kalamazoo Board of County Canvassers who reportedly indicated a willingness and intention not to abide by that duty.

As we hope you are already aware, it is the legal obligation of every member of a board of canvassers under the Michigan Constitution and under binding Michigan law to certify any election based solely upon the returns. The law does not authorize members of boards of canvassers to withhold certification based upon speculation, theories, or even evidence pertaining to the accuracy of the reported returns. The Michigan Constitution provides:

It shall be the ministerial, clerical, nondiscretionary duty of a board of canvassers, and of each individual member thereof, to certify election results based solely on ... in the case of boards of county canvassers, statements of returns from the precincts and absent voter counting boards in the county and any corrected returns. [Const 1963, art 2, § 7(3).]

Michigan Election Law parallels this requirement. MCL 168.822(3) provides:

It is the ministerial, clerical, and nondiscretionary duty of each board of county canvassers, and each of the members of the board of county canvassers, to certify election results based solely on the statements of returns from the election day precincts, early voting sites, and absent voter counting boards in the county and any corrected returns.

Thus, members of county canvassing boards have a clear, non-discretionary duty to certify election results based solely on election returns.

As you may also be aware, on May 16, 2024, Jonathan Brater, Director of the Bureau of Elections, wrote a letter to the Delta County Board of Canvassers following their initial refusal to

certify a May recall election in that county (the “Brater Letter”).<sup>81</sup> In this letter, Director Brater emphasizes that members of county canvassing boards are not permitted to refuse to certify election results based on claims by third parties of alleged election irregularities, or a desire to conduct election fraud investigations. Brater Letter, p 1. Rather, canvassers are legally required to certify the election results that are brought before them.

Even before the people of Michigan enacted the constitutional language quoted above in the 2022 election, the Michigan Supreme Court consistently held that members of county and state canvassing boards have a clear, nondiscretionary legal duty to certify the election based solely on election returns. See *Johnson v Secretary of State*, 506 Mich 975; 951 NW2d 310, 311-312 (2020) (CLEMENT, J., concurring) (citing cases). Indeed, as early as 1892, the Michigan Supreme Court held that “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.” *McQuade v Furgason*, 91 Mich 438, 440; 51 NW 1073 (1892). See also *People ex rel Attorney General v Van Cleve*, 1 Mich 362, 366 (1850) (“The duties of these [canvassing] boards are simply ministerial . . .”).

Last week, the ACLU of Michigan was forced to sue a member of the Kalamazoo Board of County Canvassers who reportedly made comments to *The Detroit News* indicating an unwillingness to comply with this ministerial duty. The case resolved a week later with the canvassing board member signing a public affidavit stating: “I agree that, consistent with Michigan law, I am required to certify the results of the election based solely on the statements of returns from the election day precincts, early voting sites, and absent voter counting boards in the county and any corrected returns, and that I may not, and will not, refuse to certify results of the election based on any information extrinsic to the statement of returns.” The Kalamazoo Circuit Court’s resulting order, dismissing the case by stipulation in light of this affidavit, similarly recites this unambiguous legal duty. We enclose the order and the affidavit for your convenience.

The speed with which this case was resolved reflects the fact that, quite simply, **there is no legal defense for members of boards of canvassers who refuse to certify elections based on anything except the returns themselves**. And there are legal consequences when canvassing board members refuse to do exactly that. Candidates or voters who believe there has been misconduct or fraud in an election have an appropriate remedy to raise those issues, either by going to court to litigate them or by requesting investigations from law enforcement and election administration officials. But boards of canvassers have no role whatsoever in considering such issues.

We resolved our lawsuit in Kalamazoo without seeking damages and without requiring payment of attorneys’ fees, in light of the unique pre-election posture of the case, and in light of

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<sup>81</sup> Michigan Department of State, *Letter to Delta County Board of Canvassers* (May 15, 2024) <<https://www.michigan.gov/ag/-/media/Project/Websites/AG/releases/2024/May/Delta-County-Canvassers-Letter-05-16-2024.pdf>> (accessed August 15, 2024).

the canvasser in question's rapid acquiescence. However, members of other boards of canvassers should be aware that the ACLU will be carefully monitoring their activities come November. A canvasser who refuses to perform their legal and constitutional obligations by voting to certify the election based solely on the returns may be subject to swift and decisive legal action, whether from the ACLU or from other voter-protective organizations, likely accompanied by demands for attorneys' fees and potentially monetary and exemplary damages.

The role of a board of county canvassers is ministerial and clerical, but it is also extraordinarily serious. By taking on that role, you have assumed a profound responsibility to the voters of Michigan and to our democracy, and we sincerely thank you for your public service. We assume that the vast majority of canvassers understand this responsibility and take it as seriously as we do and as Michigan's voters demand and expect. However, we remain troubled by public comments by some canvassers suggesting a lack of faith in Michigan's electoral system, and a potential willingness to abuse the authority vested in the position. We sincerely hope that any canvassers who have expressed such sentiments plan to put aside their political beliefs to perform their legal duties come November, thereby avoiding the potential for legal liability that could follow from a failure to do so.

Sincerely,



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cc: James W. Heath