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

PLAINTIFFS-APPELEES' OPPOSITION TO INTERVENING DEFENDANT ATTORNEY GENERAL BILL SCHUETTE'S EMERGENCY MOTION FOR A STAY

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PRELIMINARY STATEMENT

Plaintiffs received Attorney General Schuette's motion papers and 28-page brief at approximately 10:30 a.m. this morning and were given a noon deadline for responding. At the time, Plaintiffs were also preparing responsive papers to the Republican Party's voluminous papers in support of a stay and in support of a hearing en banc, filed last night at 11:30 pm, viewed by Plaintiffs' counsel for the first time this morning, and with a deadline to respond to the motion for a stay at 11:00 a.m. and en banc motion at 1:00 pm. Given the time remaining, Plaintiffs do not have time to respond to Schuette's arguments in full. We refer the court to our brief filed in opposition to the Michigan Republican Party's motion for a stay, on which Plaintiffs rely on full in response the instant motion and write now to respond to isolated arguments, to clarify the record, and to correct several misstatements of fact and law in Schuette's brief. In addition, Plaintiffs do not oppose intervention.

ARGUMENT

I. SCHUETTE'S REQUEST FOR "CLARITY" OF THE DISTRICT COURT ORDER CONFIRMS THIS COURT'S LACK OF JURISDICTION

Schuette purports to ask for clarity regarding the duration of the district court's order. While Schuette writes that the district court's order "could be *misconstrued* to retain continuing jurisdiction," Br. at 6, that is precisely what

the order explicitly does: "the recount shall commence and must continue until further order of this Court." The continuing jurisdiction and the open questions remaining for resolution in district court that Schuette highlights confirm the non-appealability of the district court's order. As Schuette notes, the relief from the two-business day, four calendar-day waiting period was the only form of emergency relief requested in a case that implicates plaintiffs' broader right to have a recount conducted and completed in time for delegates to be confirmed for the Electoral College. The question of the waiting period, standing alone, was a short-term, interim order designed to give immediate relief to preserve Plaintiffs' broader rights concerning the recount, which have yet to be addressed by the district court. The district court's TRO simply preserved the plaintiffs' ability to meaningfully present those broader questions to it, without losing time for the recount to be completed, thus mooting plaintiffs' rights without time for adjudication.

The limited issue of the waiting period that was resolved by the TRO—will itself be moot in approximately two hours from the filing of this brief—at 1:30 or 2:00 p.m. on December 6, when the waiting period would in any event have expired under state law. The district court has appropriately invited the parties to return to it should further clarity or adjudication be required in light of developments in state court proceedings. Plaintiffs' constitutional rights in light of

those developments have yet to be addressed and must be addressed in the first instance in the district court. In the meantime, the TRO, which will terminate upon further adjudication in the district court, is nonappealable, as it simply "ha[s] the modest purpose of preserving the status quo to give the district court time to determine whether a preliminary injunction [governing the pendency of the recount] should issue. *First Tech. Safety Sys., Inc. v. Depinet*, 11 F.3d 641, 650 (6th Cir.1993).

II. APELLANTS HAVE NOT DEVELOPED ANY FACTUAL RECORD TO SUPPORT THEIR LACHES ARGUMENT

Plaintiffs' opposition to the Republican Party demonstrates the legal fallacy of both intervenor-appellants' laches arguments. But both are also based on a factual fallacy. Appellants argue that Dr. Stein could have submitted her recount petition earlier than November 30. As Schuette acknowledges, Michigan law requires Dr. Stein to identify, at the time of filing her petition, every precinct in which she requests a recount and to file a fee based on the number of precincts. Br. at 15. Because of the way Michigan counties count absentee ballots, the number and identity of precincts is not constant and was not available to Dr. Stein until November 29 the day before she filed her petition, when the Bureau of Elections provided her with a list. Appellants seem to dispute this fact, but they have failed to develop any factual record on which their argument of laches could

be based, even if there were any legal basis for applying laches where a party has satisfied a filing deadline.

Dated: December 6, 2016
New York, New York

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of December, 2016, I submitted the foregoing document to the Court's ECF system for service and filing, and the document was thereby served upon counsel of record through that system.

/s/ Mark Brewer

Mark Brewer