No. 20-815

# In the Supreme Court of the United States

TIMOTHY KING, MARIAN ELLEN SHERIDAN, JOHN EARL HAGGARD, CHARLES JAMES RITCHARD, JAMES DAVID HOOPER and DAREN WADE RUBINGH,

*Petitioners*,

v.

GRETCHEN WHITMER, in her official capacity as Governor of the State of Michigan, JOCELYN BENSON, in her official capacity as Michigan Secretary of State and the Michigan BOARD OF STATE CANVASSERS,

*Respondents*.

ON PETITION FOR A WRIT OF *CERTIORARI*
TO THE
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

## *AMICUS CURIAE* BRIEF OF TODD C. BANK

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## INTRODUCTION AND INTEREST OF THE *AMICUS CURIAE*

*Amicus curiae*, Todd C. Bank ("Bank"), is a citizen of the United States of America. Bank submits the instant brief in support of Petitioners.[1]

Supreme Court Rule 37.2(a) states: "An *amicus curiae* filing a brief . . . shall ensure that the counsel of record for all parties receive notice of [the *amicus curiae*'s] intention to file [the] brief at least 10 days prior to the [brief's] due date . . ., *unless* the *amicus curiae* brief is filed earlier than 10 days before the due date." S. Ct. 37.2(a) (emphasis added). Because the instant brief is being filed "at least 10 days prior to the due date," *id.*, Bank was not required to "ensure that the counsel of record for all parties receive notice of [Bank's] intention to file [his] . . . brief." *Id.*

Supreme Court Rule 37.2(a) also states: "The *amicus curiae* brief shall indicate that *counsel of record received timely notice* of the intent to file the [*amicus curiae*] brief . . . *and* shall *specify whether consent was granted*." *Id.* (emphases added). As it appears that the clause "and shall specify whether consent was granted" is dependent upon the applicability of the preceding clause, and as Bank was not required to provide timely notice to counsel of record, Bank was thereby not required to "specify whether consent was granted." *Id.*

Supreme Court Rule 37.2(b) states: "When a party to the case has *withheld consent*, a motion for leave to file an *amicus curiae* brief before the Court's consideration of a petition for a writ of certiorari . . . [must] be presented to the Court."

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[1] No counsel for any party authored the instant brief in whole or in part, and neither any party nor any party's counsel made a monetary contribution to fund the preparation or submission of the instant brief. Bank declines to state whether any other person made such a monetary contribution, as non-disclosure of such information is protected by the First Amendment of the Constitution.

S. Ct. 37.2(b) (emphasis added). The common understanding of the word "withhold" is to decline to provide, upon a request, something that the recipient of the request could have provided. However, Bank, as set forth above, was not required to "specify whether consent was granted," S. Ct. R. 37.2(a), and, therefore, was implicitly, yet obviously, not required to request consent. Accordingly, Bank did not request consent from any of the parties, whom, as a result, were not in a position to withhold consent. As none of the parties withheld consent, and as only the withholding of consent invokes the requirement to make "a motion for leave to file an *amicus curiae* brief," S. Ct. R. 37.2(b), Bank was not required to make such motion.

## SUMMARY OF THE ARGUMENT

The District Court did not recognize that a person who sustains personal harm within the meaning of Article III of the Constitution has Article III standing regardless of how many other persons suffered the same type and degree of harm.

The District Court, in finding that de-certification would be improper because it would result in the denial of the right to vote to those persons who voted for candidate Biden ("Biden"), overlooked the fact that the *denial* of de-certification would, in the event that candidate *Trump* ("Trump") had received more lawful votes than had Biden, deny the right to vote of those persons who had lawfully voted for *Trump*.

The District Court overlooked the fact that the diluting of one's vote is distinctly harmful to a person who voted for a candidate who would have prevailed absent unlawful conduct.

## ARGUMENT

### I.

### THE DISTRICT COURT, IN FINDING THAT DE-CERTIFICATION WOULD BE IMPROPER BECAUSE IT WOULD DENY THE RIGHT TO VOTE TO THOSE PERSONS WHO HAD VOTED FOR CANDIDATE *BIDEN*, OVERLOOKED THE FACT THAT, IF CANDIDATE *TRUMP* HAD RECEIVED MORE LAWFUL VOTES THAN HAD CANDIDATE BIDEN, THE *DENIAL* OF DE-CERTIFICATION WOULD DENY THE RIGHT TO VOTE TO THOSE PERSONS WHO HAD LAWFULLY VOTED FOR CANDIDATE TRUMP

The District Court, in the opinion that is the subject of the petition for a writ of *certiorari* at issue, stated:

> Plaintiffs fail to establish that the alleged injury of vote-dilution can be redressed by a favorable decision from this Court. Plaintiffs ask this Court to de-certify the results of the 2020 General Election in Michigan. But an order de-certifying the votes of approximately 2.8 million people would not reverse the dilution of Plaintiffs' vote [sic]. . . . Plaintiffs' 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. Accordingly, Plaintiffs have failed to show that their injury can be redressed by the relief they seek and thus possess no standing to pursue their equal[-]protection claim.

Petitioners' Appendix ("Pet. Appx."), Exh. 42, *King v. Whitmer*, No. 20-cv-13134 (E.D. Mich. Dec. 7, 2020), p.25 (emphasis in original). First, de-certification would have been unwarranted if, notwithstanding any voting improprieties from which Biden benefitted, Biden had received more *lawful* votes than had Trump. However, de-certification would clearly have been warranted if *Trump* had received more lawful votes than had Biden because, absent de-certification in that event, voters for Trump would have been denied *their* right to vote. In sum, the District Court's rationale would

only be applicable if Biden were not merely the *purported* prevailing candidate but the candidate who had prevailed based upon all, and only, lawful votes.

Second, the District Court, in stating that "an order de-certifying the votes of approximately 2.8 million people would not reverse the dilution of Plaintiffs' vote [sic]," Pet. Appx., Exh. 42 at p.25, overlooked the fact that the diluting of one's vote, although always harmful, is distinctly harmful to a person who had voted for the candidate who would have prevailed absent unlawful conduct.

As Biden has been certified as the prevailing candidate, de-certification would, of course, increase the likelihood that Trump would be certified as the prevailing candidate. To be sure, de-certification would not *guarantee* that Trump would be certified as the prevailing candidate, but the redressability element of Article III standing requires only "a '*substantial likelihood*' that the requested relief will remedy the alleged injury in fact." *Vt. Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000), quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 45 (1976) (emphasis added). Therefore, if Petitioners were to prove their case, *i.e.*, that Trump had received more lawful votes than had Biden, de-certification would be appropriate.

## II.

## THE FACT THAT A LARGE NUMBER OF PERSONS SUFFERED HARM OF THE SAME TYPE AND DEGREE AS DID PETITIONERS DOES NOT CHANGE THE FACT THE HARM SUFFERED BY PETITIONERS WAS PERSONAL

The District Court stated:

> With nothing but speculation and conjecture that votes for President Trump were destroyed, discarded or

> switched to votes for Vice President Biden, Plaintiffs' equal[-]protection claim fails. *See Wood* [*v. Raffensperger*, --- F.3d ---], 2020 WL 7094866 [(11th Cir. Dec. 5, 2020)], quoting *Bognet* [*v. Sec'y Commonwealth of Penn.*, 980 F.3d 336, 356 (3d Cir. 2020)] ("'[N]o single voter is specifically disadvantaged' if a vote is counted improperly, even if the error might have a 'mathematical impact on the final tally and thus on the proportional effect of every vote.'").

Pet. Appx., Exh. 42, *King v. Whitmer*, *supra*, at 34. However, the first sentence, *i.e.*, in which the court found that Petitioners' "speculation and conjecture" did not state a claim, is distinct from the second sentence, which addresses vote-dilution standing apart from the question of whether a claim was stated. Indeed, the Eleventh Circuit, in *Wood*, stated, immediately following the second sentence: "[v]ote dilution in this context is a 'paradigmatic generalized grievance that cannot support [Article III] standing.'" *Id.*, *Wood*, 2020 WL 7094866 at *5, quoting *Bognet*, 980 F.3d at 356.

The Eleventh Circuit, and, presumably, the District Court, exhibited confusion between a *generalized* grievance with a grievance that, *although* experienced by many persons, is *personal* to each of them. This Court has repeatedly sought to dispel this confusion, explaining, in *Spokeo v. Robbins*, 136 S. Ct. 1540 (2016), for instance: "[t]he fact that an injury may be suffered by a large number of people does not of itself make that injury a nonjusticiable generalized grievance. The victims' injuries from a mass tort, for example, are *widely shared*, to be sure, but *each individual suffers a particularized harm*." *Id.* at 1548, n.7 (emphases added). As did *Spokeo*, this Court, in *FEC v. Akins*, 524 U.S. 11 (1998), recognized that one could have Article III standing where the "asserted harm . . . is one which [sic] is shared in substantially equal measure by *all or a large class of citizens*." *Id.* at 23 (emphasis added; citations and

quotation marks omitted). The distinction that the *Akins* Court drew between cases in which a plaintiff did, versus did not, have Article III standing with respect to a widely shared harm is fully applicable in the present case:

> Whether styled as a constitutional or prudential limit on [Article III] standing, the Court has sometimes determined that where large numbers of Americans suffer alike, the political process, rather than the judicial process, may provide the more appropriate remedy for a widely shared grievance.
>
> The kind of judicial language to which the FEC points, however, [in arguing against Article III standing] invariably appears in cases where the harm at issue is *not only widely shared*, but is *also* of an *abstract and indefinite nature* -- for example, harm to the "common concern for obedience to law."
>
> ***
>
> *Often* the fact that an interest is *abstract* and the fact that it is *widely shared* go *hand in hand*. But their association is *not invariable*, and *where a harm is concrete, though widely shared, the Court has found "injury in fact."*

*Id.* at 23, 24 (emphases added; citations omitted).

Under the Eleventh Circuit's, and, presumably, the District Court's, reasoning, the government could make an announcement that it is going to imprison every single person in the United States, and no one would have Article III standing to seek judicial relief against such edict, even though it is indisputable that a person would have Article III standing if, instead, he were the only person, or one of a small number of persons, subject to the edict. However, as *Akins* recognized, the fact that a harm is widely shared is not relevant by itself; rather, a widely shared harm is *often* abstract, but, when it is, it is the *abstract nature* of the harm, not the fact that it is widely shared, that precludes Article III standing. Thus, an abstract harm experienced by only

one person would prelude such person from having Article III standing. In the present case, Petitioners' asserted harm is widely shared, but it is *not* abstract.

## CONCLUSION

De-Certification would have been an appropriate remedy in the event that candidate Trump had received more lawful votes than had candidate Biden.

Insofar as Petitioners suffered harmed, that harm was personal for purposes of Article III standing.

December 18, 2020

Respectfully submitted,

s/ *Todd C. Bank*

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