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

PETITIONERS' REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules, Regulations and Orders

Other Authorities

REPLY BRIEF

In its brief in opposition ("BIO"), respondent City of Detroit offers no reason to deny review and two compelling reasons to grant the petition summarily. Moreover, Detroit's misguided case against urgency makes the case *for urgency*.

The state respondents ("Michigan") waived a BIO, but this Court does not need Michigan's response. Michigan's Rule 11 rights are derivative of Detroit's rights,[1] and respondent cannot possibly bear their burden to demonstrate the mootness needed to justify sanctions under 28 U.S.C. § 1927.

I. THE RULE 11 SANCTIONS REQUIRE REVIEW.

The Court should reverse the Rule 11 sanction. While not credibly justifying the differences between its served and filed motions, Detroit admits it violated Rule 11(c)(2)'s safe-harbor provisions.

A. Adding a bar-referral motion to the Rule 11 motion requires reversal.

To rebut petitioners' argument that the served and filed Rule 11 motions differed, Detroit explains that its filed motion's request for bar-referral relief was "explicitly limited to relief sought under Eastern District of Michigan Local Rule 83.22—not Rule 11." BIO 15. Rule 11(c)(2) requires filing other motions separately, FED. R. CIV. P. 11(c)(2), so the admission requires reversal. 5A FED. PRAC. & PROC. CIVIL § 1337.3 (4th ed.) ("failure to comport with these

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[1] On January 14, 2021, plaintiffs voluntarily dismissed, and Michigan filed a Notice of Joinder/Concurrence (ECF:84) with Detroit's motion, making Michigan's otherwise-untimely request derivative of Detroit's rights.

requirements is enough to merit reversal") (collecting cases).[2]

1. Detroit's admission is binding.

When parties "voluntarily cho[o]se [an] attorney as [their] representative," they "cannot now avoid the consequences of the acts or omissions of this freely selected agent." *Link v. Wabash R. Co.*, 370 U.S. 626, 633-34 (1962). Thus, "each party is deemed bound by the acts of his lawyer-agent." *Id.* at 634. The BIO's admission binds Detroit.

2. The issue is fairly included in the safe-harbor defense and—even if not—plain-error review applies.

Because petitioners raised a safe-harbor defense below, new safe-harbor *arguments* fall within the defense claimed below:

> [O]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below. [The] argument … is not a new claim. Rather, it is—at most—a new argument to support what has been a consistent claim[.]

Citizens United v. FEC, 558 U.S. 310, 330-31 (2010) (internal quotations, alterations, and citations omitted). Even if petitioners did not explicitly raise an objection to Detroit's Rule 11 motion, petitioners may raise it here under plain-error review. *United States v. Olano*, 507 U.S. 725, 736-37 (1993). (These arguments and *Olano*-style plain-error review apply

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[2] Applying Local Rule 83.22(c) to the non-Michigan counsel is another reason to grant the writ of *certiorari*.

to Detroit's invoking the ordinary rules of waiver. BIO 5, 10-11, 21, 25.)

Circuits uniformly use plain-error review for Rule 11 specifically[3] and civil cases generally.[4] Indeed, *Olano* itself relies on civil cases. *See* 507 U.S. at 736 (citing *Connor v. Finch*, 431 U.S. 407, 421 n.19 (1977)). The safe-harbor provisions are mandatory claim-processing rules, Pet. 11, "a district court exceeds its authority by imposing sanctions requested through a procedurally-deficient Rule 11 motion." *Brickwood Contractors*, 369 F.3d at 396. As in *Brickwood Contractors*, the error here is plain and reversal serves Rule 11's interests in reducing satellite sanction litigation through self-regulation, formalizing due-process protections, and diminishing Rule 11's chilling effect. *Id.* at 397-98 (citing *Ridder v. City of Springfield*, 109 F.3d 288, 294 (6th Cir. 1997)).

3. Detroit lacked standing for bar-referral relief.

Detroit considers it "strange" to lack standing for bar-referral relief, BIO 17-18, but movants "must demonstrate standing … for each form of relief that they seek (for example, injunctive relief and damages)." *TransUnion LLC v. Ramirez*, 141 S.Ct. 2190, 2208 (2021). Because *Willy v. Coastal Corp.*, 503 U.S. 131, 133 (1992), involved attorney-fee sanctions, *Willy* is irrelevant. Detroit's barrier to bar-referral

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[3] *See Brickwood Contractors, Inc. v. Datanet Eng'g, Inc.*, 369 F.3d 385, 396 (4th Cir. 2004) (*en banc*); *PT Pukuafu Indah v. United States SEC*, 661 F.3d 914, 926 (6th Cir. 2011); *Mike Ousley Prods., Inc. v. WJBF-TV*, 952 F.2d 380, 383 (11th Cir. 1992); *Isaacson v. Manty*, 721 F.3d 533, 539-40 (8th Cir. 2013).

[4] *See*, *e.g.*, *Salazar v. District of Columbia*, 602 F.3d 431, 437 (D.C. Cir. 2010); *All. for Good Gov't v. Coal. for Better Gov't*, 998 F.3d 661, 672 n.4 (5th Cir. 2021).

relief is Article III. Pet. 16-17.[5] The district court's barrier to bar-referral relief is due process. Pet. 17-18. Reversal is warranted for both.

B. The differences between the filed and served motions violated Rule 11(c)(2).

Acknowledging different standards for Rule 11 in the Fifth and Second Circuits, Detroit argues that petitioners overstate a "minor" split's "practical importance." BIO 13-14. But the split is outcome determinative and vast.[6]

Detroit cites *some specifics* included in both its served and filed motions, BIO 3-5, but does not address petitioners' argument that the filed motion included specifics beyond the served motion or that the brief was required to address the factual and legal issues. Pet. 2-3, 9, 12. Indeed, in the Sixth Circuit and Eastern District, incorporation of arguments by reference constitutes waiver. *Northland Ins. Co. v. Stewart Title Guar. Co.*, 327 F.3d 448, 452-53 (6th Cir. 2003); *Atlas Techs., LLC v. Levine*, 268 F.Supp.3d 950, 962 (E.D. Mich. 2017). Even if these authorities did not put Detroit on notice that its served motion *violated* the safe-harbor rule, they also did not put

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[5] Although the Sixth Circuit did not address standing, BIO 22, jurisdiction can be raised *sua sponte* or on appeal. Pet. 17; *Grupo Dataflux v. Atlas Glob. Grp., L.P.*, 541 U.S. 567, 570-71 (2004).

[6] Detroit suggests that petitioners did not press the adequacy of safe-harbor notice below, BIO 10, but petitioners raised the issue in their opening brief (at 3 (Issue VI), 14-15, 81-83), reply brief (31-32), and rehearing petition (3-7). *See also* Section I.A.2, *supra (*quoting *Citizens United*, 558 U.S. at 330-31, to distinguish arguments from claims). Indeed, Detroit designates safe-harbor compliance as a Question Presented. BIO i.

petitioners on notice that Detroit's served motion *satisfied* the safe-harbor rule.

Lack of a compliant motion "prompts the recipient to guess at his opponent's seriousness." *Penn, LLC v. Prosper Bus. Dev. Corp.*, 773 F.3d 764, 768 (6th Cir. 2014). Rule 11's "specificity requirement was intended to reduce … practice of making threats or sending vague 'Rule 11 letters' designed to bully an opponent into withdrawing a paper or position." Georgene M. Vairo, RULE 11 SANCTIONS, at 24 (Richard G. Johnson ed., 3d ed. 2004). It is untenable to have the served document's procedural status undefined.

Serving a compliant motion "gives notice to a party and its attorneys that they must retract or risk sanctions." *Radcliffe v. Rainbow Constr. Co.*, 254 F.3d 772, 789 (9th Cir. 2001). Mere "advance warning" cannot "cure [the] failure to comply with the strict procedural requirement." *Id.* Either the Fifth Circuit is correct that "motion" means the full motion or the uncertainty is impermissibly vague in this crucial First Amendment context.

Noncompliance with the safe-harbor rule requires reversal. 5A FED. PRAC. & PROC. CIVIL § 1337.3. Even if it did not, reversal would be appropriate when—as here—the record shows that petitioners withdrew the challenged papers within 21 days of actual notice. *Hadges v. Yonkers Racing Corp.*, 48 F.3d 1320, 1328-29 (2d Cir. 1995). Either way, this Court should reverse.

C. This Court should resolve the ability-to-pay and akin-to-contempt Circuit splits.

If the Court grants review, a remand order could resolve two additional splits in Circuit authority. Pet. 13-16. Without disputing the splits' existence or

relevance to a post-*certiorari* remand, Detroit argues waiver and—regarding ability to pay—that the district court found a collective ability to pay and Rule 11(c)(5)(B) bars new *monetary* sanctions. BIO 10-11, 16-17. Even if not raised below, Circuit splits—which this Court's review would resolve—can justify granting review. S.CT. R. 10(a). Under Rule 10(a), Detroit's arguments are simply nonresponsive. *Cf.* Section II.B.2, *infra*.

D. Pleading against the State Board of Canvassers was not frivolous.

Detroit acknowledges that states may decline to assert sovereign immunity and argues *vacatur* is not prospective. BIO 26-27. The former makes suing state officials non-frivolous, and the latter is wrong.

II. THE § 1927 SANCTION REQUIRES REVIEW.

The Court should reverse the § 1927 sanction. Far from meeting its burden to prove mootness, Detroit implicitly acknowledges that remedying the Elections and Electors Clause claims was possible.

A. Petitioners' claims under the Electors and Elections Clauses are viable.

Detroit argues that the complaint failed to state a claim under the Electors and Elections Clauses, the claim was moot, and petitioners lacked standing. BIO 19-25. Detroit's arguments lack merit.[7] Moreover, it is crucial that the Court expeditiously resolve these issues. *See* Section III, *infra*.

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[7] Because Detroit's arguments are meritless, Rule 11 provides no alternate basis to affirm.

1. Petitioners' claims were not moot.

Although plaintiffs must prove standing, defendants must prove mootness. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000); *cf. Pelt v. Utah*, 539 F.3d 1271, 1283 n.6 (10th Cir. 2008) (burden of proof is "fairly included" in merits). To show relief *impossible*, Detroit must show not only that the violation cannot recur but also that "events have *completely and irrevocably eradicated the effects* of the alleged violation." *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (emphasis added). While Michigan's unlawful election[8] remained in place and relief was possible, the claim remained alive. Indeed, relief remained possible for *future elections*, even if 2020 was moot. Detroit cannot meet its burden.[9]

a. Detroit admits that electors *can* be counted after the Electoral College votes.

Perhaps unaware of its burden to prove mootness, Detroit admits that Electoral College votes can swap after December 14, BIO 23, negating the *impossibility* that mootness requires. Pet. 19. Either the state or this Court—in No. 20-815—*could* have taken action that swapped votes.[10]

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[8] Courts evaluate Article III from the plaintiffs' merits views. *Cf. Warth v. Seldin*, 422 U.S. 490, 500 (1975).

[9] Although Detroit would bind petitioners to statements in an unsuccessful petition to this Court, BIO 22, estoppel does not apply to statements in denied petitions.

[10] The elector plaintiffs' convening in Lansing to vote (BIO 23 & n.14) apparently sought to comply with the Electoral Count Act of 1887, 3 U.S.C. § 7 (2018), and is immaterial to Article III.

b. Declaratory relief would redress Republican candidates' injuries.

Although petitioners cited and quoted *Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992), a decision of this Court in similar circumstances,

Detroit faults petitioners for not explaining how declaratory relief could redress the injuries here. BIO 24-25. The Court explained how declaratory relief satisfies Article III. *See Franklin*, 505 U.S. at 803.

Detroit invokes provisions of the Electoral Count Reform Act of 2022, PUB. L. NO. 117-328, § 109(a), 136 Stat. 4459, 5238 (2022) ("ECRA"). BIO 24. Detroit cannot justify ECRA's retroactive application to 2020.

Detroit argues that voiding the unlawful victors' vote would not redress the rival slate's injury. *Id.* Detroit is wrong. Plaintiffs in competitive processes can enforce statutory advantage outside discrimination actions. In *Clinton v. City of New York*, 524 U.S. 417, 456-57 (1998) (Scalia, J., dissenting), Justice Scalia would have adopted Detroit's proposed limitation, but the majority rejected it. *Id.* at 433 n.22. Affected candidates have every right to enforce the Elections and Electors Clause against administrative weakening of ballot-integrity measures.[11]

2. Petitioners had standing.

Detroit argues that electors are not "candidates" under Michigan law and so lack standing to enforce the Elections and Electors Clauses. BIO 21-22. This argument has two fatal flaws.

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[11] As indicated in Section II.A.2.b, *infra*, this case presents equal-protection issues.

a. Ceremonial office can support candidate standing.

To evade candidates' standing under the Elections and Electors Clauses, *see* Judicial Watch Br. 13-14 (discussing candidate standing), Detroit argues that Michigan's presidential electors lack sufficient power to qualify as candidates. BIO 21-22. This Court must reject Detroit's argument for two reasons.

First, Michigan law describes them as "candidates for electors of president and vice-president of the United States." M.C.L. § 168.42.

Second, this Court should reject the premise that ceremonial office cannot support Article III standing. *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972) (standing for "aesthetic" injury). Where people run for these offices and want to prevail, they have standing to challenge the unlawful denial of those wants.

b. *Lance* is inapposite when alleged violations affect voting rights.

The second fatal flaw is more important and more urgent, but just as easy to fix summarily. Detroit does not dispute that Democrats and their allies systematically attacked state-law ballot-integrity measures in swing states. Pet. 5; *cf. Democratic Nat'l Comm. v. Hobbs*, 948 F.3d 989, 1071-72 (9th Cir. 2020) (*en banc*) (Bybee, J., dissenting) ("Democratic Party disproportionately benefits from get-out-the-vote efforts by collecting mail-in ballots"), *rev'd sub nom. Brnovich v. Democratic Nat'l Comm.*, 141 S.Ct. 2321 (2021); Mackenzie Lockhart *et al.*, *America's Electorate Is Increasingly Polarized Along Partisan Lines About Voting by Mail During the COVID-19 Crisis*, 117 P.N.A.S. 24,640 (2020). With the Elections and Electors Clause recognized as justiciable, Pet. 34,

this Court should confine *Lance v. Coffman*, 549 U.S. 437 (2007), to its moorings.

Lance has wrongly come to stand for the proposition that voters cannot enforce those Clauses. To the contrary, *Lance* merely held that generalized grievances cannot support standing for plaintiffs who lacked "the sorts of injuries alleged … in voting rights cases." *Lance*, 549 U.S. at 442. Voting-rights plaintiffs with standing on due-process or equal-protection grounds may "identify[] all grounds on which the [government] may have failed to comply" with applicable laws. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 & n.5 (2006); *Duke Power Co. v. Carolina Envtl. Study Grp.*, 438 U.S. 59, 78-79 (1978) (no "nexus" requirement). Because Republicans have standing to challenge the pro-Democrat weakening of signature-verification requirements, they can raise the Elections and Electors Clauses.

3. Petitioners stated a claim under the Elections and Electors Clauses.

The petition quotes four allegations of executive deviations from Michigan election law that the Sixth Circuit missed in erroneously suggesting that the complaint did not state a claim under the Electors and Elections Clauses. *See* Pet. 25-26. Detroit parrots the Sixth Circuit, without addressing the petitioners' rebuttal. *Compare id. with* BIO 19-20. While Detroit would thus waive the issue if it were relevant, it is not relevant because "the inquiry into whether suit lies under *Ex parte Young* does not include an analysis of the merits of the claim." *Verizon Md. Inc. v. Pub. Serv. Comm'n of Maryland*, 535 U.S. 635, 638 (2002); *cf. Warth*, 422 U.S. at 500 (same for Article III). The issue under § 1927 is whether there was a *threshold* issue (*e.g.*, mootness) requiring dismissal. *Ruhrgas AG v.*

Marathon Oil Co., 526 U.S. 574, 578 (1999). Because there was not, the § 1927 sanction was erroneous.

B. This Court should resolve the bad-faith and ability-to-pay Circuit splits.

Reprising its flawed waiver argument, Detroit argues that Circuit splits on § 1927 were waived. *Compare* Section I.A.2, *supra*, *with* BIO 25. Detroit does not dispute that the splits exist or that deciding this case could resolve those splits. This Court's review is warranted.

1. The Court should resolve whether § 1927 requires bad faith.

The Circuits are split on whether § 1927 requires bad faith, Pet. 26-28, and Detroit did not timely cross-petition the Sixth Circuit's reversal of the district court's improper-purpose finding. *Compare* App:8a-9a *with* S.Ct. R. 12.5. Detroit cannot credibly rebut the argument that petitioners' Elections and Electors Clause claims remained viable until their voluntary dismissal. *See* Section II.A, *supra*. There was no bad faith or improper purpose here, so this case squarely presents the Circuit split on requiring bad faith.

2. The Court should review whether § 1927 requires assessing individuals' responsibility and ability to pay.

The Circuits are split on whether § 1927 requires assessing individual responsibility and ability to pay. Pet. 26-29 & n.9. The district court held that petitioners—*collectively*—could pay, noting that *some* seek donations online. App:162a. That collective judgment would abuse discretion in some Circuits. *See* Pet. 16 (citing decisions from the Fourth, Tenth, and Eleventh Circuits). These divergent standards require this Court's resolution.

C. The § 1927 sanction cannot be affirmed under Rule 11.

Although Detroit argues that Rule 11 provides an alternate basis to affirm the § 1927 sanction, BIO 22, 25, the § 1927 sanction concerned protracting the case by failing to dismiss after the Electoral College voted. App:29a. First, Detroit's served motion did not—and temporally *could not*—address that issue. App: 337a-343a; *Ted Lapidus, S.A. v. Vann*, 112 F.3d 91, 97 (2d Cir. 1997); *cf. Jensen v. Phillips Screw Co.*, 546 F.3d 59, 65 (1st Cir. 2008). Second, petitioners' actions were not frivolous. *See* Section II.A, *supra*. Detroit's argument is a *non sequitur*, twice over.

III. THIS CASE RAISES URGENT QUESTIONS AND IS AN IDEAL VEHICLE TO RESOLVE THEM SUMMARILY.

Perhaps inhabiting a biased-media bubble, Pet. 7, Detroit claims that 2020 involved no election irregularities. BIO 2. Violations of the Elections and Electors Clauses marred the vote in swing states, making the 2020 election the Rorschach test that petitioners claim. *Compare id. with* Pet. 5-6; *see*, *e.g.*, Section II.A.3, *supra* (signature verification); *Teigen v. Wisconsin Elections Comm'n*, 2022 WI 64, ¶¶54-83 (2022) (unmanned drop boxes); *Jefferson v. Dane Cty.*, 2020 WI 90, ¶40 (2020) (registration); *Democratic Party of Georgia v. Raffensperger*, No. 1:19-cv-5028-WMR (N.D. Ga. Mar. 6, 2020) (signature verification); *Mi Familia Vota v. Hobbs*, 977 F.3d 948, 955 (9th Cir. 2020) (registration deadline); 25 PA. STAT. § 3154(b) (counting uninvestigated results from districts with more votes recorded than voters voting). With roles reversed, media protest would be blaring.

Petitioners' non-exhaustive list of 2020 irregularities demonstrates the urgent need to confine *Lance* to generalized grievances and to thaw the chill in election-related litigation.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

January 29, 2024

Respectfully submitted,

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