Case Nos. 377923, 377994, 378054

STATE OF MICHIGAN
IN THE COURT OF APPEALS
DISTRICT III

BLAKE MAZUREK, **ROBIN SMITH**, and **TIMOTHY SMITH**,
Plaintiffs / Appellees,

v.

KATHY BERDEN,
Defendant / Appellant
(Case No. 378054)

MARI-ANN HENRY
Defendant / Appellant
(Case No. 377923)

MARIAN SHERIDAN, **AMY FACCHINELLO**, **ROSE ROOK**, and **HANK CHOATE**
Defendants / Appellants
(Case No. 377994)

and

MAYRA RODRIGUEZ, **MESHAWN MADDOCK**, **JOHN HAGGARD**, **KENT VANDERWOOD**, **JAMES RENNER**, **CLIFFORD FROST**, **STRANGELY GROT**, **TIMOTHY KING**, **MICHELE LUNDGREN**, and **KEN THOMPSON**,
Defendants / Appellees,

ON APPEAL FROM THE SEVENTEENTH JUDICIAL CIRCUIT COURT
FOR KENT COUNTY – CIVIL DIVISION
Circuit Court Case No. 2023-00306-CZ (Hon. Christina Mims)

BRIEF OF DEFENDANTS / APPELLANTS BERDEN, SHERIDAN, FACCHINELLO, ROOK, AND CHOATE

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INTRODUCTION

Defendants/Appellants Kathy Berden, Marian Sheridan, Amy Facchinello, Rose Rook, and Hank Choate ("Defendants/Appellants") appeal from the Kent County Circuit Court's Opinion and Order denying their motion for summary disposition filed pursuant to MCR 2.116(C)(8). Defendants/Appellants moved to dismiss this lawsuit filed by Plaintiffs/Appellees ("Plaintiffs") because Plaintiffs' claims fail as a matter of law. This civil lawsuit brought by three Biden electors (Plaintiffs) is a continuation of efforts to weaponize the law to punish political opponents. Defendants/Appellants are five of the sixteen alternate-slate of electors who were involved in the contentious 2020 presidential election.

Plaintiffs served as Michigan's presidential electors and cast Michigan's electoral votes for Joseph Biden and Kamala Harris, the Democratic nominees for President and Vice-President of the United States. Defendants were competing candidates for the office of elector and cast alternate votes for Donald Trump and Mike Pence, the Republican nominees for President and Vice-President. Plaintiffs claim to be "highly offended" by the casting of these alternate votes, (Compl. ¶ 45, App.036); yet, they waited three years to file this action, by which they now belatedly seek a declaratory judgment that they were lawful presidential electors and falsely accuse Defendants of conspiring to present them in a false light and to convert the office of elector.

At the end of the day, Plaintiffs cast their ballots for their candidates, their candidates won, and their candidates already served their terms as President and Vice-President of the United States. Defendants' so-called "fake ballots" were of no consequence to the outcome of the election, and they similarly had no impact on *any* cognizable legal interest of Plaintiffs—individuals who *willingly* jumped into the rough and tumble fray of contentious national politics. Plaintiffs' lawsuit has <u>*no*</u> legal merit and should be dismissed. The circuit court's opinion allowing

this lawsuit to persist is patently wrong. This Court should summarily reverse the circuit court and dismiss this lawsuit as it is an abuse of the legal process.

BACKGROUND

Without question, the 2020 general election was contentious. But so are most general elections. For example, Al Gore repeatedly claimed that the 2000 election was "stolen" by George W. Bush. (See https://gop.com/video/12-minutes-of-democrats-denying-election-results/). Hillary Clinton claimed that the 2016 election was "stolen" by Donald Trump (*id.*), and that he was an "illegitimate president" (https://abcnews.go.com/theview/video/hillary-clinton-calls-donald-trump-illegitimate-president-66010832). It's the nature of politics.

But not until recent times has a political party sought to weaponize the courts and the legal process to punish those who questioned a general election. Unfortunately, a dangerous precedent has been set, and it is unclear how this will turn out. Typically, what is good for the goose is good for the gander. Should the party that is currently out of power prevail in the next general election and the losers seek to challenge various aspects of the election, claiming that it was illegitimate (which history shows is inevitable), the precedent has been set to unleash the power of federal and state attorneys general to target political opponents with burdensome and costly criminal indictments and for politically-motivated litigants to pursue civil lawsuits for similar reasons. This dangerous practice must stop, and this Court can play a role in helping to stop it by dismissing this politically-motivated lawsuit.

In *T&V Associates v Director of Health & Human Services*, 347 Mich App 486 (2023), Judge Yates urged the Court to end the "Covid wars." Pointing to "overheated rhetoric in briefs and oral arguments," he suggested that Covid litigation had become "sacred causes" to the litigants and attorneys prosecuting them, "rather than mere court cases," and that the battles would never

end unless the judiciary decided to "bring down the curtain on [that] chapter in our history." *Id*. at 517–518 (Yates, J., dissenting). The Supreme Court ultimately agreed. *T&V Assocs v Director of Health & Human Servs*, 12 NW3d 594 (Mich 2024).

We suggest the same is true for litigation over the 2020 presidential election. Another election cycle has passed. Six years on, we have attorneys general in various states prosecuting people into financial ruin for casting alternate votes to preserve a challenge to a disputed election. And here we have Plaintiffs and their lawyers calling Defendants liars, cheats, and traitors to their country for presenting an election dispute to Congress, which ultimately declared Plaintiffs' candidates the victors. (Compl. ¶ 44, App.035-036).

Make no mistake, process is punishment. If this patently frivolous action is not summarily dismissed for the reasons set forth herein, Defendants/Appellants will continue to suffer financial hardship and emotional stress associated with this litigation. All of this has a chilling effect on the fundamental right to participate in our political process protected by the First and Fourteenth Amendments.

Unlike Plaintiffs' Complaint, the point of this appeal is not to relitigate the 2020 election—that shot is down range. Rather, the goal of this appeal is to put a stop to the weaponization of the legal process to attack political opponents. Our republican form of government will not long sustain such an abusive use of the courts. And such an abuse has a chilling effect on a private citizen's First Amendment right to be involved in the political process. See *Wesberry v Sanders*, 376 US 1, 17 (1964) (stating that "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws"); *Hand v Scott*, 285 F Supp 3d 1289, 1299 (ND Fla 2018) ("In our democratic society where the people are sovereign, voting is the citizen's ultimate form of political expression."); see also *NAACP v Claiborne Hardware Co,* 458 US 886,

913 (1982) ("[E]xpression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.' '[Speech] concerning public affairs is more than self-expression; it is the essence of self-government.'") (citations omitted); *Elrod v Burns*, 427 US 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). Accordingly, it is in the public interest to dismiss this lawsuit, which ultimately chills the exercise of First Amendment freedoms. See *G & V Lounge v Mich Liquor Control Comm'n*, 23 F3d 1071, 1079 (CA 6, 1994) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights."); *Dayton Area Visually Impaired Persons, Inc. v Fisher*, 70 F3d 1474, 1490 (CA 6, 1995) (stating that "the public as a whole has a significant interest in ensuring equal protection of the laws and protection of First Amendment liberties").

In short, it's time to move on. And that will only happen if the Court reverses the circuit court's erroneous decision. Defendants/Appellants should not be put through several more years of legal fees and costs when this case can—and should—be brought to a close now on pure questions of law.

RULINGS, ORDER, AND JUDGMENT APPEALED[1]

On October 22, 2025, the circuit court denied Defendants/Appellants' motions for summary disposition. (Op & Order, App.015-019). In its order, the circuit court allowed all claims against all Defendants to proceed. The four claims advanced by Plaintiffs are (1) a request for a declaratory judgment that Plaintiffs and "not defendants, were true Electors of the State of Michigan for President and Vice President of the United States, and that defendants' fake elector scheme was illegal under Michigan law"; (2) invasion of privacy – false light; (3) statutory conversion; and (4) civil conspiracy. (*Id.*).

[1] The Register of Actions is found in the Appendix at App.001-014.

Defendants/Appellants timely filed applications for leave to appeal the circuit court's Opinion and Order denying their motions for summary disposition. On February 18, 2026, this Court granted the motion for immediate consideration and granted Defendants/Appellants' applications for leave to appeal. Three applications were granted (Defendant/Appellant Berden, Case No. 378054; Defendants/Appellants Sheridan, Facchinello, Rook, and Choate, Case No. 377994; and Defendant/Appellant Mari-Ann Henry, Case No. 377923), and all three cases are consolidated here. (Orders, App.020-022).

ALLEGATIONS OF ERROR AND RELIEF SOUGHT

The circuit court denied Defendants/Appellants' motions for summary disposition. As set forth in detail below, the circuit court's Opinion and Order is wrong as a matter of law as Plaintiffs' Complaint fails to state a claim upon which relief can be granted. The Complaint should be dismissed.

JURISDICTIONAL STATEMENT

The circuit court entered its Opinion and Order denying Defendants/Appellants' motions for summary disposition on October 22, 2025. Defendants/Appellants filed timely applications for leave to appeal. See MCR 7.203(B)(1) & MCR 7.205(A)(1)(a). On February 18, 2026, this Court granted Defendants/Appellants' applications (Case Nos. 378054 and 377994) and the application filed by Defendant/Appellant Henry (Case No. 377923), consolidating all three cases. (Orders, App.020-022). This appeal follows.

QUESTIONS PRESENTED

I. Does the circuit court lack jurisdiction to grant Plaintiffs' request for a declaratory judgment when the claim is moot as it seeks to obtain a judgment on a "pretended controversy" and thus fails as a matter of law?

Circuit Court's Answer: No.

Defendants/Appellants' Answer: Yes.

II. Does Plaintiffs' invasion of privacy – false light claim fail as a matter of law?

Circuit Court's Answer: No.

Defendants/Appellants' Answer: Yes.

III. Does Plaintiffs' statutory conversion claim fail as a matter of law?

Circuit Court's Answer: No.

Defendants/Appellants' Answer: Yes.

IV. Does Plaintiffs' conspiracy claim fail as a matter of law?

Circuit Court's Answer: No.

Defendants/Appellants' Answer: Yes.

STATEMENT OF FACTS / RELEVANT ALLEGATIONS

Leading up to the 2020 presidential election in Michigan, Plaintiffs Blake Mazurek, Robin Smith, and Timothy Smith were nominated by the Michigan Democratic Party to serve as three of the sixteen electors on the Democratic slate of presidential electors (*i.e.*, the Biden/Harris electors) to vote in the Electoral College for President and Vice President of the United States, in the event that the Democratic presidential candidate, Joe Biden, were to win the election in Michigan. (Compl. ¶ 22, App.028-029).

The Presidential race in the State of Michigan was called on Wednesday, November 4, 2020, after the general election held on Tuesday, November 3, 2020. Joe Biden won the election in Michigan by a little more than 154,000 votes. (Compl. ¶ 26, App.030).

Michigan Election Law provides that the one and only slate of electors from Michigan for President and Vice President of the United States is the slate of electors nominated by the political

party of the candidate receiving the greatest number of votes at the November Presidential election.[2] (Compl. ¶ 27, App.030).

Following the procedure mandated by Michigan Election Law, after the State Board of Canvassers ascertained the result of the election as to the electors of President and Vice President of the United States, the Governor of the State of Michigan certified the results of the election in Michigan and the names of the electors in this State chosen as electors of President and Vice President of the United States. This is evidenced by the Amended Certificate of Ascertainment of the Electors of the President and Vice President of the United States of America signed and certified by Governor Gretchen Whitmer, under the Great Seal of the State of Michigan. A copy is attached to the Complaint as Exhibit A. (Compl. ¶ 28, Ex. A, App.030-031, 042-048).

The Amended Certificate of Ascertainment certified that the slate of electors nominated by the Democratic Party were duly elected as Electors of the President and Vice President of the United States, having received 2,804,040 votes for the winning candidate (Joe Biden) compared to the slate of electors nominated by the Republican Party, which received 2,649,852 votes for the losing Republican candidate (Donald Trump). The Amended Certificate of Ascertainment ultimately was sent according to law to Congress and the National Archives. (Compl. ¶ 29, App.031).

Following the procedure mandated by Michigan Election Law, the slate of electors nominated by the Democratic Party and elected in the general election held in the State of Michigan (*i.e.*, the Biden/Harris Electors, including Plaintiffs) duly convened in the State Capitol in Lansing on December 14, 2020, at 2 p.m., and formally cast their 16 electoral votes for Joe Biden for

[2] As Plaintiffs admit in their Complaint, Michigan law already designated Plaintiffs as the true electors in this case. There is nothing for a court to say further or otherwise on this point.

President of the United States. This is reflected in the State of Michigan Certificate of Votes for President and Vice President, which is attached to the Complaint as Exhibit B. (Compl. ¶ 30, Ex. B, App.031, 049-053).

Plaintiffs claim "an intangible personal property interest in their lawful *office* as true Electors of the State of Michigan for President and Vice President of the United States, having been duly and lawfully elected in the General Election held in the State of Michigan on November 3, 2020." (Compl. ¶ 59 [emphasis added], App.038).

Plaintiffs further allege that "defendants conspired and agreed to submit fraudulent election certificates (1) falsely claiming their candidate won the election in Michigan, when in fact he lost by over 153,000 votes; (2) falsely claiming they were 'the duly elected and qualified Electors for President and Vice President of the United States of American from the State of Michigan,' when in fact the appropriate government officials in Michigan ***had already certified Michigan's official election results for Joe Biden***; and (3) falsely purporting to 'certify' that they had 'convened and organized in the State Capitol' on December 14, 2020 to cast Michigan's 16 electoral votes for Donald Trump, when in fact none of this was true. A copy of their fake election 'certificates' signed by the defendants and styled 'Certificate of the Votes of the 2020 Electors from Michigan,' which they offered as an official public record, is attached [to the Complaint] as **Exhibit C**." (Compl. ¶ 32 [emphasis added], Ex. C, App.031-32, 054-065). Notably, no Plaintiff is named or identified in Exhibit C—the alleged "publication." Accordingly, nothing in Exhibit C says *anything* about the characteristics, conduct, or beliefs of *any* Plaintiff.

Plaintiffs' electoral college votes were in fact cast for their candidates, Joe Biden/Kamala Harris. Joe Biden and Kamala Harris were elected President of the United States and Vice-President of the United States respectively, and they served their full terms in that capacity. In

other words, no defendant prevented *any* Plaintiff from casting his or her electoral vote for Joe Biden/Kamala Harris. No defendant prevented Plaintiffs' candidates, Joe Biden/Kamala Harris, from taking their respective offices. No electoral vote of any defendant was counted. That is, there was nothing that any defendant (including Defendants/Appellants) did that prevented Plaintiffs from casting their electoral votes or that prevented those electoral votes from counting.[3] *Nothing*.

The remaining allegations (largely allegations of a "fake elector scheme") in the Complaint are immaterial. That is, they are of no legal consequence, as the discussion below illustrates.

CIRCUIT COURT ORDER

In its scant, five-page Opinion and Order, the circuit court denied Defendants/Appellants' motions for summary disposition as to all claims.[4] (Op & Order, App.015-019). As set forth in the arguments below, the circuit court's Opinion and Order is contrary to controlling law in all respects.

[3] This Court can take judicial notice of the fact that Plaintiffs successfully cast their electoral votes for Biden/Harris, that those were the only votes from Michigan that were actually counted, that Biden/Harris prevailed in the election, and that Joe Biden served his full term as President of the United States and Kamala Harris served her full term as Vice-President of the United States as a direct result. See MRE 201(b) (providing that a judicially noticeable fact is one that is "either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned").

[4] The circuit court's Opinion and Order addressed multiple motions for summary disposition, including the motions filed by Defendants/Appellants. Defendants/Appellants' motions for summary disposition are found in the Appendix at App.121-158. Plaintiffs' response to Defendant Mari-Ann Henry's motion for summary disposition, which Plaintiffs incorporated by reference in their response to Defendants/Appellants' motion, is found in the Appendix at App.159-186. Plaintiffs' responses to Defendants/Appellants Sheridan's, Facchinello's, Rook's, and Choate's motion for summary disposition is found in the Appendix at App.187-195. Plaintiff never filed a written response to Defendant/Appellant Berden's motion for summary disposition. The transcript of the hearing on the motions to dismiss is found in the Appendix at App.196-221.

STANDARD OF REVIEW

Pursuant to MCR 2.116(C)(8), a party may move for summary disposition when the opposing party has failed to state a claim upon which relief can be granted. See MCR 2.116(C)(8). A motion under this provision tests the legal sufficiency of the complaint on the pleadings alone. See *Maiden v Rozwood*, 461 Mich 109, 119 (1999). When reviewing the motion, "[a]ll well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Id*. "However, mere conclusions, unsupported by allegations of fact, will not suffice to state a cause of action." *Eason v Coggins Mem'l Christian Methodist Episcopal Church*, 210 Mich App 261, 263 (1995). The trial court should grant the motion when the claim alleged is "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery," *Maiden*, 461 Mich at 119 (internal quotations and citation omitted), as in this case.

This Court reviews *de novo* the denial of Defendants/Appellants' motions for summary disposition. *Hays v Lutheran Soc Servs of Mich*, 300 Mich App 54, 58 (2013) ("A grant or denial of a motion for summary disposition is reviewed de novo."); *Citizens Ins Co v Pro-Seal Serv Grp, Inc*, 477 Mich 75, 80 (2007) (same); *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 259 Mich App 315, 324 (2003) (same).

ARGUMENT

I. THE CIRCUIT COURT LACKS JURISDICTION TO GRANT PLAINTIFFS' REQUEST FOR A DECLARATORY JUDGMENT BECAUSE THE CLAIM IS MOOT AS IT SEEKS TO OBTAIN A JUDGMENT ON A "PRETENDED CONTROVERSY" AND THUS FAILS AS A MATTER OF LAW.

Plaintiffs seek a declaration from a court that they, and "not defendants, were true Electors of the State of Michigan for President and Vice President of the United States, and that defendants'

fake elector scheme was illegal under Michigan law."[5] (Compl, Relief Req. ¶ (a), App.041). But it is without question that Plaintiffs' votes were the only ones considered (*i.e.*, they were in fact the actual electors under existing Michigan law), resulting in the election of *their* candidates. In short, there is no controversy for a court to resolve via the prospective remedy of a declaratory judgment. It is wrong to pretend otherwise. The circuit court lacks jurisdiction as Plaintiffs' claim is moot.[6]

The purpose of a declaratory judgment is "to enable the parties to obtain adjudication of rights before an actual injury occurs, to settle a matter before it ripens into a violation of the law or a breach of contract, or to avoid multiplicity of actions by affording a remedy for declaring in expedient action the rights and obligations of all litigants." *UAW v Central Mich Trustees*, 295 Mich App 486, 496 (2012). There is no actual controversy unless "a declaratory judgment is necessary to guide a plaintiff's future conduct in order to preserve the plaintiff's legal rights." *Citizens for Common Sense in Gov't v Att'y Gen*, 243 Mich App. 43, 55 (2000). Nowhere in the Complaint do Plaintiffs allege that they require guidance for future conduct. Further, nowhere in the Complaint do we find an allegation that such judicial guidance is necessary to preserve legal rights given the undisputed fact that Plaintiffs' ballots were accepted as the official ballots for Michigan when Congress convened to tally the votes.[7] See 167 Cong. Rec. H96, H114–H115

[5] The criminal charges, which similarly alleged that the "fake elector scheme was illegal under Michigan law," were dismissed against the defendants following the preliminary examination as the claims lacked merit. See infra n.8.

[6] This point is further illustrated by the fact that Plaintiffs are not seeking injunctive relief as there is nothing to enjoin.

[7] The certificate of votes cast by the Biden electors can be taken as true for purposes of Defendants/Appellants' motions and this appeal because Plaintiffs have adopted it as such. (Comp. ¶ 30, App.031); *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 142, 163 (2019). Congress's count of the votes is an adjudicative fact of which judicial notice may be taken because it is not subject to reasonable dispute; it can be accurately and readily determined from the Congressional Record, the official record of the proceedings and debates of Congress published by the Government

(Jan. 6, 2021). Where, as here, there is no actual controversy, the Court lacks jurisdiction to issue a declaratory judgment. *Citizens for Common Sense in Gov't*, 243 Mich App at 55.

The circuit court failed to engage this analysis. Plaintiffs allege only that they are "apprehensive about again seeking to be nominated as presidential electors in 2024" (Compl. ¶47, App.036), but (a) that election has now come and gone, and (b) judicial proceedings are not therapy sessions. Courts are in the business of deciding cases and controversies. Plaintiffs do not claim they need a declaratory judgment to determine whether they are legally eligible to serve as future presidential electors, and the only election for which they express such concern has already passed. There is, therefore, no actual controversy between the parties requiring declaratory relief. The circuit court lacks jurisdiction and should have dismissed this claim for that reason. It's failure to do so is reversable error.

Indeed, "[i]t is universally understood by the bench and bar . . . that a moot case is one which seeks to get a judgment on a pretended controversy, when in reality there is none . . . ." *League of Women Voters of Mich v Sec'y of State*, 506 Mich 561, 580 (2020) (quoting *Anway v Grand Rapids R Co*, 211 Mich 592 (1920)). An issue is moot if a judicial decision on that issue would have *no practical legal effect*, as in this case.

In *Equity Funding, Inc v Village of Milford*, 342 Mich App 342 (2022), this Court made the following relevant ruling:

> Equity's arguments regarding the validity of the lien and who paid it off are irrelevant. The fact remains that following the payment, Milford released the lien. To declare the lien invalid then, by entering a declaratory judgment or quieting title in Equity, would have had ***no practical legal effect on the parties***. *Adams*, 340 Mich App at 251, 2022 Mich App LEXIS 533 at *8. The lien had already been discharged, and Equity, in effect, achieved the result it sought—clearing title to the property. Therefore, with regard to the quiet-title and declaratory-judgment

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> claims, there was no controversy left to resolve, and the circuit court correctly concluded they were moot.

Id. at 351 (emphasis added). Here, Plaintiffs' request for declaratory relief has no practical legal effect on the parties. None. Defendants' "fake elector scheme" was rejected.[8] Plaintiffs' electoral votes were cast and counted pursuant to Michigan law, Plaintiffs' candidates won the election, and they served as President and Vice-President of the United States. In sum, there is no legal controversy to resolve. The claim must be dismissed.

II. PLAINTIFFS' INVASION OF PRIVACY – FALSE LIGHT CLAIM FAILS AS A MATTER OF LAW.

Plaintiffs allege that Defendants/Appellants' failed attempt to offer an alternate slate of electors in support of Donald Trump violated the tort of invasion of privacy/false light by publicizing "fake elector certificates" that apparently invaded Plaintiffs' privacy and/or attributed to Plaintiffs highly objectionable characteristics with actual malice. The claim is without merit.

There are four types of invasion-of-privacy claims: "(1) intrusion upon the plaintiff's seclusion or solitude or into his private affairs; (2) public disclosure of embarrassing private facts about the plaintiff; (3) publicity that places the plaintiff in a false light in the public eye; and (4) appropriation, for the defendant's advantage, of the plaintiff's name or likeness." *Puetz v Spectrum Health Hosps*, 324 Mich App 51, 69 (2018) (citation and quotation marks omitted).

[8] Defendants in this civil case were facing felony charges brought by the Michigan Attorney General for their involvement in the 2020 election—the very same "fake elector scheme" alleged by Plaintiffs in this civil case. The criminal charges lacked merit and were dismissed following the preliminary examination. Insofar as necessary, the Court can take judicial notice of this fact pursuant to MRE 201. (See https://www.youtube.com/watch?v=pYMCAWZ3_AU [video recording of court ruling from the bench and dismissing criminal charges, last visited Oct. 27, 2025]). Nonetheless, similar to how a conviction in the criminal case would have had *no* impact on any cognizable *legal* interest of any Plaintiff (it may make them "feel" good, but that is irrelevant), a declaration in this case will similarly have *no* impact on any cognizable *legal* interest of any Plaintiff. At the end of the day, this is a pretend controversy designed to harass defendants and to take a political "victory lap." It is objectively an abuse of the legal process.

Plaintiffs' claim fails as a matter of law for at least five reasons. First, there was no widespread publication by Defendants/Appellants about or concerning *any* Plaintiff. Second, assuming, *arguendo*, that the submission of the "fake elector certificates" is a publication about or concerning Plaintiffs, nothing in the certificates convey "unreasonable and highly objectionable" matter and, moreover, nothing in the publication "attribut[es]" any objectionable "characteristic[], conduct, or belief[]" to any Plaintiff. Third, Plaintiffs' alleged "implication" theory that the "fake elector certificates" cast Plaintiffs in a false light is defeated by the fact that Plaintiffs were already determined as a matter of law to be the actual electors well before the "fake elector certificates" were submitted. Fourth, assuming, *arguendo*, that the submission of the "fake elector certificates" is a publication about or concerning Plaintiffs, nothing in the certificate "lift[s] the curtain of privacy on a subject matter that a reasonable man of ordinary sensibilities would find offensive and objectionable." And fifth, Plaintiffs' strained "implication" theory does not meet the actual malice standard as a matter of law.

To establish a claim for false-light invasion of privacy, a plaintiff must allege/prove "the defendant ***broadcast to the public in general***, ***or to a large number of people***, information that was ***unreasonable*** and *highly objectionable* ***by attributing to the plaintiff*** *characteristics*, *conduct*, or *beliefs* that were false and placed the plaintiff in a false position." *Puetz*, 324 Mich App at 69 (quotation marks and citation omitted) (emphasis added). "[M]alice is an element of false-light invasion of privacy, regardless of whether the plaintiff is a public or private figure." *Found For Behavioral Resources v WE Upjohn Unemployment Trustee Corp*, 332 Mich App 406, 413 (2020). Consequently, "the defendant must have known of or acted in reckless disregard as to the falsity of the publicized matter and *the false light in which the plaintiff would be placed*." *Id.* at 410 (quotation marks and citation omitted) (emphasis added). As described by this Court:

> [T]he actual malice test mandates a *subjective* inquiry concentrating on the knowledge of a defendant at the time of a publication. See *Harte-Hanks Communications, Inc v Connaughton*, 491 US 657, 688 (1989). Adoption of an objective standard that would concentrate on what readers' inferences "'should have been foreseen'" by a defendant "would permit liability to be imposed not only for what was not said but also for what was not intended to be said." *Newton v Nat'l Broadcasting Co, Inc*, 930 F2d 662, 680, 681 (CA 9, 1990). In a case such as this, where the plaintiffs are claiming injury from an allegedly harmful *implication* arising from the defendant's article, plaintiffs "*must show with clear and convincing evidence that the defendant[] intended or knew of the implications that the plaintiff is attempting to draw* . . . ." *Saenz v Playboy Enterprises, Inc*, 841 F2d 1309, 1318 (CA 7, 1988). Further, that conclusion is refuted if only a "*strained reading of the article itself" would yield the offensive interpretation that a plaintiff alleges*. *Howard v Antilla*, 294 F3d 244, 254 (CA 1, 2002).

Battaglieri v Mackinac Ctr for Pub. Policy, 261 Mich App 296, 305-06 (2004) ("We have conducted the constitutionally required independent examination of the evidence presented here and conclude that, under the actual malice requirements imposed by the First Amendment, *plaintiffs' complaint should have been dismissed as a matter of law*.") (emphasis added). Thus, whether the allegations support a finding of "actual malice" is a question of law. See *Garvelink v Detroit News*, 206 Mich App 604, 608 (1994) ("The question whether the evidence in a defamation case is sufficient to support a finding of actual malice is a question of law.").

Additionally, the "publicity must lift the *curtain of privacy* on a subject matter that a *reasonable* man of ordinary sensibilities would find offensive and objectionable: *super-sensitiveness* is not protected[.]" *Reed v Ponton*, 15 Mich App 423, 426 (1968) (emphasis added).

Of course, it must be remembered that false light is a ***privacy*** tort born out of the right to be let alone. *Cetera v Mileto*, 342 Mich App 441, 458 (2022). Privacy torts protect a person from "the dissemination of unnecessary information ***about his private life***." *Id.* (quoting *Beaumont v Brown*, 401 Mich 80, 95 (1977) (emphasis added)). Therefore, as noted, the publicity "'must lift the ***curtain of privacy***'" on the subject matter of the disclosure. *Cetera*, 342 Mich App at 457 (quoting *Reed*, 15 Mich App at 426).

There is no invasion of privacy here. Plaintiffs do not allege that the publication of the Trump electors' alternate certificate of votes concerned the private lives of any Plaintiff. To the contrary, Plaintiffs allege that the Michigan Democratic Party nominated them to serve as electors for the Democratic Party's candidates for President and Vice President of the United States. (Compl. ¶ 22, App.028-029). Plaintiffs also allege that they convened in the state capitol and cast their votes as the certified electors for the State of Michigan. (Compl. ¶ 30, App.031). These were public acts taken in a public capacity. None of the allegations concern Plaintiffs' private lives or qualify as "lift[ing] [any] curtain of privacy" surrounding Plaintiffs. "[Plaintiffs'] case simply does not fit a cause of action for [false light because] the circumstances did not involve [Plaintiffs'] right to privacy or concern the need to protect [their] privacy." *Cetera*, 342 Mich App at 457 (emphasis removed). The 2020 presidential election was very much in the public domain and therefore lacked any hallmarks of a need to protect an individual's "privacy" interests. The circuit court utterly failed to engage with this analysis, instead choosing to focus exclusively on the numerosity element. (Op & Order at 2-3, App.016-017).Nonetheless, there was no widespread publication alleged. Plaintiffs identify only two recipients of alternate elector certificates: the Archivist of the United States and the president of the U.S. Senate. (Compl. ¶ 52, App.037). As a preliminary matter, the allegation regarding publication to the president of the Senate is not well-pleaded because it contradicts a fact capable of judicial notice. The Vice President is the president of the U.S. Senate. U.S. Const., Art I, §3, cl. 4. The Vice President never received the alternate certificate of votes. H.R. Rep. 117-663, p. 43. And while presiding over a joint session of Congress to count the electoral votes, the Vice President reported that the certificate of votes cast by the Biden electors was the only one received from Michigan: "[T]his certificate from Michigan, the

Parliamentarian has advised me, is the only certificate of vote from that State that purports to be a return from the State and that has annexed to it a certificate from an authority of the State purported to appoint and ascertain electors." 167 Cong. Rec. H96 (Jan. 6, 2021) (Statement of the Vice President). His statement is immediately followed by Senator Amy Klobuchar (D–MN), who served as one of the congressional tellers, reporting that the certificate of votes memorialized 16 votes for the Democratic nominees. *Id.* (Statement of Sen. Klobuchar). No other certificate of votes was announced. *Id.*

Thus, the only well-pleaded factual allegation of publication relates to the Archivist. One publication to a single recipient (or even two, should the Vice President be counted *arguendo*) cannot qualify as a broadcast to the public in general or to a large number of people. See, e.g., *Derderian v Genesys Healthcare Sys*, 262 Mich App 364, 387 (2004) (publication to 25 people was too small of a group to qualify as a "large number of people" for a false-light claim); *Dzierwa v Mich Oil Co*, 152 Mich App 281, 288 (1986) (publication to a "handful" of people could not support a claim for false light). The circuit court acknowledged the broad dissemination element of false light but made absolutely no effort to explain how publication to, at most, two people adequately pleaded the numerosity element when this Court has held that publication to 25 people was insufficient in *Derderian*.

Additionally, Plaintiffs claim that the defendants' "fake elector certificates," which were "purportedly public documents" and which involved submitting them to the "United States National Archives and the President of the United States Senate," allegedly placed Plaintiffs "in a false light" by "*implying* that plaintiffs were not legitimate or valid electors." (Compl. ¶¶ 52, 53 [emphasis added], App.037). This, of course, is an absurd assertion as Plaintiffs were already determined to be the actual electors as a matter of Michigan law, and that has never changed.

Moreover, no Plaintiff is named or identified in any "fake elector certificate." Accordingly, nothing was "publicized" by Defendants/Appellants about any Plaintiff.

Plaintiffs' "implication" argument is further undermined by their allegations, which acknowledge that "the appropriate government officials in Michigan *had already certified Michigan's official election results for Joe Biden*" before any "fake elector certificate" was allegedly "publicized." (Compl. ¶ 32 [emphasis added], App.031-032). In other words, the "fake elector certificates" had no potential to convey anything adverse because Governor Whitmer's certification issued and delivered to Congress on November 23, 2020 was deemed "conclusive" as to the identity of the Michigan electors. This Certification was made weeks before the "fake elector certificates" were executed and delivered (*i.e.*, "publicized") to any government official. Thus, the "fake elector certificates" had no effect or impact (and thus no adverse "implication") whatsoever. This is a pretend controversy.

Indeed, Plaintiffs' "implied" invasion of privacy/false light claim is unreasonable as a matter of law as Plaintiffs' *own allegations* demonstrate that the "fake elector certificates" were obviously *not* the legitimate elector certificates. Consequently, as a matter of law, no reasonable person would remotely imply from these "fake elector certificates" that Plaintiffs' were not the actual electors.

According to Plaintiffs, this fabricated "implication" is somehow "highly offensive." (Compl. ¶ 54, App.037). Plaintiffs also allege in a conclusory fashion that this was done with "actual malice," but they do so without presenting "clear and convincing evidence" (allegations of fact) showing that any defendant (including Defendants/Appellants) recklessly sought and intended to invade the privacy of each *Plaintiff* and/or to cast each *Plaintiff* in the alleged false

light, nor could they as defendants *never* named *nor* identified any Plaintiff (nor said/publicized *anything* about the Biden/Harris electors in general) in the "fake elector certificates."

Defendants (including Defendants/Appellants) were selected as the Trump/Pence alternate slate of electors. The submission of their electoral votes, which were promptly rejected, said nothing about any Plaintiff. At best, defendants' actions were either a failed political protest to the results of the general election[9] or an effort to create an alternate slate of electors should any of the ongoing litigation succeed and change the election result. What these "fake elector certificates" plainly are <u>not</u> is a statement about any particular Plaintiff. Whoever the electors were for Biden/Harris was of no consequence.

In short, this case simply does not fit a cause of action for false-light/invasion of privacy as a matter of law. The circumstances do not involve any Plaintiffs' right to *privacy* or concern the need to protect Plaintiffs' privacy whatsoever. It's not a close call. There is no "lifting" of a "curtain of privacy" in this matter. And the matter "publicized" fails to mention any specific Plaintiff (or the Biden/Harris electors in general), let alone publicize to the general public or a large number of people anything about Plaintiffs that is "offensive and objectionable." Plaintiffs have also failed to show by *clear and convincing evidence* that defendants (including Defendants/Appellants) intended or knew of the implications Plaintiffs are attempting to draw here. Plaintiffs have failed to meet this "actual malice" standard as a matter of law as even a "strained reading" of the "fake elector certificates" would <u>*not*</u> yield the "offensive interpretation" that Plaintiffs allege. And finally, Plaintiffs' bogus theory of the harm allegedly caused by the

[9] This raises serious First Amendment issues. See *Wesberry*, 376 US at 17 ("No right is more precious in a free country than that of having a voice in the election of those who make the laws."); *Hand*, 285 F Supp 3d at 1299 ("In our democratic society where the people are sovereign, voting is the citizen's ultimate form of political expression.").

"fake elector certificates" doesn't even rise to the level of "super-sensitiveness." Whatever hurt feelings Plaintiffs are suffering do not constitute any basis for advancing this or any other legal claim. And this is particularly the case when you consider the context of their claim: Plaintiffs *willingly* jumped into the political fray of a highly contentious and public national election.

In sum, Plaintiffs' tortured attempt to make out a false-light/invasion of privacy claim is without merit. The circuit court's order permitting this claim to proceed is patently wrong.

III. PLAINTIFFS' STATUTORY CONVERSION CLAIM FAILS AS A MATTER OF LAW.

Plaintiffs allege a claim of statutory conversion in violation of MCL 600.2919a, which requires, in relevant part, the "converting [of] property to the other person's own use." MCL 600.2919a(1)(a). "[T]he Legislature's inclusion of the phrase 'to the other person's own use' in § 2919a(1)(a) indicates its intent to limit § 2919a(1)(a) to a subset of common-law conversions in which the common-law conversion was to the other person's 'own use.'" *Aroma Wines & Equip, Inc v Columbian Distribution Servs, Inc*, 497 Mich 337, 354-55 (2015).

"[S]omeone alleging conversion to the defendant's 'own use' under MCL 600.2919a(1)(a) must show that the defendant employed the *converted property* for some purpose *personal* to the defendant's interests, even if that purpose is not the object's ordinarily intended purpose." *Id.* at 359.

Under the common law, conversion is "'any distinct *act of dominion* wrongfully exerted over another's personal property *in denial of or inconsistent with his rights therein*.'" *Aroma Wines & Equip, Inc*, 497 Mich at 346 (emphasis added); see also *Foremost Ins Co v Allstate Ins Co*, 439 Mich 378, 391 (1992) ("In the civil context, conversion is defined as any distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights

therein."). "The gist of conversion is the interference with control of the property." *Sarver v Detroit Edison Co*, 225 Mich App 580, 585 (1997) (quotations and citation omitted).

The Michigan Supreme Court has held that an action for "trover" will not lie for intangible property, such as a business's goodwill. *Powers v Fisher*, 279 Mich 442, 449 (1937). And the Court has continued to describe a claim for conversion as applying to tangible chattel property. See *Thoma v Tracy Motor Sales, Inc*, 360 Mich 434, 438-439 (1960). Nevertheless, the Michigan courts have recognized that common-law conversion has been extended to *some* forms of intangible property. More specifically, the courts have extended the tort to cover intangible property that was represented or connected by something tangible. See *Sarver*, 225 Mich App at 585-86. However, the intangible property must be of a kind that is capable of being "owned and possessed to the exclusion of others"—that is, the intangible item must possess property-like traits. *Id.* at 586 (internal citation and quotation omitted); see also *id.* (holding that an intangible idea even if produced in a written document was not property capable of being converted, stating that "although plaintiff expressed her idea for an automated turn-on/disconnect process in written form, she did not thereby transform the idea into intangible property *that was subject to private ownership*") (emphasis added).

"Under Michigan law, . . . an elected official has no property right to public office." *Wayne Co Retirees Ass'n v Wayne Co*, Case No. 16-cv-10546, 2017 US Dist LEXIS 225011, at *16 (ED Mich, Feb. 24, 2017) (citing cases). In short, "[a] public office cannot be called 'property' . . . ." *Aguirre v State*, 315 Mich App 706, 718 (2016) (citing cases).

As stated by the Michigan Supreme Court:

> [W]e believe that public offices should not be treated like private property. As *Davies* observed, "To treat political rights as economic commodities *corrupts the political process*." Such treatment fundamentally misunderstands the nature of public office: the law has long been clear that there is no property interest in holding

> public office. As we have stated, "A public office cannot be called 'property,' within the meaning of" various constitutional provisions protecting property interests, including the Due Process Clause. Instead, "[p]ublic offices are created for the purposes of government. They are delegations of portions of the sovereign power for the welfare of the public. They are not the subjects of contract, but they are agencies for the State . . . ." Thus, public offices cannot be commoditized for the personal benefit of the officeholder or aspiring officeholder.

People v Smith, 502 Mich 624, 638-39 (2018); see also *LaPointe v Winchester Bd of Educ*, 366 F App'x 256, 257 (CA 2, 2010) ("[E]lected officials lack such a protected property interest in their elected offices because public offices are mere agencies or trusts, . . . not property.") (internal quotation marks and alterations omitted); *Haney v Winnebago Co Bd*, Case No. 3:19-cv-50191, 2020 US Dist LEXIS 46645, at *16 (ND Ill, Mar. 18, 2020) ("[T]his Court remains bound by the Supreme Court's instruction that, as an elected official, Haney lacks a constitutionally cognizable protected property interest in his elected position . . . ."); *Taylor v Beckham*, 178 US 548, 576 (1900) ("The view that public office is not property has been generally entertained in this country.").

Plaintiffs' conversion claim fails for at least four reasons. First, Plaintiffs allege "an intangible personal property interest in their lawful *office* as true Electors of the State of Michigan for President and Vice President of the United States." (Compl. ¶ 59 [emphasis added], App.038). Unquestionably, this is a *public* "office." Plaintiffs were serving a public function. That is, they were elected to a public and political office to serve a public purpose. They did not accept this public office for personal gain; doing so is called corruption.[10] As stated by the Michigan Supreme Court, "To treat political rights as economic commodities *corrupts* the political process. Such

[10] Plaintiffs are asking for $25,000 in damages (and treble damages for conversion). Do they think they could have sold their electoral vote for that amount of money (or for any amount of money for that matter) without running afoul of public corruption laws? See MCL 168.931. This all demonstrates that Plaintiffs had nothing of *personal* value in their "office" to be converted in the first instance.

treatment fundamentally misunderstands the nature of public office . . . ." *Smith*, 502 Mich at 638 (emphasis added). Because Plaintiffs have no personal property interest whatsoever in this public "office," there was no "property" for any defendant (including Defendants/Appellants) to convert as a matter of law. The circuit court's claim that "applying statutory conversion to this context is novel and may present an issue of first impression" (Op & Order at 3, App.017) is, in reality, another way of saying that the claim is frivolous while placing the court's thumb on the scales of justice to favor Plaintiffs' position over controlling and settled law.

Second, the "intangible property" interest that Plaintiffs' assert is only subject to conversion if it is of a kind that is capable of being "*owned and possessed* to the exclusion of others." See *Sarver*, 225 Mich App at 586 (internal citation and quotation omitted) (emphasis added). Plaintiffs' alleged interest in "their lawful *office* as true Electors of the State of Michigan for President and Vice President of the United States" is not an interest that is capable of being owned or possessed to the exclusion of others. Indeed, this "office" is not "*subject to private ownership*" and thus not subject to conversion as a matter of law. See *id.* at 586. It is wrong to argue otherwise.

Third, no defendant (including Defendants/Appellants) took dominion over Plaintiffs' "intangible property." There was no "interference with control of the property." Plaintiffs' electoral votes were submitted and counted, resulting in the election of their candidates. Plaintiffs' purposes for submitting the electoral votes were achieved. Defendants' actions did nothing to prevent any of this from occurring. In short, no defendant exercised any "dominion" whatsoever over any property (or property interest) of Plaintiffs. It is wrong to argue otherwise.

Finally, to convert property (which didn't happen here as a matter of law as set forth above) to Defendants' "own use" under MCL 600.2919a(1)(a), Plaintiffs must show that defendants

converted this property for some purpose *personal* to defendants. Defendants (including Defendants/Appellants) never obtained anything of personal value from Plaintiffs by submitting the "fake elector certificates." Moreover, Defendants/Appellants did nothing with the Biden/Harris slate of electors (*i.e.*, the tangible connection to Plaintiffs' alleged intangible property interest). It is wrong to argue otherwise.

In the final analysis, Plaintiffs' conversion claim is patently frivolous and contrary to controlling law. There is nothing "novel" about this claim.

IV. PLAINTIFFS' CONSPIRACY CLAIM FAILS AS A MATTER OF LAW.

As set forth above, Plaintiffs have not alleged any viable claims. Consequently, as a matter of law, Plaintiffs have also failed to allege a conspiracy. "A civil conspiracy is a combination of two or more persons, by some concerted action, to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by criminal or unlawful means." *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n*, 257 Mich App 365, 384 (2003) (internal quotations and citation omitted). To support a claim of civil conspiracy, Plaintiffs are required to assert some underlying tortious conduct. *Urbain v Beierling*, 301 Mich App 114, 132 (2013) ("Given that plaintiff has not established that defendants committed an underlying tort, she cannot sustain her claims of concert of action and civil conspiracy."). "[A] claim for civil conspiracy may not exist in the air; rather, it is necessary to prove a separate, actionable tort." *Advocacy Org. for Patients & Providers*, 257 Mich App at 384 (internal quotations and citation omitted); *Swain v Morse*, 332 Mich App 510, 530 n 13 (2020) ("Liability does not arise from a civil conspiracy alone; rather, it is necessary to prove a separate, actionable tort.").

Accordingly, "[i]t is well settled that a claim for civil conspiracy, standing alone, is not actionable. *Cousineau v Ford Motor Co*, 140 Mich App 19, 36-37 (1985). In other words, a civil

conspiracy claim may not be maintained where there are no legal and equitable claims remaining, as in this case. See *Detroit Bd of Ed v Celotex Corp*, 196 Mich App 694, 713 (1992).

In sum, Plaintiffs' civil conspiracy claim, which stands alone as there is no separate and actionable tort, must be dismissed.

CONCLUSION

The Court should summarily reverse the circuit court and dismiss Plaintiffs' Complaint.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Defendants/Appellants hereby certify that pursuant to MCR 7.212(B), this brief contains 7,908 words. Defendants/Appellants relied on the word count of the word-processing system used to prepare this brief.

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