No. 23-486

In the Supreme Court of the United States

SIDNEY POWELL, BRANDON JOHNSON, HOWARD KLEINHENDLER, JULIA HALLER, GREGORY ROHL & SCOTT HAGERSTROM,

Petitioners,

v.

GRETCHEN WHITMER, JOCELYN BENSON, CITY OF DETROIT, MICHIGAN, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT

AMICUS CURIAE BRIEF OF JUDICIAL WATCH, INC. IN SUPPORT OF PETITIONERS

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IDENTITY AND INTERESTS OF AMICUS CURIAE[1]

Judicial Watch, Inc. ("Judicial Watch") is a non-partisan, public interest organization headquartered in Washington, DC. Founded in 1994, Judicial Watch seeks to promote accountability, transparency, and integrity in government, and fidelity to the rule of law. In furtherance of these goals, Judicial Watch committed substantial resources to organizing an election and voting litigation team. Attorneys with Judicial Watch's election integrity team have substantial experience investigating and litigating election and voting cases on behalf of private and government clients, including serving in leadership roles at the U.S. Department of Justice enforcing the Voting Rights Act of 1965. Judicial Watch regularly files amicus curiae briefs and lawsuits related to election and voting issues.

Judicial Watch has a substantial interest in promoting the proper enforcement and interpretation of election and voting laws. Judicial Watch has participated in cases involving such issues both as counsel for parties and as amicus before this and other courts. *See Parrott v. Lamone*, No. 16-588; *Parrott v. Lamone*, No. C-02-CV-21-001773 (Circuit Court Anne Arundel Cnty., Md. 2021); *Rucho v.*

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[1] Amicus Judicial Watch states that no counsel for a party to this case authored this brief in whole or in part; and no person or entity, other than amicus and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. SUP. CT. R. 37.6. Counsel of record for all parties received notice of Judicial Watch's intent to file this amicus brief.

Common Cause, No. 18-422; *Benisek v. Lamone*, No. 17-333; *Evenwel v. Abbott*, No. 14-940; *Brnovich v. Democratic National Committee*, No. 19-1257; *North Carolina v. N.C. State Conf. of the NAACP*, No. 16-833.

Judicial Watch respectfully request this Court grant Petitioners' Petition for Certiorari to the U.S. Court of Appeals for the Sixth Circuit to review its decision affirming in part and reversing in part the sanctions award entered by United States District Court for the Eastern District of Michigan. *King v. Whitmer*, 71 F.4th 511 (6th Cir. 2023).

SUMMARY OF ARGUMENT

Presidential elections have a long history of causing a "glow[ing] feverish excitement" in the public. This was true in 2020 when the presidential election coincided with a worldwide pandemic, splintered electorate, and countless new state electoral regulations, many implemented without legislative approval through executive or judicial decree. The political litigation before and following the 2020 election is some of the most contentious political litigation ever. But political litigation, even cases with controversial claims, is part of the electoral process for validating elections.

Despite this, there is a public effort to ruin litigants, personally and professionally, for participating in political litigation. The publicly stated purpose of those leading these efforts is to discourage future litigation. It will, to be sure, but without any regard to the merits and collateral damage to core First Amendment rights of the targeted individuals. *See In re Primus*, 436 U.S. 412, 431 (1978) (parties and their attorneys are free to use litigation "as a vehicle for effective political expression and association[.]"). Going forward, litigants supporting the losing candidate are on notice: dark money may be used to brand them as "toxic."

These efforts to target litigants largely depend on whether one side can persuade a court to sanction their opponents under Fed. R. Civ. P. 11(c). Rule 11(c)(2) provides an important safe harbor for

targeted litigants. It requires the moving party to prepare its motion for sanctions "describe[ing] the specific conduct that allegedly violates Rule 11(b)." Because it must be served on the target twenty-one days before filing, it provides the targeted litigant time to "withdraw or appropriately correct" the specific conduct that is allegedly sanctionable.

This petition involves a case where targeted litigants were not served a complete, specific notice as required under Rule 11(c). The incompleteness is especially problematic in cases where, as here, "only part of the complaint [was] sanctionable." *King v. Whitmer*, 71 F.4th at 517. Without a complete, specific notice, a targeted litigant may not know which "paper, claim, defense, contention, or denial" to "withdraw or appropriately correct" during the twenty-one-day period before the motion is filed. If Rule 11 is going to be used as a means to ruin ideologically adverse opponents in political litigation, it is incumbent that the Court provide clear guidance so that targeted litigants can properly evaluate their risk. The Court should grant certiorari and resolve the circuit split regarding identicality requirement with respect to Fed. R. Civ. P. 11(c)(2).

ARGUMENT

I. The Political Nature of Election and Voting Litigation Make It Perhaps the Most Contentious Class Of Civil Litigation.

Over 175 years ago, Alexis de Tocqueville described America's presidential election in this way:

> For a long while before the appointed time has come, the election becomes the important and, so to speak, the all-engrossing topic of discussion. Factional ardor is redoubled, and all the artificial passions which the imagination can create in a happy and peaceful land are agitated and brought to light. The President, moreover, is absorbed by the cares of self-defense. He no longer governs for the interest of the state, but for that of his re-election; he does homage to the majority, and instead of checking its passions, as his duty commands, he frequently courts its worst caprices. As the election draws near, the activity of intrigue and the agitation of the populace increase; the citizens are divided into hostile camps, each of which assumes the name of its favorite candidate; the whole nation glows with feverish excitement, the election is the daily theme of the press, the subject of private conversation, the

> end of every thought and every action, the sole interest of the present. It is true that as soon as the choice is determined, this ardor is dispelled, calm returns, and the river, which had nearly broken its banks, sinks to its usual level; but who can refrain from astonishment that such a storm should have arisen?

1A. de Tocqueville, Democracy in America, Ch. VII (H. Reeve transl., 1899).

On several occasions, this national tradition of "glow[ing] feverish excitement" has led to post-election litigation. This was true in 2000. *See, e.g.*, *Bush v. Gore*, 531 U.S. 98 (2000); *Bush v. Palm Beach County Canvassing Board*, 531 U.S. 70 (2000); *Harris v. Fla. Elections Comm'n*, 235 F.3d 578 (11th Cir. 2000). And it has been true in numerous close federal elections since. *See, e.g.*, *Moss v. Bush*, 820 N.E.2d 934 (Ohio 2005); *Coleman v. Ritchie*, 762 N.W.2d 218 (Minn. 2009); *Grinols v. Electoral Coll.*, No. 12-cv-02997-MCE-DAD, 2013 U.S. Dist. LEXIS 6843 (E.D. Cal. Jan. 16, 2013); *Stein v. Thomas*, 222 F. Supp. 3d 539 (E.D. Mich. 2016); *Stein v. Cortés*, 223 F. Supp. 3d 423 (E.D. Pa. 2016).

The feverish excitement was especially high in 2020, when the presidential election, coincided with a worldwide pandemic, splintered electorate, and countless new state electoral practices, many enacted without legislative approval. *See e.g., Carson v. Simon*, 978 F.3d 1051 (8th Cir. 2020) (changes to state election law by the Minnesota Secretary of State).

Indeed, there were over 400 *pre*-election lawsuits all over the country prior to the 2020 election.[2] Over 185 years later, Tocqueville's "feverish excitement" observation remains true.

Post-election litigation is unique. The contentious nature of election and voting litigation is even more acute because political stakes are often higher and prosecuting litigants must make decisions with limited time and shifting facts. Compounding this problem are unrealistic litigation schedules that are compressed by near-immovable post-election statutory deadlines. *See Republican Party v. Degraffenreid*, 141 S. Ct. 732, 735 (Thomas, J., dissenting) (noting post-election litigation in elections is often "truncated by firm timelines" particularly in the context of "Presidential elections, which are governed by the Electoral Count Act" and the express deadlines set forth therein). These deadlines operate as *de facto* statutes of limitations that are measured in days, if not hours. Too much delay in making pre-litigation decisions may foreclose the already remote chance that a court will ever consider otherwise legitimate claims.

But the prosecution (and defense) of post-election cases play an important role in our electoral and political process. As a conservative advocacy group that often brings election and voting lawsuits Judicial Watch has a particular interest in the issues

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[2] Lila Hassan and Dan Glaun, *COVID-19 and the Most Litigated Presidential Election in Recent U.S. History: How the Lawsuits Break Down,* FRONTLINE, Oct. 28, 2020, available at https://to.pbs.org/3oLHcqu (last visited February 13, 2022).

at stake here. Judicial Watch reasonably believes the precedent will be weaponized to threaten legitimate parties prosecuting legitimate election integrity claims and other permissible First Amendment activities. *See In re Primus*, 436 U.S. at 431 (parties and their attorneys are free to use litigation "as a vehicle for effective political expression and association[.]").

II. Given that Courts Will Receive More Requests for Sanctions in Political Litigation, the Court Should Resolve the Circuit Split Related to Fed. R. Civ. P. 11(c)(2)'s Safe Harbor.

Election and voting litigation is unlikely to get any less contentious in the near term. While Tocqueville observed that once the "choice is determined" the national "ardor is dispelled" and "calm returns," that is no longer the case. The 2020 election is still being litigated in courts thanks to millions of dollars that are being directed toward disbarring "right wing" lawyers for representing candidates and voters in 2020. Lachlan Markey & Jonathan Swan, *Scoop: High-Powered Group Targets Trump Lawyers' Livelihoods*, Axios (Mar. 7, 2022). Beyond bar grievances, these funds are intended to "shame" these lawyers and "make them toxic in their communities and their firms." *Id.* Stated differently, dark money is being directed to ruining individuals, personally and professionally. These efforts are not intended just to penalize individuals who represented clients in post-election litigation in 2020, but also to discourage future litigation without any regard to the

merits. *Id.* Thus, these efforts are designed to threaten core First Amendment rights of the targeted litigants.

To be sure, activists also have First Amendment right, including the right to publicly criticize litigants. However, those rights do not include a right to censor their opponents through sanctions motions. Nevertheless, Fed. R. Civ. P. 11(c) is one of the primary tools being invoked by these activist as they seek to ruin their opponents. It is, therefore, incumbent upon the Court to provide lower courts and litigants a national standard for handling requests for sanctions in post-election litigation. That includes resolving the existing circuit split identified by Petitioners related to Fed. R. Civ. P. 11(c)(2)'s safe harbor provision. Pet. 9-13. Resolving this split will provide important clarity so litigants can evaluate their risk and receive necessary due process should they be targeted by activists. A national standard promotes uniform enforcement and limits inconsistent outcomes. If left unresolved, the split will result in disparate outcomes that will undermine public confidence that electoral grievances are being impartially resolved. If the Court grants certiorari, it should adopt the strict identicality requirement adopted by the Fifth Circuit. *See Uptown Grill, L.L.C. v. Camellia Grill Holdings, Inc.*, 46 F.4th 374, 389 (5th Cir. 2022).

Below, it was undisputed that the City of Detroit's filed motion for sanctions materially differed from the served motion. The served motion lacked legal arguments, claims, and claims for relief and failed to

identify all the specific issues that needed to be "withdrawn or appropriately corrected." Fed. R. Civ. P. 11(c). The failure of the City to satisfy identicality is an even bigger problem here where the Sixth Circuit later rejected the district court's finding that the whole complaint was sanctionable. *King*, 71 F.4th at 517. How can a party be provided a safe harbor without specific notice about the claims at issue? Identicality ensures the targeted party is fully on notice and limits the opportunity for the moving party to prematurely serve such notice while still developing and drafting the motion it intends to file at the end of the twenty-one day period.

A vague, incomplete motion for sanctions can be served on an opposing party at little costs. Yet, it creates a devastating risk to targeted litigants long before the motion is actually filed under Rule 11(c)(2). As it stands now, there is informational asymmetry. The moving party can simply serve a *pro forma* notice under Rule 11(c)(2) that exposes the noticed party to devastating sanctions without actually describing the "*specific* conduct" that needs to be "withdrawn or appropriately sanctionable." Fed. R. Civ. P. 11(c)(2). Requiring identically prevents the moving party from spending the next twenty-one days formulating its sanction claims while it completes the motion for filing. It ensures that both parties have full notice during the safe harbor period about specific conduct that is allegedly sanctionable.

Moreover, identicality requires both parties to exercise proper due diligence. Here, Petitioners were sanctioned, in part, because they failed to complete

adequate pre-suit inquiry in truncated proceedings. Yet Defendants were excused from serving a complete motion and providing full notice under Rule 11(c)(2) of the "*specific* conduct" that was allegedly sanctionable. In effect, Defendants were awarded sanctions even though they served a premature, incomplete motion.

III. The Lower Courts Incorrectly Concluded that Several Questions Raised by Petitioners Were Barred.

Judicial Watch respectfully submits that both lower courts underestimated the degree of disagreement amongst the courts over some of the legal issues raised in these proceedings, especially those related to the Elections and Electors Clauses. Many of those issues are still working their way through the courts or were only partly resolved by recent rulings from this Court. Sanctioning litigants for raising unsettled legal questions in highly-truncated proceedings will deter meritorious claims and undermine the electoral process. The democratic process depends, in part, on courts hearing and resolving disputes, no matter how unpalatable the claim.

A. The Lower Courts Erred in Finding that Petitioners' Sovereign Immunity and Other Claims Were Frivolous.

Judicial Watch respectfully disagrees that it was frivolous for Petitioners to argue that their clients' claims were not barred by the doctrines of mootness,

laches, and standing, as well as Eleventh Amendment immunity.

With respect to candidate standing, for at least 130 years this Court has allowed aggrieved federal candidates to bring claims regarding state regulations affecting their elections. *See, e.g.*, *McPherson v. Blacker*, 146 U.S. 1, 23-24 (1892); *Moore v. Ogilvie*, 394 U.S. 814 (1969); *Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Bush*, 531 U.S. 98; *Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70; and *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196 (2008). Indeed, prior to the 2020 election, it was accepted that even voters sometimes have standing under the Elections and Electors Clause. *See, e.g.*, *Foster v. Love*, 522 US 67 (1997) (involving a voter initiated suit to enforce federal Election Day statutes).

Federal candidate standing was extensively litigated in 2020. Some trial courts adopted a radically narrow view on candidate standing, including holding that presidential candidates lacked standing in several pre-election suits. *See, e.g., Donald J. Trump for President, Inc. v. Way*, 492 F. Supp. 3d 354 (D.N.J. 2020). Prior to 2020, no federal candidate had ever been held to lack standing related to his or her election. *See generally Hotze v. Hudspeth*, 16 F.4th 1121, 1126 (5th Cir. 2021) (Oldham, J., dissenting) ("[I]t's hard to imagine anyone who has a more particularized injury than the candidate has."). Yet despite several district courts ruling otherwise, at the conclusion of the 2020 election cycle, there was a net *increase* in the number of Circuits that recognized

presidential and elector candidate standing to challenge state election regulations related to their elections. *See Carson*, 978 F.3d at 1054; and *Trump v. Wis. Elections Comm'n*, 983 F.3d 919 (7th Cir. 2020). Federal candidate injuries allegedly arising from a state manner regulation are concrete and particularized affecting candidates "in a personal and individual way." 983 F.3d at 924 (citation omitted).

Claims that candidates have standing to challenge state regulations related to their elections are anything but frivolous. Indeed, the district court's ruling in the instant case is particularly vexing when considering that its ruling required it to address a then-existing circuit split *on the very issue*. *See King*, 505 F. Supp. 3d at 736-37 (discussing *Bognet v. Sec'y of Pa.*, 980 F.3d 336 (3d Cir. 2020) and *Carson*, 978 F.3d 1051). While the district court was within its authority to adopt the Third Circuit's approach in *Bognet*, it certainly was not frivolous for Petitioners to argue for it to adopt the Eighth Circuit's approach in *Carson*.[4] The district court never explained why it believes the Eighth Circuit's approach was unreasonable or frivolous under Rule 11. [5] Regardless, Petitioner-candidates' claims should not have been dismissed for lack of standing.

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[4] This split no longer exists after this Court later vacated *Bognet*. *See Bognet v. Degraffenreid*, 141 S. Ct. 2508 (2021). *Carson* remains good law. As it stands today, Petitioners were sanctioned for adopting the long-standing, majority view on candidate standing.

[5] Resolving the conflict between the vacated Third Circuit's and the Eighth Circuit's approach to standing is an issue with which federal courts are *still* struggling. *See Hotze,* 16 F.4th at 1124.

With regard to sovereign immunity under the Eleventh Amendment, it was not frivolous for Petitioners to contend that state agencies were not immune from federal suit. There are unique immunity issues that apply to the Elections and Electors Clauses cases, which many courts (and practitioners) are not familiar with. *Cf. U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 804–05 (1995) and *PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244, 2258–59 (2021). The Northern District of Illinois recently discussed this issue and found that states waived immunity in this arena under the "plan of the Convention" doctrine. *Ill. Conservative Union v. Illinois*, No. 20 C 5542, ECF No. 29 (N.D. Ill. Sept. 28, 2021). "Constitution divested the States of any original power over elections and gave that power to the federal government" and thus "the States consented to suit for claims related to the time, place, and manner of federal elections." *Id.* (applying the plan of the Convention doctrine as set forth under *U.S. Term Limits* and *PennEast*). Stated differently, states never had any power over federal elections prior to the constitution and, thus, never had any immunity in federal elections to preserve following the ratification of the Eleventh Amendment.

The unique immunity issues that arise in the Elections and Electors Clauses contexts are often overlooked by trial courts. That is to be expected especially where, like here, the trial court is having to evaluate these questions in a truncated, emergency post-election proceeding. Nevertheless, it was not frivolous or unreasonable under Rule 11(b)(2) for

Petitioners to argue that Michigan state Defendants were not immune under the Elections and Electors Clause.[6]

The district court's sanction relating to the equitable doctrine of laches has the most potential to prejudice future advocacy and deter civil rights litigants. Because laches is so fact-specific, it is virtually impossible for plaintiffs to know whether it bars their claims prior to being served with a dispositive motion. *See Williamson v. Recovery Ltd. P'shp*, No. C2-06-292, 2009 U.S. Dist. LEXIS 99670, at *14 (S.D. Ohio Sep. 30, 2009) ("matters related to … the equitable doctrine of laches are inherently fact specific and thus not amenable to dismissal at the pleading stage."); *see also* 5 C.A. Wright & A.R. Miller, *Federal Practice & Procedure* § 1277, at 338-339 (1969) (explaining that laches defense should never be grounds for dismissal because of fact-specific inquiry required into circumstances of delay). "The [laches] doctrine's provenance is the conscience of the Chancellor, and its application is not governed by the rules of the common law." *TWM Mfg. Co. v. Dura Corp.*, 722 F.2d 1261, 1268 (6th Cir. 1983).

The district court correctly noted that federal courts have used the doctrine in the voting context. *King*, 505 F. Supp. 3d at 731-32. But, as the Fifth Circuit noted, the doctrine has limited uses in the election context. *Thomas v. Bryant*, 938 F.3d 134, 150 (5th Cir. 2019). Converting a fact-specific, equitable

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[6] The Seventh Circuit is currently considering sovereign immunity under the Elections and Electors Clauses. *Bost, et al. v. Ill. State. Bd. Of Elections*, No. 23-2644.

doctrine into grounds for pre-discovery sanctions raises serious due process issues. The possibility of sanctions over the issue of laches creates a risk for all civil rights litigants who often challenge longstanding government practices and laws. Many of our country's most celebrated civil rights cases could have been subject to laches when filed since they challenged longstanding government practices and laws.

B. This Court's Recent Ruling in *Moore v. Harper* Illustrates that Petitioners' Claims Regarding State Election Regulations Implemented in 2020 Were Not Frivolous.

Many states, including Michigan, saw new time, place, and manner regulations implemented during the 2020 election. Some of those new procedures were adopted by state executives and others were implemented by judicial decree, rather than the state legislatures as the text provides under the Election and Electors Clauses. U.S. Const. art. I, § 4, cl. 1 and U.S. Const. art. II, § 1, cl. 2. This issue was widely litigated during the 2020 federal election. *See, e.g., Issa et al v. Newsom et al.*, No. 2:20-cv-01044-MCE-CKD (E.D. Cal. May 21, 2020). Plaintiffs in several of these cases were successful, including the plaintiffs in *Carson*. 978 F.3d at 1060 ("[T]he Secretary has no power to override the Minnesota Legislature.")

The question regarding whether state legislatures retain the exclusive authority to regulate federal elections was only recently resolved, in part, in *Moore v. Harper*, 600 U.S. 1 (2023) ("The Elections

Clause does not insulate state legislatures from the ordinary exercise of state judicial review."). While *Moore* provided clarity on the question of the authority of state *judiciary* to set the rules regarding federal elections, it did not resolve the question with respect to when state *executives* or *executive agencies* can implement election regulations. Yet, the district found frivolous, and the Sixth Circuit affirmed, Petitioners' claims that Michigan state executives improperly changed state election rules in violation of the Elections and Electors Clause. *King*, 556 F. Supp. 3d at 716; *King*, 71 F.4th at 528.

CONCLUSION

For the foregoing reasons, Judicial Watch respectfully request the Court grant the petition for certiorari.

Respectfully submitted,

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