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.*,

RESPONDENT.

On Petition for Writ of *Certiorari* to the U.S. Court of Appeals for the Sixth Circuit

PETITION FOR REHEARING

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PETITION FOR REHEARING

Petitioners respectfully ask this Court to rehear the denial of a writ of *certiorari*. A certification of counsel pursuant to this Court's Rule 44.2 is attached hereto.

REASONS TO GRANT THE PETITION

Whether assessed from the filing of the petition for a writ of *certiorari* or the denial of that petition, the Petition for Rehearing raises "intervening circumstances of a substantial or controlling effect or ... other substantial grounds not previously presented" within Rule 44.2's scope.

1. Potentially to minimize a Circuit split on the discrepancy between served and filed Rule 11(c)(2) motions, Detroit's brief in opposition ("BIO") admits that Detroit sought bar-referral relief under Local Rule 83.22(c), not under Rule 11(c)(2), *see* Detroit BIO 5, which raises new issues about compliance with Rule 11(c)(2)'s safe harbor. *See* Section I.A (¶¶1-2), *infra.*
2. Detroit's admission undermines the district court's bar-referral relief because no respondent has standing for bar-referral relief. *See* Section I.C (¶¶1-2), *infra.*
3. Detroit's admission undermines Detroit's entitlement to Rule 11(c)(2) sanctions because Detroit thus admits it did not comply with Rule 11(c)(2)'s safe harbor. *See* Section I.A (¶2), *infra.*
4. Detroit's admission undermines Michigan's entitlement to Rule 11(c)(2) sanctions because the Michigan respondents did not even attempt to comply with Rule 11(c)(2)'s safe harbor, instead filing a "Notice of Joinder/Concurrence" (ECF:84) to Detroit's motion on the same day that

petitioners dismissed the complaint, making Michigan's Rule 11 entitlement derivative of Detroit's entitlement. *See* Section I.A (¶4), *infra*.

5. On December 1, 2023, Michigan's Attorney Discipline Board (the "Board"), in *Grievance Adm'r v. Rohl*, Nos. 23-29-GA, 23-30-GA, 23-32-GA, 23-33-GA, 23-34-GA, 23-36-GA, 23-37-GA (Mich. Attorney Discipline Bd. Dec. 1, 2023), denied the non-Michigan petitioners' motion to dismiss bar charges against them. Contrary to the district court's finding under Local Rule 83.22(c), the non-Michigan counsel argue that they did not practice in the Michigan court merely because their names appeared on filings without being the filer and signer under the federal or local rules. *See* Section I.C (¶3), *infra*; Mot. to Expedite 19-23 (Feb. 13, 2024).
6. For all three forms of sanction or relief at issue, petitioners' motion to expedite raised new and substantial arguments in support of preserved issues. *See* Sections I.A (¶¶14), I.B (¶¶1-2), I.C (¶¶1-3), *infra*; *Citizens United v. FEC*, 558 U.S. 310, 330-31 (2010) (petitioners may present any argument in support of properly presented claim); *accord Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995).
7. Petitioners' motion to expedite was hand delivered to the Court at 3:17 p.m. on Tuesday, February 13, 2024, before the conference on Friday, February 16, 2024. The Clerk's Office eventually docketed the filing, effective on the filing date, but the docket does not indicate that the Clerk's Office distributed the motion, and the Court's order denying the writ of *certiorari* does

not show denial of the motion as moot. *See* Section II, *infra.*

8. On February 20, 2024, the Court denied the petition for writ of *certiorari* without either requesting Michigan's BIO or addressing petitioners' motion to expedite. *See* Section II, *infra.*
9. On February 21, 2024, the Rules Committee Staff in the Office of the General Counsel of the Administrative Office of the U.S. Courts posted the 1991 preliminary draft of the 1993 amendments to Rule 11 online. That document is relevant to Detroit's argument that Rule 11 provides an alternate basis for sanctioning petitioners' declining to dismiss the suit after the Electoral College voted. *See* Sections I.A (¶5).

Taken together, all these events combine to make it in the interest of justice for the Court to rehear the issue of whether to grant a petition for a writ of *certiorari. Cf. United States v. Ohio Power Co.*, 353 U.S. 98, 99 (1957) ("the interest in finality of litigation must yield where the interests of justice would make unfair the strict application of our rules"); *Gondeck v. Pan Am. World Airways, Inc.*, 382 U.S. 25, 27 (1965). Stern & Gressman *et al.*, SUPREME COURT PRACTICE §15.6 (2019). Petitioners respectfully ask the Court to rehear this matter and—in lieu of ordering a direct response—to order respondents to file any opposition to petitioners' motion to expedite.[1]

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[1] With pre-petition *applications*, the Court often construes an application as a petition for a writ of *certiorari. Nken v. Mukasey*, 555 U.S. 1042 (2008); *Trump v. Mazars USA, LLP*, 140 S.Ct. 660

(Footnote cont'd on next page)

I. PETITIONERS' MOTION TO EXPEDITE RAISED NEW, SUBSTANTIAL, AND CERT-WORTHY ISSUES OF A CONTROLLING NATURE.

For each type of sanction and relief that respondents sought and the district court issued—namely, the Rule 11 sanctions, the §1927 sanction, and the bar-referral relief—the following sections set out the new arguments of a controlling nature raised in petitioners' motion to expedite. *See* S.Ct. R. 44.2 ("substantial grounds not previously presented"). Significantly, had this Court requested Michigan's BIO, petitioners could have raised these issues in reply. Similarly, if respondents had filed an opposition to the motion to expedite, petitioners could have replied. Either way, these issues would have been before the Court without the need for rehearing.

A. <u>The Rule 11 sanctions were improper and require this Court's review.</u>

Regarding Rule 11 sanctions, petitioners' motion to expedite raised several new and cert-worthy issues of a controlling nature.

1. The Sixth Circuit affirmed the district court's extension of Rule 11 "responsibility" to "agreeing to place their names on pleadings and/or motions" (Pet.App.61a) in the signature block, without "signing" under FED. R. CIV. P. 5(d)(3)(C) or

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(2019); *accord United States v. Texas*, 142 S.Ct. 14 (2021); *cf. Citizens to Pres. Overton Park, Inc. v. Volpe*, 400 U.S. 939 (1970) (treating briefing of stay as briefing of petition and scheduling oral argument). This Court could similarly construe petitioners' motion to expedite as a petition for rehearing or for summary disposition.

advocating under Rule 11(c)(2). That is contrary to the only authority predating this case, *Morris v. Wachovia Sec., Inc.*, 2007 U.S. Dist. LEXIS 52675, * 5, 32-33 (E.D. Va. July 20, 2007), where lead court-appointed class counsel avoided Rule 11 sanctions as not being "responsible" for claims in an opposition with his name in the signature block. *Compare id. with* Pl.'s Opp'n to Mot. Summ. J. 36, *Morris v. Wachovia Sec., Inc.*, No. 3:02-cv-0797-REP (E.D. Va. June 21, 2004) (available on LEXIS). Even if this wholly unprecedented Rule 11 sanction complied with Rule 11 (it does not), it would violate FED. R. CIV. P. 83(b)'s requirement for actual notice before sanction.

2. Rule 11(c)(2) requires that motions "be made separately from any other motion." FED. R. CIV. P. 11(c)(2). Detroit's BIO (at 5) claims that Detroit's request for bar-referral relief was under Local Rule 83.22(c), not under Rule 11. By its terms, Local Rule 83.22(c) neither authorizes nor invites motions. Adding a separate Local Rule 83.22(c) component to the served Rule 11(c)(2) motion violated Rule 11(c)(2)'s safe harbor on separate motions. *Roth v. Green*, 466 F.3d 1179, 1192 (10th Cir. 2006) ("the plain language of [Rule 11] requires a copy of the actual motion for sanctions to be served on the person(s) accused of sanctionable behavior").
3. Rule 11(c)(2) requires that motions "describe the specific conduct that allegedly violates Rule 11(b)" and that the movant first serve the to-be-filed motion at least 22 days prior to filing. FED. R. CIV. P. 11(c)(2). Detroit's served motion cited "ECF No. 39, PageID.2808-2933," Pet.App:341a, which the petition interpreted as ending on page 2833—and

thus covering only part of ECF #39—because ECF #39 ends on PageID.2852. Contemporaneous with their reply, petitioners filed an Errata letter indicating that Detroit may have intended to incorporate the entire opposition (ECF #39) plus the subsequent ECF events through page 2933. Petitioners' reply cited the served-to-filed discrepancy that the served motion omitted bar-referral relief and the Young report, Pet.App. 337a-343a, but the filed motion included both. Pet.App: 389a-390a, 413a-414a. Petitioners' motion to expedite explained, however, that Detroit's slapdash served motion confused the district judge, who read the cited range just as the petition read it. *See* Pet.App.75a (correcting Detroit's page range to "ECF No. 39 at Pg ID 2808-2[8]33)") (court's alteration); Pet.App:364a (showing the end of page 2833 as the end of page 2933). As explained in the petition, *see* Pet. 4 (table), under the district court's "2[8]33" reading, the served motion failed to incorporate discussion of the Dominion issue, which arguably poses a more significant served-to-filed discrepancy than the Young Report and the bar-referral relief.

4. Michigan filed a "Notice of Joinder/Concurrence" (ECF:84) on the same day that petitioners sought to dismiss the litigation. Since Michigan did not even attempt to comply with Rule 11(c)(2)'s safe harbor, its entitlement to Rule 11 sanctions is derivative—*at best*—of Detroit's entitlement. If Detroit's BIO admissions nullify Detroit's Rule 11 sanction award, then Michigan's Rule 11 sanction award also is nullified. But even if the Court finds Detroit's Rule 11 award proper, Michigan's joinder did not satisfy Rule 11's safe-harbor.

5. Although Detroit argued that Rule 11 provides an alternate basis to §1927 for maintaining the suit after December 14, 2020, Detroit BIO 25, the 1993 Rule 11 amendments' preliminary draft sanctioned "presenting or maintaining a [covered contention]" (proposed Rule 11(b))[2] but the adopted version sanctions "signing, filing, submitting, or later advocating [a covered document]." FED. R. CIV. P. 11(b). "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) (citation omitted). In other words, Rule 11(b) does not cover simply not withdrawing a covered document.

Under the circumstances, the Court should review the Rule 11 sanctions.

B. The §1927 sanction was improper and requires this Court's review.

Regarding sanctions under 28 U.S.C. §1927, petitioners' motion to expedite raised several new and cert-worthy issues of a controlling nature.

1. Given defendants' burden to prove mootness, *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000), Detroit's admission that Hawaii's electoral votes were

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[2] This argument did not appear in the motion to expedite and is based on a document that the Administrative Office of the U.S. Courts posted Feb. 21, 2024, at https://www.uscourts.gov/rules-policies/archives/preliminary-draft/preliminary-draft-proposed-amendments-1991 (last visited Mar. 18, 2024).

swapped in January after the 1960 election means Detroit cannot possibly prove the mootness on which the §1927 sanctions were based. *Compare* Detroit BIO 23 *with Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 161 (2016) (relief must be impossible). Merits relief was thus not *impossible*, for the 2020 election, *Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992), to say nothing of subsequent elections.

2. Petitioners' purported admission in their request for *interim* relief for the 2020 election in this Court in No. 20-815 simply does not concede that *merits* relief was moot for 2020 and *future elections* in the district court. *See* 13C CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE §3533.3.1 & n.43 (3d ed.) ("preliminary injunction issue may be moot even though the case remains alive on the merits"); *Univ. of Texas v. Camenisch*, 451 U.S. 390, 394 (1981); *Tropicana Product Sales, Inc. v. Phillips Brokerage Co.*, 874 F.2d 1581, 1583 (8th Cir. 1989); *Gjertsen v. Bd. of Election Comm'rs*, 751 F.2d 199, 201 (7th Cir. 1984). In a decision binding on the Secretary of State, "[d]ismissal of these preliminary-injunction appeals, of course, does not render moot the underlying district court litigation." *Boagert v. Land*, 543 F.3d 862, 864 (6th Cir. 2008).

Under the circumstances, the Court should review the §1927 sanction and the related issue of justiciability under Article III of claims under the Elections and Electors Clauses. If we are doomed to repeat the 2020 election's serial violations of those clauses in 2024, future plaintiffs should know at least that they can continue their case vis-à-vis 2026 and future elections.

C. The bar-referral relief was improper and requires this Court's review.

Detroit's BIO (at 5) indicated that Detroit sought bar-referral relief under Local Rule 83.22(c), not under Rule 11. Regarding that bar-referral relief, petitioners' motion to expedite raised several new and cert-worthy issues of a controlling nature.

1. While movants for an attorney-fee sanction would have an Article III interest in recovering their fees, 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), and Detroit has no direct stake in bar-referral relief against petitioners, and its general interest in having the law enforced cannot support standing. *Linda R. S. v. Richard D.*, 410 U.S. 614, 619 (1973); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 574-78 (1992).
2. The Michigan respondents are the Governor and Secretary of State in their official capacities, Pet.App:224a, which—as executive offices. *League of Women Voters of Mich. v. Sec'y of State*, 506 Mich. 905, 908 (2020); *Sharp v. Genesee Cty. Election Comm'n*, 145 Mich. App. 200, 205 (Ct. App. 1985) (citing MICH. CONST. art. 5, §21)—also lack standing for bar-referral relief.[3]

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[3] Michigan's Attorney Discipline Board is "the adjudicative arm of the Supreme Court for discharge of its exclusive constitutional responsibility to supervise and discipline Michigan attorneys." *Grievance Adm'r v. Underwood*, 462 Mich. 188, 193 (2000) (interior quotation marks omitted). Moreover, Michigan's judicial power is "vested exclusively" in the judicial

(Footnote cont'd on next page)

3. The suggestion that the non-signatory counsel were practicing before the Eastern District is a non-obvious—and likely wrong—interpretation of the local rules. *See* Mot. to Expedite 19-23. Before sanctioning the non-Michigan counsel, Rule 83(b) required notice.

Prior to Detroit's BIO, it was not known that Detroit sought bar-referral relief under Local Rule 83.22(c). Under the circumstances, the Court should review the district court's bar-referral relief.

II. FAILURE TO ADDRESS THE MOTION TO EXPEDITE VIOLATED DUE PROCESS, SO REHEARING IS IN THE INTERESTS OF JUSTICE.

Given that the docket does not show the Clerk's Office distributed petitioners' motion to expedite and that the order denying the writ of *certiorari* does not deny that motion as moot, the Justices appear never to have received the motion. If petitioners' new arguments reproduced here are not "intervening" or are deemed "previously presented," notwithstanding that the lack of distribution or resolution, the intervening issue not previously presented is the Court's ignoring the motion to expedite.

The Court's review by *certiorari* is discretionary and not a matter of right, *San Franciso v. Sheehan*, 575 U.S. 600, 610 (2015), but due process is a right. U.S. CONST. amend V, cl. 4. Recognizing that the Court must process many petitions and that the Justices have devised a process to separate petitions

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branch. MICH. CONST. art. 6, § 1. Under MICH. CONST. art. 3, § 2, the executive cannot usurp the judiciary's powers except as the Michigan Constitution expressly provides.

in which they are interested from petitions that they intend to deny,[4] petitioners nonetheless respectfully submit that a court abuses its discretion when it ignores an argument. *See, e.g.*, *United States v. Lynn*, 592 F.3d 572, 585 (4th Cir. 2010) ("court erred and so abused its discretion by ignoring [a party's] non-frivolous arguments"); *Lony v. E.I. Du Pont de Nemours & Co.*, 935 F.2d 604, 612 (3d Cir. 1991); *Ahanchian v. Xenon Pictures, Inc.*, 624 F.3d 1253, 1261-62 (9th Cir. 2010);; *cf. Garrett v. San Francisco*, 818 F.2d 1515, 1518 n.3 (9th Cir. 1987) (failure to exercise discretion is legal error reviewed de novo); *Iglesias v. Mukasey*, 540 F.3d 528, 531 (7th Cir. 2008).

Further, assuming *arguendo* that this matter was already on the "dead list" when the motion to expedite was filed, cases in that jurisprudential gray zone (*i.e.*, not yet denied) remain amenable to being revived before an order denies the writ of *certiorari*. Under the circumstances, in the interests of justice and due process, the Court should consider petitioners' motion to expedite.

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[4] Reportedly, the Court's Justices divide the cases scheduled for a conference into two lists: the "discuss list" for the Justices to discuss at conference, and the "dead list" consisting of the rest of the cases set for that date's conference. Margaret Meriwether Cordray & Richard Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 WASH. U.L.Q. 389, 399 (2004) (collecting authorities). A dead-list case remains alive until the Court issues its order denying the writ of *certiorari*, even though—as a practical matter perhaps—the Court's Justices have already decided to deny the writ of *certiorari*.

III. IN LIEU OF REQUIRING A RESPONSE TO THIS PETITION FOR REHEARING, THE COURT COULD REQUIRE A RESPONSE TO THE MOTION TO EXPEDITE.

Rule 44.3 provides that—barring extraordinary circumstances—the Court will request a response before granting a petition for rehearing. As a variation on that theme, instead of ordering a response to this petition, the Court could direct respondents to file their response to petitioners' motion to expedite. The difference between these two paths is twofold: (1) the motion includes some issues from the underlying petition, as well as new issues of a controlling nature, whereas this petition includes only the latter, *cf.* S.Ct. R. 44.2; and (2) the motion argues for summary disposition, whereas the 3,000-word limit here does not allow for that. Petitioners respectfully submit that the circumstances warrant a slight departure from the process outlined in Rule 44.3. But the Court need not grant the petition for rehearing unless it decides to grant some aspects of the motion to expedite, such as summary disposition. By contrast, if the Court denies summary disposition on the merits after the motion is fully briefed, the Court later could deny this petition.

CONCLUSION

The petition for rehearing should be granted. In lieu of requesting a response, petitioners respectfully submit that the Court should deem their motion to expedite filed on February 13, 2024, as the operative filing, deem that motion a petition for rehearing, set a schedule for respondents to oppose and petitioners to reply, and decide this matter summarily—if rehearing

is granted—or deny rehearing after briefing the motion if rehearing is unwarranted.

March 18, 2024 Respectfully submitted,

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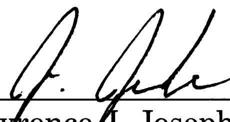
COUNSEL CERTIFICATION

Pursuant to this Court's Rule 44.2, the undersigned petitioners' counsel certifies that the grounds in the accompanying Petition for Rehearing are "limited to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented" and are not presented for delay.

March 18, 2024

Respectfully submitted,



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