No. 23-486

In the Supreme Court of the United States

SIDNEY POWELL, BRANDON JOHNSON, HOWARD KLEINHENDLER, JULIA HALLER, GREGORY ROHL & SCOTT HAGERSTROM,
Petitioners,

v.

GRETCHEN WHITMER, JOCELYN BENSON, CITY OF DETROIT, MICHIGAN, *ET AL.*,
Respondents.

ON PETITION FOR WRIT OF *CERTIORARI* TO THE U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONERS' SUPPLEMENTAL BRIEF ON *FBI v. FIKRE*, NO. 22-1178 (MAR. 19, 2024)

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PETITIONERS' SUPPLEMENTAL BRIEF

Pursuant to S.CT. R. 15.8, petitioners respectfully file a supplemental brief on the decision of this Court in *FBI v. Fikre*, 2024 U.S. LEXIS 1379 (U.S. Mar. 19, 2024) (No. 22-1178), which came out the day after petitioners asked this Court to rehear the denial of their petition for a writ of *certiorari*.

STATEMENT OF THE CASE

In district court, respondents moved for sanctions under 28 U.S.C. § 1927 for petitioners' failure to dismiss their election challenge after the Electoral College voted on December 14, 2020. The Sixth Circuit affirmed sanctions under § 1927 because "plaintiffs themselves asserted in a petition to the Supreme Court that this case would become moot on December 14, 2020." App:29a; *accord* App:4a ("Junttila and Powell filed a petition for certiorari with the Supreme Court, urging immediate intervention—because, they said, the case would become moot after the December 14 electoral-college vote"). The cited petition addresses mootness in two pertinent places:

- "This motion for immediate preliminary relief seeks to maintain the status quo so that the passage of time and the actions of Respondents do not render the case moot, depriving this Court of the opportunity to resolve the weighty issues presented herein and Respondents of any possibility of obtaining meaningful relief." Pet. for Writ of Certiorari at 1, *King v. Whitmer*, No. 20-815 (U.S. Dec.. 11, 2020) (hereinafter "*King* Pet.").
- "Once the electoral votes are cast, subsequent relief would be pointless and the petition would be moot." *Id.* at 15.

As explained below, these admissions do not establish mootness under the rigor and focus that this Court applied to the FBI's declaration in *Fikre*.

Significantly, in arguing against the first prong of the "capable of repetition, yet evading review" exception to mootness in this Court regarding the petition *for preliminary relief* in No. 20-815, the Michigan respondents acknowledged that the case was still live in the district court *on the merits*:

> Petitioners' request for injunctive relief was not fully litigated before Michigan's electors voted (although it likely could have been had counsel acted with the requisite haste). Nonetheless, Petitioners continue to pursue the merits of their claims below. They have not dismissed their case and will presumably be opposing Respondents' motion to dismiss. Accordingly, Petitioners still have the opportunity for their day in court, including in the Sixth Circuit and possibly this Court, after the district court enters a final judgment. See, e.g., *University of Texas v. Camenisch*, 451 U.S. 390, 393–394 (1981) (issue of preliminary injunction was moot but case as a whole remained alive). Accordingly, the first prong of the exception to mootness is not met.

Michigan Br. in Opp'n at 12-13, *King v. Whitmer*, No. 20-815 (U.S. Jan. 14, 2021) (hereinafter "Mich. *King* Opp'n").

Although the Sixth Circuit did not see a basis for a claim under the Elections and Electors Clauses, App:25a-26a, the complaint against Secretary of State Benson and the State Board of Canvassers alleged as follows:

- "Counting ballots without signatures, or without attempting to match signatures, and ballots without postmarks, *pursuant to direct instructions from Defendants*."
- "Local election officials must follow Secretary Benson's instructions regarding the conduct of elections."
- "'[T]he Election Commission "instructed election workers *to not verify signatures on absentee ballots*, to backdate absentee ballots, and to process such ballots regardless of their validity.'"
- "[C]ounting ballots without signatures, or without attempting to match signatures, and ballots without postmarks, *pursuant to direct instructions from Defendants*;"

Pet. 25-26 (citing and quoting First Am. Compl. ¶¶ 15.C, 30, 96, 190(h) (App:234a, 238a-239a, 266a-267a, 318a) (emphasis in Petition)). The complaint also requested "such other relief as is just and proper" in its general prayer. App:334a (¶ 13). Respondents moved to dismiss without filing answers to the complaint.

In *Genetski v Benson*, 2021 Mich. Ct.Cl. LEXIS 3, *19 (Mar. 9, 2021), Michigan's Court of Claims found Secretary Benson's signature-verification guidance—which the complaint accurately alleged as "*direct instructions from Defendants*"—to have been issued in violation of Michigan's Administrative Procedures Act of 1969, M.C.L. §§ 24.201-24.328. After December 14, 2020, respondent Benson still actively defended her signature-verification guidance in Michigan's Court of

Claims.[1] The docket shows the following events after December 14, 2020:

- Defendants' Motion for Summary Disposition and Brief in Support with Proof of Service (Dec. 16, 2020).
- Defendants' Motion for Summary Disposition and Brief in Support with Proof of Service (Jan. 20, 2021).
- Defendants' Reply Brief in Support of their 1/20/21 Motion for Summary Disposition with Proof of Service (Feb. 8, 2021).
- Defendants' Response to Plaintiffs' Cross-Motion for Summary Disposition with Proof of Service (Feb. 17, 2021).

These actions make clear that respondent Benson could *never* show that—by December 14, 2020—she intended to stop violating the Elections and Electors Clauses. Without discounting the possibility that new violations are likely in the future, the guidance that petitioners challenged became moot only when the Court of Claims held on March 9, 2021, that the

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[1] The docket is available on the Court of Claims website: https://webinquiry.courts.michigan.gov/WISearchResults/ViewPage1?commoncaseid=827241 (last visited March __, 2024). Or a user can enter the information into the website's search feature: https://webinquiry.courts.michigan.gov/?Name=COC (last visited March __, 2024). This Court may consider respondent Benson's court filings because they are a judicially noticeable public records. *See, e.g., New York Indians v. United States,* 170 U.S. 1, 32 (1898) (appellate courts may take judicial notice of "records, or public documents … or other similar matters of judicial cognizance"); *cf.* FED. R. EVID. 201(b)(2), (f); *Rodic v. Thistledown Racing Club, Inc.*, 615 F.2d 736, 738 (6th Cir. 1980) ("Federal courts may take judicial notice of proceedings in other courts of record.") (internal quotation marks omitted).

guidance was issued in violation of Michigan's Administrative Procedures Act, *Genetski*, 2021 Mich. Ct.Cl. LEXIS 3, *19, after petitioners dismissed the underlying litigation here.

REASONS TO GRANT REHEARING

I. *FIKRE* CLARIFIED THE APPLICATION OF MOOTNESS DOCTRINE TO EVALUATING A DEFENDANT'S PROOF OF MOOTNESS.

Fikre covers known ground on the law of mootness in many respects, but it makes one contribution that is highly relevant to petitioners' challenge to the § 1927 sanction in their case.

First, the known ground. *Fikre* restates mootness doctrine, making clear the respondents here cannot show mootness:

- To find a lack of jurisdiction to hear a complaint, the defendant accepts the complaint's allegations unless denied or controverted. *Fikre*, 2024 U.S. LEXIS 1379, *6 & n.* (Slip Op. 2 & n.*).
- "A court with jurisdiction has a 'virtually unflagging obligation' to hear and resolve questions properly before it." *Fikre*, 2024 U.S. LEXIS 1379, at *11 (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U. S. 800, 817 (1976)) (Slip Op. 5).
- To show mootness, the defendant—not the plaintiff—bears the "formidable burden" to show that "no reasonable expectation remains that it will return to its old ways." *Fikre*, 2024 U.S. LEXIS 1379, *12 (interior quotation marks and alterations omitted) (Slip Op. 6).
- A case's procedural posture informs the mootness showing a defendant must make, which can be more difficult when a "case comes to [a court] in a

> preliminary posture, framed only by uncontested factual allegations and a terse declaration." *Fikre*, 2024 U.S. LEXIS 1379, *16-17 (Slip Op. 9).

- The foregoing "holds for governmental defendants no less than for private ones." *Fikre*, 2024 U.S. LEXIS 1379, *12-13 (Slip Op. 6).

All these known issues that *Fikre* restates support petitioners' arguments that the complaint did not become moot on December 14, 2020, when the Electoral College voted and—indeed—was not moot when the complaint was dismissed.

What is new in *Fikre* is the rigor and focus applied to parsing the defendants' mootness evidence versus the foregoing mootness standards:

> Viewed in that light, this case is not moot. To appreciate why, it is enough to consider one aspect of Mr. Fikre's complaint. He contends that the government placed him on the No Fly List for constitutionally impermissible reasons, including his religious beliefs. In support of his claim, Mr. Fikre alleges (among other things) that FBI agents interrogated him about a mosque in Portland he once attended and threatened to keep him on the No Fly List unless he agreed to serve as an informant against his co-religionists. Accepting these as-yet uncontested allegations, the government's representation that it will not relist Mr. Fikre based on "currently available information" may mean that his past actions are not enough to warrant his relisting. But, as the court of appeals observed, none of that speaks to whether the government might relist him if he does the

> same or similar things in the future—say, attend a particular mosque or refuse renewed overtures to serve as an informant. Put simply, the government's sparse declaration falls short of demonstrating that it cannot reasonably be expected to do again in the future what it is alleged to have done in the past.

Fikre, No. 22-1178, 2024 U.S. LEXIS 1379, at *13-14 (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000)) (Slip Op. 7). First, the Court accepted the defendant's *as-yet uncontested allegations* at face value, given that Mr. Fikre apparently did not contest those allegations. Even then, a court reviewing defendants' evidence of mootness must consider what the evidence *may mean* and what *might* happen in the future, especially when faced with only *sparse* evidence.

II. UNDER *FIKRE*, THE CLAIM UNDER THE ELECTIONS AND ELECTORS CLAUSES WAS NOT MOOT.

Under *Fikre*, this Court must reject the lower courts' unsupported finding that a claim under the Elections and Electors Clauses became moot when the Electoral College voted on December 14, 2020. Under *Fikre*, that finding is unsupportable factually and legally.

A. The Electors and Elections Clause claim was not *factually* moot.

Three factual issues make it impossible for respondents to show the alleged mootness of the claim under the Elections and Electors Clauses:

- Detroit's brief in opposition ("BIO") *admits* that Electoral College votes can swap after December

14, BIO 23 (discussing swapping of Kennedy votes for Nixon votes on January 6,. 1961). Either the state or this Court—in No. 20-815—*could* have taken action that swapped Michigan's electoral votes, which means relief was not "impossible" under *Fikre*.

- In the *Genetski* litigation, Secretary Benson was still defending her unlawful signature-verification guidance as late as February 17, 2021, which does not suggest someone who could show voluntary cessation *vis-à-vis* future elections. Voluntary cessation would not be dispositive of mootness under *Fikre*, but here it is factually clear that the Michigan respondents cannot show even that they had voluntarily ceased their unlawful conduct.
- Most importantly, the admission in No. 20-815 admitted only that "subsequent relief would be pointless and the petition would be moot." *King* Pet. at 15.[2] As explained in more detail below, that says nothing about the merits, as the Michigan respondents admitted. Mich. *King* Opp'n at 12-13.

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[2] Significantly, *Fikre* evaluated the FBI's "as-yet uncontested allegations" in a defendant's declaration. *Fikre*, 2024 U.S. LEXIS 1379, at *13 (Slip Op. 7). Here, by contrast, the Sixth Circuit evaluated petitioners' own statement in a petition to this Court on which the Court denied the petition. For a plaintiff's admission to qualify as dispositive and "uncontested" under *Fikre*, the admission would need to trigger estoppel. Given the lack of reliance and inequitable conduct, withdrawn statements in an unsuccessful petition are unlikely to be "uncontested" under *Fikre*. *See*, *e.g.*, *Markel v. William Beaumont Hosp.*, 510 Mich. 1071, 1078-79 (2022); *Gjokaj v. HSBC Mortg. Servs.*, 602 F. App'x 275, 279 (6th Cir. 2015); *Dickerson v. Colgrove*, 100 U.S. 578, 580 (1879).

Under these facts, neither respondents nor the lower courts can show mootness under *Fikre*.

Because the Sixth Circuit's decision stands or falls on the claimed admission in No. 20-815, petitioners now analyze the import of that specific evidence under the focused analysis that *Fikre* brought to bear on the FBI's evidence—there, a declaration—to determine if the evidence meets the defendants' burden of showing mootness.

First, the most salient admission was that—after the Electoral College voted—"subsequent relief would be pointless and the *petition* would be moot." *King* Pet. at 15 (emphasis added). This admission expressly refers only to the emergency preliminary-injunction petition then before this Court, which is inapposite to the merits in district court: "Once the opportunity for a preliminary injunction has passed, … the preliminary injunction issue may be moot even though the case remains alive on the merits." 13C CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3533.3.1 & n.43 (3d ed.) (collecting cases); *accord Univ. of Texas v. Camenisch*, 451 U.S. 390, 394 (1981) ("[t]his … is simply another instance in which one issue in a case has become moot, but the case as a whole remains alive because other issues have not become moot"); *Boagert v. Land*, 543 F.3d 862, 864 (6th Cir. 2008) ("[d]ismissal of these preliminary-injunction appeals, of course, does not render moot the underlying district court litigation"). Significantly, the *Boagert* defendant was Michigan's then-Secretary of State in her official capacity as well as her individual capacity. *Bogaert*, 543 F.3d at 863. Under *Fikre*, the key admission on which the Sixth Circuit premised sanctions is no admission at all.

Indeed, the Michigan respondents *admitted* that the merits dispute in district court was not moot when they filed their opposition *on January 14, 2021*:

> Petitioners still have the opportunity for their day in court, including in the Sixth Circuit and possibly this Court, after the district court enters a final judgment.

Mich. *King* Opp'n at 12-13 (citing *Camenisch*, 451 U.S. at 393-94). Having prevailed before this Court to have the petition in No. 20-815 denied, Michigan may well be estopped from inverting its argument here, arguing the opposite to secure sanctions in district court.

Second, the petition also states that the "motion for immediate preliminary relief seeks to maintain the status quo so that the passage of time and the actions of Respondents do not render the *case* moot." *King* Pet. at 1 (emphasis added). While that statement uses the generic term "case" in place of "petition," it does not tie mootness to the Electoral College's voting on December 14, as distinct from the downstream Twelfth Amendment process or swearing-in process. Similarly, it says nothing either about exceptions to mootness (*e.g.*, actions capable of repetition, yet evading review) or about *future* elections. Under *Fikre*, this admission is therefore also insufficient to support conclusively finding the merits case in district court moot based only on the Electoral College's vote.

B. The Electors and Elections Clause claim was not *legally* moot.

Both for the 2020 election and *a fortiori* for future elections, the merits dispute in district court was not moot because declaratory relief remained possible, even if injunctive relief was not an option:

> [W]e need not decide whether injunctive relief against the President was appropriate, because we conclude that the injury alleged is likely to be redressed by declaratory relief against the Secretary alone.

Franklin v. Massachusetts, 505 U.S. 788, 803 (1992) (citations omitted). Like the Secretary of Commerce in *Franklin*, Secretary Benson here "certainly [had] an interest in defending her policy determinations concerning the [object of the litigation], even [if] she cannot herself change [it]." *Id.* Like the U.S. Solicitor General in *Franklin*, respondents cannot "contend[] to the contrary," so "we may assume it is substantially likely that the … [Vice-President and] congressional officials would abide by [a court's] authoritative interpretation of the [relevant] statute[s] and constitutional provision …, even though they would not be directly bound by such a determination." *Id.* Thus, as with the swapping of Kennedy electors for Nixon electors on January 6, 1961, declaratory relief remained possible and potentially useful until electoral votes were counted pursuant to the Twelfth Amendment. *Fikre* thus precludes reliance on a lack of possible injunctive relief to find mootness.

Moreover, swapping Trump votes for Biden votes was unnecessary for partial relief. If—as the complaint validly alleges—the Michigan election violated the Elections and Electors Clauses, Biden votes could be rejected without substituting Trump votes in their place, which would partially redress the Republican slate of electors' injury from the unlawful election process. When faced with unequal-footing claims, judicial relief can level the parties' treatment *up or down*:

> [W]hen the right invoked is that to equal treatment, the appropriate remedy is a *mandate* of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class.

Heckler v. Mathews, 465 U.S. 728, 740 (1984) (emphasis in original); *Clinton v. City of New York*, 524 U.S. 417, 433 n.22 (1998) (unequal-footing analysis applies outside equal-protection cases). Under the rigor and focus that *Fikre* applies to analyzing mootness, the case was not moot because partial relief remained possible.

Finally, although the Sixth Circuit did not see a basis for suit, App:25a-26a, that is both irrelevant and wrong. First, it is wrong because plaintiffs can name state officers to enjoin ongoing violations of federal law under the officer-suit exception to sovereign immunity, *Ex parte Young*, 209 U.S. 123, 159-61 (1908), which applies to suing state boards consisting of individual officers (*i.e.*, not entities like departments). FED. R. CIV. P. 25 Advisory Committee Notes to 1961 Amendments ("it has been often decided that there is no need to name the individual members and substitution is unnecessary when the personnel changes"); FED. R. APP. P. 43(c)(1); S.CT. R. 35.4; *Brown v. Georgia Dep't of Revenue*, 881 F.2d 1018, 1023 (11th Cir. 1989). Second, it is irrelevant because "the inquiry into whether suit lies under *Ex parte Young* does not include an analysis of the merits of the claim." *Verizon Md. Inc. v. Pub. Serv. Comm'n of Maryland*, 535 U.S. 635, 638 (2002); *cf. Warth v. Seldin*, 422 U.S. 490, 500 (1975) (same for Article III). Again, under the rigor and focus that *Fikre* applies to analyzing mootness, the case was not moot because

the complaint stated a claim on which relief could have been granted.

CONCLUSION

The petition for rehearing should be granted.

March 26, 2024

Respectfully submitted,

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