No. 22-1014

In the
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RONALD WEISER; MICHIGAN REPUBLICAN PARTY,

Plaintiffs-Appellants,

v.

JOCELYN BENSON, in her official capacity as Secretary of State,

Defendant-Appellee,

WHITMER FOR GOVERNOR COMMITTEE,

Intervenor-Appellee.

Appeal from the United States District Court
Western District of Michigan
Honorable Janet T. Neff

BRIEF FOR DEFENDANT-APPELLEE SECRETARY OF STATE JOCELYN BENSON

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Plaintiffs-Appellants have requested oral argument. Defendant-Appellee Michigan Secretary of State Jocelyn Benson believes that oral argument is unnecessary for the Court to decide the issues presented in this appeal of the District Court's well-reasoned opinion and that the issues raised in this appeal are resolved by established law. However, if the Court grants oral argument, Defendant Benson requests the opportunity to present argument.

JURISDICTIONAL STATEMENT

Defendant-Appellee Michigan Secretary of State Jocelyn Benson agrees that this Court generally has jurisdiction over appeals from the final decisions of district courts under 28 U.S.C. §1291. But, for the reasons stated in the brief below, this case is now moot and so the federal courts no longer have jurisdiction over Plaintiffs-Appellants' claims.

STATEMENT OF ISSUES PRESENTED

1. Article III of the United States Constitution provides that federal courts may adjudicate only actual, ongoing cases or controversies. Here, Plaintiffs seek to challenge the constitutionality of a ruling regarding campaign finance laws for ongoing recall efforts, but there are no active recall campaigns, and under Michigan law no new recalls may be started before the next general election. Is this challenge now moot?

2. Federal courts have long recognized that a party lacks standing where it does not have a concrete and particularized injury. Here, Plaintiffs Michigan Republican Party and its chair sought to challenge a campaign finance ruling by the Michigan Secretary of State regarding funds raised by an incumbent officer to oppose a recall effort, but their only claimed injury was speculation of how those funds might be spent. Do the Plaintiffs lack standing?

INTRODUCTION

Plaintiffs-Appellants Michigan Republican Party and its chair Ronald Weiser allege that a long-standing interpretation regarding the Michigan Campaign Finance Act (MCFA) violates their free speech rights under the First Amendment and equal protection guarantees under the Fourteenth Amendment. Since 1983, the Michigan Department of State has interpreted the MCFA such that an office holder may receive contributions exceeding the limits provided by the Act if the office holder's recall is "actively being sought." The reasoning for this conclusion was that proponents of a recall are required to form a political committee, but contributions to such committees are not subject to limitations under the MCFA. As a result, if office holders subject to recall were held to MCFA contribution limits while recall proponents were not, the office holders would be at a significant disadvantage. Such office holders would be limited in their ability to raise money to defend themselves, while those seeking their recall would be "operating under different sets of rules."

Plaintiffs sought to challenge this decades-old interpretation, arguing that the "recall exception" is unconstitutional on its face and as

applied to contributions collected by Governor Gretchen Whitmer, who has been the subject of at least seven recall attempts since June of 2020.

However, Plaintiff's claims are now moot. As of this date, all recall efforts have concluded and, under Michigan law, no new petitions could be filed. The Governor has already disgorged any contributions received in excess of the MCFA limits—as she was required to do—months before the April 19, 2022 deadline for Republican gubernatorial candidates to file their nominating petitions.

Moreover, Plaintiffs' arguments in support of their challenge are simply wrong. Plaintiffs err in asserting that the Governor is permitted to keep or use any excess contributions for her re-election effort. Secretary Benson, and the Secretaries of State before her, have instead long interpreted the MCFA to require that any contributions collected by an office holder in excess of MCFA limits for purposes of opposing a recall must be returned or disgorged (for example, donated to a party or charity) if a recall election is not called. Simply put, office holders do not get to keep or use that money for their re-election.

STATEMENT OF THE CASE

A. Plaintiffs-Appellants' Allegations and Procedural History

Plaintiffs filed this action on September 20, 2021. (R. 1, Page ID # 16, Complaint.) Plaintiffs' complaint challenged the constitutionality of an interpretation of the MCFA by the Michigan Secretary of State that has been in effect since 1983. (*Id.*, Page ID # 5.) Under that interpretation, an elected official subject to a recall effort may raise funds in excess of the MCFA's contribution limit in order to defend against the recall effort but must—at the conclusion of the recall effort—disgorge any unexpended funds in excess of the contribution limit. (*Id.*, Page ID # 18–21.) Plaintiffs refer to this interpretation as "the recall exception." (*Id.*, Page ID # 5.) In their complaint, Plaintiffs alleged that the recall exception violates—both on its face and as-applied—free speech rights under the First Amendment and equal protection guarantees under the Fourteenth Amendment. Plaintiffs contend that the recall exception allows office holders—and Governor Whitmer, specifically—to gather unlimited amounts of money while any challengers to the incumbent's re-election are subject to MCFA contribution limits.

The complaint did not name Governor Gretchen Whitmer or her campaign as parties, and it did not seek any relief against them. (*Id.*, Page ID # 16.) On October 12, 2021, the Whitmer for Governor Committee (the Committee) filed a motion to intervene in this matter as a Defendant. (R. 8, Page ID # 46–53.) The District Court granted the Committee's motion to intervene on October 25, 2021. (R. 27, Page ID # 125.)

On November 18, 2021—almost two months after filing the complaint—Plaintiffs filed a motion for temporary restraining order (TRO), in which they asked the court to restrain the Governor's committee from transferring any funds contributed under the recall exception. (R. 34, Page ID # 145, 171). The Secretary of State and the Committee filed their briefs opposing the TRO on November 24, 2021. (R. 39, Page ID # 249; R. 41, Page ID # 264.) The district court heard arguments on the TRO in a hearing held on December 1, 2021, during which the court questioned whether Plaintiffs had standing. On December 1, 2021, the district court entered an order denying the TRO and requesting additional briefing on standing. (R. 44, Page ID # 386.) The parties filed their supplemental briefs on December 15 and 16,

2021. (R. 46, Page ID # 425 (Committee's Br.); R. 47, Page ID # 440 (Secretary's Br.); R. 48, Page ID # 458 (Plaintiffs' Br.). On January 4, 2022, the district court entered an opinion and order dismissing Plaintiffs' complaint for lack of standing. (R. 50, Page ID # 496.)

B. The Secretary's Determination regarding the MCFA Complaint Filed Against the Governor's Committee.

On December 21, 2021, Defendant Secretary Benson made determinations in a complaint filed against the Governor's Committee based upon contributions collected under the recall exception.[1] In that letter, the Secretary determined that recall cycles end in one of three ways: (1) when a recall election occurs; (2) when the filing official determines that the recall petitions are insufficient to require a recall election; or (3) when the statutory time for filing a sufficient petition with the filing official has elapsed and the filing official is barred from

[1] Defendant recognizes that this letter is not included within the record below, since it issued after the District Court dismissed the case. Defendant, however, has filed a motion asking that this Court take judicial notice of the letter and its contents under Fed. R. Evid. 201(b)(2), (c)(1), and (d). The letter is also available online at SOS - Campaign Finance Disclosure - Resolved Complaints (michigan.gov) and MFF_v_Whitmer_File_744164_7.pdf (michigan.gov). (Note: the Secretary's ruling appears at the bottom of the linked page, following the complaint.) Subsequent references to this letter include page numbers for the convenience of the Court.

accepting the petition for filing. (12/21/22 Letter, p. 8.) The letter also noted that the time period for each of the recall petitions that had been approved for circulation had expired no later than July 26, 2021. (12/21/22 Letter, p. 6.) There are no longer any active recall efforts that would allow contributions to be accepted under the recall exception. The Secretary then observed that there had been no prior decisions examining when a recall cycle ended, and so a regulated entity—such as the Governor's Committee—could have believed it was acting in compliance with the Department's precedent, and dismissed the complaint *provided the applicable contributions were disgorged*. (12/21/22 Letter, pp. 9–10.) Plaintiffs' brief cites to the most recent financial disclosure by the Governor's Committee, and they acknowledge that the Governor's Committee has, in fact, refunded one $250,000 contribution and disgorged $3,548,865.61 to the Michigan Democratic Party. (Doc. 25, Appellants' Br., p. 18.)

In short, there have been no active recall efforts against the Governor since July 26, 2021, and—at least as of December 21, 2021—the Governor's committee can accept no further contributions under the

recall exception, and any excess contributions received have been disgorged.

C. Summary of the Operation of Michigan Election Law and the 1983 Interpretation of the Michigan Campaign Finance Act.

1. Michigan laws governing the recall of the governor.

Mich. Comp. Laws § 168.951 provides that no recall petition may be filed against an officer during the last year of his or her term of office if the term is more than 2 years. Under Michigan's Constitution, the term of office for governor is 4 years. Mich. Const. 1963, Art. V, § 21. The current gubernatorial term ends at noon on January 1, 2023. Mich. Comp. Laws § 168.63. By operation of Mich. Comp. Laws § 168.951, any recall petition, therefore, had to be filed by 11:59 a.m. on January 1, 2022. That deadline has now passed, and so there can be no more recall petitions filed against the Governor for the remainder of the current term of office. The only recall efforts to which the MCFA recall exception might apply were those that had been previously filed. As discussed below, however, those efforts have already ended and there

are **no** presently active recall efforts for which the recall exception may now apply.

But if a successful recall petition had been filed against the Governor, it would have triggered a special recall election. Mich. Comp. Laws § 168.963(4). The latest possible date for a special recall election on the basis of that petition would be the August 2022 primary—which would be the same election in which a Republican nominee to challenge Governor Whitmer in the general election would be chosen. Mich. Comp. Laws §§ 168.963(4); 168.534. The ballot for a special recall election for the governor would be printed with 200-word statements of both the reason for recall and the governor's response, and then provide voters only with a "yes" or "no" option. Mich. Comp. Laws §168.975e(1), (4). There is no opposing candidate in a special recall election—if a governor is successfully recalled, the governor is replaced according to the line of succession provided in Article V, § 26, of the Michigan Constitution, beginning with the Lieutenant Governor. Mich. Comp. Laws § 168.975g.

2. The MCFA and the History of Its Interpretation by the Michigan Secretary of State.

Under the MCFA, the Michigan Secretary of State has the authority to make declaratory rulings or interpretive statements regarding issues arising under the MCFA. Mich. Comp. Laws § 169.215(2) and (6). On October 7, 1983, then-Secretary of State Richard Austin issued an informational Interpretive Statement in which he concluded that the individual contribution limits in Mich. Comp. Laws § 169.252 of the MCFA were not applicable to candidate committees of officeholders subject to a recall election. (R. 1, Page ID # 19–21, 10/7/1983 Interp. Stmnt.) The following year, Secretary Austin reached the same conclusion in a declaratory ruling. (R. 1, Page ID # 23-25, 1/3/1984 Decl. Ruling.) Notably, the Interpretive Statement observed that "[S]ection 52 does not apply to contributions received by an officeholder who is being recalled, **provided the contributions are designated for a recall election**." (R. 1, Page ID # 20 (emphasis added).)

In summary, the Secretary of State determined in 1983 and 1984 that, because recall proponent committees were not restrained by any contribution limits, applying the contribution limit to office holders

opposing a recall effort might result in First Amendment violations against the office holder. (R. 1, Page ID # 21.) If officials were held to contribution limits while those advancing recall efforts against them were not, the officials would be at a considerable disadvantage. (R. 1, Page ID # 20.) Further, the Secretary observed that the MCFA defined "elective office" as a "public office filled by an election," but recall elections do not fill public offices. (R. 1, Page ID # 20.) The Secretary thus concluded that the contribution limits of § 52 of the MCFA do not apply to contributions received by an officeholder who is being recalled, provided the contributions are designated for a recall election. (R. 1, Page ID # 20–21.) The Secretary's Interpretive Statement also expressly recognized that any funds collected in excess of MCFA limits during a recall effort must be disgorged:

> An officeholder's candidate committee may accept contributions in excess of the section 52 contribution limitations **only if the officeholder's recall is actively being sought**. Moreover, if a special recall election is not called by the appropriate election official, a contribution designated for the recall election may not be retained unless otherwise designated by the contributor. **In the event an election is not called**, a contributor may indicate in writing that the portion of the contribution not exceeding the application limitation may be retained by the candidate committee for the next election in which the candidate is involved. **The portion exceeding the limitation must be**

> **returned to the contributor. Any contribution, or portion of a contribution, not otherwise designated by a contributor in the instance where a recall election is not called, shall be given by the candidate committee to a political party committee or to a tax exempt charitable institution.**

(R. 1, Page ID # 21 (emphasis added).)

These interpretations had gone unchallenged for nearly 30 years until Plaintiffs filed suit.

STANDARD OF REVIEW

Whether a party has standing is an issue of the court's subject matter jurisdiction and is reviewed *de novo*. *Lyshe v. Levy, et al.*, 854 F.3d 855, 857 (6th Cir. 2017).

SUMMARY OF ARGUMENT

First, the Plaintiffs' claims can no longer be adjudicated because they are now moot. The Secretary of State determined that there are no longer any active recall efforts, and the Governor's Committee has been required to divest any funds collected in excess of the MCFA limits. And no new recall efforts may be launched before the next general election. So, any supposed "disadvantage" claimed by the Plaintiffs no longer exists and cannot exist for the remainder of this election cycle.

There simply is no longer any live controversy, and so this appeal should be dismissed as moot.

Second, the district court correctly recognized that Plaintiffs lacked standing where they failed to demonstrate any concrete or imminent injury. Plaintiffs' standing—whether it be Mr. Weiser's individual standing or MRP's standing under either the associational or organizational theories—each require an injury in fact. But, any contributions collected by the Governor's Committee under the recall exception are to oppose recall efforts that had to resolve—one way or another—before the Republican candidate would be chosen. As such, there can be no disadvantage to a candidate that has not yet been chosen. Further, Plaintiffs were capable of making unlimited contributions to any or all of the various recall efforts, and so there was no disparity between the Governor's Committee and the recall committees. Plaintiffs' concern that the Governor's Committee "might" use recall exception funds to support her re-election are unsupported and speculative—all the more so now that funds have been publicly accounted for and divested. Plaintiffs' description of the disgorgement as "money laundering" are hyperbolic and difficult to square with

MRP's status as a political party that is equally capable of receiving donations and making expenditures on behalf of candidates it prefers. Plaintiffs have no injury that would support standing, and their complaint was properly dismissed.

ARGUMENT

I. Plaintiffs' appeal is moot because there is no longer a live case or controversy and no exception to the mootness doctrine applies.

A. There is no longer a genuine dispute between the parties for which any meaningful relief may be granted.

Under Article III of the Constitution, federal courts may adjudicate only actual, ongoing cases or controversies. *Kentucky v. U.S. ex rel. Hagel*, 759 F.3d 588, 595 (6th Cir. 2014) (quoting *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990)). Federal courts have a continuing duty to ensure that they adjudicate only genuine disputes between adverse parties, where the relief requested would have a real impact on the legal interests of those parties. *See Church of Scientology v. United States,* 506 U.S. 9, 12 (1992); *McPherson v. Mich. High School Athletic Ass'n,* 119 F.3d 453, 458 (6th Cir. 1997) (en banc).

If "the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome," then the case is moot and the court has no jurisdiction. *Los Angeles County v. Davis,* 440 U.S. 625, 631 (1979). A "live" controversy is one that "persists in 'definite and concrete' form even after intervening events have made some change in the parties' circumstances." *Mosely v. Hairson*, 920 F.2d 409, 414 (6th Cir. 1990) (citing *DeFunis v. Odegaard*, 416 U.S. 312, 317 (1974)); *Ford v. Wilder*, 469 F.3d 500, 504 (6th Cir. 2006) ("The test for mootness is whether the relief sought would, if granted, make a difference to the legal interests of the parties.") (internal quotation marks and citation omitted). In other words, a case is moot where the court lacks "the ability to give meaningful relief[.]" *Sullivan v. Benningfield*, 920 F.3d 401, 410 (6th Cir. 2019).

Here, the relief sought by Plaintiffs in their complaint was a declaratory ruling that the recall exception is unconstitutional. But now, as stated earlier, the Secretary of State has determined that there are no longer any active recall efforts against the Governor that would allow for contributions under the recall exception, and the Governor's campaign disgorged all funds it collected under that rule. (*See*

Appellants' Br, Doc. 25, p. 18; 12/21/22 Letter.) As a result, the Governor's Committee may no longer receive contributions in excess of the MCFA limit, and any contributions previously received under the recall exception have either been returned to the donor or donated to a political party. (*See id.*) The excess funds will, as a result, *not* be held or expended by the Governor's Committee during the 2022 election. The disadvantage claimed by the Plaintiffs under the recall exception no longer exists and will not exist for the rest of the election cycle. There is no longer a live controversy.

Simply stated, the declaration requested by the Plaintiffs—that the recall exception is unconstitutional—would no longer grant any meaningful relief to the Plaintiffs, and so there is no longer any live case or controversy. Plaintiffs' case is moot.

In their brief, Plaintiffs argue that federal courts could order the non-party Michigan Democratic Party to return the funds under Fed. R. Civ. Proc. 65(d), and so a "remedy" remains available to them. There are several problems with this argument.

First, Rule 65(d) pertains to injunctions, and the Plaintiffs' complaint did not include any request for injunctive relief other than

enjoining the application or implementation of the recall exception in the upcoming gubernatorial election. (R. 1, Page ID # 16.) While Plaintiffs did eventually file a motion seeking a TRO that would have restrained the Governor from transferring any funds, Plaintiffs never requested that funds already transferred to eligible organizations be returned. (R. 34-2, Page ID # 171, Proposed TRO.) Moreover, Plaintiffs' TRO motion was denied and Plaintiffs did not seek an emergency appellate action to prevent any transfers. (R. 44, Page ID # 385, Order Denying TRO.)

Second, Plaintiffs cite to no cases from this Circuit issuing such an extraordinary order. Instead, they cite to a case from the Seventh Circuit describing the purpose of Rule 65(d) as being "to ensure that defendant may not nullify a decree by carrying out *prohibited acts* through aiders and abetters." (Doc. 25, Appellants' Br., pp 38–39) (quoting *Blockowicz v. Williams,* 630 F.3d 563, 567 (7th Cir. 2010)). Plaintiffs also invoke the All Writs Act, 28 U.S.C. § 1651(a), as a basis for issuing orders to non-parties who "frustrate the implementation of a court order." (*Id.*) (quoting *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1100 (11th Cir. 2004)). But here, no party in this case appears to

dispute that funds collected by any official under the recall exception must be disgorged once there is no longer any recall effort. Consequently, there has been no "prohibited act" committed through an "abettor"—the transfer of funds from the Governor's Committee was not only permitted and appropriate, it was expressly **required**.

Lastly, it is not clear what kind of actual relief such an order would provide to the Plaintiffs. Even if funds were clawed back from non-parties and returned to donors, nothing would stop those donors from simply re-donating the funds back to the Michigan Democratic Party or any other organization that might either support the Governor's campaign or oppose the candidates favored by Plaintiffs. Plaintiffs fail to explain how disgorgement to the Michigan Democratic Party causes them harm, while disgorgement to donors who would then give money to the Democratic Party would not cause them harm. So, even Plaintiffs' proposal for an extraordinary order would result in no meaningful or substantive relief.

B. The exceptions to the mootness doctrine do not apply to this case.

There are two relevant exceptions to the mootness doctrine. First, voluntary cessation of the challenged conduct does not moot a case unless it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *United States v. Concentrated Phosphate Exp. Ass'n*, 393 U.S. 199, 203 (1968). Second, a case will not become moot if the injury is "capable of repetition, yet evading review." *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 462 (2007). Neither exception applies in this case.

1. Voluntary cessation

"A defendant's voluntary cessation of allegedly unlawful conduct ordinarily does not suffice to moot a case." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 174 (2000). Where the defendant voluntarily ceases the challenged conduct, the defendant must establish that: "there is no reasonable expectation that the alleged violation will recur"; and (2) "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Thomas v. City of Memphis*, 996 F.3d 318, 324 (6th Cir. 2021) (quoting *Speech First v. Schlissel*, 939 F.3d 756, 767 (6th Cir. 2019)).

Here, the Secretary's ruling is not merely a "voluntary cessation" that could be reversed at any time. The Secretary instead issued a decision on a complaint that directly bears on the issues Plaintiffs sought to raise in their challenge. As an initial matter, the Secretary's decision reflects that it is not a "cessation" of unlawful conduct, but a clarification of the existing laws and declaratory rulings. *See* MCL 24.263 ("A declaratory ruling is binding on the agency and the person requesting it unless it is altered or set aside by any court. An agency may not retroactively change a declaratory ruling. . . ."). The Secretary's ruling affirms that officers may not do what Plaintiffs claim to fear—use contributions collected in opposition to a recall for their re-election. (12/21/22 Letter, p 11, n 8.) Thus, the Secretary's decision is not a voluntary cessation of unlawful conduct that could be easily rescinded—it is a published decision articulating a position that results in there no longer being any live case or controversy for the federal courts to consider.

Moreover, the Secretary's decision may be cited by future complaints to achieve the same outcome. Thus, any future complaint involving an elected official collecting contributions to combat a recall

that is no longer actively being sought would be guided by this decision. As a result, not only is there no reasonable expectation that a future recall effort could be misused in the manner contemplated in the Plaintiffs' claims (i.e., using recall funds for re-election), but also that—if one attempted to do so—they would be constrained by this decision.

2. Capable of repetition yet evading review

This exception is limited "to situations where: '(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration; and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again.' " *Chirco v. Gateway Oaks, L.L.C.*, 384 F.3d 307, 309 (6th Cir. 2004) (quoting *Weinstein v. Bradford*, 423 U.S. 147, 148 (1975)). The party asserting this exception bears the burden of proof. *Lawrence v. Blackwell*, 430 F.3d 368, 371 (6th Cir. 2005). Plaintiffs cannot satisfy both requirements for this exception.

But here, there is no reason to believe that a challenge to the recall exception in a case where the parties had standing could not be litigated prior to the case becoming moot. The Plaintiffs' lawsuit in this case was filed relatively late in the current election cycle, and the

Governor's committee had been collecting contributions for some time before the Plaintiffs filed. A diligent future litigant could file a complaint sooner and obtain a decision long before a governor's final year where no additional recall efforts could be made.

More pointedly, however, there is no reason to think that the Plaintiffs would raise this challenge again. First, in light of the Secretary's determination, future campaign committees are now on notice of when a recall is no longer "actively being sought," and when disgorgement is required. And second, it is not clear that Plaintiffs themselves could claim to be injured by the recall exception in the future. Either they will be successful in their efforts to challenge the Governor's reelection—in which case the recall exception would then benefit their newly elected incumbent—or the Governor will be reelected but subject to Michigan's term limits and ineligible to seek reelection. At a minimum, Plaintiffs could not have a basis to challenge the recall exception for at least five years, following the election of a different governor of some party other than their own, and the lapse of one year before a recall effort could be filed under Michigan law. Mich. Comp. Laws § 168.951(1). Or, if candidates of their own party are

elected governor, they may not have cause to file a similar challenge for a decade or longer.

For these reasons, this appeal is moot and this Court consequently lacks jurisdiction to adjudicate Plaintiffs' claims. The appeal should be dismissed.

II. Plaintiffs lack standing because they failed to demonstrate any injury in fact.

A. A case in which no party has standing to sue must be dismissed.

When the plaintiff lacks standing to bring claims in federal court, the Court lacks jurisdiction and dismissal is warranted under Fed. R. Civ. P. 12(b)(1). *Taylor v. KeyCorp.*, 680 F.3d 609, 612–13 (6th Cir. 2012). "It is well established . . . that before a federal court can consider the merits of a legal claim, the person seeking to invoke [its] jurisdiction . . . must establish the requisite standing to sue." *Whitmore v. Arkansas,* 495 U.S. 149, 154–55 (1990) (internal quotations omitted.) And with good reason. "[T]he standing requirement limits federal court jurisdiction to actual controversies so that the judicial process is not transformed into a 'vehicle for the vindication of the value interests of concerned bystanders.' " *Coal Operators and Assocs., Inc. v. Babbitt*,

291 F.3d 912, 915–16 (6th Cir. 2002) (quoting *Coyne v. Amer. Tobacco Co.*, 183 F.3d 488, 494 (6th Cir. 1999) (internal citations and quotations omitted.))

Under Article III of the United States Constitution, federal courts can resolve only "cases" and "controversies." U.S. Const. art. III § 2. The case-or-controversy requirement is satisfied only where a plaintiff has standing to bring suit. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016), *as revised* (May 24, 2016). Each plaintiff must demonstrate standing for each claim he seeks to press. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) (citation omitted) ("[A] plaintiff must demonstrate standing separately for each form of relief sought.").

B. Both Plaintiffs must demonstrate standing to bring their claims.

Plaintiff Weiser is the Chair of the MRP. To establish standing, he must show that: (1) he has suffered an injury in fact that is "concrete and particularized" and "actual or imminent"; (2) the injury is "fairly . . . trace[able] to the challenged action of the defendant"; and (3) it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504

U.S. 555, 560–62 (1992) (internal quotation marks and citations omitted).

MRP, as an organization, can demonstrate standing in two ways: associational standing and organizational standing. Associational standing exists if an association's members have standing; if the interests at stake are relevant to the organization's purpose; and if the claims and relief do not require the participation of individual members. *Barry v. Lyon,* 834 F.3d 706, 716 (6th Cir. 2016). An organization can establish standing to sue on its own behalf by satisfying the three *Lujan* elements. *Lujan*, 504 U.S. at 560–61; *Havens Realty Corp. v. Coleman,* 455 U.S. 363, 378–79 (1982).

Thus, Plaintiff Weiser, if not both Weiser and MRP, must demonstrate standing to bring their claims under *Lujan*. These elements are "not mere pleading requirements," but are an "indispensable part of plaintiff's case[.]" *Lujan*, 504 U.S. at 561–62. Where, as here, Plaintiffs' allegations fail to satisfy these elements, a court is "powerless to create its own jurisdiction by embellishing otherwise deficient allegations of standing." *Whitmore,* 495 U.S. at 155–56.

So, Plaintiffs' standing—whether it be Weiser's individual standing or MRP's standing under either the associational or organizational theories—requires an injury in fact. And standing is not "dispensed in gross: A plaintiff's remedy must be tailored to redress the plaintiff's particular injury." *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018) (citing *Daimler-Chrysler Corp. v. Cuno*, 547 U.S. 332, 353 (2006)) ("The remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established.") (quoting *Lewis v. Casey*, 518 U.S. 343, 357 (1996)).

C. Neither Plaintiff has been injured by the recall exception and so they lack standing to challenge its constitutionality.

Plaintiffs' argument—reduced to its essence—is that they are or have been injured because they were treated differently from the contributors to the Governor's Committee as a result of the recall exception. As stated by Plaintiffs' counsel during the hearing on their TRO, "The injury to him (Weiser) is that he can't make a contribution in unlimited amounts to a Republican candidate for governor." (R. 45, Page ID # 395, 12/3/21 Tr.) However, this premise is fundamentally flawed and totally erroneous.

First, Plaintiffs were not injured in any way by the Governor's collection or expenditure of funds in opposition to the recall efforts. As the district court observed, in a recall election under Michigan law, there can only be one recalled candidate, and Plaintiffs' counsel acknowledged that Plaintiff Weiser could have contributed unlimited amounts to a recall committee opposing the governor. (R. 50, Op. & Order, Page ID # 492; R. 45, Page ID # 395, 12/3/21 Tr.) But neither of the Plaintiffs appear to have backed any of the recall petitions against Governor Whitmer. So, this admission is fatal to Plaintiffs' claim to having been injured by the recall exception, since both Weiser and MRP were capable of making the same "unlimited" contributions to support the recall effort that the Governor's Committee received to oppose it. There was no disparity or inequity—they could have contributed to any or all of the several recall efforts in unlimited sums. As the district court pointedly stated, the very case Plaintiffs sought to rely upon—*Davis v. Fed. Elections Comm'n,* 554 U.S. 724, 737 (2008)—held that there is no basis for challenging elevated contribution limits that apply across the board. (R. 50, Page ID # 493.) Simply put, in the context of recalling the governor, Plaintiffs were equally capable of contributing

unlimited amounts to the recall as the Governor's supporters were capable of contributing to oppose it, and so there was no disadvantage to the Plaintiffs.

The district court also aptly recognized that the Plaintiffs' alleged injury sounded as a generalized grievance. (R. 50, Page ID # 494.) That is, the Plaintiffs complain that Michigan **ought** to make recall contribution limits more in harmony with the limits for elections to public office, but that is a generalized grievance claiming a harm to every citizen's interests rather than the kind of particularized injury sufficient to bestow standing. *Id.* (citing *Lance v. Coffman*, 549 U.S. 437, 440 (2007) (per curiam)).

Further, the district court correctly recognized that the alleged injury is not actual and imminent because their asserted injury was not the result of the declaratory ruling and was instead self-inflicted. (R. 50, Page ID # 495) (citing *Clapper v. Amnesty Int'l USA,* 568 U.S. 398, 410 (2013) and *Bucholtz v. Meyer Njus Tanick, PA,* 946 F.3d 855, 865 (6th Cir. 2020)). Plaintiffs could have contributed unlimited amounts to the recall efforts against the Governor but chose not to. As a result, any

imbalance in the playing field was self-generated and does not, therefore, grant them standing to sue. (R. 50, Page ID # 495.)

There is also no disparity between the Governor's Committee and any Republican candidate for governor, because there will be no actual Republican candidate for governor until after the August 2022 primary election, at which the Republican candidate will be chosen. Any Republicans vying for their party's nomination are running against each other—not against the Governor. Any contributions collected by the Governor's Committee under the recall exception could only be used to oppose recall efforts, and those have already ended. Even if one of those efforts had succeeded in gaining sufficient signatures to trigger a special recall election, that election would have occurred during the August 2022 primary—when the Republican nominee would be chosen. There would never have been any overlap in time when there was an active recall effort and a election contest between the Governor and a Republican nominee. So, any recall exception funds could never have been used against any Republican nominee for the office of governor, and so there could be no injury to Plaintiffs through their ability to contribute funds to the candidate opposing the Governor.

Instead, Plaintiffs were concerned that the contributions collected by the Governor's Committee through the recall exception would be spent on her reelection campaign. But, through counsel, Plaintiffs admitted that they do not know how or if the contributions collected by the Governor's Committee to oppose the recall have been spent, or if the funds have been comingled with re-election campaign funds or if they were accounted for separately.[2] (R. 45, Page ID # 395–96.) In short, Plaintiffs were claiming to be injured by something they fear **might** happen. But Plaintiffs cannot demonstrate standing with speculation and hypotheticals. Again, their injury must be "concrete and particularized, and actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560–61.

Moreover, the harm they described—that the Governor's Committee might expend excess contributions gathered under the recall exception to support her reelection—is explicitly not permitted by the same Interpretive Statement and declaratory ruling they challenge here as unconstitutional. *See, e.g.* R. 1, Page ID # 21 (the officeholder's

[2] As noted above, the 1983 Interpretive Statement challenged by Plaintiffs in this case requires that contributions in excess of the contribution limit be designated for a recall election.

committee may accept contributions in excess of the § 52 limit only if their recall is actively being sought, and if a recall election is not called, any contribution or portion of contribution in excess of the limit must be returned to the donor or given to a political party or tax exempt charity). Further, since a recall cannot be filed in the last year of the Governor's term, and the last possible date for a special recall election would have been in August of 2022, there could never have been a recall "actively being sought" by the time there will be a Republican nominee.[3] Any contributions in excess of § 52's limit cannot be spent on re-election and must be disgorged by the Governor's Committee—and, in fact, the Governor's Committee has already done so.[4]

[3] Again, for such a special recall election to have been called for August 2022, a recall petition would have to have been filed with the Secretary of State before 12:00 p.m. on January 1, 2022, the petition would have to be submitted to the Board of State Canvassers for a determination that the petition is factual and clearly stated, and then the proponents would have to gather enough signatures within the statutory time period. Mich. Comp. Laws § 168.951; Mich. Comp. Laws §168.951a(3) and (9); Mich. Comp. Laws § 168.959.

[4] As noted above, subsequent to the district court's dismissal of the complaint, the Governor's Committee was required through the Secretary's December 21, 2021 letter to disgorge recall exception funds, and it has reported that it did so. (Doc. 25, Appellants' Br., p. 18.)

Plaintiffs' counsel also suggested that Plaintiffs had a concern that the Governor's Committee might, by way of transfer to the Governor's political party, fund other candidates in other races:

> Your Honor, the constitutional claim, I think, boils down to this: One particular kind of competitor in the 2022 election, a candidate, can raise unlimited money and then transfer that money to her allies at the conclusion of recall proceedings, and another class of candidates, namely, you know, Republican candidates for governor, are subjected to the $7,150 limit. They cannot raise unlimited funds, and they cannot transfer those unlimited funds to their allies.

(R. 45, Page ID # 399.) This argument, however, simply misses the mark.

The Governor's Committee would not be transferring money directly to any "allies." Instead, it is required to disgorge excess contributions by returning them to the donor or giving them to a political party or charitable organization. It is true that a political **party** receiving excess contributions from the Governor's Committee might then use what are now **that party's** funds in whatever manner it finds appropriate, which may include supporting candidates who ally themselves with the Governor. But political party committees are not subject to § 52 contribution limits. *See, e.g.* R. 1, Page ID # 21 ("Contributions to political committees are not subject to limitations

under the Act.") So, those party committees are already—independent of the recall exception—capable of collecting "unlimited" contributions and using them to aid whatever candidates they choose, subject to other restrictions. That includes Plaintiff MRP, who is wholly capable of receiving unlimited contributions.

There has been no injury to Plaintiffs because Weiser could already contribute "unlimited" amounts to MRP, and MRP can already collect "unlimited" contributions from its members and supporters—and then distribute those contributions to adversaries of the Governor in the same way the Michigan Democratic Party might support the Governor's allies. Simply put, Plaintiff MRP can collect as much money as it wants and can use those funds to support its candidates. Because Weiser and MRP's other members are free to make unlimited contributions to MRP, Plaintiffs cannot claim any constitutional injury from the possibility that the Governor's Committee might also give money to her own party once her recall is no longer being actively sought.

Lastly, Plaintiffs complain that the money contributed to the Governor in opposition to the recall efforts allowed a show of "fundraising strength" that they believe disadvantages their preferred

candidates. However, the district court correctly recognized the error of this line of argument where it quoted *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 207 (2014) and its rejection of such reasoning: "it is not an acceptable governmental objective to 'level the playing field,' or to 'level electoral opportunities,' or to 'equaliz[e] the financial resources of candidates.' " (R. 50, Page ID # 495.) The Plaintiffs are seeking to have the federal courts do what the legislative branches cannot—level the financial resources of candidates. The Plaintiffs' argument is deeply unsound and contrary to the Supreme Court's holdings, and so it should be rejected by this Court.

In summary, any funds collected by the Governor's Committee under the recall exception cannot be used to support the Governor's reelection; the Plaintiffs were free to contribute the same unlimited sums to the any or all of the recall efforts; and Weiser and MRP's other members are free to make unlimited contributions to MRP who may then make contributions or expenditures to candidates opposing the Governor. Plaintiffs simply have not been injured by the recall exception, and so the district court correctly determined that they lack standing.

CONCLUSION AND RELIEF REQUESTED

For the reasons set forth above, Defendant-Appellee Michigan Secretary of State Jocelyn Benson respectfully requests that this Court dismiss this appeal as moot, or alternatively to affirm the District Court's dismissal of the Plaintiffs' complaint for lack of standing.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Certificate of Compliance with Type-Volume Limit,
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1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because, excluding the part of the document exempted by Federal Rule of Appellate Procedure 32(f), this brief contains no more than 13,000 words. This document contains 6,856 words.

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CERTIFICATE OF SERVICE

I certify that on March 17, 2022, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record (designated below).

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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Defendant-Appellee, per Sixth Circuit Rule 28(a), 28(a)(1)-(2), 30(b), hereby designated the following portions of the record on appeal:

Description of Entry	Date	Record Entry No.	Page ID No. Range
Complaint	09/20/2021	R. 1	1-36
Motion to Intervene by Whitmer for Governor	10/12/2021	R. 8	46-53
Order	11/03/2021	R. 27	125
Plaintiff's Emergency Motion for Temporary Restraining Order	11/18/2021	R. 34	145-172
Defendant Benson's Brief in Response to Plaintiffs' Emergency Motion for a Temporary Restraining Order	11/24/2021	R. 39	249-261
Intervening-Defendant Whitmer for Governor's Response to Plaintiffs' Motion for Temporary Restraining Order	11/24/2021	R. 41	264-281
Order	12/01/2021	R. 44	385-386
Transcript 12/01/2021 Hearing on Plaintiff's Motion for Temporary Restraining Order	12/03/2021	R. 45	387-424

Whitmer for Governor's Briefing on Issue of Standing Requested by the Court	12/15/2021	R. 46	425-439
Benson's Court Requested Briefing on Plaintiffs' Standing	12/15/2021	R. 47	440-457
Plaintiffs' Supplemental Memorandum Regarding Article III Standing	12/15/2021	R. 48	458-483
Opinion and Order	01/04/2022	R. 50	485-496