No. 21-1786

In the U.S. Court of Appeals for the Sixth Circuit

TIMOTHY KING, *ET AL.*,
Plaintiffs,

GREGORY J. ROHL, BRANDON JOHNSON, HOWARD KLEINHENDLER, SIDNEY POWELL, JULIA HALLER, SCOTT HAGERSTROM,
Interested Parties-Appellants,

v.

GRETCHEN WHITMER; JOCELYN BENSON; CITY OF DETROIT, MI,
Defendants-Appellees.

ON APPEAL FROM U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, CIVIL ACTION NO. 2:20-CV-13134-LVP, HON. LINDA V. PARKER

MOTION TO RECALL THE MANDATE

Lawrence J. Joseph
1250 Connecticut Ave. NW, Ste. 700
Washington, DC 20036
202-355-9452
ljoseph@larryjoseph.com

Counsel for Appellants

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to Sixth Circuit Rule 26.1, appellants Sidney Powell, Brandon Johnson, Howard Kleinhendler, Julia Haller, Gregory Rohl, and Scott Hagerstrom make the following disclosure:

1) Is said party a subsidiary or affiliate of a publicly owned corporation? If yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

Appellants are natural persons.

2) Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and nature of the financial interest:

No.

Dated: May 3, 2024

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph
1250 Connecticut Ave NW, Ste. 700
Washington, DC 20036
Tel: 202-355-9452
Email: ljoseph@larryjoseph.com

Counsel for Appellants

TABLE OF CONTENTS

ADDENDUM

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS AND RULES

OTHER AUTHORITIES

MOTION TO RECALL THE MANDATE

The appellants ("Appellants") respectfully move to recall the mandate based on supervening legal and factual developments and—with respect to the sanctions under 28 U.S.C. §1927—the Michigan appellees' inconsistent positions. Appellants further move to vacate the bar-referral relief under E.D. Mich. R. 83.22(c) and the monetary and nonmonetary sanctions under §1927 and FED. R. CIV. P. 11(c)(2). The Supreme Court did not consider these issues, but "the denial of a writ of certiorari imports no expression of opinion upon the merits of the case." *Missouri v. Jenkins*, 515 U.S. 70, 85 (1995) (internal quotation omitted). Recalling the mandate is necessary to avoid injustice and to address the supervening legal and factual issues.

STANDARD OF REVIEW

Recalling a mandate requires "good cause … through a showing of exceptional circumstances," which includes remedying fraud on the court, clarifying mandates, and considering supervening Supreme Court decisions, *Patterson v. Haskins*, 470 F.3d 645, 661-62 (6th Cir. 2006). New Supreme Court decisions can "call[] into question the integrity of the earlier panel decision and amount[] to extraordinary circumstances that merit recall of the mandate." *Id.* at 662 (internal quotation omitted). The primary rationale against recalling mandates is "the profound interests in repose attached to a court of appeals mandate." *United States v. Saikaly*, 424 F.3d 514, 517 (6th Cir. 2005), with a counterbalancing "need to allow

courts to remedy actual injustice." *Calderon v. Thompson*, 523 U.S. 538, 558 (1998). In the criminal-law context,[1] the rationale to avoid injustice concerns "actual as compared to legal innocence." *Id.* at 559 (internal quotation marks omitted).

This Court defines fraud on the court as counsel's conduct that misleads a court—by either positive averment or concealment under a duty to disclose—and that "is intentionally false, wilfully blind to the truth, or is in reckless disregard for the truth." *Demjanjuk v. Petrovsky*, 10 F.3d 338, 348 (6th Cir. 1993). "Reckless disregard for the truth is sufficient." *Id.* at 353. Although failing a duty of candor is not always fraud on the court, *Shotwell Mfg. Co. v. United States*, 371 U.S. 341, 358 & n.19 (1963) (failure to disclose witnesses' prior inconsistent statements), counsel's duty of candor requires "present[ing[] the law in the light most favorable to the client," not "misrepresent[ing] the law when it clearly goes against the client." *Thompson v. Paasche*, 950 F.2d 306, 315 n.7 (6th Cir. 1991). Violating a duty to disclose can constitute deception. *Wolfe v. A. E. Kusterer & Co.*, 269 Mich. 424, 427-28 (1934) (intentionally concealing or suppressing facts "is evidence of and equivalent to a false representation" when good faith required disclosure) (contract law).

[1] Courts' reticence to recall mandates in *criminal* appeals derives in part from criminal-law issues that do not apply to *civil* appeals. *Id.* ("our habeas corpus jurisprudence" cabins judicial discretion).

FACTUAL BACKGROUND

Appellants cite the District Court record pursuant to Circuit Rule 28(a)(1) and collect pertinent record excerpts from other courts in the Addendum ("Add"). Appellants seek to recall the mandate based on the following court records.[2]

1. On January 14, 2021, Michigan's brief in opposition ("BIO") in No. 20-815 cited *University of Texas v. Camenisch*, 451 U.S. 390, 393-94 (1981), for the proposition that—if the Supreme Court denied interim relief—Appellants "still have the opportunity for their day in court, including in the Sixth Circuit and possibly this Court, after the district court enters a final judgment," Add:67a, with Dana Nessel, Fadwa Hammoud, Heather Meingast, and Erik Grill as counsel. Add:65a.

2. Between December 2020 and February 2021, Meingast defended Secretary Benson's Absent Voter Ballot Processing: Signature Verification and Voter Notification Standards ("Signature-Verification Standards") in the Michigan Court of Claims, Add:70a-71a, before the court ruled against her in March. *Genetski v Benson*, 2021 Mich. Ct.Cl. LEXIS 3, *19 (Mar. 9, 2021).

3. Meingast, Mark Donnelly, and Ann Sherman represented Michigan's Secretary of State in *Boagert v. Land*, No. 08-2130 (6th Cir.). Add:53a-54a.

4. Meingast and Grill represented Michigan in this Court, Add:73a-74a,

[2] Court filings are judicially noticeable. *Rodic v. Thistledown Racing Club, Inc.*, 615 F.2d 736, 738 (6th Cir. 1980).

and in District Court. Defs. Whitmer & Benson's Sanction Mot., PageID#105, 4378.

5. Detroit's Supreme Court BIO admitted that Detroit's sanction motion (ECF #78) sought bar-referral relief only under Local Rule 83.22(c), not under Rule 11. Add:78a.

6. Sherman filed Michigan's waiver of a BIO in No. 23-486. Add:75a.

7. The Supreme Court denied Appellants' petition for a writ of *certiorari* on February 20, 2024, and their petition for rehearing on April 15, 2024. Add:80a.

I. THIS COURT HAS AUTHORITY TO RECALL THE MANDATE.

Two supervening Supreme Court decisions, a Detroit admission in the Supreme Court, and Michigan's inconsistent positions all qualify as sufficiently "extraordinary" to recall the mandate. *Patterson*, 470 F.3d at 661-62.

II. APPELLANTS' MOTION IS TIMELY.

Recalling the mandate was not ripe here until the Supreme Court denied rehearing on April 15, 2024. "One cannot be guilty of laches until his right ripens into one entitled to protection." *What-A-Burger of Va., Inc. v. Whataburger, Inc.*, 357 F.3d 441, 449 (4th Cir. 2004) (internal quotation omitted); *Osborn v. Griffin*, 865 F.3d 417, 450-51 (6th Cir. 2017) (laches requires undue delay and prejudice). Until the Supreme Court denied rehearing, this Court lacked jurisdiction to alter its holding. *Hermann v. Brownell*, 274 F.2d 842, 843 (9th Cir. 1960). Accordingly, timeliness is measured against the Supreme Court's action, and this motion is

timely.[3]

This Circuit evaluates timeliness under a four-factor test:[4]

- The elapsed time between the Supreme Court's denying review and the revised appellate decision.
- Appellees' reliance on the prior decision during that time.
- Revised decisions' adopting arguments in movants' rehearing petition.
- Habeas-related concerns about federalism, comity, and finality of convictions.

Patterson, 470 F.3d at 664. Appellants satisfy all four factors.

First, Appellants have moved quickly after the Supreme Court denied rehearing. *Cf. id.* at 662 (three months after Supreme Court's denial is reasonable).

Second, there was no reliance on this Court's mandate—which had been stayed through the denial of *certiorari*—in this satellite sanctions litigation.

Third, Appellants seek recall for after-arising issues not previously addressed.

---

[3] Historically, common-law reasoning continued Supreme Court review through rehearing, *R. Simpson & Co. v. Commissioner*, 321 U.S. 225, 229-30 (1944), but the 1989 addition of Rule 16.3 made denying *certiorari* final. *Robinson v. United States*, 416 F.3d 645, 648-50 (7th Cir. 2005) (distinguishing *Simpson*). For ripeness, the common-law reasoning continues to apply (*i.e.*, timeliness of Appellants' motion is measured from the denial of rehearing).

[4] Court rules—including rules on timeliness—do not limit courts' inherent authority. *A to Z Portion Meats, Inc. v. NLRB*, 643 F.2d 390, 391 n.1 (6th Cir. 1981).

Fourth, the habeas-based fourth factor is inapplicable to civil litigation.

III. APPELLANTS RAISE NEW ISSUES THAT WARRANT RECALLING THE MANDATE.

Recalling the mandate is appropriate to address extraordinary circumstances under *Patterson*:

- The supervening decisions in *Moore v. Harper*, 143 S.Ct. 2065 (2023), and *FBI v. Fikre*, 144 S.Ct. 771 (2024).
- Michigan's admission that the *merits* were not moot in District Court upon denial of *preliminary relief* in the Supreme Court, and Michigan's lack of candor on that issue.
- Detroit's supervening admission that it requested bar-referral relief solely under Local Rule 83.22(c).

Each circumstance warrants recalling the mandate.

A. The supervening *Fikre* and *Moore* decisions and Michigan's inconsistent positions warrant vacating the §1927 sanctions.

Under *Fikre* and *Moore*, the Elections and Electors Clause claim was neither moot nor improper. Indeed, *Fikre* reversed a decision on which this Court relied to find that governments bear *lower* burdens to show mootness. *Compare Speech First, Inc. v. Schlissel*, 939 F.3d 756, 767-68 (6th Cir. 2019) (citing *Fikre v. FBI*, 904 F.3d 1033, 1037 (9th Cir. 2018)) *with Fikre*, 144 S.Ct. at 777 (burden "holds for governmental defendants no less than for private ones"). Appellees cannot meet their

Fikre burden on mootness.

Shotwell notwithstanding, Michigan's lack of candor regarding *Camenisch* and *Boagert* approaches fraud on the court under the reckless-disregard *Demjanjuk* factor.[5] Even without fraud, Michigan's inconsistent positions—and Appellants' "actual innocence" under §1927—warrant recalling the mandate to reconsider mootness under *Fikre*. Appellees simply cannot show mootness.

1. The Elections and Electors Clause claim was not moot.

This Court affirmed the §1927 sanction based in part on Appellants' failure to dismiss their case in District Court on December 15, 2020, after having argued that their emergency petition to the Supreme Court for interim relief would become moot on December 14, 2020. Add:21a. As Michigan argued in the Supreme Court, mooting *interim* relief for the 2020 election in No. 20-815 simply would not moot *merits* relief for 2020 and *future elections* in the District Court. *See* 13C WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE §3533.3.1 & n.43 (3d ed.) ("preliminary injunction issue may be moot even though the case remains alive on the merits"); *Camenisch*, 451 U.S. at 394. "Dismissal of these preliminary-injunction appeals, of course, does not render moot the underlying district court litigation." *Boagert v. Land*, 543 F.3d 862, 864 (6th Cir. 2008) (judgment against Michigan's Secretary of

[5] Counsel's material in-court lack of candor misled this Court, self-evidently meeting the other four *Demjanjuk* factors.

State). Appellees' primary evidence of mootness is wholly inapposite.

Moreover, *defendants* bear the burden of proving mootness. As relevant to the reckless-disregard *Demjanjuk* factor, Michigan's counsel cited *Camenisch* in No. 20-815 and overlapped with the Secretary's counsel in *Boagert*, but they failed to notify the courts of those decisions under Rule 3.3(a)(2) in the District Court and Rule 46(c) here. *Cf. Waeschle v. Dragovic*, 687 F.3d 292, 296 (6th Cir. 2012) ("extremely troubling" when counsel fails to mention negative precedent where they were counsel).

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

A case is 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), and events have *completely and irrevocably eradicated the* alleged violation's effect. *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979). When challenging unanswered complaints as moot, defendants necessarily accept the uncontroverted allegations, *Fikre*, 144 S.Ct. at 775 & n.1, making mootness difficult to show when a "case comes to [a court] in a preliminary posture, framed only by uncontested factual allegations and [defendant's] terse declaration." *Fikre*, 144 S.Ct. at 779. Under *Fikre*, appellees could not show mootness in December.

Courts review defendants' mootness rigorously, including what the evidence *may mean* and what *might* later happen. *Fikre*, 144 S.Ct. at 778. Under that exacting

standard—applicable to appellees now—appellees cannot make their required showing.

- Appellants' statement in No. 20-815 that "subsequent relief would be pointless and the petition would be moot," *King* Pet. at 15, expressly refers only to the interim relief then before the Supreme Court. Under *Camenisch*, *Boagert*, and blackletter law in WRIGHT & MILLER, that is inapposite to the merits in District Court, as Michigan admitted in No. 20-815. Add:63a.[6]
- In *Genetski*, Secretary Benson defended her unlawful Signature-Verification Standards through February 17, 2021, Add:70a-71a, which disqualifies a voluntary-cessation defense for *future* elections.

Appellees could never show mootness under *Fikre*.

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

Both for the 2020 election and *a fortiori* for future elections, the merits dispute in District Court was not moot because declaratory relief remained possible, even if

[6] Appellants' statement that the "motion for immediate preliminary relief seeks to maintain the status quo so that the passage of time and the actions of Respondents do not render the *case* moot," Add:62a (emphasis added), uses the generic term "case," but without tying "the passage of time" to December 14, as opposed to the later Twelfth Amendment or swearing-in processes. Similarly, it does not address mootness doctrine's capable-of-repetition *exception* for *future* elections.

injunctive relief was unavailable. *Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992) ("injury alleged [can] be redressed by declaratory relief against the Secretary alone"). Like the Commerce Secretary in *Franklin*, Secretary Benson "certainly [had] an interest in defending her policy determinations concerning the [litigation's object], even [if] she cannot herself change [it]." *Id.* Like the U.S. Solicitor General in *Franklin*, appellees cannot "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 …, even though they would not be directly bound." *Id.* Thus, as with swapping Hawaii's electors on January 6, 1961, declaratory relief remained possible and potentially useful at least until electoral votes were counted. *Fikre* thus precludes using injunctive relief's unavailability to find mootness.

Moreover, swapping Trump votes for Biden votes was unnecessary. If the Michigan election violated the Elections and Electors Clauses, *see* Section III.A.2.b, *infra*, Biden votes could be rejected without swapping in Trump votes. That would partially redress the candidate plaintiffs' injury from the unlawful election process. When facing unequal-footing claims, judicial relief can level the parties' treatment *up or down*. *Heckler v. Mathews,* 465 U.S. 728, 740 (1984); *Clinton v. City of New York*, 524 U.S. 417, 433 n.22 (1998) (unequal-footing analysis applies outside equal-protection cases). Under the rigorous *Fikre* analysis, the case was not moot.

c. Michigan cannot have it both ways.

Assistant Attorneys General Meingast and Grill were on the papers in all three courts, and Meingast was the Secretary of State's counsel in *Boagert*. Defs. Whitmer & Benson's Sanction Mot., PageID#105, 4378; Add:73a-74a, 65a, 54a. Moreover, Michigan's Solicitor General—whose waiver in the Supreme Court avoided her ethical duty to correct—was also the Secretary's counsel in *Boagert*. Add:75a, 54a. Under the duties of candor in Rules 3.3(a)(2) and 46(c), these counsel recklessly disregarded ethical duties in material court filings that deceived this Court. *See* MICH. R. PROF'L CONDUCT 3.3(a)(2); ABA Model R. 3.3(a)(2); FED. R. APP. P. 46(c); *In re Snyder*, 472 U.S. 634, 645 & n.6 (1985). Significantly, the reckless-disregard factor "does not require a finder of fact to decide whether [the non-moving party] *actually* knew" but only what he or she "had cause to know." *Okros v. Angelo Iafrate Constr. Co.*, 298 F.App'x 419, 432 (6th Cir. 2008) (emphasis in original). Under *Demjanjuk*, Michigan's counsel *actually* knew about the *Camenisch* line of cases generally and about *Boagert* specifically. Certainly, they "had cause to know" of those decisions. Even if these government counsel's lack of candor did not rise to fraud on the court, they could never show mootness under *Fikre*.

Indeed, as government counsel, they represent sovereignties with an "obligation to govern impartially [that] is as compelling as [the] obligation to govern at all," so that their interest here arguably "is not that [they] shall win [the] case, but

that justice shall be done." *Simpson v. Warren*, 475 F.App'x 51, 58-59 (6th Cir. 2012) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)); *People v. Buckey*, 424 Mich. 1, 33 & n.26 (1985) (same); *Freeport-McMoRan Oil & Gas Co. v. FERC*, 962 F.2d 45, 47 (D.C. Cir. 1992) (that *prosecutorial* standard applies to government lawyers in civil litigation); Richard O. Faulk & John S. Gray, *Alchemy in the Courtroom? The Transmutation of Public Nuisance Litigation*, 2007 MICH. ST. L. REV. 941, 1000-01 & n.274 (2007) (similar regarding private counsel representing governments).

Further, the criteria for judicial estoppel are met, *New Hampshire v. Maine*, 532 U.S. 742, 755-56 (2001); *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 598-99 (6th Cir. 1982), as are the criteria for non-mutual collateral estoppel. *Monat v. State Farm Ins. Co.*, 469 Mich. 679, 691-92 (2004); *Peterson v. Heymes*, 931 F.3d 546, 554 (6th Cir. 2019). Collateral estoppel applies to Detroit as a political subdivision. *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 340-41 (1958).

2. The Elections and Electors Clause claim was viable.

By finding the Elections and Electors Clauses justiciable, the supervening *Moore* decision warrants revisiting the jurisdictional and pleading defects that this Court identified. Add:18a-19a. Although a merits analysis is not necessary to determine the claim was not moot, *Verizon Md. Inc. v. Pub. Serv. Comm'n of Maryland*, 535 U.S. 635, 638 (2002) (inquiry under *Ex parte Young* does not include

analyzing a claim's merits); *cf. Warth v. Seldin*, 422 U.S. 490, 500 (1975) (same for Article III), this Court should clarify these issues to avoid chilling voting-rights litigation.

a. *Moore* is a supervening decision that warrants recalling the mandate.

Unremedied Elections and Electors Clause violations by executive actors—like Secretary Benson—and federal courts were rampant in the 2020 election. *See* Mollie Hemingway, RIGGED: HOW THE MEDIA, BIG TECH & THE DEMOCRATS SEIZED OUR ELECTIONS, 14-20 (Regnery 2021). Three days after this Court's decision, the Supreme Court elevated a three-justice concurrence, *Bush v. Gore*, 531 U.S. 98, 113 (2000) (Rehnquist, C.J., concurring), to hold that "federal courts must not abandon their own duty to exercise judicial review" under those clauses. *Moore*, 143 S.Ct. at 2089-90. The national interest in ensuring trust in elections warrants revisiting this Court's decision to avoid chilling the right of petition to enforce *Moore* for future elections.

b. The complaint pleads a viable case or controversy under the Elections and Electors Clauses.

This Court found the Elections and Electors Clause claims frivolous for several reasons:

- The complaint failed to support the claim that the Secretary or Governor acted unilaterally in contravention of Michigan election law. Add:19a.

- Michigan's Board of State Canvassers ("Board") has sovereign immunity under *Boler v. Earley*, 865 F.3d 391, 410 (6th Cir. 2017), and already had acted prior to the suit, thus negating redressability under *Parsons v. U.S. Dept. of Justice*, 801 F.3d 701, 715-16 (6th Cir. 2015). Add:18a.

If these findings were correct, they would go to Rule 11—frivolousness—and not to the §1927 issue of vexatiously prolonging moot litigation. Given the Elections and Electors Clauses' significance to election integrity under *Moore*, this Court should revisit this issue under §1927.

Perhaps because the lengthy complaint was not "short and plain," FED. R. CIV. P. 8(a)(2), the panel's review of the complaint missed allegations making the claim that Michigan violated the Elections and Electors Clauses:

- "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*, … and to process such ballots regardless of their validity.'"

Am. Compl., PageID#6, 879, 883, 904 (¶¶15.C, 30, 96) (emphasis added). Although *Genetski* invalidated the Signature-Verification Standards on state-law grounds, even that ruling confirms that the Secretary purported to make election law when the Constitution vests that authority in the Legislature.

Appellants respectfully submit that these allegations show that Republican voters and candidates had competitive or unequal-footing standing to challenge Secretary Benson's Signature-Verification Standards, *vis-à-vis* both 2020 and future elections: "Democrats … voted absentee more than Republicans did." Add:13a. That, coupled with the allegations about the Signature-Verification Standards, suffice to show an Article III controversy. *Mecinas v. Hobbs*, 30 F.4th 890, 897-900 (9th Cir. 2022); *Trump v. Wis. Elections Comm'n*, 983 F.3d 919, 924-25 (7th Cir. 2020); *cf. Fulani v. League of Women Voters Educ. Fund*, 882 F.2d 621, 626 (2d Cir. 1989); *Clinton*, 524 U.S. at 433 n.22. Moreover, the Supreme Court vacated the contrary authority on which Detroit relied to argue otherwise. *Compare* Opinion & Order, PageID#62, 3320 *with Bognet v. Degraffenreid*, 141 S.Ct. 2508 (2021). Invoking *Parsons* is inapposite under *Franklin*, *supra*. Indeed, *Parsons* itself recognized that injunctive or declaratory relief can redress past action. *Parsons*, 801 F.3d at 715-16. That is especially true for *future* elections.

State agencies' sovereign immunity does not extend to multi-member groups like the Board, *see* MICH. CONST. art 2, §7, because federal pleading standards allow

naming them by title, rather than by name. FED. R. CIV. P. 25 Advisory Committee Notes to 1961 Amendments; FED. R. CIV. P. 17(d); FED. R. APP. P. 43(c)(1); 4 MOORE'S FEDERAL PRACTICE - CIVIL §17.29. Moreover, sovereign immunity cannot shield state officers from claims that the Signature-Verification Standards violated the Constitution. *Boler*, 865 F.3d at 412.

3. Rule 11 does not provide an alternate basis to affirm the §1927 sanctions.

Rule 11 cannot support alternate sanctions for failing to dismiss on December 14, 2020. For the 1993 amendments to Rule 11(b), the preliminary draft would have sanctioned "presenting *or maintaining* a [covered contention]," Proposed Amendments to the Federal Rules of Civil Procedure, 2 (June 13, 1991) (emphasis added),[7] but the adopted version sanctions only "signing, filing, submitting, or later advocating [a covered document]." FED. R. CIV. P. 11(b). "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) (citation omitted). In other words, Rule 11(b) does not cover failing to withdraw covered documents.

[7] https://www.uscourts.gov/rules-policies/archives/preliminary-draft/preliminary-draft-proposed-amendments-1991 (last visited May 3, 2024).

B. Detroit's admission that it sought bar-referral relief solely under Local Rule 83.22(c) raises merits and jurisdictional issues.

In avoiding review on whether the served Rule 11 motion differed too much from its filed Rule 11 motion, Detroit acknowledged that it sought bar-referral relief solely under Local Rule 83.22(c), not under Rule 11. That new admission undermines this Court's holding jurisdictionally and substantively.

1. Appellees lack standing for bar-referral relief.

Parties seeking relief from federal courts bear the burden of proving standing, *Renne v. Geary*, 501 U.S. 312, 316 (1991); *Wooten v. United States*, 825 F.2d 1039, 1045-46 (6th Cir. 1987) (jurisdiction not conferred by waiver), and appellees have no Article III interest in bar-referral relief against Appellants. General interests in having the law enforced cannot support standing. *Linda R. S. v. Richard D.*, 410 U.S. 614, 619 (1973); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 574-78 (1992). While movants for an attorney-fee sanction would have an Article III interest in recovering fees, movants "must demonstrate standing … for each form of relief that they seek (for example, injunctive relief and damages)." *TransUnion LLC v. Ramirez*, 141 S.Ct. 2190, 2208 (2021). Because *Willy v. Coastal Corp.*, 503 U.S. 131, 133 (1992), involved attorney-fee sanctions, *Willy* is irrelevant. In short, appellees lack a general Article III interest in bar-referral relief.

The Michigan appellees' statewide roles cannot create an Article III interest in the Governor and Secretary of State in their official capacities, Am. Compl.

PageID#6, 872, as *executive* officers. *League of Women Voters of Mich. v. Sec'y of State*, 506 Mich. 905, 908 (2020); *Sharp v. Genesee Cty. Election Comm'n*, 145 Mich. App. 200, 205 (App. 1985) (citing MICH. CONST. art. 5, §21). The Michigan Attorney Discipline Board is "the adjudicative arm of the Supreme Court for discharge of its exclusive constitutional responsibility to supervise and discipline Michigan attorneys." *Grievance Adm'r v. Underwood*, 462 Mich. 188, 193 (2000) (interior quotation omitted). Moreover, Michigan's judicial power is "vested exclusively" in the judicial branch. MICH. CONST. art. 6, §1. Michigan has structured its government under the separation-of-powers doctrine, with each branch confined to its powers unless otherwise *expressly* provided in the constitution. MICH. CONST. art. 3, §2. Accordingly, the Michigan appellees lack a cognizable interest in bar-referral relief.

2. The non-signing lawyers did not practice law in the U.S. District Court for the Eastern District of Michigan.

Regarding bar-referral relief, this Court rejected Appellants' Due Process arguments because "rule [83.22(c)] permits such referrals rather than proscribes them." Add:26a. This was error for two reasons.

First, for e-filed documents, signing means "filing … through a person's electronic-filing account …, together with that person's name on a signature block." FED. R. CIV. P. 5(d)(3)(C). The local rule's catchall for otherwise practicing cannot include "being listed in the signature block of a paper" because that would render

"sign a paper" mere surplusage. *Marx v. General Revenue Corp.*, 568 U.S. 371, 386 (2013). Moreover, the *ejusdem generis* canon requires limiting catchall phrases to actions analogous to the preceding list's actions, *Washington State Dept. of Social and Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384 (2003), without "render[ing] specific words meaningless." *CSX Transp., Inc. v. Alabama Dept. of Revenue*, 562 U.S. 277, 295 (2011). It is clear error to include non-signing counsel as "otherwise practicing in this court" when "signing a paper" is a specific basis to "practice in this court."

Second, the federal rules prohibit sanctioning or disadvantaging a person without prior actual notice. FED. R. CIV. P. 83(b). By expressly listing "sign a paper" as a form of "practice in this court," Local Rule 83.22(c) in no way gives notice that having a non-signer's name in the signature block qualifies as "otherwise practicing in this court." To the contrary, under the surplusage and *ejusdem generis* canons, Local Rule 83.22(c)'s list assures non-Michigan counsel that having one's name in the signature block—by itself—*cannot* constitute "practice in this court."[8]

[8] Specifically, Local Rule 83.22(c) applies only to "an attorney who is a member of the bar of this court or has practiced in this court as permitted by LR 83.20." E.D. Mich. Civil R. 83.22(c). For the non-signing counsel, the rule defines the covered scope as "to appear in, commence, conduct, prosecute, or defend the action or proceeding; appear in open court; *sign a paper*; participate in a pretrial conference; represent a client at a deposition; or *otherwise practice* in this court or before an officer of this court." E.D. Mich. Civil R. 83.20(a)(1) (emphasis added).

3. Detroit's addition of a new motion under Local Rule 83.22(c) to the served motion under Federal Rule 11(c)(2) implicates Rule 11's separate-motion safe harbor.

Detroit's recent admission that it added a motion for bar-referral relief under Local Rule 83.22(c) to its served Rule 11 motion implicates Rule 11's safe-harbor rule that "motion[s] for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b)." FED. R. CIV. P. 11(c)(2). In this Circuit's leading separate-motion decision, the movant did not serve a Rule 11 motion before moving for fees under Rule 11, §1927, and 42 U.S.C. §1988(b). *Ridder v. City of Springfield*, 109 F.3d 288, 294 n.7 (6th Cir. 1997). The *Ridder* combined-motion footnote was *dicta* because *Ridder* rejected the motion's Rule 11 component for failure to comply with Rule 11's safe harbor.

Here, the facts are reversed: (1) Detroit served a Rule 11 motion, but (2) added another motion under Local Rule 83.22(c) to the filed version. Detroit's admission thus presents three issues to resolve on the separate-motion safe harbor:

- Whether to adopt the *Ridder* combined-motion *dicta* as the law of this Circuit?
- Whether permissibly combined motions must be served *en toto*, even if the other motions do not require prior service and could be separately filed?
- Whether to extend allowing combined *fee motions* in *Ridder* to include

the combined *bar-referral relief* here?

For each issue, the movants could separately file their non-Rule 11 motions, but the nonmovants would lack notice of the combined motion.

These issues warrant the Court's resolution. It may elevate form over substance—and procedure over the merits—to prohibit adding new motions into a filed Rule 11 motion when the new motion could be filed separately. *Ridder*, 109 F.3d at 294 n.7. But "'procedural rights' are special." *Lujan*, 504 U.S. at 572 n.7. If this Circuit requires serving combined motions in their combined form as a condition of filing combined motions, the Circuit may get less satellite Rule 11 litigation. *Holgate v. Baldwin*, 425 F.3d 671, 677-78 (9th Cir. 2005) (strict compliance required, even if underlying litigation was frivolous); *accord Uszak v. Yellow Transp., Inc.*, 343 F.App'x 102, 107-08 (6th Cir. 2009); *cf. Roth v. Green*, 466 F.3d 1179, 1192 (10th Cir. 2006) ("the plain language of [Rule 11] requires a copy of the actual motion for sanctions to be served on the person(s) accused of sanctionable behavior"). Clear, binding Circuit precedent on these issues would greatly benefit the Circuit's bench, bar, and litigants.

4. If this Court reassesses Rule 11 sanctions, the Court may consider Detroit's served motion's inadequate notice.

Appellants did not previously raise several issues on which they might have prevailed or lessened sanctions:

- Filing prematurely *on day 21*, Detroit did not provide Rule 11's full 21-

day safe harbor, much less Rule 6's additional 3 days. FED. R. CIV. P. 6(d), 11(c)(2); *Ridder*, 109 F.3d at 297 (Rule 11 sanctions unavailable unless motion preceded by "the full twenty-one day 'safe harbor' period"). Michigan's "joinder" on January 14 blatantly violated the 21-day safe harbor.

- By incorporating key issues by reference to an earlier filing, *see* Detroit's Sanction Mot. (served), PageID#161-3, 6064 (incorporating "ECF No. 39, PageID.2808-2933"), Detroit waived the incorporated issues. *Northland Ins. Co. v. Stewart Title Guar. Co.*, 327 F.3d 448, 452-53 (6th Cir. 2003); *Atlas Techs., LLC v. Levine*, 268 F.Supp.3d 950, 962 (E.D. Mich. 2017). Moreover, Detroit's confusing incorporation did not comply with the District Court's practice guidelines, Add:27a-28a, and did not clearly incorporate Detroit's arguments about Dominion. Opinion & Order, PageID#172, 6931 (interpreting cited range as "2808-2[8]33") (District Court's alteration).
- Moving to enlarge its page count, Detroit argued that extensive briefing was required "to address the full scope of legal and factual issues raised in the Motion," Detroit's Mot. to Extend, PageID#77, 3613, which admits that the served motion did not convey *to Appellants* the notice that Rule 11 requires.

Rule 11 requires motions to "describe the specific conduct that allegedly violates Rule 11(b)," FED. R. CIV. P. 11(c)(2), "to reduce … practice of making threats or sending vague 'Rule 11 letters' designed to bully an opponent into withdrawing a paper or position." Georgene M. Vairo, RULE 11 SANCTIONS, at 24 (Richard G. Johnson ed., 3d ed. 2004). Under *Penn, LLC v. Prosper Bus. Dev. Corp.*, 773 F.3d 764, 767 (6th Cir. 2014), a slapdash served motion is insufficiently specific "[t]o stress the seriousness" that the sender would file the incomplete motion as served.

Even if this Court would not resolve these issues now as plain error, *PT Pukuafu Indah v. United States SEC*, 661 F.3d 914, 926 (6th Cir. 2011), the Court could consider them in equitably assessing appellees' ongoing entitlement to any remaining sanctions. Alternatively, the Court should revisit appellees' right to reimbursement for hours billed versus any relief afforded to Appellants, as well as allow appellees to seek §1927 sanctions for Michigan's "reckless disregard of the duty owed by counsel to the court." *In re Ruben*, 825 F.2d 977, 983 (6th Cir. 1987) (internal quotation marks omitted). Michigan's nondisclosure unreasonably and vexatiously multiplied these proceedings far more than Appellants' short pause before dismissing the underlying litigation. Even if the Court denies Appellants relief on these issues, the Court should correct Circuit precedent to avoid elevating clearly erroneous aspects of the District Court's decision to Circuit precedent.

CONCLUSION

This Court should recall the mandate, vacate the bar-referral relief, and vacate all sanctions under Rule 11(c)(2) and 28 U.S.C. §1927. If the Court grants Appellants only partial relief, the Court should vacate the portion of the monetary sanctions that corresponds to the relief granted. Finally, if the Court vacates the §1927 sanctions for lack of candor without vacating all sanctions, the Court should allow Appellants to move for offsetting §1927 sanctions under *Ruben*.

Dated: May 3, 2024

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph
1250 Connecticut Ave. NW, Ste. 700-1A
Washington, DC 20036
Tel: 202-355-9452
Fax: 202-318-2254
Email: ljoseph@larryjoseph.com

Counsel for Appellants

BRIEF FORM CERTIFICATE

1. The accompanying motion complies with the type-volume limitation of FED. R. APP. P. 27(d)(2)(A) and Circuit Rule 27-1(1)(d) because the motion contains 5,200 words, including footnotes, but excluding the parts of the motion exempted by FED. R. APP. P. 32(a)(7)(B)(iii). I have relied on Microsoft Word 365's word-count feature for the calculation.

2. The accompanying motion complies with the typeface and type style requirements of FED. R. APP. P. 27(d)(1)(E) because the motion has been prepared in a proportionally spaced typeface using Microsoft Word 365 in Times New Roman 14-point font.

Dated: May 3, 2024

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph
1250 Connecticut Ave. NW, Ste. 700
Washington, DC 20036
Tel: 202-355-9452
Fax: 202-318-2254
Email: ljoseph@larryjoseph.com

Counsel for Appellants

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Description of Entry	Record Entry	PageID# Range
Amended Complaint (Nov. 29, 2020)	6	# 872- 957
Opinion & Order (Dec. 7, 2020)	62	# 3295- 3330
Detroit's *ex parte* Motion to Extend Page Limit (Jan. 5, 2021)	77	# 3612-3615
Detroit's Motion for Sanctions, for Disciplinary Action, for Disbarment Referral and for Referral to State Bar Disciplinary Bodies (Jan. 5, 2021)	78	3616- 3671
Defendants Whitmer & Benson's Motion for Sanctions under 28 U.S.C. §1927 (Jan. 28, 2021)	105	# 4334- 4378
Pls.' Supplemental Brief, Attachment B (July 26, 2021) (served Rule 11 sanctions motion)	161-3	# 6057- 6067
Opinion & Order (Aug. 25, 2021)	172	# 6890- 6999

CERTIFICATE OF SERVICE

I hereby certify that on May 3, 2024, I electronically filed the foregoing document—together with its addendum—with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit using the appellate CM/ECF system, causing the service on counsel for the parties to this action via electronic means.

/s/ Lawrence J. Joseph
Lawrence J. Joseph