

STATE OF MICHIGAN
IN THE COURT OF APPEALS

ATTORNEY GENERAL BILL SCHUETTE, ON
BEHALF OF THE PEOPLE OF THE STATE OF
MICHIGAN,

No. 335947

Plaintiff-Appellant,

-against-

BOARD OF STATE CANVASSERS; CHRIS
THOMAS, DIRECTOR OF ELECTIONS,

Defendants-Appellees.

**INTERVENING APPLICANT JILL STEIN'S MOTION TO INTERVENE
AS A PARTY DEFENDANT AND FOR IMMEDIATE CONSIDERATION**

JILL STEIN by and through her attorneys, GOODMAN ACKER, P.C. and EMERY
CELLI BRINCKERHOFF & ABADY LLP, moves this Court pursuant to Mich. Court Rules 2.209
and 7.211(C)(6) to intervene as a party defendant and for immediate consideration of this motion,
for the following reasons:

1. The above-caption suit is a mandamus action seeking to compel Chris Thomas and
the Board of Canvassers not to commence, or to cease, Jill Stein's lawful recount for the
presidential election in the state of Michigan. The Attorney General also seeks immediate
consideration of its mandamus action.

2. Intervening Applicant, JILL STEIN ("Dr. Stein"), was the Green Party candidate
for President of the United States in the 2016 election. On November 30, 2016, Dr. Stein filed a
valid Petition with the state Board of Canvassers seeking a recount of 2016 vote.

3. Defendant-Appellee the BOARD OF STATE CANVASSERS (“Board”) is a Michigan body created by the Michigan State Constitution. Duties of the Board include canvassing and certifying elections and conducting recounts.

4. Defendant-Appellee CHRIS THOMAS (“Thomas”) is the Michigan Director of Elections. By order of the Board on November 28, 2016, Thomas and the staff of the Bureau of Elections were authorized to represent the Board in any recount of votes cast at the November 8, 2016 general election.

5. Under Mich. Court Rules 2.209(A)(3), a person has the right to intervene when the intervening applicant claims an interest in an action and its ability to protect its interest may be impaired or impeded if intervention is denied.

6. Under Mich. Court Rules 2.209(B)(2) intervention is permissible “when an applicant’s claim or defense and the main action have a question of law or fact in common.”

7. “[T]he rule for intervention should be liberally construed to allow intervention where the applicant’s interests may be inadequately represented.” *Neal v. Neal*, 219 Mich. App. 490, 492; 557 (1996).

8. Dr. Stein’s motion to intervene is timely. “[A]n intervenor must be diligent, and any unreasonable delay after knowledge of the action will justify a denial of intervention where no satisfactory excuse is shown for the delay.” *Burger Structural Steel Co. v. Richmond Steel Erectors, Inc.*, 2003 WL 21508503, at *4 (Mich. July 1, 2003). Dr. Stein learned of this action yesterday and has filed her motion to intervene one day later. She has acted with diligence and there has been no delay in her seeking intervention.

9. Dr. Stein may intervene as a matter of right under MCR 2.209(A)(3) because she claims an interest in this action, and her ability to protect her interest will be impaired or impeded

if intervention is denied. This action seeks a mandamus “ordering the Secretary and Board of Canvassers not to commence, or to cease” the recount that Dr. Stein petitioned for. Dr. Stein has an undeniable interest in ensuring that the recount she lawfully petitioned for proceeds according to Michigan law. Dr. Stein has a further interest, as a candidate in the presidential election, in ensuring that Michiganders, including those who cast votes on her behalf, are not disenfranchised as a result of Plaintiff’s attempts to quash a lawful recount. Currently, there is no party to this lawsuit who is representing Dr. Stein’s interest.

10. Dr. Stein may also intervene permissively under MCR 2.209(B)(2)) because her defenses share common questions of law and fact with Plaintiffs’ claims, including whether the Board must follow Michigan law and the Federal Constitution and proceed with the recount sought by Dr. Stein’s petition.

11. Because the Attorney General seeks immediate consideration of his requested mandamus, Dr. Stein, pursuant to Mich. Court Rule 7.211(C)(6), likewise requests immediate consideration of this motion to intervene in this suit so that her interests are properly and fully represented in this action.

12. Attached to this Motion is Jill Stein's proposed Intervening Answer. (**Exhibit 1 – Copy of Proposed Intervening Answer**).

Respectfully submitted,

GOODMAN ACKER, P.C.

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*Attorneys for Intervenor-Defendant-
Appellee Jill Stein*

Dated: December 3, 2016

Exhibit 1

[PROPOSED] ANSWER OF JILL STEIN

By and through her attorneys, GOODMAN ACKER, P.C. and EMERY CELLI BRINCKERHOFF & ABADY LLP, for her Answer, JILL STEIN states as follows:

INTRODUCTION

1. In response to the allegations in Paragraph 1 of the Complaint, Dr. Stein admits that this action is brought by the Attorney General against the Board of State Canvassers and the Director of Elections, and admits that the Attorney General claims that it is an action for a writ of mandamus. Dr. Stein denies that this action is brought on behalf of the People of the State of Michigan, who are entitled to a prompt and thorough hand recount of all ballots cast in Michigan in the 2016 presidential election.

2. In response to the allegations in Paragraph 2 of the Complaint, Dr. Stein admits that she was the Green Party candidate for president in the general election held on November 8, 2016, that she received approximately 1.07% of votes, and that the electronic machines that tallied the ballots counted nearly 4.8 million votes in Michigan for president. Dr. Stein further admits that she is unlikely to win the presidential election, but asserts that the number of votes cast in her favor, and on behalf of the other candidates for president, is likely to be different from the number certified by the Board of State Canvassers. Dr. Stein further denies that there is zero evidence of fraud or mistake in the canvass of votes and respectfully refers this Honorable Court, for example, to the affidavits of seven experts filed in support of Dr. Stein's motion for a temporary restraining order in *Stein v. Thomas*, No. 16-cv-14233 (E.D. Mich. Dec. 2, 2016). In any event, Dr. Stein notes that she is not required in her petition for a recount to present evidence, but only *allegations*, of fraud or mistake. Mich. Comp. Laws § 168.879(1)(b).

Dr. Stein further admits that she has filed a petition for statewide recount of the votes by hand, but denies that this method of recounting is a particularly expensive and time-consuming process and respectfully refers this Honorable Court, for example, to statements made by employees of the Bureau of Elections at the Board of State Canvassers meeting held on December 2, 2016.

3. In response to the allegations in Paragraph 3 of the Complaint, Dr. Stein denies that she could have filed a complete petition at any point after the election on November 8, 2016 for several reasons, including that under Michigan law, a candidate filing a recount petition must specify at the time of filing the counties, cities, townships, and precincts in which the recount is required, and must deposit a check at the time of filing, the amount of which depends on the number of precincts referred to in her petition. Mich. Comp. Laws § 168.879; 168.881. A list of all precincts, and their total number, was not available to Dr. Stein until November 29, 2016. Dr. Stein further denies any suggestion by the Attorney General that the timing of Dr. Stein's petition deprives her of the right to a recount. Dr. Stein's petition must be granted, because it was timely filed less than two days after the Board of State electors finally certified the results of its canvass.

4. In response to the allegations in Paragraph 4 of the Complaint, Dr. Stein denies the Attorney General's hyperbolic allegations about potential costs of the recount as rank speculation. Dr. Stein further denies that proceeding with the recount puts Michigan citizens at risk of losing their votes at the Electoral College and instead asserts that *delaying* the recount as the Attorney General and Donald Trump have desperately tried to do puts Michigan's participation in the Electoral College at risk. Dr. Stein further

denies the Attorney General’s allegation that a recount would violate clear legal duties of the Board of State Canvassers and Director of Elections. To the contrary, Michigan law directs that “[t]he board of state canvassers, at as early a date as possible after the receipt of [a recount] petition and the deposits required *shall* . . . cause a recount of the votes cast in the several precincts included in the petition.” Mich. Comp. Laws § 168.883. As the Court of Appeals made clear in *Kennedy v. State Board of Canvassers*, 127 Mich. App. 493, 498 (1983), the law *requires* the Board to conduct a recount upon receipt of a petition and deposit, which Dr. Stein filed on November 30. The State’s interest in allowing recounts to proceed expeditiously and fairly is so great that under the law, any public official engaged in the conduct of a recount who “willfully commit[s] any act which shall interfere with a fair and impartial recount” is guilty of a felony. Mich. Comp. Laws § 168.887.

5. In response to the allegations in Paragraph 5, Dr. Stein denies each and every one of the Attorney General’s assertions, except that Dr. Stein does not object to an order of the Court directing that the recount be completed and the results certified by December 13, 2016. Dr. Stein notes that the only “dilatatory and frivolous request[s]” made “by an unaggrieved party” and likely “to disenfranchise Michigan voters” are the objections filed by Mr. Trump to Dr. Stein’s recount petition and this action filed by the Attorney General, both of which are designed to interfere with a fair and expedient process for confirming that every vote cast by a Michigander in the 2016 presidential election was correctly counted. Dr. Stein further asserts that this Honorable Court must allow the recount to proceed and denies that the Honorable Court should, or even can, issue the writ of mandamus requested by the Attorney General. The law bestows

discretion on the Board of State Canvassers to “direct[], supervis[e] and control” the conduct of any recount, “with such rules and regulations as in the opinion of said board of state canvassers shall be necessary to conduct such recount in a fair, impartial and uniform manner.” Mich. Comp. Laws § 168.889. At a meeting of the Board of State Canvassers on November 28, all four members of the Board voted unanimously to designate Director Thomas to carry out the recount as he saw fit, pursuant to Mich. Comp. Laws § 168.890. The Attorney General does not deny that the recount plan prepared by Director Thomas is “fair, impartial and uniform.” Mich. Comp. Laws § 168.889. In any event, the discretionary choices made by Director Thomas, deputized by the Board of State Canvassers, are not subject to mandamus. In particular, the law gives the Board, and in turn Director Thomas, discretion to carry out a recount by “[a] manual tally of the ballots,” as he has chosen to do, in part because that has long been the practice of the Bureau of Elections in conducting recounts and in part because it is less expensive and more efficient than any other method. Mich. Comp. Laws §§ 168.871(4)(a); 168.891. “If the act requested by the plaintiff involves judgment or an exercise of discretion, a writ of mandamus is inappropriate.” *See, e.g., Hanlin v. Saugatuck Tp.*, 299 Mich. App. 233 (2013). Dr. Stein further asserts that this Honorable Court must deny the request for a writ of mandamus ordering that a recount be delayed for two business days—and four calendar days—following the Board of State Canvassers’ rejection of Mr. Trump’s objections on Friday, December 2 for at least three reasons. First, Director Thomas has already publicly stated, at the Board meeting on December 2, that he intends to begin the recount after a four-day delay, rendering the Attorney General’s request moot. Second, the law requires that the recount be conducted “and the result of the

election determined at the earliest possible moment,” a legislative directive that is frustrated by unnecessary delay in beginning the recount. Mich. Comp. Laws § 168.890. Third, delaying the recount presents a risk that it will not be completed by December 13, which, according to the Attorney General, could disenfranchise Michigan at the Electoral College. Dr. Stein notes the irony in the Attorney General’s simultaneous requests for orders that the recount be delayed and that it be completed before December 13. Dr. Stein shares the Attorney General’s desire to complete the recount by December 13, and therefore urges this Honorable Court not to exceed its jurisdiction to delay the recount or alter its methods.

JURISDICTION

6. In response to the allegations in Paragraph 6 of the Complaint, Dr. Stein admits that an action for mandamus against the Board and Director Thomas is properly brought in the Court of Appeals but denies that this action provides a proper basis for mandamus.

PARTIES

7. In response to the allegations in Paragraph 7 of the Complaint, Dr. Stein admits that this action has been filed by the Attorney General pursuant to his constitutional and statutory authority to initiate actions, but denies that the Attorney General is acting on behalf of the People of the State, who deserve the prompt recount that the law requires without illegal and expensive delays that threaten their right to have their votes accurately counted and to timely select their delegates to the Electoral College.

8. In response to the allegations in Paragraph 8 of the Complaint, Dr. Stein admits that the Board of State Canvassers is responsible for canvassing and certifying the election returns, including votes cast for president and vice president of the United States. Dr. Stein further admits that the Board of State Canvassers determines whether a recount will proceed, and has sole discretion for directing, supervising, and controlling any recount. However, to the extent that the Attorney General implies that the Board has any authority to deny a recount when a petition is filed in accordance with Mich. Comp. Laws § 168.879, Dr. Stein denies that assertion and refers this Honorable Court to its decision in *Kennedy*, 127 Mich. App. at 498.

9. Dr. Stein admits the allegations in Paragraph 9 of the Complaint.

FACTUAL ALLEGATIONS

10. Dr. Stein admits the allegations in Paragraph 10 of the Complaint.

11. In response to the allegations in Paragraph 11 of the Complaint, Dr. Stein admits that she petitioned for a statewide recount, to be conducted by hand, on November 30, 2016, but she denies every other allegation and respectfully refers this Honorable Court to her responses to the allegations in Paragraphs 2 and 3 of the Complaint set forth above.

12. In response to the allegations in Paragraph 12 of the Complaint, Dr. Stein admits that Michigan's elections are conducted by paper ballot and then counted by machines. Dr. Stein denies that the machines are not connected to the internet, and denies any implication by the Attorney General that a direct connection to the internet is required for an optical scanner or tabulator to be hacked for several reasons. For example, the software loaded into the machines, including ballots or the votes

themselves, provided to tabulators, are transmitted over the internet and copied from machines directly connected to the internet. And machines are programmed using removable media that have been previously used in machines that are directly connected to the internet. For further elaboration, Dr. Stein refers this Honorable Court to the seven expert affidavits filed in *Stein v. Thomas, supra*. Dr. Stein therefore denies that there is not evidence of fraud or mistake, denies any suggestion that she was required to provide such evidence, and respectfully refers the Honorable Court to her responses to the allegations in Paragraph 2 of the Complaint set forth above.

CAUSES OF ACTION

COUNT I – MANDAMUS PROHIBITING RECOUNT

13. Dr. Stein repeats, reiterates and realleges every denial contained in Paragraphs 1 through 12 of this Answer with the same force and effect as if fully set forth herein.

14. In response to the allegations in Paragraph 14 of the Complaint, Dr. Stein denies that the State Defendants have a legal duty—or even any authority—to deny Dr. Stein’s petition for a recount, and respectfully refers the Honorable Court to her responses to the allegations in Paragraph 4 of the Complaint set forth above. Dr. Stein further denies that she is not an “aggrieved” party under Mich. Comp. Laws § 168.879(1)(b), and therefore failed to satisfy the statutory prerequisites for obtaining a recount, both because the statute requires only that Dr. Stein *allege* and not establish that she is aggrieved, and because Dr. Stein—and every citizen of Michigan—is aggrieved if the votes cast for her, and the votes cast for others in the election in which she ran, were improperly tabulated. For evidence that votes may have been improperly counted due to

either fraud or mistake, Dr. Stein respectfully refers the Honorable Court to her filings in *Stein v. Thomas*, No. 16-cv-14233 (E.D. Mich. Dec. 2, 2016). Conclusive proof as to whether votes were improperly tabulated can be obtained only through a hand recount of all ballots.

15. In response to the allegations in Paragraph 15 of the Complaint, Dr. Stein denies that Michigan law allows only a candidate who has been aggrieved to seek a recount. The law requires the Board of State Canvassers to conduct a recount on the petition of any candidate who “*alleges* that the candidate is aggrieved on account of fraud or mistake in the canvass of the votes.” Mich. Comp. Laws § 168.879(1)(b) (emphasis added).

16. In response to the allegations in Paragraph 16 of the Complaint, Dr. Stein admits that she received approximately 1.07% of the vote, and that she is unlikely to win Michigan’s electoral votes in a recount. Dr. Stein denies that she has not been “aggrieved” by fraud or mistake in the election or that she is required to prove that she was aggrieved and respectfully refers the Honorable Court to her responses to the allegations in Paragraph 14 of the Complaint set forth above.

17. In response to the allegations in Paragraph 17 of the Complaint, Dr. Stein denies that the Court should, or even can, order the Board of State Canvassers and Director Thomas to deny Dr. Stein’s petition for a recount and respectfully refers the Honorable Court to her responses to each allegation in Complaint, and in particular her responses to the allegations in Paragraphs 2, 4, 5, and 14 of the Complaint set forth above.

**COUNT II – MANDAMUS ORDERING COMPLIANCE WITH MICH. COMP. LAWS
168.882(3)**

18. Dr. Stein repeats, reiterates and realleges every denial contained in Paragraphs 1 through 17 of this Answer with the same force and effect as if fully set forth herein.

19. In response to the allegations in Paragraph 18 of the Complaint, Dr. Stein admits that the Attorney General has accurately quoted Mich. Comp. Laws § 168.882(3), but denies any implication that that statute provides authority for the relief that the Attorney General requests. Dr. Stein respectfully refers the Honorable Court to her responses to the allegations in Paragraph 5 of the Complaint set forth above.

20. Dr. Stein admits the allegations in Paragraph 19 of the Complaint.

21. In response to the allegations in Paragraph 20 of the Complaint, Dr. Stein denies that the Court should, or even can, order the Board of State Canvassers and Director Thomas to immediately cease a recount and respectfully refers the Honorable Court to her responses to each allegation in Complaint, and in particular her responses to the allegations in Paragraphs 2, 4, 5, and 14 of the Complaint set forth above.

22. In response to the allegations in Paragraph 21 of the Complaint, Dr. Stein denies that the Attorney General has any right to the relief requested and respectfully refers the Honorable Court to her responses to each allegation in Complaint, and in particular her responses to the allegations in Paragraphs 2, 4, 5, and 14 of the Complaint set forth above.

**COUNT III – MANDAMUS REQUIRING DEFENDANTS TO COMPLETE ANY
RECOUNT AND CERTIFY ELECTORS BY DECEMBER 13, 2016**

23. Dr. Stein repeats, reiterates and realleges every denial contained in Paragraphs 1 through 22 of this Answer with the same force and effect as if fully set forth herein.

24. In response to the allegations in Paragraph 22 of the Complaint, Dr. Stein admits that the Attorney General has correctly cited the import of Article III, § 2, cl. 2 of the U.S. Constitution as construed by the U.S. Supreme Court in *Bush v. Gore*, 531 U.S. 98 (2000).

25. In response to the allegations in Paragraph 23, Dr. Stein admits that Michigan's laws provide for popular election of delegates to the Electoral College and joins the Attorney General in venerating the principle of ensuring Michigan voters' voices be accurately heard in the election process. Dr. Stein decries the Attorney General's efforts to frustrate that principle in practice.

26. In response to the allegations in Paragraph 24 of the Complaint, Dr. Stein admits that if the recount is not resolved by December 13, 2016, Michigan risks being unable to select electors for the Electoral College.

27. In response to the allegations in Paragraph 25 of the Complaint, Dr. Stein admits that Michigan's electors must be certified on or before December 13, 2016 in order for them to vote in the Electoral College.

28. In response to the allegations in Paragraph 26, Dr. Stein does not object to an order directing that the recount be completed by December 13, 2016, and denies that there is any legal basis or need for an order directing certification of the initial elector results announced on November 28, 2016. Dr. Stein condemns the Attorney General's eagerness to certify results that have been called into question, as both she and the people

of Michigan are entitled to have the previously certified results verified through the recount process—a process that is designed and prepared to be completed before December 13 if it is allowed to proceed without further interference by the Attorney General and Mr. Trump.

29. In response to the allegations in Paragraph 27, Dr. Stein denies that the Court should, or can, order a halt to the recount process based on the number of votes Dr. Stein receives. The Attorney General does not cite any legal basis for his requested relief. The *only* legal basis for discontinuing a recount is “[i]f the person petitioning for such recount shall withdraw [her] petition or discontinue the recount before the completion thereof.” Mich. Comp. Law § 168.893.

30. In response to the allegations in Paragraph 28 of the Complaint, Dr. Stein denies that the Attorney General has any right to the relief requested and respectfully refers the Honorable Court to her responses to each allegation in Complaint, and in particular her responses to the allegations in Paragraphs 2, 4, 5, and 14 of the Complaint set forth above.

COUNT IV - MANDAMUS ORDERING ANY RECOUNT TO PROCEED ELECTRONICALLY

31. Dr. Stein repeats, reiterates and realleges every denial contained in Paragraphs 1 through 30 of this Answer with the same force and effect as if fully set forth herein.

32. In response to the allegations in Paragraph 29 of the Complaint, Dr. Stein admits that the law gives the Board of State Canvassers discretion to conduct recounts either manually or electronically, and denies that that discretion is cabined by any mandate that Michigan’s electors participate in the Electoral College. Dr. Stein further

notes that the Attorney General and Mr. Trump, and not the Board, threaten to jeopardize Michigan's votes in the Electoral College through their campaign to delay the start of the recount.

33. In response to the allegations in Paragraph 30, Dr. Stein denies that conducting a statewide hand recount jeopardizes Michigan's votes in the Electoral College, and respectfully refers the Honorable Court to statements by Director Thomas and other employees of the Bureau of Elections at the November 28 and December 2 meetings of the Board of State Canvassers. Those statements confirm that, if the Attorney General and Mr. Trump end their baseless interference with the process, the recount is ready to begin and can be completed by December 13. They further confirm that an electronic recount is likely to be more burdensome, costly, and time consuming than a hand recount, which has long been the standard practice in this state and for which the Bureau of Elections has already fully prepared.

34. In response to the allegations in Paragraph 31 of the Complaint, Dr. Stein denies that the court should, or can, direct that an electronic recount proceed. Dr. Stein respectfully refers the Court to her responses to each allegation in Complaint, and in particular her responses to the allegations in Paragraphs 2, 5, and 30 of the Complaint set forth above.

35. In response to the allegations in Paragraph 32 of the Complaint, Dr. Stein denies that the Attorney General has any right to the relief requested and respectfully refers the Honorable Court to her responses to each allegation in Complaint, and in particular her responses to the allegations in Paragraphs 2, 5, and 30 of the Complaint set forth above.

Dated: December 3, 2016
Southfield, Michigan

GOODMAN ACKER, P.C.

/s/ Mark Brewer
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** Pro hac vice applications pending*

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Plaintiff-Appellant,

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Defendants-Appellees.

BRIEF IN SUPPORT

JILL STEIN relies upon the applicable case and statutory law and the Michigan Court Rules.

Dated: December 3, 2016

GOODMAN ACKER, P.C.

/s/ Mark Brewer

Mark Brewer

Attorney for Jill Stein

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Defendants-Appellees.

NOTICE OF HEARING

PLEASE TAKE NOTICE that the attached Motion to Intervene as Party Defendant and for Immediate Consideration will be brought on for Hearing at a date and time set by the Court.

Dated: December 3, 2016

GOODMAN ACKER, P.C.

/s/ Mark Brewer

Mark Brewer

Attorney for Jill Stein

STATE OF MICHIGAN
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PROOF OF SERVICE

The undersigned certifies that a copy of Intervening Defendant's Motion to Intervene and for Immediate Consideration, Brief in Support, Notice of Hearing and this Proof of Service was served upon all counsel of record by using the Court's efile and eserve system on December 3, 2016.

/s/ Mark Brewer
MARK BREWER

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