UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Blake Mazurek, Robin Smith, and
Timothy Smith,

Plaintiffs,

v

Kathy Berden, Mayra Rodriguez, Meshawn Maddock, John Haggard, Kent Vanderwood, Marian Sheridan, James Renner, Amy Facchinello, Rose Rook, Hank Choate, Mari-Ann Henry, Clifford Frost, Stanley Grot, Timothy King, Michele Lundgren, and Ken Thompson,

Defendants.

Case No. 1:23-cv-00185

Honorable Jane M. Beckering

Magistrate Phillip J. Green

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Motion for Remand

Plaintiffs Blake Mazurek, Robin Smith, and Timothy Smith, through their undersigned counsel, pursuant to 28 U.S.C. § 1447(c) and LCivR 7.1 and 7.2, respectfully move this Court for an order remanding this case due to a lack of subject matter jurisdiction. Plaintiffs also request that the order remanding the case require payment of attorney fees incurred as a result of the removal, as allowed by 28 U.S.C. § 1447(c). In support of this motion, plaintiffs respectfully submit their accompanying brief. Opposing counsel informed the undersigned that the motion would be opposed.

Respectfully Submitted,

BLAKE MAZUREK, ROBIN SMITH, and
TIMOTHY SMITH

Date: March 22, 2023

By:/s/ Bradford W. Springer

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Brief in Support of Plaintiffs' Motion for Remand

Plaintiffs Blake Mazurek, Robin Smith, and Timothy Smith respectfully submit this brief in support of their motion for remand.

Introduction

Plaintiffs filed suit in Kent County Circuit Court, asserting exclusively state law claims against the defendants, all of whom falsely certified and portrayed themselves as the winning electors from the 2020 presidential election in Michigan. Defendants filed a Notice of Removal, citing, as the alleged bases for removal, 28 U.S.C. § 1441(c)(1)(A) (federal question removal) and 28 U.S.C. § 1442(a)(1) (federal officer removal). Section 1441(c)(1)(A) allows removal of a claim "arising under the Constitution, laws, or treaties of the United States"; Section 1442(a)(1) allows removal when a claim is against "any officer (or any person acting under that officer) of the United

States . . . for or relating to any act under color of such office . . . ." These statutes do not allow removal here. Remand is required because this Court lacks subject matter jurisdiction.

Plaintiffs' complaint asserts only state law claims, not claims "arising under" the Constitution, laws, or treaties of the United States. 28 U.S.C. § 1441(c)(1)(A). Further, defendants are not federal officers (or persons acting under federal officers), and they were not acting "under color" of any such office. 28 U.S.C. § 1442(a)(1). Indeed, no allegations in the complaint, and no other facts, support this theory of removal. In short, defendants' notice of removal lacks merit, like their fake election certificates, in which they falsely certified that they were "the duly elected and qualified Electors for President and Vice President of the United States of America from the State of Michigan . . . ." Complaint Exhibit C, ECF No. 1-1, PageID.42-43, 46, 48. For these reasons, this Court lacks subject matter jurisdiction, and the Court's order remanding the case should require payment of attorney fees incurred as a result of the removal, as allowed by 28 U.S.C. § 1447(c).

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Procedural Background

Plaintiffs are three of the sixteen presidential electors selected in the 2020 presidential election in Michigan in 2020. They filed their complaint against the defendant fake electors on January 11, 2023, alleging that defendants conspired and agreed to submit fraudulent election certificates, infringing plaintiffs' rights under Michigan law. *See, e.g.*, Complaint paragraphs 32, 42-48, ECF 1-1, PageID.17-18, 21-22. Plaintiffs' complaint alleges four counts under Michigan law: declaratory judgment under Michigan Court Rule 2.605 (Count I), common law invasion of privacy – false light (Count II), statutory conversion in violation of Michigan's conversion statute, MCL 600.2919a (Count III), and common law civil conspiracy (Count IV). *See* ECF No. 1-1.

Defendants filed their Notice of Removal to this Court on approximately February 21, 2023. Defendants assert that removal is proper under 28 U.S.C. § 1441(c)(1)(A) (providing that a civil action may be removed if it includes a claim "arising under the Constitution, laws, or treaties of the United States") and 28 U.S.C. § 1442(a)(1) (providing that a civil action may be removed if it is against an "officer"—or any person acting under that officer—of the United States for any act "under color of such office"). Plaintiffs now seek remand because neither basis for removal is valid, and this Court lacks subject matter jurisdiction.

Argument

The statutes governing the jurisdiction of the federal courts on removal are restrictive and therefore should be strictly construed. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108 (1941). *See also, Eastman v. Marine Mechanical Corp.*, 438 F.3d 544, 549-550 (6th Cir. 2006) ("Because lack of jurisdiction would make any decree in the case void and the continuation of the litigation in federal court futile, the removal statute should be strictly construed and all doubts resolved in favor of remand") (internal quotations omitted). The party seeking removal bears the burden of demonstrating that the district court has original jurisdiction. *Eastman*, 438 F.3d at 549.

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Defendants cannot meet their burden of demonstrating that the Court has jurisdiction here. The removal statutes relied upon by defendants do not apply: plaintiffs' complaint does not assert claims "arising under" federal law as required to support jurisdiction under 28 U.S.C. § 1441(c)(1)(A), and there is no non-frivolous basis to argue that any defendant was an "officer" (or a person acting under that officer) of the United States and acting "under color of such office" to support jurisdiction under 28 U.S.C. § 1442(a)(1). Because the Court lacks subject matter jurisdiction, remand is required. And because defendants lack an objectively reasonable basis for

seeking removal, the Court's remand order should include an award of attorney fees under 28 U.S.C. § 1447(c).

Plaintiffs' complaint does not assert claims "arising under" federal law. 28 U.S.C. § 1441(c)(1)(A).

Defendants assert that plaintiffs' complaint states claims "arising under" federal law. 28 U.S.C. § 1441(c)(1)(A). Defendants are wrong.

The question whether a claim "arises under" federal law must be determined by reference to the well-pleaded complaint. *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 808 (1986). The so-called "well-pleaded complaint rule" makes the plaintiff "the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987) (footnote omitted). A defendant cannot, merely by injecting a federal question into an action that asserts what is plainly a state-law claim, transform the action into one "arising under" federal law, thereby selecting the forum in which the claim shall be litigated. *Id*. at 399. "If a defendant could do so, the plaintiff would be master of nothing." *Id*. For this reason, "[a] defense that raises a federal question is inadequate to confer federal jurisdiction." *Merrell Dow Pharmaceuticals Inc*. at 808.

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Similarly, a case does not arise under federal law where the vindication of a right under state law does not necessarily and substantially turn on some construction of federal law. *Id*. at 817. *See also, Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 701 (2006) ("it takes more than a federal element to open the 'arising under' door") (internal quotations omitted); *Hampton v. R.J. Corman R.R. Switching Co.*, 683 F.3d 708, 713 (6th Cir. 2012) (if a complaint does not plead a federal cause of action or raise a substantial federal issue, it does not state a claim arising under federal law, and the federal court lacks subject matter jurisdiction, requiring remand).

In *Gunn v. Minton*, 568 U.S. 251 (2013), the Supreme Court explained that a case can arise under federal law in two ways. Most directly, a case arises under federal law when federal law creates the cause of action asserted. *Id*. at 257. But even where a claim is based on state law rather than federal law, there is a "special and small category" of cases in which "arising under" jurisdiction still lies. *Id*. at 258. The Court described the synthesis of its previous cases addressing this "slim category" of "arising under" jurisdiction supporting removal as follows:

> [F]ederal jurisdiction over a state law claim will lie if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress. Where all four of these requirements are met . . . jurisdiction is proper because there is a serious federal interest in claiming the advantages thought to be inherent in a federal forum, which can be vindicated without disrupting Congress's intended division of labor between state and federal courts.

Id. at 258 (holding that a legal malpractice claim does not "arise under" federal patent law, even when the alleged malpractice is based on an alleged error in a federal patent case, and even though a court necessarily must answer a question of patent law to resolve the legal malpractice claim) (internal quotations omitted).

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Few if any of the requirements articulated in *Gunn* are met here.

First, it is doubtful that resolution of any federal question is "necessary" to plaintiffs' case. Plaintiffs' complaint alleges violations of four criminal statutes—two of which are federal statutes and two of which are state statutes—but these were cited only as alternative bases to support a claim for civil conspiracy under Michigan common law, which allows a claim for civil conspiracy to be predicated upon either a tort or criminal violation. *See, e.g., Temborius v. Slatkin*, 157 Mich. App. 587, 599-600 (1986) ("Civil conspiracy is a combination of two or more persons, by some concerted action, to accomplish a criminal or unlawful purpose . . . ."). Complaint, paragraphs 39,

66, ECF 1-1, PageID.19-20, 26. In contrast to plaintiffs' citation to federal criminal law in support of a state law claim, defendants are attempting to inject federal issues as defenses.[1] But, as noted above, federal defenses do not provide a basis for removal. *See, e.g., Caterpillar Inc. v. Williams*, 482 U.S. at 399 ("Congress has long since decided that federal defenses do not provide a basis for removal"); *Merrell Dow Pharmaceuticals Inc.*, 478 U.S. at 808 ("A defense that raises a federal question is inadequate to confer federal jurisdiction.") *See also, Merrell Dow Pharmaceuticals Inc.,* 478 U.S. at 817 ("We conclude that a complaint alleging a violation of a federal statute as an element of a state cause of action, when Congress has determined that there should be no private, federal cause of action for the violation, does not state a claim 'arising under the Constitution, laws, or treaties of the United States.' 28 U.S.C. § 1331.")

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Second, for similar reasons, it is a reach to say that any federal issue is "actually disputed" here. The federal criminal statutes the violation of which form alternative bases for common law civil conspiracy are only relevant to the extent they establish factual elements constituting crimes. Plaintiffs do not allege that violation of the statutes themselves creates a private, federal cause of action. *Merrell*, 478 U.S. at 817.

Third, even assuming there were a federal question that is "necessary" to plaintiffs' case and "actually disputed", as was true in *Gunn*, any federal issue in this case is "not substantial in the relevant sense." *Gunn*, 568 U.S. at 259. In other words, there is no federal issue raised in

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[1] Defendants' Notice of Removal tries to raise multiple convoluted federal defense theories involving "faithless elector[s]," the "independent state legislature" theory, and the "Electors Clause" of the United States Constitution. *See, e.g.*, Notice of Removal, paragraphs 13,17-19, ECF 1, PageID.4-5. All of these defenses are based on defendants' frivolous assertion, which they repeat throughout their Notice of Removal, that they were "alternate electors." Defendants fraudulent election certificates, in which they falsely represented themselves to be the real electors from the State of Michigan, are attached to plaintiff's complaint as Exhibit C. ECF No. 1-1, PageID.41-51. There is no factual basis for defendants to claim now that they were simply acting as "alternate electors."

plaintiffs' complaint that is significant to the federal system as a whole, or that, if addressed in state court, would undermine the development of federal law. *Gunn*, 568 U.S. at 261-264.

Fourth, as in *Gunn*, it follows from the absence of a "substantial" federal issue in this case that the fourth requirement is not met, either. As a result, there is no indication that any federal issues are capable of resolution in federal court without disrupting the federal-state balance approved by Congress. This is particularly true when plaintiffs' complaint asserts no federal causes of action and all four counts are core state law claims.

In a similar case brought against fake electors in Wisconsin, based on Wisconsin state law and filed in Wisconsin state court, the fake elector defendants in that case removed the case to federal court. The defendants in that case, *Penebaker et al. v. Hitt, et al.,* Case No. 3:22-cv-00334, argued, like the defendants here, that the case presented issues "arising under" federal law. The United States District Court for the Western District of Wisconsin granted plaintiffs' motion for remand, rejecting defendants' arguments and finding that the court lacked subject matter jurisdiction. A copy of the court's opinion and order dated February 10, 2023 granting remand is attached here as persuasive authority as **Exhibit A**.

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Defendants were not federal officers acting under color of any such office. 28 U.S.C. § 1442(a)(1).

Defendants assert that 28 U.S.C. § 1442(a)(1), the so-called officer removal statute, provides a basis for removal. It does not. 28 U.S.C. § 1442(a)(1) provides in relevant part that a civil action may be removed if it is against an "officer (or any person acting under that officer) of the United States" for or relating to any act "under color of such office . . . ." A federal officer acts "under color of such office" when he or she acts within the scope of authority warranted by and inherent in the duties of the office and in enforcement of federal law. *See Mesa v. California*,

489 U.S. 121, 126, 131-132 (1989). *See also, Mays v. City of Flint, Michigan,* 871 F.3d 437, 442 (6th Cir. 2017) (defendants who are not federal officers must satisfy several requirements in order to invoke the federal-officer removal statute, including the following – they must establish that they acted under a federal officer and that their actions were performed under color of federal office). Defendants' position is groundless. Defendants are not officers at all, much less federal officers (or persons acting under federal officers), and they were not acting "under color" of any such office. 28 U.S.C. § 1442(a)(1). Instead, as alleged in plaintiffs' complaint, defendants were simply rogue actors, falsely portraying themselves as legitimate electors without any factual basis to do so. These facts alleged in the complaint are not subject to reasonable dispute. The fake election certificates attached to the complaint as Exhibit C make this plain.

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In their Notice of Removal, defendants engage in creative word play and revisionist history, casting themselves, repeatedly, as "alternate electors". Defendants were not "alternate electors"; they were fake electors. As alleged in the complaint, defendants falsely portrayed themselves as the true electors, signing fake certificates falsely certifying that they were "the duly elected and qualified Electors for President and Vice President of the United States of America from the State of Michigan . . . ." Complaint, paragraph 32 and Exhibit C, ECF No. 1-1, PageID.17-18, 42-43, 46, 48. Defendants' attempt to cast themselves now as "alternate electors" is contradicted by the facts alleged in this case and appears to be nothing more than an effort to manufacture facts in support of various legal defense theories under federal law.

Fees are warranted under 28 U.S.C. § 1447(c).

Plaintiffs respectfully submit that it is appropriate for the Court to consider whether an award of attorney fees is appropriate here. 28 U.S.C. § 1447(c) provides in relevant part that "An order remanding the case may require payment of just costs and any actual expenses, including

attorney fees, incurred as a result of the removal." Absent unusual circumstances, courts may award attorney's fees under § 1447(c) only where the removing party lacked an objectively reasonable basis for seeking removal. *Martin v. Franklin Capital Corp.*, 546, U.S. 132, 141. Conversely, when an objectively reasonable basis exists, fees should be denied. *Id. See also, Warthman v. Genoa Township Board of Trustees*, 549 F.3d 1055, 1060 (6th Cir. 2008) ("In general, objectively unreasonable removals should result in fee awards to plaintiffs. District courts should consider, however, whether unusual circumstances warrant a departure from the rule in a given case.") (internal citation omitted.) Plaintiffs respectfully submit in light of the facts and controlling law cited above that the attempt at removal here was objectively unreasonable and that no unusual circumstances warrant a departure from the general rule in this case.

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Conclusion

For the foregoing reasons, plaintiffs respectfully request that this Court enter an order remanding this case to state court and requiring defendants to pay plaintiffs' attorney fees incurred as a result of the removal, as allowed by 28 U.S.C. § 1447(c).

Respectfully Submitted,

BLAKE MAZUREK, ROBIN SMITH, and
TIMOTHY SMITH

Date: March 22, 2023

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