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

BRIEF OF THE CITY OF DETROIT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CITY OF DETROIT
LAW DEPARTMENT
Conrad L. Mallet, Jr.
2 Woodward Ave.,
Suite 500
Detroit, MI 48226
(313) 224-4550

DAVID H. FINK*
**Counsel of Record*
FINK BRESSACK
David H. Fink
Nathan J. Fink
David A. Bergh
645 Griswold St.,
Suite 1717
Detroit, MI 48226
(248) 971-2500
dfink@finkbressack.com

Counsel for Intervenor-Defendant/Respondent City of Detroit

January 17, 2024

QUESTIONS PRESENTED

Petitioners were sanctioned for frivolous filings in a case purportedly seeking to overturn the results of the 2020 presidential election. They were not sanctioned for the political content of their speech; they were sanctioned for asserting claims that had no colorable basis in fact or law. The lawsuit filed by Petitioners was not a serious attempt to challenge election irregularities. Instead, they asserted claims based on speculation, conjecture, facially absurd "expert" reports and baseless legal arguments, as part of a broader effort to delegitimize the election results.

Rule 11 sanctions were proper here, because the filings were frivolous and all procedural requirements of that rule were met. Sanctions under § 1927 were proper because the Elections and Electors Clause claims became moot when the Electoral College voted on December 14, 2020.

The questions presented are:

1. Whether the City of Detroit complied with Rule 11(c)(2) by serving its Rule 11 Motion 21 days before it was filed.

2. Whether Rule 11 sanctions were properly issued when the lower court determined that the legal claims were frivolous and that Petitioners presented unsupported (and unsupportable) factual claims without conducting a reasonable pre-filing inquiry.

3. Whether the lower court properly imposed § 1927 sanctions where Petitioners refused to dismiss the complaint after it had become moot.

PARTIES TO THE PROCEEDINGS

Petitioners are Sidney Powell, Brandon Johnson, Howard Kleinhendler, Julia Haller, Gregory Rohl and Scott Hagerstrom, who were counsel for plaintiffs in the District Court and appellants in the court of appeals.

Petitioners' co-counsel in the district court—L. Lin Wood—has filed a separated petition (No. 23-497).

Sanctions against two of Petitioners' co-counsel, Stefanie Lynn Junttila and Emily Newman were reversed by the Sixth Circuit. Accordingly, they have no interest in this Petition.

Respondents are Gretchen Whitmer in her official capacity as Governor of Michigan. Jocelyn Benson in her official capacity as Michigan Secretary of State and the City of Detroit, Michigan, who were defendants in the district court and appellees in the court of appeals.

Another defendant—the Michigan State Board of Canvassers—was dismissed in the district court, did not seek sanctions, was not a party in the court of appeals, and is not a respondent here.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Statutes

Rules

OPINIONS BELOW

The Sixth Circuit's Opinion is reported at 71 F.4th 511 and reprinted in Petitioners' Appendix ("Pet. App.") at 1a. The district court Opinion and Order finding that Petitioners violated Rule 11 and § 1927 is published at 556 F. Supp. 3d 680 and reprinted at Pet. App. 37a. The unpublished district court Opinion and Order regarding the monetary sanctions awarded is reprinted at Pet. App. 139a.

JURISDICTION

Petitioners argue this Court has jurisdiction under 28 U.S.C. § 1254(1). Respondents do not object to Petitioners' Statement of Jurisdiction.

STATEMENT OF THE CASE

Petitioners' Complaint purportedly sought to invalidate the votes of millions of Michigan residents, seeking the unprecedented relief of an "emergency order instructing Defendants to de-certify the results of the General Election for the Office of the President[,]" or, "[a]lternatively,...an order instructing the Defendants to certify the results of the General Election for the Office of the President in favor of President Donald Trump." Pet. App. 331a at ¶¶ 229-230. If they had been serious about their allegations, they could have sought a recount; instead they filed a collection of baseless claims. Any attorney with the slightest understanding of Michigan election law and procedures had to know that these claims were destined for dismissal. This was not a legitimate

attempt to obtain judicial relief. This frivolous lawsuit—entirely devoid of legitimate factual or legal support—was part of a broader attack on the peaceful transition of power, seeking to bolster the false claims of election deniers and to provide the appearance of legitimacy to Donald Trump's attack on our democratic republic.

The City of Detroit (the "City") intervened to protect the rights of its citizens and to address the allegations of purported fraud, most of which were based on false claims relating to the processing and tabulation of absentee ballots by the City.

The 2020 Election

Despite a broadly orchestrated campaign to spread false rumors and conspiracy theories to undermine the free and fair election of President Joe Biden, no evidence of election irregularities materially affecting the outcome of the 2020 Presidential Election has ever been produced. Attorney General Bill Barr declared that the Justice Department had "not seen fraud on a scale that could have effected a different outcome in the election." Michael Balsamo, *Disputing Trump, Barr says no widespread election fraud,* ASSOCIATED PRESS (June 28, 2022). Likewise, a months-long investigation led by Republican members of the Michigan Senate concluded that there was "no evidence of widespread or systematic fraud in Michigan's prosecution of the 2020 election[.]" Clara Hendrickson and Dave Boucher, *Michigan*

Republican-led investigation rejects Trump's claim that Nov. 3 election was stolen, DETROIT FREE PRESS (June 23, 2021). Petitioners' description of the 2020 presidential election as "a Rorschach test with perception influenced by viewers' favored candidate and information sources" simply reveals their unrelenting refusal to accept the basic rules of our civil justice system. Pet. at 5. The sanctions issued here had nothing to do with subjective political perceptions; they arose from the Petitioners' persistent failure to present claims and arguments grounded in fact and law.

Petitioners cite *Moss v. Bush*, 828 N.E.2d 994 (Ohio 2005) for the proposition that sanctions have not been imposed in similar election cases brought by Democrats. But *Moss* is inapposite. The Ohio Supreme Court did determine that *Moss* involved allegations that were "highly improbable…inflammatory, and devoid of logic." *Id*. at 995. But, unlike the case at bar, *Moss* was decided under the Ohio Contest of Election statute (Ohio Rev. Code § 3515.08, *et seq*.), which did not authorize sanctions. *Id*. at 998. Petitioners were sanctioned because their lawsuit was frivolous, not because they challenged an election.

Procedural Background

Although they were seeking emergency relief affecting the outcome of the 2020 General Election, Petitioners waited three weeks after the Election before filing their initial complaint on November 25,

2020. The City filed a motion to intervene on November 27, 2020, which was granted on December 2, 2020. Petitioners filed an Amended Complaint on November 29, 2020. Pet. App. 224a. On that same date, Petitioners filed an "Emergency Motion for Declaratory, Emergency, and Permanent Injunctive Relief" (the "Motion for Injunctive Relief"), requesting "de-certification of Michigan's election results[.]" On December 2, 2020, the City filed its Response to the Motion for Injunctive Relief (the "Response to Motion for Injunctive Relief"). Pet. App. 344a. On December 7, 2020, the District Court issued an Opinion and Order denying the Motion for Injunctive Relief, finding that injunctive relief was not warranted because the claims asserted were barred by Eleventh Amendment immunity, mootness, laches, the abstention doctrine and lack of standing. Pet. App. 167a.

On December 15, 2020, the City served a Rule 11 motion upon Petitioners. Pet. App. 337a. Contrary to Petitioners' claim that the served Rule 11 motion did not contain a request for "bar-referral relief[,]" the served motion stated that the City would seek an order "[r]eferring Plaintiffs' counsel to the State Bar of Michigan for grievance proceedings[.]" Pet. at 3; Pet. App. 342a at ¶ i.[1] The served Rule 11 motion

[1] The Motion filed on January 5, 2021, explained that, in addition to relief identified in the motion served on December 15, 2020, the City sought referral to the Michigan state bar association and the state bar association for each out-of-state Plaintiffs' counsel's home jurisdiction. Compare Pet. App. 342a at ¶ i with 391a-392a at ¶ j. The supplemental disciplinary action

incorporated by reference the City's earlier-filed Response to Motion for Injunctive Relief, which thoroughly described the sanctionable factual contentions in the Amended Complaint. Pet. App. 344a. On January 5, 2021, 21 days after serving the Rule 11 motion, the City filed the Rule 11 motion.[2] Pet. App. 384a.

On July 12, 2021, the district court held a six-hour hearing regarding the motions for sanctions, during which Petitioners and their co-counsel had the opportunity to respond to the district court's questions. On August 25, 2021, the district court issued a 110-page Opinion and Order sanctioning Petitioners and their co-counsel under Rule 11, § 1927 and the court's inherent authority and ordering that Petitioners pay the City's reasonable attorney fees. Pet. App. 37a. On December 2, 2021, the district court issued an Opinion and Order requiring Petitioners and their co-counsel to pay $153,285.62 in attorney fees to the City.

---

sought in that motion was described in Paragraphs 18-20, and it was *not* based upon Rule 11; the motion, as filed, sought disciplinary referral under Eastern District of Michigan Local Rule 83.22.

[2] Petitioners argue in a footnote that filing the Rule 11 motion 21 days after it was served was "4 days too soon" citing Rule 6(e). Pet. at 3 n. 1. Rule "6(e)" does not exist. Presumably, Petitioners are referring to Rule 6(d), which provides for additional time to respond after certain types of service under Rule 5. Petitioners have waived this argument as they did not raise it in the lower courts. *Nevada Com'n on Ethics v. Carrigan*, 564 U.S. 117, 128 (2011).

On December 3, 2021, Petitioners filed a notice of appeal to the Sixth Circuit. The Sixth Circuit held oral argument on December 8, 2022. On June 23, 2023, the Sixth Circuit issued an Opinion upholding in part and reversing in part the sanctions imposed by the district court. Pet. App. 1a. The Sixth Circuit upheld the district court's award of Rule 11 sanctions, finding the following misrepresentations of fact and law in Petitioners' Amended Complaint:

- allegations regarding an international conspiracy to use Dominion voting machines to commit election fraud were "entirely baseless[,]" in violation of Rule 11(b)(3). Pet. App. 10a-11a.
- allegations regarding Michigan's voting system wrongly presumed that Michigan used an "all-in-one system," rather than a "hand marked ballot system[,]" indicating that Petitioners' pre-filing inquiry "was patently inadequate." Pet. App. 11a-13a.
- allegations regarding supposed statistical anomalies in the Michigan election results were based on "facially unreliable" expert reports. Pet. App. 2a.
- allegations regarding ballot counting at the TCF Center in Detroit displayed a "pattern of embellishment to the point of misrepresentation." Pet. App. 18a-21a.

- most of the legal claims asserted in the complaint were either unwarranted by law, or based upon frivolous factual allegations, in violation of Rule 11(b)(2). Pet. App. 24a-27a.

The Sixth Circuit also upheld the § 1927 sanctions, finding Petitioners' argument that the case gained "new life" when "an alternative slate of electors for Michigan was advanced in early January" unpersuasive because Petitioners did not explain "why any competent attorney would take [the alternative slate of electors'] self-election seriously for purposes of persisting in this lawsuit." Pet. App. 29a-30a. The Sixth Circuit reversed the imposition of inherent authority sanctions, determining that the district court's findings regarding bad faith were based upon speech outside the courtroom protected under the First Amendment. Pet. App. 8a-9a.

Petitioners state that "none of the[] bases [identified by the Sixth Circuit] for upholding sanctions appeared within Detroit's served [Rule 11] motion." Pet. at 4. Petitioners are incorrect. The City warned Petitioners that the claim for violation of the Elections and Electors Clause was frivolous. Pet. Appx 339a-340a at ¶ 10. The Sixth Circuit found that claim "legally and factually frivolous." Pet. App. 26a. The City warned Petitioners that "controlling law contradicted the[ir] claims." Pet. App. 340a at ¶ 12. The Sixth Circuit found that many of the allegations regarding violations of Michigan election law were

frivolous, because the facts alleged in the complaint did not amount to a violation of the cited statutes. Pet. App. 21a-22a. The Sixth Circuit held these allegations violated Rule 11, because "a reasonable prefiling inquiry as to all these allegations would have included reading [the statute at issue]." Pet. App. 22a. The Rule 11 Motion, served December 15, 2020, also referred Petitioners to the City's Response to Motion for Injunctive Relief, which detailed many of the frivolous factual allegations in the complaint. Pet. App. 341a at ¶ 17. As just one example, the City's Response to Motion for Injunctive Relief explained that the factual allegations regarding Dominion voting machines were objectively false because they presumed that Michigan used a ballot marking system that would not permit hand recounts. Pet. App. 364a; see also, Pet. App. 228a at ¶ 8 ("The design and features *of* [sic] the Dominion software do not permit a simple audit to reveal its misallocation, redistribution, or deletion of votes."). The Sixth Circuit found these allegations sanctionable because Michigan uses a hand-marked paper-ballot system, which allows a recount of paper ballots—a fact that Petitioners would have known had their pre-filing inquiry not been "patently inadequate." Pet. App. 11a-13a.

On August 8, 2023, the Sixth Circuit denied Petitioners' request for a rehearing *en banc*. On August 11, 2023, the Sixth Circuit issued an Order staying the mandate to allow Petitioners time to seek review by this Court.

REASONS FOR DENYING THE PETITION

I. There is No First Amendment Right to File Frivolous Litigation

Petitioners seek shelter under the umbrella of the First Amendment, hoping to obtain immunity for their patently-false pleadings. But there is no First Amendment right to file frivolous litigation. *McDonald v. Smith*, 472 U.S. 479, 484 (1985) ("Nor do the Court's decisions interpreting the Petition Clause in contexts other than defamation indicate that the right to petition is absolute. For example, filing a complaint in court is a form of protected activity; but 'baseless litigation is not immunized by the First Amendment right to petition.'") (quoting *Bill Johnson's Rests., Inc., v. N.L.R.B.*, 461 U.S. 731, 743 (1983)). The sanctions imposed by the district court serve the purpose of deterring the filing of frivolous litigation. "[T]he central purpose of Rule 11 is to deter baseless filings in district court[.]" *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 393 (1990).

The lower court decisions do not threaten to chill the filing of future non-frivolous election litigation. Petitioners were not sanctioned because they spoke in support of a disfavored cause or represented an unpopular client; they were sanctioned because they used the megaphone of federal court filings to broadcast claims that had no colorable basis in fact or law. As the Sixth Circuit noted, Petitioners failed to read the statutes they alleged were violated and based factual allegations on "facially unreliable

expert reports," including reports authored by the operator of "Europe's highest grossing Tex-Mex restaurant" and "a Dallas IT consultant who dropped out of an entry-level intelligence course after seven months' training." Pet. App. 2a; 14a; 13a. The decisions of the lower courts do not create any uncertainty for future litigants. The guardrails for future election litigation (and all other litigation) are plainly spelled out in the Federal Rules of Civil Procedure, the Local Rules of each district and in each state's Rules of Professional Conduct.

II. The Purported Circuit Splits Regarding Rule 11 Do Not Support Review

a. Petitioners Have Waived any Argument Regarding the Purported Circuit Splits

Petitioners urge this Court to grant the Petition based on purported splits among the Circuits regarding three Rule 11 issues: (1) whether Rule 11(c)(2) requires that a served Rule 11 motion be absolutely identical to a filed Rule 11 motion[3], (2) whether a court imposing monetary sanctions under Rule 11 must individually consider each sanctioned attorney's ability to pay[4], and (3) whether sanctions

---

[3] In the district court, Petitioners argued that the City's served Rule 11 motion failed to comply with Rule 11(c)(2) because it did not include the later-filed brief in support. Petitioners did not argue that the City failed to comply with Rule 11(c)(2) in the Sixth Circuit, so the issue of the adequacy of the notice provided by the served motion was not addressed in that court.

[4] Petitioners did argue in the Court of Appeals that the

under Rule 11(c)(3) require use of an "akin-to-contempt" standard. Petitioners have waived these arguments; these substantive issues were not raised below and these arguments were not considered by the Sixth Circuit. Where issues were not considered by the Court of Appeals, this Court will not ordinarily consider them. *Meyer v. Holley*, 527 U.S. 280, 291-92 (2003); *see also*, *Pennsylvania Dept. of Corr. v. Yeskey*, 524 U.S. 206, 212-13 (1998) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.") (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n. 2 (1970)).

Even if Petitioners had preserved these arguments, they would not support granting the Petition, as set forth below.

b. The Rule 11(c)(2) "Safe-Harbor" Requirement

Under Rule 11(c)(2), before a party can seek sanctions, "[t]he motion [for sanctions] must be served under Rule 5, but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets." This is frequently

---

district court abused its discretion by failing to individually consider the sanctioned attorneys' ability to pay the monetary sanctions. The Sixth Circuit did not address this issue on appeal, presumably because neither Petitioners nor their co-counsel raised their inability to pay the monetary sanctions before the district court.

referred to as the Rule 11 "safe-harbor" requirement.

Two of the four Circuits that have addressed this issue have applied the safe-harbor requirement in accordance with the plain text of Rule 11(c)(2), requiring that a *motion* for Rule 11 sanctions, which need not include an accompanying *brief*, must be served at least 21 days prior to filing. *See Star Mark Mgmt., Inc. v. Koon Chun Hing Kee Soy & Sauce Factory, Ltd.*, 682 F.3d 170, 176 (2d Cir. 2012) (holding that party seeking Rule 11 sanctions "met the procedural requirements of…Rule 11(c)(2) by serving its notice of motion for Rule 11 sanctions with its January 9, 2008 letter, even though it did not serve at that time supporting affidavits or a memorandum of law."); *Burbidge Mitchell & Gross v. Peters*, 622 F. Appx. 749, 757 (10th Cir. 2015) ("We thus join the Second Circuit in declining 'to read into the rule a requirement that a motion served for purposes of the safe-harbor period must include supporting papers such as a memorandum of law and exhibits.'") (citing *Star Mark Mgmt., Inc.*, 682 F.3d at 176).[5]

[5] Petitioners argue that the Tenth Circuit requires that a served Rule 11 motion be absolutely identical to a filed Rule 11 motion, including a supporting brief and any exhibits, citing *Roth v. Green*, 466 F.3d 1179, 1192 (10th Cir. 2006). Pet. at 10. Petitioners misconstrue the Tenth Circuit's holding in *Roth*. The issue in *Roth* was whether service of a warning letter, as opposed to a Rule 11 motion, satisfied the safe harbor requirement. *Id.* at 1191-92. The Tenth Circuit held that service of a warning letter does not comply with Rule 11(c)(2), because the subrule requires service of a motion. *Id.* at 1192. The Tenth Circuit did not hold that the served Rule 11 motion must be identical in all respects

Two Circuits have interpreted the Rule 11(c)(2) safe-harbor requirement differently. The Fifth Circuit requires that the served motion be identical in every respect to the filed motion, including an attached brief in support and any exhibits. *Uptown Grill, LLC v. Camellia Grill Holdings, Inc.*, 46 F.4th 374, 388-89 (2022). The Seventh Circuit permits warning letters to satisfy the safe-harbor requirement, in substantial compliance with Rule 11(c)(2). *Nisenbaum v. Milwaukee Cnty.*, 333 F.3d 804, 808 (7th Cir. 2003).

This minor variation in the application of Rule 11(c)(2) does not require this Court's attention. Rather, this issue should be allowed to develop in the Circuits. Only four Circuits have taken a position on what, exactly, a party must serve to satisfy the safe-harbor requirement. The Fifth Circuit's unique identicality requirement is only a year-and-a-half old. Additionally, the Seventh Circuit may reconsider its outlying holding in *Nisenbaum* and join the majority of Circuits in requiring a party to serve a motion to start the safe-harbor clock.[6] *See McGreal v. Village of Orland Park*, 928 F.3d 556, 559 (7th Cir. 2019) (noting that the Seventh Circuit is the sole Circuit to adopt the

---

to the filed motion, including a supporting brief and all exhibits.

[6] While the question of what, exactly, constitutes a "motion" under Rule 11(c)(2) has been addressed only by the Second, Fifth and Tenth Circuits, a clear majority of the Circuits require service of a motion to satisfy the safe harbor requirement. *See Penn, LLC v. Prosper Bus. Dev. Corp.*, 773 F.3d 764, 768 (6th Cir. 2014) (noting that the Second, Third, Fourth, Fifth, Sixth, Eighth, Ninth and Tenth Circuits all require service of a Rule 11 motion.).

"substantial compliance" approach and that "other circuits have…criticized our analysis [in *Nisenbaum*] as cursory and atextual.").

Petitioners overstate the practical importance of this split. Petitioners warn that failure to adopt the Fifth Circuit's identicality requirement would "enable[] selective and viewpoint based enforcement" of Rule 11. Pet. at 30. But Petitioners do not explain the connection between the notice required by Rule 11(c)(2) and a court's ultimate decision to impose sanctions. Regardless of the notice required under Rule 11(c)(2), the imposition of Rule 11 sanctions remains a matter of discretion for a district court. *Cooter & Gell*, 496 U.S. at 405. Nor is adoption of the Fifth Circuit's identicality standard required to ensure adequate notice of what allegedly sanctionable material the party seeking Rule 11 sanctions wants withdrawn.

If this court does want to address a Circuit split regarding application of the Rule 11 safe harbor in the context of inadequate notice, this is simply the wrong case. On December 15, 2020, the City of Detroit described the conduct that allegedly violated Rule 11 and put Petitioners on notice that the entire complaint was sanctionable and that the City would seek Rule 11 sanctions if it were not withdrawn. Petitioners would have this Court believe that in the case at bar "the served and filed motions materially differed." Pet. At 9. That mischaracterization of the record can be resolved by comparing the served motion, found at Pet.

App 337a, with the filed motion, found at Pet. App 384a. The served Rule 11 motion included 17 paragraphs describing the conduct that violated Rule 11. The same 17 paragraphs were included as the first 17 paragraphs of the January 5, 2021, filed motion. The only significant difference between the served motion and the filed motion was the addition of three paragraphs at the end of the motion seeking referrals for disciplinary proceedings, but those paragraphs were explicitly limited to relief sought under Eastern District of Michigan Local Rule 83.22—not Rule 11.[7]

Petitioners also argue that the served Rule 11 motion was deficient because it requested "different relief" than the filed version. However, Petitioners cite no authority limiting a district court's authority to impose Rule 11 sanctions to the specific relief requested in the served Rule 11 motion.[8]

Intervention by this Court is not required to resolve any uncertainty regarding Rule 11(c)(2). In every Circuit, a party is required to warn the opposing party that it intends to seek Rule 11 sanctions at least 21 days before filing a motion seeking those sanctions.

---

[7] The Sixth Circuit's holding that some sections of the complaint were not sanctionable does not mean that Petitioners were not afforded sufficient notice under Rule 11(c)(2). _Petitioners' suggested rule which would render a served Rule 11 motion insufficient under Rule 11(c)(2) if a single basis for sanctions identified in the served motion is overturned on appeal would eviscerate Rule 11.

[8] Furthermore, the City's served Rule 11 motion requested "any other relief for the City that the Court deems just or equitable." Pet. App. 342a at ¶ j.

A party receiving such notice has the opportunity to consider the merits of the challenged pleading and to withdraw that pleading to avoid sanctions. Petitioners were given that opportunity and preferred to continue to advance their false narrative about a stolen election rather than to avail themselves of the safe harbor they were offered.

c. Ability to Pay

This case does not implicate the Circuit split regarding a court's obligation to consider a sanctioned attorney's ability to pay monetary sanctions. The district court found that Petitioners "have the ability to pay this sanction." Pet. App. 162a. Directly addressing Petitioners' ability to pay, the district court noted that it was concerned that the monetary sanctions might not have their normal deterrent effect because Petitioners were using the suit to fundraise, suggesting that the "sanctions will be paid with donor funds rather than counsel's." Pet. App. 136a n. 85. According to Petitioners, the district court erred in failing to *individually* consider each attorney's ability to pay the monetary sanctions, despite the failure of Petitioners to raise this issue below. Notably, no Circuit requires such an individualized assessment, so there is no split to resolve.[9] Nor would such a rule have

[9] The Third, Fourth, Tenth and Eleventh Circuits require consideration of sanctioned attorneys' ability to pay, but no circuit requires *individualized* consideration of each sanctioned attorney's financial resources. Such an intensive inquiry would create "needless satellite litigation, which is contrary to the aim of the Rules themselves." *Chambers v. NASCO, Inc.*, 501 U.S. 32,

meaningful application here, where the district court imposed the monetary sanctions jointly and severally.

d. The "Akin-to-Contempt" Standard

Any split regarding the "akin-to-contempt" standard is irrelevant to this case. The district court did not rely on Rule 11(c)(3) to impose sanctions. Regardless of whether the Sixth Circuit requires use of an akin-to-contempt standard for sanctions imposed under Rule 11(c)(3), the district court could not rely on Rule 11(c)(3) as a new source of sanctions on remand, as petitioners have dismissed the case.[10] Fed. R. Civ. P. 11(5)(B).

III. Petitioners' Other Rule 11 Arguments Do Not Support Review

a. Detroit had Standing to Seek Non-Monetary Sanctions

Strangely, Petitioners argue that the City lacked standing to seek non-monetary Rule 11 sanctions. Petitioners do not cite any authority requiring a party to demonstrate Article III standing to seek Rule 11 sanctions.[11] Such a requirement would

---

51 (1991).

[10] Rule 11(5)(B) limits a district court's ability to impose monetary sanctions under Rule 11(c)(3). Here, the monetary sanctions are the only relief awarded by the district court which are not now moot.

[11] Petitioners argue that the bar referral sanctions were punitive, whereas a court is limited to remedying a violation of Rule 11 with compensatory sanctions. This argument appears to be based on Petitioners' interpretation of *Goodyear Tire & Rubber v. Haeger*. In *Goodyear*, this Court held that *monetary* sanctions

be contrary to established law, as this Court has held that sanctions under Rule 11 are "collateral to the merits[,]" and that a district court may impose Rule 11 sanctions even where it lacks subject matter jurisdiction over the underlying litigation. *Willy v. Coastal Corp*., 503 U.S. 131, 137-39 (1992).

b. The District Court had Authority to Refer Petitioners to Disciplinary Authorities

Petitioners argue that the district court failed to provide sufficient due process protections when it "initiate[d] bar-referral sanctions *sua sponte*." Pet. at 17. The district court did not impose the bar-referral sanctions *sua sponte*; it imposed them because the City requested those sanctions in both the served and filed Rule 11 motions. Notwithstanding the City's requests, the district court was empowered to refer Petitioners to bar associations for investigation, as E.D. Mich. LR 83.22(c) expressly authorizes judges to refer allegations of misconduct to a "disciplinary authority that has jurisdiction over the attorney[.]" Furthermore, the 1993 Rule 11 Advisory Committee Notes indicate that a "court has available a variety of possible sanctions to impose for violations, such as…referring the matter to disciplinary authorities[.]"

---

under a court's inherent authority must go no farther than compensating the other party for costs caused by the sanctionable conduct. 581 U.S. at 109. Here, the district court limited monetary sanctions to costs caused by the sanctionable conduct.

IV. Petitioners' Arguments Regarding the Sanctions Imposed Under 28 U.S.C. § 1927 Do Not Support Review

a. Petitioners did not State a Claim for Violation of the Elections and Electors Clauses

The Sixth Circuit found that Petitioners failed to state a claim for violation of the Elections and Electors Clauses because Petitioners did not allege that Governor Whitmer or Secretary Benson took action inconsistent with Michigan election law. Pet. App. 25a-26a. Petitioners point to several allegations which they claim the Sixth Circuit missed, but those allegations are not sufficient to make out a well-pleaded claim under the Elections and Electors Clauses. Pet. at 25. All of the referenced allegations relate to actions by election workers, not actions undertaken by Governor Whitmer or Secretary Benson.

Furthermore, all of the cited allegations reflect a misunderstanding of Michigan election law. The theory set out in Petitioners' amended complaint was that election workers at the Absent Voter Counting Boards (AVCB) at the TCF Center in Detroit failed to follow Michigan election law. *See, e.g.*, Pet. App. 231a at ¶ 13. Specifically, Petitioners alleged that election workers acted unlawfully by following instructions "to not verify signatures on absentee ballots, to backdate absentee ballots, and to process such ballots regardless of their validity." Pet. App. 266a-267a at ¶

96. In Michigan, the verification of signatures and confirmation of the validity of absentee ballots is performed by clerks when the ballots are received, not at AVCBs on Election Day. Mich. Comp. Laws § 168.765a. As the Sixth Circuit noted, Petitioners' failure to read the statutes they alleged were violated was sanctionable. Pet. App. 21a.

The Michigan Court of Claims' holding in *Genetski v. Benson* does not demonstrate that Petitioners' claim under the Elections and Electors Clauses had merit. In *Genetski*, the court held that guidance issued by Secretary Benson regarding standards for matching signatures on absentee ballots had been promulgated in violation of the Michigan Administrative Procedures Act.[12] *Genetski v. Benson*, 2021 WL 1624452, at *6 (Mich. Ct. Cl. Mar. 9, 2021). The *Genetski* court did not hold that the signature guidance (or any other action taken by Secretary Benson) violated Michigan election law. Nor did Petitioners allege in their complaint that the

[12] Under Michigan law, a person voting by absentee ballot must sign both an absentee ballot application and the absentee ballot. These signatures are then checked against the Qualified Voter File (QVF). Ballots with signatures that do "not sufficiently agree" with those in the QVF are rejected. *See* Mich. Comp. Laws § 168.765a(6). The statute does not define what it means for signatures to "sufficiently agree." *Genetski*, 2021 WL 1624452, at *1. The guidance at issue in *Genetski* provided criteria for determining whether signatures "sufficiently agree." *Id*., at *2. That guidance did not contravene or in any way address the statutory requirement that signature verification for absentee ballots is performed by clerks when the ballots are received.

signature matching guidance at issue in *Genetski* was unlawful.

b. The Plaintiffs Lacked Standing

Petitioners argue that the lower court erred in determining that the elector-nominee Plaintiffs lacked standing to assert claims under the Elections and Electors Clauses.[13] Only the Eighth Circuit Court of Appeals has held that elector-nominees have standing to assert claims under the Elections and Electors Clauses. *Carson v. Simon*, 978 F.3d 1051, 1057 (8th Cir. 2020). However, the Eighth Circuit reached this conclusion because Minnesota election law treats elector-nominees as candidates for office. *Id*. Michigan election law does not.

While it is widely accepted that candidates for office have standing to assert claims under the Elections and Electors Clauses, elector-nominees should not be treated as candidates for office, absent a quirk in state law. As one district court has noted,

> Electors are not candidates for office as the term is generally understood. Arizona law makes clear that the duty of an Elector is to fulfill a ministerial function, which is extremely limited in scope and duration, and that they have no discretion to deviate at all from the

[13] Petitioners waived this issue by not raising it in the Sixth Circuit. *Meyer*, 527 U.S. at, 291-92.

duties imposed by the statute.

Bowyer v. Ducey, 506 F. Supp. 3d 699, 710 (D. Ariz. 2020). As in Arizona, electors in Michigan serve a purely ministerial function. Mich. Comp. Laws § 168.47.

Finally, this would be an inappropriate case for addressing the question of elector-nominee standing, when it was not addressed in the Sixth Circuit and when the lower courts' reliance upon Rule 11 provides an alternative, independent basis for the sanctions imposed.

c. The Lower Courts Correctly Concluded that Petitioners' Claims were Moot after December 14, 2020

Even if Petitioners had stated a claim for violation of the Elections and Electors Clauses and even if their clients had standing, the lower courts correctly concluded that any such claim became moot when Michigan's electors cast their votes on December 14, 2020. In a petition to this Court filed on December 11, 2020, Petitioners admitted that their case "would be moot" after Michigan's electors cast their votes on December 14, 2020. Pet. App. 80a. After admitting in their December 11, 2020 filing that the vote of the electors would moot their claims, Petitioners introduced new arguments after the electoral votes were cast. None has merit.

i. Selection of the Republican elector-nominees was not possible after December 14, 2020

Selection of the Republican elector-nominees was not possible after the Michigan electors cast their votes for Joe Biden on December 14, 2020. Petitioners argue that there is precedent for selection between competing slates of electors, citing the entirely inapposite example of Hawaii in the 1960 election. In 1961, there was a genuine dispute between competing slates of electors in Hawaii. The acting governor certified the Republican slate on November 26, 1960, and then the newly-elected governor certified the Democratic slate on January 4, 1961. *See Bush v. Gore*, 531 U.S. 98, 127 n. 5 (Stevens, J. dissenting).

Here, the elector-nominee Plaintiffs simply decided they were electors without any basis in law.[14] As the Sixth Circuit stated, Petitioners have never "explain[ed] why any competent attorney would take that self-election seriously for purposes of persisting in this lawsuit." Pet. App. 30a. Petitioners fail to identify any lawful basis for the selection of the Republican elector-nominees after December 14, 2020.

---

[14] The sixteen Michigan Republican elector-nominees (including Timothy King, James Earl Haggard and Marian Ellen Sheridan, who were Plaintiffs in the underlying litigation) have been criminally charged for submitting forged electoral college certificates. *See* https://www.michigan.gov/ag/-/media/Project/Websites/AG/releases/2023/July/Felony-Complaints-Redacted-combined.pdf

ii. No relief could have redressed the Plaintiffs' alleged injuries after December 14, 2020

Petitioners try to avoid mootness by arguing that the court could have issued declaratory relief after December 14, 2020. Pet. 20-21. However, Petitioners do not explain how declaratory relief would redress their alleged injury. Secretary Benson had no further role in the counting of the electoral votes after Michigan's electors cast their votes on December 14, 2020. Petitioners do not explain how declaratory relief would affect the counting of the electoral votes in the Senate. Nor do they explain how such relief could be effective after a state casts its electoral votes, as the Electoral Count Act strictly limits the grounds on which an objection can be made to the counting of a state's votes. *See* 3 U.S.C. § 15(d)(2)(B)(ii).

Petitioners' argument regarding the potential availability of "level down" relief is also unpersuasive. As the Court held in *Heckler v. Matthews*, 465 U.S. 728, 739 (1984) an injury suffered by a plaintiff alleging discriminatory treatment by the government can be remedied by "a mandate of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class." (emphasis omitted). Unlike *Heckler*, this case does not involve discrimination in the administration of a government benefit and Petitioners do not explain how this doctrine could be applied to negate the votes of

Michigan's electors.

d. The Purported Circuit Splits Regarding § 1927 Do Not Support Review

As with the purported Circuit splits regarding Rule 11, Petitioners have waived their arguments regarding these issues, as they did not raise them in the lower courts. *Meyer*, 527 U.S. at, 291-92. The question of whether § 1927 requires a court to consider a sanctioned attorney's ability to pay monetary sanctions is not presented by this case, as the district court did find that Petitioners had the ability to pay. Pet. App. 162a. Nor is this case a proper vehicle for resolving the split regarding whether § 1927 sanctions require a showing of bad faith, as the lower courts' reliance upon Rule 11 provides an alternative, independent basis for the sanctions imposed.[15]

---

[15] Petitioners argue in a footnote that the non-Michigan attorneys could not have dismissed the case because the Eastern District does not admit attorneys *pro hac vice*. However, the Eastern District does permit permanent admission of out-of-state attorneys. E.D. Mich. LR 83.20. Petitioners' argument that they could not have violated § 1927 because they failed to seek admission suggests an extraordinary form of immunity for out of state attorneys: as long as out-of-state attorneys ignore the local rules and do not seek admission to the district court, Petitioners argue that those attorneys could never be sanctioned under § 1927.

V. Petitioners' Other Arguments Do Not Support Review

a. Petitioners Claims Against the State Board of Canvassers were Frivolous

The lower courts held that Petitioners' claims against the State Board of Canvassers were barred by Eleventh Amendment immunity. Petitioners cite *Wisconsin Dep't of Corr. v. Schat*, 524 U.S. 381, 389 (1998) for the proposition that, because a state may decline to assert Eleventh Amendment immunity, suing a state agency in federal court is not *per se* frivolous. However, *Schat* merely held that a federal court is not automatically deprived of subject matter jurisdiction over all claims asserted by a party, where one claim is barred by Eleventh Amendment immunity. *Id*. While a state may decline to assert Eleventh Amendment immunity, Petitioners have never argued that the State would decline to assert it in this case. *See* Pet. App. 25a. In fact, the State Defendants did argue that Petitioners' claims were barred by Eleventh Amendment immunity in their response to Petitioners' Motion for Injunctive Relief. *See* Pet. App. 333a.

Petitioners argue that federal claims for injunctive relief against state officials may not be barred by the Eleventh Amendment under *Ex Parte Young*, 209 U.S. 123 (1908), but the *Ex Parte Young* exception applies only to prospective relief. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984). Here, the Petitioners did not seek prospective

relief; they sought an injunction directing the State Board of Canvassers to reverse the certification of the State's election results. *See* Pet. App. 333a.

b. Detroit was Not Required to Demonstrate Article III Standing to Intervene as a Defendant

Petitioners' argument that the City of Detroit lacked standing to intervene as a defendant, or to seek sanctions, is meritless. This Court has held that parties intervening as *plaintiffs* under Rule 24(a)(2) must demonstrate Article III standing if they seek relief beyond that requested by the original plaintiff. *Town of Chester, N.Y. v. Laroe Estates, Inc.*, 581 U.S. 433, 435 (2017). However, there is no requirement that a party seeking to intervene as a *defendant* must demonstrate standing; standing analysis applies to legal claims asserted by plaintiffs, not to defenses asserted by defendants. *See Spokeo, Inc. v. Robbins*, 578 U.S. 330, 338 (2016) ("The plaintiff, as the party invoking federal jurisdiction, bears the burden of establishing the[] elements [of Article III standing]."). And, as noted above, a defendant need not establish Article III standing to seek Rule 11 sanctions. *Willy*, 503 U.S. at 137-39.

VI. This Case Would Be a Poor Vehicle For Consideration of Any of the Issues Raised By Petitioners

Petitioners argue that their case offers an opportunity for this court to address important legal issues. But, the record they bring to this court does

not support the laudable goals they claim to champion. The pleadings filed by these Petitioners in the lower courts, the arguments they advanced and the manner in which they presented their claims are an embarrassment to the legal profession. These were not close questions. The "facts" they alleged were objectively false. The "law" they relied upon was non-existent.

"Alternative facts" may survive in the uncritical world of political discourse, but they have no place in our nation's courtrooms. Non-lawyers may "learn" the law from internet memes, and they can be excused for believing that "fraud vitiates everything,"[16] but lawyers must be tethered to the law. The sanctions at issue in this case were not casually imposed. Judge Linda Parker's 110-page opinion painstakingly addressed the undeniable failure of these lawyers to meet their professional responsibilities, and the heart of that ruling was affirmed by the well-reasoned opinion of the Sixth Circuit.

Now, Petitioners come to this court seeking

---

[16] In the District Court, Petitioners cited this Court's decision in *United States v. Throckmorton*, 98 U.S. 61 (1878) as supporting the court's authority to overturn the election. As the district court noted, that case did not support Petitioners' arguments, and it appeared that Petitioners' citation to *Throckmorton* was attributable to the phrase "fraud vitiates everything[,]" which is found in the *Throckmorton* opinion in a quotation from a treatise, and, although that phrase has no relevance to election law, it had become an internet meme among election deniers. *See* Pet. App. 87a-88a.

review of issues that were not argued or briefed below and asking the Court to give them special consideration not *in spite* of the extraordinary relief that they sought, but *because* of it. These lawyers used the federal courts to spread lies and to undermine faith in our democracy in service to the goal of preventing the peaceful transition of power. History will determine just how close they came to usurping our democracy. Before that judgment comes, this Court should not reward their abuse of the federal courts.

CONCLUSION

The Court should DENY Petitioners' Request for the Writ of Certiorari.

Respectfully submitted,

DAVID H. FINK*
**Counsel of Record*

FINK BRESSACK
David H. Fink
Nathan J. Fink
Philip D.W. Miller
David A. Bergh
645 Griswold St., Suite 1717
Detroit, MI 48226
(248) 971-2500
dfink@finkbressack.com
nfink@finkbressack.com
pmiller@finkbressack.com
dbergh@finkbressack.com

CITY OF DETROIT LAW DEPARTMENT
Conrad L. Mallet, Jr.
2 Woodward Ave., Suite 500
Detroit, MI 48226
(313) 224-4550
conrad.mallett@detroitmi.gov
Counsel for Respondent City of Detroit

January 17, 2024