STATE OF MICHIGAN
IN THE SUPREME COURT

DONALD J. TRUMP, **Appellant,** **V** **MICHIGAN BOARD OF STATE CANVASSERS and CHRISTOPHER THOMAS, Director of Elections, in his official capacity,** **Appellee.**	**THIS APPEAL INVOLVES A RULING THAT A STATE GOVERNMENT ACTION IS INVALID AND IN WHICH A DELAY IN FINAL ADJUDICATION IS LIKELY TO CAUSE SUBSTANTIAL HARM—DECISION NEEDED BY NOON ON DECEMBER 6, 2016.** **Supreme Court No. _____** **Court of Appeals No. 335958** **APPELLANTS' APPLICATION FOR LEAVE TO APPEAL** **ORAL ARGUMENT REQUESTED**

Gary P. Gordon (P26290)
Jason T. Hanselman (P61813)
Dykema Gossett, PLLC
Attorneys for Donald J. Trump
201 Townsend Street, Suite 900
Lansing, MI 48933
(517) 374-9100

Denise Barton (P41535)
Assistant Attorney General
Michigan Department of Attorney General
525 W. Ottawa Avenue
G. Mennen Williams Bldg.
Lansing, MI 48933
(517) 373-6434

John D. Pirich (P23204)
Honigman Miller Schwartz and Cohn LLP
Attorneys for Donald J. Trump
222 North Washington Square, Suite 400
Lansing, Michigan 48933
(517) 377-0712

Donald F. McGahn II
General Counsel
Donald J. Trump for President, Inc.
51 Louisiana Ave., N.W.
Washington, D.C. 200001-2113
(202) 879-3939

Chad A. Readler
Jones Day
Attorney for Donald J. Trump
325 John H. McConnell Blvd., Suite 600
Columbus, OH, 43221
(614) 469-3939
Pro hac vice application pending

Eric E. Doster (P41782)
Doster Law Offices, PLLC
Attorney for Donald J. Trump
2145 Commons Parkway
Okemos, MI 48864
(517) 483-2296

APPELLANTS' APPLICATION FOR LEAVE TO APPEAL
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STATEMENT IDENTIFYING ORDER APPEALED FROM AND RELIEF SOUGHT

On December 2, 2016, the Michigan State Board of Canvassers deadlocked in considering whether to accept Appellant Donald J. Trump's objections to Dr. Jill Stein's petition for a statewide hand recount and directed the Director of Elections to undertake a hand recount of nearly five million votes across Michigan. At the December 2, 2016 meeting, attorneys for Trump detailed the various legal deficiencies with the Recount Petition. One Board member made a motion to deny Stein's Recount Petition because it failed to fulfill the statutory prerequisites for a recount petition under MCL 168.879. That motion was seconded by another Board member, however, the Board ultimately deadlocked and failed to reject the Petition.

This Application for Leave to Appeal the Board of Canvassers' decision is being filed contemporaneously with a Complaint for Mandamus and Injunctive Relief, filed in the Michigan Court of Appeals. Accordingly, the Application is timely under Michigan Court Rule ("MCR") 7.305(c)(a), which governs Applications filed "before the Court of Appeals decision," and requires that such Applications be filed within 42 days of the date "a claim of appeal is filed in the Court of Appeals."

For the reasons stated herein, Appellant Trump respectfully requests that this Court grant leave to appeal and, on appeal, reverse the Board of Canvassers' ruling authorizing a statewide hand recount, and permanently enjoin any further actions relating to the recount.

SUFFICIENT GROUNDS EXIST TO WARRANT GRANTING THE APPLICATION FOR LEAVE TO APPEAL

MCR 7.305(B)(4) allows, as relevant here, for an Application for Leave to Appeal to be filed in the Supreme Court if the Application shows that:

> (1) the issue involves a substantial question about the validity of a legislative act;
> (2) the issue has significant public interest and the case is one by or against the state or one of its agencies or subdivisions or by or against an officer of the state or one of its agencies or subdivisions in the officer's official capacity;
> (3) the issue involves a legal principle of major significance to the state's jurisprudence;
> (4) in an appeal before a decision of the Court of Appeals,
> (a) delay in final adjudication is likely to cause substantial harm, or
> (b) the appeal is from a ruling that a provision of the Michigan Constitution, a Michigan statute, a rule or regulation included in the Michigan Administrative Code, or any other action of the legislative or executive branches of state government is invalid….[MCR 7.305(B)].

This Application clearly meets the requirements of MCR 7.305(B) because:

1. The issues in this case are issues of significant public interest, and the case is one against officers of the State, Michigan's Board of State Canvassers and Michigan's Director of Elections Chris Thomas, in his official capacity.

2. The case involves legal principles of major significance to the state's jurisprudence, including issues related to statutory interpretation, administrative law, and constitutional law.

3. This Court should hear this case prior to a decision by the Court of Appeals because a delay in final adjudication is likely to cause substantial harm. Allowing this recount to proceed will result in substantial costs to Michigan taxpayers, substantial time commitments from volunteers statewide, and a message to every United States citizen that elections are

inherently unreliable, and should be presumed so until proven otherwise. See Livengood, *Ingham Co. clerk calls recount $45k 'logistical hell'*, DETROIT NEWS (Nov. 30, 2016), archived at https://perma.cc/44JE-H3LK (quoting one county clerk describing the recount process as a "logistical hell"); Wisely, Guillen, & Hall, *Here's What Michigan Will need for 'monumental' presidential recount*, DETROIT FREE PRESS (Nov. 29, 2016), archived at https://perma.cc/HM3F-DY8R (quoting another election official, who explained that Oakland County has "never had a recount of this magnitude," and described the task as a "monumental undertaking").

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. MCL 168.879(b) requires recount petitions to allege that the petitioning candidate is "aggrieved on account of fraud or mistake." Here, the petitioning candidate (Stein) received approximately 1% of the vote, and it is undisputed that the fraud or mistake she alleges did not prevent her from winning Michigan's election. Because Stein was unaffected by the fraud or mistake she alleges, and because she failed to allege that a recount could result in her winning Michigan's election, has Stein alleged that she was "aggrieved" by fraud or mistake, as required by MCL 168.879(b)?

   Appellants' answer: No.

   Appellees' answer: Yes.

   Board of Canvassers' answer: Deadlocked

2. Michigan law requires that all recounts be finished by December 13, 2016. The Board of Canvassers decided to proceed with a hand recount that cannot possibly be finished by that date. Was its decision contrary to Michigan law?

   Appellants' answer: Yes.

   Appellees' answer: No.

   Board of Canvassers' answer: Deadlocked

3. Did the Board commit reversible error when it failed to reject Stein's recount petition that was not properly signed and sworn to by the candidate?

   Appellants' answer: Yes.

   Appellees' answer: No.

   Board of Canvassers' answer: Deadlocked

INTRODUCTION

Minutes before the deadline for doing so, Green Party Presidential candidate Dr. Jill Stein filed a half-page, four paragraph petition challenging the outcome of Michigan's presidential election. (Ex. 1) Without any specification, Dr. Stein asks that Michigan residents endure an expensive, time-consuming recount, and the scrutiny and hardship that comes with it. Earlier today, the Board of Canvassers deadlocked 2-2 over the propriety of the recount petition.

Why would Dr. Stein make this request? We know it has nothing to do with changing the election's outcome. Dr. Stein did not win the State of Michigan. Not by a longshot. She received barely 1 percent of the vote in the 2016 Michigan presidential election, finishing over 2.2 million votes behind the winner. Dr. Stein has thus understandably conceded that her recount is "not about flipping the vote" or "chang[ing] the result." Dr. Jill Stein on Twitter, TWITTER (Nov. 30, 2016), archived at https://perma.cc/4ZCH-YDPS ("… #Recount2016 is about election integrity, not about flipping the vote …"); Stein, *Why the recount matters: Jill Stein*, USA TODAY (Dec. 1, 2016), *archived at* https://perma.cc/VZK4-5BVF ("Our goal is not to change the result of the election.").

Nor could her request justly rest on ensuring the fairness and accuracy of Michigan's presidential election. All available evidence indicates the 2016 general election was not tainted by fraud or mistake. Governor Snyder has said so. See Governor Rick Snyder on Twitter, TWITTER (Nov. 28, 2016) archived at https://perma.cc/Q5X3-ACZV. So too has the White House. See Geller, *White House insists hackers didn't sway election, even as recount begins*, POLITICO (Nov. 26, 2016), archived at https://perma.cc/5Z5C-Z59S. Even the chief counsel to second-place finisher Hillary Clinton concedes there is no evidence of any tampering that would warrant a recount or lawsuit. See Elias, *Listening and Responding To Calls for an Audit and Recount*, MEDIUM, archived at https://perma.cc/S45U-MWZ4.

So why is Stein seeking a recount? All we know for certain is that she is using it to line her pockets with funds donated from those gullible enough to think Michigan's electoral process was hijacked by nameless foreign entities. It would be bad enough if she were wasting only her own time and resources as part of her electoral farce. But she is also wasting millions of dollars in taxpayer money: estimates suggest Michigan will spend $4 million of its own money to fund this unneeded recount. See Livengood, *Mich. Recount to start Friday barring Trump challenge*, THE DETROIT NEWS (Dec. 1, 2016), archived at https://perma.cc/LN4N-2SEE ("Secretary of State Ruth Johnson said Wednesday the recount cost could total $5 million," and that "state and county governments on the hook for … $4 million."). On top of its financial ramifications, her request also casts upon the State a "logistical hell," according to election officials. See Livengood, Ingham Co. clerk calls recount $45k 'logistical hell', THE DETROIT NEWS (Nov. 30, 2016), archived at https://perma.cc/44JE-H3LK; see also Wisely, Guillen, & Hall, *Here's What Michigan Will need for 'monumental' presidential recount*, DETROIT FREE PRESS (Nov. 29, 2016), archived at https://perma.cc/HM3F-DY8R (Oakland County election official stating he has "never had a recount of this magnitude," and described the task as a "monumental undertaking.").

And not just dollars, cents, and the need for herculean individual efforts are on the line. Rather, it is Michigan's participation in the Electoral College. Having endured a lengthy, expensive, hard-fought presidential election, Michiganians surely expected their votes would matter when the Electoral College meets this December. But that is now in jeopardy. There is just over a week before to finish a monumental recount before the federal deadline for certifying Michigan's electors in accordance with federal and state. See 3 USC § 5 (requiring disputes over electors to be resolved by December 13). A hand recount, however, will take weeks, more likely

months, to complete. And with Stein having made the same demands in neighboring states as well, she even puts at risk confirmation of the entire election's outcome when Congress meets in January 2017. Ultimately, Stein cannot change the outcome of the presidential election. She apparently has no qualms, however, with creating chaos in her effort to do so.

Fortunately, Michigan law does not compel the State to conduct a recount under these circumstances. This Court should therefore reverse the Board of Canvassers' ruling allowing a statewide hand recount to go forward, and permanently enjoin any further actions relating to the recount.

SUMMARY OF ARGUMENT

Michigan Election Law permits candidates "voted for at a primary or election for an office" to "petition for a recount" only if 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." MCL 168.879(1)(b) (emphasis added). Stein's recount petition failed this standard for several reasons, and the Board's determination to the contrary must be reversed. *First*, the petition failed to allege that Stein—a fourth-place finisher, trailing the President-elect by over 2 million votes—was "aggrieved" by the election canvass. Michigan law, the law of other jurisdictions, principles of statutory interpretation, and public policy all support a finding that Stein, who has not alleged that any speculative improprieties harmed her, could not possibly have been "aggrieved."

Second, even if Stein had satisfied the requirements of MCL 168.879, the Board of Canvassers still should have denied her request for a hand recount.[1] In order to ensure its

[1] Michigan's chief elections officer, Secretary of State Ruth Johnson explained in a December 2, 2016 letter to the Board of State Canvassers that an electronic recount is the best option in the event of a recount. See Exhibit 2.

participation in the Electoral College, Michigan law requires that election disputes be resolved by December 13, 2016. If the recount is conducted by hand, that will not be possible: It is inconceivable that Michigan will be able to count over 4.5 million votes by hand in the six days between Tuesday, December 7 (the earliest day on which the recount can begin), and December 13. And MCL 168.879 should not be read to permit a recount that would violate state law by delaying the certification of electors to the Electoral College.

Finally, the Board committed reversible error when it failed to reject a recount petition that was not properly signed and sworn to by Stein. The jurat on Stein's petition, which left out critical requirements, resulted in an invalid notarization. Thus, the recount petition should have never been considered in the first place.

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

On November 9, 2016, Hillary Clinton conceded the presidential election to Donald J. Trump. Over the next several weeks, President-elect Trump worked to fill his Cabinet. In Michigan, the Boards of County Canvassers in each county canvassed the votes cast in their precincts, verifying provisional ballots and ensuring that every valid vote cast was included in the election totals. Stein, who never finished so high as third in any state Presidential election, nonetheless began raising funds to conduct recounts in various states.

On November 28, upon completion of the canvass, the Michigan Board of State Canvassers (the "Board") certified the results of the election. The final vote tallies included 2,279,543 votes for President-elect Trump, 2,268,839 votes for Hillary Clinton, 172,136 votes for Libertarian candidate Gary Johnson, and 51,463 votes for Stein. See *2016 Presidential Election Results*, MICHIGAN SECRETARY OF STATE (last visited Nov. 30, 2016), http://www.michigan.gov/sos/0,4670,7-127-1633_8722_76444-397762--,00.html. That same

day, despite the absence of a formal recount petition filed by Stein, the Board of State Canvassers indicated that the anticipated statewide recount would be conducted by hand.

Two days later—at almost the last possible moment—Stein filed a recount petition with the Board (the "Recount Petition"), as she has also done in Pennsylvania and Wisconsin. The Recount Petition is a half-page, four paragraph petition challenging the outcome of Michigan's presidential election. (See Ex. 1). Despite the substantial nature of her filing, Stein offered no specificity, examples, or even a clear articulation of her theoretical concerns. Indeed, on the basis of nothing more than speculation, Stein asks that Michigan residents endure an expensive, time-consuming recount, and the scrutiny and hardship that comes with it. And not simply a tedious recount of the totals of thousands of individual election machines, but instead a painstaking recount by hand of each of the nearly 5 million ballots cast for President in Michigan. Trump filed objections to the Recount Petition less than 24 hours later, on December 1, 2016. (Ex. 3).

The Board deadlocked 2-2, thus allowing the recount to go forward. Those members who voted in favor of allowing the recount inquired about so-called "under-votes"—that is, ballots on which no vote was cast for President or Vice-President. The presence or absence of under-votes is legally irrelevant, as explained below. But regardless, the level of under-votes and over-votes were recorded at near normal levels in Michigan:

Year	Total Ballots Cast	Total POTUS Votes	POTUS Left Blank #	POTUS Left Blank %
2000	4,279,299	4,232,501	46,798	1.09%
2004	4,875,692	4,839,252	36,440	0.75%
2008	5,039,080	5,001,766	37,314	0.74%
2012	4,780,701	4,730,961	49,740	1.04%
2016	**4,874,619**	**4,790,329**	**84,290**	**1.73%**

Additionally, in this election, many people in Michigan indicated in repeated public surveys that they were dissatisfied with their choices for President. That explains why they were unwilling to vote for anyone on the ballot, choosing instead to leave that field blank or write-in a protest vote for a non-candidate (for example, Bernie Sanders).

ARGUMENT

I. STANDARD OF REVIEW

Whether to grant leave to appeal is within this Court's discretion. This case involves questions of statutory interpretation and constitutional questions, which are both reviewed *de novo*. *People v Stewart*, 472 Mich 624, 631; 698 NW2d 340 (2005); *People v Drohan*, 475 Mich 140, 146; 715 NW2d 778 (2006).

Mandamus is an extraordinary remedy and "the primary purpose of a writ of mandamus is to enforce duties required by law." *Stand Up v Secy of State*, 492 Mich 588, 618 (2012). To obtain a writ of mandamus, the plaintiff must show that it "has a clear legal right to the performance of the specific duty sought to be compelled and that the defendant has a clear legal duty to perform the act." Id.

Whether to grant leave to appeal is within this Court's discretion. This case involves questions of statutory interpretation and constitutional questions, which are both reviewed *de novo*. *People v Stewart*, 472 Mich 624, 631; 698 NW2d 340 (2005); *People v Drohan*, 475 Mich 140, 146; 715 NW2d 778 (2006).

II. STEIN'S RECOUNT PETITION SHOULD HAVE BEEN REJECTED BASED ON ITS FAILURE TO SUFFICIENTLY ALLEGE AGGRIEVEMENT.

MCL 168.879(1) permits candidates "voted for at a primary or election for an office" to "petition for a recount," if and only if they can meet certain requirements. Among other things, the petition must allege "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." MCL 168.879(1)(b) (emphasis added).

Stein's recount petition fails this standard. She does not allege (let alone explain) how a fourth-place finisher could be "aggrieved" by the election canvass. And even if that could be overlooked, Stein's request would have to be denied because no recount can be reliably completed in the time required by state and federal law. Finally, in addition to all that, Stein's petition is not properly notarized as required by Michigan law.

A. The Board Cannot Accept Stein's Recount Petition Because Stein Has Not Shown That She Is "Aggrieved."

1. Candidates seeking recount must demonstrate that they are "aggrieved."

Michigan law requires candidates seeking recounts to allege that they have been "*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 … the board of state canvassers." MCL 168.879(1)(b) (emphasis added). If a "statute's language is clear and unambiguous," the government must "assume that the Legislature intended its plain meaning and … enforce the statute as written." *People v Gardner*, 482 Mich 41, 50; 753 NW2d 78 (2008) (internal quotation marks omitted).

MCL 168.879 is unambiguous with respect to its use of the term "aggrieved." That word, in this context, connotes the violation of a legal right that *causes harm* to the right's holder. See *Maxwell v Dep't of Environmental Quality*, 264 Mich App 567, 571; 692 NW2d 68, (2004) ("Black's Law Dictionary (6th ed.) defines 'aggrieved' to mean 'Having suffered loss or injury; damnified; injured."); see also *Black's Law Dictionary* (10th ed) ("[H]aving legal rights that are adversely affected; *having been harmed by* an infringement of legal rights") (emphasis added).

In the election context, a candidate is harmed—and thus "aggrieved"—by losing an election she should have won.

Michigan officials have long understood "aggrieved" to bear its natural meaning. That much is confirmed by the statements Chris Thomas, Michigan's Director of Elections, made before a hearing of the Board of State Canvassers ten years ago. See Board of State Canvassers Hearing Transcript, November 27, 2006, pp. 1-2. (Ex. 4). There, he reported that the Board "rejected" a recount petition "from a candidate for Secretary of State," who challenged the results in "a number of precincts from Washtenaw County." *Id*. Mr. Thomas explained that Michigan recount law "talks about an *aggrieved* candidate," and added that the petitioning Secretary-of-State candidate did not qualify. *Id*. (emphasis added). Why? Because she did not challenge the vote in "enough precincts to actually affect the outcome of the election." *Id*.

That natural understanding of "aggrieved" is consistent with the idea that legal redress is typically available only to those able to show that they have been harmed. Most torts, for example, require proof of injury. See, e.g., *Henry v Dow Chem Co*, 473 Mich 63, 72; 701 NW2d 684 (2005) ("Michigan law requires an actual injury to person or property as a precondition to recovery under a negligence theory."). So too do most statutory rights of action. See, e.g., *Epps v 4 Quarters Restoration LLC*, 498 Mich 518, 534; 872 NW2d 412 (2015) (explaining that Michigan courts will infer a private right of action to exist only where necessary to, among other things, protect against "the kind of harm which has resulted") (internal citations omitted).

Interpreting "aggrieved" to connote some degree of actual injury also comports with the way that word is used throughout Michigan law. Take, for example, the standing context, where the Michigan Supreme Court has held that "[a]n aggrieved party is not one who is merely disappointed over a certain result," but rather a party who has "suffered a concrete and

particularized injury." *Federated Ins Co v Oakland County Rd Comm'n*, 475 Mich 286, 291; 715 NW2d 846 (2006). This statement reflects the longstanding rule that "[t]o be aggrieved, one must have some interest … in the outcome of the case, and not a mere possibility arising from some unknown and future contingency." *In re Miller's Estate*, 274 Mich 190, 339-340; 264 NW 338 (1936). This harm-requiring reading of "aggrieved" finds more support in *Herman Brodsky Enterprises, Inc v State Tax Commission*, 204 Mich App 376, 383; 522 NW2d 126 (1994), which held that petitioners did not qualify as a "part[ies] aggrieved," for purposes of MCL 207.570, where "no substantial rights of the petitioners were prejudiced." *Herman*, 204 Mich App at 383. See also *Emerick v Saginaw Township*, 104 Mich App 243, 247; 304 NW2d 536 (1981) (explaining that an "aggrieved party" in a fraud case must "allege a causal link between the inequitable conduct and the resulting harm").

In other words, Michigan courts have consistently read "aggrieved" to require actual injury. Michigan's legislature must be assumed to have been aware of that settled meaning when it amended MCL 168.879 in 1999. And when "administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well." *Bragdon v Abbott*, 524 US 624, 645; 118 S Ct 2196; 141 L Ed 2d 540 (1998).

For this reason, Michigan cases involving recounts unsurprisingly involve margins close enough to permit an inference that the alleged fraud or mistake caused the petitioning candidate to lose an election; harm that would render the losing candidate "aggrieved." See, e.g., *Kennedy v Bd of State Canvassers*, 127 Mich App 493, 495; 339 NW2d 477 (1983) (difference of 17 votes between winning and losing candidate); *State v Bd of City Canvassers*, 70 Mich 147, 148-149;

38 NW 11 (1888) ("aggrieved" party, who claimed he would have won but for error in counting votes, was entitled to a recount). MCL 168.879 has never been understood to permit challenges by bottom-dwelling (and thus not aggrieved) candidates like Stein.

2. Case law from other jurisdictions further demonstrates that Stein was not "aggrieved."

Cases from other states confirm that parties claiming to have been "aggrieved" by vote-counting errors must allege that the errors made a difference. One court, interpreting another recount statute, explained that "the 'person aggrieved' must have sustained a direct injury that somehow differentiates him or her from other members of the community." *Babiarz v Town of Grafton*, 155 NH 757, 761; 930 A2d 395 (2007). Another held that a candidate is not "aggrieved" by a recount unless "the ultimate consequence of the recount" goes against him. *Carville v Allen*, 13 AD2d 866, 867; 214 NYS2d 985 (1961). Likewise, when the candidate "does not claim or demonstrate entitlement to th[at] nomination or contend that he would have received it were it not for alleged irregularities in the [election process]," he is not an "aggrieved candidate." *Nicolai v Kelleher*, 45 AD3d 960, 962; 844 NYS2d 504 (2007).

Similarly, the Wisconsin Court of Appeals held that a candidate was not "aggrieved" where she was "not directly injured by [a] recount because the result was in her favor." *Roth v La Farge Sch Dist Bd of Canvassers*, 247 Wis 2d 708, 719; 634 NW2d 882 (2001). And the same court has held "that a person running for office could not be aggrieved by any election irregularities if he or she was not eligible to run for or hold that office in the first place." *Willan v. Brereton*, 238 Wis 2d 446 at *5; 617 NW2d 907 (2000) (per curiam) (unpublished table disposition). (Ex. 5). Each of these cases illustrates that one cannot be aggrieved, in the relevant sense, without having suffered an injury. And each is in addition to the cases from other states holding that, without regard to any statutory requirement of aggrievement, recounts are

unavailable unless the alleged "irregularities" are "such that they would change the result." *Wood v. Lydick*, 1974 OK 75, 523 P.2d 1082, 1084 (1974). There is no good reason for Michigan to do things differently.

3. Public policy and principles of statutory interpretation weigh in favor of a finding that Stein was not "aggrieved."

It is true that "[p]ublic policy requires that statutes controlling the manner in which elections are conducted be construed as far as possible in a way which prevents the disenfranchisement of voters through the fraud or mistake of others." *Kennedy*, 127 Mich App at 496. But there is also "a strong public policy favoring stability and finality of election results." *Buonanno v DiStefano*, 430 A2d 765, 770 (1981); see also *Sumner v New Hampshire Sec'y of State*, 168 NH 667, 670; 136 A3d 101 (2016) (same); *Donaghey v Attorney Gen*, 120 Ariz 93, 95; 584 P2d 557 (1978) ("The rationale for requiring strict compliance with the time provisions for initiating a contest is the strong public policy favoring stability and finality of election results."). And the interest in finality outweighs the competing interest where the party seeking a recount cannot allege even a slim possibility that voter "disenfranchisement" cost her the election. Such is the case here. Further, the principle of liberal construction comes into play only when the statute is otherwise ambiguous. Here, the text and context are *un*ambiguous, and so that principle has no role to play.

No doubt, the Michigan Legislature could have passed a recount law permitting *all* losing candidates to demand a recount. Some states do exactly that. See, e.g., § 102.168(1), Fla Stat (allowing a challenge "by any unsuccessful candidate for [the particular] office"). But Michigan's legislature authorized only those "aggrieved" by the outcome to seek a recount, and so that word cannot be read as mere "surplusage." *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 748; 641 NW2d 567 (2002). To avoid giving "aggrieved" no meaning—to avoid treating it

as surplusage—it should be read to require allegations of actual injury. See *Babiarz*, 155 NH at 759 (applying identical logic to a New Hampshire statute's use of "aggrieved").

To be sure, the legislature may create legal rights enforceable without any showing of harm. See *Lansing Sch Educ Ass'n v Lansing Bd of Educ*, 7487 Mich 349; 92 NW2d 686 (2010) (explaining Michigan's standing doctrine). But it would be stunning if the legislature did so here: What could justify giving candidates the right to force an expensive, time-consuming recount when they are "aggrieved" only in the sense of being "troubled or distressed in spirit"? See *Webster's Ninth New Collegiate Dictionary* (1987). Nothing at all, which bolsters the conclusion that MCL 168.879 was not intended, and has never been understood, to permit recounts at the request of a candidate who does not even purport to be the potential winner.

We are aware of just one case that supports the contrary meaning—an unpublished Report and Recommendation from a magistrate judge that addressed the issue in dicta. See *Bormuth v. Johnson*, 16-cv-13166, Dk. No. 13, slip op. 13–15 (E.D. Mich. Oct. 24, 2016). (Ex. 6). Its analysis is not binding, both because it occurs in dicta, *Auto-Owners Ins. Co. v. All Star Lawn Specialists Plus, Inc.*, 497 Mich. 13, 21, 857 N.W.2d 520, 523 (2014), and because Michigan courts and agencies are "not bound to follow a federal court's interpretation of state law," *Doe v. Young Marines of The Marine Corps League*, 277 Mich. App. 391, 399, 745 N.W.2d 168, 172 (Mich. 2007). Neither is it persuasive. *Bormuth* relied primarily on the principle of liberal construction addressed above, which it believed militated for reading "aggrieved" to mean "having legal rights that are adversely affected." *Bormuth*, slip op. at 14 & n.8. And, it concluded, a candidate's legal rights are adversely affected whenever the vote total is not "accurately tabulated." *Id.*

This analysis is flawed. For one thing, the liberal principle of interpretation has no application here, for the reasons discussed above. Even if it did, the definition of "aggrieved" on which *Bormuth* relies does not support its conclusion. It is true that "aggrieved" may refer to "having legal rights that are adversely affected." But that is only because people are usually injured when their rights are affected, and so that sense of the word *assumes* actual harm. Indeed, the very definition *Bormuth* cites makes this clear: "having legal rights that are adversely affected; *having been harmed by an infringement of legal rights*." Black's Law Dictionary 80 (10th ed.) (quoted in part by *Bormuth*, slip op. at 14 n.8) (emphasis added). *Bormuth* reached its conclusion by simply ignoring, and by *failing to quote*, the second half of that definition. Far from justifying a harm-free reading of "aggrieved," this definition underscores the obviousness of the link between injury and aggrievement.

One final flaw plagues the *Bormuth* decision: it made no attempt to grapple with its interpretation's problems. It did not explain, for example, why its reading of "aggrieved" did not treat the word as surplusage. Nor could it have: If a candidate is "aggrieved" whenever votes are not "accurately tabulated," then a candidate would allege aggrievement simply by alleging mistake or fraud. Why, then, did Michigan's legislature require allegations of *both* (1) aggrievement, and (2) mistake or fraud? *Bormuth* has no answer.

Before the Board, Stein argued that she satisfied her obligation to plead aggrievement, because her petition uses the word "aggrieved," and because the MCL § 168.879(b) does not require *proof* of aggrievement. See Response of Dr. Jill Stein to Donald J. Trump and Donald J. Trump for President, Inc.'s Objections to Dr. Jill Stein's Recount Petition, 1–3 (Bd. Of Canvassers 2016). (Ex. 7.) But that argument is completely non-responsive to Mr. Trump's objections. The problem with Stein's petition is not lack of proof. It is, rather, that she fails

even to *allege* aggrievement. There is no dispute that Stein did not, and would not on recount, win Michigan's presidential election. She does not allege otherwise. Thus, though the petition does use the word "aggrievement," it does not allege that Stein was "aggrieved" in the sense in which that word is used by MCL § 168.879.

4. Because the Board's finding that Stein was aggrieved was contrary to Michigan law, it must be reversed and the recount must cease immediately.

In light of all this, the recount cannot go forward. On November 28, 2016, the Board certified the results of this year's general election. Trump won the state, with 2,279,543 votes. Stein came in fourth, with just 51,463 votes. For perspective, third-place finisher Gary Johnson more than tripled Stein's performance, receiving 172,136 votes. See 2016 Michigan Election Results, http://miboecfr.nictusa.com/election/results/2016GEN_CENR.html (last visited Nov. 29, 2016). Given her tiny vote total, Stein does not, and could not possibly, allege a good-faith belief that she may have won the state of Michigan. Assuming for the sake of argument that there were errors in counting the votes, it is ludicrous to suggest that her votes were undercounted by over 2 million. That is especially so because Stein's support in Michigan is roughly consistent with the support she earned around the country; she won just over 1 percent of the votes in Michigan, and between .4 and 3 percent in other states where she appeared on the ballot.America'sElectionHeadquarters,http://www.foxnews.com/politics/elections/2016/presidential-election-headquarters (last visited Nov. 29, 2016).

In sum, Stein fails to allege that any improprieties harmed her, and thus fails to allege that she is "aggrieved" for purposes of MCL 168.879. Stein, therefore, fails to satisfy the requirements for a recount, and the Board should have denied her Recount Petition for failure to meet that threshold requirement.

III. STEIN'S PETITION SHOULD HAVE BEEN REJECTED BECAUSE IT WAS NOT PROPERLY SIGNED AND SWORN TO BY THE CANDIDATE.

Michigan law requires that all recount petitions be signed and sworn to by the candidate. MCL 168.879(1)(e). Stein's Recount Petition was notarized in Massachusetts, but was not validly notarized. Under Massachusetts law, a jurat (the statement a notary public must affix to make the notarization valid) must take substantially the following form:

> On this _____day of_____, 20_____, before me, the undersigned Notary Public, personally appeared _____(name of document signer),proved to me through satisfactory evidence of identification, which were_____, to be the person who signed the preceding or attached document in my presence, and who swore or affirmed to me that the contents of the document are truthful and accurate to the best of (his) (her) knowledge and belief.
>
> _____(official signature and seal of Notary). See Apostilles and Certificates of Appointment, Ex. 8.

The jurat on Stein's petition omits critical requirements. For example, it does not say that Stein "personally appeared." Nor does the Recount Petition list the forms of identification she used. The notarization is therefore invalid and the Recount Petition must be rejected because Stein has failed to sign and swear to the Recount Petition as the candidate.

This Court has held in other elections cases that "substantial compliance is insufficient to certify…petitions." *Stand Up for Democracy v Secretary of State*, 492 Mich. 588; 822 NW2d 159–162–63 (2012). In other words, if a statute includes a mandatory prerequisite requirement, the petition must fully comply with all such mandatory requirements, not merely partially comply.[2] Because the Recount Petition fails to strictly comply with MCL 168.879(1)(e), it is fatally deficient and cannot provide the basis for a recount.

[2] On December 1, 2016—two days after the deadline for recount petitions—Stein filed a revised petition with a corrected jurat. See Exhibit 9.

Stein's primary response before the Board is difficult to take seriously. She did not dispute the insufficiency of the notarization under Massachusetts law. See Stein Response at 3–4. But, she said, the notarization took the form that notarizations must take in Michigan. Putting aside whether that is even true, it is frivolous. There is no support for the facially absurd notion that *Michigan law* governs the power of a Massachusetts notary to notarize a petition in Massachusetts.

Stein additionally argued that the problem can be ignored, because electors from Stein's slate of electors also petitioned for a recount, and because *their* petitions were properly notarized. She claims that the electors are themselves "candidate[s] voted for at a primary or election for an office," and thus eligible to seek a recount. MCL § 168.879 (emphasis added). Assuming that is true, it is also irrelevant. (If it *is* true—if voters are in truth voting for electors—then Stein herself is not a "candidate," and is therefore ineligible to seek a recount.) In order to seek a recount in an election (such as this one) decided by more than 50 votes or .5 percent of the electorate, "*the petitioner* shall deposit with the state bureau of elections the sum of $125.00 for each precinct referred to in his or her petition." MCL § 168.881. None of the electors did that, and so none has validly petitioned for a recount. Stein cannot save *her* petition by relying on the notarizations of other petitioners whose petitions fail for other reasons.

IV. A RECOUNT CANNOT BE COMPLETED IN TIME FOR MICHIGAN TO BE REPRESENTED AT THE ELECTORAL COLLEGE.

Even if Stein satisfied the requirements of MCL 168.879, her request would have to be denied, as it interferes with Michigan and federal law governing the certification of electors.

Federal law's safe-harbor statute requires that a state's determination of electors be "made at least six days before the time fixed for the meeting of the electors." 3 USC § 5. Michigan, by requiring its electors to convene and vote within the time-frame required by that

statute, see MCL 168.47, has evinced its intent to come within its safe harbor. This year, the "meeting of the electors" will occur on December 19, 2016. 3 USC § 5. Therefore, because Michigan has indicated its intent to participate in the electoral process described by 3 USC § 5, "any controversy or contest that is designed to lead to a conclusive selection of electors [must] be completed by" December 13. *Bush v. Gore*, 531 US 98, 110; 121 S Ct 525; 148 L Ed 2d 388 (2000).

That is no longer possible, particularly if the recount is to occur by hand. Stein waited until the last possible hour to file her recount petition—this despite having all she needed to seek a recount long beforehand. While Michigan law mandates that recount petitions be filed no later than "48 hours following the competition of the canvass of votes," MCL 168.879(c), it puts no limitations on filing earlier, including *before* the canvass of votes, *Santia v Bd of State Canvassers*, 152 Mich App 1; 391 NW2d 504 (1986).

It may well be possible to finish a recount in short order in a local race. But anyone seeking a recount in a statewide race, in particular the presidential election, must be conscious of time constraints, and must file in a manner that will enable election officials to comply with the request. Yet Stein waited until minutes before the deadline, making a recount impossible under state and federal deadlines. Given Stein's 11th-hour recount request, the State could not start a recount before Friday, December 2, 2016, giving vote counters just eleven days to recount nearly 5 million votes. The result is a "logistical hell," says one election official, no doubt aware of the frenzy caused by a late-stage recount. See Livengood, *Ingham Co. clerk calls recount $45k 'logistical hell'*, DETROIT NEWS (Nov. 30, 2016), archived at https://perma.cc/44JE-H3LK. Another explained that Oakland County has "never had a recount of this magnitude," and described the task as a "monumental undertaking." See Wisely, Guillen, & Hall, *Here's What*

Michigan Will need for 'monumental' presidential recount, Detroit Free Press (Nov. 29, 2016), archived at https://perma.cc/HM3F-DY8R. And lest there be any doubt about the deadline, note that the Wisconsin Elections Commission ordered another Stein-led recount to be completed by December 12. See *In re: A Recount of the General Election for President of the United States held on November 8, 2016*, Recount EL 16-03 (Nov. 29, 2016). (Ex. 10).

To count that many votes by hand is not feasible and any attempt to finish the process in time will no doubt lead to errors; poll workers will need to work with tremendous speed for long hours, and mistakes are inevitable. Indeed, one election-law expert has opined that "it is doubtful that *any* state could fairly complete its procedures on" the current federal safe harbor timetable. Tokaji, *An Unsafe Harbor*, 106 Mich L Rev 84, 86 (2008). And this is so even though many of these states would typically be able to begin recounting ballots much earlier than Michigan would be able to here. Reading MCL 168.879 to permit a recount in the present circumstances thus contradicts the principle that "statutes controlling the manner in which elections are conducted be construed as far as possible in a way which prevents the disenfranchisement of voters through the fraud *or mistake* of others." 152 Mich App at 6 (emphasis added). Here, holding a frantic, around-the-clock recount all but assures mistakes.

Reading MCL 168.879 to allow a recount would also contradict the principle that laws governing related subject matter should, "so far as reasonably possible, be construed in harmony with each other, so as to give force and effect to each." *Int'l Bus Machines Corp v Dep't of Treasury*, 496 Mich 642, 652; 852 NW2d 865 (2014). That principle matters here because, again, Michigan has opted to avail itself of 3 USC § 5's safe-harbor provision. See MCL 168.47. Reading Michigan recount law to require recounts that cannot be completed during the safe-harbor period would thus bring it into conflict with MCL 168.47. That conflict is easily avoided,

however, by reading Michigan's recount provisions as implicitly prohibiting recounts initiated so late in the process that they cannot be reliably completed before the 3 USC § 5 deadline expires. That harmonizes all the relevant provisions. See *Int'l Bus. Machines*, 496 Mich at 651-652.

It is also consistent with the rule that "[c]ourts should be reluctant to apply the literal terms of a statute to mandate pointless expenditures of effort." *Alabama Power Co v Costle*, 204 US App DC 51, 62; 636 F.2d 323 (1979). That rule suggests that Michigan's recount provisions should be read as implicitly disallowing recounts that cannot be finished in time to have any effect. And the rule has particular force where, as here, the party demanding the pointless expenditure suffered no harm from the wrongs that expenditure is supposed to right.

At the very least, there is no way of reliably counting the ballots by hand. Nor is there any reason to, as machines are more reliable, and *less* likely to create opportunities for fraud than the use of human counters. To be clear, there is no reason to believe that even a machine recount could be carried out by December 13. But if the State is to have any chance at doing so, that is its only option. *See Bush*, 531 U.S. at 533 (ordering the end to a recount that could not be completed in time to satisfy 3 U.S.C. § 5).

CONCLUSION AND REQUEST FOR RELIEF

The costs of going forward with this recount must not be underestimated. Most obvious, perhaps, are the expenditures of time and money that any recount will entail. Then there are the less-measurable but no-less-real costs that come with questioning the validity of the State's electoral processes. See *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 197, 128 S. Ct. 181, 170 L.Ed.2d 574 (2008) (plurality) (explaining that states have an interest in ensuring "public confidence in the integrity and legitimacy of representative government.") (internal quotation marks omitted). Many of these costs would be acceptable if Michigan law really did entitle Stein to a recount. But it does not. And there is no reason to rewrite Michigan election

law to accommodate the conspiracy-minded requests of an acknowledged loser. This Court should therefore compel the Board of Canvassers to reject the Recount Petition that does not comply with Michigan law and permanently enjoin any further actions relating to the recount.

Respectfully submitted,

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/s/ Gary P. Gordon

Gary P. Gordon (P26290)
Jason T. Hanselman (P61813)
DYKEMA GOSSETT PLLC
Attorneys for Donald J. Trump
201 Townsend Street, Suite 900
Lansing, MI 48933
Telephone: (517) 374-9133

Eric E. Doster (P41782)
DOSTER LAW OFFICES, PLLC
Attorney for Donald J. Trump
2145 Commons Parkway
Okemos, MI 48864
Telephone: (517) 977-0147

Donald F. McGahn II
Counsel
Donald J. Trump for President, Inc.
51 Louisiana Ave., N.W.
Washington, D.C. 200001-2113
(202) 879-3939

Chad A. Readler
JONES DAY
Attorney for Donald J. Trump
325 John H. McConnell Blvd., Suite 600
Columbus, OH, 43221
(614) 469-3939
Pro hac vice application pending

John D. Pirich (P23204)
HONIGMAN MILLER SCHWARTZ COHN
Attorney for Donald J. Trump
222 North Washington Square Suite 400
Lansing, MI 48933
Telephone: (517) 377-0712