STATE OF MICHIGAN
IN THE COURT OF APPEALS

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

Plaintiff,

v

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

Defendants.
_____/

Court of Appeals No.

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other State governmental action is invalid.

Expedited relief requested under MCR 7.211(C)(6). Relief requested by 5:00 p.m. Tuesday, December 6, 2016.

BRIEF OF PLAINTIFF ATTORNEY GENERAL BILL SCHUETTE IN SUPPORT OF EMERGENCY ORIGINAL COMPLAINT FOR WRIT OF MANDAMUS

Bill Schuette
Attorney General

Carol L. Isaacs (P49889)
Chief Deputy Attorney General

Matthew Schneider (P62190)
Chief Legal Counsel
Counsel of Record

John Bursch
Special Assistant Attorney General
BURSCH LAW PLLC
9339 Cherry Valley Ave SE, #78
Caledonia, MI 49316
(616) 450-4235
Kathryn M. Dalzell (P78648)
Assistant Solicitor General
Attorneys for Plaintiff
P.O. Box 30212
Lansing, MI 48909
(517) 373-1124

Dated: December 2, 2016

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

Constitutional Provisions

Dictionaries/Books

STATEMENT OF JURISDICTION

The Attorney General institutes this action against the Board of State Canvassers and Chris Thomas, Director of Elections, to enforce the Legislature's directive that Michigan's electors participate fully in the federal electoral process. Because this action seeks to enjoin or control the Board of State Canvassers' action in resolving candidate Stein's petition for a recount, the action is one for mandamus. MCL 168.878. This Court has original jurisdiction over actions for mandamus against state officers, at the option of the party commencing the action—here, the People of the State of Michigan. MCL 600.4401(1); MCR 7.203(C)(2).

STATEMENT OF QUESTIONS PRESENTED

Green Party candidate Jill Stein received fewer than 52,000 of the more than 4.7 million votes cast in Michigan's election for President, yet she now alleges that she is an "aggrieved" candidate and demands a recount that has no possibility of changing the result of that election. Although Stein had the ability to request a recount from the moment the polls closed on November 9, 2016, she waited an additional three weeks—until the last possible minute under Michigan law—to do so. And she demanded a hand recount, a process that cannot possibly be completed in time for Michigan to guarantee that its votes will be counted in the Electoral College, and a process that will cost Michigan taxpayers millions of dollars. The questions presented are:

1. Whether Defendants may proceed with a statewide recount where the party who filed the recount petition is not an "aggrieved" party, as MCL 168.879(b) requires.

2. Whether a recount may begin, contrary to MCL 168.882(3), *before* two business days after the State Board of Canvassers resolves all objections to the recount petition.

3. Whether any recount must be complete and certified to federal officials by December 13, 2016, to satisfy Michigan election law.

4. Whether any recount must be completed electronically when a manual statewide recount cannot possibly be completed by the December 13, 2016 certification date.

CONSTITUTIONAL PROVISIONS, STATUTES, RULES INVOLVED

US Const, art II, § 1, cl 2

> Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

Mich. Comp. Laws 168.46

> As soon as practicable after the state board of canvassers has, by the official canvass, ascertained the result of an election as to electors of president and vice-president of the United States, the governor shall certify, under the seal of the state, to the United States secretary of state, the names and addresses of the electors of this state chosen as electors of president and vice-president of the United States. The governor shall also transmit to each elector chosen as an elector for president and vice-president of the United States a certificate, in triplicate, under the seal of the state, of his or her election.

Mich. Comp. Laws 168.47

> The electors of president and vice-president shall convene in the senate chamber at the capitol of the state at 2 p.m., eastern standard time, on the first Monday after the second Wednesday in December following their election. At any time before receipt of the certificate of the governor or within 48 hours thereafter, an elector may resign by submitting his written and verified resignation to the governor. Failure to so resign signifies consent to serve and to cast his vote for the candidates for president and vice-president appearing on the Michigan ballot of the political party which nominated him. Refusal or failure to vote for the candidates for president and vice-president appearing on the Michigan ballot of the political party which nominated the elector constitutes a resignation from the office of elector, his vote shall not be recorded and the remaining electors shall forthwith fill the vacancy. The ballot used by the elector shall bear the name of the elector. If at the time of convening there is any vacancy caused by death, resignation, refusal or failure to vote, neglect to attend, or ineligibility of any person elected, or for any other cause, the qualified electors of president and vice-president shall proceed to fill such vacancy by ballot, by a plurality of votes. When all the electors appear and the vacancy shall be filled, they shall proceed to perform the duties of such electors, as required by the constitution and laws of the United States. If congress hereafter fixes a different day for such meeting,

the electors shall meet and give their votes on the day designated by act of congress.

Mich. Comp. Laws 168.842(1)

(1) The board of state canvassers, for the purpose of canvassing the returns and ascertaining and determining the result of an election, shall meet at the office of the secretary of state on or before the twentieth day after the election. The secretary of state shall appoint the day of the meeting and shall notify the other members of the board. The board has power to adjourn from time to time to await the receipt or correction of returns, or for other necessary purposes, but shall complete the canvass and announce their determination not later than the fortieth day after the election. The board may at the time of its meeting, or an adjournment of its meeting, canvass the returns for any office for which the complete returns have been received.

Mich. Comp. Laws 168.875

All recounts shall be completed for a primary election not later than the twentieth day and for any other election not later than the thirtieth day immediately following the last day for filing counter petitions or the first day that recounts may lawfully begin. As soon as the recount is completed, the board shall return any ballots to their respective containers and seal the containers. The board shall then return the ballots, voting devices, machines, any related keys, and seals to the officer or officers having the care and custody of those items.

Mich. Comp. Laws 168.879(1)(b)–(c)

(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.

(c) Except as otherwise provided in this subdivision, the petition for a recount is filed not later than 48 hours following the completion of the canvass of votes cast at an election. If the recount petition relates to a state senatorial or representative district located wholly within 1 county or to the

district of a representative in congress located wholly within 1 county, the petition for a recount shall be filed not later than 48 hours following the adjournment of the meeting of the board of state canvassers at which the certificate of determination for that office was recorded pursuant to section 841. However, for a special election for representative in congress, state senator, or state representative for a district located wholly within 1 county, the petition for recount shall be filed not later than 48 hours after the certificate of determination is filed with the secretary of the board of state canvassers.

Mich. Comp. Laws 168.882(3)

(3) On or before 4 p.m. of the seventh day after a recount petition has been filed under section 881, an opposing candidate may file objections to the recount petition with the board of state canvassers. The opposing candidate shall set forth his or her objections to the recount petition in writing. Upon receipt of an objection under this subsection, the board of state canvassers shall notify the petitioner and the objecting candidate of the date of the hearing of the board of state canvassers to consider the objections. The board of state canvassers shall allow the recount petitioner and the objecting candidate to present oral or written, or both, arguments on the objections raised to the recount petition at the hearing. Not later than 5 business days following the hearing, the board of state canvassers shall rule on the objections raised to the recount petition. The board of state canvassers shall not begin a recount unless 2 or more business days have elapsed since the board ruled on the objections under this subsection, if applicable.

3 USC 5

If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned.

3 USC 6

It shall be the duty of the executive of each State, as soon as practicable after the conclusion of the appointment of the electors in such State by the final ascertainment, under and in pursuance of the laws of such State providing for such ascertainment, to communicate by registered mail under the seal of the State to the Archivist of the United States a certificate of such ascertainment of the electors appointed, setting forth the names of such electors and the canvass or other ascertainment under the laws of such State of the number of votes given or cast for each person for whose appointment any and all votes have been given or cast; and it shall also thereupon be the duty of the executive of each State to deliver to the electors of such State, on or before the day on which they are required by section 7 of this title to meet, six duplicate-originals of the same certificate under the seal of the State; and if there shall have been any final determination in a State in the manner provided for by law of a controversy or contest concerning the appointment of all or any of the electors of such State, it shall be the duty of the executive of such State, as soon as practicable after such determination, to communicate under the seal of the State to the Archivist of the United States a certificate of such determination in form and manner as the same shall have been made; and the certificate or certificates so received by the Archivist of the United States shall be preserved by him for one year and shall be a part of the public records of his office and shall be open to public inspection; and the Archivist of the United States at the first meeting of Congress thereafter shall transmit to the two Houses of Congress copies in full of each and every such certificate so received at the National Archives and Records Administration.

3 USC 7

The electors of President and Vice President of each State shall meet and give their votes on the first Monday after the second Wednesday in December next following their appointment at such place in each State as the legislature of such State shall direct.

3 USC 15

Congress shall be in session on the sixth day of January succeeding every meeting of the electors. The Senate and House of Representatives shall meet in the Hall of the House of Representatives at the hour of 1 o'clock in the afternoon on that day, and the President of the Senate shall be their presiding officer. Two tellers shall be previously appointed on the part of the Senate and two on the part of the House of Representatives, to whom shall be handed, as they are opened by the President of the Senate, all the certificates

and papers purporting to be certificates of the electoral votes, which certificates and papers shall be opened, presented, and acted upon in the alphabetical order of the States, beginning with the letter A; and said tellers, having then read the same in the presence and hearing of the two Houses, shall make a list of the votes as they shall appear from the said certificates; and the votes having been ascertained and counted according to the rules in this subchapter provided, the result of the same shall be delivered to the President of the Senate, who shall thereupon announce the state of the vote, which announcement shall be deemed a sufficient declaration of the persons, if any, elected President and Vice President of the United States, and, together with a list of the votes, be entered on the Journals of the two Houses. Upon such reading of any such certificate or paper, the President of the Senate shall call for objections, if any. Every objection shall be made in writing, and shall state clearly and concisely, and without argument, the ground thereof, and shall be signed by at least one Senator and one Member of the House of Representatives before the same shall be received. When all objections so made to any vote or paper from a State shall have been received and read, the Senate shall thereupon withdraw, and such objections shall be submitted to the Senate for its decision; and the Speaker of the House of Representatives shall, in like manner, submit such objections to the House of Representatives for its decision; and no electoral vote or votes from any State which shall have been regularly given by electors whose appointment has been lawfully certified to according to section 6 of this title from which but one return has been received shall be rejected, but the two Houses concurrently may reject the vote or votes when they agree that such vote or votes have not been so regularly given by electors whose appointment has been so certified. If more than one return or paper purporting to be a return from a State shall have been received by the President of the Senate, those votes, and those only, shall be counted which shall have been regularly given by the electors who are shown by the determination mentioned in section 5 of this title to have been appointed, if the determination in said section provided for shall have been made, or by such successors or substitutes, in case of a vacancy in the board of electors so ascertained, as have been appointed to fill such vacancy in the mode provided by the laws of the State; but in case there shall arise the question which of two or more of such State authorities determining what electors have been appointed, as mentioned in section 5 of this title, is the lawful tribunal of such State, the votes regularly given of those electors, and those only, of such State shall be counted whose title as electors the two Houses, acting separately, shall concurrently decide is supported by the decision of such State so authorized by its law; and in such case of more than one return or paper purporting to be a return from a State, if there shall have been no such determination of the question in the State aforesaid, then those votes, and those only, shall be counted which the two Houses shall concurrently decide were cast by lawful electors appointed in

accordance with the laws of the State, unless the two Houses, acting separately, shall concurrently decide such votes not to be the lawful votes of the legally appointed electors of such State. But if the two Houses shall disagree in respect of the counting of such votes, then, and in that case, the votes of the electors whose appointment shall have been certified by the executive of the State, under the seal thereof, shall be counted. When the two Houses have voted, they shall immediately again meet, and the presiding officer shall then announce the decision of the questions submitted. No votes or papers from any other State shall be acted upon until the objections previously made to the votes or papers from any State shall have been finally disposed of.

INTRODUCTION

Green Party candidate Jill Stein—who received approximately *1%* of the nearly 4.8 million votes cast in Michigan for president of the United States—has filed an 11th-hour petition for recount that threatens to deprive Michigan citizens of their voice in the Electoral College. Stein has zero chance of winning Michigan's electoral votes; she cited no evidence of fraud or mistake in the canvass of votes; and she has offered no argument as to how she is aggrieved by the electoral counts. Despite these facts, Stein asks for a statewide recount, by hand, that could cost Michigan taxpayers millions of dollars. And while Stein could have requested a recount immediately after polls closed on November 9th, she waited until the last possible moment under state law—the afternoon of November 30th, nearly three weeks later—to file her recount petition.

This Court cannot allow a dilatory and frivolous request for a recount by an unaggrieved party to silence all Michigan votes for President. Stein's delay means that the statewide hand recount will be impossible to accomplish by December 13, 2016, the federal "safe harbor" date by which Michigan must resolve any disputes over the appointment of its electors to guarantee that Michigan (rather than Congress) determines its electors under our federal electoral system. The United States Constitution gives Michigan's Legislature plenary authority to determine how the State's electors are appointed, and the Legislature has exercised that authority by mandating that Michigan's voice be heard in the electoral college. Yet if any dispute over the State's electors extends beyond December 13, 2016, Michigan's voters are at risk of being disenfranchised in the Electoral College.

For these reasons, the Attorney General—on behalf of the People of the State of Michigan—asks this Court to immediately issue a writ of mandamus to prohibit the recount because Stein is not an aggrieved candidate.

Alternatively, the Attorney General asks this Court to immediately issue a writ of mandamus ordering the State Defendants to: (1) stop the recount until two business days after the Board of State Canvassers resolves objections to the recount petition; (2) complete any recount and certify electors to the federal government by December 13, 2016, or else certify to the federal government on or before that date the initial elector results announced on November 28, 2016; and (3) conduct the recount electronically, not by hand. This Court should further order that if, at any point in the recount process, the number of votes that Stein requires to win Michigan's electoral votes exceeds the number of ballots left to be counted, the recount must end immediately.

This Court's immediate intervention is required to ensure that Michigan's voice is heard in the Electoral College as the Michigan Legislature has directed.

STATEMENT OF FACTS AND PROCEEDINGS

On November 28, 2016, the Board of State Canvassers certified the 2016 presidential election results. See Certified 2016 Presidential Election Results, available at http://www.michigan.gov/sos/0,4670,7-127-1633_8722-397762--,00.html (last visited Nov. 30, 2016). Republican candidate Donald Trump received the highest number of votes (2,279,543), and Democrat candidate Hillary Clinton received the second-highest, trailing Mr. Trump by 10,704 votes. Green Party candidate Jill Stein came in fourth place, receiving 51,463 votes—only 1.07% of the nearly 4.8 million total votes cast.

On November 30, 2016—at nearly the last minute when Stein could request a recount under state law, MCL 168.879(1)(c)—Stein petitioned for a statewide recount, to be conducted by hand. See Petition for a Recount (Nov. 30, 2016) (attached as Ex. 1). Stein cited no evidence of any fraud or mistake in the canvass of the votes, and provided no explanation for how she may have been aggrieved by any hypothetical fraud or mistake given the mammoth voting deficit that she faced. See *id*.

Michigan's elections are conducted by paper ballot and then counted by machines that are not connected to the Internet, refuting any suggestion that the election results could have been "hacked." And there is no other alleged evidence of fraud or mistake in the Michigan vote-tallying process.

STANDARD OF REVIEW

A writ of mandamus is an extraordinary remedy that this Court may issue when: (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; (3) the act is ministerial; and (4) no other remedy exists that might achieve the same result. *Citizens Protecting Michigan's Constitution v Sec'y of State*, 280 Mich App 273, 283–284, aff'd in part, appeal denied in part, 482 Mich 960 (2008).

ARGUMENT

I. No recount may proceed because Jill Stein is not an "aggrieved" party as a matter of Michigan law.

Jill Stein's petition for a recount does not meet the statutory prerequisite because she has not been "aggrieved" on account of fraud or mistake in the canvass of votes, as MCL 168.879(1)(b) requires. Aside from the fact that Stein has stated publicly that she has no evidence of wrongdoing in the vote-counting process, she has not been "aggrieved" as a matter of law because she has no possible chance of winning Michigan's electoral votes in a recount. Because she does not meet this statutory prerequisite, this Court should order the State Defendants to reject it.

Michigan law allows a candidate who has been "*aggrieved* on account of fraud or mistake in the canvass of votes" to seek a recount. MCL 168.879(1)(b) (emphasis added). While the statute does not define "aggrieved," "consulting a dictionary is appropriate" in "determining the common, ordinary meaning of a word[.]" *Title Office, Inc v Van Buren Co Treasurer*, 469 Mich 516, 522 (2004).

At the time the Legislature chose the word "aggrieved," 1913 PA 320, the edition of *Black's Law Dictionary* then in effect defined "aggrieved" as "[h]aving suffered loss or injury; damnified; injured." *Black's Law Dictionary* (2d ed. 1910), p 51. The dictionary further defined "aggrieved party" as "one whose pecuniary interest is directly affected by the adjudication; one whose right of property may be established or divested thereby," or "one against whom error has been committed." *Id.*

These definitions are consistent with the way Michigan courts have interpreted the term "aggrieved" in a variety of other contexts. E.g., *Federated Ins Co v Oakland County Rd Comm'n*, 475 Mich 286, 291 (2006) ("An aggrieved party is not one who is merely disappointed over a certain result. Rather, to have standing on appeal, a litigant must have suffered a concrete and particularized injury . . . ."); *Herman Brodsky Enterprises v State Tax Comm'n*, 204 Mich App 376, 383 (1994) (party not aggrieved for purposes of MCL 207.570 where "no substantial rights of the petitioners were prejudiced."); *Emerick v Saginaw Twp*, 104 Mich App 243, 247 (1981) (aggrieved party in a fraud case must "allege a causal link between the inequitable conduct and the resulting harm").

In the circumstances here, Stein could not possibly have been "aggrieved" by any heretofore unidentified fraud or mistake. Stein received approximately 1.07% (51,463 votes) of the total votes cast for President in Michigan (approaching 5 million votes), and over 2.2 million votes separate her from the number of votes received by the winner, candidate Donald Trump. Certified 2016 Presidential

Election Results, available at http://www.michigan.gov/sos/0,4670,7-127-1633_8722-397762--,00.html (last visited Nov. 30, 2016). She has no possible chance of winning Michigan's electoral votes in a recount. Indeed, Stein has publicly acknowledged that her recount effort is "*not about flipping the vote.*" Jill Stein on Twitter (Nov. 30, 2016), available at https://twitter.com/DrJillStein/status/804135489074774028 (last visited Nov. 30, 2016) (emphasis added).

Accordingly, Stein has suffered no loss or injury from any supposed irregularities in the canvass of votes; she has not been "aggrieved" as MCL 168.879(1)(b) requires. See *Ward v Culver*, 144 Mich 57, 59 (1906) (issuing mandamus to compel recount where "slight changes in one or all of the wards specified," if in the plaintiff's favor, would "be *sufficient to change the result*") (emphasis added); *State v Bd of City Canvassers*, 70 Mich 147, 148 (1888) (granting mandamus and ordering recount where "aggrieved" party alleged that *he would have won* if votes had been counted correctly); *Kennedy v Bd of State Canvassers*, 127 Mich App 493, 497 (1983) (denying petition for mandamus seeking to prohibit recount where "only a slight change in the totals would have been sufficient to *change the outcome* of the election") (emphasis added).

Importantly, a generalized injury to the integrity of the voting and canvassing process that does not affect the petitioner candidate's chances of winning is not enough to cause the candidate to be "aggrieved" within the meaning of the statute. If such a generalized injury is enough, then the word "aggrieved" has been written out of the statute entirely, because *any* candidate could seek a recount, for any

reason. But this Court avoids constructions of a statute that would nullify words in a statute. *Lesner v Liquid Disposal*, 466 Mich 95, 101–102 (2002) (court must "apply the language of the statute as enacted, without addition, subtraction, or modification"); *Univ of Mich Bd of Regents v Auditor General*, 167 Mich 444, 450 (1911) (each word of a statute is presumed to be used for a purpose, and, as far as possible, effect must be given to every clause and sentence); *Detroit v Redford Twp*, 253 Mich 453, 456 (1931) (court may not assume that the Legislature inadvertently made use of one word instead of another).

It is for that reason that Michigan election decisions have focused on a candidate's particularized injury in fact that is distinct from a generalized injury that all candidates suffer. E.g., *Martin v Sec'y of State*, 482 Mich 956 (2008) (candidate has a concrete injury in fact when "he or she is prevented from being placed on the ballot or must compete against someone improperly placed on the ballot," adopting the dissent's reasoning in *Martin v Sec'y of State*, 280 Mich App 417, 431 (2008), which noted that an incumbent candidate forced to run in a contested election is "aggrieved" where he must spend more time and money on the election); *Deleeuw v State Bd of Canvassers*, 263 Mich App 497, 506 (2004) (plaintiff petition signers seeking mandamus to compel Board of Canvassers to place Ralph Nader's name on ballot were "aggrieved" because their interest was invaded in a "concrete and particularized way": the Board's action "poses the imminent threat of effectively extinguishing the petitions' power" and "threatens to obliterate the petitions in every practical way").

In sum, the Legislature required a candidate to be "aggrieved" before seeking a recount to prevent the exact situation presented here—where a candidate who has no possible chance of victory in a recount endangering Michigan's votes in the Electoral College and imposing millions of dollars in cost to the taxpayers on a frivolous recount.[1] Because Stein has not been "aggrieved" under MCL 168.879(1)(b) as a matter of law, this Court should order the State Defendants to reject her recount petition.

II. This Court should immediately order that no recount may begin until two business days after the State Board of Canvassers resolves any objections to the recount petition.

Michigan law expressly provides that when objections are made to a recount petition, a recount "shall not begin" until at least two business days *after* the Board of State Canvasser resolves the objections. MCL 168.882(3). Candidate Trump filed his objections to Stein's recount petition on December 1, 2016. Because the Legislative directive is clear, this Court should immediately issue an order that no recount may begin until two business days *after* the Board of State Canvassers resolves those objections. Alternatively, if any recount has begun at the time this

[1] Under Michigan law, Stein was only required to deposit $125 for each of Michigan's 6,300 precincts in order to launch the recount, MCL 168.881(4), an amount that totals $787,500. The Secretary of State has publicly stated that the hand recount could cost the taxpayers as much as $5 million. See Chad Livengood, *Mich. recount to start Friday barring Trump challenge*, The Detroit News (Dec. 1, 2016), available at http://www.detroitnews.com/story/news/politics/2016/11/30/recount/94667998/ (last visited Dec. 1, 2016).

Court considers this request, this Court should order the State Defendants to immediately cease such recount because such actions violate MCL 168.882(3).

This Court may grant a writ of mandamus ordering the Secretary and Board of Canvassers not to commence, or to cease, any recount where the recount proceeds in a manner that violates clear legal directives. *Citizens Protecting Michigan's Constitution v Sec'y of State*, 280 Mich App 273, 277 (issuing order directing Secretary and Board to stop the canvass where initiative petition did not satisfy constitutional prerequisites), aff'd in part, appeal denied in part, 482 Mich 960 (2008).

Under Michigan law, an opposing candidate has seven days after a recount petition has been filed to object to the petition. MCL 168.882(3). After receipt of the objections, the Board of Canvassers must notify the petitioner and the objecting candidate of the date of the Board's hearing to consider the objections. *Id*. The Board must allow both sides to present oral and/or written arguments on the objections. *Id*. "Not later than 5 business days following the hearing," the Board must rule on the objections. *Id*.

The statute expressly provides that the Board "*shall not* begin a recount unless 2 or more business days have elapsed since the board ruled on the objections under this subsection, if applicable." *Id*. (emphasis added). "The Legislature's use of the term 'shall' indicates a mandatory and imperative directive." *Stand Up v Sec'y of State*, 492 Mich 588, 601 (2012) (quotations and citation omitted).

Accordingly, where objections have been filed, no recount may commence or proceed until two business days after the Board's resolution of the objections.

A practical purpose undergirds this strict statutory timeline. If the Board of Canvassers improperly accepts or rejects an objection, the two-business-day window gives the aggrieved party the opportunity to appeal to this Court. The Legislature's statutory directive will be thwarted if the Defendants proceed with the recount *regardless of the filing of any objections*.

Because objections to Stein's recount petition have been lodged with the Board of State Canvassers, this Court should immediately order that no recount may begin until two business days after the Board resolves any objections to the recount petition or, if the recount process has already begun, that such recount must cease and not proceed except in compliance with Michigan law.

III. This Court should immediately order the State Defendants to complete any recount by December 13, 2016, or else certify to the federal government on or before that date the initial elector results announced on November 28, 2016.

This Court should not allow a recount to proceed at all given that Stein is not an "aggrieved" party as a matter of law. But at a bare minimum, the Court should order the State Defendants to complete any recount by December 13, 2016, or else certify to the federal government on or before that date the initial elector results announced on November 28, 2016. That is because any recount that extends beyond December 13, 2016 would put Michigan at risk of being disenfranchised in the federal Electoral College, against the Legislature's will.

The United States Constitution gives a state legislature plenary authority to dictate the manner in which the state's electors are appointed. US Const, art II, § 1, cl 2; *Bush v Gore*, 531 US 98, 104 (2000) (explaining that "the state legislature's power to select the manner for appointing electors is plenary . . . ."). And through its laws governing the selection and convention of electors, Michigan's Legislature has evinced a clear intent that the State's electors "participate fully in the federal electoral process[.]" *Bush v Gore*, 531 US at 110.

For example, the Legislature has provided that Michigan's electors "shall convene" on December 19, 2016 and "shall proceed to perform the duties of such electors, as required by the constitution and laws of the United States." MCL 168.47. This timing matches the date that the Electoral College is required to meet under federal law. 3 USC 7. Other state law also shows that the Legislature intended for Michigan's electors to participate fully in the federal electoral process. For example, Michigan law requires the State Board of Canvassers to complete the canvass by the 40th day after the election, MCL 168.842(1), a date that precedes the meeting of the Electoral College under federal law, 3 USC 7. And Michigan law requires the Governor to certify Michigan's chosen electors to the U.S. Secretary of State "[a]s soon as practicable after the state board of canvassers has, by the official canvass, ascertained the result of an election" as to the electors. MCL 168.46. This provision parallels federal law, which also requires the executive of the State, "as soon as practicable after the conclusion of the appointment of the electors," to

furnish certificates of the electors to the Archivist of the U.S. and to the electors themselves. 3 USC 6, 7.

Accordingly, the Legislature has exercised its plenary authority to mandate that Michigan's electors be heard and counted in the federal electoral process. But under federal law, Michigan's electors are not guaranteed full participation in the federal electoral process *unless* the State resolves any dispute over their appointment before December 13, 2016. 3 USC 5. Title 3, Section 5 provides a "safe harbor" that guarantees the counting of a State's electoral votes *if* any "controversy or contest" regarding those electors is resolved "at least six days before the time fixed for the meeting of electors." *Id.*; *Bush v Palm Beach Cty Canvassing Bd*, 531 US 70, 77–78 (2000). Because 3 USC 7 fixes the meeting of electors this year for December 19, 2016, Michigan must resolve any "controversy or contest" regarding its electors "at least six days before" that date, i.e., by December 13, 2016, to guarantee the counting of its electoral votes under this safe harbor. *Bush v Gore*, 531 US 98, 110 (2000) (noting that "[3 USC 5] requires that any controversy or contest that is designed to lead to a conclusive selection of electors be completed by" the safe harbor date).

If Michigan *does not* resolve a dispute as to its electors by the "safe harbor" date, Michigan's electoral votes are potentially vulnerable to objection once Congress convenes on January 6, 2017 to count the states' electoral votes. That is because the President of the Senate, who presides over the session, "shall call for objections" upon reading aloud "the certificates and papers purporting to be

certificates of the electoral votes." 3 USC 15. If there is an objection to Michigan's electoral return, the State's return must be counted if it was "regularly given" by electors whose appointment has been "lawfully certified" under 3 USC 6.

But if the House and Senate agree that the State's return was not "regularly given"—a term that is undefined—the State's electoral return is at risk of being rejected. 3 USC 15. And if Michigan submits more than one electoral return (say, an initial return, and a second return following a partial recount), Congress is directed to honor votes that have been "regularly given" by electors appointed consistently with the safe harbor provision, 3 USC 5. 3 USC 15. And if two State authorities dispute the electors to be certified, or if the State submits multiple returns and has not resolved a conflict by the safe harbor date, then Michigan is at risk of having its electors finally determined (and possibly completely rejected) not by the State, but by a federal body—the U.S. House and Senate. 3 USC 15.

This means that any recount results—and indeed any controversy or contest over the appointment of Michigan's electors—*must* be resolved and certified to the federal government before the safe harbor date of December 13, 2016, for Michigan to comply with the Legislature's directive that Michigan's electors take part in the federal electoral process. *Bush v Gore*, 531 US 98, 110 (2000).

Michigan Compiled Laws 168.875 is not to the contrary. While that provision gives a catchall deadline for any recounts (which would include elections for any federal, state, or local office), the Legislature's more specific mandates regarding the State's participation in the federal electoral process for *presidential* elections—the

situation currently at hand—controls. Cf. *Palm Beach Cty Canvassing Bd v Harris*, 772 So 2d 1273, 1289 (Fla, 2000) (noting that while State might accept amended returns in an election other than a presidential election, in a presidential election "the decision as to when amended returns can be excluded from the statewide certification must necessarily be considered in conjunction with the contest provisions of [state law] and the deadlines set forth in 3 U.S.C. § 5 [the federal safe harbor provision]").

Importantly, if a recount *cannot* be accomplished by the "safe harbor" date, or if it is started but not finished by that date, then the State Defendants *must*, on or before December 13, 2016, certify to the federal government the initial elector results announced on November 28, 2016. Accordingly, this Court should issue a writ of mandamus ordering as such. Any other result would threaten to disenfranchise Michigan's voters in the Electoral College or cede control over the appointment of Michigan's electors to a federal body—a result that would not only be contrary to Michigan's interests and to the express will of the Legislature, but that would also be unconstitutional under the United States Constitution as violating the Legislature's determination under its plenary authority that Michigan participate fully in the federal electoral process. US Const, art II, § 1, cl 2.

Should there be any conceivable dispute over state deadlines for resolving recounts in a presidential election, it is for the Legislature, and not any other state entity, to issue specific laws to govern the timetable for such recounts. See *Bush v*

Gore, 531 US 98, 110 (2000) (reversing state court's order to recount where recount procedure then in place could not adequately and constitutionally meet federal safe harbor deadline of 3 USC 5); *Gore v Harris*, 773 So 2d 524 (Fla, 2000) (holding, on remand from the U.S. Supreme Court, that candidates were not entitled to recount given passage of safe harbor date and fact that uniform standards for recounting of ballots should be left to legislature). In the meantime, no State entity may contravene the Legislature's express will that Michigan's electors participate fully in the electoral process. Any dispute must be finally resolved and certified before December 13, 2016.

IV. Because it is not possible to complete a statewide hand recount before December 13, 2016, this Court should order that any recount, if allowed to proceed, must be done electronically.

While Michigan law generally gives the Board of State Canvassers discretion to conduct recounts either manually or electronically, MCL 168.871(1) & (3), 168.874(2)(a), that discretion—again—is cabined by the Legislature's mandate that Michigan's electors participate fully in the federal electoral process. Stated differently, the Legislature has given the Board no authority to jeopardize Michigan's votes in the Electoral College.

But proceeding with a recount by hand would do just that: it would jeopardize Michigan's votes in the Electoral College. A 2005 recount *just for the Detroit mayoral election* took a month, and other Detroit mayoral recounts have taken three weeks. Chad Livingood, *State officials gear up for Michigan recount effort*, The

Detroit News (Nov. 28, 2016), available at http://www.detroitnews.com/story/news/politics/2016/11/28/jill-stein-recount/94539238/ (last visited Dec. 1, 2016).

Indeed, Michigan's Director of Elections, Chris Thomas, has expressed "concern" over the ability to complete a statewide recount by December 13: "Anytime you have a 10-day period, 10, 12 day period to do a statewide recount, there's a lot of things that hopefully will not go wrong. It's going to have to move right along. So yeah, we have concerns[.]" Joe LaFurgey, *Vote recount ordered by Jill Stein likely to cost MI taxpayers*, Wood TV (Nov. 28, 2016), available at http://woodtv.com/2016/11/28/vote-recount-ordered-by-jill-stein-likely-to-cost-mi-taxpayers/ (last visited Nov. 30, 2016). Secretary of State spokesman Fred Woodhams has also cited the "limited amount of time" to conduct the recount, noting that state elections officials must supervise the recounts at the county level but that the Bureau of Elections does not have enough employees even to send one employee per county. *Id.*

Further delay is also inevitable under state law. As discussed above, because candidate Trump has filed objections to the recount petition with the Board of State Canvassers, the Legislature has directed that the Board "shall not begin a recount unless 2 or more business days have elapsed since the board ruled on the objections[.]" MCL 168.882(3). "The Legislature's use of the term 'shall' indicates a mandatory and imperative directive." *Stand Up v Sec'y of State*, 492 Mich 588, 601 (2012) (quotations and citation omitted). It is anyone's guess at this point when the Board will rule on the objections, which ruling must take place *after* the Board

holds a hearing and allows both sides to present argument on the objections. *Id*. But what is certain is that this legislatively mandated delay cuts into what is already an insufficient amount of time to conduct a statewide recount.

Importantly, the inability to complete a manual, statewide recount by December 13, 2016, as required to guarantee Michigan's place in the Electoral College, was not caused by any State entity or by the current President Elect's lodging of objections. Instead, the impossibility was caused by Stein's own decision to wait until the *last possible moment* under state law to petition for the largest recount Michigan has had to undertake in 60 years. LaFurgey, *supra*. Michigan Compiled Laws 168.879(1)(c), which sets the deadline for filing a petition for recount, does not preclude a candidate from filing the petition before the canvass of votes is completed. *Santia v Bd of State Canvassers*, 152 Mich App 1, 4 (1986) ("We find that the statute on its face sets only an outside time limit upon which the recount petition may be filed."). If Stein wished to trigger an orderly and timely recount that could be completed consistently with state and federal law—and not a rushed, disorderly recount that inevitably threatens Michigan's vote in the federal electoral system—she should have filed her petition long ago, as early as the close of polls on November 9, 2016, and certainly more than the drop-dead deadline of "48 hours following the completion of the canvass of votes." MCL 168.879(1)(c).

It was Stein's decision to drag her feet in requesting a recount. But this Court cannot allow that choice to jeopardize Michigan's role in the Electoral College. At this late point, any recount must be conducted electronically, as the elections

board and a federal district court have similarly concluded with respect to Stein's recount petition in Wisconsin. Mark Sommerhauser and Matthew DeFour, *Judge denies request for hand recount of Wisconsin's presidential election results*, Wisconsin State Journal (Nov. 30, 2016), available at http://host.madison.com/wsj/news/local/govt-and-politics/judge-denies-request-for-hand-recount-of-wisconsin-s-presidential/article_527e4a4b-4840-579b-a56c-10ab0c4a334f.html (last visited Dec. 1, 2016).

CONCLUSION AND RELIEF REQUESTED

For the foregoing reasons, the Attorney General asks this Court to immediately issue a writ of mandamus to prohibit the recount of presidential ballots because Stein is not an aggrieved candidate under Michigan law.

Alternatively, the Attorney General asks this Court to immediately issue a writ of mandamus ordering the State Defendants to comply with Michigan law, specifically to: (1) stop the recount until two business days after the Board of State Canvassers resolves objections to the recount petition; (2) complete any recount and certify electors to the federal government by December 13, 2016, or else certify to the federal government on or before that date the initial elector results announced on November 28, 2016; and (3) conduct the recount electronically, not by hand. This Court should further order that if, at any point in the recount process, the number of votes that Stein requires to win Michigan's electoral votes exceeds the number of ballots left to be counted, the recount must end immediately.

Respectfully submitted,

Bill Schuette
Attorney General

Carol L. Isaacs (P49889)
Chief Deputy Attorney General

Matthew Schneider (P62190)
Chief Legal Counsel
Counsel of Record

John Bursch
Special Assistant Attorney General
BURSCH LAW PLLC
9339 Cherry Valley Ave SE, #78
Caledonia, MI 49316
(616) 450-4235

Kathryn M. Dalzell (P78648)
Assistant Solicitor General
Attorneys for Plaintiff
P.O. Box 30212
Lansing, MI 48909
(517) 373-1124

Dated: December 2, 2016