No. __-_____

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

PETITION FOR WRIT OF *CERTIORARI*

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QUESTIONS PRESENTED

The Sixth Circuit upheld large joint-and-several monetary sanctions and bar-referral sanctions under Rule 11(c)(2) for a complaint against Michigan's 2020 election and under 28 U.S.C. § 1927 for not dismissing the case as moot when the Electoral College voted. These sanctions chill and burden the First Amendment right to petition in unpopular cases.

The Rule 11 sanctions were improper because the served motion did not: seek the same relief as the filed version; include the filed version's detail and 38-page brief; or describe the specific conduct to be sanctioned. The Circuits are split on the trigger for the 21-day safe harbor for Rule 11(c)(2) sanctions (*i.e.*, serving papers *identical* to the filed version versus various lesser tests), as well as on the need to show conduct akin to contempt for Rule 11(c)(3) and to assess ability to pay.

The § 1927 sanction was improper because the Elections and Electors Clause claims did not become moot when the Electoral College voted, providing an opportunity to resolve not only the justiciability of those claims, but also Circuit splits on § 1927's need to find bad faith and to assess attorneys' ability to pay.

The questions presented are:

1. Whether serving a Rule 11(c)(2) motion that seeks different relief and lacks the filed version's brief and details triggers the 21-day safe-harbor period.

2. Whether the lower court's sanctions otherwise complied with Rule 11 or can be made to so on remand.

3. Whether the elector-plaintiffs' Elections and Electors Clause claims presented an Article III controversy before and after the Electoral College voted.

4. Whether the lower court's sanctions otherwise complied with § 1927 or can be made to so on remand.

PARTIES TO THE PROCEEDING

Petitioners are Sidney Powell, Brandon Johnson, Howard Kleinhendler, Julia Haller, Gregory Rohl, and Scott Hagerstrom, who were counsel for plaintiffs in district court and appellants in the court of appeals for review of the district court's sanction order.

Petitioners' clients in the underlying litigation—Timothy King, Marian Ellen Sheridan, John Earl Haggard, Charles James Ritchard, James David Hooper And Daren Wade Rubingh—were plaintiffs in district court, were not sanctioned, were not parties in the appeal, and are not respondents here.

Petitioners' district court co-counsel—Stefanie Lynn Junttila and Emily Newman—were sanctioned by the district court and were appellants in the court of appeals, which reversed the sanctions as to them, so they have no interest in the outcome of the petition. S.CT. R. 12.6.

Petitioners' other district court co-counsel—L. Lin Wood—was sanctioned by the district court and was an appellant in the court of appeals, but petitioners understand that he intends to petition this Court separately, making him a titular respondent here.

The remaining respondents are Gretchen Whitmer in her official capacity as Governor of Michigan, Jocelyn Benson in her official capacity as Michigan Secretary of State, and intervenor City of Detroit, Michigan, who were defendants in district court and appellees in the court of appeals.

Another initial defendant—the Michigan Board of State Canvassers—was dismissed in district court, did not seek sanctions, was not a party in the appeal, and is not a respondent here.

RULE 29.6 STATEMENT

Petitioners are natural persons with no parent companies and no outstanding stock.

STATEMENT OF RELATED CASES

For purposes of this Court's Rule 14.1(b)(iii), this case arises from and is related to the following proceedings in the U.S. District Court for the Eastern District of Michigan, the U.S. Court of Appeals for the Sixth Circuit, and this Court:

- *King v. Whitmer,* No. 2:20-cv-13134-LVP-RSW (E.D. Mich.). Voluntarily dismissed Jan. 14, 2021; sanctions ordered Dec. 2, 2021.
- *King v. Whitmer,* No. 20-2205 (6th Cir.). Dismissed by stipulation Jan. 26, 2021.
- *King v. Whitmer,* No. 20-815 (U.S.). Writ of *certiorari* before judgment denied Feb. 22, 2021.
- *King v. Whitmer,* Nos. 21-1785, 21-1786, 21-1787, 22-1010 (6th Cir.). Decided June 23, 2023; rehearing denied Aug. 8, 2023; motion to stay mandate granted Aug. 11, 2023.

Although several unrelated suits challenged the 2020 election in Michigan, no other case directly relates to this case within the meaning of Rule 14.1(b)(iii).

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PETITION FOR WRIT OF *CERTIORARI*

Sidney Powell, Brandon Johnson, Howard Kleinhendler, Julia Haller, Gregory Rohl, and Scott Hagerstrom respectfully petition this Court for a writ of *certiorari* to the U.S. Court of Appeals for the Sixth Circuit to review the partial affirmance of sanctions entered in district court. In the underlying litigation, petitioners' clients challenged Michigan's 2020 election. Respondents are Michigan's Governor and Secretary of States—in their official capacities—and intervenor City of Detroit.

OPINIONS BELOW

The Sixth Circuit's Opinion is reported at 71 F.4th 511 and reprinted in the Appendix ("App") at 1a. The district court's first Opinion and Order is published at 556 F.Supp.3d 680 and reprinted at App:37a; its second, unpublished Opinion and Order is reprinted at App:139a.

JURISDICTION

On June 23, 2023, the Sixth Circuit issued its Opinion affirming in part and reversing in part the district court's Opinion and Order sanctioning petitioners. Petitioners timely sought rehearing *en banc*. On August 8, 2023, the Sixth Circuit denied the petition for rehearing *en banc*. The district court had jurisdiction under 28 U.S.C. §§ 1331, 1343, 1367, and the Sixth Circuit had jurisdiction under 28 U.S.C. § 1291. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Appendix sets out the relevant constitutional and statutory provisions. App:200a-223a.

STATEMENT OF THE CASE

This case presents two urgent issues, one about the First Amendment and the legal profession, the other about elections and the Elections and Electors Clauses. Both compel this Court's expeditious review.

Procedural Background

On behalf of three Republican Party county chairs and three candidates to serve Michigan as Republican electors, petitioners filed suit against the state respondents and the Board of State Canvassers ("Board") regarding Michigan's 2020 election. Detroit intervened permissively. Petitioners Rohl, Hagerstrom, and Powell signed the operative complaint, which Rohl e-filed on November 29, 2020. App:334a-335a. The complaint lists the other petitioners as "of counsel" without their signatures. *Id.* The district court denied petitioners' motion for emergency relief on December 7, 2020. App:167a.

On December 15, Detroit served petitioners a 7-page Rule 11(c)(2) motion, which cited an improper purpose under Rule 11(b)(1), mootness, laches, standing, and the invalidity of the constitutional arguments under Rule 11(b)(2), and the "supposed fraud in the processing and tabulation of absentee ballots" under Rule 11(b)(3). App:338a-341a (citing district court's denial of emergency relief for legal issues and pages 1-19 of Detroit's opposition to emergency relief for factual issues). For factual allegations, the served motion did not "describe the specific conduct" violative of Rule 11(b)(3). *See* FED. R. CIV. P. 11(c)(2); App:341a.

On January 5, 2021,[1] Detroit filed a 10-page sanction motion, now supported by a 38-page brief. App:384a-432a. In seeking to enlarge its page count, Detroit admitted that the extensive brief was required "to address the full scope of legal and factual issues raised in the Motion." App:382a. In addition to adding significant detail, the filed version added bar-referral relief. *Compare* App:342a *with* App:391a-392a.

On January 11, 2021, this Court denied expedited review. *King v. Whitmer*, 141 S.Ct. 1044 (2021). Three days later, on January 14, 2021, plaintiffs voluntarily dismissed as to all respondents. App:433a.

On January 28, 2021, the state respondents moved for sanctions under 28 U.S.C. § 1927 and the court's inherent authority, based on petitioners' maintaining the suit after the Electoral College voted and after the district court found plaintiffs unlikely to prevail. On April 6, 2021, the state respondents filed a supplemental brief raising issues about Dominion electronic voting systems. On July 6, 2021, the district court held a non-evidentiary hearing on the sanctions motions, raising still more issues. Acting pursuant to Rule 11(c)(2), § 1927, and its inherent authority—but not Rule 11(c)(3)—the district court awarded sanctions of $21,964.75 (Michigan) and $153,285.62 (Detroit), as well as non-monetary sanctions including referrals to petitioners' licensing authorities. App:162a, 137a. The district court chose the sanctions to deter future suits "designed primarily to spread the narrative that our election processes are rigged." App:131a.

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[1] Filing *on day 21* was 4 days too soon. FED. R. CIV. P. 11(c)(2), 6(e); *Carruthers v. Flaum*, 450 F. Supp. 2d 288, 305 (S.D.N.Y. 2006).

The Sixth Circuit rejected the improper-purpose and inherent-authority findings as protected speech, App:8a, and some of the factual allegations, *e.g.*, App:17a-18a, 23a-24a, but otherwise upheld reduced sanctions, App:35a-36a ($19,639.75 for Michigan and $132,810.62 for Detroit), based on allegations about Dominion, four expert reports, and several affidavits associated with vote counting at the TCF Center. App:10a-15a, 15a-16a, 18a-22a. Significantly, none of these bases for upholding sanctions appeared within Detroit's served motion, App:337a-343a, although an earlier filing incorporated by reference touched *briefly* on some. *See* App:350a-364a; Figure 1 (identifying issues arising outside served motion).

	Served Motion	ECF #39, pp. 1-19	Filed Motion	§ 1927 Motion	Supplement	Hearing
Dominion allegations				■	■	■
Ramsland affidavit		■	■		■	■
Braynard report		■	■			■
Briggs report		■	■			■
Young report			■			
TCF-related affidavits		■	■			■
Bar-referral remedy			■			■

Figure 1

The Sixth Circuit denied rehearing *en banc*, App:164a, but granted petitioners' motion to stay the mandate pending petitions for a writ of *certiorari*. App:166a. The stay underscores that these sanctions

"present a substantial question" for this Court's review. *See* FED. R. APP. P. 41(d)(1).

Political and Electoral Situation

The 2020 presidential election is a Rorschach test, with perception influenced by viewers' favored candidate and information sources. Biden supporters consider it the most secure election ever. Trump supporters consider it the worst election since 1876. Before voting started, Democrats and their allies systematically attacked state-law ballot-integrity measures in swing states. Mollie Hemingway, RIGGED: HOW THE MEDIA, BIG TECH & THE DEMOCRATS SEIZED OUR ELECTIONS, 14-20 (Regnery 2021) (describing hundreds of lawsuits to weaken ballot-integrity measures such as signature or witness requirements for absentee ballots); BUILDING CONFIDENCE IN U.S. ELECTIONS: REPORT OF THE COMMISSION ON FEDERAL ELECTION REFORM, at 46 (Sept. 2005) (absentee ballots are "the largest source of potential voter fraud"). Although these attacks may have violated the Elections and Electors Clauses in an election, their far-greater danger is that their legality remains *unresolved*. That uncertainty fuels legitimate doubt about elections' lawfulness, which only this Court can resolve.

The 2024 election must not repeat 2020. For justiciability reasons, no court considered these Elections and Electors Clause challenges in 2020. That does not make the 2020 election either lawful or unlawful. *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974) ("assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing"). Because the claims *are justiciable*, the need for voters' continued faith in

fair elections compels this Court urgently to resolve this issue.

Unprecedented Attacks on Political Rivals and the Legal Profession

With roles reversed and similar election claims similarly dismissed early, sanctions not only have been denied, *Moss v. Bush*, 828 N.E.2d 994, 997 (Ohio 2005), but Democrats argued that "[f]or over two hundred years, one of the strengths of our democracy has been that citizens may question the results of an election," so "courts must show determined restraint before imposing sanctions against those who seek to vindicate the public interest through an election contest." Memo. of Rep. John Conyers, Jr., as *Amicus Curiae* Supporting Respondents, at 2, 6, *Moss v. Bush*, 828 N.E.2d 994 (Ohio 2005) (No. 04-2088); *accord* Mot. to Join *Amicus* Brief, at 2, *Moss v. Bush*, 828 N.E.2d 994 (Ohio 2005) (No. 04-2088) (motion of Sen. Feingold and Reps. Clay, Frank, Kucinich, Jackson Lee, Lofgren, McDermott, Meehan, Nadler, Oberstar, Payne, Sanchez, Schiff, Scott, Van Hollen, Waters, Wexler, and Woolsey to join Conyers brief). Justice requires that these *founding principles* be applied equally, without first knowing one's side in a dispute. John Rawls, A THEORY OF JUSTICE 136-42 (Belknap 1971).

Combined with targeting election-integrity laws, Democrats and their allies have launched an unprecedented campaign—across allied media, high-technology gatekeepers to media, and government—to marginalize political opponents and destroy their counsel. *See*, *e.g.*, Molly Ball, *The Secret History of the Shadow Campaign That Saved the 2020 Election*, TIME (Feb. 4, 2021); *Murthy v. Missouri*, __ S.Ct. __, ___ (2023) (Alito, J., dissenting from grant of

application for stay); Lachlan Markey & Jonathan Swan, *Scoop: High-powered group targets Trump lawyers' livelihoods*, Axios (Mar. 7, 2022) (founder described "65 Project" as effort to "not only bring the grievances in the bar complaints, but shame [the lawyers] and make them toxic in their communities and in their firms").[2] The "big lie" is not disputing election results, but rather implying that election results are beyond question. *Compare* Peter Baker, *Biden Warns That 'Big Lie' Republicans Imperil American Democracy*, THE NEW YORK TIMES A18 (Nov 2, 2022) *with Tah v. Glob. Witness Publ'g, Inc.*, 991 F.3d 231, 254 (D.C. Cir. 2021) (Silberman, J., dissenting in part) (major newspapers "are virtually Democratic Party broadsheets"). The sanctions here will chill legitimate election challenges, as well as countless other controversial representations.

REASONS TO GRANT THE WRIT

The petition raises important issues of procedural and substantive due process regarding sanctions and even more important issues of First Amendment rights and electoral integrity. This Court should grant the writ of *certiorari* for several independent reasons.

1. The Circuits are deeply split on the notice that Rule 11 requires to trigger Rule 11's 21-day safe harbor. *See* Section I.A, *infra.*

2. The Circuits are split on whether Rule 11(c)(3) requires a showing akin to contempt. *See* Section I.B.1, *infra.*

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[2] *See also* "About" page for 65 Project (listing Detroit counsel as consulting counsel on the "65 Project" website) (Mar. 7, 2022) https://web.archive.org/web/20220307173320/https://the65project.com/about/ (last visited Nov. 6, 2023).

3. The Circuits are split on the justiciability of claims under the Elections and Electors Clauses, which the Court's supervening decision in *Moore v. Harper*, 143 S.Ct. 2065 (2023), and the upcoming 2024 election make urgent. *See* Sections II.A, III.B, *infra.*

4. The Circuits are further split on whether Rule 11 and § 1927 require assessing attorneys' ability to pay, contrary to this joint-and-several sanction, issued without individualized considerations. *See* Sections I.B.2, II.C, *infra.*

These important reasons justify this Court's resolving these crucial issues expeditiously.

I. THE DECISION DEEPENS SEVERAL CIRCUIT SPLITS ON PROCEDURAL AND SUBSTANTIVE ASPECTS OF RULE 11 SANCTIONS.

The Circuits are split on several outcome-determinative issues under Rule 11. Each split would justify the Court's review. The combination—and the resulting First Amendment chill—compels the Court's review.

A. The Circuits are fractured on what Rule 11(c)(2) requires as "the motion" that triggers the 21-day safe-harbor period.

A deep split in Circuit authority leaves "the motion" that triggers the 21-day safe-harbor period undefined. The Fifth and Tenth Circuits—consistent with Rule 11—require serving the basis for sanctions in the form of the full motion that the movants will press. Several other Circuits—quibbling on what "motion" means in federal courts—allow serving a motion without its accompanying brief. The Seventh Circuit allows notice—with no motion—as substantial compliance.

Because the served and filed motions materially differed, Detroit did not meet Rule 11(c)(2)'s safe-harbor requirements. Specifically, Detroit's served and filed motions included the following deviations under Rule 11(c)(2):

- The filed motion requested additional relief.
- The served motion did not "separately … describe the specific conduct that allegedly violates Rule 11(b)." FED. R. CIV. P. 11(c)(2).
- The served motion did not include the filed motion's 38-page brief (*i.e.*, Detroit did not serve the full "motion").
- The district court based some sanctions on issues from supplemental briefs or even the hearing (*i.e.*, issues arising in neither the *served nor filed motions*).

Detroit's notice was inadequate to trigger the 21-day safe-harbor period that Rule 11(c)(2) requires for sanctions.

1. The Fifth and Tenth Circuits require—and this Court *should* require—literal compliance.

Rule 11(c)(2) uses the definite article to describe the trigger for the 21-day safe-harbor period: "*The motion* must be served under Rule 5[.]" FED. R. CIV. P. 11(c)(2) (emphasis added). The definite article implies that movants must serve a copy of the ultimate filing.[3]

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[3] The Advisory Committee Note is similar: "The rule provides that requests for sanctions must be made as a separate motion[.] … *The motion* for sanctions is not, however, to be filed until at least 21 days … *after being served*. If, during this period, the alleged violation is corrected, as by withdrawing (whether formally or informally) some allegation or contention, *the motion*

The Fifth and Tenth Circuits thus require serving an identical version of the filed motion, including any accompanying brief: "the Rule 11 safe harbor provision requires identicality," without which a "district court properly denied the motion and declined to enter sanctions." *Uptown Grill, L.L.C. v. Camellia Grill Holdings, Inc.*, 46 F.4th 374, 389 (5th Cir. 2022); *accord Roth v. Green*, 466 F.3d 1179, 1192 (10th Cir. 2006) (Rule 11 "requires a copy of the actual motion for sanctions to be served on the person(s) accused of sanctionable behavior").

In *Uptown Grill*, the served motion and brief differed from the filed motion and brief. *See Uptown Grill, LLC v. Shwartz*, 2021 U.S. Dist. LEXIS 15102, at *35 n.107 (E.D. La. Jan. 27, 2021) (No. 13-6560) (comparing filed 2-page motion and 12-page brief (ECF #456) with served 2-page motion and 13-page brief (ECF #461-2)).[4] In assessing differences between the served and filed versions, the Fifth Circuit treated the motion and brief together as the "motion" under Rule 11(c)(2):[5]

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should not be filed with the court. These provisions are intended to provide a type of 'safe harbor' against motions under Rule 11 in that a party will not be subject to sanctions on the basis of another party's motion unless, after receiving *the motion*, it refuses to withdraw that position or to acknowledge candidly that it does not currently have evidence to support a specified allegation." FED. R. CIV. P. 11 Advisory Committee Notes to 1993 Amendments (emphasis added).

[4] The Fifth Circuit appendix shows the served motion as ECF #466-2.

[5] A "motion must … "state with particularity the grounds for seeking the order" and "state the relief sought." FED. R. CIV. P. 7(b)(1)(B)-(C). Motions may include but do not require briefs. E.D. Mich. Civil R. 7.1(d)(1)(A) ("brief may be separate from or

> The final Motion for Sanctions that Khodr filed with this Court contained substantial deviations from the draft version Khodr served upon Shwartz. These alterations include the addition of argument and case law under 28 U.S.C. § 1927, the addition of argument and case law relating to "legally indefensible" filings, and a change in the relief requested.

Uptown Grill, 46 F.4th at 388 (quoting district court, alterations and internal quotation omitted). Detroit's motion was *far worse*: Detroit changed the relief requested and omitted its brief altogether.

In Circuits that interpret Rule 11(c)(2) literally, petitioners would prevail. When "properly raise[d]" as petitioners did by objecting to motion's lacking a 21-day safe-harbor period, such "mandatory claim-processing rules ... are unalterable." *Manrique v. United States*, 581 U.S. 116, 121 (2017) (internal quotations omitted). Because petitioners dismissed the complaint within 9 days of the Detroit's serving the full motion, Rule 11(c)(2) sanctions should have been denied.

2. Some Circuits accept a motion or notice of motion without substantive briefing.

Distinguishing between motions and supporting papers (*e.g.*, legal memoranda, briefs, exhibits), *see* note 5, *supra*, some Circuits allow service of a short motion—without the to-be-filed memorandum or

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may be contained within the motion or response"); *cf.* FED. R. APP. P. 27(a)(2)(C)(i) ("separate brief supporting … a motion must not be filed"); S.CT. RULE 21.1 ("[n]o separate brief may be filed").

brief—to suffice under Rule 11(c)(2)'s safe harbor. *See, e.g.*, *Star Mark Mgmt., Inc. v. Koon Chun Hing Kee Soy & Sauce Factory*, 682 F.3d 170, 175-76 (2d Cir. 2012) (movant "met the procedural requirements of the safe harbor provision of Rule 11(c)(2) by serving its notice of motion for Rule 11 sanctions with its …. letter, even though it did not serve at that time supporting affidavits or a memorandum of law"). While Detroit's Rule 11(c)(2) letter included a draft motion, the served motion omitted bar-referral relief and the full brief and did not identify the *specific* issues Detroit wanted petitioners to withdraw. Significantly, the Sixth Circuit rejected the district court's argument that the *whole* complaint was sanctionable.

If this Court accepts the Second Circuit's reading of Rule 11(c)(2) over the Fifth and Tenth Circuits' reading, two issues would remain: (1) does new relief requested require a new 21-day period, and (2) are sanctions available for issues that the motion did not expressly raise and describe? These issues would warrant this Court's resolution, even if the Court adopts the Second Circuit's reading.

3. The Seventh Circuit requires "substantial compliance."

Deepening the Circuit split further, the Seventh Circuit allows "substantial compliance" with Rule 11(c)(2) through notice letters that are not motions. *Nisenbaum v. Milwaukee Cty.*, 333 F.3d 804, 808 (7th Cir. 2003) (accepting "a 'letter' or 'demand' rather than a 'motion'"). As that court acknowledges, it is "the sole circuit to adopt this 'substantial compliance' theory, and other circuits have subsequently criticized our analysis as cursory and atextual." *McGreal v. Village of Orland Park*, 928 F.3d 556, 559 (7th Cir.

2019); *cf. Penn, LLC v. Prosper Bus. Dev. Corp.*, 773 F.3d 764, 768 (6th Cir. 2014) ("a letter prompts the recipient to guess at his opponent's seriousness"). Only this Court can clarify these diverging Circuit authorities.

B. This Court's order on remand can resolve one or both of two Circuit splits on the assessment of sanctions under Rule 11(c).

If the Court grants the writ and decides this case, the Court could resolve either or both of two additional Circuit splits, depending on the terms on which the Court returns the case to the lower courts.

1. This Court could resolve the Circuit split on the "akin-to-contempt" standard for sanctions under Rule 11(c)(3).

The Circuits are split on whether Rule 11(c)(3)'s lack of a safe-harbor period requires court-initiated sanctions to meet an "akin-to-contempt" standard. *Compare, e.g.*, *In re Pennie & Edmonds LLP*, 323 F.3d 86, 90 (2d Cir. 2003) (requiring akin-to-contempt standard for Rule 11(c)(3) sanctions);[6] *Hunter v. Earthgrains Co. Bakery*, 281 F.3d 144, 151 (4th Cir. 2002); *Barber v. Miller*, 146 F.3d 707, 711 (9th Cir. 1998) *with Young v. City of Providence*, 404 F.3d 33,

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[6] The akin-to-contempt standard derives partially because—unlike Rule 11(c)(2) sanctions—court-initiated sanctions lack a safe-harbor opportunity to withdraw a filing: "Since show cause orders will ordinarily be issued only in situations that are akin to a contempt of court, the rule does not provide a 'safe harbor' to a litigant for withdrawing a claim, defense, etc., after a show cause order has been issued on the court's own initiative." *Id.* (quoting FED. R. CIV. P. 11 Advisory Committee Notes to 1993 Amendments).

40 (1st Cir. 2005) (rejecting akin-to-contempt standard for Rule 11(c)(3) sanctions). Although the district court eschewed Rule 11(c)(3) as a basis for sanctions, App:55a n.10, this Court's ruling on the Rule 11(c)(2) sanctions could enable the Court to resolve this split.

Specifically, the Court could either cleanly reverse the sanctions order or could remand the case for further proceedings. As part of choosing the remedy, the Court could decide whether a remand would be futile under the akin-to-contempt standard: "remand for the lower Courts to consider those questions in the first instance is … appropriate … *unless such a remand would be futile*." *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S.Ct. 2183, 2208 (2020) (emphasis added). The choice between remanding and cleanly reversing would provide a basis to resolve the Circuit split on whether Rule 11(c)(3) sanctions must meet an "akin-to-contempt" standard.

For several reasons, petitioners respectfully submit that the Court should reverse without a remand for further proceedings. Given the exigency of post-election litigation and the complaint's support in expert testimony and declarations, the district judge could not meet an akin-to-contempt standard. *See*, *e.g.*, *Int'l Union v. Bagwell*, 512 U.S. 821, 823 (1994) (discussing due-process protections of contempt proceedings); *Goodyear Tire & Rubber Co. v. Haeger*, 581 U.S. 101, 108 & n.5 (2017). The Circuit split on the akin-to-contempt standard would thus be relevant to whether the Court—after granting review—issues the clean reversal that petitioners seek or remands with the potential for further proceedings under Rule 11(c)(3).

2. This Court should resolve the Circuit split on whether courts must individualize sanctions to attorneys' ability to pay.

The Court should resolve the Circuit split on whether trial courts must make an individualized assessment of sanctioned attorneys' ability to pay a monetary Rule 11 sanction. *Cf.* Section II.C, *infra* (similar for 28 U.S.C. § 1927).

The district court sanctioned all counsel on a joint-and-several basis, App:136a, 162a, which the Sixth Circuit upheld as to some, but not all counsel. App:36a. No lower court considered any individual counsel's ability to pay.

Although Rule 11 allows sanctioning *law firms* for their lawyers' actions, FED. R. CIV. P. 11(c)(1), such collective sanctions align with traditional agency principles. By contrast, petitioners here are independents.

The Circuits are split on whether Rule 11 *requires* considering sanctioned counsel's ability to pay. The Third, Fourth, Tenth, and Eleventh Circuits require it. *Doering v. Union Cty. Bd. of Chosen Freeholders*, 857 F.2d 191, 195-96 & n.4 (3d Cir. 1988); *In re Kunstler*, 914 F.2d 505, 524 (4th Cir. 1990) ("monetary sanction imposed without any consideration of ability to pay would constitute an abuse of discretion"); *White v. GM Corp.*, 908 F.2d 675, 685 (10th Cir. 1990); *Byrne v. Nezhat*, 261 F.3d 1075, 1098 n.53 (11th Cir. 2001). Other circuits allow considering ability to pay, without *requiring* it. *Star Mark Mgmt.*, 682 F.3d at 179 (citing *Oliveri v. Thompson*, 803 F.2d 1265, 1281 (2d Cir. 1986)); *Landscape Props., Inc. v. Whisenhunt*, 127 F.3d 678, 685 (8th Cir. 1997) (court must consider

ability to pay only if nonmoving party raises it); *Johnson v. A. W. Chesterton Co.*, 18 F.3d 1362, 1366 (7th Cir. 1994) (ability to pay is discretionary factor to consider). In short, the Circuits are split on the need to consider ability to pay.

In several Circuits, the joint-and-several sanctions here—without individually analyzing the ability to pay—would be an abuse of discretion. *Byrne*, 261 F.3d at 1098 n.53; *Kunstler*, 914 F.2d at 524; *White*, 908 F.2d at 685. Because the courts below did not consider each petitioner's ability to pay, this action squarely presents the Circuit split on whether to require individually assessing the ability to pay.

C. The non-compensatory bar-referral sanctions require heightened due-process protections.

The Sixth Circuit reversed the bad faith finding for protected First Amendment activity. App:8a. As such, the bar-referral sanctions should have been vacated as improper under Rule 11(c)(2) and without the procedural protections that Rule 11(c)(3) or the court's inherent authority require.

1. Respondents lack Article III standing to seek bar-referral sanctions under Rule 11(c)(2).

In addition to impermissibly adding bar-referral sanctions to the filed Rule 11(c)(2) motion that were absent from the served Rule 11(c)(2) motion, *compare* App:342a *with* App:391a-392a, Detroit lacks standing to seek bar-referral sanctions. *See Linda R. S. v. Richard D.*, 410 U.S. 614, 619 (1973) ("a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another"). Moreover, "a sanction counts as compensatory only if it is

'calibrated to the damages caused by' the bad-faith acts on which it is based," *Goodyear Tire & Rubber*, 581 U.S. at 108 (quoting *Bagwell*, 512 U.S. at 834) (alterations omitted), and bar-referral sanctions do not compensate Detroit for anything. *Linda R. S.*., 410 U.S. at 619; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 574-78 (1992) (generalized grievance about proper application of laws does not support standing). Detroit lacks Article III standing for a bar-referral sanction under Rule 11(c)(2).

Because "plaintiff[s] must demonstrate standing separately for each form of relief sought," *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006), the district court should have denied bar-referral sanctions under Rule 11(c)(2). This Court has the independent obligation to assess the lower courts' jurisdiction, *Steel Co. v. Citizens for a Better Env't.*, 523 U.S. 83, 95 (1998), so this Court should vacate the bar-referral sanctions for lack of Article III standing.

2. The district court did not provide due-process protections required for bar-referral sanctions.

To initiate bar-referral sanctions *sua sponte*, the district court had to—but did not—provide petitioners due-process protections under either Rule 11(c)(3) or that court's inherent authority.

First, the district court expressly disavowed Rule 11(c)(3) as its basis for sanctions, App:55a n.10, and went far beyond "what suffices to deter repetition" by making an example of petitioners. FED. R. CIV. P. 11(c)(4). Exemplary is synonymous with punitive. *Dutra Grp. v. Batterton*, 139 S.Ct. 2275, 2284 (2019); *Landgraf v. USI Film Prods.*, 511 U.S. 244, 281

(1994). In short, the district court issued punitive sanctions.

Second, a finding "tantamount to bad faith … would have to precede any sanction under the court's inherent powers," *Roadway Express v. Piper*, 447 U.S. 752, 767-68 (1980), *abrogated in part on other grounds*, PUB. L. NO. 96-349, § 3, 94 Stat. 1154, 1156 (1982), and the Sixth Circuit reversed the district court's bad faith showing *vis-à-vis* petitioners' purportedly improper purpose that the Sixth Circuit found protected by the First Amendment. App:8a; *cf.* Section I.B.1, *supra* (discussing akin-to-contempt standard). Rule 11(c)(3) sanctions should not be available on remand.

Indeed, the non-Michigan counsel lacked the *capacity* to act. *See* note 9, *infra*. Although the 1993 amendments partly abrogated *Pavelic & LeFlore v. Marvel Entm't Grp.*, 493 U.S. 120 (1989), to allow sanctioning law firms or persons "responsible" for violations, the Advisory Committee Notes tie "responsibility" to one's capacity to cure within Rule 11(c)(2)'s 21-day safe harbor. FED. R. CIV. P. 11 Advisory Committee Notes to 1993 Amendments. This Court should clarify the post-1993 contours of sanctionable responsibility.

II. THE § 1927 SANCTION PROVIDES THE OPPORTUNITY TO CLARIFY JUSTICIABILITY UNDER THE ELECTIONS AND ELECTORS CLAUSES BEFORE THE 2024 ELECTION AND TO RESOLVE CIRCUIT SPLITS.

Wholly separate from its Rule 11(c)(2) sanction for violation of Rule 11(b)(1)-(3), the district court also sanctioned petitioners under 28 U.S.C. § 1927 for not

dismissing the litigation after the Electoral College voted on December 14, 2020. App:84a; *id.* 29a-30a (Sixth Circuit affirms). This discrete issue is another independent reason that this Court should expeditiously review this case, both to resolve Circuit splits on sanctions under § 1927 and to clarify justiciability for Elections and Electors Clause claims. Indeed, the electoral issues have transcendent and urgent importance to our constitutional democracy.

A. Petitioners did not unreasonably or vexatiously protract the proceedings under § 1927 because the case did not become moot on December 14, 2020.

Although plaintiffs previously had argued that the case would become moot without relief prior to the Electoral College's voting, plaintiffs later argued that the elector plaintiffs' claims continued past the vote. The Court of Appeals dismissively viewed the case as moot *vis-à-vis* the presential-elector plaintiffs: "counsel do not explain why any competent attorney would take that self-election seriously for purposes of persisting in this lawsuit." App:30a. As explained in this section, the Sixth Circuit thus demonstrated that even competent counsel—with all the time that they need—can make mistakes.

1. Mootness sets the high bar of the impossibility of relief.

"A case becomes moot … only when it is impossible for a court to grant any effectual relief whatever." *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 161 (2016) (internal quotations omitted). As shown below, there were—and indeed still would be—Article III grounds to award the elector-plaintiffs relief.

a. The selection of Republican electors still was possible.

The Sixth Circuit blithely suggests that the case became moot as to the elector-plaintiffs on December 14, 2020, when the Electoral College voted. App:29a-30a. Until the Electoral College votes were counted under the Twelfth Amendment, however, it remained *possible* for the Republican electors to prevail. For example, this process was followed at the joint session of Congress on January 6, 1961 for Hawaii, with the Kennedy electors meeting unofficially in mid-December and eventually being certified in January, and the Nixon electors—who were originally certified—decertified. Vasan Kesavan, *Is the Electoral Count Act Unconstitutional*?, 80 N.C.L. REV. 1653, 1691-92 (2002).

b. Michigan's selection of Democrat electors could have been vacated or otherwise made inoperative.

Neither the lower courts nor respondents explain why the federal courts lack the power to *vacate* state actions that violate the Elections or Electors Clauses. *Moore*, 143 S.Ct. at 2089-90 (federal courts maintain "their own duty to exercise judicial review" over actions of state actors to enforce the Elections Clause). But the district court would not need to *vacate* the state action here because even declaratory relief would suffice.

Although "[t]he power to interpret the Constitution in a case or controversy remains in the Judiciary," *City of Boerne v. Flores*, 521 U.S. 507, 524 (1997), Members of Congress swear to uphold the Constitution every bit as much as judges. U.S. CONST. art. VI, cl. 3; *Arizona Christian Sch. Tuition Org. v.*

Winn, 563 U.S. 125, 133 (2011) ("[t]he legislative and executive departments of the Federal Government, no less than the judicial department, have a duty to defend the Constitution"). Even if district courts somehow lacked authority to vacate unconstitutional state election proceedings, *but see* U.S. CONST. art. VI, cl. 2 (federal law supreme), that would not preclude federal courts from providing meaningful *declaratory* relief:

> [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 in *Franklin*, the Secretary here "certainly has 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 will be unable to "contend[] to the contrary," so "we may assume it is substantially likely that the … [Vice-President and] congressional officials would abide by an authoritative interpretation of the [relevant] statute[s] and constitutional provision by the District Court, even though they would not be directly bound by such a determination." *Id.* As explained in Section II.A.3, *infra*, rejecting the allegedly unconstitutional votes of the Democrat electors at the Twelfth Amendment proceeding to count electoral votes would have partially redressed the Michigan Republican elector-plaintiffs' injuries.

c. The case falls within the capable-of-repetition-yet-evading-review exception to mootness.

Although respondents and the courts below argue that the Electoral College's vote on December 14, 2022, mooted the underlying action, not even the swearing in of the next President on January 20, 2021, fully mooted the underlying action. Instead, review would—or at least could—outlast even the selection of the next President under "the 'capable of repetition, yet evading review' doctrine," which applies "in the context of election cases … when there are 'as applied' challenges as well as in the more typical case involving only facial attacks." *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 463 (2007) (internal quotations omitted); *accord Norman v. Reed*, 502 U.S. 279, 287-88 (1992). The action was not moot.

2. Presidential electors have standing to sue under the Elections and Electors Clauses.

Although individual voters suffer only generalized grievances from Electors Clause violations, *Lance v. Coffman*, 549 U.S. 437, 442 (2007), the candidates to represent their state in the Electoral College are not mere voters. Whereas the implication for mere voters is monumental—namely, voting in fair versus unfair elections—albeit generalized, the implications for a slate of candidates to be electors is both particularized and concrete: they can vote in the Electoral College or they cannot.

Even the "personal stake in a *fraction* of a vote … [is] sufficient to support standing," *Schlesinger*, 418 U.S. at 223 n.13 (emphasis added), so *a fortiori* a whole vote suffices. Although the district court found

the elector-plaintiffs lacked standing, App:191a-193a, that seems clearly erroneous:

> As candidates, the Electors argue that they have a cognizable interest in ensuring that the final vote tally accurately reflects the legally valid votes cast. An inaccurate vote tally is a concrete and particularized injury to candidates such as the Electors. The Secretary's use of the consent decree makes the Electors' injury certainly-impending, because the former necessarily departs from the Legislature's mandates. Thus, the Electors meet the injury-in-fact requirement.

Carson v. Simon, 978 F.3d 1051, 1058 (8th Cir. 2020) (footnote omitted); *cf. Wood v. Raffensperger*, 981 F.3d 1307, 1314 (11th Cir. 2020) (affirming that if the appellant had been a candidate for office "he could assert a personal, distinct injury" required for standing). Despite the trial court's contrary ruling, this litigation presented a case or controversy under the Elections and Electors Clauses.

Nonetheless, the Circuits are split on this issue. The Third Circuit held to the contrary in *Bognet v. Sec'y Pa.*, 980 F.3d 336, 348-52 (3d Cir. 2020) (congressional candidate lacks standing under Elections Clause), vacated *sub nom. Bognet v. Degraffenreid*, 141 S.Ct. 2508 (2021); *Donald J. Trump for President, Inc. v. Sec'y Pa.*, 830 F.App'x 377, 387 (3d Cir. 2020); App:192a (relying on *Bognet*). This case presents an ideal vehicle for the Court to resolve this important issue before the next election.

3. Article III did not require that the Republican electors be able to *replace* the Democrat electors in the Electoral College.

Significantly, even if the Sixth Circuit panel were correct about the impossibility of the elector-plaintiffs' representing Michigan in the Electoral College, *but see* Section II.A.1, *supra*, that would not make the case *moot* for purposes of Article III.

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). This level-up versus level-down relief provides the principle that allows suit in federal court against neighbors' paying lower taxes for the same houses, even if the remedy is to raise the neighbors' taxes (*i.e.*, the plaintiff does not benefit *financially*).[7]

For leveling-down relief, it is immaterial whether the Michigan Republican elector-plaintiffs lacked the *bona fides* of the rival slate. If the elector-plaintiffs could negate the vote on which the rival slate based their *bona fides* as unconstitutional under the Electors Clause, that would suffice—for Article III purposes—to throw out *both* slates of electors.

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[7] Plaintiffs have standing to assert statutes that protect their relative position. *Clinton v. City of New York*, 524 U.S. 417, 433 n.22 (1998).

4. The complaint stated a claim for violation of the Electors and Elections Clauses.

The Sixth Circuit rejected constitutional claims because the complaint did not allege "unilateral" executive deviations from Michigan election law (*e.g.*, signature-verification requirements) and M.C.L. § 168.765a(6) requires *clerks*—not the *counting centers*—to verify signatures. App:21a-22a, 26a. This was error.

a. The complaint alleged that Michigan's 2020 election violated the Electors and Elections Clauses by accepting ballots without verifying signatures.

Contrary to the Sixth Circuit's cursory review of the complaint, petitioners alleged that Secretary Benson purported to negate signature-verification laws:

- "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*;"

First Am. Compl. ¶¶ 15.C, 30, 96, 190(h) (App:234a, 238a-239a, 266a-267a, 318a) (emphasis added). The Sixth Circuit simply missed these allegations.

b. *Genetski* demonstrates that Michigan's 2020 election violated the Electors and Elections Clauses on signature verification.

On March 9, 2021, Michigan's Court of Claims invalidated Secretary Benson's signature-verification guidance for violating Michigan's administrative procedures act ("APA").[8] *Genetski v Benson*, 2021 Mich. Ct.Cl. LEXIS 3, *19 (Mar. 9, 2021). *Genetski* is relevant for two issues. First, respondents cannot credibly dispute that Secretary Benson did what the complaint alleged. *Cf. City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 340-41 (1958) (holdings bind constituents). Second, counsel can rely on after-arising grounds to demonstrate positions were non-frivolous. *In re Keegan Mgmt. Co., Sec. Litig.*, 78 F.3d 431, 433-34 (9th Cir. 1996). In short, the Sixth Circuit erred in rejecting the Elections and Electors Clause claims.

B. This Court should resolve the Circuit split on whether sanctions under § 1927 require showing bad faith.

Consistent with Circuit precedent, the panel held that sanctions under 28 U.S.C. § 1927 do not require bad faith. App:30a; *Rentz v. Dynasty Apparel Indus., Inc.*, 556 F.3d 389, 396 (6th Cir. 2009). Analogous to the "akin-to-contempt" split on what Rule 11(c)(3)

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[8] Courts often call such agency misconduct "unilateral." *Dep't of Homeland Security v. Regents of the Univ. of California*, 140 S.Ct. 1891, 1932 (2020) (Kavanaugh, J., concurring in the judgment in part and dissenting in part).

requires, *see* Section I.B.1, *supra*, there is a Circuit split on whether § 1927 requires bad faith.

Several Circuits have adopted a variant of the Sixth Circuit position. *See Fink v. Gomez*, 239 F.3d 989, 993 (9th Cir. 2001) ("recklessness suffices for § 1927"); *Jones v. UPS*, 460 F.3d 1004, 1011 (8th Cir. 2006) (objective unreasonableness); *Amlong & Amlong, P.A. v. Denny's, Inc.*, 500 F.3d 1230, 1241 (11th Cir. 2007) ("objectively reckless conduct is enough to warrant sanctions even if the attorney does not act knowingly and malevolently"); *see also Claiborne v. Wisdom*, 414 F.3d 715, 721 (7th Cir. 2005); *Edwards v. Gen'l Motors Corp.*, 153 F.3d 242, 246 (5th Cir. 1998); *Cruz v. Savage*, 896 F.2d 626, 631-32 (1st Cir. 1990). But the Sixth Circuit's position is not uniform.

The Second, Third, and Fourth Circuits have held otherwise: "§ 1927 requires a clear showing of bad faith." *Oliveri*, 803 F.2d at 1273 (Second Circuit) (internal quotations omitted); *Prosser v. Gerber*, 777 F.3d 155, 162 (3d Cir. 2015) (bad faith or intentional misconduct required); *Harvey v. CNN, Inc.*, 48 F.4th 257, 276-77 (4th Cir. 2022) ("an element of bad faith" is "inherent" in "court's authority to impose sanctions and in Section 1927"). The D.C. Circuit has declined to choose between the rival standards ("'recklessness' or the more stringent 'bad faith'"), but eschews "magic words" given an adequate showing in the record. *LaPrade v. Kidder Peabody & Co.*, 146 F.3d 899, 905-06 (D.C. Cir. 1998). In sum, there is a mature Circuit split on the degree of misconduct required for sanctions under § 1927.

The Sixth Circuit reversed the district court's finding of improper purpose, but found it could affirm the sanction under § 1927 without bad faith:

> Unlike Rule 11, inherent-authority sanctions require a showing of bad faith in addition to frivolousness. The court's inherent authority therefore does not support sanctions for the matters we have found non-sanctionable; and as to the sanctionable ones, Rule 11 and § 1927 sufficed.

App:30a (citations omitted). But § 1927 would not have sufficed if this case arose in the Second, Third, or Fourth Circuits. That is a split compelling this Court's review.[9]

C. This Court should resolve the Circuit split on whether sanctions under § 1927 require assessing the sanctioned counsel's ability to pay.

As with sanctions under Rule 11, *see* Section I.B.2, *supra*, the Circuits are split on courts' need or ability to consider ability to pay when assessing sanctions under § 1927. Here, the lower courts did not apportion liability between petitioners, relying instead on joint-and-several liability. App:136a, 162a, 36a. The Court should resolve this split in Circuit authority.

The Seventh and Tenth Circuits rely on § 1927's compensatory nature to reject considering the ability to pay sanctions. *Shales v. General Chauffeurs, Sales Drivers & Helpers Local Union No. 330*, 557 F.3d 746,

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[9] The Eastern District does not admit attorneys *pro hac vice*, E.D. Mich. Civil R. 83.20 cmt., so the non-Michigan counsel lacked the *capacity* to dismiss the case, even if the clients had allowed dismissal. *Cf.* FED. R. CIV. P. 11(b) (Rule 11 obligations attach only to "signing, filing, submitting, or later advocating" on a filing), 11(c)(1) (allowing sanction if attorney "violated the rule or *is responsible for* the violation") (emphasis added).

749 (7th Cir. 2009); *Hamilton v. Boise Cascade Express*, 519 F.3d 1197, 1205-06 (10th Cir. 2008).[10]

By contrast, the Second, Ninth, and Eleventh Circuits allow considering the ability to pay. *Haynes v. City & County of San Francisco*, 688 F.3d 984, 987 (9th Cir. 2012); *Oliveri*, 803 F.2d at 1281 (Second Circuit); *Danubis Grp., LLC v. Landmark Am. Ins. Co.*, 685 Fed. Appx. 792, 804 (11th Cir. 2017) (citing *Martin v. Automobili Lamborghini Exclusive, Inc.*, 307 F.3d 1332, 1337 (11th Cir. 2002)). Indeed, in the Eleventh Circuit, joint-and-several liability with no individual analysis of the ability to pay constitutes abuse of discretion. *Byrne*, 261 F.3d at 1098 n.53. The counsel here were sanctioned jointly and severally, without consideration of either each individual's ability to pay or even their respective roles in the case.

III. THE QUESTIONS PRESENTED ARE IMPORTANT, RECURRING, AND SQUARELY PRESENTED.

Lawyers must know the rules under which courts will sanction them. Without knowing that, lawyers—and thus clients—cannot freely exercise the right of petition. Fortuitously, beyond these crucial First Amendment issues, the sanctions would allow the Court an opportunity to clarify justiciability under the Electors and Elections Clauses before the 2024 election. All these reasons warrant expeditious review.

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[10] *Hamilton* distinguished *White*—where the Tenth Circuit required considering ability to pay—by distinguishing the bases for sanctions under Rule 11 versus § 1927: "*White* dealt with sanctions under Rule 11, which is not a compensatory mechanism." *Id.* at 1206.

A. The uncertainty on Rule 11(c)(2)'s requirements is untenable.

The Circuits are wildly split on the notice required to trigger Rule 11(c)(2)'s 21-day safe-harbor period. *See* Section I.A, *supra*. For something as significant to the profession and—more importantly—the public's ability to rely on counsel to assert the First Amendment right of petition,[11] the lack of clarity in untenable as a purely procedural issue. Substantively, however, the First Amendment context makes the Circuit split even more untenable for two reasons.

1. The uncertainty enables selective and viewpoint-based enforcement.

Sanctions' discretionary nature allows judges to alleviate procedural unfairness against any particular litigant. For example, in Circuits that do not require Rule 11(c)(2)'s full notice, a judge can assess nominal sanctions or decline to sanction altogether. Discretion creates room for implicit or unconscious bias.

Given the exigency of election litigation, the complexity of issues presented in the litigation, the early phase at which the underlying case ended, all that the Sixth Circuit held petitioners got correct, and all that petitioners argue here that the Sixth Circuit got wrong, it is difficult to contend that the complaint here warranted sanctions more than other filings that came before the judge. But petitioners' complaint—created under exigent timing and supported by numerous affidavits and expert reports—provoked potentially career-ending sanctions.

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[11] "The right of access to the courts is indeed but one aspect of the right of petition." *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972).

Although federal judges swear to "administer justice without respect to persons" before taking office, 28 U.S.C. § 453, and should perform their duties without bias or prejudice, Code of Conduct for United States Judges, Canon 3, neither oaths nor ethical obligations immunize judges from *unconscious* bias. Jeffrey J. Rachlinski, Sheri Lynn Johnson, Hon. Andrew J. Wistrich, & Chris Guthrie, *Does Unconscious Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1225 (2009) (finding that "implicit biases are widespread among judges" and that "these biases can influence their judgment").

If anything, judges may be *overconfident* about their ability to avoid bias or prejudice: "We worry that this result means that judges are overconfident about their ability to avoid the influence of race and hence fail to engage in corrective processes on all occasions." *Id.* at 1225-26 (recounting survey in which 97 percent of judges self-assessed themselves in the top half of judges for their ability to avoid racial prejudice in decisionmaking). To be clear, petitioners do not accuse the lower-court judges of unconscious racial bias. The unconscious bias here could be against Republicans or—among Republicans—against former President Trump's supporters.

This Court should exercise its supervisory power under S.CT. R. 10(a) to remove the Circuit splits' uncertainty and to ensure the notice that Rule 11 and due process require before courts issue sanctions.

2. The uncertainty chills First Amendment activity

Significantly, Detroit sought sanctions *intending* to chill future representations and litigation in electoral disputes, as well as to damage the lawyers

involved. Given the resulting chill to First Amendment rights, *cf. NAACP v. Button*, 371 U.S. 415, 428-29 (1963) (lawyers exercised First Amendment expression and association rights), sanctions in right-to-petition cases should require both express notice and egregious misconduct.

Crucial First Amendment rights cannot tolerate ambiguity:

> Even when speech is not at issue, the void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way. When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech.

FCC v. Fox TV Stations, Inc., 567 U.S. 239, 253-54 (2012) (citations omitted). If the First Amendment bars ambiguous rules authored by administrative agencies, it must also bar ambiguous rules authored by courts.

Under *Fox TV Stations*, First Amendment chill has always been a concern, but it is especially important now. We face unprecedented attacks on civil liberties by organized efforts that combine legacy media, purportedly non-partisan nonprofits, and their allies in government bodies.

As Justice Robert Jackson explained regarding unchecked executive power, our constitutional "institutions may be destined to pass away. But it is

the duty of the Court to be last, not first, to give them up." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 655 (1952) (Jackson, J., concurring). That pledge is even more relevant to this moment and the unchecked power of malicious or merely uninformed governmental and nongovernmental actors who—emboldened by biased or false information—respond by shouting down or pillorying opponents, rather than by reasoned counterargument.

B. Clarifying the justiciability and merits of challenges under the Elections and Electors Clauses is crucial prior to the 2024 election.

The § 1927 sanction squarely rests on the lower courts' erroneous determination that petitioners had no Elections and Electors Clause claim after the Electoral College voted. Like the "truth defense" for defamation, establishing the claim now would rebut the § 1927 sanction. Although petitioners can prevail against the sanction by showing the Elections and Electors Clause claim *nonfrivolous*, even if wrong, *McKnight v. General Motors Corp.*, 511 U.S. 659, 660 (1994), petitioners also can prevail by showing the claim justiciable and meritorious.

The issues presented are vitally important: "'the political franchise of voting' [is] 'a fundamental political right, because preservative of all rights.'" *Reynolds v. Sims*, 377 U.S. 533, 562 (1964) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)); *cf. Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971) (First Amendment has its "fullest and most urgent application precisely to the conduct of campaigns for political office"). Under the circumstances, this Court should—and certainly *could*—resolve any uncertainty over justiciability of Electors Clause claims as part of

reviewing the § 1927 sanction. *Singleton v. Wulff*, 428 U.S. 106, 121 (1976) (discussing "what questions may be taken up and resolved for the first time on appeal").

1. *Moore* clarified that the Elections Clause supports a federal claim.

In deciding *Moore* four days after the Sixth Circuit acted here, the Court changed a *potential* claim based on a *concurrence*, *Bush v. Gore*, 531 U.S. 98, 113 (2000) (Rehnquist, C.J., concurring), to claim recognized by a majority. *Moore*, 143 S.Ct. at 2089-90 ("federal courts must not abandon their own duty to exercise judicial review"); *cf. Angel v. Bullington*, 330 U.S. 183, 189 (1947) ("whether the claims are based on a federal right or are merely of local concern is itself a federal question on which this Court, and not the Supreme Court of North Carolina, has the last say"). This Court should review the § 1927 sanction through the prism of *Moore*.

2. This Court should clarify that presidential electors have standing to sue under the Elections and Electors Clauses.

Although Elections and Electors Clause violations may inflict merely generalized grievances on ordinary voters, *Lance*, 549 U.S. at 442, this Court should expeditiously resolve the Circuit split on the standing of *presidential electors*' and other candidates to raise those claims. *See* Section II.A.2, *supra*.[12] Given the

[12] Reviewing candidate standing would provide an opportunity to revisit *state* standing. "All judges make mistakes … [e]ven us[,]" *Dietz v. Bouldin*, 579 U.S. 40, 53 (2016), and one mistake was refusing to hear Texas's challenge to counting unconstitutional elections in Pennsylvania, Georgia, Michigan, and

degree of legal effort devoted to changing state election law via non-legislative actors, *see*, *e.g.*, Hemingway, RIGGED, *supra*, there is an urgent need for this Court to clarify standing under the Elections and Electors Clauses, especially given that *Moore* now has recognized a federal claim.

3. Executive-branch officials lack authority to alter state election law by fiat.

Whatever power state constitutions may give state courts or commissions to address state election law, *Moore*, 143 S.Ct. at 2081; *Arizona State Legis. v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787, 830 (2015), state legislatures cannot subdelegate authority under the Elections and Electors Clauses to administrative officers. THE FEDERALIST No. 43, at 275 (Madison) ("Whenever the States may choose to substitute *other republican forms*, they have a right to do so.") (emphasis added); *cf. J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 405-07 (1928) (*delegata potestas non potest delegari* doctrine). Significantly, setting the time, place, and manner of *federal* elections is not a power the States possessed before the Constitution created federal elections.

Wisconsin in 2020 for lack of standing. *Texas v. Pennsylvania*, 141 S.Ct. 1230 (2020). If the elections in those states had been stricken as unconstitutional, Texas would have had a vote in the House and Senate for President and Vice-President, respectively. U.S. CONST. amend. XII. The difference between having a vote and not having a vote is more than enough for Article III. *Schlesinger*, 418 U.S. at 223 n.13 ("personal stake in a fraction of a vote … [is] sufficient to support standing"); *Lance*, 549 U.S. at 442 (distinguishing standing of citizen plaintiffs from that of citizen relators suing in the name of a state). Reviewing electors' standing under the Elections and Electors Clauses could correct the record as to state standing.

United States Term Limits v. Thornton, 514 U.S. 779, 802 (1995) (Tenth "Amendment could only 'reserve' that which existed before"); *Cook v. Gralike*, 531 U.S. 510, 522 (2001). Administrative officers cannot constitutionally set election laws, and certainly not *by fiat*. *Cf.* Section II.A.4.b, *supra* (Secretary lacked procedural power to issue her rule).

C. The decision below is wrong in several recurring ways that warrant this Court's supervision.

The preceding sections identify numerous areas where the lower courts erred and numerous areas where the Circuits are split on applicable law. This Section identifies two additional areas where the lower courts erred that are recurring and that this Court should address in assessing the sanctions.

1. Suing state boards (*i.e.*, official groups) is permissible.

The panel faults petitioners for suing the Board when state agencies are immune from suit under the Eleventh Amendment and also because relief would have been untimely. App:25a. Leaving aside that the Board did not even request sanctions, petitioners did nothing improper here for four reasons.

- States can decline to assert sovereign immunity, *Wisconsin Dep't of Corr. v. Schacht*, 524 U.S. 381, 389 (1998), so suing state defendants is not *per se* frivolous.[13]
- Plaintiffs can name state officers to enjoin ongoing violations of federal law under the officer-suit

[13] Because political subdivisions lack sovereign immunity, Detroit's intervention arguably mooted the immunity issue *vis-à-vis* declaratory relief.

exception to sovereign immunity, *Ex parte Young*, 209 U.S. 123, 159-61 (1908).

- For state boards consisting of individual officers (*i.e.*, not entities like departments), plaintiffs can name the "board" under *Ex parte Young*. 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).
- A court could have vacated the Board's action, *see* Section II.A.1.b, *supra*, but even declaratory relief satisfied Article III. *Franklin*, 505 U.S. at 803.

The Sixth Circuit's contrary suggestions were error.

2. Detroit lacks *parens patriae* standing to protect voters.

The Sixth Circuit defended the disproportionately large sanction award for a mere permissive intervenor because Detroit "was all but compelled to intervene in this case, given (among other things) the plaintiffs' request that all the absentee ballots from the City's residents be eliminated from the vote count." App:35a (interior quotations and alterations omitted). The Sixth Circuit erred on many levels, including jurisdiction.

Although Wayne County is Detroit's electoral unit under Michigan law, only the State of Michigan—not Wayne County, certainly not Detroit—has *parens patriae* standing to protect voters' interests. *See In re Dixon*, 116 Mich.App. 763, 772-73 (App. 1982); *Michigan Gas Utils. v. Pub. Serv. Comm'n*, 200 Mich.App. 576, 584 n.1 (App. 1993). Where Detroit

intervened with Michigan's Attorney General adequately representing Wayne County voters, Detroit's large sanction exceeded what was necessary under the circumstances. The panel's "all but compelled" rationale was legal error.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

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Respectfully submitted,

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