NO. _____

In the Supreme Court of the United States

CLIFFORD JAMES FROST, JR.,

Petitioner,

v.

DANA NESSEL,
IN HER OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF MICHIGAN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the "bad faith" exception to *Younger* preemption require the plaintiff to show that he or she has been subject to multiple criminal prosecutions as a prerequisite to proving that a prosecution has been undertaken in bad faith without hope of obtaining a valid conviction, or can a single criminal prosecution be sufficient?

LIST OF PROCEEDINGS

U.S. Court of Appeals for the Sixth Circuit

No. 24-1132

Clifford James Frost, Jr., *Plaintiff-Appellant, v.* Dana Nessel, *Defendant-Appellee*.

Opinion: April 17, 2025

U.S. District Court, Western District of Michigan

Case No. 1:23-cv-1226

Clifford James Frost, Jr., *Plaintiff, v.* Dana Nessel, *Defendant*.

Order and Judgment: January 18, 2024

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The United States District Court for the Western District of Michigan, Southern Division, on January 18, 2024, denied Petitioners' Motion for Preliminary and/or Permanent Injunction, abstained from exercising jurisdiction under the doctrine articulated in *Younger v. Harris*, 401 U.S. 37 (1971), and dismissed the action for lack of jurisdiction. App.21a. On April 17, 2025, the Sixth Circuit affirmed the District Court's order (App.1a) in *Frost v. Nessel*, No. 24-1132, 2025 Fed. App. 0207N (6th Cir.); 2025 U.S. App. LEXIS 9312; 2025 WL 1136288 (April 17, 2025) (unpublished).

JURISDICTION

The judgment of the Court of Appeals was entered on April 17, 2025. App.1a. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

- U.S. Const. amend. XIV, § 1
- 42 U.S.C. § 1983
- 3 U.S.C. § 5 (Prior to December 29, 2022) (App.36a)

- 3 U.S.C. § 6 (Prior to December 29, 2022) (App.37a)
- 3 U.S.C. § 15 (Prior to December 29, 2022)
- MCL 168.42
  Presidential electors; selection at state political party conventions, certification. (App.42a)
- MCL 168.45
  Cross or check mark as vote for presidential electors. (App.43a)
- MCL 168.46
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  Convening of presidential electors; time and place thereof; resignations; refusal or failure to vote; vacancies. (version then in effect) (App.44a)
- MCL 750.248
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- MCL 750.249
  Uttering and Publishing
- MCL 168.933a
  Forgery
- MCL 750.157a
  Conspiracy

STATEMENT OF THE CASE

I. Introduction

A state attorney general shopped around a highly political case to a county prosecutor and the U.S. Department of Justice. They declined to prosecute, and the county prosecutor's office issued an opinion that the facts alleged did not amount to a crime. The attorney general persisted and brought the charges directly out of her own office, using charging documents that alleged facts which, if taken as true, do not describe a crime.

Imagine if a prosecutor alleged in an indictment that one Arthur Gates was guilty of breaking and entering and larceny. The supporting facts: Fred Smith owned Blackacre, gave Arthur Gates a key, and told him to go to Blackacre and take a certain wristwatch. Gates complied. Those facts obviously would not support breaking and entering or larceny, and it would be unjust for the prosecution to continue. Gates's objections to prosecution would not simply be "typical defenses raised by criminal defendants". App.17a-18a.

This is what Defendant did to Petitioner. She alleged that he committed a series of acts that – even if they were proven to be true – would not, as a matter of law, constitute any charged offense. A prosecution "that has been brought without a reasonable expectation of obtaining a valid conviction" is the very definition of bad faith. *Kugler v. Helfant*, 421 U.S. 117, 124 (1975). But Defendant argued, and the District Court and Circuit Court agreed, that a single criminal

prosecution cannot be sufficient to show bad faith and overcome the abstention doctrine articulated in *Younger v. Harris*, 401 U.S. 37 (1971), which limits a federal court's power to enjoin pending state court criminal proceedings.

This Court has never held that a plaintiff must show multiple prosecutions to prove bad faith. Whether multiple prosecutions are a prerequisite for the bad faith exception to *Younger* abstention is "an important question of federal law that has not, but should be, settled by this Court" under Supreme Court Rule 10(c).

"There is a constitutional right to be free of bad faith prosecution." *Hand v. Gary*, 838 F.2d 1420, 1424 (5th Cir. 1988). That right exists under the Fourteenth Amendment. *See, e.g.*, *Id.* at 1424 n.3. Bad faith prosecutions "cause sufficient irreparable harm to support federal injunction of a state prosecution." *Id.* This Court has defined a bad faith prosecution to include one "brought without a reasonable expectation of obtaining a valid conviction." *Kugler v. Helfant*, 421 U.S. 117, 126 (1975) (citing *Perez v. Ledesma*, 401 U.S. 82, 85 (1975)). While federal court intervention in a state criminal proceeding is only permissible in "exceptional circumstances," *Kugler*, 421 U.S. at 123, this case amply meets that standard. Exceptional circumstances include where the plaintiff shows bad faith, harassment, *or* flagrant unconstitutionality of the statute or rule at issue." *Doe v. University of Kentucky*, 860 F.3d 365, 371 (6th Cir. 2017) (emphasis added).

Petitioner Clifford Frost ("Frost") seeks to enjoin an ongoing Michigan state prosecution (the "Michigan Criminal Prosecution") by the Defendant Michigan

Attorney General Dana Nessel (the "AG") against Frost and 15 other Michigan citizens (the "Republican Electors") who questioned the results of the 2020 presidential election in Michigan. The AG brought the Michigan Criminal Prosecution with no reasonable expectation of obtaining valid convictions against the Republican Electors. She did so to retaliate against and/or punish the Republican Electors – all of whom are political opponents of the AG – for their unsuccessful efforts to protest the outcome of the election.

What did the Republican Electors do, according to the AG? They submitted to Congress a document (the "Republican Elector Certificate", App.87a) that the Republican Electors allegedly signed. The AG alleges that "[n]otwithstanding the fact that the Democratic Party nominees had been certified by the Michigan Board of Canvassers as having received the greatest number of votes for President and Vice-President, the 16 persons who signed the [Republican Elector Certificate] falsely asserted that they were the duly elected and qualified Electors from the State of Michigan." *See* Affidavit of Probable Cause, App.60a.

The AG concedes that Congress only accepted the electoral votes submitted by the Democrat Electors that were certified by the State of Michigan in accordance with state statutes. Nonetheless, based upon the Republican Elector Certificate, the AG has brought 8 felony counts, all of which require a showing that the Republican Elector Certificate was a "forgery," and which seek to imprison Frost and the other Republican Electors for up to 14 years. *See* Indictment, App.82a.

But the Republican Elector Certificate was exactly what it purported to be, and what the AG says it was – a piece of paper allegedly signed by the 16 Republican Electors that did not bear the Seal of the State of Michigan or the Governor's certification. It had no legal effect and could not have caused the President of the Senate, Mike Pence, to award Michigan's electoral votes to the wrong candidate. Without the seal and certification, the Republican Elector's Certificate did not, and could not have, "falsely asserted" anything. It did not purport to exchange the real Democrat electors for fake Republican electors and could not have affected the outcome of the election in any way.

In the State of Michigan, the AG – the prosecutor with the broadest powers – is an elected official and a member of a political party. The Michigan Criminal Prosecution represents an attempt to criminalize what was at most a futile political protest. Pursuant to federal and state law, Michigan's 16 electoral votes for president are cast by "electors" of the political party whose candidates receive the highest number of votes in the State in the presidential election. After the 2020 presidential election, the State of Michigan (through Governor Gretchen Whitmer), after determining that Joe Biden and Kamala Harris received the highest number of votes in the State, certified the electors designated by the Democratic Party (the "Democrat Electors") as the electors who would cast Michigan's 16 electoral votes. Governor Whitmer thus caused the Seal of the State of Michigan and her own certification to be affixed to the Democrat Elector Certificate, and not the Republican Elector Certificate Frost allegedly signed. That made the

Republican document a nullity under state law. Importantly, the AG has not even alleged that the Republican Electors tried to have Governor Whitmer certify and seal the wrong elector certificate. They merely (allegedly) sent the Republican Elector Certificate to Congress without the essential seal and certification, which rendered the Republican Elector Certificate an ineffective piece of paper, not a forgery of anything.

Again, the factual allegations of "forgery" which form the basis for all the counts in the Michigan Criminal Prosecution, even if true, as a matter of law do not constitute a crime for at least two reasons. First, the crime of forgery requires an act that makes an instrument appear to be what it is not (*see, e.g.*, *People v. Susalla*, 392 Mich. 387, 220 N.W.2d 405 (1974)), but the Republican Electors' Certificate was exactly what it purported to be. Second, forgery cannot occur unless the act of forgery exposes another to loss, and there is no question that the actions the AG alleges were undertaken by Plaintiff and the other Republican Electors as a matter of law could not have resulted in Michigan's 16 electoral votes being awarded to the Republican Party's candidates and therefore could not have exposed anyone to a "loss."

Frost's preliminary exam will purportedly determine whether the AG has "sufficient facts to determine whether or not a crime was committed", and his trial will purportedly determine whether the AG has proven the facts she alleged. But the AG has not even alleged facts in her indictment that would, if true, constitute a crime. Neither a preliminary exam nor a trial is warranted. Frost endured a multi-day preliminary exam that still has not resulted in a bind-over decision. The

preliminary exam, the potential binding over for trial, and the psychic cost of enduring a prosecution that does not describe a crime have violated Frost's constitutional rights.

The Michigan and Federal election statutes which applied to the 2020 Presidential election collectively demonstrate that because Governor Whitmer formally certified the Democrat Electors as the duly elected Michigan electors, her certification was "conclusive" under federal law and Congress was bound by it when it counted the electoral votes from the State of Michigan. Not surprisingly, then, Congress counted only the electoral votes submitted by the Democrat Electors. Thus, the Republican Elector Certificate at most had the effect of furthering a political protest, and could never have resulted in Michigan's 16 electoral votes being cast for the Republican Party candidates.

Notably, the AG herself has made public statements and filed pleadings in other cases acknowledging that the Elector Certificate was a legal nullity. In one brief filed in this Court, the AG cited a December 15, 2020 newspaper article titled *Michigan Republicans who cast electoral votes for Trump have no chance of changing Electoral College result*. Nonetheless, the AG has claimed that the Elector Certification was "part of a much bigger conspiracy" to "overthrow the U.S. Government." On Rachel Maddow's nationally televised television program on MSNBC, prior to filing the charges, the AG called the conduct of the Republican Electors a "conspiracy to overthrow the United States Government" and constituted "the most significant case of election fraud ever in our state's history." The AG made similar statements to other media outlets like CNN and the Detroit News. Additionally, in a

federal brief she filed in *King v. Whitmer*, E. D. Mich. Case No. 2-20-cv-13134, a case arising out of a different challenge to the results of the 2020 election, the AG flatly stated that, as of December 14, 2020, there was "no process for permitting the unsuccessful elector candidates to cast their votes."

II. Factual and Legal Background

A. The Alleged Basis for the State Prosecution

The purported factual basis for the Michigan Criminal Prosecution is set forth in the Affidavit of Special Agent Investigatory Howard Shock ("Shock"), App.60a. Shock's affidavit describes felony counts under MCL 750.248 ("Making, altering, forging, or counterfeiting public record"), MCL 168.933a (Forgery), and MCL 750.249 (Uttering and Publishing), plus four additional counts under MCL 750.157a (Conspiracy). The core of Shock's allegations is "that a fraudulent 'Certificate of Votes of the 2020 Electors from Michigan' was created" and "was made and published with the intent to defraud the National Archives, President of the U.S. Senate, and others."

Shock also describes how Governor Whitmer "signed and issued an *Amended Certificate of Ascertainment of the Electors of the President and Vice President of the United States*" identifying the Democratic candidates as the winners and stating that the Democratic electors "were duly elected as Electors." Appx.68a. Shock states that due to the Governor's certification, "[t]he Republican nominees were not the duly elected Presidential electors and had no legal authority to act as duly elected Presidential electors." *Id.*

An examination of the applicable Michigan and Federal election statutes, and the application of the Michigan criminal statutes which form the basis for the Michigan Criminal Prosecution confirms that no crime was committed here, even if all the AG's factual allegations are true. Because no crime was committed, Frost has the right under the Fourteenth Amendment to be free from prosecution for conduct that as a matter of law, could not have constituted a crime – not starting after his preliminary examination, or at any later date, but now.

B. The Michigan Election Statutes at Issue

The procedure by which Michigan selects Presidential electors is set out in Chapter IV of the Michigan Election Law (MCL 168.41 – MCL 168.47). The following Michigan statutory provisions governed that process at the relevant time.[1]

First, MCL 168.42 requires that, prior to a presidential election, each political party must elect a slate of electors who would be entitled to cast the State's 16 electoral votes in the event that their party's chosen candidates for President and Vice President received the most votes in the Presidential election. App.42a. Second, MCL 168.45 makes clear that Michigan voters in a presidential election do not directly vote for individual candidates but instead vote for the presidential electors chosen by the political party of the individual candidate. App.43a. Third, MCL 168.46 authorizes the Michigan Board of Canvassers to determine the

[1] MCL 168.46 and 168.47 were substantially revised in February 2024. The versions of those provisions referenced here are the ones that were in effect at relevant times.

Presidential and Vice-Presidential candidates who receive the highest number of votes in the election, and further requires the Governor of the State of Michigan to certify the legal electors elected by the political party based upon the Board of Canvassers determinations. App.43a.

Importantly, only the electors certified by the Governor have the legal ability to cast the State's electoral votes for President and Vice-President. This is made clear by MCL 168.47. App.44a.

The AG concedes that all the above statutorily required procedures and actions actually occurred in the aftermath of the November 2020 Presidential election, as to the Democrat Electors and not as to Frost and the other Republican Electors. *See* Shock Affid., App.60a; Affidavit of Ascertainment, App.87a.

C. The Applicable Federal Election Statutes[2]

The State of Michigan's admitted adherence to its own statutory procedures for certifying electors ensured that only the Democratic Electors could legally cast Michigan's electoral votes for President and Vice-President after the 2020 election regardless of any legal or illegal actions taken by the Republican Electors. This is because, under federal law, Governor Whitmer's certification of the Democrat Electors under Michigan law was "conclusive" and had to be followed by Congress. *See* 3 U.S.C. § 5.

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[2] The federal statutes referenced in this section were substantially revised in 2022. The versions of those provisions referenced here are the ones that were in effect in during the relevant time period – *i.e.*, November 2020 through January 2021.

"Both the Constitution of the United States and 3 U.S.C. § 5 indicate that states have the primary authority to determine the manner of appointing Presidential Electors and to resolve most controversies concerning the appointment of Electors." *Touchston v. McDermott*, 234 F.3d 1130 (11th Cir. 2000). Indeed, in *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70, 77; 121 S. Ct. 471 (2000), this Court observed that Section 5 "creates a 'safe harbor' for a State insofar as congressional consideration of its electoral votes is concerned. If the state legislature has provided for final determination of contests or controversies by a law made prior to election day, that determination shall be conclusive if made at least six days prior to said time of meeting of the electors." [Emphasis added]. *See also Id.* at 78 (observing that Section 5 "contains a principle of federal law that would assure finality of the State's determination if made pursuant to a state law in effect before the election.") (emphasis added).

Here, the AG concedes that the State of Michigan certified the Democratic Electors pursuant to a state law in effect before the election within the times set forth in Section 5. Accordingly, the certification of the Democratic Electors was conclusive under federal law and Congress was required to give full legal effect to the electoral votes cast by Democratic Electors, and Congress was precluded from even considering any alternative submission, including the document Frost signed.

This is further confirmed by 3 U.S.C. § 6 (App.37a-38a), which also makes clear that the competing Elector Certification purportedly submitted by Frost and the other Republican Electors could not have been

given any effect because it was contradicted by the Governor's Certificate.

Because the State of Michigan complied with its own statutes in certifying the Democratic Electors, Congress was required to count the votes submitted by the Democratic Electors, and only the Democratic Electors. *See* 3 U.S.C. § 15, App.38a.

Thus, in Section 15, Congress expressly envisioned two potential scenarios and dictated how Congress was required to address each one. First, Section 15 addressed the situation where only "one return was received" from a State. Under those circumstances, Congress could not reject the electoral votes so long as they had "been regularly given by electors whose appointment has been lawfully certified to according to section 6 of this title." Clearly, the Governor's certification here satisfied 3 U.S.C. § 6, and the votes purportedly cast by the Democrat Electors were in fact cast by the Democrat Electors. Accordingly, Congress was legally required to count Michigan's electoral votes as cast by the Democrat Electors.

The same is true for the other possibility. Elsewhere in Section 15, Congress considered the possibility that competing slates of electors could submit electoral votes for the same state. Under those circumstances, Congress expressly required that Congress consider only the votes "given by the electors who are shown by the determination mentioned in section 5 of this title to have been appointed." There is no question that the only electors determined by Section 5 to have been appointed were the Democratic Electors.

But to make this conclusion even more inevitable, Section 15 goes on to provide that the Governor's cert-

ification, by virtue of 3 U.S.C. § 6, would have been dispositive, even if the State of Michigan had not reached a "determination" as defined by 3 U.S.C. § 5. This is because Section 15 provides:

> . . . in such case of more than one return or paper purporting to be a return from a State, if there shall have been no such determination of the question in the State aforesaid, then those votes, and those only, shall be counted which the two Houses shall concurrently decide were cast by lawful electors appointed in accordance with the laws of the State, unless the two Houses, acting separately, shall concurrently decide such votes not to be the lawful votes of the legally appointed electors of such State. But if the two Houses shall disagree in respect of the counting of such votes, then, and in that case, the votes of the electors whose appointment shall have been certified by the executive of the State, under the seal thereof, shall be counted.

Again, Governor Whitmer's certification ensured that, even if the Republican Elector Certificate had reached the floor of Congress, the applicable state and federal statutes collectively prohibited Congress from counting the votes of the Republican Electors.

Not surprisingly, then, the Congressional Record confirms that Congress received the Michigan electoral votes submitted by the Democrat Electors without even mentioning the Republican Elector Certificate. *See* 167 Cong. Rec. H96, 2021.

D. The Electors' Certificate Could Not Be a Forgery Because the Certificate Did Not Purport to Be Something It Was Not

All the counts of the criminal complaint require a showing that the defendants in the Michigan Criminal Prosecution have committed the crime of forgery.[3] The Michigan Supreme Court has defined forgery as the making of a document with intent to deceive in a manner which exposes another to loss. *In re Loyd*, 424 Mich. 514, 526; 384 N.W.2d 9 (1986). In *People v. Susalla*, 392 Mich. 387; 220 N.W.2d 405 (1974), the Court reaffirmed its assertion set forth in *In re Stout*, 371 Mich. 438, 441; 124 N.W.2d 277 (1963) that forgery includes any act which fraudulently makes an instrument purport to be what it is not. *Susalla*, 392 Mich. at 390. *See also People v. Hodgins*, 85 Mich. App. 62, 65; 270 N.W.2d 527 (1978). The *Susalla* Court also concluded that the key to forgery is that the writing itself was a lie. *Susalla*, 392 Mich. at 392-393.

Here, given the AG's allegations, the Electors' Certificate can only be characterized as being exactly what it purports to be. It accurately identifies the persons purporting to be the "duly elected and qualified Electors for President and Vice-President of the United States of America from the State of

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[3] MCL 750.248 and MCL 168.933a expressly criminalize forgery. The elements of uttering and publishing statute, MCL 750.249, are (1) knowledge on the part of the defendant that the instrument was false; (2) an intent to defraud, and (3) *either* a presentation of the forged instrument for payment or presentation of a forged "record," "public record," or other document specified in MCL 750.248 in a manner "capable of affecting the rights of others or creating liability in others." *People v. Cassadine*, 258 Mich. App. 395, 3990400, 671 N.W.2d 559 (2003).

Michigan." In sum, the "writing itself" is "not a lie." At most, the AG alleges that the Elector's Certificate contains false statements of fact. But an authentic document that contains false statements is not, as a matter of law, a "forgery." For example, in *People v. Thomas*, 182 Mich. App. 225; 452 N.W.2d 215 (1989), a police officer was charged with forgery for including false information in a police report. The Court of Appeals held that there was no forgery because the police report was exactly what it purported to be, notwithstanding the allegedly false information. The Court observed:

> In the instant case, it can be argued that defendant included the false information with the intent to deceive and that such action resulted in exposing the suspect to loss of his freedom. However, we are hard put to find that this single statement made the entire police report purport to be something it was not and decline any invitation to extend the definition of forgery to this context. [*Id.* at 229-230 (emphasis added).

Similarly, in *People v. Hardrick*, Nos. 333568, 333898; 2017 Mich. App. LEXIS 2087 (Dec. 19, 2017) (ECF No. 1-13), defendant recorded numerous quitclaim deeds on properties he did not actually own. He then proceeded to attempt to sell the properties to third parties. He was charged with, among other crimes, forgery under MCL 750.248. Defendant was convicted of perjury, but the Court of Appeals reversed, finding that the quit claim deeds were "exactly what they purported to be." In reaching this conclusion, the Court observed:

> Here, the quit claim deeds, prepared by defendant, did not purport to be anything other than quitclaim deeds conveying whatever interest defendant had in the property to his company or vice versa. . . . the deeds only purported to convey whatever interest defendant or his company possessed, even if neither possessed any legal interest. Accordingly, the quitclaim deeds were not falsely made, and there was insufficient evidence to support defendant's convictions of forgery . . . [*Hardrick*, 2017 Mich. App. LEXIS 2087 at **9-10, PageID.134 (emphasis added).]

Like the police report in *Thomas* and the quit claim deeds in *Hardrick*, under the facts alleged in the indictment, the Republican Electors' Certificate indisputably is authentic. It identifies each person purporting to execute it, and the indictment alleges that each of the Republican Electors signed the Certificate. The fact that, in the government's view, the Republican Electors were not authorized to submit the Certificate and that they falsely represented that they were duly authorized does not change the fact that the Certificate is "exactly what it purported to be."[4]

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[4] These facts clearly distinguish this case from, for example, *People v. Hawkins*, 340 Mich. App. 155; 985 N.W.2d 853 (2022). There, defendant, an election worker, was charged with forgery based upon her alteration of an official election record to change the number of votes cast in an election. The Court held that the forgery charge should go forward because "defendant's fraudulent act of falsifying the QVF made that altered election record appear to be what it certainly was not, an accurate report regarding the AV ballots." Here, the Republican Electors' Certificate is exactly what it appears to be.

The Elector's Certificate could be deemed to "purport to be what it is not" only if Frost and the other Republican Electors tried to "dummy up" a certificate that appeared to comply with the state and federal requirements to evade the state and federal electoral requirements, and fool Congress into giving Michigan's 16 electoral votes to the Republicans. But that would require Frost and the other Republican Electors to, at the very least, present an Electors' Certificate that didn't include their own signatures, but instead contained the forged signatures of the Democratic Electors (presumably falsely voting for Trump and Pence) coupled with a forged copy of the necessary Governor's Certification.

Here, however, there is no allegation that Frost forged the signature of any of the Democratic Electors, or that Frost forged the Governor's Certificate. Both of those types of forgery are necessary before the Elector Certificate could be characterized as something other than what it purports to be.

E. The Electors' Certificate Could Not Constitute a Crime Because as a Matter of Law It Could Never Have Achieved the Purported Goal of Overturning the Election

The Elector Certificate was a legal nullity and never could have achieved the Republican Electors' purported goal of having Congress award Michigan's 16 electoral votes to Trump and Pence.

Again, forgery requires "the making of a document with intent to deceive in a manner which exposes another to loss." *In re Loyd*, 424 Mich. 514, 526, 384 N.W.2d 405 (1974) (emphasis added). *See also People*

v. Hodgins, 85 Mich. App. 62, 65; 270 N.W.2d 527 (1978) (forgery requires a showing "that a liability is created in someone other than the defendant or some liability is enlarged.") Said another way, forgery requires "the false making or material alteration, with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy or the foundation of legal liability." *People v. Susalla*, 392 Mich. 387, 392; 220 N.W.2d 405 (1974) (quoting 2 WHARTON'S CRIMINAL LAW & PROCEDURE Sec. 621, p. 396) (emphasis added).

The same is true under the uttering and publishing statute, MCL 750.249. That statute requires, among other things, *either* a presentation of the forged instrument for payment *or* presentation of a forged "record," "public record," or other document specified in MCL 750.248 in a manner "capable of affecting the rights of others or creating liability in others." *People v. Cassadine*, 258 Mich. App. 395, 3990400, 671 N.W.2d 559 (2003).

To be a crime, an alleged forgery must have at least potential legal consequences, either by benefiting the forger or harming the victim, or both. Here, however, the allegedly forged Republican Electors' Certificate could not have been legally capable of working the allegedly intended fraud or injury because (1) it did not have Governor Whitmer's certification, (2) Governor Whitmer's certification named the Democrat Electors and not the electors named in the allegedly forged certification, and (3) the state and federal statutory scheme makes Whitmer's certification "conclusive" as to the identity of the electors. Because the Electors' Certificate did not "expose" anyone to a "loss," there could be no forgery as a matter of law.

III. Procedural History

A. Frost Moved Michigan's 54-A District Court to Dismiss the Indictment Against Frost for Failure to State a Claim, But the 54-A District Court Denied Frost's Motion on Incorrect Procedural Grounds Without Reaching the Motion's Merits

On September 14, 2023, Frost filed a Motion for Summary Disposition under MCR 2.116(C)(8) in the Michigan Criminal Prosecution. The 54-A District Court denied Plaintiff's Motion for Summary Disposition on wholly procedural grounds, without reaching the motion's merits. *See* Hearing Trans. 10/6/23, App.52a ("I don't think we're in a situation here where it's appropriate to bring a motion for Summary Disposition. . . . It should be something that should be given or taken before the court, maybe at the circuit court level . . . We don't even know if they have sufficient facts to determine whether or not a crime was committed. All we have is a pleading.").

B. The Proceedings in the Western District of Michigan

On November 21, 2023, Frost filed his Complaint in the Western District of Michigan. ECF No. 1, PageID.1. On November 30, 2023, Frost filed a Motion for Preliminary and/or Permanent Injunction in the District Court. ECF No. 5, PageID.346. Frost's motion included a request for expedited consideration. *Id.*, PageID.347. The District Court denied Frost's request for expedited consideration and set a briefing schedule for Frost's motion. Order Denying Expedited Consideration, ECF No. 11, PageID.422-423.

In its January 18, 2024 Order, the District Court held it was required to abstain from exercising subject matter jurisdiction over this case under *Younger v. Harris*, 401 U.S. 37 (1971). App.33a. The District Court acknowledged that under *Younger*, 401 U.S. at 53-54, and its progeny like *Doe v. Univ. of Ky.*, 860 F.3d 365, 371 (6th Cir. 2017), notwithstanding abstention "a plaintiff still has the opportunity to show that an exception to Younger applies. These exceptions include bad faith, harassment, or flagrant unconstitutionality of the statute or rule at issue."

However, the District Court held that "the state prosecution provides Frost with adequate opportunities to raise constitutional challenges and any other challenges in a competent forum." App.27a. Even if the allegations against Frost "do not amount to a crime", Frost may assert a "sufficiency-of-the-evidence claim in the state criminal proceedings – starting at his impending preliminary examination." The Circuit Court noted that the purpose of a preliminary exam "is to determine whether a crime was committed" (*Id.*, quoting *People v. Taylor*, 890 N.W.2d 891, 894 (Mich. App. 2016)), but failed to recognize that the question here is whether a crime was alleged. Frost brought the equivalent of a Rule 12(b)(6) motion to dismiss for failure to state a claim, and the 54-A District Court refused to entertain that motion. Surely a crime must be alleged before a criminal defendant can be expected to undergo a preliminary exam, not to mention a jury trial.

The District Court further held that a plaintiff alleging bad faith prosecution must show that he or she has been subjected to multiple prosecutions or threats of prosecution. ECF No. 15, PageID.533-534. As discussed below, the District Court's cited authority

does not say what the District Court believes it said. Neither the U.S. Supreme Court in *Dombrowski v. Pfister*, 380 U.S. 479 (1965) nor this Court in *Ken-N.K., Inc. v. Vernon Twp.*, 18 F. App'x 319, 324 n.2 (6th Cir. 2001) held that a plaintiff must show multiple prosecutions to prove a prosecution was brought in bad faith and without any expectation of securing a conviction.

Finally, the District Court held that "Frost's argument that the prosecution cannot prove its case against him or has failed to state an actionable claim is akin to the claims by almost every defendant contesting liability in any criminal case." App.32a. As discussed below, that holding misses the point. This is not a case of "a crime was committed, but I didn't do it," or "I did it, and if the facts were what the prosecutor says, that would be a crime, but let me tell you the real facts." Here, no possible crime has been alleged, even if all the allegations in the charging documents are taken as true.

C. The Proceedings in the Sixth Circuit

The Sixth Circuit affirmed the Western District's decision. In the portion of the Sixth Circuit's opinion that is relevant to this Petition, the court found that "the cost, anxiety, and inconvenience of having to defend against a single criminal proceeding alone do[es] not constitute [the kind of] 'irreparable injury'" that warrants abstention pursuant to *Younger*. App.18a (citing *Kugler*, 421 U.S. at 124 (quoting *Younger*, 401 U.S. at 46).

REASONS FOR GRANTING THE PETITION

I. INTRODUCTION

The Sixth Circuit issued a thoughtful opinion that seems reasonable at first glance. "Why not let the state prosecution play out? It's just one felony prosecution, not a pattern. Frost is not a civil rights activist in the Jim Crow south, like the plaintiffs in *Dombrowski*. Let's not jump to conclusions, or else every defendant will want federal review of whether his or her charging documents alleged a crime."

But the Sixth Circuit's reasoning ignores Frost's personal, individual constitutional right to be free from bad faith prosecution. The court appears to agree with the AG's contention that Frost's objections to the Michigan Criminal Prosecution are nothing more than "typical defenses raised by criminal defendants that do not warrant federal interference in Michigan state court proceedings." It is difficult to believe a "typical" criminal defendant argues the charging documents do not, for example, allege a murder. "Ms. Prosecutor, you don't allege anyone died" is probably not a common defense to a murder charge.

More importantly, the District Court's decision, which the Circuit Court essentially adopted, reveals an apparent misconception about the state of the law on the part of the federal courts, or even a circuit split under *McNatt v. Texas*, 37 F.3d 629 [published in full-text format at 1994 U.S. App. LEXIS 41439] (5th Cir. 1994) (declining to find a bad faith prosecution, but making no reference to multiple prosecutions). No prosecutor would in good faith knowingly charge a

citizen with a "non-crime" such as breaking and entering his own house. A prosecutor would not start a charging affidavit by saying "the defendant owns and resides in the property at 123 Main Street. He lives alone, and no other person has any right to occupy 123 Main Street. On the night in question, the defendant went to the store. When he returned, 123 Main Street was empty. No one was inside. Only the defendant had the right to be inside. The defendant used his lawfully possessed key to unlock the front door and entered the dwelling, with the intent to go to sleep in his own bed. He therefore broke and entered the property without permission, with the intent to commit a felony therein, and is guilty of burglary." If a prosecutor charged a citizen with burglary under those circumstances, using charging documents that alleged the above facts and nothing more, the prosecutor's bad faith would be obvious. With no allegation of a crime, there could be no possibility of obtaining a valid conviction, and thus no reasonable expectation of a valid conviction. That would leave only bad faith or harassment as possible motives for the charges.

One can imagine a prosecutor bringing charges under slightly different circumstances: "The defendant leased 123 Main Street to a tenant, who had the exclusive right to occupy the property. The defendant had a key so he could access the rental property in an emergency. Using his own lawfully possessed key, the defendant let himself in with the intent to kill the tenant." Those statements describe a crime.

Or imagine a more ambiguous set of circumstances: "The defendant went to the store and left his girlfriend at her house. They had been fighting. She locked the door behind the defendant. When he returned, the

defendant entered the house using a key in his possession." Under those alleged facts, there is some ambiguity. Did the defendant have the right to enter the house, when his girlfriend told him to stay out and locked the door? Did the girlfriend previously give the defendant a key and tell him "come in anytime"? Did the girlfriend tell the defendant not to come in? Did she call down to the defendant from a window and tell him to let himself in with his own key? There are many potential questions of fact for a jury, and if the prosecutor can marshal evidence to support his or her theory of the case, then the court would be justified in binding over the case for trial.

There is no such ambiguity here. The AG has alleged a non-crime, like "possession of alcohol by a person over 21 years of age who is not for any reason prohibited from possessing alcohol." The Michigan 54-A District Court has refused to consider Frost's motion to dismiss. Frost has shown the requisite bad faith by the AG, or at a minimum has shown enough evidence of bad faith to warrant the exercise of federal jurisdiction followed by further inquiry through discovery and an evidentiary hearing.

II. *YOUNGER* ABSTENTION

Exceptions to *Younger* "include bad faith, harassment, *or* flagrant unconstitutionality of the statute or rule at issue." *Doe v. University of Kentucky*, 860 F.3d 365, 371 (6th Cir. 2017) (emphasis added). *Younger* abstention is not required here because the State Court Prosecution was brought in bad faith and/or to harass Frost. Frost can satisfy the "bad faith" requirement by showing that the state officials have proceeded "'without hope of obtaining a valid conviction.'" *Perez v. Ledesma*, 401 U.S. 82, 85; 91 S. Ct. 674 (1971). *See*

also Kevorkian v. Thompson, 947 F. Supp. 1152, 1164 (E.D. Mich. 1997) ("Bad faith generally means that a prosecution has been brought without a reasonable expectation of obtaining a valid conviction").

In the proceedings below, the Western District of Michigan held:

> To apply, "the threat to [Frost's] federally protected rights must be one that cannot be eliminated by his defense against a single criminal prosecution." *Younger*, 401 U.S. at 46. As already noted, Frost has multiple opportunities in the state proceedings to present and prevail on his theories. This strongly militates against applying the bad faith prosecution exception here. Indeed, "the Supreme Court has applied the bad faith/harassment exception to 'only one specific set of facts: where state officials initiate repeated prosecutions to harass an individual or deter his conduct, and where the officials have no intention of following through on these prosecutions." *Lloyd v. Doherty*, No. 18-3552, 2018 WL 6584288, at *4 (6th Cir. Nov. 27, 2018) (quoting *Ken-N.K., Inc. v. Vernon Township*, 18 F. App'x 319, 324 n.2 (6th Cir. 2001)). [Opinion, PageID. 533-534.]

The "one specific set of facts", according to the District Court, requires proof of multiple prosecutions. But nothing in the cited cases established such a requirement, and the Sixth Circuit appears to have adopted the Western District of Michigan's requirement of multiple prosecutions.

First, *Younger* itself does not require multiple prosecutions. The Supreme Court in *Younger* said the "inconvenience of having to defend against a single criminal prosecution" would not ordinarily justify federal interference with state prosecutions. *Younger*, 401 U.S. at 46. However, the *Younger* court noted that the circumstances of *Dombrowski* "sufficiently establish the kind of irreparable injury, above and beyond that associated with the defense of a single prosecution brought in good faith, that had always been considered sufficient to justify federal intervention." *Id.* at 48 (emphasis added). The *Younger* court then found that "There is no suggestion that this single prosecution against Harris is brought in bad faith or is only one of a series of repeated prosecutions to which he will be subjected." *Id.* at 49. Nowhere does *Younger* hold that multiple prosecutions are necessary to show bad faith. To the contrary, *Younger* examined whether "this single prosecution . . . is brought in bad faith" and merely noted that "defense of a single prosecution brought in good faith" would not justify federal interference.

It is true that in *Dombrowski*, the plaintiffs had been prosecuted twice. But Frost is entitled to at least explore whether the AG's motives are similar to those of the defendants in *Dombrowski v. Pfister*, 380 U.S. 479, 482; 85 S. Ct. 1116 (1965), of whom the plaintiff alleged:

> that the threats to enforce the statutes against appellants are not made with any expectation of securing valid convictions, but rather are part of a plan to employ arrests, seizures, and threats of prosecution under color of the statutes to harass appellants and discourage them and their supporters from

> asserting and attempting to vindicate the constitutional rights of Negro citizens of Louisiana.

But the cases following *Younger* did not view *Younger* as holding that multiple prosecutions were necessary. The Sixth Circuit in *Ken-N.K., Inc. v. Vernon Twp.*, 18 F. App'x 319, 324 n.2 (6th Cir. 2001) stated as follows:

> Commentators have noted that the Supreme Court has applied the "bad faith" exception to only one specific set of facts: where state officials initiate repeated prosecutions to harass an individual or deter his conduct, and where the officials have no intention of following through on these prosecutions. Erwin Chemerinsky, FEDERAL JURISDICTION § 13.4, at 806-08 (3d ed. 1999). In this case, Shiawassee County followed through with its nuisance suit against the Canfields and, indeed, was successful in enjoining the Canfields from continuing to present adult entertainment. The facts of this case simply do not fit within the Supreme Court's narrow interpretation of the bad faith exception. [emphasis added]

Ken-N.K. does not hold that multiple prosecutions are necessary, or even reflect such a requirement in *Younger* or *Dombrowski*. It merely cites a single commentator, Erwin Chemerinsky, who wrote in his treatise that as of 1999, the U.S. Supreme Court had only applied the "bad faith" exception to repeated prosecutions. That is an interesting "factoid" but not a strict limitation. The Supreme Court has never said that *Younger* requires abstention unless the prosecution

at issue is, for example, the second, third, or fourth such prosecution of the same individual.

Lloyd v. Doherty, No. 18-3552, 2018 U.S. App. LEXIS 33324, at *9 (6th Cir. Nov. 27, 2018) notes *Ken-N.K.*'s footnoted "factoid" but also cites a Fifth Circuit case that apparently involved only a single prosecution:

> As we have explained, the Supreme Court has applied the bad faith/harassment exception "to only one specific set of facts: where state officials initiate repeated prosecutions to harass an individual or deter his conduct, and where the officials have no intention of following through on these prosecutions." *Ken-N.K., Inc. v. Vernon Township*, 18 F. App'x 319, 324-25 n.2 (6th Cir. 2001) (citing Erwin Chemerinsky, Federal Jurisdiction § 13.4, at 806-08 (3d [*10] ed. 1999)); *see also, e.g.*, *McNatt v. Texas*, 37 F.3d 629 [published in full-text format at 1994 U.S. App. LEXIS 41439] (5th Cir. 1994) (holding that the bad faith/harassment exception to Younger "is extremely narrow and applies only in cases of proven harassment or prosecutions undertaken without hope of obtaining valid convictions").

In *McNatt*, the court held that the plaintiff's "conclusional allegation of bad faith prosecution is insufficient to bring this case under the exception in *Younger*", but made no reference to repeated prosecutions. Although the law may favor federal interference where there have been repeated prosecutions, and the principal Supreme Court case that led to *Younger* abstention (*i.e.*, *Dombrowski*) involved repeated

prosecutions, it is clear that repeated prosecutions are not a threshold requirement for *Younger* abstention.

Is the AG's prosecution of Frost and others – which she brought more than two years after she alleges they broke the law – intended to prevent Frost and the other criminal defendants from participating in future elections? Is the prosecution intended to discourage citizens from agreeing to serve as Republican electors, lest they find themselves indicted for felonies? The District Court's dismissal of this action without allowing Frost to examine the AG denied Frost the right to investigate these and other possibilities.

At worst for Frost, there is an issue of first impression regarding whether a criminal defendant must show multiple prosecutions to prove that any prosecution was brought in bad faith. No binding authority strictly requires multiple prosecutions where a single prosecution is not "by itself" the basis of a federal plaintiff's constitutional claims. It also makes no logical sense to require multiple prosecutions. What if the criminal defendant, now a plaintiff in a federal Section 1983 suit like this one, were accused of a heinous crime and denied bail, or had cash bail set at an amount he or she could not possibly afford? Would that citizen have to sit in jail for a year awaiting trial, with no recourse for the prosecutor's bad faith except to pray for justice in state court?

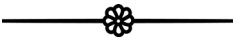
Younger and its binding progeny held that multiple prosecutions can be sufficient, but are not necessary, to show bad faith. This Court can and should consider other factors such as those the Fifth Circuit examined in *Netflix, Inc. v. Babin*, 88 F.4th 1080 (5th Cir. 2023), which Frost discussed in his Corrected Brief on Appeal, pp. 28-33. The same "mosaic of bad faith" that

occurred in *Netflix* is present here, including novel charges, harassment and retaliation for the exercise of a constitutional right, and inflammatory public statements by the prosecutor. At a minimum, this case deserves further review by the District Court.

Finally, this Court's formulation of the standard in *Doe v. University of Kentucky*, 860 F.3d 365, 371 (6th Cir. 2017) suggests that harassment in the form of multiple prosecutions is not required if bad faith is shown. There the Court stated: "[t]hese exceptions include bad faith, [*or*] harassment, *or* flagrant unconstitutionality of the statute or rule at issue." (emphasis added). This Court has observed that "'or' is generally considered a 'disjunctive' term which provides alternatives." *Gencorp, Inc. v. Am. Int'l Underwriters*, 178 F.3d 804, 821 (6th Cir. 1999) (citing Ohio law for the proposition). *See also* Antonin Scalia & Bryan A. Garner, READING LAW (2012) ("Under the conjunctive/disjunctive canon, *and* combines items while *or* creates alternatives. Competent users of the language rarely hesitate over their meaning."). If "bad faith" requires "harassment" (*i.e.*, multiple, repeated civil rights violations), then "bad faith" by itself means nothing, and/or the only way to discern a prosecutor's state of mind is by showing serial prosecutions.

Clearly, there is at minimum a question among commentators and lower courts (particularly the Sixth Circuit and Western District of Michigan) about whether *Younger* requires more than one prosecution to show bad faith. As described above, tracing the various courts' reasoning back to *Younger* shows that the intercession of Mr. Chemerinski may have effectively given rise to a "multiple prosecution rule" this Court never intended to create. For the sake of Frost

and others like him who might suffer a bad faith prosecution, the question of whether the federal courts will stop the *first* such prosecution, or at least exercise jurisdiction long enough for the plaintiff to develop an already-robust factual record, is of great importance.



CONCLUSION AND RELIEF REQUESTED

For the foregoing reasons, this Court should grant this Petition for Writ of Certiorari.

Respectfully submitted,

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