IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JILL STEIN, et al., *Plaintiffs-Appellees,* -against- THOMAS, et al., *Defendants-Appellants* -and- SCHEUTTE, *Intervenor-Defendant* -and- MICHIGAN REPUBLICAN PARTY, *Intervenor-Appellant*	Appeal No. 16-2690

MEMORANDUM OF LAW IN OPPOSITION
TO EMERGENCY MOTION FOR A STAY

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PRELIMINARY STATEMENT

For the voices of Michigan's people to be heard and their votes counted in the 2016 Presidential election, Michigan must complete a recount of votes by December 13, the federally imposed deadline for the selection of electors to the Electoral College.

This Emergency Motion for a Stay by Appellants' the Michigan Republican Party is the latest siege in Appellants' war to thwart the recount and suppress the constitutional rights of Michigan voters. On Friday, December 2, the Michigan Board of State Canvassers and Christopher Thomas, Director of Elections, announced that they would not begin the recount until two full business days have passed, even though all objections to the recount petition have now been resolved. That decision threatened to render the recount pointless insofar as Michigan's actual participation in the 2016 presidential election is concerned.

In response, Appellees filed a Complaint and motion for a temporary restraining order and preliminary with the District Court, seeking an order that the recount should start without the four-day delay. On Sunday, December 4, the district court held a hearing on the motion, and issued a temporary restraining order ordering the recount to begin, thereby preserving Appellee's rights to have the recount finish before the safe harbor deadline.

This Court must allow the recount that has already started, as ordered by the district court, to continue and be completed as planned by December 13, the federally imposed deadline for the selection of electors to the Electoral College. The Michigan Republican Party has asked this Court to stay that order and to halt a state-wide recount process that is already well underway. The district court properly concluded that a two-business day waiting period, which was effectively a four-day delay pursuant to Michigan state law, in starting Dr. Stein's requested recount was likely unconstitutional. And, the district court properly issued a temporary

restraining order mandating that the recount begin yesterday at noon and continue until otherwise ordered. The Michigan Republican Party has failed to demonstrate that a stay is warranted here, and Appellees Dr. Jill Stein and Louis Novak respectfully request that the Court deny this requested stay.

FACTS

On November 30, 2016, Jill Stein filed a petition seeking a statewide recount of the 2016 Presidential Election. As Dr. Stein recognizes, there is reason to believe that sufficient votes in Michigan for president may have been miscounted, possibly to change the results, as a result of large-scale hacking and/or malfunction of the optical scan machines used to tabulate ballots in every county in the state. Fortunately, Michigan law provides a mechanism for restoring confidence and correcting any disenfranchisement of voters: that mechanism is a statewide recount.

When a candidate files an adequate petition for a recount in Michigan, absent any valid objections to its form, that recount *must* proceed as long as the candidate wishes until a new result is certified. Accordingly, on November 28, 2016, anticipating Dr. Stein's petition, the State Board of Canvassers prepared for a recount that was to begin this morning. The Bureau of Elections has already undertaken to obtain central locations in which the recount can take place, to arrange for secure transportation of the ballots, and to train its staff throughout the state to efficiently and accurately count every presidential vote cast in a matter of days. The Bureau planned to proceed with the recount from 9 a.m. to 8 p.m. every day, including weekends, and Thomas expressed his confidence that the schedule would ensure completion of the recount by December 13.

However, the State Board abruptly reversed course last Thursday, December 1, when candidate Donald J. Trump filed a set of objections aiming to slow down the State's

momentum and delay the recount. The Board promptly announced that it was cancelling the recounts scheduled to begin today pending a Board hearing on the objections that took place this morning. The Board held its hearing this morning, December 2, and rejected the Trump campaign's objections. Even though the Board swiftly rejected Mr. Trump's frivolous objections, it concluded that the recount could not begin until two business days elapse from the time of its decision—the evening of Tuesday, December 6, or the morning of Wednesday, December 7. The Board relied on Michigan Comprehensive Law § 166.882(3), which reads in part, "The board of state canvassers shall not begin a recount unless two or more business days have elapsed since the board ruled on the objections under this subsection, if applicable." Mr. Thomas stated his intention to start the recount on Tuesday evening or, more likely, Wednesday morning, based on this directive—but, critically, he could not assure the Board that a recount starting then would be completed before the December 13th Electoral College deadline. *Id.*

If Michigan does not complete its recount on or before December 13, the date by which presidential electors must be chosen, the presidential votes of every single one of Michigan's nearly 5 million voters will be nullified. Michigan law forbids the certification of presidential electors until "after the state board of canvassers has, by the official canvass, ascertained the result of [the] election." Mich. Comp. Laws § 168.46. Once a recount has begun, "[t]he returns made by the . . . boards of canvassers of any recount shall be deemed to be correct, anything in the previous return of any board of election inspectors or any county canvassing board to the contrary notwithstanding." *Id.* § 168.892. Once it begins, a recount can be discontinued only at the election of the person petitioning for it. *Id.* § 168.893.

Here, if applied as Defendants have proposed, § 166.882 threatens to make it impossible for Michigan to complete the recount to make a "final determination of any

controversy or contest concerning the appointment of all or any of the electors" by December 13, the federal safe-harbor date for the selection of electors. 3 U.S.C. § 5. The result will be the disenfranchisement of Michiganders in the Electoral College—and the erasure of *all* its citizens' votes—a result the Legislature could not possibly have intended. *See Bush v. Gore*, 531 U.S. 98, 113 (2000) (observing that "to respect the legislature's Article II powers" to select electors, courts should be careful not to "frustrate the legislative desire to attain the 'safe harbor' provided by § 5").

ARGUMENT

I. THIS COURT SHOULD DECLINE TO CONSIDER AN APPEAL OF THE TRO

"[A]n order ruling on a motion for a TRO is not appealable." *Kayrouz v. Ashcroft*, 115 F. App'x 783, 785 (6th Cir. 2004) (citing *Office of Pers. Mgmt. v. Am. Fed'n of Gov't Employees, AFL-CIO*, 473 U.S. 1301, 1303-05 (1985)). The rationale behind this settled rule is easy to understand: "TRO's have the modest purpose of preserving the status quo to give the court time to determine whether a preliminary injunction should issue." *First Tech. Safety Sys., Inc. v. Depinet*, 11 F.3d 641, 650 (6th Cir.1993). A TRO lasts only a short duration, and terminates with a ruling on an preliminary injunction, from which the losing party may appeal. *Workman v. Bredesen*, 486 F.3d 896 (6th Cir. 2007).

Here, the district court issued a TRO ordering officials to bypass a two-day waiting period following the State Board of Canvassers' ruling on objections to Jill Stein's recount petition because it was unconstitutional as applied in this case. The effect of the ruling is to order temporary relief until *tonight*, when the two-day waiting period expires anyway. The district court has not had an opportunity to meaningfully review any of the other issues raised in Plaintiffs' complaint, and it issued relief with the sole effect of *preserving* Appellees' right to complete a recount by the safe harbor deadline. For that reason, the TRO ordered in this case is

exactly the type of TRO that this Court has repeatedly held is not subject to review. It is a short-term, interim order designed to give immediate relief preserving Appellee's rights.

Though appeal of a TRO is appealable in certain limited circumstances, none of those circumstances apply here. As this Court has held, a TRO may be appealable when it "directions action so potent with consequences so irretrievable" that an immediate appeal is needed to protect the rights of the parties. *See Ne. Ohio Coal. For Homeless Serv. Employees Intern'l Union, Local 1199 v. Blackwell*, 467 F.3d 999 (6th Cir. 2006) (citing *Adams v. Vance*, 570 F.2d 950, 953 (D.C. Cir. 1978)). As in more detail below, Appellant's suffer no harm—and certainly not irretrievable harm—as a result of the district court's order. The only harm that Appellants have raised is that the court's order will cause "confusion," an assertion lacking any factual support.

Appellants will have a meaningful opportunity to seek review of the district court's order at an appropriate time. This Court should decline to review the district court's TRO.

II. APPELLANTS ARE NOT ENTITLED TO A STAY

A. The Burden is on the Appellant to Demonstrate the Need for Stay

This Court reviews a district court's decision to grant or deny an injunction, when appealable, for abuse of discretion." *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219 (6th Cir. 1996). In doing so, the Court must determine whether the TRO should be stayed by analyzing the ordinary factors to determine whether a TRO should issue in the first place: "1) whether the movant has a strong likelihood of success on the merits, (2) whether the movant would suffer irreparable injury absent a stay, (3) whether granting the stay would cause substantial harm to others, and (4) whether the public interest would be served by granting the stay." *U.S. Student Ass'n Found. v. Land*, 546 F.3d 373, 380 (6th Cir. 2008).

"These factors are not prerequisites that must be met, but are interrelated considerations that must be balanced together." *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir.1991). The burden is on Appellants to show their entitlement to a stay. *U.S. Students Ass'n*, 546 F.3d at 373. For the reasons below, they cannot make that showing.

B. Plaintiffs Are Likely to Succeed on the Merits

1. Plaintiffs have standing

Both Jill Stein, the Green Party candidate for president, and Louis Novak, a Michigan voter who cast his vote for President in the 2016 have standing. To argue otherwise, the Republican Party cites only general cases for the anodyne principle that a plaintiff must have suffered a redressable injury traceable to the challenged conduct and—for their conclusion that Stein and Novak have suffered no injury—Fox News. Appellant's Br. at 10-11. Supreme Court and Sixth Circuit voting rights case law, on the other hand, establish plaintiffs' standing.

Stein has a right to have her supporters' votes registered for her, and Novak has a right to have his vote accurately counted. *See e.g., Illinois State Bd. of Elects. v. Socialist Workers Party*, 440 U.S. 173 (1979) (confirming Constitutional interest of minor party to appear on ballot and receive votes); *Williams v. Rhodes*, 393 U.S. 23, 29 (1968) (citing "the right of qualified voters, regardless of their political persuasion, to cast their votes effectively" (emphasis added)). The Republican Party concedes that "the First Amendment does indeed give a right to political association, and that the Fourteenth Amendment requires that, if states permit voters to vote for president, they must fairly tabulate the votes." Those are the rights that plaintiffs seek to have vindicated here.

When a right is "directly related to voting, the most basic of political rights, "the fact that [it] is widely shared" does not mean that it a plaintiff cannot pursue "its vindication in

the federal courts." *Fed. Elec. Comm'n v. Akins*, 524 U.S. 11, 25 (1998). Nor must a plaintiff establish, as the Republican Party insists, that "his vote was not properly counted" to have standing. Appellant's Br. at 11 (emphasis added). "In the voting context, the Sixth Circuit has recognized that voters can have standing based on an increased risk that their voting rights will be infringed." *Michigan State A. Philip Randolph Inst. v. Johnson*, No. 16-CV-11844, 2016 WL 3922355, at *4 (E.D. Mich. July 21, 2016) (citing *Sandusky Cnty. Democratic Party v. Blackwell*, 387 F.3d 565, 574 (6th Cir. 2004). Here, plaintiffs in part challenge the system of tallying votes as "so devoid of standards and procedures" as to violate both due process and equal protection, *League of Women Voters v. Brunner*, 548 F.3d 463, 478 (6th Cir. 2008), and cannot therefore "identif[y] particular voters [or candidates]" who will be adversely affected and "cannot know in advance" of receiving the relief they seek whether, in Stein's case, votes for her, and in Novak's case, the vote he cast, was accurately counted. "The issues Appellees raise are not speculative or remote," because of this; "they are real and imminent." *Sandusky* 387 F.3d at 574.

2. Plaintiffs Will Succeed on the Merits of their Constitutional Claims

As the district court found, Appellants' proposed application of Section 166.882 would infringe the right to vote under the First and Fourteenth Amendments. "The right to vote is a precious and fundamental right. Other rights, even the most basic, are illusory if the right to vote is undermined." *Obama for Am. v. Husted*, 697 F.3d 423, 428 (6th Cir. 2012) (internal quotation marks and citations omitted). When, as here, "a plaintiff alleges that a state has burdened voting rights through the disparate treatment of voters," federal courts review the claim using the flexible standard outlined by the Supreme Court in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992). *Obama for Am.*, 697 F.3d at 429 . Under that standard:

> A court considering a challenge to a state election law must weigh the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate against the precise interests put forward by the State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiffs' rights.

Burdick, 504 U.S. at 434 (internal quotation marks omitted). "This standard is sufficiently flexible to accommodate the complexities of state election regulations while also protecting the fundamental importance of the right to vote." *Obama for Am.*, 697 F.3d at 429.

Here, the State can offer no persuasive justifications for delaying the recount process enshrined in State law. There is certainly no such justification sufficient to outweigh the burden on Michiganders' voting rights occasioned by jeopardizing Michigan's ability to participate in the Electoral College and setting up the disenfranchisement of *all* of its voters. There is no conceivable justification for allocating more time to the objection process than to the entire recount itself, especially with full knowledge that doing so will almost certainly prevent the will of Michigan voters from being counted in the electoral college. "All of the precedent indicates that having one's vote properly counted is fundamental to the franchise." *Stewart v. Blackwell*, 444 F.3d 843, 868 (6th Cir. 2006), *superseded on other grounds*, 473 F.3d 692 (6th Cir. 2007).

Appellants attempt to avoid the obvious conclusion that their stated justifications for the delay cannot possibly outweigh Michiganders' right to vote by insisting that the *Burdick* test does not require strict scrutiny. But "with the perceived integrity of the presidential election as it was conducted in Michigan at stake, concerns with cost pale in comparison." Order at 4 ("Historically, courts have assigned diminished weight to a state's financial interest when constitutional rights are at stake."). This is not a case about inconsequential stray irregularities in

the voting process, but one in which a State's own decision to derail its *own* statutorily prescribed process for counting votes—for no reason—is jeopardizing its citizens' chance to participate in the selection of the President. Appellants do not—and could not—dispute that their proposed delay would place Michigan at risk of missing the safe harbor deadline, as the State's own Director of Elections testified in a hearing that Judge Goldsmith personally observed and oversaw. *See* Order at 5 (finding based on the testimony of Christopher Thomas that "there is a credible threat to the voters' right to have a determination made that Michigan's vote for president was properly tabulated"). That finding is entitled to this Court's deference. *See* Fed. R. Civ. P. 52(a)(6) ("Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility."); *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-75 (1985) ("If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently . . . . [O]nly the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said."); *Harrison v. Monumental Life Ins. Co.*, 333 F.3d 717, 722 ("the appellate court must review the facts in the light most favorable to the appellee").

This deference is especially dispositive here, where the State interest being asserted is clearly pretextual and largely invented for litigation. It is telling that the only request for an emergency stay comes from the Michigan Republican Party, *not* from the State itself or the Director of Elections who is actually charged with carrying out the logistics of the recount. The Michigan Republican Party purports to assert "Michigan's interest in ensuring an orderly

and accurate recount by giving the relevant actors two business days to prepare for that recount," Stay Br. at 13-14, ignoring the fact that Michigan has actually been preparing to conduct the recount at least since Dr. Stein filed her recount petition on November 30, and proceeded with these preparations and training of recount workers even while observing the Section 166.882 waiting period. And as the district court correctly found, Appellants' arguments about the expense of undertaking the recount process provided for by Michigan law are makeweight, especially since Dr. Stein has paid nearly a million dollars—as required by statute—to pay for it. *See* Order at 4. The recount has already begun in accordance with the district court's order, and Appellants have presented no evidence to substantiate their claims that it is not proceeding in an orderly and accurate manner—and certainly none to show that two additional business days were needed to ensure order and accuracy. *See, e.g.*, Kathleen Gray and John Wisely, *Presidential Recount Begins in Oakland, Ingham Counties*, Detroit Free Press (Dec. 5, 2016)[1] ("Oakland County Clerk Lisa Brown said her staff wasn't fazed by the recount work. 'We were ready to go last week,' she said. 'This is what we do.'").

Michigan's interest in following an arbitrary timeline for resolving objections to a recount petition cannot overcome the fundamental rights of all Michigan voters to have their will registered in the national election for the highest office in the land, especially when that timeline, which was designed for elections generally and not adapted for the needs of the Electoral College, is misconstrued to invite frivolous objections designed solely to slow the process, and the unnecessary, inexplicable delay between resolution of objections and any recount. Because "there are other, reasonable ways to achieve [Michigan's] goals with a lesser burden on

[1] Available at http://www.freep.com/story/news/politics/2016/12/05/presidential-recount-begins-oakland-ingham-counties/94999952/

constitutionally protected activity"— the most obvious one being to commence the recount now that objections have been fully resolved—Michigan "may not choose the way of greater interference." *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972). Indeed, as the Supreme Court has held, "in the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest" because "the President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation." *Anderson*, 460 U.S. at 795. Accordingly, "the State has a less important interest in regulating Presidential elections than statewide or local elections, because the outcome of the former will be largely determined by voters beyond the State's boundaries." *Id.*.

The delay Appellants advocate threatens to "arbitrarily deny [Michiganders] the right to vote depending on where they live." *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 476 (6th Cir. 2008). "Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value on person's vote over that of another." *Bush v. Gore*, 531 U.S. 98, 104-05 (2000) (per curiam); *accord Brunner*, 548 F.3d at 476 ("The right to vote includes the right to have one's vote counted on equal terms with others."). But that is precisely what will happen if insufficient time is allocated to a state-wide recount of nearly five million votes: Michigan voters will be treated unequally from voters in every other state whose statewide official election results will be ascertained prior to the safe-harbor date. They will be deprived of their voice in selecting the President. Devaluing the votes of Michigans' citizens in this way offends the Constitution, as recognized by decades of Supreme Court law. *See Moore v. Ogilvie*, 394 U.S. 814, 819 (1969) (systemic devaluation of votes cast in certain geographic areas violates the Fourteenth Amendment). Because delaying the recount as Defendants propose would run afoul of the "minimum requirement for nonarbitrary treatment of

voters necessary to secure the fundamental right," *Bush*, 531 U.S. at 105, Appellees are likely to succeed on the merits of their claim that Appellants' proposed application of Section 166.882 is unconstitutional.

Needless delay in commencing Michigan's recount will result in "significant disenfranchisement and vote dilution," *Warf v. Bd. of Elections of Green Cnty*, 619 F.3d 553, 559 (6th Cir. 2010), violating the due process rights of Michiganders whose votes in the 2016 election go unheard in the Electoral College. Millions of Michiganders voted on November 8 under the expectation that their votes would determine the electors who would cast votes for President and Vice President on their behalf in the Electoral College. *See* Mich. Comp. Laws §§ 168.43, 168.45, 168.46. The Michigan Legislature created a recount process to ensure that those votes—and votes in all other elections—were accurately counted. Reading a statutory scheme designed for all elections to unnecessarily delay a recount in the peculiar context of a presidential election until it is too late to complete it in time upends voters' and the Legislature's expectations and threatens to render the votes cast by citizens meaningless. "There is more to the right to vote than the right to mark a piece of paper and drop it in a box or the right to pull a lever in a voting booth. The right to vote includes the right to have the ballot counted." *South v. Peters*, 339 U.S. 276, 279 (1950) (Douglas, J., dissenting). That principle applies here with full force: the only way to avoid nullifying the millions of votes cast on Election Day is to commence the required recount in time to complete it by December 13.

3. Plaintiffs Have a Constitutional Right to Have their Votes Property Counted

Plaintiffs are moreover likely to succeed on the merits because an immediate start to the recount was necessary to ensure that the votes of Michigan's voters were properly counted in time for the count to matter for Michigan's selection of delegates to the Electoral College.

Michigan's current system of using unsecured optical scan machines to read and tally votes, without any audit or other procedures to ensure they are accurately reading voters' ballots, burdens the right of voters and candidates "to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights, of course, rank among our most precious freedoms." *Anderson v. Celebrezze*, 460 U.S. 780, 787 (1983) (quoting *Williams v. Rhodes*, 393 U.S. 23, 31 (1968).

Recourse to a recount is an essential part of Michigan's vote-counting regime, and a constitutionally necessary one in the circumstances of this election. Without recourse to a recount, Michigan's approach to tallying votes in this election severely burdens Plaintiffs' constitutional rights to have votes counted. The recount procedure provided for under state law ensure that votes were properly counted, and the State's interest in delaying its commencement cannot justify the likelihood that the delay would render the recount meaningless for purposes of selecting the next president.

"The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) ("the political franchise of voting" is a "fundamental political right, because [it is] preservative of all rights."). This fundamental right to vote applies equally (if not more so) in presidential elections: "When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental." *Bush v. Gore*, 531 U.S. 98, 104 (2000).

The right to vote would be meaningless if it meant only the right to *cast* a vote on Election Day, with no assurance that the vote was accurately *counted*. As the Supreme Court

makes clear, "[o]bviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted . . . ." *United States v. Classic*, 313 U.S. 299, 315 (1941); *see also Reynolds*, 377 U.S. at 554 ("It has been repeatedly recognized that all qualified voters have a constitutionally protected right to vote, . . . and to have their votes counted."). If "one's franchise extended only so far as placing one's ballot in the ballot box, . . . the situation of a ballot box subsequently 'falling off of a truck' would be of no constitutional moment. That is an unacceptable result." *Hoblock v. Albany Cnty. Bd. of Elections*, 487 F. Supp. 2d 90, 98 (N.D.N.Y. 2006).

As the district court noted, "when this right is burdened, courts must engage in a careful analysis of the magnitude of the infringement and the countervailing interest of the state." Opinion at 3. The test to be applied is set out in *Burdick v. Takushi*, 504 U.S. 428 (1992): "A court considering a challenge to state election law must weigh the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate against the precise interests put forward by the State as justification for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights." *Id.* at 434 (internal quotation marks omitted). "Furthermore, in the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest. For the President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation. Moreover, the impact of the votes cast in each State is affected by the votes cast for the various candidates in other States.Thus in a Presidential election a State's enforcement of more stringent ballot access requirements, including filing deadlines, has an impact beyond its own borders. Similarly, the State has a less important interest in regulating Presidential elections than statewide or local

elections, because the outcome of the former will be largely determined by voters beyond the State's boundaries." *Anderson v. Celebrezze*, 460 U.S. 780, 794–95, 103 S. Ct. 1564, 1573, 75 L. Ed. 2d 547 (1983).

Here, without a timely and meaningful recount, the burdens placed on plaintiffs' rights are immense. A recount is the *only* way to ensure that votes have been counted on equal terms throughout Michigan, and that votes for Dr. Stein and each of her opponents have been recorded properly. Michigan has adopted clear rules for the tabulation of ballots: a vote is "considered valid [if] there is a mark within the predefined area" on a ballot, unless it is "a stray mark." Mich. Comp. Laws § 168.799a(3). But the public has every reason to believe that, because of computer malfunction and/or malicious hacking, these standards were disregarded in tallying a substantial number of votes—enough votes to change the election's outcome. Michigan's vulnerability to cyber attacks, the unprecedented foreign cyber attacks this year, and striking numbers of undervotes raise grave concerns that voters throughout the state have been arbitrarily stripped of the right "to have [their] vote[s] counted on equal terms with others." *Brunner*, 548 F.3d at 476.

As the district court properly held, because Michigan provides a "right to a recount . . . designed to ensure a fair and accurate election," "the loss of a recount right would impair the right to vote." Opinion at 4. Without that right, there is no way to know that in 2016's presidential election, votes were counted by anything but "a system . . . devoid of standards and procedures." *Brunner*, 548 F.3d at 476. Optical scan machines are inherently unreliable, and as plaintiffs' expert affidavits in the district court show, are demonstrated not to read votes that should be counted as votes under Michigan law, because of the type of pen a user uses, machine miscalibration, the type of mark a voter makes, and numerous other machine and

human error. In this election, the machines failed to register votes for president in over 75,000 ballots cast, or approximately 1.6 % of all ballots. While many or even most of those ballots may not have contained a vote for president, we know from expert testimony that at least some of them will have simply not been read by the machines. Meanwhile, only approximately one-tenth of one percent of votes needed to have been misread to have affected the outcome of the election.

There is also no reason to have confidence that the rest of Michigan's vote was accurately tabulated. The margins in this election, the unprecedented interference with the election by foreign agents, including governments, with the ability and motive to hack Michigan's voting machines, and the demonstrated vulnerabilities of these machines means that there is every reason to believe that "significant numbers of voters" had their votes affected by the type of computer malfunction or interference that this court has already held violates substantive due process and equal protection. *Id*. This year, unlike any year before, as confirmed by the federal government, the Democratic National Convention was hacked, the Clinton campaign manager's email was hacked, Arizona election officials were hacked, Illinois election officials were hacked and 200,000 voter record stolen, and twenty other hacking attempts were made on other state election officials, offices, computers and the like. These are only the hacks we know about. We also know that the machines used in Michigan have been hacked, including by two experts who submitted affidavits in the district court.

Michigan knew or should have known about these vulnerabilities and knows or should know about the extraordinary circumstances in this election but continue to employ vulnerable machines without any audit procedure for ensuring they are operating properly. Fortunately, Michigan has a ready mechanism for doing so now. Michigan uses optical scan

voting machines that allow the voter to fill out a paper ballot that is scanned and counted by a computer. The good news for Michigan voters—and, unfortunately, this is not true in all of this nation's states—is that those paper ballots are physical evidence that is not vulnerable to cyberattack. Reviewing those paper ballots is the only way to determine whether a cyberattack affected the outcome of the 2016 presidential election. It is the only way to verify which candidate won the most Michigan votes. It is the only way to ensure that the votes cast by actual voters match the results determined by the computers. If the paper ballots are not examined, any unintentional software bugs, intentional alterations to the vote or to the tally, or procedural errors leading to an incorrect election outcome will not be detected.

Also fortunately, Michigan has a system for reviewing those paper ballots—the recount process. As the Michigan Director of Elections testified in district court, election officials were ready to begin that process last week. The district court ordered that the start of that process—provided for under state law and prepared to commence at a moment's notice—not be delayed. This has not resulted in the "logistical hell" that the Republican Party envisions. Instead, the recount began smoothly yesterday and is proceeding. Notably, defendants in this case, the Board of State Canvassers and the Director of Elections have not appealed the district court decision and do not claim that they have been injured in any way by the district court's order. What has proved to be an entirely workable and minor alteration to the plan that the Board of State Canvassers had already adopted for a recount is a minor burden on the state compared to the significance of knowing that Michigan voters' votes were reliably counted.

4. The District Properly Declined to Abstain

The district court properly declined the Republican Party's invitation to abdicate its "virtually unflagging obligation" to exercise its jurisdiction to resolve constitutional disputes. *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813 (1976). This

court reviews a district court's refusal to postpone or exercise its jurisdiction for abuse of discretion. *Harman v. Forssenius*, 380 U.S. 528, 534 (1965). The district court did not abuse its discretion both because the prerequisites for abstention are not met here, and because, even if they were "[t]he abstention doctrine is not an automatic rule applied whenever a federal court is faced with a doubtful issue of state law; it rather involves a discretionary exercise of a court's equity powers." *Baggett v. Bullitt*, 377 U.S. 360, 375 (1964). Abstention is "an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it." *Colorado River*, 424 U.S. at 813.

The only abstention argument presented to the district court relied on *Burford*. The Republican Party cites the elements of *Burford* abstention but does not even attempt to explain why it applies here. As the district court properly concluded, *Burford* abstention is appropriate only when complex state regulatory schemes are at issue, and federal court intervention "would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 727 (1996). Here, the Republican Party identifies no complex regulatory system that is or will be disrupted by the district court's decision.

The Republican Party, for the first time on appeal, argues that the district court should have abstained under *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941). This doctrine applies where there is uncertainty in an issue of state law that should be resolved in state court before a federal court adjudicates a constitutional challenge. Id. Here, the two-day state law is unambiguous. The constitutional injury has occurred here by applying this unambiguous two-day delay to this recount in this circumstance, which would effectively precluded the recount from concluding before December 13 and giving rise to the constitutional issue. Additionally,

were the court to abstain from ruling on the constitutional issue, it would have allowed the two-day stay to occur and the constitutional injury would have been realized.

5. Laches Does Not Apply

Appellant also claims that Dr. Stein's suit should be barred by laches, even though Dr. Stein has timely pursued all of her legal rights. Under Michigan law, Dr. Stein was required to file a petition for recount within 48 hours. Mich. Comp. Law 168.879. There is no contention by Appellant, nor could there be, that Dr. Stein missed this deadline. Dr. Stein timely filed her Petition on Wednesday, November 30th and the Board of State Canvassers was prepared to start the recount on Friday, December 2nd. As the district court properly found, "[t]here is a strong presumption that a filing delay is reasonable when the filing complies with the limitations period." Order at 6 (citing *Chirco v. Crosswinds Cmtys, Inc.*, 474 F.3d 227, 233 (6th Cir. 2007)).

The Republican Party also contends that laches applies here because Dr. Stein "made no effort to proactively fix the aged problems with Michigan's election procedures and implement risk-limiting audits." Appellant's Br. at 16. The notion that a plaintiff cannot sue to challenge a state procedure unless she first makes some affirmative effort to lobby the legislature and have the law changes is a first, and unsurprisingly, the republicans cite no authority to support this erroneous contention.

C. Appellants Will Not Suffer Irreparable Harm Absent a Stay, and Appellees Will Suffer Irreparable Harm if a Stay is Granted

The only harm that Appellant's point to is a speculative and vague allegation that the court's order will cause "confusion." Appellant's Br. at 18. The Party does not explain how or why they are injured even though the recount has already begun. Their failure to do so and the

fact that the Board has complied with the district court's order to begin the recount weigh heavily against irreparable harm here. *See U.S. Student Ass'n*, 546 F.3d at 386-87 (6th Cir. 2008).

Additionally, this argument of alleged "confusion" was never raised before the district court. Instead, Appellant argued that the recount would cause logistical problems for the Party in terms of having its members present to attend the recount. The district court soundly rejected this argument, concluding that it is unlikely that removing a two-day delay would significantly alter the plans of the party to participate in the recount. Order at 6. Any claim of the possibility of confusion was never raised.

Dr. Stein, on the other hand, as well as Michigan voters like Plaintiff-Appellee Louis Novak, will be harmed by staying the recount. Dr. Stein has properly sought this recount and is doing so to ensure the accuracy and integrity of this election. Stopping the recount that properly underway, which was approved by the Board of State Canvassers, would undermine her interest in having this process completed. For Michigan voters like Louis Novak, stopping the recount not only undermine his interest in ensuring a fair election.

D. The Public Interest Is Served by Granting the Stay

The public interest is served in denying this stay. The recount is an effort to protect citizen's right to vote and ensure that votes cast were counted fairly and accurately—which, as the district court recognized is "the bedrock of our Nation." Order at 5. Stopping the recount midstream would undermine the public interest in this key principle. It would also cause county officials around the state, who have organized around this effort and deployed hundreds of employees, to stop a detailed process already in motion.

Issuing a stay now also creates the possibility that the recount will not be completed by the December 13th safe harbor deadline. As the district court found based on the testimony of Chris Thomas, Director of Elections, it would be "a monumental undertaking" to

complete the recount in five day. Currently, there are seven days left before the safe harbor deadline. Staying the decision ordering the recount to continue could result in an incomplete recount, and would create "a credible threat to the voters' right to have a determination made that Michigan's vote for president was properly tabulated." Order at 5.

CONCLUSION

For the reasons above, Appellees respectfully request that Appellants' motion for a stay be denied.

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New York, New York

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