UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BLAKE MAZUREK, et al.,

Plaintiffs,

v.

KATHY BERDEN, et al.,

Defendants.
_____/

Case No. 1:23-cv-185

HON. JANE M. BECKERING

OPINION AND ORDER

Now pending before the Court in this removed case is Plaintiffs' Motion to Remand (ECF No. 5). The motion does not require the Court to decide the merits of Plaintiffs' state-law claims, only whether the state-law claims were properly removed to federal court. For the reasons that follow, the Court grants Plaintiffs' motion to remand this matter back to state court, although the Court denies Plaintiffs' request therein for their attorney fees and costs.

I. BACKGROUND

A. Legal Context

As Justice Kagan explained in 2020, "[e]very four years, millions of Americans cast a ballot for a presidential candidate. Their votes, though, actually go toward selecting members of the Electoral College, whom each State appoints based on the popular returns. Those few 'electors' then choose the President." *Chiafalo v. Washington*, ___ U.S. ___; 140 S. Ct. 2316, 2319 (2020). Article II, § 1, clause 2 of the United States Constitution—the "Electors Clause"—provides that electors to the Electoral College shall be appointed by each State "in such Manner as the Legislature thereof may direct."

The Michigan Legislature promulgated a law providing that in the year in which presidential electors are to be elected, "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." MICH. COMP. LAWS § 168.42. Michigan law further provides that "[a]s soon as practicable after the state board of canvassers has, by the official canvass, ascertained the result of an election as to electors of president and vice-president of the United States, the governor shall certify, under the seal of the state, to the United States secretary of state, the names and addresses of the electors of this state chosen as electors of president and vice-president of the United States. The governor shall also transmit to each elector chosen as an elector for president and vice-president of the United States a certificate, in triplicate, under the seal of the state, of his or her election." MICH. COMP. LAWS § 168.46.

The Supreme Court has held that a State may penalize an elector for breaking his or her pledge and voting for persons other than the candidates who won the State's popular vote. *Chiafalo*, 140 S. Ct. at 2320. *See also Ray v. Blair*, 343 U.S. 214, 228 (1952) (rejecting the argument that the Constitution "demands absolute freedom for the elector to vote his own choice"). Many States, including Michigan, have devised mechanisms to ensure that the electors they appoint vote for the presidential candidate their citizens have preferred, that is, to prohibit so-called "faithless voting." *Chiafalo*, 140 S. Ct. at 2319–21. Michigan law provides that "[r]efusal 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." MICH. COMP. LAWS § 168.47.

In 2020, Michigan had sixteen electors to reflect the number of senators and representatives it had in Congress (Compl. [ECF No. 1-1] ¶ 22). Three of the sixteen electors selected by the Democratic Party—Blake Mazurek, Robin Smith, and Timothy Smith—are the Plaintiffs in this case (*id.*). The sixteen persons chosen by the Republican Party—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—are named as the Defendants in this case (*id.* ¶ 23).

B. Procedural Posture

Plaintiffs initiated this action on or about January 11, 2023 in the 17th Circuit Court for Kent County, Michigan, alleging that Defendants participated in a "fraudulent scheme to steal the election and install the losing candidate (Donald Trump) as President" (Compl. ¶ 31). According to Plaintiffs, Defendants conspired and agreed to submit fraudulent election certificates, which they sent to the President of the United States Senate and the Archivist of the United States (*id.* ¶¶ 32–33).

Plaintiffs allege four counts in their state-court Complaint. In Count I, under Michigan Court Rule 2.605, Plaintiffs seek a declaratory judgment that they were the legitimate electors of the State of Michigan for President and Vice President of the United States in the 2020 presidential election (Compl. ¶ 50). In Count II, titled "Invasion of Privacy–False Light," Plaintiffs allege that Defendants "knew when they submitted their election certificates that the certificates were fraudulent, that they were fake electors, and that the real Biden electors would be placed in a false light as a result of [D]efendants' scheme" (*id.* ¶ 55). In Count III, titled "Statutory Conversion in Violation of MICH. COMP. LAWS § 600.2919a," Plaintiffs allege that they had an "intangible personal property interest in their lawful office as Electors of the State of Michigan for President

and Vice President of the United States" and that Defendants "wrongfully exerted dominion over [Plaintiffs'] property interest" and converted the interest "to their own use" (*id.* ¶¶ 58–62). Last, in Count IV, Plaintiffs allege that by submitting fake elector certificates, Defendants engaged in a common law civil conspiracy to violate multiple state and federal criminal statutes (*id.* ¶¶ 39 & 66).

On February 21, 2023, Defendants filed a Notice of Removal (ECF No. 1), alleging that removal to this Court 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"). On March 22, 2023, Plaintiffs filed this Motion to Remand (ECF No. 5). On April 19, 2023, Defendants filed a response in opposition to the motion (ECF No. 7). On May 3, 2023, Plaintiffs filed a reply (ECF No. 8). Having considered the parties' submissions, the Court concludes that oral argument is unnecessary to resolve the issues presented. *See* W.D. Mich. LCivR 7.2(d).

II. ANALYSIS

A. Motion Standard

Federal courts are courts of limited jurisdiction. "Unlike state trial courts, they do not have general jurisdiction to review questions of federal and state law, but only the authority to decide cases that the Constitution and Congress have empowered them to resolve." *Ohio ex rel. Skaggs v. Brunner*, 549 F.3d 468, 474 (6th Cir. 2008). "When a party opts to file a complaint in state court, the federal courts must honor that choice unless Congress has authorized removal of the case." *Id.* (citing *Rivet v. Regions Bank of La.,* 522 U.S. 470, 474 (1998)). *See also Shamrock Oil*

& Gas Corp. v. Sheets, 313 U.S. 100, 108–09 (1941) (instructing that "due regard" must be given to the "power reserved to the states under the Constitution to provide for the determination of controversies in their courts").

Removal of cases from state to federal court is authorized by 28 U.S.C. § 1441(a), which provides that "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants to the district court of the United States . . . . where such action is pending." Absent diversity of citizenship, 28 U.S.C. § 1441(b), which Defendants do not allege, or the applicability of other express grounds for removal, 28 U.S.C. §§ 1442–1444, federal-question jurisdiction is required. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987); *Skaggs,* 549 F.3d at 474 (citing *Mikulski v. Centerior Energy Corp.*, 501 F.3d 555, 560 (6th Cir. 2007) (en banc)).

"The party seeking removal bears the burden of demonstrating that the district court has original jurisdiction." *Eastman v. Marine Mech. Corp.*, 438 F.3d 544, 549 (6th Cir. 2006). "[T]he removal statute should be strictly construed and all doubts resolved in favor of remand." *Id.* at 550 (citation omitted). This Court has treated the pending motion to remand as a facial attack on the Court's jurisdiction, looking to the pleadings—the Complaint, the Notice of Removal, and the appropriate exhibits—for the relevant facts. *See generally Mays v. City of Flint, Mich.*, 871 F.3d 437, 442 (6th Cir. 2017) (describing facial jurisdictional attacks).

B. Discussion

1. Federal Question

In their Notice of Removal, Defendants first assert that "[u]nder 28 U.S.C. § 1441(c)(1)(A), this court has federal court jurisdiction to determine, under the Electors Clause, whether state court

common law remedies can be applied against an elector or alternate elector without state legislative approval by law or otherwise" (Notice [ECF No. 1] ¶ 21).

According to Plaintiffs, their Complaint does not assert claims "arising under" federal law as required to support jurisdiction under 28 U.S.C. § 1441(c)(1)(A) (ECF No. 5-1 at PageID.168).

In response, Defendants argue that because the Michigan Legislature has authority over the appointment of presidential and vice-presidential electors from 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" (ECF No. 7 at PageID.232). Defendants argue that the threshold issue in this case is the interpretation of the Electors Clause and "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" (*id.* at PageID.232, 237, & 239). Defendants assert that this issue is a "federal question regarding the state legislature's exclusive authority" (*id.* at PageID.237). According to Defendants, the Michigan Legislature has the exclusive and independent authority to penalize electors, and state courts cannot grant common law or statutory remedies where there is "nothing more, nothing less" than the penalties in place in MICH. COMP. LAWS § 168.47 (*id.* at PageID.232 & 234). Indeed, Defendants opine that Plaintiffs' claims are "displaced" or "completely preempted" by the Electors Clause (*id.* at PageID.235–237).

In reply, Plaintiffs argue that Defendants have confused and conflated their status *before* the election with their status *after* their candidates lost the election, "all in an effort to create federal jurisdiction where none exists" (ECF No. 8 at PageID.254). Plaintiffs emphasize that Defendants never achieved the status of presidential electors and that Plaintiffs' claims therefore do not implicate Defendants' articulation of the so-called "independent state legislature theory" (*id.*).

Plaintiffs' argument has merit.

28 U.S.C. § 1331 provides federal-question jurisdiction of all civil actions "arising under" federal law. "A claim arises under federal law, for purposes of federal-question jurisdiction, when the cause of action is (1) created by a federal statute or (2) presents a substantial question of federal law." *Miller v. Bruenger*, 949 F.3d 986, 991 (6th Cir. 2020). Most often, federal-question jurisdiction attaches when federal law creates the cause of action asserted. *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 578 U.S. 374, 383 (2016). In the other "longstanding, if less frequently encountered, variety of federal 'arising under' jurisdiction," federal-question jurisdiction lies over state-law claims that "implicate significant federal issues." *Grable & Sons Metal Prod., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312–13 (2005). Defendants do not argue that federal law creates the state-law claims that Plaintiffs have asserted. Plaintiffs' claims that Defendants falsely claimed to be the duly elected electors for the state of Michigan are governed by Michigan law. At issue is whether Plaintiffs' state-law claims present a substantial question of federal law.

It is well established that "the mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction." *Merrell Dow Pharms., Inc. v. Thompson*, 478 U.S. 804, 813 (1986). The Supreme Court has not treated the phrase "'federal issue' as a password opening federal courts to any state action embracing a point of federal law." *Grable*, 545 U.S. at 314. Hence, a complaint merely 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 federal law." *Id.* at 817. Similarly, "Congress has long since decided that federal defenses do not provide a basis for removal." *Caterpillar*, 482 U.S. at 399.

The substantial-federal-question pathway is a "slim category," *Empire Healthchoice Assur., Inc. v. McVeigh*, 547 U.S. 677, 701 (2006), which is to be "read narrowly," *Mikulski*, 501 F.3d at 568. Specifically, federal jurisdiction over a state law claim will lie if the "state law claim necessarily raise[s] a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." *Grable, supra.* Where these requirements are met, the Supreme Court has held that "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." *Gunn v. Minton*, 568 U.S. 251, 258 (2013) (quoting *Grable*, 545 U.S. at 313–14).

Defendants do not distinguish among Plaintiffs' claims but argue that Plaintiffs' case in its entirety presents a substantial federal question because the case implicates the Electors Clause. However, as Plaintiffs point out, Plaintiffs' state-law claims are not challenges to Defendants' appointment, which is the subject the Electors Clause governs. Rather, Plaintiffs' claims seek declaratory and monetary relief for the would-be electors' activities after the election. While the Electors Clause provides legal context for Plaintiffs' case, Plaintiffs' case does not require interpretation of the Electors Clause. Defendants have not demonstrated that Plaintiffs' case necessarily raises any federal issue, actually disputed or substantial.

Another district court reached the same conclusion on similar facts. In *Penebaker v. Hitt*, No. 22-CV-334-JDP, 2023 WL 1879304, at *4 (W.D. Wis. Feb. 10, 2023), the plaintiffs-electors likewise alleged that the defendants had "falsely certified that they were the duly-elected electors from the state of Wisconsin even though they knew that Trump had lost the election and that the Wisconsin Supreme Court had affirmed the election results." The defendants removed the case to

federal court, arguing, in pertinent part, that the plaintiffs' claims implicated the federal Electoral Count Act, 3 U.S.C. § 1 et seq. The district court there similarly determined that the plaintiffs' claims did not require the court to consider whether defendants' actions met the requirements of the Electoral Count Act. *Id.* The district court ultimately remanded the plaintiffs' case back to state court, explaining that the federal issues were "merely incidental to the fundamental state-law questions." *Id.* at *7.

The same conclusion is appropriate here. Defendants have not shown that this case is properly "squeezed into the slim category" of cases to which the substantial-federal-question doctrine applies. *See Empire*, 547 U.S. at 701.

2. Federal Officer

As a second basis for removal, Defendants relied on 28 U.S.C. § 1442(a)(1), which provides that a state civil action can be removed to federal court if the defendant is "[t]he United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity…." (Notice ¶ 22). According to Defendants, alternate electors are "persons acting under a United States' agency or officer" (*id.* ¶ 23).

According to Plaintiffs, 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) (ECF No. 5-1 at PageID.168). Plaintiffs opine that Defendants were not acting under any federal officer but were simply "rogue actors, falsely portraying themselves as legitimate electors without any factual basis to do so" (*id.* at PageID.173).

In response, Defendants acknowledge that they included federal-officer-removal in their Notice, *see* Resp., ECF No. 7 at PageID.224, but Defendants do not develop any argument in support of this basis for removal. As Defendants bear the burden of demonstrating this Court's jurisdiction, *see Eastman*, 438 F.3d at 549, the Court considers the theory abandoned.

Therefore, because Defendants have not demonstrated that this Court may exercise jurisdiction over the subject matter of this case, this Court must remand the matter to the state court from which this case was removed. *See* 28 U.S.C. § 1447(c).

3. Fees

Last, Plaintiffs assert that Defendants lacked an objectively reasonable basis for seeking removal and that no unusual circumstances are present; therefore, Plaintiffs request this Court's remand order include an award of their attorney fees under 28 U.S.C. § 1447(c) (ECF No. 5-1 at PageID.168–169, 173–174).

In response, Defendants argue that fees are not warranted because they have presented an objectively reasonable basis for removal (ECF No. 7 at PageID.240). Indeed, according to Defendants, resolution of the federal question they present will have "far-reaching implications" (*id.*).

Plaintiffs' request is properly denied.

28 U.S.C. § 1447(c) provides in relevant part that "[a]n order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." As a general rule, the award of fees is inappropriate if the removing party had "an objectively reasonable basis for seeking removal." *A Forever Recovery, Inc. v. Twp. of Pennfield*, 606 F. App'x 279, 280 (6th Cir. 2015) (quoting *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005)). "A defendant lacks an objectively reasonable basis for removal when well-

settled case law makes it clear that federal courts lack jurisdiction to hear the case." *Id.* at 281. A district court retains discretion to award fees if it identifies an "unusual circumstance" that justifies departing from the objectively-reasonable-basis rule. *Id.* at 282 (quoting *Martin*, 546 U.S. at 141). In exercising this discretion, the district court should aim to "deter removals sought for the purpose of prolonging litigation and imposing costs on the opposing party, while not undermining Congress' basic decision to afford defendants a right to remove as a general matter, when the statutory criteria are satisfied." *Id.* (quoting *Martin*, 546 U.S. at 140).

Here, while the Court concludes that Defendants' decision to remove Plaintiffs' claims lacks merit, the Court declines to award Plaintiffs their costs and fees. As the Sixth Circuit has recognized, "it must be possible for defendants to develop relevant case law by removing cases in the absence of precedent." *Kent State Univ. Bd. of Trustees v. Lexington Ins. Co.*, 512 F. App'x 485, 491 (6th Cir. 2013) (citing *Lussier v. Dollar Tree Stores, Inc.*, 518 F.3d 1062, 1066–67 (6th Cir. 2008) (affirming denial of fees where removal was sought under a "new statute whose meaning had not yet been fleshed out"); *Lott v. Pfizer, Inc.*, 492 F.3d 789, 793 (7th Cir. 2007) (same)).

III. CONCLUSION

For the foregoing reasons,

IT IS HEREBY ORDERED that Plaintiffs' Motion to Remand (ECF No. 5) is GRANTED, and this case is REMANDED to the 17th Circuit Court for Kent County, Michigan.

Because this Opinion and Order resolves all pending claims in this matter, a corresponding Judgment will also enter. *See* FED. R. CIV. P. 58.

Dated: June 21, 2023

/s/ Jane M. Beckering
JANE M. BECKERING
United States District Judge