UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JILL STEIN and LOUIS NOVAK,

Plaintiffs,

v

CHRISTOPHER THOMAS, et al.,

Defendants,

BILL SCHUETTE, Attorney General, and MICHIGAN REPUBLICAN PARTY,

Intervenors-Defendants.

No. 2:16-cv-14233-MAG-EAS

HON. MARK A. GOLDSMITH

MAG. ELIZABETH A. STAFFORD

MICHIGAN ATTORNEY GENERAL BILL SCHUETTE'S EMERGENCY MOTION TO IMMEDIATELY DISSOLVE TEMPORARY RESTRAINING ORDER AND BRIEF IN SUPPORT

On December 5, 2016, this Court issued an opinion and order granting Plaintiffs' motion for a temporary restraining order and directing the Michigan Board of Canvassers and Michigan's Director of Elections to "commence" the Michigan recount notwithstanding the two-day tolling period in Mich. Comp. Laws § 168.882(3). The ruling contemplated that the recount might "later be halted." 12/5/16 Op. &

Order at 8 n.2. The Sixth Circuit affirmed the TRO in an order issued earlier this evening (Exhibit 1), while recognizing the limited nature of this Court's ruling. 6th Cir. Order at 6 (noting that this Court's order "merely required the recount to start a day-and-a-half earlier than it otherwise would have"); *id.* at 8 (holding that this Court "did not abuse its discretion by issuing a temporary restraining order halting *operation of the waiting period law*" (emphasis added)).

Nearly simultaneously, the Michigan Court of Appeals released its own published opinion (Exhibit 2) granting Michigan Attorney General Bill Schuette's request for a writ of mandamus and directing the Board of State Canvassers "to reject the November 30, 2016 petition of candidate Stein the precipitated the current recount process." Mich. Ct. App. Op. at 7. The Court of Appeals held that candidate Stein is not an "aggrieved" party under Mich. Comp. Laws § 168.879(1)(b). *Id.* As a matter of Michigan law, then, it is as though Stein's recount petition was never accepted and the recount process never began.

The Sixth Circuit, anticipating this possibility, had already clarified in its order that the question whether "Stein had the right to initiate the recount in the first place" is "an issue of Michigan state law

that [was] not before [the panel], and will in any event be determined by the Michigan courts." 6th Cir. Order at 3. And in the event "the Michigan courts determine that Plaintiffs' recount is improper under Michigan state law for any reason," as has now happened, the Sixth Circuit expected that this Court would of course "entertain any properly filed motions to dissolve or modify" the TRO. *Id.* at 8. Accordingly, Attorney General Schuette moves this Court to dissolve the TRO.[1]

ARGUMENT

The Michigan Court of Appeals determined conclusively that candidate Jill Stein is not an "aggrieved" candidate entitled to a recount under Michigan law. Mich. Ct. App. Op. 4–7. And the Sixth Circuit determined conclusively that whether Plaintiffs are entitled to a recount is a question of state law, to which it expects this Court to defer. 6th Cir. Order at 8. This Court is precluded under the law-of-

[1] As required by Local Rule 7.1(a)(2)(A), the State Defendants and the Michigan Republican Party have all consented to the filing of this motion. Counsel has attempted to obtain concurrence from Plaintiffs' counsel, by voicemail and email, and Plaintiffs' counsel has not yet responded.

the-case doctrine from reexamining that issue. *Bowling v. Pfizer, Inc.*, 132 F.3d 1147, 1150 (6th Cir. 1998).

The Sixth Circuit throughout its order emphasized that it is for the Michigan courts, and not this Court, to determine whether Stein is an "aggrieved" candidate entitled to a recount under Michigan law. The Sixth Circuit expressly held that this question is "*best left to the Michigan courts* at this stage." 6th Cir. Order at 7; accord *id.* at 3 (whether Stein "had the right to initiate the recount in the first place" is "an *issue of Michigan state law* . . . and *will* . . . *be determined by the Michigan courts*") (emphasis added); *id.* (noting that "Michigan law" provides for election recounts and that Plaintiffs have invoked the recount right "created by Michigan law"); *id.* (explaining that while the "Michigan state courts may eventually decide otherwise, to date, no court has held that Stein and Novak's recount petition was invalid"); *id.* at 5 (referring to "right to a recount *provided under Michigan law*" and "*state* recount right") (emphasis added); *id.* at 5–6 (noting that "*once a state legislature vests its citizens with election rights*," those rights are fundamental and protectable under the federal Constitution) (emphasis added); *id.* at 6 (referring to "*state-recognized recount right*"); *id.* (noting

Plaintiffs' right to invoke the recount procedures "*afforded them under Michigan law*") (emphasis added); *id.* at 6–7 (noting "*state-created* recount right") (emphasis added).

This Court should accordingly dissolve the TRO and do so immediately. This Court's order was properly limited to precluding Defendants from enforcing the statutory two-day waiting period before commencing the recount—as the Sixth Circuit recognized—and that two-day period has now passed. And there is no other basis for this Court's continuing jurisdiction. Because Michigan's election law is generally applicable and non-discriminatory, it is deemed to impose no more than a minimal burden, and it is presumed to pass constitutional muster. *Ohio Democratic Party v. Husted*, 834 F.3d 620, 631 (6th Cir. 2016) (citing *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 200, 202–03 (2008)).

This Court declined to require Plaintiffs to post a bond to cover the immense public cost of a recount—a cost that will be borne almost entirely by Michigan taxpayers—because it reasoned that Stein's deposit of just under $1 million provided "sufficient funds from which to compensate Michigan for the *start* of the recount before December 7,

should the recount later be halted." 12/5/16 Op. & Order at at 8 n.2 (emphasis added); *id*. at 4 (noting that deposit "covers the cost of starting the recount roughly a day or two before it would otherwise commence if the two-day rule were observed"). The Michigan Court of Appeals has now directed that the recount be halted.

For every moment the recount persists, Michigan taxpayers will be harmed irreparably by having to pay for a recount that Michigan law does not authorize and which has been estimated to cost $5 million. Chad Livengood, *Mich. recount to start Friday barring Trump challenge*, The Detroit News (Dec. 1, 2016), available at goo.gl/wNq0RQ (last visited Dec. 1, 2016). More important, as the Chief Justice of the Supreme Court has stated, "any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) (internal quotation omitted). The TRO should be dissolved immediately.

Respectfully submitted,

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Dated: December 6, 2016

CERTIFICATE OF SERVICE

I hereby certify that on December 6, 2016, I electronically filed the above document(s) with the Clerk of the Court using the ECF System, which will provide electronic copies to counsel of record.

/s/ *John Bursch*
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NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 16-2690

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Dec 06, 2016
DEBORAH S. HUNT, Clerk

JILL STEIN and LOUIS NOVAK,

Plaintiffs-Appellees,

v.

CHRISTOPHER M. THOMAS, in his official capacity as Director of Elections for the State of Michigan,

&

JEANETTE BRADSHAW, NORMAN D. SHINKLE, JULIE MATUZAK, and COLLEEN PERO, in their official capacities as Members of the Michigan Board of Canvassers,

Defendants,

&

The MICHIGAN REPUBLICAN PARTY,

&

WILLIAM D. SCHUETTE, in his official capacity as Attorney General of the State of Michigan,

Intervenors-Defendants-Appellants.

O R D E R

Before: CLAY, MCKEAGUE, and DONALD, Circuit Judges.

Defendant-Intervenors, the Michigan Republican Party and Michigan Attorney General Bill Schuette ("Defendants"), appeal the temporary restraining order issued by the district court

on December 5, 2016, requiring Michigan election officials to commence recounting the presidential votes cast in the recent presidential election two days earlier than would have been provided for under Michigan law. For the following reasons, we **AFFIRM** the district court's temporary restraining order.[1]

BACKGROUND

On November 8, 2016, the nation conducted a general election to determine, among other offices, the forty-fifth President of the United States. Republican Party presidential candidate Donald J. Trump ("Trump") was declared the winner in the State of Michigan by 10,704 votes.

On November 30, 2016, Green Party presidential candidate Jill Stein ("Stein") petitioned the State of Michigan for a recount of its presidential ballots. Trump subsequently objected to the recount, arguing among other things that the recount was invalid under Michigan law. On December 2, 2016, the Michigan State Board of Canvassers deadlocked as to Trump's objections. Pursuant to Michigan law, Trump's objections therefore were automatically rejected. *See* Mich. Comp. Laws § 168.22d(2). Michigan law provides that after the State Board of Canvassers resolves objections to a recount, the recount cannot begin until two business days have passed ("waiting period law"). *See id.* § 168.882(3). Because December 2, 2016 was a Friday, the recount therefore could not begin until Wednesday, December 7, 2016, two business days and four days total after the Board of Canvassers' decision.

Federal law requires that all disputes over a state's delegation to the Electoral College be resolved by December 13, 2016. *See* 3 U.S.C. § 5. On December 2, 2016, Stein and Michigan voter Louis Novak filed the instant federal lawsuit against Michigan election officials in the Eastern District of Michigan asserting that Michigan's waiting period law would make it impossible for the recount to be completed by the federal deadline. Plaintiffs asserted various First and Fourteenth Amendment claims under 42 U.S.C. § 1983 all seeking the same relief—an

[1] We **GRANT** Attorney General Schuette's motion to intervene in this appeal, but **DENY** his and the Michigan Republican Party's separate motions to stay the district court's order **AS MOOT**.

order requiring the recount to begin immediately without observing the waiting period law. Stein also filed an application for a temporary restraining order seeking the same relief. On December 5, 2016, the district court granted the restraining order and required the recount to begin at noon the same day. Defendants filed a notice of appeal in this Court challenging the restraining order, and have moved us for a stay of the district court's order.

While these federal proceedings were going on, Trump filed applications before the Michigan Court of Appeals and the Michigan Supreme Court attacking the recount on substantive grounds under Michigan law. The parties filed briefing before the Michigan Court of Appeals on December 5, 2016, and that court will hear arguments on the matter on December 6, 2016.

DISCUSSION

I. Article III Standing

At the outset, we are obliged to determine whether Article III standing exists to adjudicate this matter. We note that this is a separate question from whether a Stein had the right to initiate the recount in the first place, an issue of Michigan state law that is not before us, and will in any event be determined by the Michigan courts. In order to establish Article III standing, a party must demonstrate: (i) that she has suffered an injury in fact that is (ii) fairly traceable to the conduct being challenged, and (iii) the injury will likely be redressed by a favorable decision from the federal court. *See, e.g.*, *Wittman v. Personhuballah*, 136 S. Ct. 1732, 1736 (2016).

We hold that Stein and Novak have demonstrated Article III standing to bring this lawsuit. Michigan law provides for election recounts under certain circumstances. *See* Mich. Comp. Laws §§ 168.880 *et seq.* Stein and Novak have invoked the recount right created by Michigan law, and although the Michigan state courts may eventually decide otherwise, to date, no court has held that Stein and Novak's recount petition was invalid. Accordingly, Plaintiffs'

allegations that the waiting period law will make it functionally impossible to exercise their state law recount right alleges an injury in fact sufficient to satisfy Article III. This injury is fairly traceable to the waiting period law, which as the district court noted, would have eliminated roughly one-third of the time available for the recount.

Moreover, Plaintiffs' injury was redressable by a favorable order from the district court. Indeed, by obtaining the temporary restraining order Plaintiffs sought, the recount was initiated in sufficient time to be completed by the December 13, 2016 federal deadline. Accordingly, Plaintiffs are properly before our Court.

II. Appealability of the Temporary Restraining Order

Plaintiffs assert that we lack jurisdiction over this appeal because a temporary restraining order is not a reviewable interlocutory order. We disagree.

Generally, temporary restraining orders are not immediately appealable. *See Office of Pers. Mgmt. v. Am. Fed'n of Gov't Employees, AFL–CIO*, 473 U.S. 1301, 1303–05 (1985). We have acknowledged exceptions to this rule that permit appeal whenever irreparable harm will occur before the order expires, or the order requires "affirmative action" rather than simply preserving the status quo. *Ne. Ohio Coalition for Homeless & Serv. Emps. Int'l Union, Local 1199 v. Blackwell*, 467 F.3d 999, 1005–06 (6th Cir. 2006).

Here, the district court's temporary restraining order required affirmative action—it ordered Michigan officials to begin the recount two days before the time provided under Michigan law. We therefore hold that the district court's order was an appealable interlocutory order.

III. Propriety of the Temporary Restraining Order

We review a district court's decision to grant a temporary restraining order for abuse of discretion. *Id.* at 1009. "To determine whether a TRO should be stayed," we consider the same factors used to determine whether the TRO should be issued in the first place, including:

"(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." *Id.* "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). "For example, the probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury the movants will suffer absent the stay." *Blackwell*, 467 F.3d at 1009.

We hold that the district court did not abuse its discretion in granting the temporary restraining order at issue here. Plaintiffs have made a compelling showing that they will be irreparably harmed in the absence of the temporary restraining order. Defendant Thomas admitted before the district court that it would have been extremely difficult and unlikely—a "monumental undertaking"—for the State to have completed the recount before the December 13, 2016 federal deadline if it had observed the waiting period law. If the recount could not be completed by the federal deadline, the right to a recount provided under Michigan law would have been effectively worthless. Facing the potential that Plaintiffs' state recount right may have been deprived entirely by the waiting period law, we cannot say that the district court abused its discretion in determining that Plaintiffs would suffer irreparable harm without a TRO.

Because Plaintiffs made an extremely strong showing of irreparable harm, they were not required to make as a strong a showing of a likelihood of success on the merits. *Blackwell*, 467 F.3d at 1009. Plaintiffs met this lowered bar. As the district court recognized, once a state legislature vests its citizens with election rights, those rights are fundamental and are protectable by the First and Fourteenth Amendments. *See, e.g.*, *Bush v. Gore*, 531 U.S. 98, 104 (2000) (non-precedential); *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 476 (6th Cir. 2008). Plaintiffs made a sufficient showing that the State of Michigan granted them a right to a recount;

once that premise is established, we think it clear that the State could not use arbitrary or unreasonable procedural rules to make that right a nullity.

When evaluating whether state election procedures violate First and Fourteenth Amendment election rights, we use the framework set out by the Supreme Court in *Anderson v. Celebrezze*, 460 U.S. 780, 788–89 (1983), and *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). Under the *Anderson/Burdick* framework, we weigh the burden to a plaintiff's First and Fourteenth Amendment rights against the interests put forward by the State as justifications for its election procedures. *Burdick*, 504 U.S. at 434. Our inquiry is rigorous when the burden on a plaintiff's rights is severe, and more relaxed when the burden is slight or minimal. *Id.*

Here, as explained earlier, Plaintiffs would have essentially lost their state-recognized recount right entirely if the waiting period law had been followed. This is a severe burden, and requires us to closely scrutinize the justifications put forward for the waiting period. As the district court correctly recognized, the justification put forward by Defendants—that the waiting period allows for judicial review before the state spends resources on a recount—is simply not compelling enough to justify *de facto* nullifying Plaintiffs' right to invoke the recount procedures afforded them under Michigan law. The district court did not abuse its discretion in determining that Plaintiffs made a sufficient showing of success on the merits in light of the irreparable harm Plaintiffs would have suffered without relief.

The two other TRO factors also justify the district court's decision. First, the TRO did not cause substantial harm to the State of Michigan or its citizens; it merely required the recount to start a day-and-a-half earlier than it otherwise would have. Likewise, given that Michigan has chosen to provide for potential recounts, we believe the public interest was served by relaxing a procedural requirement that would have effectively nullified that right.

Finally, we wish to emphasize the narrowness of the question we decide today. We do not decide that there is a freestanding constitutional right to a recount, or that Plaintiffs validly

invoked a recount under Michigan law, or that Plaintiffs should necessarily prevail on the merits of this suit. We merely hold that given the strong showing of irreparable harm here, Plaintiffs' colorable arguments that their state-created recount right was being arbitrarily abridged, and the relatively minimal stakes involved in starting the recount slightly earlier than it otherwise would have, the district court did not abuse its discretion in granting a temporary restraining order.

IV. Defendants' Arguments

Defendants offer several arguments in support of their position, but we pause to address two briefly. First, Defendants argue that Plaintiffs could have initiated a recount or raised concerns about the vulnerability of Michigan's election machinery earlier than they did, and that therefore Plaintiffs' suit should be barred by the doctrine of laches. This argument lacks merit. Plaintiffs indisputably filed their recount petition within two days after the final certification of Michigan's presidential vote. *See* Mich. Comp. Laws § 168.880. We doubt that laches can ever be invoked when Plaintiffs have complied with statutory time limits. But in any event, Defendants have made no showing of the sort of bad faith or inexcusable delay necessary to invoke the doctrine here. Moreover, Plaintiffs do not ask this Court to find that Michigan's election results were tainted by fraud; they merely argue that the waiting period law was unconstitutional as applied to them. Given the narrowness of the issues properly before the Court, we decline to weigh in on any issues concerning the propriety of the recount or Michigan's presidential canvas, which are best left to the Michigan courts at this stage.

Second, Defendants urge us to abstain from deciding the questions presented in this appeal under the doctrines announced in *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941), and *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). *Pullman* abstention is appropriate where a litigant asks a federal court to reach a constitutional question predicated on the federal court's own, non-binding interpretation of state law. *Moore v. Sims*, 442 U.S. 415, 425 (1979). *Burford* abstention is appropriate "where timely and adequate state-court review is available and

(1) a case presents difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the results in the case at bar, or (2) the exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *Caudill v. Eubanks Farms, Inc.*, 301 F.3d 658, 660 (6th Cir. 2002).

Neither doctrine is appropriate here. We have not decided a single state law issue or interpreted a single Michigan statute in deciding this appeal. We merely took the waiting period law at face value, and evaluated whether the district court abused its discretion in temporarily restraining its operation. This inquiry involved only established federal standards governing TROs, and federal constitutional principles stemming from the First and Fourteenth Amendments. Because we did not decide any state law questions, *Pullman* and *Burford* are inapposite.

CONCLUSION

For the foregoing reasons, we hold that the district court did not abuse its discretion by issuing a temporary restraining order halting operation of the waiting period law. We therefore **AFFIRM** the district court's temporary restraining order. If, subsequently, the Michigan courts determine that Plaintiffs' recount is improper under Michigan state law for any reason, we expect the district court to entertain any properly filed motions to dissolve or modify its order in this case.

McKEAGUE, Circuit Judge, dissenting. Because it is obvious that the district court overstepped its bounds in numerous ways by inserting itself into what were orderly election processes in accordance with state law, I dissent from the denial of the motion to stay.

Let's consider the chronology once again. Presidential election candidate Jill Stein received approximately one percent of the nearly 4.8 million votes cast in Michigan in the presidential election that culminated on November 8, 2016. Results of the election have been

certified by the Board of State Canvassers and names of the presidential electors have been transmitted by the Michigan Governor to the United States Secretary of State, as required by federal law. Undeterred by the results of the election, Stein filed her petition for a recount under M.C.L. § 168.879, less than one week ago, on November 30, 2016, alleging she was "aggrieved on account of fraud or mistake." Objections to the request were filed on December 1, 2016, and the Board of State Canvassers timely addressed the matter, held a hearing, and rejected the objections on December 2. Michigan Director of Elections, defendant Christopher M. Thomas, in fulfillment of his duties and in compliance with M.C.L. § 168.882(3), thereupon directed that the recount would commence on December 7, after two business days had elapsed since the ruling of the Board. Thus, an orderly and *expedited* process for addressing Stein's request in accordance with state law was well under way.

Stein was not satisfied however. She commenced litigation in federal district court on December 2, demanding, in contravention of an undisputedly clear and unambiguous state law, that the recount be commenced *immediately*. She moved the court for a temporary restraining order enjoining enforcement of the state-law mandated "delay" until December 7. The district court took the extraordinary measure of scheduling a hearing on Sunday morning at 10:30 a.m., December 4, and issued a temporary restraining order requiring commencement of the recount at noon on Monday, December 5. That is, even though a temporary restraining order is an extraordinary remedy designed for the limited purpose of preserving the status quo pending further proceedings on the merits, *see University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981), the district court peremptorily intervened to *disrupt* the status quo. And the court did so on the thinnest of legal foundations—based on a speculative showing of harm and undefined showing of legal entitlement to relief.

The district court justified its decision by concluding that Stein had shown "a likelihood of success on the merits" of the claim that the two-day waiting period could result in a violation of the First Amendment right to vote, without even *identifying any* factual basis for Stein's allegation that she was aggrieved on account of fraud or mistake. Instead, the court relied implicitly on the showing that Michigan's voting machines, like voting machines across the nation, are vulnerable to *potential* hacking or cyberattack—despite the absence of any evidence of such tampering. Nor did the district court identify the precise nature of the supposed violation of the First Amendment right to vote posed by this vulnerability.

The court observed that the right to vote is fundamental, albeit not defined in the Constitution, and paid lip service to the *Anderson/Burdick* standard that applies to such a claim. *See Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992). Yet, the court failed to apply the first step of the *Anderson/Burdick* analysis, which requires assessment of the character and magnitude of the asserted injury to First Amendment rights. If the state regulatory scheme is generally applicable and non-discriminatory, as is Michigan law, then, pursuant to the Supreme Court's most recent guidance, it is deemed to impose no more than a minimal burden and is presumed to pass constitutional muster. *Ohio Democratic Party v. Husted*, 834 F.3d 620, 631 (6th Cir. 2016) (citing *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 200, 202–03 (2008)). The district court failed to explain how permitting the recount process to proceed in accordance with state law imposed or threatened *any* cognizable burden on Stein's or co-plaintiff Louis Novak's right to vote.

The majority essentially gives Stein a pass on this fundamental prerequisite to injunctive relief, observing that she was only required to meet a "lowered bar" because her showing of irreparable harm is "extremely strong." Really?

The district court concluded that Stein had shown a likelihood of irreparable harm if, pursuant to Michigan law, the recount were not commenced until December 7, based on the showing that completing the recount by the December 13 "safe harbor date" would be a "monumental undertaking." There is no dispute: the recount process is demanding. But the process is governed by presumptively valid state law. Stein made her request for recount, under state law, only on November 30; and her request was in the process of being *granted* under the provisions of that same state law when she, on the same day objections were overruled, December 2, complained that the state law process was too slow. For the sake of accelerating the process by two days, the district court ordered defendants, in contravention of state law, to commence the recount immediately, on December 5. Yes, the time period within which the recount must be accomplished, per federal law, is short, but the record is devoid of any showing that the constitutionally protected right to vote, whether Stein's or that of co-plaintiff Michigan voter Louis Novak, is threatened with irreparable harm if the statutorily prescribed process is permitted to run its course.

The majority reads "monumental undertaking" as synonymous with "impossibility" and characterizes the two-day period as "effectively nullifying" Stein's right to a recount. And this is the "extremely strong" showing of irreparable harm that is said to obviate the need for the court to scrutinize likelihood of success on the merits. Yet, the record is devoid of any showing that the recount will not be timely completed. Nor is it clear, to anyone apparently, what the impact of post-December 13 completion would be. December 13 is simply a "safe harbor date." The electors do not actually meet and cast their votes until December 19. There is simply no evidence on the likelihood of such dire consequences as Stein and the majority imagine. Speculation about what may or may not happen in the future is hardly justification for federal

court interference with what is by all appearances an orderly and expedited state election process.

Further underscoring the impropriety of the district court's interference is its own acknowledgement that proceedings challenging the Board of State Canvassers' decision were pending in the Michigan Court of Appeals and Michigan Supreme Court since December 2 and that the Michigan Court of Appeals had scheduled a hearing on Michigan Attorney General Bill Schuette's emergency complaint for writ of mandamus on December 6. Again, it was and is abundantly clear that Michigan authorities in the executive and judicial branches have taken great pains to fairly address the merits of Stein's request under the law.

So, stepping back to behold this picture with perspective, we find that, even though the Constitution recognizes the states' clear prerogative to regulate election processes and to thereby ensure they are accompanied by fairness and order, not chaos, *see Ohio Democratic Party*, 834 F.3d at 626–27; and even though a temporary restraining order is an extraordinary remedy designed for the limited purpose of preserving the status quo (not demolishing it) pending further proceedings on the merits; and even though plaintiff Stein was unable to muster even the barest showing of likelihood of success and irreparable harm; and even though state court proceedings to ensure the fairness of any recount are currently pending and poised to address any demonstrated need for relief, a district judge has seen fit to deploy the judicial power of the federal sovereign to intrude upon proceedings under state law that are traditionally entrusted to the states . . . simply because he thinks, in regard to a statutory two-day period (!), that he has a better idea than the elected representatives of the people of the State of Michigan . . . and because he can.

Moreover, in manifest display of partiality and overreach, the district court purports to have granted relief even more expansive than was requested. Whereas plaintiff Stein asked the court to enjoin any delay in commencement of the recount *prior to* December 7 (when the recount otherwise would have been commenced in accordance with state law), the district court purports to have not only ordered immediate commencement of the recount, but *continuation* thereof "until further order of this Court." And not only that: the district court further defined the required continuation as including the requirement that "all governmental units participating in the recount to assemble necessary staff to work sufficient hours to assure that the recount is completed in time to comply with the safe harbor provision of 3 U.S.C. § 5." R. 16, Temporary Restraining Order at 7–8, Page ID 678–79.

To this, I can only respond, "Astounding!" "Just who do we think we are?" *Obergefell v. Hodges*, 135 S.Ct. 2584, 2612 (2015) (Roberts, J., dissenting).

At the very least, we should stay any effect of the temporary restraining order that extends beyond 12:01 a.m. on December 7, 2016. Even the district court's own findings and conclusions, as insufficient as they are, justify absolutely no relief beyond that time, when state officials were prepared to comply with state law. By ordering commencement of the recount on December 5, in advance of the December 7 date provided for under state law, the district court granted Stein all the relief she had requested in her motion. By ordering continuation and completion of the recount by December 13, the court purported to assert "power" in excess even of the "authority" it had illegitimately claimed for itself. This overreach should be seen for what it is: a naked and illegitimate power grab that should stand as no impediment to the state courts' orderly adjudication of the state law issues before them in accordance with state law.

My colleagues seem to recognize this infirmity in the district court's order by observing that, depending on the outcome of proceedings in the state courts, they "expect the district court to entertain any properly filed motions to dissolve or modify its order in this case." In my opinion, this should be read to mean that, if the Michigan courts conclude that Stein has no right to a recount, the temporary restraining order should be vacated. If, on the other hand, the Michigan courts allow the recount to proceed, then the two-day waiting period relief granted in the temporary restraining order will essentially have been mooted by the passage of time. Either way, the temporary restraining order will cease to have any continuing vitality.

In my opinion, no issue of constitutional magnitude is implicated by any of plaintiff Stein's pleadings. By issuing the temporary restraining order, the district court abused its discretion. By refusing to stay this judicial overreach, the majority perpetuates, and lends the Sixth Circuit's imprimatur to, modern confusion surrounding the federal courts' *limited* oversight of state election processes. I respectfully dissent.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Deborah S. Hunt
Clerk

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Filed: December 06, 2016

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Re: Case No. 16-2690, *Jill Stein, et al v. Christopher Thomas, et al*
Originating Case No. : 2:16-cv-14233

Dear Counsel:

The Court issued the enclosed (Order/Opinion) today in this case.

Sincerely yours,

s/Patricia J. Elder
Senior Case Manager
Direct Dial No. 513-564-7034

cc: Mr. David J. Weaver

Enclosure

Mandate to issue

STATE OF MICHIGAN

COURT OF APPEALS

ATTORNEY GENERAL,

Plaintiff,

v

BOARD OF STATE CANVASSERS and DIRECTOR OF ELECTIONS,

Defendants,

and

JILL STEIN,

Intervening-Defendant.

FOR PUBLICATION
December 6, 2016
6:15 p.m.

No. 335947

DONALD J. TRUMP,

Plaintiff,

v

BOARD OF STATE CANVASSERS and DIRECTOR OF ELECTIONS,

Defendants,

and

JILL STEIN,

Intervening-Defendant.

No. 335958

Before: O'CONNELL, P.J., and MARKEY and MURRAY, JJ.

PER CURIAM.

The Attorney General and President-Elect Donald J. Trump have filed separate complaints for mandamus, each asking this Court to compel the Board of State Canvassers (the Board) to reject the November 30, 2016 petition of Green Party Presidential Candidate Dr. Jill Stein to recount the votes cast in the November 8, 2016 general election for the Office of President of the United States, and to cease any and all efforts to conduct the requested recount. Both the Attorney General and President-Elect Trump assert in part that Dr. Stein's petition failed to meet the requirements of MCL 168.879(1)(b) because she is not an aggrieved candidate. We agree and issue a writ of mandamus.

I. FACTUAL BACKGROUND

Michigan voters cast their ballots for the Office of United States President in the general election of November 8, 2016. On November 28, 2016, the Board certified the results of the presidential election in Michigan. The final vote tallies certified by the Board are as follows: 2,279,543 votes for Republican Party candidate Donald Trump; 2,268,839 votes for Democratic Party candidate Hillary Clinton; 172,136 votes for Libertarian Party candidate Gary Johnson; and 51,463 votes for Green Party candidate Dr. Jill Stein. Dr. Stein's vote total is approximately 1.07 percent of the nearly 4.8 million votes cast for the Office of United States President.

On November 30, 2016, Dr. Stein and ten of her electors petitioned the Board for a manual recount of the votes cast for the Office of United States President. The petition reads, in pertinent part, as follows:

> I, Jill Stein, a candidate for the office of the President of the United States in an election held on November 8, 2016, petition the Board of State Canvassers for a recount of the votes cast for this office. The undersigned members of my slate of electors join me in this Petition.
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> I and the undersigned members of my slate of electors, individually and collectively, are aggrieved on account of fraud or mistake in the canvass of the votes by the inspectors of election, and/or the returns made by the inspectors, and/or by the Board of County Canvassers, and/or by the Board of State Canvassers.
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> I request that all of the precincts and absent voter count board (AVCB) precincts within the State of Michigan be recounted by hand count. . . .

On December 1, 2016, President-Elect Trump filed objections to the recount petition. The President-Elect objected in part on the basis that Dr. Stein was not "aggrieved" under MCL 168.879(1)(b) because she had no chance of winning Michigan's electoral votes as the result of a recount.

That same day, Dr. Stein filed a response to the objections, asserting that MCL 168.879(1)(b) only required her to allege generally that she was aggrieved. She further asserted that the statute did not require her to meet any particular standard or offer proof to demonstrate her aggrieved status.

The Board met on December 2, 2016, to consider the petition and rule on the objections. The Board deadlocked, voting 2-2 on whether to approve the recount petition. This deadlock resulted in the petition being deemed approved. By order of the United States District Court for the Eastern District of Michigan, the recount began on Monday, December 5, 2016. *Stein v Thomas*, No. 16-cv-14233 (ED Mich, 2016).

II. JURISDICTION AND STANDARD OF REVIEW

This Court has original jurisdiction to entertain actions for mandamus against state officers. MCR 7.203(C)(2); *Citizens Protecting Michigan's Constitution v Secretary of State*, 280 Mich App 273, 282; 761 NW2d 210 (2008). We consider de novo whether the defendant had a clear legal duty to perform and whether the plaintiff had a clear legal right to performance of that duty. *Citizens for Protection of Marriage v Bd of State Canvassers*, 263 Mich App 487, 491-492; 688 NW2d 538 (2004).

III. REQUIREMENTS FOR MANDAMUS

"Mandamus is the appropriate remedy for a party seeking to compel action by election officials." *Citizens Protecting Michigan's Constitution*, 280 Mich App at 283. This Court will only issue a writ of mandamus if the party seeking mandamus meets four requirements:

> (1) the party seeking the writ has a clear legal right to performance of the specific duty sought, (2) the defendant has the clear legal duty to perform the act requested, (3) the act is ministerial, and (4) no other remedy exists, legal or equitable, that might achieve the same result. [*Id*. at 284.]

This Court may also "enter any judgment or order and grant further or different relief as the case may require[.]" MCR 7.216(A)(7). The issuance of a writ of mandamus rests within the discretion of this Court. *Rental Props Owners Ass'n*, 308 Mich App at 518. "The plaintiff bears the burden of demonstrating entitlement to the extraordinary writ of mandamus." *Citizens for Protection of Marriage*, 263 Mich App at 492.

IV. DUTIES OF THE BOARD OF STATE CANVASSERS AND DIRECTOR OF ELECTIONS

A clear legal right is a right "clearly founded in, or granted by, law; a right which is inferable as a matter of law from uncontroverted facts regardless of the difficulty of the legal question to be decided." *Rental Props Owners Ass'n of Kent Co v Kent Co Treas*, 308 Mich App 498, 519; 866 NW2d 817 (2014) (quotation marks and citation omitted). The parties do not dispute that the Attorney General or President-Elect Trump has a clear legal right to have the Board perform its statutory duties. The question presented is whether the Board has a clear legal duty to perform the acts requested—that is, whether the Board had a clear legal duty to deny Dr. Stein's petition for a recount.

The Board is an agency having no inherent power—"[a]ny authority it has is vested by the Legislature, in statutes, or by the Constitution." *Citizens for Protection of Marriage*, 263 Mich App at 492. MCL 168.879(1)(b) provides the authority by which a candidate may petition for a recount:

> (1) A candidate voted for at a primary or election for an office may petition for a recount of the votes if all of the following requirements are met:
>
> * * *
>
> (b) The petition alleges that the candidate is aggrieved on account of fraud or mistake in the canvass of the votes by the inspectors of election or the returns made by the inspectors, or by a board of county canvassers or the board of state canvassers. The petition shall contain specific allegations of wrongdoing only if evidence of that wrongdoing is available to the petitioner. If evidence of wrongdoing is not available, the petitioner is only required to allege fraud or a mistake in the petition without further specification.

MCL 168.882(2) allows a candidate to file a counter-petition challenging the petition for a recount. MCL 168.882(3) provides in pertinent part that "the board of canvassers shall rule on the objections raised to the recount petition." MCL 168.883 requires the Board to "investigate the facts set forth in said petition and cause a recount of the votes cast . . . ."

The Attorney General and President-Elect Trump each allege that the Board had a clear legal duty to deny the petition because it was not made by a candidate who was "aggrieved on account of fraud or mistake." We agree.

When interpreting a statute, this Court's primary goal is to ascertain the intent of the Legislature. *Rental Props Owners Ass'n*, 308 Mich App at 508. We first review the language itself, because the words of the statute provide the most reliable evidence of the Legislature's intent. *Id*. We afford every word and phrase of the state its plain and ordinary meaning, unless otherwise statutorily defined. *Id*. We may consult a dictionary to give words their common and ordinary meanings. *Id*. If the statute's language is clear and unambiguous, we may not engage in judicial construction. *Id*. When interpreting law governing elections, we must construe the statutes "as far as possible in a way which prevents the disenfranchisement of voters through the fraud or mistake of others." *Kennedy v Bd of State Canvassers*, 127 Mich App 493, 496-497; 127 NW2d 493 (1983).

MCL 168.879(1)(b) does not define the term "aggrieved." Nor has this Court defined "aggrieved" in this specific context. Thus, we look to dictionary definitions to provide the common and ordinary meaning of the word aggrieved.

MCL 168.879(1)(b) is clear and unambiguous. It requires that the candidate seeking a recount allege that he or she "is aggrieved on account of fraud or mistake in the canvass of the votes[.]" "Aggrieved" is defined as "having suffered loss or injury; damnified; injured." *Black's Law Dictionary* (2nd ed, 1910). Aggrieved also means "suffering from an infringement or denial of legal rights," *Merriam-Webster's Collegiate Dictionary* (11th ed, 2014), p 25, or "([o]f a person or entity) having legal rights that are adversely affected; having been harmed by an infringement of legal rights," *Black's Law Dictionary*, (10th ed), p 80.

Assigning the term "aggrieved" its plain and ordinary meaning, MCL 168.879(1)(b) requires that the candidate allege a loss or injury that resulted from fraud or mistake in the canvassing of votes. As previously noted, the Attorney General and President-Elect argue that,

in the context of an election, a candidate suffers a loss or injury—and thus is "aggrieved" for purposes of MCL 168.879(1)(b)—by losing an election the candidate would have won but for errors in the counting of votes. They are correct that, under such circumstances, a candidate would be aggrieved for purposes MCL 168.879(1)(b).

This commonly understood definition of aggrieved is consistent with our courts' previous statements regarding petitions for recount. For instance, the Michigan Supreme Court has noted that a party's petition was sufficient to invoke a right to a recount when "slight changes in one or all of the wards specified, if in relator's favor, without corresponding changes in favor of Mr. Culver [the winner], will be sufficient to change the result announced." *Ward v Culver*, 144 Mich 57, 58-59; 107 NW 444 (1906).[1]

Similarly, MCL 168.880a provides that "[a] recount of all precincts in the state shall be conducted at any time a statewide primary or election shall be certified by the board of state canvassers as having been determined by a vote differential of 2,000 votes or less." This indicates that our Legislature has recognized the same remedial purpose of recounts. See, also, *Mich Ed Assoc v Secretary of State*, 241 Mich App 432, 440; 616 NW2d 234 (2000) (quoting former Attorney General Frank Kelley, who stated, "The purpose of a recount is to determine whether the results of the first count of ballots should stand or should be changed because of fraud or mistake in the canvass of votes…").

For these reasons, we conclude that, to meet the "aggrieved" candidate requirement under subsection 879(1)(b), the candidate must be able to allege a good faith belief that but for mistake or fraud, the candidate would have had a reasonable chance of winning the election.[2]

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[1] Also see *McKenzie v Bd of City Canvassers of the City of Port Huron*, 70 Mich 147, 148-150; 38 NW 11 (1888) (holding that the candidate's petition was sufficient when it alleged that he lost the election by four votes and mistakes or fraudulent acts resulted in the under-reporting of votes actually cast for the petitioning candidate and the over-reporting of votes for the candidate's opponent, such that if the votes had been correctly tabulated, the petitioning candidate would have won); *Kennedy*, 127 Mich App at 495-497 (holding that the candidate's petition was sufficient when the candidate lost by 17 votes and "only a slight change in the totals would have been sufficient to change the outcome of the elections").

[2] The appellate courts of this state have long recognized, in the context of the law, that the term "aggrieved" contemplates an actual injury that adversely impacts or prejudices the substantial rights of a party. *Federated Ins Co v Oakland Co Rd Comm'n*, 475 Mich 286, 291-292; 715 NW2d 846 (2006); *Ford Motor Co v Jackson (On Rehearing)*, 399 Mich 213, 226 n 9; 249 NW2d 29 (1976) (Coleman, J.); *In re Estate of Trankla*, 321 Mich 478, 482; 32 NW2d 715 (1948); *Spires v Bergman*, 276 Mich App 432, 441-442; 741 NW2d 523 (2007); *Maxwell v Dep't of Environmental Quality*, 264 Mich App 567, 571; 692 NW2d 68 (2004). A party is not aggrieved by a mere possibility of injury arising from some unknown and future contingency, *Ford Motor Co*, 339 Mich at 226 n 9, or by being merely disappointed over a certain outcome, *Federated Ins Co*, 475 Mich at 291.

The Board argues that its clear legal duties do not include a determination of whether a party is an aggrieved party. The Board asserts that, under MCL 168.882(3) and MCL 168.883, the Board has only two legal duties to perform regarding recount petitions: to rule on the objections to the petition offered by any opposing candidate and to investigate the facts set forth in the petition. According to the Board, its members satisfied their duties in this case because they met, considered, and ruled on the objections.

We find the Board's position untenable. MCL 168.879(1) conditions a candidate's right to petition for a recount on the submission of a petition that satisfies that statute's requirements, clearly stating that "a candidate voted for at a primary or election for an office may petition for a recount of the votes *if all of the following requirements are met*[.]" (Emphasis added.) When read in conjunction with the Board's obligation under MCL 168.882(3) to rule on objections to a petition, MCL 168.879(1) creates a clear legal duty to accept only those petitions that satisfy MCL 168.879's requirements and to reject those that do not.[3]

V. APPLICATION TO DR. STEIN

A review of candidate Stein's petition for a recount reveals that she merely parroted the language of MCL 168.879(1)(b) in her petition. The petition lacks even the most general allegations from which the Board could infer that a recount would change the outcome of the election in Dr. Stein's favor. The vote totals for President-Elect Trump and Dr. Stein cannot be characterized as close, nor will a slight change in these totals be sufficient to change the outcome of the election: President-Elect Trump received 2,279,543 votes and Dr. Stein received 51,463 votes. The 2,228,080 difference in vote totals assures that no change in the vote totals is reasonably likely to change the previously announced result in Dr. Stein's favor.

Indeed, Dr. Stein readily admits that she is unlikely to change the result previously announced. Under these circumstances, we conclude that Dr. Stein's petition failed to meet the requirements of subsection 879(1)(b) because she has not alleged, and cannot allege in good faith, that she "is aggrieved on account of fraud or mistake in the canvass of the votes" for the Office of President of the United States. Under these circumstances, the Board had a clear legal duty to reject Dr. Stein's petition.

The act of rejecting the petition is ministerial. A ministerial act is "one in which the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment." *Hillsdale Co Senior Servs, Inc v Hillsdale Co*, 494 Mich 46, 63 n 11; 832 NW2d 728 (2013) (quotation marks and citation omitted). There is no exercise of discretion required in the rejection of a recount petition on purely legal grounds. Finally, we are convinced that no other legal remedy exists that would achieve the same result as rejecting Dr. Stein's petition.

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[3] Our conclusion is consistent with this Court's prior recognition that a petition for a writ of mandamus is the proper tool to enforce the provisions of MCL 168.879. See *Santia v Bd of State Canvassers*, 152 Mich App 1, 6; 391 NW2d 504 (1986).

Accordingly, we grant the requests of the Attorney General and President-Elect Trump for issuance of a writ of mandamus.[4] We direct the Board of State Canvassers to reject the November 30, 2016 petition of candidate Stein that precipitated the current recount process. We retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Jane E. Markey
/s/ Christopher M. Murray

[4] We recognize that the United States District Court for the Eastern District of Michigan entered a temporary restraining order which affirmatively required that the Secretary of State commence the recount before the expiration of the 2-day waiting period required by MCL 168.882(3). *Stein v Thomas*, No. 16-cv-14233 (ED Mich, 2016). That decision did not address the threshold issue presented in this case, whether Stein is an aggrieved candidate, so there is no conflict between our decisions. Additionally, the second footnote in the Eastern District's opinion recognized the possibility that this Court would halt the recount.