No. 23-497

IN THE

Supreme Court of the United States

L. LIN WOOD,
Petitioner,

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

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January 17, 2024

QUESTIONS PRESENTED

Petitioner was sanctioned for frivolous filings in a case purportedly seeking to overturn the result of the 2020 presidential election in Michigan. Petitioner claims that the district court erred in sanctioning him under Rule 11 because he did not sign any sanctionable filing. The district court did not find that Petitioner *signed* a sanctionable filing; the court found that Petitioner was *responsible* for the sanctionable conduct. The Rule 11 sanctions were also proper because both the City of Detroit and the district court complied with the procedural requirements of Rule 11.

The questions presented are:

1. Whether a court has the authority to sanction an attorney it determines is responsible for a violation of Rule 11 if that lawyer did not sign the improper filings.

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

PARTIES TO THE PROCEEDINGS

Petitioner is L. Lin Wood, who was counsel for plaintiffs in the district court and appellant in the court of appeals.

Petitioner's co-counsel in the district court—Sidney Powell, Brandon Johnson, Howard Kleinhendler, Julia Haller, Gregory Rohl and Scott Hagerstrom—have filed a separate Petition (No. 23-486).

Sanctions against two of Petitioner's 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.

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The Sixth Circuit's Opinion is reported at 71 F.4th 511 and reprinted in Petitioner's Appendix ("Pet. App.") at 1a. The district court Opinion and Order finding that Petitioner violated Rule 11 is published at 556 F. Supp. 3d 680 and reprinted at Pet. App. 65a. The unpublished district court Opinion and Order regarding the monetary sanctions awarded is reprinted at Pet. App. 40a.

JURISDICTION

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

STATEMENT OF THE CASE

Petitioner and his co-counsel purportedly filed the underlying case 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 were 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 because most of the allegations of purported fraud were based on allegations 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).

Procedural Background

Although they were seeking emergency relief affecting the outcome of the 2020 General Election, Petitioner and his co-counsel waited three weeks after the Election before filing their initial complaint on November 25, 2020. Pet. App. 520a. The City filed a motion to intervene on November 27, 2020, which was granted on December 2, 2020. Petitioner and his co-counsel filed an Amended Complaint on November 29, 2020. On that same date, Petitioner and his co-counsel 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"). Respondent's Appendix ("Resp. App.") 1a. 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, abstention doctrine and lack of standing. Pet. App. 169a.

On December 15, 2020, the City served a Rule 11 motion upon Petitioner. Pet. App. 229a. Contrary to

Petitioner's claim that the served Rule 11 motion did not contain a request for "bar-referral relief[,]" the served motion indicated that the City would seek an order "[r]eferring Plaintiffs' counsel to the State Bar of Michigan for grievance proceedings[.]" Pet. at 5; Pet. App. 237a at ¶ i.[1] The served Rule 11 motion 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. Resp. App. 7a-22a. On January 5, 2021, 21 days after serving the Rule 11 motion, the City filed the Rule 11 motion. Pet. App. 239a.

On July 12, 2021, the district court held a six-hour hearing regarding the motions for sanctions, during which Petitioner and his 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 Petitioner and his co-counsel under Rule 11, § 1927 and the court's inherent authority and ordering that Petitioner pay the City's reasonable attorney fees. Pet.

[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. 237a at ¶ i with Pet. App. 247a at ¶ j. The supplemental disciplinary action 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.

App. 65a. On December 2, 2021, the district court issued an Opinion and Order requiring Petitioner and his co-counsel to pay $153,285.62 in attorney fees to the City. Pet. App. 40a.

On December 3, 2021, Petitioner 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. 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 Petitioner's pre-filing inquiry "was patently inadequate." Pet. App. 12a-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 Petitioner's argument that the case gained "new life" when "an alternative slate of electors for Michigan was advanced in early January" unpersuasive because Petitioner and his co-counsel 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-31a. 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.

Petitioner states that "none of the[] bases [identified by the Sixth Circuit] for upholding sanctions appeared within Detroit's served [Rule 11] motion." Pet. at 6. Petitioner is incorrect. The City warned Petitioner that the claim for violation of the Elections and Electors Clause was frivolous. Pet. App.

234a at ¶ 10. The Sixth Circuit found that claim "legally and factually frivolous." Pet. App. 26a. The City warned Petitioner that "controlling law contradicted the claims." Pet. App. 234a-235a 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 statute. 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. 23a. The City also referred Petitioner to the City's Response to Motion for Injunctive Relief, which detailed many of the frivolous factual allegations in the complaint. Pet. App. 235a-236a at ¶ 17. As just one example, the City's Response to Motion for Injunctive Relief argued that the factual allegations regarding Dominion voting machines were frivolous because they presumed that Michigan used a ballot marking system that would not permit hand recounts. Resp. App. 21a-22a; see also, Pet. App. 525a 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 for a recount of paper ballots, and that Petitioner and his co-counsel would have been aware of this fact had their pre-filing inquiry not been "patently inadequate." Pet. App. 11a-

13a.

On August 8, 2023, the Sixth Circuit denied Petitioner's request for a rehearing *en banc*. Pet. App. 202a. On August 11, 2023, the Sixth Circuit issued an Order staying the mandate to allow Petitioner time to seek review by this Court. Pet. App. 204a.

REASONS FOR DENYING THE PETITION

I. The District Court Properly Determined that Petitioner was Responsible for the Sanctionable Conduct

Petitioner argues that the district court could not sanction him under Rule 11 because he did not sign any of the filings the district court found sanctionable. But, the district court did not sanction Petitioner based upon a finding that he signed a sanctionable filing under Rule 11(b). The district court sanctioned Petitioner because it found that he was *responsible* for the identified violations of Rule 11(b), under Rule 11(c)(1).[2]

Under Rule 11(c)(1), "if…the court determines

[2] In the district court, in the Sixth Circuit, and now here, Petitioner has relied upon irrelevant case law that precedes the current version of Rule 11. Petitioner cites *Pavelic & LeFlore v. Marvel Ent. Grp.*, 493 U.S. 120, 126 (1989) for the proposition that Rule 11 imposes a "personal, nondelegable responsibility" upon the signer of a document. Pet. At 9. That case was decided before the 1993 amendments to Rule 11, under which "the court [may] consider whether other attorneys in the firm, co-counsel, other law firms, or the party itself should be held accountable for their part in causing the violation." 1993 Rule 11 Advisory Committee Notes.

that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule *or is responsible for the violation*." (emphasis added). Rule 11 authorizes a district court to impose Rule 11 sanctions on attorneys who have not signed, filed, submitted or later advocated a sanctionable filing, if the court determines that the sanctioned attorneys are responsible for another attorney's violation of Rule 11(b).

Here, the district court determined that the Amended Complaint and Motion for Injunctive Relief violated Rule 11(b). Pet. App. 114a-159a. And, the district court found that Petitioner was *responsible* for the violation of Rule 11(b). Pet. App. 90a-96a. The Sixth Circuit determined that this finding, which was based in part on the district court's assessment of Petitioner's credibility, was not clearly erroneous. Pet. App. 33a. Petitioner has not identified any reason for this Court to review the district court's factual findings regarding his responsibility for the violations of Rule 11(b).

II. The Purported Circuit Split Regarding Rule 11 Does Not Support Review

A. Petitioner has Waived any Argument Regarding the Purported

Circuit Split

Petitioner urges this Court to grant the Petition based on a purported split among the Circuits regarding whether Rule 11(c)(2) requires that a served Rule 11 motion be absolutely identical to a filed Rule 11 motion. Petitioner has waived any argument regarding the requirements of Rule 11(c)(2) because that issue was not raised in the Sixth Circuit.[3] 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)).

B. The City Complied with the Rule 11(c)(2) "Safe-Harbor" Requirement

Even if Petitioner had preserved arguments related to Rule 11(c)(2) they would not provide a meaningful basis to grant the Petition, because the City complied with the requirements of that Rule.

Under Rule 11(c)(2), before a party can seek sanctions, "[t]he motion [for sanctions] must be served

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[3] In the district court, Petitioner 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. Petitioner did not argue that the City failed to comply with Rule 11(c)(2) in the Sixth Circuit.

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

Petitioner argues that the City of Detroit failed to comply with the safe-harbor requirement because, he claims, it served a "letter" rather than a "motion." Pet. at 17. Petitioner therefore argues that, if this case had arisen in a Circuit which requires service of a Rule 11 motion to satisfy Rule 11(c)(2), Detroit's motion for Rule 11 sanctions "would have been denied." Pet. at 16. That argument is meritless.

First, the City served the Rule 11 motion 21 days before it was filed. Pet. App. 229a. The City's served Rule 11 motion described the specific conduct that allegedly violated Rule 11(b). The City alleged in the December 15, 2020, served motion that Petitioner violated Rule 11(b)(1) by filing the lawsuit for the improper purpose of undermining the public's "faith in the democratic process and their trust in our government." Pet. App. 232a. The City explained that Petitioner violated Rule 11(b)(2) because the claims asserted were moot, barred by laches, were contrary to controlling law and that the Plaintiffs lacked standing to assert them. Pet. App. 233a-235a. And, the City explained that Petitioner violated Rule 11(b)(3) because the factual allegations lacked support, as explained in the City's Response to Motion for

Injunctive Relief, which was incorporated by reference. Pet. App. 235a-236a. That Petitioner refers to the served motion as a "notice" or a "letter" does not alter these indisputable facts.

Petitioner would have this Court believe that the served motion was a "7 page bare bones motion[,]" which "had grown to 10 pages" when it was served. Pet. At 12. That mischaracterization of the record is easily resolved by comparing the served motion, found at Pet. App 337a, with the filed motion, found at Pet. App 384a. The motion served December 15, 2020, 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.[4]

Second, this case *did* arise in a Circuit which

[4] The distinction between the issues related to Rule 11 and those related to Local Rule 83.22 was clearly set forth in the titles of the motions. The served motion referred to Rule 11 sanctions only, the filed motion, which was not limited to Rule 11, was entitled "The City of Detroit's Motion for Sanctions, For Disciplinary Action, for Disbarment Referral, and for Referral to State Bar Disciplinary Bodies."

requires service of a Rule 11 motion to satisfy Rule 11(c)(2). *Penn, LLC v. Prosper Bus. Dev. Corp.*, 773 F.3d 765, 767 (6th Cir. 2014) (holding that Rule 11(c)(2) requires service of a motion and noting that "the word 'motion' [in Rule 11(c)(2)] definitionally excludes warning letters[.]"). If this court wants to address a Circuit split regarding application of the Rule 11 safe harbor in the contest of inadequate notice, this is simply the wrong case—notice *is* required in the Sixth Circuit and it *was* provided by the City.

C. The Purported Circuit Split Does Not Support Review

Notwithstanding his failure to address Rule 11(c)(2) in the Sixth Circuit, Petitioner urges this Court to grant the Petition to resolve a split between the Circuits regarding what, exactly, constitutes a "motion" under Rule 11(c)(2). 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]

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).[6]

This minor variation in the application of Rule 11(c)(2) does not require this Court's attention.

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[5] Petitioner argues 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 11. Petitioner misconstrues 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 to the filed motion, including a supporting brief and all exhibits.

[6] Petitioner claims that the Federal Circuit also applies the "substantial compliance" standard, but does not support that statement with citation to any authority. Pet. at 7.

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

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. A party receiving such notice has the opportunity to consider the merits of the challenged pleading and to withdraw that pleading to avoid potential sanctions. Petitioner was given that opportunity and preferred to continue to advance the false narrative about a stolen

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[7] 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*, 773 F.3d at 768 (noting that the Second, Third, Fourth, Fifth, Sixth, Eighth, Ninth and Tenth Circuits all require service of a Rule 11 motion.).

election rather than to avail himself of the safe harbor he had been offered.

III. Petitioner's Arguments Regarding Bar Referral Relief are Moot

On July 4, 2023, Petitioner permanently and irrevocably surrendered his law license in response to disciplinary proceedings brought by the Office of the General Counsel of the State Bar of Georgia. *See* Jacqueline Thomsen, *Lawyer who challenged Trump loss retires amid disciplinary probes*, REUTERS (July 5, 2023), available at https://www.reuters.com/legal/legalindustry/lawyer-who-challenged-trump-loss-retires-amid-disciplinary-probes-2023-07-05/ Accordingly, Petitioner's claim that the district court erred in referring him to bar authorities for investigation is now moot.

CONCLUSION

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

Respectfully submitted,

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January 17, 2024

APPENDIX

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APPENDIX

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

TIMOTHY KING, MARIAN ELLEN SHERIDAN, JOHN EARL HAGGARD, CHARLES JAMES RITCHARD, JAMES DAVID HOOPER and DAREN WADE RUBINGH,, Plaintiffs, v. GRETCHEN WHITMER, in her official capacity as Governor of the State of Michigan, JOCELYN BENSON, in her official capacity as Michigan Secretary of State and the Michigan BOARD OF STATE CANVASSERS, Defendants.	No. 2:20-cv-13134 Hon. Linda V. Parker

RESPONSE TO PLAINTIFFS' EMERGENCY MOTION FOR DECLARATORY, EMERGENCY, AND PERMANENT INJUNCTIVE RELIEF

The City of Detroit (the "City") respectfully submits this Response to Plaintiffs' Emergency Motion for Declaratory, Emergency and Permanent Injunctive Relief.

[Tables of Contents and Authorities omitted]

STATEMENT OF THE ISSUES PRESENTED

I. Should Plaintiffs' Motion be denied because Plaintiffs do not have standing?

The City answers: "Yes."

II. Should Plaintiffs' Motion be denied under abstention principles?

The City answers: "Yes."

III. Should Plaintiffs' Motion be denied based on laches?

The City answers: "Yes."

IV. Should Plaintiffs' Motion be denied because Plaintiffs cannot meet the standards for injunctive relief?

The City answers "Yes"

CONTROLLING OR MOST APPROPRIATE AUTHORITIES

Ashcroft v. Iqbal, 556 U.S. 662 (2009)

Burford v. Sun Oil Co., 319 U.S. 315 (1943)

Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976)

Costantino v. Detroit et al, Wayne County Circuit Case No. 20-014780-AW

Courtney v. Smith, 297 F.3d 455 (6th Cir. 2002)

Donald J. Trump for President, Inc. v. Pennsylvania, No. 20-3371, 2020 WL 7012522 (3d Cir. Nov. 27, 2020)

Railroad Commission of Texas v. Pullman Co., 312 U.S. 496 (1941)

Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982)

U.S. Const. art. III, § 2

Fed. R. Civ. P. 9(b)

U.S. attorneys and FBI agents have been working to follow up specific complaints and information they've received, but to date, we have not seen fraud on a scale that could have effected a different outcome in the election.

There's been one assertion that would be systemic fraud and that would be the claim that machines were programmed essentially to skew the election results. And the DHS and DOJ have looked into that, and so far, we haven't seen anything to substantiate that

– U.S. Attorney General William Barr, statement to the Associated Press[1]

INTRODUCTION

This is the lawsuit that one-time Trump legal team member Sidney Powell has been promising would be "biblical." Perhaps, plaintiffs should have consulted with Proverbs 14:5, which teaches that "a faithful witness does not lie, but a false witness breathes out lies."

Few lawsuits breathe more lies than this one. The allegations are little more than fevered rantings of conspiracy theorists built on the work of other conspiracy theorists. Plaintiffs rely on affidavits of so-called "experts"—really confidence men who spread lie after lie under cover of academic credential— which misstate obviously false statistics. These "experts" use academic jargon as if that could transmute their

[1] https://apnews.com/article/election-2020-joe-biden-donald- trump-elections- william-barr-b1f1488796c9a98c4b1a9061a6c7f49d?cid=ed_npd_bn_tw_bn.

claims from conspiracy theory to legal theory. The key "factual" allegations from the supposed fact witnesses, some of whom attempt to cloak their identities while attacking democracy, have been debunked.

The allegations about supposed fraud in the processing and tabulation of absentee ballots by the City of Detroit at the TCF Center have been rejected by every court which has considered them. The claims were rejected in *Stoddard v. City Election Commission of the City of Detroit*, Wayne County Circuit Court Case No. 20-014604-CZ, Opinion and Order (Nov 6, 2020), from which no appeal has been filed. The claims were rejected by the Michigan Court of Claims in *Donald J. Trump for President Inc. v. Benson*, Mich. Court of Claims Case No. 20-000225- MZ, Opinion and Order (Nov. 5, 2020) (Ex. 1). The campaign waited until *December* 1, 2020 to file a brief in support of its application for leave to appeal to the Michigan Court of Appeals. And, importantly, the claims were tested and found wanting in *Costantino v. Detroit et al*, Wayne County Circuit Case No. 20-014780-AW, in an Opinion and Order entered by Chief Judge Timothy M. Kenny on Nov. 13, 2020. The Complaint in this lawsuit explicitly relies on the same allegations as those made in the *Costantino* matter, but fails to advise this Court that those claims were rejected in that case, with Plaintiffs' applications to the Michigan Court of Appeals and Michigan Supreme Court being expeditiously denied. *See Costantino v. Detroit*, Mich COA Case No. 355443, Order (Nov 16, 2020) (Ex. 2); *Costantino v Detroit*, No. 162245, 2020 WL 6882586, at *1 (Mich, Nov 23, 2020) (Ex. 3).

If any of the claims in this lawsuit had merit, that would have been demonstrated in those cases. If any of the conspiracy theories in this case had merit,

they would have been brought in those cases or by the Trump campaign. Donald J Trump for President Inc. would have pushed the claims in the lawsuit it filed in the Western District of Michigan on November 11, 2020, rather than voluntarily dismissing the case under Fed. R. Civ. P. 41(a)(1)(A) on November 18, 2020, after being served with a Motion to Dismiss and concurrences. *See Donald J. Trump for President Inc. v. Benson*, WD Mich. Case No. 1:20-cv-1083. Or the Trump campaign would have pursued the claims in the Michigan Court of Claims in the lawsuit they filed on November 4, 2020, *supra*. But, even the Trump campaign lawsuits have avoided the off-the-wall claims included this lawsuit, with the campaign famously attempting to distance itself from Sidney Powell and this lawsuit (after a press event highlighting Ms. Powell as part of the "super-team").

It is difficult to know whether Plaintiffs and their counsel actually believe any of the ridiculous claims they allege or whether this entire lawsuit is designed solely as a fundraising exercise, a talking point, something they can use to bolster their imaginary claims of widespread voter fraud. But, the fact that the Complaint is frivolous, does not mean that this lawsuit is not dangerous to our democracy. Plaintiffs seek nothing less than a court-ordered coup d'état. They, quite literally, ask that the results for the selection of Michigan's Presidential electors in the November 3, 2020 election "be set aside."

If Plaintiffs actually believed they were making legitimate claims, they would have filed their motions months, or years ago. After all, the globe-spanning conspiracy claims regarding Dominion supposedly go back for years. But no lawsuit was filed related to the 2016 lawsuit, when Donald Trump won by narrow

margins in Michigan, Georgia and Wisconsin. Instead, Plaintiffs waited almost a full month after the 2020 election was held to file this "lawsuit." Then, they waited days before bothering to serve the Complaint and file their so-called "emergency" Motion. They were likely waiting to file a remarkably similar Motion in Georgia, with the same "experts" making the same specious arguments. Unsurprisingly, the case they filed in Wisconsin also finds a way to challenge enough votes to overcome Trump's deficit there.

Descending even farther into conspiracy theory does not—and cannot— change the outcome. The law is the law. Plaintiffs do not have standing. This lawsuit is barred by laches. This lawsuit is barred by abstention doctrines. And, the facts are the facts. Numerous public servants and journalists have started the process of debunking the hundreds of pages of nonsense in Plaintiffs' Complaint, Motion and Exhibits. It would take far more pages than allowed by the Local Rules to include all of the information disproving Plaintiffs' claims, but some of the highlights are identified in the following Statement of Facts.

STATEMENT OF FACTS

A. Plaintiffs' Allegations Relating to Supposed Electoral Fraud in Detroit Have Been Rejected by the Michigan Courts Which Have Addressed Them

1. Republican Challengers

Plaintiffs repeatedly assert that Republican challengers were not given "meaningful" access to the ballot processing and tabulation at the Absent Voter

Counting Board located in Hall E of the TCF Center. Nearly all of Plaintiffs' requested relief is predicated on this claim. The theory is that if certain challengers were not in the TCF Center, the ballots counted there should be deemed "unlawfully cast," somehow in violation of Plaintiffs' constitutional rights. The legal theory is nonsensical. But it is also important to note that the underlying claim is false.

Challengers are allocated one per respective party or organization to each counting board. The only challenger right specifically listed with respect to absent voter ballots is to observe the recording of absentee ballots on voting machines. M.C.L. § 168.733(1)(e)(i) ("A challenger may do 1 or more of the following: … Observe the recording of absent voter ballots on voting machines.") This requirement was met at all times.

In *Costantino*, the City submitted an affidavit and supplemental affidavit from Christopher Thomas disproving plaintiffs' claims. Because so many of the claims in this lawsuit are duplicative of the claims in that lawsuit, the City is attaching to this brief, the affidavits submitted by Mr. Thomas in state court. (Ex. 4 and 5). Mr. Thomas's knowledge of Michigan election law is unparalleled; he served in the Secretary of State Bureau of Election for 40 years beginning in May 1977 and finishing in June 2017. (Thomas Aff. ¶ 1, Ex. 4). In June 1981, he was appointed Director of Elections and in that capacity implemented four Secretaries of State election administration, campaign finance and lobbyist disclosure programs. (*Id.*). Mr. Thomas was brought in to serve as Senior Advisor to Detroit City Clerk Janice Winfrey beginning on September 3, 2020 until December 12, 2020. (*Id.* ¶ 2). In this capacity, he advised the Clerk and

management staff on election law procedures, implementation of recently enacted legislation, revamped absent voter counting board, satellite offices and drop boxes, Bureau of Election matters and general preparation for the November 3, 2020 General Election. (*Id.*). Mr. Thomas had oversight and was involved in nearly all aspects of the election in the City, including the processing and tabulation at the TCF Center. (*Id.*).

As Mr. Thomas attested, while six feet of separation was necessary for health reasons, the Department of Elections at some expense, provided large monitors (photo attached to Mr. Thomas' affidavit) to keep the inspectors safe and provide the challengers with a view of what was being entered, without crossing the 6-foot distancing barrier. (Thomas Aff. ¶ 14, Ex. 4). The monitors made observing the process very transparent. (*Id.*).

When it became clear that the number of challengers had reached or exceeded the lawful quota and the room had become over-crowded, for a short period of time, *additional* challengers were not admitted until challengers from their respective parties voluntarily departed. This is affirmed by Christopher Thomas and others. (Thomas Aff., ¶¶ 32-35 Ex. 4; see also Garcia Aff., Ex. 6).

Plaintiffs also claim that election workers at the TCF Center did not record certain challenges. Apparently, Plaintiffs are asserting that any "challenge" that someone makes up must be recorded. However, challengers' rights and responsibilities are subject to the law. At a polling place, a challenger can challenge "the voting rights of a person who the challenger has good reason to believe is not a registered elector." M.C.L. § 168.733. Under a

separate section, at a polling place, a qualified challenger may question "the right of an individual attempting to vote who has previously applied for an absent voter ballot and who on election day is claiming to have never received the absent voter ballot or to have lost or destroyed the absent voter ballot." M.C.L. § 168.727. In that situation, an election inspector is to make a report about the challenge. The statute further provides that:

> A challenger shall not make a challenge indiscriminately and without good cause. A challenger shall not handle the poll books while observing election procedures or the ballots during the counting of the ballots. A challenger shall not interfere with or unduly delay the work of the election inspectors. An individual who challenges a qualified and registered elector of a voting precinct for the purpose of annoying or delaying voters is guilty of a misdemeanor.

M.C.L. § 168.727.

Plaintiffs provide little detail of the so-called challenges which were "disregarded." But, as Christopher Thomas attests, he is not aware of any valid challenge being refused or ignored. (Thomas Aff ¶ 39, Ex. 4). All election workers were instructed to record valid challenges. What election workers did not need to record were the numerous frivolous and legally invalid challenges which were made. Republican making wholesale challenges based on complete misunderstandings of law. (*Id.* ¶ 39). Challengers were congregating in large groups standing in the main aisles and blocking Election Inspectors' movement. (*Id.* ¶ 35). In one instance, challengers exhibited disorderly behavior by

chanting "Stop the Vote." (*Id.*). Yelling "Stop the vote" or all absent ballots are invalid are not legitimate challenges and there was no requirement that they be record. That was an abuse of the process and a violation of the law.

2. Allegations of "Pre-Dating"

Plaintiffs' allegations of "pre-dating" are based on the affidavits of Jessica Connarn and Jessy Jacob initially submitted in the *Costantino* Complaint. (First Amended Complaint ("FAC") ¶¶ 88 and 90). These claims have been thoroughly debunked. Ms. Connarn's claims were addressed by the Michigan Court of Claims which held:

> Plaintiffs have submitted what they refer to as "supplemental evidence" in support of their request for relief. The evidence consists of: (1) an affidavit from Jessica Connarn, a designated poll watcher; and (2) a photograph of a handwritten yellow sticky note. In her affidavit, Connarn avers that, when she was working as a poll watcher, she was contacted by an unnamed poll worker who was allegedly "being told by other hired poll workers at her table to change the date the ballot was received when entering ballots into the computer." She avers that this unnamed poll worker later handed her a sticky note that says "entered receive date as 11/2/20 on 11/4/20." Plaintiffs contend that this documentary evidence confirms that some unnamed persons engaged in fraudulent activity in order to count invalid absent voter ballots that were received after election day.
>
> This "supplemental evidence" is inadmissible

> as hearsay. The assertion that Connarn was informed by an unknown individual what "other hired poll workers at her table" had been told is inadmissible hearsay within hearsay, and plaintiffs have provided no hearsay exception for either level of hearsay that would warrant consideration of the evidence. See MRE 801(c). The note—which is vague and equivocal—is likewise hearsay. And again, plaintiffs have not presented an argument as to why the Court could consider the same, given the general prohibitions against hearsay evidence. See *Ykimoff v Foote Mem Hosp*, 285 Mich App 80, 105; 776 NW2d 114 (2009). Moreover, even overlooking the evidentiary issues, the Court notes that there are still no allegations implicating the Secretary of State's general supervisory control over the conduct of elections. Rather, any alleged action would have been taken by some unknown individual at a polling location.

(*See* Ex. 7).

The reliance on the "pre-dating" allegations in the *Costantino* matter is misplaced. Those allegations were made by Jessy Jacob, a furloughed City employee, with no known prior election experience, who was given a limited assigned to the Department of Elections on a short-term basis. (Ex. 8, Affidavit of Daniel Baxter, ¶ 7). Her claim appears to have been based on flawed semantics, because all absentee ballots she handled at the TCF Center had been received by 8:00 p.m. on November 3, 2020. The ballots had all been painstakingly verified by City employees (in a public process) before they were brought to the

TCF Center for tabulation. No ballots were backdated; instead, for a small number of ballots, election workers at the TCF Center were directed to enter the date received into the computer system, as stamped on the envelope. Ms. Jacob was simply marking the date the ballot had been received. (Thomas Aff ¶¶ 12, 20). All dates on the envelopes were on or before November 3, 2020; no ballots received by the Detroit City Clerk after 8:00 p.m. on November 3, 2020 were even brought to the TCF Center. (*Id.* ¶¶ 20, 27). Absentee ballots were not "backdated" in the Qualified Voter File; they were properly "dated" in the system, based upon time stamps on the ballot envelopes. The court in Costantino agreed, holding:

> Ms. Jacob also alleges misconduct and fraud when she worked at the TCF Center. She claims supervisors directed her not to compare signatures on the ballot envelopes she was processing to determine whether or not they were eligible voters. She also states that supervisors directed her to "pre-date" absentee ballots received at the TCF Center on November 4, 2020. Ms. Jacob ascribes a sinister motive for these directives. Evidence offered by long-time State Elections Director Christopher Thomas, however, reveals there was no need for comparison of signatures at the TCF Center because eligibility had been reviewed and determined at the Detroit Election Headquarters on West Grand Blvd. Ms. Jacob was directed not to search for or compare signatures because the task had already been performed by other Detroit city clerks at a previous location in compliance with MCL 168.765a. As to the allegation of "pre-dating" ballots, Mr. Thomas explains

> that this action completed a data field inadvertently left blank during the initial absentee ballot verification process. Thomas Affidavit, #12. The entries reflected the date the City received the absentee ballot. *Id.*

(*See* Ex. 9, Opinion and Order of Wayne County Circuit Order). Notably, prior to the filing of these lawsuits, Ms. Jacob did not report any of the issues addressed in her affidavit to any of her supervisors. (*See* Ex. 8, Baxter Affidavit, ¶ 16).

It was physically impossible for any election worker at the TCF Center to have counted or processed a ballot for someone who was not an eligible voter or whose ballot was not received by the 8:00 p.m. deadline on November 3, 2020. No ballot could have been "backdated," because no ballot received after 8:00 p.m. on November 3, 2020 was ever at the TCF Center. (Ex. 4, Thomas Aff., ¶¶ 19- 20).

3. Allegations Regarding Ballot Duplication

Plaintiffs allege that the ballot duplication process was not followed. As Mr. Thomas attested, ballots were duplicated according to Michigan law. Contrary to Plaintiffs' assertion, Michigan election law does not require partisan challengers to be present when a ballot is duplicated; instead, when a ballot is duplicated as a result of a "false read," the duplication is overseen by one Republican and one Democratic inspector coordinating together. That process was followed. (Thomas Aff., ¶ 31). And, again, partisan challengers were at the TCF Center during the entire process. As the Wayne County Circuit Court held in the *Stoddard* matter:

> An affidavit supplied by Lawrence Garcia, Corporation Counsel for the City of Detroit,

> indicated he was present throughout the time of the counting of absentee ballots at the TCF Center. Mr. Garcia indicated there were always Republican and Democratic inspectors there at the location. He also indicated he was unaware of any unresolved counting activity problems.
>
> By contrast, plaintiffs do not offer any affidavits or specific eyewitness evidence to substantiate their assertions. Plaintiffs merely assert in their verified complaint "Hundreds or thousands of ballots were duplicated solely by Democratic party inspectors and then counted." Plaintiffs' allegation is mere speculation.

(Ex. 10, Opinion and Order).

4. Allegations Regarding Ballots Supposedly Counted More than Once

Plaintiffs claim challengers observed ballots repeatedly run through tabulation machines, including "a stack of about fifty ballots being fed multiple times into a ballot scanner counting machine." (FAC ¶ 94). This same claim was made by Melissa Carone, a contractor working for Dominion, who claimed that stacks of 50 ballots were fed through tabulators as many as eight times. (Exh. 5 to FAC, ¶¶4-5). Whatever the challengers and Ms. Carone think they saw, ballots cannot be counted in that manner. If they were correct, hundreds of extra votes would show up in numerous precinct (or absent voter counting boards). This would obviously be caught very quickly on site. (Ex. 5, Thomas Supp. Aff). What the challengers and Ms. Carone claim they saw would also be caught by the Detroit Department of Elections and

the County Canvassing Board during the canvassing which occurs after every election as a matter of law. (*Id.*). While precincts are often off by a few votes at the end of the process due to human error, the result of repeatedly scanning ballots would lead to precincts being off by hundreds or thousands of votes.

Plaintiffs also note that challengers reported that "when a voter was not in the poll book, the election officials would enter a new record for that voter with a birth date of January 1, 1900." (FAC ¶¶ 14, 85, 190 & 191). This claim is actually true, but not evidence of anything improper. As Christopher Thomas attested, and as was explained to Republican challengers on Wednesday, November 4, 2020, the Detroit counting boards were using the Secretary of State e-pollbook, comprised of a downloaded instance (i.e. snapshot) of the Qualified Voter File ("QVF") as it existed late afternoon on Sunday, November 1. (Thomas Aff. ¶ 7, Ex. 4). Since the e- pollbook had not been specifically modified for the AVCB environment, procedural adjustments were required to record ballots. (*Id.* ¶ 15). Specifically, to add a voter in the e-pollbook (or "EPB"), the voter's birthdate needs to be entered. (*Id.*). This is not a legal requirement, but essentially a quirk in the design of the software. (*Id.*). In a *polling place*, where e- pollbook is designed to work, provisional ballots are entered into the e-pollbook manually by inspectors. (*Id.*). The voter as part of the provisional ballot process completes a new voter registration application which contains a birthdate. (*Id.*). In that situation, at a polling place, the date of birth is a data point used to verify the voter. (*Id.*). Thus, the system includes a tab for birthdates. (*Id.*). At an *AVCB*, the inspectors do not have access to a voter's date of birth; moreover, there is no need for that data point to be included, because the voter's signature is the data

point used for verification purposes. (*Id.*). Nevertheless, to process the vote, the e-pollbook requires the date of birth data field to be filled out. (*Id.*). Thus, inspectors were directed to enter the consistent date of birth of January 1, 1900. (*Id.*). The use of January 1, 1900 as a substitute for an actual date of birth is a standard practice by election clerks. (*Id.*). The Republican challengers who questioned the process were satisfied with the explanation and did not lodge (what would have been an obviously frivolous) challenge. (*Id.* ¶ 16). Nevertheless, that claim is raised repeatedly as evidence of "fraud" in this case and others.

5. Allegations Regarding Tabulating Machines

Perhaps the most baseless of Plaintiffs' allegations is a conspiracy theory about vote tabulators. Plaintiffs cite two instances of errors— one in Antrim County and one in Oakland County (Rochester Hills) to insinuate that the tabulating system used in many counties was flawed. The warped logic: because there was an isolated error in Antrim County which uses the same software as Wayne County, and an isolated error in Rochester Hills, which does not use the same software, the votes in Detroit must be thrown out.

The Michigan Department of State released a statement titled "Isolated User Error in Antrim County Does Not Affect Election Results, Has no Impact on Other Counties or States," explaining what happened in Antrim County. (Ex. 11). The statement explains that the "error in reporting unofficial results in Antrim County Michigan was the result of a user error that was quickly identified and corrected; did not affect the way ballots were actually tabulated; and would have been identified in the county canvass

before official results were reported even if it had not been identified earlier." (*Id.*). Essentially, the County installed an update on certain tabulators, but not others. (*Id.*). The tabulators worked correctly, but when they communicated back to the County, the discrepancy in the software versions led to a discrepancy in the reporting. (*Id.*). This was quickly discovered and would certainly have been uncovered in the post- election canvass. (*Id.*).

The Republican clerk of Rochester County, Tina Barton, discredited the allegations of fraud in that City. Officials realized they had mistakenly counted votes from the city of Rochester Hills twice, according to the Michigan Department of State. Oakland County used software from a company called Hart InterCivic, not Dominion, though the software was not at fault. Ms. Barton stated in a video she posted online: "As a Republican, I am disturbed that this is intentionally being mischaracterized to undermine the election process…. This was an isolated mistake that was quickly rectified."[2]

B. Plaintiffs' "Expert" Analyses are Woefully Deficient

Plaintiffs rely on "experts" to amplify their factual allegations and create their grand conspiracy. Essentially, the "experts" attempt to provide cover for the lie that there was somehow fraud in Detroit, accounting for hundreds of thousands of "extra" votes (even though there were slightly less votes in Detroit in 2020 than there were in 2016). Of course, to the

[2] https://www.bridgemi.com/michigan-government/gop-calls- michigan- election-probe-officials-say-their-claims-are-weak.

extent those "experts" are relying on "facts" which are not true or are misinterpreting those facts, their analysis is of no value to this Court.

Plaintiffs' "experts" pepper their reports with speculation, innuendo and "facts" which are simply not true. Plaintiffs' "expert" Russell James Ramsland Jr., an unsuccessful Republican candidate for Congress in 2016, is particularly reckless with the facts. He extrapolates extraordinary vote discrepancies from the well- publicized Antrim County error in reporting early unofficial results. In doing so, he either intentionally ignores the Secretary of State's report or simply does not do his homework. In his November 24, 2020 affidavit, appended as Exhibit 24 of the First Amended Complaint, he reports "In Michigan we have seen reports of 6,000 votes in Antrim County that were switched from Donald Trump to Joe Biden *and were only discoverable through a hand counted manual recount*." (Ramsland Affidavit ¶10; emphasis added). With the slightest due diligence any actual expert would know that there were no hand recounts in Michigan as of that date.[3] Equally troubling, the logical explanation by the Secretary of State, released more than two weeks before this affidavit was prepared and which is discussed in the Amended Complaint, is not even discussed. Presumably, this "expert" did not bother to inquire once he had a conspiracy theory to run with.

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[3] Plaintiffs, who include three nominees to be Trump electors, the Republican County Chair for Antrim County, the Republican County Chair of Oceana County and the Chair of the Wayne County Eleventh Congressional District, as well as their attorneys, should also know that there was no hand

recount in Antrim County.

Similarly, Mr. Ramsland, who is referenced 23 times in the Amended Complaint, explicitly relies upon the affidavit of Melissa Carone in support of his claim that "ballots can be run through again effectively duplicating them." (Ramsland Affidavit; FAC Exh. 24 at ¶13). It is understandable that inexperienced challengers and Ms. Carone (who is a service contractor with no election experience) might not understand that there are safeguards in place to prevent double counting of ballots in this way, but that does not excuse Plaintiffs' "experts," who choose to rely on these false claims.

Dr. Eric Quinnell (misspelled as Quinell throughout the Amended Complaint) offers a creative, but pointless, "expert" analysis, which can be summarized as follows: "it's surprising that Joe Biden did so much better than Donald Trump in some places." Dr. Quinnell posits that he should be able to predict what voters will do, and because they did not do what he expected he has encountered results that he calls "incredibly mathematically anomalous." He compares results from 2016 and 2020, and when President Trump does not keep all of his 2016 voters, Dr. Quinnell interprets that to mean that more than 100% of new voters voted for President-Elect Biden. While academically interesting and perhaps amusing for a cocktail party analysis, there is absolutely no legal significance to his "analysis."

William Briggs offers some charts and predictions, based upon surveys. But, again, not a shred of evidence of voter fraud is even purportedly found in his brief report. And, much of his "analysis" is based upon a telephone survey by Matt Braynard, in which

Braynard tries to extrapolate the results of that survey to establish proof of voter fraud. Of course, no such survey could establish the legal elements of fraud. But, here, there is not even an attempt to make the process look scientific. We are not told about survey methods, the skills of the interviewers, or even Mr. Braynard's expert credentials. Dr. Quinnell admits in his executive summary that "a team of unpaid citizen volunteer(s)" collaborated in a statistical analysis vote analysis. (FAC, Exh. 22) .

Emblematic of Plaintiffs' carelessness with the facts is another "expert" report that was so weak that after last week's filing of the Complaint he was outed in public news media reports, apparently leading to his deletion from the Amended Complaint. Paragraph 18 of the original Complaint introduced "Expert Navid Kashaverez-Nia" and alleged that "[h]e concludes that hundreds of thousands of votes that were cast for President Trump in the 2020 general election were transferred to former Vice-President Biden." Notably, the "expert" report relied on a finding that in "Edison County, MI, Vice President Biden received more than 100% of the votes…" The fact that there is no Edison County in Michigan (or anywhere in the United States) was not only was missed by this "expert," its inclusion in a nine page report was also was not noticed by any of the Plaintiffs or their counsel—that is, not until it became a public embarrassment when it was reported by the press.

C. Allegations Regarding Dominion

Plaintiffs, with either no experience with Michigan election law, or no interest in being candid with this Court, weave a fantastical tale about how a theoretical

software weakness could upend Michigan's election results. The fundamental problems with their analyses are: *not a shred of evidence suggests a single vote was not counted in Michigan*; and; *any problem with vote counts could be addressed by a hand recount in this State that preserves the paper ballots that are scanned by the tabulating machines*.

So, even if everything in the Amended Complaint about the theoretical possibility that Dominion equipment could be compromised were true (it is not) the preservation of paper ballots would allow the vote count to be tested. Here, however, Plaintiffs and their counsel want to cast doubt upon the integrity of our elections, not correct any errors in the vote count. If the Trump campaign took these allegations seriously, they would have sought a recount. But, the time to demand a recount has passed, and nobody seriously thought that a recount would change a 154,000 vote win for President-Elect Joe Biden.

The Plaintiffs' claims regarding Dominion are so detached from reality that the Trump campaign and Rudy Giuliani have publicly distanced themselves from Plaintiffs' counsel and have literally disavowed her involvement on their legal team. And, as noted above, Attorney General Bill Barr yesterday announced that neither the Department of Homeland Security nor the Department of Justice could find any evidence to support these wild allegations. Rather than respond point by point to these strange claims, the City attached a detailed, public response released by Dominion Voting Systems on November 26, 2020. (Ex. 12).

ARGUMENT

II. Applicable Legal Standards

A "complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (*quoting Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* Claims that are "conceivable" or "possible," but not plausible, fall short of the standard. *Twombly* at 570.

In alleging fraud, a party must state with particularity the "circumstances constituting fraud." Fed. R. Civ. P. 9(b). The complaint must "alert the defendants to the precise misconduct with which they are charged" to protect them "against spurious charges of immoral and fraudulent behavior." *Sanderson v. HCA-Healthcare Co.*, 447 F.3d 873, 877 (6th Cir. 2006) (internal quotations omitted). A complaint must "(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." *Frank v. Dana Corp.*, 547 F.3d 564, 570 (6th Cir. 2008) (internal quotations omitted).

III. The Motion Should be Denied Because Plaintiffs Do Not Have Standing to Pursue this Lawsuit

Article III of the United States Constitution restricts the jurisdiction of federal courts to actual "Cases" and "Controversies." U.S. Const. art. III, § 2, cl. 1. "To satisfy this 'case-or-controversy' requirement, 'a plaintiff must establish three elements: (1) an injury in fact that is concrete and particularized; (2) a connection between the injury and the conduct at issue—the injury must be fairly traceable to the defendant's action; and (3) [a] likelihood that the

injury would be redressed by a favorable decision of the Court.'" *Courtney v. Smith*, 297 F.3d 455, 459 (6th Cir. 2002), *quoting Blachy v. Butcher*, 221 F.3d 896, 909 (6th Cir.2000).

The first requirement—that plaintiffs establish an "injury in fact"—limits justiciability to those cases involving a well-defined injury to the plaintiff, which allows the parties to develop the necessary facts and seek responsive remedies. As the Supreme Court has repeatedly instructed, "[t]he requirement of 'actual injury redressable by the court' . . . tends to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982) . To this end, the Supreme Court "repeatedly has rejected claims of standing predicated on the right, possessed by every citizen, to require that the Government be administered according to law." *Id.* at 482–83. Moreover, the Court has "consistently held that a plaintiff raising only a generally available grievance about government— claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 573–74 (1992).

A. Plaintiffs Do Not Have Standing to Pursue Claims Under the Electors and Election Clauses

Count I of the Complaint purports to bring a claim under the Elections and Electors clause of the U.S.

Constitution. But, the underlying "factual allegations" are the same "allegations" made throughout the Complaint: that Defendants supposedly failed to follow the Michigan Election Code, relating to election challengers and the processing and tabulation of ballots in Detroit. *See*, *e.g.*, FAC ¶ 180. Plaintiffs *do not* allege that their ballots were not counted or that they were not allowed to vote. Plaintiffs' claim is precisely the type of claim that is "predicated on the right, possessed by every citizen, to require that the Government be administered according to law" that is insufficient to confer standing. *See*, *e.g.*, *Valley Forge*, 454 U.S. at 472.

Plaintiffs reliance on *Carson v. Simon* is misplaced. Brief at 8, *citing Carson v. Simon*, 978 F.3d 1051, 1057 (8th Cir. 2020). *Carson* is an outlier that erroneously conflated candidates for electors with candidates for office based on a quirk of Minnesota law. *Id.* Meanwhile, the Supreme Court has been clear that citizens do not have Article III standing under the clauses. *See*, *e.g.*, *Lance v. Coffman*, 549 U.S. 437, 442 (2007) (Holding plaintiffs did not have standing because the "only injury plaintiffs allege is that the law—specifically the Elections Clause—has not been followed. This injury is precisely the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past."). And, other courts have held that neither citizens, nor electors, nor candidates themselves have standing under the clause. *See*, *e.g.*, *Bognet v. Secretary Commonwealth of Pennsylvania*, ---F3d.----, 2020 WL 668120 (3rd Cir., Nov. 13, 2020); *Hotze v. Hollins*, No. 4:20-CV- 03709, 2020 WL 6437668 at *2 (S.D. Tex., Nov. 2, 2020); *L. Lin Wood, Jr. v Raffensperger*, No. 1:20-CV- 04651-SDG, 2020 WL 6817513, at *5 (N.D. Ga., Nov. 20, 2020).

Additionally, these particular Plaintiffs do not have

standing for the claims, because they are actually purporting to bring claims that, if they could be brought, could only be brought by the Michigan Legislature. Plaintiffs are effectively seeking to enforce "rights" of that body, not rights that are particular to themselves. *See*, *e.g.*, *Bognet*, 2020 WL 6686120, at *7 (concluding that the plaintiffs' Elections and Electors Clause claims "belong, if they belong to anyone, only to the Pennsylvania General Assembly") (citation omitted).

B. Plaintiffs Do Not Have Standing to Pursue Their Equal Protection, Due Process or Michigan Electoral Law Theories

The equal protection, due process and Michigan Election Law theories (Counts II – IV) also rely on the allegations relating to the processing and tabulation of votes in Detroit. *See* FAC ¶¶ 118-192, 206, 211, 213-228. Once again, Plaintiffs do not— and cannot— allege an actual, particularized injury in fact. They do not claim they were denied the right to vote; instead, they claim that the grant of the franchise to others, somehow infringed on their right to equal protection, due process and compliance with Michigan law. The apparent remedy for allowing the "wrong type of people" to vote, is to take away the vote from everyone. Setting aside just how absurd this theory is, it is clear that these Plaintiffs do not have standing to pursue it.

Plaintiffs are alleging an "injury" identical to the injury supposedly incurred by every Michigan voter. Under Plaintiffs' theory, the "effect" of an erroneously counted vote will proportionally impact every Michigan voter to the same mathematical degree. Because the approximately 5.5 million Michigan voters in the Presidential election suffer the identical incremental dilution, the alleged injury constitutes a

quintessential generalized injury incapable of conferring standing. Federal courts have addressed this "novel" voter dilution claim, with each court finding the claim fails to constitute an injury in fact. *See Paher v. Cegavske*, 457 F. Supp. 3d 919, 926–27 (D. Nev. 2020); *Martel v. Condos*, No. 5:20-cv- 131, —– F.Supp.3d ——, 2020 WL 5755289, at *4 (D. Vt. Sept. 16, 2020); *Am. Civil Rights Union v. Martinez-Rivera*, 166 F. Supp. 3d 779, 789 (W.D. Tex. 2015).

This is not to say that a claim under the label of "voter dilution" can never be brought in federal court; but such claims can only survive with facts starkly different from the case at bar. First, voter dilution claims may be appropriate in cases of racial gerrymandering, where the legislature impermissibly relied on race when drawing legislative districts. *See*, *e.g.*, *United States v. Hays*, 515 U.S. 737, 744–45 (1995). Second, voter dilution claims may proceed in apportionment cases, where un- updated legislative districts disfavor voters in specific districts merely due to the voter's geographic location. *See*, *e.g.*, *Reynolds v. Sims*, 377 U.S. 533 (1964). Neither theory provides any support for Plaintiffs' claims. The injury in the colorable dilution claims is particularized to a specific group. In contrast to the specific class of minority voters in a racially gerrymandered district, or voters living in a growing but un-reapportioned district, the supposed dilution here is shared in proportion by *every* single Michigan voter. In alleging a generalized injury rather than an actual and particularized injury in fact, Plaintiffs lack standing.

IV. This Motion Should be Denied Because this Case Should be Dismissed Under Abstention Principles

A. This Court Should Abstain Under the Inter-Related *Colorado River*, *Pullman* and *Burford* Doctrines

The *Colorado River* doctrine counsels deference to parallel state court proceedings. *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976).. The related *Pullman* abstention doctrine "is built upon the traditional avoidance of unnecessary constitutional decisions and the sovereign respect due to state courts." *Gottfried v. Med. Planning Servs., Inc.*, 142 F.3d 326, 331 (6th Cir. 1998) (*citing Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 500–01 (1941). Abstention is appropriate "when the state-law questions have concerned matters peculiarly within the province of the local courts, we have inclined toward abstention." *Harris Cty. Comm'rs Court v. Moore*, 420 U.S. 77, 83–84 (1975). Indeed, "[w]here there is an action pending in state court that will likely resolve the state-law questions underlying the federal claim, [the Supreme Court has] regularly ordered abstention." *Id.* at 84 (1975).

While there is much extraneous noise in the Complaint, it is clear from the actual legal Counts that virtually all of the "factual" assertions actually relevant to the Counts relate to the processing and tabulation of ballots in the City of Detroit, and, primarily the processing and tabulation of absentee ballots at the TCF Center. *See*, *e.g.*, FAC ¶¶ 180-192, 206, 211, 213-228. The integrity of the process in Detroit has already been litigated in state court in active lawsuits (all of which denied any injunctive or declaratory relief based on the specious claims). The "facts" identified in the Counts—which are the only "facts" actually offered in support of the relief in the Counts—are claims that election officials: did not allow Republican challengers to observe the counting

and processing of ballots; discriminated against Republican challengers; added "batches" of ballots; added voters to the Qualified Voter File; changed dates on ballots; altered votes on ballots; double counted ballots; violated ballot security; accepted "unsecured" ballots; counted ineligible ballots; and, failed to check ballot signatures. Each and every one of those allegations is false. But, the one thing they all have in common is that they are based entirely on the claims raised in cases in Michigan state courts. In fact, each and every one of those allegations is based on the allegations and "evidence" submitted in the *Costantino* matter.[4]

All of Plaintiffs' claims (frivolous as they may be) are being litigated in State Court. The fact that the Plaintiffs here may, incredibly enough, be making even more frivolous allegations than the litigants in *Costantino* does not change the fact that the same underlying issue—the integrity of the process employed in Detroit—is already in suit. The Wayne County Circuit Court has already decided that the claims were frivolous and not worth of injunctive relief. The Michigan Court of Appeals and the Michigan Supreme Court reviewed the trial court's decision on an expedited basis and did not disagree. The claims remain before Judge Kenny,

[4] The other allegations in the Complaint are essentially offered to provide "support" for the central theory that there was somehow widespread fraud in Detroit that resulted in President Elect Biden receiving 154,000 more votes than Donald Trump in the State.

which is the proper court to see them through to their inevitable dismissal with prejudice.[5]

Abstention is also warranted under *Burford* abstention doctrine, which "requires a federal court to abstain from jurisdiction where to assume jurisdiction would 'be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.'" *Adrian Energy Assocs. v. Michigan Pub. Serv. Comm'n*, 481 F.3d 414, 423 (6th Cir. 2007) (*referencing Burford v. SunOil Co.,* 319 U.S. 315 (1943). The doctrine applies where the lawsuit could result in a "potential disruption of a state administrative scheme." *Id.*, 481 F.3d at 423. Here, the relief Plaintiffs seek would lead to an unprecedented disruption of Michigan election law.

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[5] The claims were also brought in *Donald J. Trump for President, Inc. v. Benson*, Mich. Court of Claims Case No. 20- 000225-MZ (filed Nov. 4, 2020) and which *Stoddard v. City Election Commission of the City of Detroit*, Wayne County Circuit Court Case No. 20-014604-CZ (filed Nov. 5, 2020) Various pre-election lawsuits filed in Michigan made somewhat related claims against the Secretary of State: *Cooper-Keel v. Benson*, Mich. Court of Claims Case No. 20-000091-MM (filed May 20, 2020); *Black v. Benson*, Mich. Court of Claims Case No. 20-000096-MZ (filed May 26, 2020); *Davis v Benson*, Mich. Court of Claims Case No. 20-000099-MM (filed May 28, 2020); *Election Integrity Fund v. Benson*, Mich. Court of Claims Case No. 20-000169-MM; *Ryan v. Benson*, Mich. Court of Claims Case No. 20-000198- MZ (filed Oct. 5, 2020).

B. Deference to State Courts is Warranted Pursuant to the Electoral Count Act of 1877

Additionally, due to the autonomy federal courts provide state courts in resolving election disputes, abstention is particularly appropriate in the instant case. *Id.* The importance of allowing state courts the initial opportunity to settle disputes concerning the Presidential election is reflected in the Electoral Count Act of 1877. Section 5 of the Electoral Count Act applies if the state has provided, "by laws enacted prior to the day fixed for the appointment of the electors"—that is, through laws enacted before Election Day—for its "final determination" of any "controversy or contest" by "*judicial or other methods or procedures*," and such "determination" has been made "at least six days before the time fixed for the meeting of electors." 3 U.S.C. § 5 (emphasis added). This safe harbor provision states that if the determination is made "pursuant to such law" existing before Election Day, then that determination "shall be conclusive, and shall govern in the counting of the electoral votes . . . so far as the ascertainment of the electors appointed by such State is concerned." *Id.* Thus, in recognizing the important role state courts play in the resolution of election disputes under state law, this court should abstain from hearing this case. *See Harrison*, 360 U.S. at 177.[6]

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[6] The claims are also barred under estoppel doctrines, including the prohibition against collateral attacks. The claims have been tested and rejected.

V. Plaintiffs' Motion Must be Denied Pursuant to the Doctrine of Laches

"Laches arises from an extended failure to exercise a right to the detriment of another party." *Ottawa Tribe of Oklahoma v. Logan,* 577 F.3d 634, 639 n. 6 (6th Cir. 2009). The elements of the claim are: "(1) lack of diligence by the party against whom the defense is asserted, here the plaintiffs, and (2) prejudice to the party asserting the defense." *Chirco v. Crosswinds Communities, Inc.,* 474 F.3d 227, 231 (6th Cir.2007) (citation omitted)).

All of Plaintiffs' claims arise from allegations relating to supposed events which occurred well-before the election (including years before the election) or on the 3rd and 4th of November. If Plaintiffs had legitimate claims regarding Dominion, they could have brought those claims years ago. If Plaintiffs had legitimate claims relating to the processing and tabulation of ballots in Detroit, they could have brought the claims at the time. Instead of bringing the claims when they were timely (albeit still frivolous), they issued press releases and fundraised. Plaintiffs chose to wait until after the election had been certified. The claims cannot proceed.

VI. Plaintiffs Cannot be Entitled to Injunctive Relief

A. Applicable Law

When evaluating a request for injunctive relief, a court "must consider four factors: '(1) whether the movant has a strong likelihood of success on the merits: (2) whether the movant would suffer irreparable injury without the injunction: (3) whether

issuance of the injunction would cause substantial harm to others: and (4) whether the public interest would be served by issuance of the injunction.'" *Waskul v. Washtenaw Cty. Cmty. Mental Health*, 221 F. Supp. 3d 913, 917 (E.D. Mich. 2016) (*citing* Bonnell v. Lorenzo, 241 F.3d 800, 809 (6th Cir. 2001)).

While no single factor is controlling, "if 'there is simply no likelihood of success on the merits,' that is usually 'fatal.'" *Waskul* at 917 (*citing Gonzales v. Nat'l Bd. of Med. Exam'rs*, 225 F.3d 620, 625 (6th Cir. 2000)).

B. There is Virtually no Likelihood of Plaintiffs' Prevailing on the Merits

Plaintiffs cannot prevail for all the reasons stated above and because their claims are demonstrably false and are not fit for inclusion in a document filed with a court. Plaintiffs also cannot prevail because their legal theories are untenable. As discussed above, Plaintiffs equal protection, due process, and state law claims are predicated on their "voter dilution" theories. Equal protection voter dilution claims exist only in a narrow set of circumstances. *See, e.g., Reynolds*, 377 U.S. at 568 ("Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State."). In those unique cases, the plaintiffs can allege disparate treatment from similarly situated voters. *See, e.g., id.* at 537 (Plaintiffs alleging devalued voting power when compared to similarly situated voters in other parts of the state).

In contrast, the gravamen of Plaintiffs' claim— that Michigan voters will have the value of their votes

diluted—falls far wide of the mark. Plaintiffs allege breaches of the Michigan Election Code due to a lack of access provided to poll watchers, as well as a number of often hyper-localized violations of the Michigan Election Code. However, even if Plaintiffs successfully showed an impermissible lack of meaningful access for poll watchers, such a showing is plainly insufficient to prove fraudulent votes were *actually* counted. And with regard to the allegations of localized Election Code violations, the fundamental principle currently at play is that "[t]he Constitution is not an election fraud statute." *Minn. Voters All. v. Ritchie*, 720 F.3d 1029, 1031 (8th Cir. 2013), *quoting Bodine v. Elkhart Cnty. Election Bd.*, 788 F.2d 1270, 1271 (7th Cir. 1986). No case supports the notion that the Equal Protection Clause of the U.S. Constitution can be turned into the weapon of oppression sought by Plaintiffs.

The Michigan law claims fair no better. Plaintiffs allege violations of M.C.L. §§ 168.730, 168.733, 168.764a, 168.765a and 168.765.5 (all supposedly at the TCF Center) but for each claim either don't understand the statute or rely on facts that have been rejected by Michigan courts, especially the Circuit Court, Court of Appeals and Supreme Court in *Costantino*.

M.C.L. §§ 168.730 and 168.733 relate to allowing partisan challengers to observe the process. As the *Costantino* court concluded, the truth of the matter is that Republican challengers were always in the TCF Center, and, as long as they were not yelling and causing disruptions (including by chanting "stop the vote"), they were allowed to observe the process in full compliance with the law. Even if the allegations were true, they could not possibly entitle Plaintiffs to any

post- election remedy. The "remedy" is in the statute itself, and unsurprisingly, does not include disenfranchisement of all voters.

M.C.L. § 168.765(5) relates to a deadline to post certain information relating to absentee ballots. Tellingly, as has been the case each time plaintiffs filed Complaints derived from the same allegations, the allegation is made "upon information and belief." FAC ¶ 221. No plaintiff has ever presented an iota of evidence, let alone a claim not made "upon information and belief" about this issue.

M.C.L. § 168.764a provides that ballots received after 8:00 p.m. on election day cannot be counted. This allegation is also based "upon information and belief." FAC ¶ 224. Obviously, an "information and belief" allegation is woefully deficient to obtain any relief, let alone the extraordinary relief Plaintiffs' seek.

MCL § 168.765a provides for ballots to be duplicated under the supervision of *inspectors* (i.e. paid workers) from both major parties. Plaintiffs' claim is based on their conflation of the role of ballot *inspectors* and ballot *challengers*. Plaintiffs' false claim about Republicans being excluded from the TCF Center, relates to challengers, not inspectors. There was a short period of time when excess overflow challengers of all parties were not able to enter the TCF Center until a challenger of their party left, but there was never a time when *inspectors* were disallowed.

In any event, Plaintiffs bring "novel" claims ostensibly available to every Michigan voter in the event any voting error resulting in an erroneously counted vote is detected. Their supposed remedy— the rejection of hundreds of thousands, if not millions, of votes. No such legal theory exists. As a district court

recently held in one of the Trump election lawsuits brought in Pennsylvania, "[t]his Court has been unable to find any case in which a plaintiff has sought such a drastic remedy in the contest of an election, in terms of the sheer volume of votes asked to be invalidated." *Donald J. Trump for President, Inc. v. Boockvar*, No. 4:20-CV-02078, 2020 WL 6821992, at *1 (M.D. Pa. Nov. 21, 2020), *aff'd sub nom. Donald J. Trump for President, Inc. v. Pennsylvania*, No. 20-3371, 2020 WL 7012522 (3d Cir. Nov. 27, 2020).

C. Plaintiffs Would Suffer No Harm if an Injunction Does Not Enter

Plaintiffs cannot show how an injunction would protect them from irreparable injury. The election is over. President-Elect Biden carried the State by 154,000 votes. The results have been certified. The supposed injuries claimed by Plaintiffs, a harm to their voting rights, would not be avoided by the injunction they seek; they would be exacerbated.

D. Issuance of an Injunction Would Harm the City and the Public in an Almost Unimaginable Manner

In contrast, the City and the public at large would be severely harmed by the requested relief. The City is tasked with managing elections for all candidates, not just for the candidates for President. The proposed injunction would put an abrupt stop to the orderly process of this election and undo the timely certification of all elections.

As aptly stated by the Third Circuit, "tossing out millions of mail-in ballots would be drastic and unprecedented, disenfranchising a huge swath of the electorate and upsetting all down-ballot races too." *Donald J. Trump for President, Inc. v. Pennsylvania*,

No. 20-3371, 2020 WL 7012522, at *1 (3d Cir. Nov. 27, 2020). "Democracy depends on counting all lawful votes promptly and finally, not setting them aside without weighty proof. The public must have confidence that our Government honors and respects their votes." *Id.* at *9. The "public interest strongly favors finality, counting every lawful voter's vote, and not disenfranchising millions of … voters who voted by mail." *Id.*

The preservation of our democracy requires zealous protection against threats external and internal. Plaintiffs would inflict generational damage in their naked pursuit of power. Their request must be denied.

CONCLUSION

WHEREFORE, for the foregoing reasons, the City of Detroit respectfully requests that this Court enter an Order: (1) denying Plaintiffs' Motion, (2) compelling Plaintiffs to publicly file unredacted versions of all affidavits previously submitted with redactions, and (2) requiring Plaintiffs to pay all costs and fees incurred by all Defendants and Intervenor-Defendants.

December 2, 2020

Respectfully submitted,

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