No. 20-815

In the Supreme Court of the United States

IN RE: TIMOTHY KING, ET AL., PETITIONERS

v.

GRETCHEN WHITMER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the petition filed by Petitioners seeking to appeal the district court's denial of their motion for a preliminary injunction to prevent the counting of Michigan's electoral votes should be denied as moot?

2. Whether the petition filed by Petitioners seeking to appeal the district court's denial of their motion for a preliminary injunction should be denied because the district court did not abuse its discretion in denying the motion?

PARTIES TO THE PROCEEDING

Petitioners Timothy King, Marian Sheridan, and John Haggard are Michigan voters and nominees of the Republican Party to be presidential electors for Michigan. Petitioners James Ritchard, James Hooper, and Darren Ribingh are Republican Party chairpersons for Michigan counties. The named Respondents are Michigan Governor Gretchen Whitmer, Michigan Secretary of State Jocelyn Benson, and the Michigan Board of State Canvassers. The Intervenor Respondents are Robert Davis, a Michigan voter, the City of Detroit, the Democratic National Committee, and the Michigan Democratic Party.

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OPINION BELOW

The opinion and order by the district court denying Petitioners' emergency motion for a preliminary injunction, (Pet. App. 42), is not yet published but is available at 2020 WL 7134198.

JURISDICTION

The district court has jurisdiction over Petitioners' federal claims under 28 U.S.C. § 1331 and supplemental jurisdiction over the state-law claims under 28 U.S.C. § 1367. Petitioners premise this Court's jurisdiction on 28 U.S.C. § 1254(1) and Rule 11 of this Court's rules as a notice of appeal was filed in the Sixth Circuit Court of Appeals, but no opinion has been rendered in that case. Petitioners make other allegations as to this Court's jurisdiction to issue writs and other forms of relief, but Respondents do not consider it necessary to address these assertions.

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, § 4, cl. 1 provides:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

Article II, § 1, cl. 2 provides:

> Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

INTRODUCTION

The petition here is meritless and asks for relief that this Court is unable to provide. The outlandish claims of widespread election fraud that somehow changed the election's outcome are unfounded, and these basic charges have gained no traction in the state courts. The gravamen of the claims are ones based in state law. Michigan's state officials have followed Michigan election law and certified the election. The Congress has also done so. There is nothing left to be done as the election is over. Thus, the petition should be denied for two reasons.

First, Petitioners' appeal is moot. Michigan has already performed its duties as to the certification of its election, its selection and certification of its presidential electors, and those electors have voted. Further, Congress has counted their votes and declared a new president. No effective relief can be granted by any court with respect to Petitioners' request to de-certify Michigan's election or to de-certify its presential electors and to halt their vote or that of Congress.

Second, even if the request for preliminary injunctive relief is not moot, the claims are without merit. The district court did not abuse its discretion in rejecting Petitioners' motion. Petitioners are not likely to succeed on the merits of the Electors Clause and Elections Clause claims, or their vote-dilution equal protection claim, substantive due process claim, and state statutory claims. Further, Petitioners' claims of irreparable harm are speculative, not imminent, and the requested injunctive relief is unwarranted and unprecedented and would disenfranchise Michigan's voters.

STATEMENT OF THE CASE

Michigan, like the other states, held an election on November 3, 2020, to select electors for president and vice president. See Mich. Comp. Laws § 168.43.

A. Michigan certified the November election

Michigan's elections are decentralized and principally conducted at the local level by the over 1,600 city and township clerks. In keeping with that structure, local jurisdictions began canvassing results immediately after the polls closed on November 3. Mich. Comp. Laws § 168.801. The boards of county canvassers commenced canvassing two days later, and the 83 county boards completed their canvasses by November 17. Mich. Comp. Laws §§ 168.821, 168.822.

Respondent Board of State Canvassers, a bi-partisan board, see Mich. Comp. Laws § 168.22, was required to meet by the twentieth day after the election to certify the results. Mich. Comp. Laws § 168.842(1), The Board met on November 23 and certified the statewide results.[1] President-elect Joe Biden defeated President Donald Trump by 154,188 votes.[2]

"As soon as practicable after the state board of canvassers has" certified the results the Governor must certify the presidential electors to the Archivist for the

[1] See 11/23/20 Draft Meeting Minutes, Board of State Canvassers, available at https://www.michigan.gov/documents/sos/112320_draft_minutes_708672_7.pdf, (accessed January 14, 2021.)

[2] See November 2020 General Election Results, available at https://mielections.us/election/results/2020GEN_CENR.html., (accessed January 14, 2021.)

United States. Mich. Comp. Laws § 168.46; 3 U.S.C. § 6.[3] Respondent Governor Whitmer certified the electors the same day the Board certified the results.[4]

No presidential candidate requested a recount within the time permitted. See Mich. Comp. Laws § 168.879(1)(c). And under federal law, the "safe harbor" provision regarding a state's certification of electors activated on December 8. See 3 U.S.C. § 5. Michigan's presidential electors were then required to "convene" in the State capitol on December 14, 2020. Mich. Comp. Laws § 168.47; 3 U.S.C. § 7.

B. Michigan's electors convened on December 14 and cast their votes

As provided by law, Michigan's Democratic presidential electors met in the State Capitol on December 14 and cast their votes for President-elect Biden.[5] They did so under heavy security in light of credible threats of violence that required the capitol and other state buildings be closed to the public.[6]

On the same day and outside Michigan's capitol, the presidential electors selected by the Republican Party sought access to the capitol in order to cast alternate votes for President Trump. They were not allowed access to the building, however,

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[3] Although Michigan's statute continues to refer to the U.S. Secretary of State, under 3 U.S.C. § 6 the Certificate of Ascertainment is sent to the Archivist of the United States.

[4] See Michigan's Certificate of Ascertainment, available at https://www.archives.gov/files/electoral-college/2020/ascertainment-michigan.pdf, (accessed January 14, 2021.)

[5] See Michigan's Certificate of the Votes, available at https://www.archives.gov/files/electoral-college/2020/vote-michigan.pdf (accessed January 14, 2021.)

[6] See Michigan Gov. Whitmer Addresses Security Threat to Electoral College Vote, 12/14/20, National Public Radio, available at https://www.npr.org/sections/biden-transition-updates/2020/12/14/946243439/michigan-gov-whitmer-addresses-security-threat-to-electoral-college-vote (accessed January 14, 2021.)

since there is no process for permitting the unsuccessful electors to cast their votes.[7] Furthermore, leadership for both the Michigan House of Representatives and the Michigan Senate had indicated that the results of the election and the presidential electors' votes must stand under the law.[8]

C. Michigan's electoral votes were counted by Congress and the new President has been declared.

At 1:00 p.m. on January 6, 2021, Congress convened in a joint session as required by 3 U.S.C. § 15 to count the electoral votes of the fifty states and the District of Columbia. Respondents will not address the shocking violence that occurred shortly thereafter. It is sufficient to say that in the early hours of January 7, 2021, Congress counted Michigan's 16 electoral votes for President-elect Biden. And at the end of the joint session, Mr. Biden was certified the winner and the new President. With that declaration, the November 3, 2020, presidential election concluded.

D. The underlying litigation—*King*, *et. al.* v. *Benson*, *et. al.*

On November 25, several Republican Party electors and operatives filed a complaint for declaratory and injunctive relief in federal district court against Michigan Secretary of State Jocelyn Benson, Governor Whitmer, and the Board of State Canvassers. (ECF No. 1, Compl., PageID.1.) These plaintiffs then filed an amended

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[7] See Michigan Republicans who cast electoral votes for Trump have no chance of changing Electoral College result, 12/15/20, MLIVE, available at https://www.mlive.com/public-interest/2020/12/michigan-republicans-who-cast-electoral-votes-for-trump-have-no-chance-of-changing-electoral-college-result.html (accessed January 14, 2021.)

[8] *Id.*

complaint (ECF No. 6, Am. Compl., PageID.872) and an emergency motion for a preliminary injunction on November 30, 2020 (ECF No. 7, Mot., PageID.1832).

The *King* plaintiffs alleged the same litany of irregularities in the City of Detroit's election as had been alleged and rejected in numerous other state-court filings. They allege that the defendants violated the Electors and Elections Clauses of the U.S. Constitution by failing to conduct the November 3 general election in accordance with the election laws enacted by the Michigan Legislature; violated the Equal Protection Clause by causing the debasement or dilution of the plaintiffs' votes by failing to comply with Michigan's election laws; and violated the plaintiffs' substantive due process rights by diluting their votes through the counting of unlawful or illegal votes. (ECF No. 6, Am. Compl., PageID.937–953.) The plaintiffs requested that the court direct the defendants to de-certify the election results; enjoin the Governor from sending the electors certificates; order the Governor to certify results that President Trump won the election; impound voting machines and software; order the rejection of various ballots; and declare other various forms of relief. (*Id.* at 954–956.)

On December 7, the district court denied the motion for injunctive relief. (ECF No. 62, Op. & Order, PageID.3295.) The court concluded that the Eleventh Amendment barred the plaintiffs' claims; that their claims were moot; that their claims were barred by laches; that abstention applied; that the plaintiffs lacked standing to bring their equal protection, Electors Clause and Elections Clause claims; and that the plaintiffs had no likelihood of succeeding on the merits of their constitutional claims. (*Id.* at PageID.3301–3328.) The court further concluded that the irreparable harm,

balance of harm, and public interest factors weighed against granting relief. (*Id*. at PageID.3329.)

On December 8, the plaintiffs filed a notice of appeal to the Sixth Circuit Court of Appeals. (ECF No. 64, PageID.3332.) The plaintiffs did not move to expedite their appeal, most likely because the State of Texas moved to file an original action against Michigan and several other "swing" states in this Court on December 7, alleging widespread fraud in Michigan's general election, and requesting that the Court overturn Michigan's results. See *Texas* v. *Pennsylvania*, *et al*., 22O155. But on December 11, this Court denied Texas's motion "for lack of standing under Article III of the Constitution" because "Texas ha[d] not demonstrated a judicially cognizable interest in the manner in which another State conducts its elections."[9]

The *King* plaintiffs then pivoted and filed the instant petition for certiorari on December 11, 2020, seeking to bypass review by the Sixth Circuit. Days later, on December 15, plaintiffs, now Petitioners, filed a "notice of supplemental authority," for the purpose of attaching a "preliminary report" of a purported forensic exam of a single Dominion Voting Systems tabulator used in Antrim County, Michigan, and generated in connection with pending state-court litigation in that county. See *Bailey* v. *Antrim County*, *et al*., Antrim Circuit Court No. 20-9238. The report was released on December 14 and is not part of the lower court record in this case. As Petitioners note, the report asserts that Dominion software is designed to perpetuate errors and

[9] See order dated December 11, 2020, in Case No. 22O155, available at https://www.supremecourt.gov/orders/courtorders/121120zr_p860.pdf (accessed January 14, 2021.)

fraudulent results. (Pet. Notice of Supp. Auth., p. 3.) But this report has largely been repudiated,[10] and Michigan legislators have stated that there is no evidence of fraud perpetuated by Dominion Voting Systems.[11] Petitioners then waited several more days to file a motion to consolidate and expedite consideration of their "emergency" petition. This Court denied the motion to expedite on January 11, 2021.

Back in the district court, on December 22, Respondents and the intervening defendants in the *King* case filed motions to dismiss the case. (ECF No. 70, Defs' Mot. & Brf., PageID.3350–3428.) Those motions remain pending.

E. Related federal litigation—*Wisconsin Voters Alliance et al.* v. *Pence*, *et al.*

On December 22, the Wisconsin Voters Alliance and several other similar groups and individual plaintiffs filed a complaint for declaratory and injunctive relief along with a motion for a preliminary injunction in the district court for the District of Columbia. See *Wisconsin Voters Alliance*, *et al.* v. *Pence*, *et al.*, Case No. 20-03791.

These plaintiffs sued Vice President Pence, in his capacity as President of the U.S. Senate, the U.S. House of Representatives, the U.S. Senate, the "Electoral College," and various principals from the swing states including Michigan's Governor, the Speaker of Michigan's House of Representatives, and the Majority Leader for Michigan's Senate. These plaintiffs principally alleged the same claims of fraud and

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[10] See Antrim County audit shows 12-vote gain for Trump, 12/17/20, The Detroit News, available at https://www.detroitnews.com/story/news/local/michigan/2020/12/17/antrim-county-audit-shows-12-vote-gain-trump/3938988001/ (accessed January 14.)

[11] See, e.g., statement by State Senator Ed McBroom, available at https://www.detroitnews.com/story/news/local/michigan/2020/12/17/antrim-county-audit-shows-12-vote-gain-trump/3938988001/ (accessed January 14).

irregularities in Michigan's election as alleged in *King* and the *State of Texas* cases. They sought to have various federal and state statutes relating to the process for selecting electors, including a Michigan statute, declared unconstitutional and requested that the court enjoin the "Vice President and the U.S. Congress . . . from counting Presidential elector votes from the states," including Michigan, "unless their respective state legislatures vote affirmatively in a post-election vote to certify their Presidential electors[.]" (ECF No. 1, Compl., PageID.115, Prayer for Relief.)

But on January 4, the district court denied the plaintiffs' motion for a preliminary injunction. (ECF No. 10, p. 1.) The next day, January 5, the plaintiffs voluntarily dismissed the case. (ECF No. 16.)

REASONS FOR DENYING THE PETITION

I. Petitioners' appeal of the denial of their motion for a preliminary injunction to prevent the counting of Michigan's electoral votes should be dismissed as moot.

Petitioners' appeal of the denial of preliminary injunctive relief is plainly moot. In general, a federal court has a continuing duty to ensure that it adjudicates only genuine disputes between adverse parties, where the relief requested would have a real impact on the legal interests of those parties. See *Church of Scientology* v. *United States*, 506 U.S. 9, 12 (1992). Article III of the Constitution limits federal-court jurisdiction to "cases" and "controversies." U.S. Const. art. III, § 2.

This Court has interpreted this requirement to demand that "an actual controversy . . . be extant at all stages of review, not merely at the time the complaint is filed." *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 67 (1997) (quoting

Preiser v. *Newkirk*, 422 U.S. 395, 401 (1975)). "If an intervening circumstance deprives the plaintiff of a 'personal stake in the outcome of the lawsuit,' at any point during litigation, the action can no longer proceed and must be dismissed as moot." *Genesis Healthcare Corp*. v. *Symczyk*, 569 U.S. 66, 72 (2013) (quoting *Lewis* v. *Continental Bank Corp*., 494 U.S. 472, 477–478 (1990)). A case becomes moot "when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Knox* v. *Service Employees Int'l Union*, *Local 1000*, 567 U.S. 298, 301 (2012) (internal quotation marks omitted).

A. This Court can no longer provide any effective relief.

Petitioners recognize that their claims would be moot absent expedited consideration by the Court. They note they sought "immediate preliminary relief . . . to maintain the status quo *so that the passage of time and the actions of Respondents do not render the case moot*, depriving this Court of the opportunity to resolve the weighty issues presented herein and Respondents of any possibility of obtaining meaningful relief." (Petition, p. 1) (emphasis added.)

Petitioners ask this Court to "exercise its authority to issue the writ of certiorari and stay the vote for the Electors in Michigan," to "stay or set aside the results of the 2020 General Election in Michigan," and to "stay the Electoral College Vote[.]" (*Id*., pp. 10, 15–16.) Similarly, they argue that "the Michigan results must be decertified, [and] the process for seating electors stayed[.]" (*Id*., p. 17.) They request an "injunction prohibiting the State Respondents from transmitting the certified results[.]" (*Id*., p. 22.) In their conclusion, they ask the Court to enter an emergency

order "instructing Respondents to de-certify the results of the General Election for the Office of President," or alternatively to order Respondents "to certify the results of the General Election for Office of the President in favor of President Donald Trump." (*Id*., p. 31.)

Petitioners expressly acknowledge that "[*o*]*nce the electoral votes are cast*, *subsequent relief would be pointless*," and "*the petition would be moot*." (*Id*., pp. 7, 15) (emphasis added.) Respondents agree. The instant petition *is* moot.

Michigan's electors met on December 14 and cast their votes for President-elect Biden, and the results were transmitted to the United States Archivist. On January 7, Congress counted Michigan's and all the other states' certified electoral votes and declared Mr. Biden the winner of the Presidential election. All the events Petitioners seek to prevent or enjoin have occurred. The Court cannot grant any effective injunctive relief whatsoever to Petitioners at this time, and certainly no relief as to the named Respondents. *Knox*, 567 U.S. at 301.

B. The exception to the mootness doctrine does not apply.

There is a narrow exception to the mootness doctrine for disputes that are capable of repetition, yet evading review. See *Los Angeles* v. *Lyons*, 461 U.S. 95 (1983). "The exception applies where '(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again.' " *Fed. Election Comm'n* v. *Wisconsin Right To Life, Inc*., 551 U.S. 449, 462 (2007)

(quoting *Spencer* v. *Kemna*, 523 U.S. 1, 17 (1998) (internal quotation marks and brackets omitted).)

1. Petitioners' request for preliminary relief was not fully litigated, but the merits of the case remain in dispute.

Legal disputes involving election laws almost always take more time to resolve than the election cycle permits. See *Moore* v. *Ogilvie*, 394 U.S. 814, 816 (1969). Petitioners' complaint was filed on November 25, two days after Respondent Board of State Canvassers certified the state's general election results, which results were certified to the federal Archivist the same day by Respondent Governor Whitmer. Petitioners moved for a preliminary injunction on November 30. (ECF No. 7, Mot., PageID.1832.) The district court denied the motion on December 7, and Petitioners appealed to the Sixth Circuit on December 8, and filed their petition in this Court on December 11. Michigan's electors met on December 14 to cast their votes.

Thus, Petitioners' request for injunctive relief was not fully litigated before Michigan's electors voted (although it likely could have been had counsel acted with the requisite haste). Nonetheless, Petitioners continue to pursue the merits of their claims below. They have not dismissed their case and will presumably be opposing Respondents' motion to dismiss. Accordingly, Petitioners still have the opportunity for their day in court, including in the Sixth Circuit and possibly this Court, after the district court enters a final judgment. See, e.g., *University of Texas* v. *Camenisch*, 451 U.S. 390, 393–394 (1981) (issue of preliminary injunction was moot but case as a

whole remained alive). Accordingly, the first prong of the exception to mootness is not met.

2. There is no reasonable expectation that the same or a similar controversy will recur as to these Petitioners.

Under the second prong, Petitioners must show that there is a "reasonable expectation" or "demonstrated probability" that the alleged controversy will recur as to these Petitioners. See *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975) (per curiam). In *Federal Election Commission* v. *Wisconsin Right To Life*, *Inc.*, the U.S. Supreme Court observed that "[o]ur cases find the same controversy sufficiently likely to recur when a party has a reasonable expectation that it 'will again be subjected to the alleged illegality,' or 'will be subject to the threat of prosecution' under the challenged law." 551 U.S. 449, 463 (2007) (internal citations omitted). To meet this burden, a party need not show "repetition of every 'legally relevant' characteristic of an as-applied challenge—down to the last detail[.]" (*Id.*) (citation omitted). Rather, a party must show that "materially similar" circumstances will recur. (*Id.* at 464.)

Here, there is nothing in the record that demonstrates it is probable, reasonable, or even credible, to expect that in four years these same Petitioners will face the same or a materially similar situation in which they are alleging widespread fraud in the conducting of Michigan's presidential election, particularly in the City of Detroit. Nor does the record suggest that Petitioners might find themselves in need of filing another lawsuit and filing another motion for a preliminary injunction.

Indeed, Petitioners' unfounded claims of fraud and other alleged election irregularities are rooted in the specific facts of the November 3 general election. Even if it is theoretically possible that Petitioners could find themselves in this situation, it is not "reasonable" under the present circumstances to expect that this will occur. *Murphy* v. *Hunt*, 455 U.S. 478, 482 (1982) (per curiam) ("The Court has never held that a mere physical or theoretical possibility was sufficient to satisfy the [capable-of-repetition] test[.]"). See also *Hall* v. *Secretary of State*, 902 F.3d 1294, 1298 (11th Cir. 2018) ("reasonable expectation requires more than a theoretical possibility"). Thus, Petitioners cannot meet the second prong of the exception to mootness.

Because Petitioners' appeal of the denial of their motion for preliminary injunction is moot, the Court should dismiss the petition. But even if the petition is not moot, it is meritless because the district court did not abuse its discretion in denying Petitioners' motion. The Michigan election was neither fraudulent nor unlawful.

II. Petitioners were not entitled to a preliminary injunction where the necessary factors weighed against granting such extraordinary relief.

A. Petitioners did not demonstrate a strong likelihood of success on the merits of their claims.

1. The Electors and Elections Clauses.

Petitioners contend that because the Michigan Legislature has established laws for the administration of elections, including presidential elections, Respondents violated the Electors and Elections Clauses of the Constitution by "failing to follow the requirements of the Michigan Election Law." (ECF No. 6, Am. Compl., ¶179–180, PageID.938.)

As an initial matter, Petitioners lack standing to bring these claims. (ECF No. 62, Op. & Order, PageID.3320–3324.) Petitioners argue that, as nominees of the Republican Party to be electors they have standing to allege violations of these clauses because "a vote for President Trump and Vice-President Pence in Michigan . . . is a vote for each Republican elector[], and . . . illegal conduct aimed at harming candidates for President similarly injures Presidential Electors." (ECF No. 7, Mot., PageID.1837–38; ECF No. 49, Plfs. Reply, PageID.3076–78.)

But where, as here, the only injury Petitioners have alleged is that the Elections Clause has not been followed, this Court has made clear that "[the] injury is precisely the kind of undifferentiated, generalized grievance about the conduct of government that [courts] have refused to countenance." *Lance* v. *Coffman*, 549 U.S. 437, 442 (2007). Because Petitioners "assert no particularized stake in the litigation," they fail to establish injury-in-fact and thus standing to bring their Elections and Electors Clause claims. *Id.*

Petitioners' claims also fail on the merits. In *Bush* v. *Palm Beach County Canvassing Bd.*, 531 U.S. 70, 76 (2000), this Court held that state legislatures enacting laws governing the selection of presidential electors are acting under a grant of authority under Article II, § 1, cl. 2 of the U.S. Constitution. The Court has also held that the power to define the method of selecting presidential electors is exclusive to the state legislature, *McPherson* v. *Blacker*, 146 U.S. 1, 27 (1892), and cannot be "taken or modified" even by the state constitutions. *Bush* v. *Gore*, 531 U.S. 98, 112–13 (2000) (C.J. Rehnquist, concurring). From this modest premise, Petitioners

contend that any violation of the Michigan Election Law is tantamount to a modification of the Michigan Legislature's enactments. But neither *Bush* nor *McPherson* holds as much.

The principal problem with Petitioners' argument is that Respondents have not violated state law. Absent from Petitioners' complaint is any reference to any act or decision by the Governor, the Secretary, or the Board that supposedly "violated" state election law—let alone the Electors and Elections Clauses as a consequence thereof. In *Bush* v. *Gore*, Justice Rehnquist observed that federal courts' review of state-court decisions affecting presidential electors under Article II although independent was "still deferential." 531 U.S. at 114. Here, Respondents have not "infringed" upon the authority of "the Legislature."

Further, Respondents did not do anything to violate the Elections Clause. U.S. Const. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof[.]") Frankly, it is not entirely clear how this clause applies to the present case. The election was held on November 3, its results were certified along with the electors, and the electors voted, all in conformity with state law.

In reviewing claims under these clauses, this Court has generally weighed state election laws against federal requirements—but has not examined alleged *violations* of enacted state laws against those federal requirements. See, e.g., *Cook* v. *Gralike*, 531 U.S. 510, 525–26 (2001) (striking down state law that constituted an improper regulation of congressional elections); *Arizona State Legislature* v. *Arizona*

Independent Redistricting Comm, 576 U.S. 787, 824 (2015) (upholding state law that transferred redistricting power to state commission). Petitioners provided no authority supporting the claims they raise here. As the district court observed, "Plaintiffs ask the Court to find that any alleged deviation from state election law amounts to a modification of state election law and opens the door to federal review. Plaintiffs cite to no case—and this Court found none—supporting such an expansive approach." (ECF No. 62, Op. & Order, PageID.3325.) Petitioners failed to demonstrate a substantial likelihood of success as to these claims.

2. The Equal Protection Clause.

Petitioners attempt to establish an equal protection claim based on the theory that Respondents engaged in "several schemes" to, among other things, "destroy," "discard," and "switch" votes for President Trump, thereby "devalu[ing] Republican votes" and "diluting" the influence of their individual votes in favor of Democratic votes. (ECF No. 49, Plfs. Reply, PageID.3079.)

"Equal protection of the laws" means that "[h]aving 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*, 531 U.S. at 104–05. Voting rights can be impermissibly burdened "by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Id*. (quoting *Reynolds* v. *Sims*, 377 U.S. 533, 555 (1964)). "Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right [to vote]." *Reynolds*, 377 U.S. at 559 (quoting *Wesberry* v. *Sanders*, 376 U.S. 1,

17–18 (1964)). "[A]ll who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be." *Id*. at 557–58 (citation omitted). Thus, "a law that would expressly give certain citizens a half-vote and others a full vote" would be violative of the Equal Protection Clause. *Wesberry*, 376 U.S. at 19 (citation omitted).

As above, Petitioners lack standing to bring this claim. (ECF No. 62, Op. & Order, PageID.3318–3319.) Even if Petitioners could establish injury-in-fact and causation under their "dilution" theory, they fail to establish redressability because the alleged injury of vote-dilution could not be redressed by a favorable decision from the court. Petitioners ask the court to de-certify the results of the 2020 General Election in Michigan. But an order invalidating the votes of approximately 2.8 million people would not reverse or remedy the dilution of Petitioners' vote. Standing is not "dispensed in gross: A plaintiff's remedy must be tailored to redress the plaintiff's particular injury." *Gill* v. *Whitford*, 138 S. Ct. 1916, 1934 (2018) (citing *DaimlerChrysler Corp*. v. *Cuno*, 547 U.S. 332, 354 (2006).) As the district court stated, Petitioners "alleged injury does not entitle them to seek their requested remedy because the harm of having one's vote invalidated or diluted is not remedied by denying millions of others *their* right to vote." (ECF No. 62, Op. & Order, PageID.3319.) Petitioners fail to establish redressability and thus lack standing to bring their equal protection claim.

Petitioners' claim also fails on the merits. In *Gill*, this Court recognized that the 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." 138 S. Ct. at 1929–30 (quoting *Reynolds*, 377 U.S. at 561, and *Baker* v. *Carr*, 369 U.S. 186, 206 (1962)). This case is different. Petitioners broadly alleged that their votes will be diluted, but they failed to explain why their votes would be "diluted" at all—or by whom. The alleged "dilution" would affect all Michigan voters equally, giving no particular advantage to one class or group, or any identifiable disadvantage to Petitioners. Indeed, it is impossible at this time to determine with any level of accuracy whether any supposed "invalid" votes were for or against any candidate for whom Petitioners voted. Petitioners fail to identify by name a single voter who voted when they should not have—let alone anything resembling widespread election fraud. Similarly, Petitioners have not identified any election workers who supposedly engaged in misconduct or malfeasance.

Moreover, there has simply been no valuation of any person's—or group of persons'—votes as being more valuable than others. There has been no disparate treatment and thus nothing to violate "one-person, one-vote jurisprudence." *Bush*, 531 U.S. at 107 (citation omitted). Petitioners' equal protection claim is not supported by any allegation that Respondents' alleged schemes caused votes for President Trump to be changed to votes for President-elect Biden. The closest Petitioners get to alleging that physical ballots were altered in such a way is the following statement in an election challenger's sworn affidavit: "I believe some of these workers were changing votes that had been cast for Donald Trump and other Republican candidates." (ECF No. 6, Am. Compl., PageID.902, ¶ 91 (citing Aff. Articia Bomer, ECF No. 6-3,

PageID.1008–1010).) But, as the district court observed, "[a] belief is not evidence" and falls far short of what is required to obtain any relief, much less the extraordinary relief Petitioners request. (ECF No. 62, Op. & Order, PageID.3327) (citations omitted.) Similarly, the closest Petitioners "get to alleging that election machines and software changed votes for President Trump to Vice President Biden in Wayne County is an amalgamation of theories, conjecture, and speculation that such alterations were *possible*." (*Id.*, PageId.3327–3328); (ECF No. 6, Am. Compl., ¶¶ 7–11, 17, 125, 129, 138–43, 147–48, 155–58, 160–63, 167, 171.)

"With nothing but speculation and conjecture that votes for President Trump were destroyed, discarded or switched to votes for President-elect Biden, Petitioners' equal protection claim fails." (ECF No. 62, Op. & Order, PageID.3328).

3. The Due Process Clause.

Petitioners offered minimal allegations to support their substantive due process claim. Indeed, the district court found it so insufficiently pled or briefed that it did not address the claim. (ECF No. 62, Op. & Order, PageID.3317 n.5.) But, to the extent such a claim is raised, it necessarily fails as a matter of law. Petitioners claim that violations of state election law constitute "widespread and systemic" violations of the Due Process Clause. (ECF No. 6, Am. Compl., ¶ 206, PageID.948).

But this Court has not recognized the right to vote as a right qualifying for substantive due process protection. Instead, the Court has held that "[w]here a particular Amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more

generalized notion of "substantive due process," ' must be the guide for analyzing these claims." *Albright* v. *Oliver*, 510 U.S. 266, 273 (1994) (quoting *Graham* v. *Connor*, 490 U.S. 386, 395 (1989).) Vote-dilution claims are typically analyzed under the Equal Protection Clause. Equal protection also applies when a state either classifies voters in disparate ways or places undue restrictions on the right to vote. See, e.g., *Bush*, 531 U.S. a 104–05. For the reasons stated in the argument above, there is no violation of the Equal Protection Clause. Consequently, there is also no violation of substantive due process. As a result, Petitioners fail to demonstrate a likelihood of success on the merits as to this claim.

4. The state statutory claims.

Petitioners also alleged that Respondents violated various state election statutes. (ECF No. 6, Am. Compl., PageID.949–953, ¶¶ 209–228.) But these claims are barred by the Eleventh Amendment. (ECF No. 62, Op. & Order, PageID.3305) ("Unquestionably, Plaintiffs' state law claims against Defendants are barred by Eleventh Amendment immunity.")

This Court is familiar with the tenets of Eleventh Amendment immunity. The Eleventh Amendment generally does not permit plaintiffs to use the federal courts to litigate state law claims against state officials. *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 106 (1984) ("A federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state

officials on how to conform their conduct to state law.") Because these claims are barred by the Eleventh Amendment, Petitioners fail to demonstrate a substantial likelihood of success on the merits of these claims.

B. Petitioners did not demonstrate a strong likelihood of success on the merits of their claims for jurisdictional and prudential reasons.

In addition to lack of standing and their failure to state a claim regarding the substance of their case, Petitioners' claims fail for other reasons.

1. Petitioners' claims are barred by the Eleventh Amendment.

Petitioners raise three claims under 42 U.S.C. § 1983. Each count—even though framed as federal claims—in reality is a state-law claim barred by the Eleventh Amendment because the claims depend on resolution of state-law issues.

Generally, the only way to bring a § 1983 claim against a state in federal court is to sue a state officer and request prospective injunctive relief to enjoin a continuing violation of federal law. See, e.g., *Verizon Md., Inc.* v. *Pub. Serv. Comm'n*, 535 U.S. 635, 645 (2002) (quoting *Coeur d'Alene Tribe of Idaho*, 521 U.S. 296 (1997) (O'Connor, J., concurring)). But Petitioners claims against Respondents are actually state-law claims that are barred from being vindicated in federal court. See, e.g., *Pennhurst State Sch. & Hosp.*, 465 U.S. at 106.

Here, each count of Petitioners' complaint is predicated on the election being conducted contrary to Michigan law. In fact, Petitioners' amended complaint explicitly requests a declaration that ballot fraud occurred in violation of state law. (ECF No. 6, Am. Compl., PageID.956.) The Eleventh Amendment bars the federal court's

exercise of judicial power to issue Petitioners' requested relief. As the Court held in *Pennhurst*, federal courts are prohibited from granting "relief against state officials on the basis of state law, whether prospective or retroactive." *Pennhurst State Sch. & Hosp.*, 465 U.S. at 106.

Petitioners claims are also barred because they are not actually requesting prospective injunctive relief as opposed to retroactive relief. See *Edelman* v. *Jordan*, 415 U.S. 651, 666–667 (1974). The district court agreed with this argument. (ECF No. 62, Opn. & Order, PageID.3305–3307.) Petitioners do not seek to require state officials to conform their conduct to the law in the future, but rather to retroactively *undo* the actions of state officials, and—indeed—to substitute new actions in their place, in effect having the district court make determinations in place of state officials. Such a request is inconsistent with long-established principles of state sovereignty. As a result, the *Ex Parte Young* exception to the Eleventh Amendment does not apply to these claims. *Ex parte Young*, 209 U.S. 123 (1908).

2. Petitioners' claims are moot.

As noted above, a case is moot if the court can no longer grant any effective relief. *Knox*, 567 U.S. at 301. The district court observed that "this lawsuit was moot well before it was filed on November 25" and that any "relief the Court could grant . . . [was] no longer available." (ECF No. 62, Op. & Order, PageID.3307–08.)

In their amended complaint, Petitioners requested various forms of relief. Among other things, they asked the court to order Respondents and non-party Wayne County to "de-certify the election results"; enjoin the Governor from transmitting the

certified election results; order the Governor to transmit certified results that declare President Trump is the winner of the election; order the impounding of voting machines and software for inspection by Petitioners; order a recount; and an order that no votes received or tabulated by non-certified machines be counted. (ECF No. 6, Am. Compl., PageID.955, ¶ 233.)

But, as stated above, all 83 counties in Michigan finished canvassing their results for all elections by Tuesday, November 17, and reported their results for state office races to the Secretary and the Board by the next day, see Mich. Comp. Laws § 168.843. The Board certified the results of the November 3 general election on November 23, and the Governor sent the slate of presidential electors the same day. By the time the suit was filed, the time for requesting a special election based on mechanical errors or malfunctions in voting machines had also expired. See Mich. Comp. Laws §§ 168.831, 168.832. So too, had the time for requesting a recount for the office of President. See Mich. Comp. Laws § 168.879. And subsequent to the district court's decision, Michigan's electors met and voted on December 14, and Congress counted Michigan's electoral votes on January 7.

Respondents had already performed any duties they had under the law with respect to the conducting of and certification of the November 3 general election, and there was no mechanism available for de-certifying Michigan's election results or for retracting the slate of electors the Governor had already sent to the Archivist. See, e.g., *Wood* v. *Raffensperger*, 981 F.3d 1307, 1317 (11th Cir. 2020) (" 'We cannot turn back the clock and create a world in which' the 2020 election results are not certified.")

(citation omitted.) Because the district court can no longer grant Petitioners any effective relief, their claims are moot.

Further, the "capable of repetition yet evading review" exception does not apply. While it may be that the merits of Petitioners' claims were not fully litigated before becoming moot, as discussed above, there is nothing in the record that demonstrates it is probable, reasonable, or even credible, to expect that these same Petitioners will face the same or a materially similar situation in the future. *Fed. Election Comm'n*, 551 U.S. at 463–64. See also *Weinstein*, 423 U.S. at 149.

Petitioners thus failed to demonstrate a likelihood of success on the merits where their claims are moot.

3. Petitioners' claims are barred by laches.

In addition to being moot, Petitioners claims are barred by laches. The district court agreed. (ECF No. 62, Op. & Order, PageID.3310–3313.) In the Sixth Circuit, "laches is 'a negligent and unintentional failure to protect one's rights.' " *United States* v. *City of Loveland*, *Ohio*, 621 F.3d 465, 473 (6th Cir. 2010) (quoting *Elvis Presley Enters.*, *Inc.* v. *Elvisly Yours*, *Inc.*, 936 F.2d 889, 894 (6th Cir. 1991)). The "party asserting laches must show: (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting it." *City of Loveland*, 621 F.3d at 473. " '[T]he [application] of laches is a question primarily addressed to the discretion of the trial court.' " *Czaplicki* v. *The Hoegh Silvercloud*, 351 U.S. 525, 534 (1956) (quoting *Gardner* v. *Panama R. Co.*, 342 U.S. 29, 30 (1951).)

Petitioners unreasonably delayed raising their claims. Petitioners filed this action on November 25, (ECF No. 6, Am. Cmplt., PageID.1–830)—more than 21 days after the November 3 general election—and it was not served upon the Defendants until December 1, 2020. (ECF No. 21, Service, PageID.2109–2114.) Any concerns about the application of state law prior to the election could have been brought far in advance of election day. Also, the counting of votes in Michigan was completed by the 83 boards of county canvassers on November 17, and by the Board of State Canvassers on November 23. There is no reason why Petitioners' claims of irregularities on election day or during the canvass should not have been brought sooner—if not at the time of the purported events. Petitioners' claims related to election machines and software are based upon "expert and fact witness" reports discussing "glitches" and other alleged vulnerabilities that date as far back as 2010. (ECF No. 6, Am. Cmplt., PageID.927–933, ¶¶ 157(C)–(E), (G), 158, 160, 167.) Petitioners could have filed such claims well before the 2020 general election, but they took no action until after the election was over and votes were counted. And while Petitioners have filed a notice of appeal in the Sixth Circuit, they have not prosecuted their appeal there, seeking instead the rare and unjustified relief of a bypass petition to this Court.

In brief, Petitioners' delay is simply unreasonable. In fact, Petitioners made little or no attempt to explain why they waited so long to file this suit. As the court below noted, Petitioners stated they needed time to gather statements and retain experts. (ECF No. 62, Op. & Order, PageID.3312.) But according to Petitioners themselves, "[m]anipulation of votes was apparent *shortly after the polls closed on*

November 3, 2020." (ECF No. 7, Mot., PageID.1837 (emphasis added).) And Respondents have most certainly been prejudiced by the delay. This is especially true here, where Petitioners' lawsuit was filed not just at the last-minute, but well after the fact. While Petitioners delayed, the ballots were cast, the votes were counted, and the results were certified. Petitioners unreasonably delayed in raising their claims before the court, and the consequences of their delay prejudiced the Respondents.

Petitioners thus failed to demonstrate a likelihood of success on the merits where their claims are barred by the doctrine of laches.

4. Petitioners' claims are barred by abstention.

Last, abstention principles support declining jurisdiction over Petitioners claims. Respondents argued below that abstention was warranted in this case under *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800 (1976). In *Colorado River*, the Court held that federal courts may abstain from hearing a case solely because similar pending state court litigation exists. (*Id*. at 817.) For abstention to apply, the state cases must be parallel, and there are several factors a court should weigh in determining whether abstention is warranted. (*Id*. at 818–19.) See also *Moses H. Cone Mem'll Hosp*. v. *Mercury Constr. Corp*., 460 U.S. 1 (1983) (discussing factors to be considered).

Respondents explained fully in their briefing below that there were five pending state-court cases that included claims sufficiently parallel to the instant case to warrant application of *Colorado River* abstention, and that numerous of the factors weighed in favor of abstention. (ECF No. 31, Defs' Resp to Mtn, PageID.2193–2201.)

The district court agreed that the cases were sufficiently parallel and that a "careful balancing of the factors set forth by [this] Court counsel in favor of deferring to the concurrent jurisdiction of the state courts." (ECF No. 62, Op. & Order, PageID.3316.) The court reviewed the factors and concluded that "abstention is appropriate under the *Colorado River* doctrine." (*Id.*, PageID.3315–17.)

Although two of the cases have subsequently been resolved, three remain pending, and abstention under *Colorado River* continues to be appropriate. Petitioners thus failed to demonstrate a likelihood of success on the merits where abstention supported declining jurisdiction over their claims in this case.

C. Petitioners did not demonstrate that any of the other factors weighed in favor of granting their request for injunctive relief.

Petitioners also failed to demonstrate that the other injunction factors weighed in their favor. (ECF No. 62, Op. & Order, PageID.3329.) Petitioners' claims of irreparable harm were speculative because their allegations of fraud and irregularities in the election are vague, speculative, and fail to demonstrate that any single person voted where they were ineligible, or that any ballot was improperly counted. Their supposed harms were entirely hypothetical and abstract. And the balance of harms and public interest factors weighed against granting injunctive relief because the requested relief would have upended Michigan's process for certifying its election and its presidential electors. Moreover, the relief would have disenfranchised tens of thousands of voters in favor of the preferences of a handful of people who disappointed with the official results.

CONCLUSION

Because the district did not abuse its discretion in denying Petitioners' emergency motion for a preliminary injunction, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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Dated: JANUARY 14, 2021