



STATE OF MICHIGAN  
JOCELYN BENSON, SECRETARY OF STATE  
DEPARTMENT OF STATE  
LANSING

October 28, 2022

Dear Clerks:

The Bureau of Elections is aware that clerks have received a document, purporting to be a “Memorandum of Law,” urging clerks to violate the Michigan Election Law and disregard the lawful determinations of Michigan’s 83 county clerks by switching to “hand counting” ballots weeks before a statewide general election.

At the outset, it is important to understand that each clerk should seek legal advice from their own municipal or county legal counsel, not from outside parties claiming to offer a “legal opinion”. Clerks and local and county legal counsel may in turn seek input from local government associations, including the Michigan Association of Municipal Clerks, Michigan Association of County Clerks, Michigan Townships Association, Michigan Municipal League, and Michigan Association of Counties. The Bureau of Elections, on behalf of the Michigan Secretary of State, has supervisory control over local election officials in the performance of their duties under the Michigan Election Law, and issues instructions and advises and directs clerks in the proper methods of conducting elections. MCL 168.31.

The Michigan Election Law includes the requirements enacted by our State Legislature governing the conduct of elections. Decades ago, the Michigan State Legislature enacted provisions of the Michigan Election Law that clearly and expressly require that ballots be counted by a certified electronic system. MCL 168.37, 795, 795a. The Michigan Election Law does not allow county or state officials to waive these requirements. Suggestions that local clerks may simply disregard the requirements of the Michigan Election Law if they choose to do so have no valid basis in law and put clerks at risk of willfully failing to perform duties required of them by law, which can carry criminal penalties. MCL 168.931(h).

Further, the Michigan Election Law clearly and expressly states that county clerks choose the voting systems for each county, in consultation with city and township clerks. Once the system is selected, the Michigan Election Law does not provide authority for city or township clerks to choose a different system or to refuse to use the system to tabulate ballots on election day. Specifically, MCL 168.37a states that “a county clerk, in consultation with each city and township clerk in the county” will “determine which electronic voting system will be used in the county[.]”

Before voting systems are purchased or used in Michigan, they are approved by the Board of State Canvassers, a bipartisan body that is assisted by the Bureau of Elections but is independent of the Michigan Secretary of State. In 2017, the Board of State Canvassers (BSC) approved the three voting systems for use in Michigan as required by MCL 168.795a. Prior to approval, the systems were tested by one of the Election Assistance Commission (EAC)-accredited voting

systems test laboratories (VSTL<sup>1</sup>), and then were subject to rigorous Michigan-specific testing conducted by BOE. Only after BSC approval did county clerks determine which voting system would be used in the county.

County clerks across the state consulted with their local clerks and determined which of the 3 certified voting systems would be used. The voting systems were implemented in 2017 and 2018 and have been in continuous use since. Since that time, the Bureau has tested and the Board of State Canvassers have approved software and hardware updates to each system as required by state law.

In addition to the initial testing and certification process, county and municipal clerks adhere to strict security and testing requirements for each election. Prior to this election, all clerks have or soon will conduct public accuracy testing using test ballots to ensure the tabulators are counting ballots as expected.

After pre-election testing and the election occurs, there are numerous post-election safeguards to ensure the tabulators properly counted paper ballots. Paper ballots are secured in approved, sealed storage containers. In each county, a bipartisan board of county canvassers verify that the tapes printed from each tabulator match the reported results and can identify and correct any errors as needed before certification. Following county and state certification, any candidate who believes the tabulators did not count paper ballots correctly can request a recount. Following that, municipal, county, and state election officials participate in post-election audits which include hand counts of paper ballots in numerous precincts across the state to verify that they were tabulated correctly.

Even after all of these processes, paper ballots are retained for 22 months following each federal election. Any individual who truly believes that tabulators do not count paper ballots correctly, and seeks to provide actual evidence for this belief, has had every ability to inspect paper ballots from past elections and show that ballots were tabulated improperly. As clerks are no doubt aware, nobody has come forth with such evidence.

Election officials have worked diligently and cooperatively over the last two years to prepare for a safe, secure, and impartial November 2022 election. This includes thorough and extensive protocols to ensure legally mandated electronic voting equipment is secure and programmed properly to tabulate ballots. After election day, election officials will follow required post-election protocols for the canvass, certification, recount, and audit of election results to further verify equipment functioned properly.

As noted above, you should consult carefully with your municipal or county legal counsel to evaluate the merits of any legal arguments you receive from outside entities. The November 2022 election must be conducted with certified electronic tabulators that count paper ballots, selected by county clerks for each county as required by law. Unfortunately, clerks have received numerous communications sharing false claims, misstatements of fact, and legal arguments that are baseless and incomprehensible. Unlike clerks, the individuals making these claims are not responsible for conducting elections under the requirements of the Michigan Election Law.

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<sup>1</sup> Past claims that VSTLs are not EAC-certified are false. For additional details, see my letter of July 28, 2022. Systems used in Michigan, like those in other states, were tested under Voluntary Voting System Guidelines (VSSG) standards. The EAC has approved a next-generation standard, VVSG 2.0, for future testing and certification, but that standard is not yet required for testing by the EAC or in any state.

Under these requirements, voting systems used in Michigan have been properly selected, purchased, certified, and tested, and are the lawful method of conducting the upcoming election. Please contact the Bureau of Elections if you have any additional questions regarding this matter. As always, thank you for your hard work and dedication to Michigan's voters, especially at this time.

Sincerely,

A handwritten signature in black ink, appearing to read 'Jonathan Brater', with a stylized flourish at the end.

Jonathan Brater, Director  
Bureau of Elections