No. 20-815

In the Supreme Court of the United States

IN RE: TIMOTHY KING, ET AL., PETITIONERS

v.

GRETCHEN WHITMER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONSE TO MOTION TO CONSOLIDATE AND EXPEDITE CONSIDERATION OF THE EMERGENCY PETITION FOR EXTRAORDINARY WRIT OF MANDAMUS AND APPLICATION FOR PRELIMINARY INJUNCTION, TO EXPEDITE MERITS BRIEFING AND ORAL ARGUMENT IN THE EVENT THAT THE COURT GRANTS THE PETITION, AND TO EXPEDITE CONSIDERATION OF THIS MOTION

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INTRODUCTION

The instant petition should look familiar to this Court for it is nothing more than a reiteration of the factual allegations and legal claims this Court recently declined to hear against Michigan in *Texas* v. *Pennsylvania, et al.*, Case No. 22O155. While this litigation was filed and Petitioners' request for injunctive relief denied before the *Texas* case even commenced, Petitioners sat on their rights, failing to prosecute their appeal in the Court of Appeals for the Sixth Circuit.

Petitioners now seek to bypass the Sixth Circuit and have their petition heard on an emergency basis by this Court. They have moved to consolidate the instant petition with a purportedly similar case from Georgia and they ask this Court to order briefing and have this petition decided before January 6, 2021—the date Congress will meet to count the states' electoral votes and declare the new president. But the motions should be denied for three reasons.

First, Petitioners' motion is not well-taken where Petitioners' waited a week to seek expedited relief in what they allege to be a time-sensitive election case. *Second*, their appeal of the denial of their motion for injunctive relief is moot because Michigan has already performed its duties as to the selection and certification of its presidential electors, and there is no reason to expedite a moot appeal. And *third*, even if the requested injunctive relief is not moot, the district court did not abuse its discretion in denying Petitioners' motion for an injunction, and there is no reason to expedite an appeal in which Petitioners have no chance of winning. The claims here are meritless.

STATEMENT OF THE CASE

Michigan, like the other states, held an election on November 3, 2020, to select electors for president and vice president. See Mich. Comp. Laws § 168.43.

A. Michigan certified the November election

Michigan's elections are decentralized and principally conducted at the local level by the over 1,600 city and township clerks. In keeping with that structure, local jurisdictions began canvassing results immediately after the polls closed on November 3. Mich. Comp. Laws § 168.801. The boards of county canvassers commenced canvassing two days later, and the 83 county boards completed their canvasses by November 17. Mich. Comp. Laws §§ 168.821, 168.822.

The Board of State Canvassers, a bi-partisan board, see Mich. Comp. Laws § 168.22, was required to meet by the twentieth day after the election to certify the results. Mich. Comp. Laws § 168.842(1). The Board met on November 23 and certified the statewide results.[1] President-elect Joe Biden defeated President Donald Trump by 154,188 votes.[2]

"As soon as practicable after the state board of canvassers has" certified the results the Governor must certify the presidential electors to the Archivist for the

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[1] See 11/23/20 Draft Meeting Minutes, Board of State Canvassers, available at https://www.michigan.gov/documents/sos/112320_draft_minutes_708672_7.pdf.

[2] See November 2020 General Election Results, available at https://mielections.us/election/results/2020GEN_CENR.html., (last accessed December 28.)

United States. Mich. Comp. Laws § 168.46; 3 U.S.C. § 6.[3] Michigan's Governor certified the electors the same day the Board certified the results.[4]

No presidential candidate requested a recount in Michigan within the time permitted. See Mich. Comp. Laws § 168.879(1)(c). And under federal law, the "safe harbor" provision regarding a state's certification of electors activated on December 8. See 3 U.S.C. § 5. Michigan's presidential electors were then required to "convene" in the State's capitol on December 14, 2020. Mich. Comp. Laws § 168.47; 3 U.S.C. § 7.

B. Michigan's electors convened on December 14 and cast their votes

As provided by law, Michigan's Democratic presidential electors met in the State Capitol on December 14 and cast their votes for President-elect Biden and Vice-President elect Kamala Harris.[5] They did so under heavy security in light of credible threats of violence that required the capitol and other state buildings be closed to the public.[6]

On the same day and outside Michigan's capitol, the presidential electors selected by the Michigan Republican Party sought access to the capitol in order to cast alternate votes for President Trump and Vice President Mike Pence. However, they

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[3] Although Michigan's statute continues to refer to the U.S. Secretary of State, the Certificate of Ascertainment is sent to the Archivist of the United States under 3 U.S.C. § 6.

[4] See Michigan's Certificate of Ascertainment, available at https://www.archives.gov/files/electoral-college/2020/ascertainment-michigan.pdf, (accessed December 28.)

[5] See Michigan's Certificate of the Votes, available at https://www.archives.gov/files/electoral-college/2020/vote-michigan.pdf (accessed December 28.)

[6] See Michigan Gov. Whitmer Addresses Security Threat to Electoral College Vote, 12/14/20, National Public Radio, available at https://www.npr.org/sections/biden-transition-updates/2020/12/14/946243439/michigan-gov-whitmer-addresses-security-threat-to-electoral-college-vote (accessed December 28.)

were not allowed access to the building since there is no process for permitting the unsuccessful electors to cast their votes.[7] Notably, in their instant motion, Petitioners suggest that the Michigan Legislature has endorsed the purported competing slate of electors. (Pet Motion, p 4.) That is not true. Leadership for both the Michigan House of Representatives and the Michigan Senate have indicated that the results of the election and the presidential electors' votes must stand under the law.[8]

C. The underlying litigation—*King, et. al.* v. *Benson, et. al.*

On November 25, 2020, several Republican Party electors filed a complaint for declaratory and injunctive relief and a motion for a temporary restraining order in federal district court against the Michigan Secretary of State, the Governor of Michigan, and the Michigan Board of State Canvassers.

These Petitioners alleged the same litany of irregularities in the City of Detroit's election as had been alleged and rejected in numerous other state-court filings. The *King* Petitioners alleged that the defendants violated the Electors Clause of the U.S. Constitution by failing to conduct the November 3 general election in accordance with the election laws enacted by the Michigan Legislature; violated the Equal Protection Clause by causing the debasement or dilution of the plaintiffs' votes by failing to comply with Michigan's election laws; and violated the plaintiffs' substantive due

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[7] See Michigan Republicans who cast electoral votes for Trump have no chance of changing Electoral College result, 12/15/20, MLIVE, available at https://www.mlive.com/public-interest/2020/12/michigan-republicans-who-cast-electoral-votes-for-trump-have-no-chance-of-changing-electoral-college-result.html (accessed December 28.)

[8] *Id.*

process rights by diluting their votes through the counting of unlawful or illegal votes. See (ECF No. 6, Am. Complt., PageID 937–953, *King*, *et. al.* v. *Whitmer, et al.*, Case No. 20-cv-13134 (E.D. Mich., 2020) (Parker, J.).) The Petitioners requested that the court direct the defendants to de-certify the election results; enjoin the Governor from sending the electors certificates; order the Governor to certify results that President Trump won the election; impound voting machines and software; order the rejection of various ballots; and declare other various forms of relief. *Id.* at 954–956.

On December 7, 2020, the district court denied the motion for injunctive relief. See *King*, ___ F. Supp. 3d ___; 2020 WL 7134198 (E.D. Mich. 12/7/20). The court concluded that the Eleventh Amendment barred the plaintiffs' claims; that their claims were moot; that their claims were barred by laches; that abstention applied; that the plaintiffs lacked standing to bring their equal protection, Electors Clause and Elections Clause claims; and that the Petitioners had no likelihood of succeeding on the merits of their constitutional claims. (*Id.* at **3–13.)

On December 8, the plaintiffs filed a notice of appeal to the United States Court of Appeals for the Sixth Circuit. (See ECF No. 64, PageID.3332.) The plaintiffs, however, did not move to expedite their appeal. This was likely because the State of Texas moved to file an original action against Michigan and several other "swing" states in this Court on December 7, alleging widespread fraud in Michigan's general election, and requesting that the Court overturn Michigan's results. See *Texas* v. *Pennsylvania, et al.*, 22O155. But on December 11, this Court denied Texas' motion "for lack of standing under Article III of the Constitution" because "Texas ha[d] not

demonstrated a judicially cognizable interest in the manner in which another State conducts its elections."[9]

The *King* Petitioners then pivoted and filed the instant petition for certiorari on December 11, 2020, seeking to bypass review by the Sixth Circuit. Days later, on December 15, Petitioners filed a "notice of supplemental authority," for the purpose of attaching a "preliminary report" of a purported forensic exam of a single Dominion Voting Systems tabulator used in Antrim County, Michigan, and generated in connection with pending state-court litigation in that county. See *Bailey* v. *Antrim County, et al.*, Antrim Circuit Court No. 20-9238. The report was released on December 14 and is not part of the lower court record in this case. As Petitioners note, the report concludes that Dominion software is designed to perpetuate errors and fraudulent results. (Pet Notice of Supp Auth, p 3.) This report, however, has largely been repudiated,[10] and Michigan legislators have stated that there is no evidence of fraud perpetuated by Dominion Voting Systems.[11] Petitioners then waited several more days to file the instant motion to consolidate and expedite consideration of their "emergency" petition.

On December 22, 2020, all defendants in the *King* case filed motions to dismiss the case in the district court.

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[9] See order dated Dec 11, 2020, in Case No. 22O155, available at https://www.supremecourt.gov/orders/courtorders/121120zr_p860.pdf (accessed December 28).

[10] See Antrim County audit shows 12-vote gain for Trump, 12/17/20, The Detroit News, available at https://www.detroitnews.com/story/news/local/michigan/2020/12/17/antrim-county-audit-shows-12-vote-gain-trump/3938988001/ (accessed December 28.)

[11] See statement by State Senator Ed McBroom, available at https://www.detroitnews.com/story/news/local/michigan/2020/12/17/antrim-county-audit-shows-12-vote-gain-trump/3938988001/ (accessed December 28).

D. Related litigation – *Wisconsin Voters Alliance et al.* v. *Pence, et al.*

On December 22, 2020, the Wisconsin Voters Alliance and several other similar groups and individual plaintiffs filed a complaint for declaratory and injunctive relief along with a motion for a preliminary injunction in the district court for the District of Columbia. See *Wisconsin Voters Alliance, et al.* v. *Pence, et al.,* Case No. 20-03791.

These plaintiffs have sued Vice President Pence, in his capacity as President of the U.S. Senate, the U.S. House of Representatives, the U.S. Senate, the "Electoral College," and various principals from the swing states including Michigan's Governor, the Speaker of Michigan's House of Representatives, and the Majority Leader for Michigan's Senate. These plaintiffs principally allege the same claims of fraud and irregularities in Michigan's election as alleged in the *King* case and the *State of Texas* case. They seek to have various federal and state statutes relating to the process for selecting electors, including a Michigan statute, declared unconstitutional and request that the court enjoin the "Vice President and the U.S. Congress . . . from counting Presidential elector votes from the states," including Michigan, "unless their respective state legislatures vote affirmatively in a post-election vote to certify their Presidential electors[.]" (ECF No. 1, Compl., PageID 115, Prayer for Relief.)

The court in that case has ordered that as soon as proofs of service have been filed, the court will issue a briefing schedule and schedule a hearing date.

REASONS FOR DENYING THE MOTION

I. Petitioners' motion to consolidate and expedite should be denied as untimely and without merit.

Petitioners request that this Court consolidate the instant petition with a similar petition filed regarding the presidential election results in Georgia in Case No. 20-816. (Pet Motion, pp. 1–2.) Petitioners also ask that this Court expedite consideration of their petition, proposing that this Court direct Respondents to respond to the petition by December 23, and that Petitioners reply by December 28. (Pet Motion, p. 7.) Petitioners argue that this expedited schedule would allow this Court to adjudicate the petition before Congress meets on January 6, 2021, to count the electors votes cast by the states. *Id*., p. 2. Consistent with Rule 21, the Respondents provide this response, and ask this Court to deny the motion for three reasons.

First, Petitioners sat on their hands with respect to this motion. Petitioners filed their petition on December 11 but then waited 7 days to file the motion to consolidate and to expedite, filing on Friday, December 18, 2020. Petitioners do not explain their delay in seeking to expedite their time-sensitive petition, instead asking this Court to impose untenable deadlines on Respondents and this Court on the eve of the Holidays. And of course, Petitioners' proposed schedule for responding is now moot as the Court did not grant immediate relief. While this Court could still order expedited briefing, the idea that Respondents should be ordered to respond to the petition, Petitioners permitted to reply, and the petition submitted, heard, and decided by the Court in the few business days remaining before January 6 is impracticable and, this Court should deny the request.

Second, Petitioners' appeal of the denial of their motion for a preliminary injunction is, for all practical purposes, moot. The crux of Petitioners' requested injunctive relief below was to have Respondents ordered to de-certify the presidential election results and to prevent the previously certified results, including the certification of the Democratic presidential electors, and the impending vote of those electors on December 14, enjoined or changed to reflect votes for President Trump. But Respondents have fully performed any duties they had with respect to the process for selecting presidential electors and Michigan's electors have performed their duty.

As noted above, Michigan's certified electors met on December 14 and cast their votes for President-elect Biden and the Governor transmitted the results of the vote to the U.S. Archivist the same day.[12] There is no mechanism for state officials or a court to "undo" any of these actions. See 3 U.S.C. §§ 5, 15; *Carson* v. *Simon*, 978 F.3d 1051, 1055 (8th Cir. 2020) (Congress "must generally accept the votes of those electors selected and certified by six days prior to the meeting of the Electoral College"). The only action left to take is the counting of the electoral votes by Congress at a Joint session to be held on January 6, 2021. See 3 U.S.C. § 15. There, Congress must count Michigan's electoral votes, and the votes of the other states, unless both Houses determine that a state's votes were not "regularly given." *Id.*

Thus, for the named parties here, the matter is moot. Rather, the proper party, at this point, for any request for declaratory and injunctive relief seeking to invalidate

[12] See Michigan's Certificate of the Votes, available at https://www.archives.gov/files/electoral-college/2020/vote-michigan.pdf (accessed December 28.)

Michigan's electoral vote or to enjoin those votes from being counted, would be Congress. And, as noted above, such a case has already been filed in the district court for the District of Columbia. See *Wisconsin Voters Alliance, et al.* v. *Pence, et al.,* Case No. 20-03791. Thus, this Court could not provide any relief regarding Petitioners' claims since any relief would not make a difference to the legal interests of the parties as pled. See, e.g., *Church of Scientology* v. *United States,* 506 U.S. 9, 12 (1992).

As a result, there is no reason to consolidate this petition with the one from Georgia or to expedite hearing on Petitioner's appeal from the denial of injunctive relief.

And *third*, even if the appeal and denial of injunctive relief is not moot, the district court did not abuse its discretion in denying Petitioners' motion for a preliminary injunction as these claims are without merit.

As discussed above, the district court correctly determined that Petitioners' state law claims and their federal claims were barred by the Eleventh Amendment; that their claims were moot because there was no relief the court could grant; that their claims were barred by laches because Petitioners had not been diligent in bringing their claims and Respondents were prejudiced by the delay; that abstention was warranted where there were several pending state-court lawsuits involving the same of similar issues; that Petitioners lacked standing to bring their equal protection, Electors Clause and Elections Clause claims; and that Petitioners had no likelihood of succeeding on the merits of their equal protection, Electors Clause, and Election Clause claims. (See *King*, 2020 WL 7134198 at **3–13.) The court further concluded

that Petitioners had not demonstrated irreparable harm, but that harm to the public would occur if an injunction were to issue. *Id.* at *13.

Because the district court did not err in denying the request for injunctive relief, there is no need for expedited review in this case or for its consolidation with the Georgia petition.

CONCLUSION

This Court should deny Petitioners' motion to consolidate and for expedited consideration of their petition for certiorari because (1) Petitioners' did not timely request such relief, (2) their appeal of the denial of their motion for a preliminary injunction is moot, and (3) even if their appeal is not moot, the district court did not abuse its discretion in denying injunctive relief, and there is no need for immediate review.

Respectfully submitted,

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