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.

Court File No. 1:23-cv-00185-JMB-PJG

DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION TO REMAND

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Introduction

Defendants 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 filed a Notice of Removal under 28 U.S.C. § 1441(c)(1)(A) (federal question) and 28 U.S.C. § 1442(a)(1) (federal officer removal). After that filing, plaintiffs Blake Mazurek, Robin Smith, and Timothy Smith filed a motion to remand asserting that this Court has no subject matter jurisdiction.

The Plaintiffs assert their complaint alleges only state-law claims. However, the Defendants in their Notice of Removal, evidenced claims arising under the Constitution, laws, or treaties of the United States. This is because the Plaintiffs, former Democratic Party electors, seek to punish the defendants beyond what the Michigan Legislature authorized under the Electors Clause. The Electors Clause gives state legislatures the sole prerogative to punish electors.

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The Plaintiffs' so-called "state law claims" complaint are in fact an extrinsic attack on the constitutional framework involving the Electors Clause. They seek to punish the Defendants who once were electors of the Republican Party. However, only the legislature may punish those electors under the Electors Clause that gives it sole authority over the process and processes of all presidential electors. State courts cannot thereafter fashion other remedies relating to the elector process. Therefore, the Plaintiffs' motion to remand should be denied and this Court retain jurisdiction.

Factual Background

Defendants were Republican Party electors. They were recognized in the Michigan Governor's "Amended Certificate of Ascertainment of the Electors of the President and Vice President of the United States of America," as persons nominated by the Republican Party as alternate electors. (Defs. Removal Compl. Ex. A., Dckt No. 1-1 A, Kaardal Decl. Exs. 1a and 1b (Apr. 19, 2023).[1] Federal law requires the Michigan Governor to send to the U.S. Archivist the electors' credentials ("Certificates of Ascertainment") and two sets of electoral votes ("Certificates of Vote"). The "Certificate of Ascertainment" sets "forth the names of such electors and the canvass or other ascertainment under the laws of such State of the number of votes given or cast for each person for whose appointment any and all votes have been given or cast." 3 U.S.C. § 6. The Defendants participated in the electoral process.

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Meanwhile, the Plaintiffs were presidential electors nominated by the Michigan Democratic Party to serve as Michigan's presidential electors for the 2020 U.S. presidential election. They were not and are not a part of Michigan's lawmaking bodies nor do they have a relationship to them. Despite that fact, the Plaintiffs now seek state court remedies on claims asserting: (i) declaratory judgment to declare that they were the legitimate presidential electors Michigan electors in 2020; (ii) common law invasion of privacy – false light based on

[1] The Certificate also identified all other electors that were, presumably, certified by their respective political parties as candidates for electors to the secretary of state. *See,* MCL § 168.42. This also included for example, nominated electors for the Libertarian Party, the U.S. Taxpayers Party, and the Natural Law Party. Kaardal Decl. Exs. 1a and 1b. Indeed, individual write-in candidates were included in the Certificate who had the necessary number of candidates for electors. *Id.*

Defendants identifying themselves as alternate electors; (iii) statutory violation of Michigan Compiled Laws §600.2919a – conversion of property by Defendants for stealing Plaintiffs' alleged property interest in their selection as an elector; (iv) and common law civil conspiracy based allegedly on the Defendants having engaged in a concerted action to violate various state and federal criminal laws. The criminal laws referenced include: MCL §168.932(d) and § 750.248 (making a false public record based on their status as alternate electors), 18 U.S.C. §371 (conspiring to defraud the United States), and 18 U.S.C. §1001 (conspiring to make a false statement regarding their status as electors).

Argument in Opposition to Remand

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I. The State Legislature, under Article II, § 1, cl. 2, has the exclusive authority over all electors identified and presented to the secretary of state from a state political party, including punishments when and if necessary.

Article II, § 1, cl. 2, provides that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct," electors for President and Vice President. (Emphasis added.) "Thus, the text of the election law itself, and not just its interpretation by the courts of the States, takes on independent significance." *Bush v. Gore*, 531 U.S. 98, 112–13 (2000). In *McPherson v. Blacker,* 146 U.S. 1 (1892), the U.S. Supreme Court explained that Art. II, § 1, cl. 2, "convey[s] the broadest power of determination" and "leaves it to the legislature exclusively to define the method" of appointment. *Id.,* 146 U.S. at 27.

The Michigan State legislative scheme for president and vice-president electors is found under MCL §§ 168.41 to 168.47. The provisions reveal that the legislative scheme is in-line with the powers solely invested to the State Legislature through Article II, § 1, cl. 2. As the U.S. Supreme Court opined, state legislatures have, "far-reaching authority over

presidential electors, absent some other constitutional constraint."[2] *Chiafalo v. Washington,* 140 S.Ct. 2316, 2324 (July 6, 2020) (State legislatures have the authority under Article II, § 1 to prohibit faithless voting of electors and impose sanctions, including monetary fines.). And within those powers, the legislative scheme for appointing presidential and vice-presidential electors includes *all electors* of *all political parties* within the state. *See* MCL § 168.42. Indeed, Michigan as well as other states, provide for the punishment for electors, such as "faithless electors."[3] *Chiafalo,* 140 S.Ct. at 2324. *See also* MCL § 168.47 (mandated resignation from the office of elector and vote nullification). Since "[t]he Constitution is barebones about electors,"[4] and Article II, § 1 powers provide far-reaching authority over electors, it is the state legislature that retains the authority to determine all remedies or punishments related to the appointment of presidential and vice-presidential electors.

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It is the Defendants' contention that when a plaintiff in a state court action seeks to punish presidential and vice-presidential electors of a political party under state common or statutory law—not election law specifically related to electors— any granted state court remedy is "[a] significant departure from the legislative scheme for appointing Presidential electors [and thus,] presents a federal constitutional question." *Bush,* 531 U.S. 113. In short,

[2] For example, a check on the state legislature's power to appoint an elector could come, theoretically, "from anywhere in the Constitution. A State…cannot select its electors in a way that violates the Equal Protection Clause." *Chaifalo, v. Washington,* 140 S.Ct. 2316, 2324 n.4 (July 6, 2020).
[3] In *Chaifalo,* the U.S. Supreme Court identified 15 states who, as of 2020, had statutory provisions governing electors to ensure that the electors voted for the candidate who got the most statewide votes in the presidential election. The list included Michigan. The Court also noted that some states imposed monetary fines on any elector that flouted his or her pledge. *Chiafalo,* 140 S.Ct. at 2322 n.2.
[4] *Chiafalo,* 140 S.Ct. at 2324.

within those powers provided under Article II, § 1, the Michigan legislative scheme for appointing presidential electors provides the legislature the *exclusive authority over all electors* of state political parties and any punishment as the Legislature so chooses or deems necessary. The Defendants contend that this includes not only "faithless electors," but any other presidential elector presented to the secretary of state from a state political party regarding their acts or actions.

II. The Michigan legislative scheme ensures that only electors vote for the candidate who got the most votes statewide in the presidential election.

In Michigan, the State Legislature determines who may be eligible to be an elector of president and vice-president. MCL § 168.41 is specific as to citizenship, residency, and voter registration within the congressional district or of the state, for which the person will represent as an elector:

> No person shall be eligible to be an elector of president and vice-president who shall not have been a citizen of the United States for at least 10 years and a resident and registered elector of the congressional district for an elector representing a congressional district, or of the state, for an elector representing the state at large for at least 1 year prior to the election….

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The Legislature then directs how and when *state political parties* select their candidates for electors of president and vice-president. In Michigan, each party's state convention nominates candidates for electors for the national party's presidential and vice-presidential candidate. The "when" is notable—during the fall state conventions of those parties—*before* the November general elections:

> In the year in which presidential electors are to be elected under section 43, each political party in this state shall choose at its fall state convention a number of candidates for electors of president and vice-president of the United States equal to the number of senators and

> representatives in congress that this state is entitled to elect.

MCL § 168.42. Those electors considered candidates "are those whose names have been certified to the secretary of state by that political party receiving the greatest number of votes for those offices at the next November election." *Id. See also*, MCL 168.45 (governing votes for presidential electors).

Michigan had 16 electors in 2020 to reflect the number of senators and representatives it had in the U.S. Congress.[5] After the candidates for electors are chosen, the chairperson and the secretary of the state central committee of each political party must then submit to the secretary of state a certificate containing the names of the candidates for electors:

> The chairperson and the secretary of the state central committee of each political party shall, within 1 business day after the conclusion of the state convention, forward by registered or certified mail a certificate containing the names of the candidates for electors to the secretary of state.

MCL § 168.42.

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After the November election, specifically after the state board of canvassers has ascertained the result of the election as to electors of president and vice-president, the governor then would certify to the United States secretary of state, the names and addresses of the Michigan electors chosen as electors of president and vice-president. MCL § 168.46. Following the ascertainment of the election results, the electors of president and vice-

[5] "What is the Electoral College," Michigan Dept. of State, https://www.michigan.gov/sos/elections/upcoming-election-information/voters/special-topics/what-is-the-electoral-college#:~:text=Presidential%20candidates%20on%20the%20Michigan,the%20State%20Capitol%20in%20December (last visited Apr. 18, 2023).

president of the party who won the statewide election would convene in the Senate Chamber of the State Capitol in December to cast their vote. If an elector refuses or fails to vote for the presidential and vice-presidential candidates, the act or actions constitutes a mandated resignation and the elector's vote is nullified:

> Refusal or failure to vote for the candidates for president and vice-president appearing on the Michigan ballot of the political party which nominated the elector constitutes a resignation from the office of elector, his vote shall not be recorded and the remaining electors shall forthwith fill the vacancy.

After the convening of presidential electors at the Michigan State Capitol, federal law sets forth the next step. In 2020, the governor executed a "Certificate of Ascertainment of the Electors of the President and Vice President of the United States of America." The Certificate identified *all* electors nominated by their respective parties in accordance with MCL § 168.42, which is then forwarded to the National Archives. *See* Plts. Compl. Ex. A, Dckt No. 1-1 A (Ex. A); Kaardal Decl. Exs. 1a and 1b.[6] The 2020 governor's Certificate complied with 3 U.S.C. § 6. Section 6 governs the composition of the Certificate including the number of votes cast for electors for all political parties:[7]

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> It shall be the duty of the executive of each State…under and in pursuance of the laws of such State providing for such ascertainment, to communicate by registered mail under the seal of the State to the Archivist of the United States a certificate of such ascertainment of the electors appointed, setting forth the names of such electors and the canvass or other ascertainment under the laws of such State of the number of votes given or cast for each person for whose appointment any and all votes have been given or cast; and it shall also thereupon be

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[6] The plaintiffs' complaint had two Certificates; an Amended Certificate dated Nov. 23, 2020, and a Certificate dated December 30, 2020.

[7] National Archives, https://www.archives.gov/electoral-college/about#:~:text=After%20the%20general%20election%2C%20your,appointed%20as%20your%20State's%20electors. (Last visited Apr. 18, 2023).

> the duty of the executive of each State to deliver to the electors of such State….

Foremost, the Certificate identified the Democratic Party electors for the candidate who got the most votes statewide in the presidential election. The Certificate does not identify by name the national party's presidential or vice-presidential candidates. Plts. Compl. Ex. A, Dckt No. 1-1 A (Ex. A); Kaardal Decl. Ex. 1a and 1b.

The statutory provisions, MCL §§ 168.41–168.47, found under Michigan's Chapter IV–Electors of President and Vice-President—constitute the entire state legislative scheme for the appointment and punishment of electors. The provisions, as found for instance under § 168.47, guarantees that regardless of any other acts or actions of any other rogue elector not from the political party for which the candidate received the most statewide votes for president, the elector(s) cannot harm or contradict the outcome. And, even if a rogue elector (the "faithless elector") from the very party who did receive the most votes for president deviates from his or her obligation to vote for that party's candidate, there is an immediate penalty as described.

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The legislature is so confident of its elector process that it does not impose penalties on other candidates for electors, except for the "faithless" elector. But, if the Legislature believed rogue candidate electors, who were not part of the elector voting process under § 168.47, and had acted in a manner to suggest their votes should be provided to the National Archives, should be punished, the Legislature would have done so. Here, the state legislature did not and as for all candidate electors presented to the Michigan secretary of state (MCL § 168.42), the legislature has the *sole authority* to punish or not to punish any so-called rogue candidate electors.

As the Supreme Court noted, the only possible claim that would be a check on the state legislature's power over electors would "theoretically come from the Constitution," such as an Equal Protection Clause violation. *Chiafalo*, 140 S.Ct. at 2324 n.4. As the Supreme Court declared, "Article II, § 1's appointments power gives the States far-reaching authority over presidential electors, absent some other constitutional constraint." *Id.* at 2324. *See Ray v. Blair,* 343 U.S. 214, 224 (1952).

III. The state court cannot grant common law or statutory remedies.

There is no case law directly on point to this particular constitutional issue regarding state court non-legislative remedies against rogue candidate electors. However, because the legislature has the authority granted under Article II, § 1 over all aspects of and control over the appointment of presidential and vice-presidential electors from all state political parties, it is logical to conclude that the state legislature has the exclusive authority to provide any remedy, if necessary, to penalize electors for their acts or actions. State courts play no role in fashioning common law or statutory law remedies as it relates to electors under MCL §§ 168.41 to 168.47 unless specifically provided for by the state legislature. What the Plaintiffs in this case seek to obtain from the state court is "[a] significant departure from the legislative scheme for appointing Presidential electors [and, thus,] presents a federal constitutional question." *Bush,* 531 U.S. 113 (Roberts, J., concurring).

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The issue here is whether the State Legislature has the exclusive authority under Article II, § 1, cl. 2, to impose the sole penalties (remedies) on presidential and vice-presidential electors. This brings to the forefront a further analysis of the presented constitutional question which involves the independent state legislature theory. The theory

holds that under Article II's Presidential Electors Clause, state legislatures have the power to exclusively regulate federal elections, excluding state executive branch and judicial branch officials. Indeed, this is a rare instance in which "the Constitution imposes a duty or confers a power on a particular branch of a State's government—that is, the state legislature…" *Id.*

The independent state legislature theory basically provides that when the U.S. Constitution grants federal authority to "state legislatures," no other body or law can interfere with the state legislature's authority. As stated above, Article II, § 1 delegates to "state legislatures" power over presidential electors. In turn, the President, Congress, federal agencies cannot interfere with the state legislature's constitutionally-delegated power. Additionally, the state's own constitution, the state's courts, nor the state's governor can interfere with the state legislature's authority. The U.S. Supreme Court cases cited for the independent state legislature theory include *McPherson v. Blacker*, 146 U.S. 1, 27 (1892) ("The constitution .... leaves it to the legislature exclusively[.]") and *Bush v. Palm Beach Cnty. Canvassing Bd.*, 531 U.S. 70, 76 (2000) (concurring opinion).

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The U.S. Court of Appeals for the Eighth Circuit, relying on *McPherson* and *Bush v. Palm Beach Cnty. Canvassing Bd.*, 531 U.S. 70 (2000), applied the independent state legislature theory to the Electors Clause under Article II to the state executive branch. The appellate court adjudicated an injunction was proper against the Minnesota Secretary of State enjoining the Secretary from changing election mail-in ballot deadlines due to the COVID pandemic. The court concluded that the Secretary had no authority to override exclusive legislative authority regarding the manner of conducting presidential elections regarding the selection of electors finding the analysis relatively straight forward: "By its plain terms, the

Electors Clause vests the power to determine the manner of selecting electors exclusively in the 'Legislature' of each state. U.S. Const. art. II, § 1, cl. 2; *McPherson v. Blacker*, 146 U.S. at 27. ('The constitution .... leaves it to the legislature exclusively[.]')." *Carson,* 978 F.3d at 1059–60. "[W]hen a state legislature enacts statutes governing presidential elections, it operates "by virtue of a direct grant of authority" under the United States Constitution. *Bush v. Palm Beach Cnty. Canvassing Bd.*, 531 U.S. 70, 76, 121 S.Ct. 471, 148 L.Ed.2d 366 (2000). In fact, a legislature's power in this area is such that it "cannot be taken from them or modified" even through "their state constitutions." *McPherson*, 146 U.S. at 35, 13 S.Ct. 3; *see also Palm Beach*, 531 U.S. at 76–77, 121 S.Ct. 471." *Id.,* 978 F.3d at 1060.

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Through the back-dock, guised in state common and statutory law, the Plaintiffs seek to circumvent the exclusive authority of the legislature over presidential and vice-presidential electors. They do not and cannot dispute that the Defendants were the Republican Party electors certified to the Michigan secretary of state. *See e.g.,* Kaardal Decl. Exs. 1a and 1b; MCL § 168.42. In this regard, the Defendants were subject to the provisions of MCL §§ 168.41 to 168.47. Those provisions, governing presidential and vice-presidential electors, represent the direct grant of authority under the U.S. Constitution—Article II, § 1, cl. 2. State courts have *no authority* to create remedies where none exist, but for those within the provisions governing all electors from state political parties. MCL § 168.42.

What penalties that do exist are found under § 168.47—nothing more, nothing less. If the state legislature believed that rogue electors could undermine the outcome of the electors vote for the party candidate who got the most statewide votes in the presidential election, it would have provided for such penalties. Because the legislature did not, the state

court has no authority to impose any penalty in common law or statutory law over those rogue presidential electors. In fact, there is no penalty for rogue candidate electors' acts or actions.[8] It is for the state legislature to determine, if it desires, to enact penalties for electors, not the state court.

IV. Complete preemption as an exception to the well-pleaded complaint doctrine prevails because of Article II, § 1's exclusive delegation of authority to the state legislature over presidential and vice-presidential electors.

The Plaintiffs claims are completely preempted by Article II, § 1 of the U.S. Constitution. The Constitution delegates to the state legislature the exclusive authority to declare any state remedy involving presidential and vice-presidential state party electors (as found under MCL §§ 168.41 to 168.47). Thus, the federal issue arises from the Constitution. 28 U.S.C. § 1441(c)(1)(A).

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"The 'complete preemption' doctrine has been referred to as a corollary or an exception to the well pleaded complaint rule. Complete preemption applies where 'the pre-emptive force of a statute is so 'extraordinary' that it 'converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.'" *Roddy v. Grand Trunk W. R.R. Inc.,* 395 F.3d 318, 323 (6th Cir. 2005) (citation omitted).

[8] MCL § 168.931(2) is also inapplicable regarding violations of election laws. Subsection (2) states that "[a] person who violates a provision of this act for which a penalty is not otherwise specifically provided in this act, is guilty of a misdemeanor." Because MCL §§ 168.41 to 168.47 fails to provide for a penalty or otherwise describe a penalty other than that of an elector failing to vote for the candidate receiving the most statewide votes by a mandated resignation and vote nullification under § 168.47, the Defendants have not violated the law. Even if the provision applied, which it does not, only the State can prosecute and not the Plaintiffs through civil litigation. Regardless, the state court cannot act contrary to Article II, § 1 exclusivity of authority given to the legislature regarding remedies against presidential and vice-presidential electors.

"When the doctrine is properly invoked, a complaint alleging only a state law cause of action may be removed to federal court on the theory that federal preemption makes the state law claim 'necessarily federal in character." *Metro. Life Ins. Co. v. Taylor,* 481 U.S. 58, 63–64 (1987). "Once an area of state law has been completely pre-empted, any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law." *Caterpillar, Inc. v. Williams,* 482 U.S. 386, 392 (1987). This jurisdictional doctrine provides that "to the extent that Congress has displaced a plaintiff's state law claim, that intent informs the well-pleaded complaint rule, and a plaintiff's attempt to utilize the displaced state law is properly 're-characterized' as a complaint arising under federal law." *Rice v. Panchal*, 65 F.3d 637, 640 n.2 (7th Cir. 1995)(citing *Taylor,* 481 U.S. at 64). Thus, federal subject matter jurisdiction exists if the complaint concerns an area of law "completely preempted" by federal law, even if the complaint does not mention a federal basis of jurisdiction.

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Here, we have the U.S. Constitution, Article II, § 1, cl. 2, displacing the Plaintiffs claims because the state court cannot invoke a common law or statutory remedy where the legislature has exclusive authority over presidential and vice-presidential electors. Article II, § 1, cl. 2, provides the scope and breath of the legislature's authority over those electors, including remedies or penalties for violating any provision under MCL §§ 168.41 to 168.49. Here, there is no penalty that applies to the Defendants. Complete preemption applies where "the pre-emptive force of a statute is so 'extraordinary' that it 'converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.' " *Caterpillar,* 482 U.S. at 393 (quoting *Metro. Life,* 481 U.S. at 65, 107 S.Ct.

1542). "Once an area of state law has been completely pre-empted, any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law." *Roddy,* 395 F.3d at 323 *quoting Caterpillar,* 482 U.S. at 393.

Indeed, the pre-emptive force of Article II, § 1, cl. 2 is so extraordinary that the Plaintiffs' ordinary state court compliant must be converted into a complaint stating a federal claim for federal court jurisdictional purposes under 28 U.S.C. § 1331.

The state court has no jurisdiction nor authority to impose any remedy the Plaintiffs seek. Yes, the Defendants have no cause to answer. In other words, the Plaintiffs have no private cause of action. But, to reach the Defendants' proposed conclusion of the Plaintiffs' claims, this Court has federal jurisdiction and, as explained, there exists an exception to the well-pleaded complaint rule. Once this Court determines there is a federal claim as the basis for removal jurisdiction, the Plaintiffs can argue here that Article II, § 1 does not provide for an exclusive delegation to the Michigan legislature and, hence, the state court can provide for other common law or statutory remedies against presidential and vice-presidential electors. However, the question presented remains a federal constitutional issue for the federal court to resolve first under Article II, §1, while considering among other things, the independent state legislature doctrine.

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In this regard, Plaintiffs analysis of *Gunn v. Minton,* 568 U.S. 251 (2013) is misplaced. Plts. Mot. for Remand at 5-6. There is a federal question regarding the state legislature's exclusive authority granted under Article II, §1, the resolution of which is necessary to resolve the Plaintiffs' claims. *See, id.* at 258. And, the resolution of Article II, §1 in this case is actually disputed. *Id.* The Plaintiffs assert that their remedies can be fashioned by the state

court. However, as previously explained, the state court cannot. This legal dispute, of course, is a constitutional question under Article II, §1.

The Plaintiffs then explain that "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." Plts. Mot. to Remand at 6, *citing Gunn* at 259. The Plaintiffs contend that there is no federal issue raised that is significant to the federal system as a whole or if addressed in state court, would undermine the development of federal law. *Id.* at 6–7 citing *Gunn,* at 261–264.

Quite to the contrary; the resolution of the issue the Defendants have presented has significant implications on the federal system as it pertains to the relationship between Article II, § 1's exclusive authority delegated to state legislatures and the state legislatures' authority over presidential electors. *See Chiafalo,* 140 S.Ct. at 2324. The issue further directly implicates the framework of federal election law as the framers of the Constitution had envisioned under Article II, § 1 as understood in regard to the independent state legislature theory.

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Finally, the Plaintiffs assert that with an absence of a "substantial federal question" there is no need to address the fourth element in *Gunn* regarding whether the issue regarding the state claims is "capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Gunn,* 568 U.S. at 258; Plts. Mot. to Remand at 7. However, there is a need to address the issue raised in *Gunn.* Federal court "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" governed by the application of 28 U.S.C. § 1331. *Id., citing Grable & Sons Metal Products, Inc. v. Darue Engr. & Mfg.,* 545 U.S. 308, 314 (2005). Here, the meaning, the reach, and interpretation of Article II, § 1, cl. as applied to the state court is an essential element to the Plaintiffs' claims that they are entitled to common law or statutory relief. It is an important issue of federal law that sensibly belongs in a federal court.

To further their argument, the Plaintiffs attached to their supporting memorandum the recent unpublished decision in the Wisconsin district court, *Penebaker v. Hitt,* 22-CV-334-JDP, 2023 WL 1879304 (W.D. Wis. Feb. 10, 2023). The Plaintiffs provided little discussion about that case. Plts. Mot. to Remand at 7. The facts in *Penebaker* are purported to be similar to the Plaintiffs' complaint where the defendants executed and sent to the Archivist of the United States a Certificate of the Votes of the 2020 Electors from Wisconsin." *Penebaker,* 22-CV-334-JDP, 2023 WL 1879304, at *2. The defendants argued that resolving plaintiffs' state claims of civil conspiracy and public nuisance required the federal court to interpret the federal Electoral Count Act. *Id.* at *4. The federal Electoral Count Act, 3 U.S.C. §§ 1–21, is not at issue here.

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Here, the interpretation of Article II, § 1, cl. 2 of the U.S. Constitution *is* the issue. As previously argued, under the independent state legislative theory, when issues involve presidential and vice-presidential electors, the state executive and state judicial branches of government play *no role* regarding legislative prerogatives over the electors. The *Penebaker* district court did not have that constitutional issue before it. The district court's analysis found that "[t]he selection and appointment of presidential electors is governed by state law…so plaintiffs' claims do not require the court to consider whether defendants' actions

met the requirements of the Electoral Count Act." *Id.*

But, the argument before this Court is profoundly different. The Defendants assert that because of the authority provided to the Michigan Legislature under Article II, § 1, cl. 2, only the legislature may declare the punishment and remedy for any violation of MCL §§ 168.41 to 168.47, against a presidential elector. No other branch of government can fashion a remedy or punishment against a presidential elector—neither the executive branch nor the judicial branch. Therefore, the Wisconsin district court's analysis is wholly inapplicable to the present proceedings.

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V. Fees are not warranted under 28 U.S.C. § 1447(c) because the Defendants have presented an objectively reasonable basis for removal.

Attorney fees under 28 U.S.C. § 1447(c) are not warranted as Plaintiffs suggest. Plts. Mot. for Remand at 8–9. The Defendants have presented reasonable arguments as to why there is a basis for removal. Federal jurisdiction is warranted as argued. Resolution by this Court of the federal constitutional issues presented here have far-reaching implications in all states, not just Michigan. This Court will define the authority of state legislatures under Article II, § 1 as it relates to presidential and vice-presidential electors *and* as it relates to the state court jurisdiction over remedies not otherwise defined by the state legislature as applied to presidential electors. Hence, the Defendants' arguments of removal cannot be characterized as "unreasonable." Therefore, the Plaintiffs' request for attorney fees should be denied.

Conclusion

Based upon the reasoning provided, the Michigan State Legislature is the sole branch of government that is authorized under Article II, § 1, cl. 2, to govern presidential and vice-

presidential electors. The state legislature is the only authority to fashion any remedy against any elector who violates MCL §§ 168.41 to 168.47. If the legislature believed such a remedy was necessary, it would have done so. Here, the state legislature did not do so. What the Plaintiffs in this case seek to obtain from the state court is "[a] significant departure from the legislative scheme for appointing Presidential electors [and, thus,] presents a federal constitutional question." *Bush,* 531 U.S. 113 (Roberts, J., concurring). In this case, this Court has federal jurisdiction under 28 U.S.C. § 1331 to resolve the constitutional question presented.

Therefore, the Plaintiffs' motion for remand should be denied.

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