APPEAL NO. 16-2690

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Jill Stein, et al.,
Plaintiffs-Appellees,

v.

Christopher M. Thomas, et al.,

Defendants-Appellants.

Bill Schuette, Attorney General
Intervenor-Defendant,

and

Michigan Republican Party,
Intervenor-Appellant.

On Appeal from the United States District Court
For the Eastern District of Michigan Southern Division
Case No. 2:16-cv-14233
Judge Mark A. Goldsmith

INTERVENOR-APPELLANT MICHIGAN REPUBLICAN PARTY'S EMERGENCY PETITION FOR INITIAL HEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Intervenor-Appellant Michigan Republican Party states as follows:

Michigan Republican Party is not a parent, subsidiary, or other affiliate of a publicly owned corporation, nor does a publicly owned corporation have any interest in the Michigan Republican Party.

INTERVENOR-APPELLANT MICHIGAN REPUBLICAN PARTY'S EMERGENCY PETITION FOR INITIAL HEARING EN BANC

Intervenor-Appellant Michigan Republican Party seeks initial hearing en banc of this appeal on an issue of exceptional importance: whether a voter or a candidate—in certain, undefined circumstances—has a constitutional right to force a statewide recount of an election without any evidence that the election in question was affected by fraud or other improprieties. *See* FED. R. APP. P. 35(a).

INTRODUCTION

Invoking Plaintiffs' "fundamental right" to participate in elections that are both "conducted fairly" and also "perceived to be fairly conducted," Order at 6, the district court ordered Michigan immediately to begin recounting millions of ballots in the 2016 Presidential election. It did so at the request of Green Party presidential Candidate Dr. Jill Stein, who received barely 1 percent of the votes cast in that election, and who thus has understandably conceded that her recount is "not about flipping the vote" or "chang[ing] the result." Dr. Jill Stein on Twitter, TWITTER (Nov. 30, 2016), archived at https://perma.cc/4ZCH-YDPS ("… #Recount2016 is about election integrity, not about flipping the vote …"); Stein, *Why the recount matters: Jill Stein*, USA TODAY (Dec. 1, 2016), archived at https://perma.cc/VZK4-5BVF ("Our goal is not to change the result of the election."). Stein was joined in the action by Louis Novak, a Michigan resident.

Neither Stein nor Novak has evidence of wrongdoing in the Michigan presidential election. All they have are conspiracy theories—backed by wholesale speculation—that nameless actors interfered with the election. *See* D.Ct. ECF No. 1 at ¶3. Nonetheless, the district court, believing that the "perceived integrity of the presidential election as it was conducted in Michigan [is] at stake," ordered federal intervention in, and control over, the state recount process: "the recount shall commence [in 12 hours] and must continue until further order of the Court." Order (attached as Exhibit 2) at 7 (instructing that state and local government officials "assemble necessary staff to work sufficient hours to assure that the recount is completed" in accordance with the Order).

Setting aside for a moment whether Stein and Novak enjoy the fundamental right to invoke immediate recount proceedings to ensure the "perceived integrity" of the presidential election, the district court should never have answered that question to begin with, given that both Stein and Novak lack Article III standing to seek that relief. Stein, for her part, has not alleged an injury-in-fact likely to be redressed by any ruling related to the need for a recount. She does not contend that a Michigan recount will result in her securing Michigan's electoral votes, and in fact has conceded it will not. Novak has no better claim to standing. Even if Novak voted in the election (and there seemingly is no allegation or evidence confirming

as much), there are not factual allegations or evidence that give rise to a plausible assumption that his vote was not properly counted.

Ignoring these threshold concerns, the court below turned to the merits of Plaintiffs' constitutional challenge. Concluding that—at least in certain circumstances inadequately defined by the order—voters and candidates have a constitutional right to demand a recount based on mere suspicion of electoral improprieties, the district court unleashed a statewide recount upon the people of Michigan. No one doubts the fundamental nature of the right to vote, *see* Order at 3. But no court, to our knowledge, has read that privilege to include not only the right to cast one's vote, but also the right to request a recount *after* the vote to ensure an election's integrity. If all Americans now enjoy that right, ballot counting could become year-round sport.

Instead, Stein's request for extraordinary relief should have been denied. As just explained, there is no chance for success on the merits of Stein's constitutional claim. And Stein's own actions undercut her claim of irreparable injury. Indeed, despite having suspicions about the 2016 presidential election's integrity as soon as it concluded on November 8, Stein waited until November 30 to file her recount request, less than an hour before the deadline for doing so. Anyone fearing an irreparable injury of the magnitude suggested here surely would have acted sooner.

Stein did not, and she now has only herself to blame for much of the purported emergency she now asserts.

Given the exceptional importance of the constitutional question answered below, the exhaustive nature and steep costs of the statewide recount sprung upon the state of Michigan, the threat the decision below presents to Michigan's participation in the Electoral College, and the fact that Michigan's state courts have yet to determine for themselves whether Michigan law requires a recount to begin with, today's case deserves the en banc court's swift attention. (A more extensive factual discussion can be found in the Party's Emergency Motion for Stay, which was filed contemporaneously with this petition.)

ARGUMENT

I. IMMEDIATE EN BANC REVIEW IS APPROPRIATE TO RESOLVE THIS QUESTION OF EXCEPTIONAL IMPORTANCE.

Rule 35 of the Federal Rules of Appellate Procedure permits en banc review in cases involving "question[s] of exceptional importance." This is one such case. The district court invented a constitutional right to a recount. And it did so in the context of the Presidential election, where a statewide recount risks a state's certification of Presidential Electors by the December 13 "safe harbor" deadline.

Specifically, the court below held that voters and candidates can, at least in unspecified circumstances, force states to recount all the votes cast in an election, and that they may do so *without* any showing of harm. If that is true, it is a sea

change in election law, one that should be settled within the Sixth Circuit. If it is false, the district court's decision should be pulled from the law books, preventing it from being used to buffalo taxpayers into funding future unnecessary recounts.

II. THE DISTRICT COURT'S DECISION SHOULD BE STAYED.

In deciding whether to stay a temporary restraining order, this Court applies "the same factors considered in determining whether to issue a TRO or preliminary injunction." *Ohio Republican Party v. Brunner*, 543 F.3d 357, 361 (6th Cir. 2008) (quoting *Ne. Ohio Coal. for Homeless & Serv. Employees Int'l Union, Local 1199 v. Blackwell*, 467 F.3d 999, 1009 (6th Cir. 2006)). There are four such factors: (1) whether the movant is likely to succeed on the merits, (2) whether the movant would suffer irreparable injury without a stay, (3) whether a stay would cause substantial harm to others, and (4) whether a stay would serve the public interest. *Id*. The Party meets each one of these.

A. Stein has not established any likelihood of success on her constitutional claims.

1. Before getting to the merits, an antecedent problem requires attention: neither Stein nor Navaro has Article III standing to bring this suit.

"A party has standing only if he shows that he has suffered an 'injury in fact,' that the injury is 'fairly traceable' to the conduct being challenged, and that the injury will likely be 'redressed' by a favorable decision." *Wittman v. Personhuballah*, 136 S. Ct. 1732, 1736 (2016) Stein fails this requirement. She

has not alleged an injury-in-fact likely to be redressed by any ruling related to the need for a recount. She does not contend that she will (or even might) win Michigan's electoral votes after a recount. Nor, in any event, would a victory in Michigan send Stein to the White House. After all, Stein gained no more than 3 percent of the vote in any state where she appeared on the ballot. *See* America's Election Headquarters, FOX NEWS, http://www.foxnews.com/politics/elections/2016/presidential-election-headquarters (last visited Nov. 29, 2016). Accordingly, she has failed to allege facts showing that she has suffered a constitutionally cognizable injury.

Plaintiff Novak fares no better. Novak describes himself as a "Michigan voter" (although he never alleges or proves he voted in the election). Assuming Novak did vote, he still has not alleged any facts giving rise to a plausible assumption that his vote was not properly counted. He is left with only a "merely speculative" injury, one that does not meet Article III's injury-in-fact requirement for establishing standing. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992).

Insofar as Navaro seeks to defend the interest in a free and fair election, he has no standing to assert that grievance either. It is a "generally available grievance," one for which relief benefits Navaro no more "than it does the public at large." *Id.* at 573–74. That generalized grievance also "does not state an Article III case or controversy." And even if Novaro could seek relief for a generalized

grievance, he failed to allege any facts plausibly suggesting that his votes were not accurately tabulated.

2. On to the merits. The district court's opinion is based on the assumption that Stein has the right to a recount under Michigan law. Order at 5. (Whether she does indeed have that right is now being litigated in state court, but this brief accepts the district court's assumption for the sake of argument.) Under Michigan law, objections to the recount can be filed with the State Board of Canvassers. Mich. Comp. Laws § 168.882(3). Once those objections are resolved, Michigan imposes a two-business-day waiting period before the recount begins, to allow for an expedited appeal and to afford election officials time to ensure recount procedures are universally (and uniformly) understood. *Id*. According to the District court, there is a "credible threat that the recount, if delayed, would not be completed by the 'safe harbor' day," Order at 5—the "safe harbor day" being December 13, which is the date by which states must resolve election contests to be assured participation in the Electoral College, 3 U.S.C. § 5. Therefore, the court concluded, the delay violates the First and Fourteenth Amendment.

The trouble with this argument is that the conclusion does not follow from the premises. It is true that December 13 is the date by which Michigan must resolve any dispute over the presidential election to be guaranteed an opportunity to participate in the Electoral College. *See* 3 U.S.C. § 5. But there is no reason to

think this statutory end-date gives rise to a constitutionally based start date by which all recounts must begin.

It is also true 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. But the delay does not jeopardize either right, because the votes *already have been* fairly and accurately tabulated. The district court cites no evidence to the contrary, no surprise given the fact that Plaintiffs did not present anything worthy of a court's consideration.

At best, Plaintiffs presented evidence of how some have speculated that the election results *could have* been inaccurate, something that can only be disproven by a recount. By that logic, however, there is a constitutional right to a recount in every state, anytime someone thinks that votes might have been inaccurately counted, without regard to whether that person has evidence suggesting this is so. And the tab for those recounts would be the state's alone, despite the ubiquity of state laws requiring recount requestors to pay some or all of the recount fee. After all, just as the right to cast a ballot cannot be infringed by a poll tax, *see generally Harper v. Bd. of Educ.*, 383 U.S. 663 (1966), the recount right similarly could not encumbered by state fees.

In addition, the district court relied on a misapplication of *Burdick v. Takushi*, 504 U.S. 428 (1992). Under *Burdick*, 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 plaintiff's rights." *Burdick*, 504 U.S. at 434. The district court, however, made little effort to consider Michigan's interest in ensuring an orderly and accurate recount by giving the relevant actors two business days to prepare for that recount. It simply asserted that the State's administrative and financial interests—not to mention its interest in ensuring the recount is perceived as proceeding in a reliable manner—"pale in comparison" to Plaintiffs' interests in assuring "the perceived integrity of the presidential election." Order at 4. But if that were how *Burdick* worked, the balance would *always* tip to the plaintiff in any election law case, a result completely at odds with *Burdick*'s express refusal to assess election laws under a strict-scrutiny standard. 504 U.S. at 432.

Burdick adds that "the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." *Id*. at 434. Here, there is no evidence that Plaintiffs' rights were burdened *at all*, tilting the balance even more heavily toward the State. (It is perhaps for these reasons why one election-law

scholar—Derek Muller, of Pepperdine University Law School—swiftly characterized "[t]he Michigan federal court's analysis of the *Burdick* balancing test" as "about the worst I've read." *See* Derek T. Muller, TWITTER (Dec. 5, 2016), archived at https://twitter.com/derektmuller/status/805784844659662848).)

3. There is another problem with Stein and Novak's request: it comes much too late in the day. As the State argued before the district court, Stein's suit should have been barred by the doctrine of laches. In the Sixth Circuit, a party asserting the defense of laches must show: "(1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting it." *Herman Miller, Inc. v. Palazzetti Imports and Exports, Inc.*, 270 F.3d 298, 320 (6th Cir. 2001). As the district court noted, there is a strong presumption that a delay in filing is reasonable when the filing complies with the statute of limitations. *Chirco v. Crosswinds Cmtys. Inc.*, 474 F.3d 227, 233 (6th Cir. 2007). But this presumption is not absolute, and "just as various tolling doctrines can be used to lengthen the period for suit specified in a statute of limitations, so laches can be used to contract it." *Id.* at 234 (citation omitted). "[A] flat proscription . . . against the doctrine of laches in cases involving a . . . statutory claim is both unnecessary and unwise." *Id.* at 233-34.

This case is a perfect example of why that is so. *First*, Stein demonstrated a "lack of diligence" in this matter. The premise of Stein's claim is that Michigan's

election machinery is vulnerable to attack. The machinery has not changed in years. Nor is the evidence that Stein relies upon in an attempt to support this theory new. *See* Exhibits attached to Pls.' Mot. for TRO (citing studies and research from 2000, 2004, 2005, 2007, 2008, and 2011).

Stein herself contends that "the vulnerability of American voting machines have been known for some time[.]" *See* Pls.' Br. In Support of TRO, D.Ct. ECF No. 2 at 12. If Stein's motivation for this recount was truly to ensure election integrity, she could have raised these issues *before* the election. For example, several of Stein's experts before the district court touted "risk-limiting audits" as "the gold standard" for reliably ensuring the correctness of elections. Yet Stein made no effort to proactively fix the alleged problems with Michigan's election procedures and implement risk-limiting audits.

Likewise, if Stein's motivation for the recount was truly to ensure election integrity, and she had specific concerns about what had occurred during Michigan's election in 2016, she could have raised these concerns on *November 9, 2016*, immediately following the election. Michigan law allows for such a challenge. *See Santia v. Bd. of State Canvassers*, 391 N.W.2d 504 (Mich. Ct. App. 1986). And if Stein's motivation for the recount was truly to ensure election integrity and, as she now contends, she was concerned with the State meeting the December 13 safe harbor deadline, she could have filed her petition for recount immediately fol-

lowing the Board of Canvassers' certification of the election results on November 28.

But Stein did not do so. She did not raise these concerns prior to the election, as she could have done. She did not raise these concerns immediately following the election, as she could have done. And she did not raise these concerns immediately following Michigan's certification of the election results, as she could have done. Instead, she waited until November 30, 2016—just minutes before the deadline—to file her conclusory petition for recount. She now has the audacity to argue that it is an unconstitutional Michigan law, and the effect of the President-elect's objections to her petition for recount (filed less than 24 hours after the petition itself), that endanger Michigan's Electoral College votes. It is not. It is Stein's own unjustified delay that has caused the concerns she now raises. If ever there were a case of "lack of diligence" by a party, *Herman Miller*, 270 F.3d at 320, this is it.

The district court also erred in finding that the second factor—prejudice to a party asserting the defense of laches—was not satisfied. The court noted that there is "no reason to believe that [the State or Michigan Republican Party] have been prejudiced" by Stein's lack of diligence. This is wrong. As argued before the district court, the changes to the recount schedule, to start the recount before the statutory start time, has the enormous financial impact of causing Michigan's taxpayers to shoulder massive expenses to undertake a recount likely to be ceased under the

Michigan Election Law. The changes to the schedule have also caused a logistical nightmare, making it difficult to train and recruit volunteers to assist in conducting an accurate recount. These harms have only been compounded by the district court's failure to apply Michigan law. The State, county clerks, and the Michigan Republican Party are now left scrambling to implement a statewide recount with less than twelve hours' notice. And they are ordered to do so (1) when it was thought that the recount would not begin until Tuesday evening or Wednesday morning, pursuant to Michigan Election Law, and (2) the Michigan state courts have before them the question whether Michigan law even allows a fourth-place, one percent finisher to request a recount.

B. The District Court's Order Irreparably Harms The Party.

Stein and Novak faced no fear of irreparable injury absent emergency relief. But the same cannot be said for the Michigan Republican Party, which now faces irreparable harm from the district court's order. The Party is responsible for advising candidates on election laws, and for helping monitor elections. Without clear rules, it cannot accomplish these tasks. Yet the decision below muddies constitutional waters so thoroughly, the Party can hardly carry out its election-related duties. And the Party is subject to further order from the court, both now and in the future. Unless the district court's order is stayed, that confusion will persist through this election and beyond.

C. Neither Plaintiff Nor Anyone Else Will Be Harmed If The Order Is Stayed.

There is no evidence that Stein, Novak, or anyone else has been harmed by the way in which Michigan records voters' votes. There is, therefore, no reason to think that anyone will be deprived of any constitutional right by a stay of the district court's judgment.

D. Granting A Stay Would Serve The Public Interest.

Entering a stay will materially *advance* the public interest. The recount in question needlessly undermines confidence in Michigan's elections, and forces the State to pay $4 million for a recount admittedly undertaken for completely academic reasons. Perhaps Michigan's courts will determine that Michigan's laws require those costs really do need to be borne. But if not, entering a stay of the district court's order will save the State from wasting millions of dollars of taxpayer money, and thousands of hours of manpower

CONCLUSION AND RELIEF REQUESTED

The Party respectfully asks this Court to grant the petition for initial hearing en banc, stay the district court's order, and reverse the district court's order.

Dated: December 5, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned attorney hereby certifies that this motion complies with the type-volume limitations of Federal Rule of Appellate Procedure 35(b)(2)(A). The brief contains 3,378 words (excluding those parts of the brief exempted by Federal Rule 32(f), and was prepared using Microsoft Word 2007.

s/ Chad A. Readler
Counsel for Michigan Republican Party

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of December, 2016, I submitted to the Clerk of Courts and Deputy Clerk of Courts for the United States Court of Appeals for the Sixth Circuit this Emergency Petition For Initial Hearing En Banc via e-mail pursuant to instructions from the Clerk's Office for emergency filings, and further certify that opposing counsel was copied on that e-mail.

s/ Chad A. Readler
Counsel for Michigan Republican Party