No. _____, Original

In the Supreme Court of the United States

STATE OF LOUISIANA, STATE OF A, AND STATE OF B,

Plaintiff,

v.

COMMONWEALTH OF PENNSYLVANIA, STATE OF GEORGIA, STATE OF MICHIGAN, STATE OF MINNESOTA, STATE OF NEVADA, AND STATE OF WISCONSIN,

Defendants.

BILL OF COMPLAINT

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"[T]hat form of government which is best contrived to secure an impartial and exact execution of the law, is the best of republics."

—John Adams

BILL OF COMPLAINT

Our Country stands at an important crossroads. Either the Constitution matters and must be followed, even when some officials consider it inconvenient or out of date, or it is simply a piece of parchment on display at the National Archives. We ask the Court to choose the former.

Lawful elections are at the heart of our constitutional republic. Using the COVID-19 pandemic as a justification, a few government officials in the defendant States Georgia, Michigan, Minnesota, Nevada, Pennsylvania, and Wisconsin—(the "Defendant States") usurped their legislatures' authority and unconstitutionally revised their State's election laws. As a result of these unconstitutional changes, election officials flooded their States with millions of ballots to be sent through the mails, or placed in drop boxes, with little or no chain of custody and, at the same time, weakened the strongest security measures protecting the integrity of the vote—signature verification and witness requirements.

In defying the Constitution, the Defendant States weaken the bonds that hold States together in our Republic—injuring the States that are faithful to the Constitution and violating the terms on which electors are to be appointed to the Electoral College.

Against that background, the States of Louisiana, A, and B, bring this action against Defendant States based on the following allegations:

NATURE OF THE ACTION

1. Plaintiff State challenges the Defendant States' administration of the 2020 election under the Electors Clause of Article II, Section 1, Clause 2, of the U.S. Constitution.

2. This case presents a pure question of law: did the Defendant States violate the Electors Clause by taking non-legislative actions to change the election rules that would govern the appointment of presidential electors?

3. Those unconstitutional changes appear to have opened the door to election fraud in various forms. We do not know the extent of fraudulent and abusive practices that took place during the 2020 election. However, this case is not dependent upon a factual showing that such fraud and abuse occurred. What we do know is that each of the Defendant States flagrantly violated constitutional rules governing the appointment of Presidential Electors. In doing so, seeds of deep distrust have been sown across the country. In the spirit of *Marbury v. Madison*, this Court's attention is profoundly needed to declare what the law is.

4. As Justice Gorsuch observed recently, "Government is not free to disregard the [Constitution] in times of crisis. … Yet recently, during the COVID pandemic, certain States seem to have ignored these long-settled principles." *Roman Catholic Diocese of Brooklyn, New York v. Cuomo*, 592 U.S. ____ (2020) (Gorsuch, J., concurring). This case is no different.

5. Each of the Defendant States acted in a common pattern. State officials, sometimes in combination with the judiciary and sometimes unilaterally, announced new rules for the conduct of the 2020 election that were inconsistent with existing state statutes defining what constitutes a lawful vote.

6. The Defendant States also failed to segregate ballots in a manner that permits accurate analysis to determine which ballots were cast in conformity with the legislatively-set rules and which were not. This is especially true of the mail-in ballots in these states. By waiving, lowering, and otherwise failing to follow the state statutory requirements for signature validation and other processes for ballot security, the entire body of such ballots is now constitutionally suspect and may not be legitimately used to determine allocation of a state's Presidential Electors.

7. The actions of the Pennsylvania Secretary of State before this Court epitomize the blatant disregard for the rule of law that took place in this election cycle. In a classic bait and switch, Pennsylvania used guidance from its Secretary of State to argue that this Court should not expedite review because the State would segregate potentially unlawful ballots. A court of law would reasonably rely on such a representation. Remarkably, before the ink was dry on the Court's 4-4 decision, Pennsylvania changed that guidance, breaking the State's promise to this Court. *Compare Republican Party of Pa. v. Boockvar*, No. 20-542, 2020 U.S. LEXIS 5188, at *5-6 (Oct. 28, 2020) ("we have been informed by the Pennsylvania Attorney General that the Secretary of the Commonwealth issued guidance today directing county boards of elections to segregate [late-arriving]

ballots") (Alito, J., concurring) *with Republican Party v. Boockvar*, No. 20A84, 2020 U.S. LEXIS 5345, at *1 (Nov. 6, 2020) ("this Court was not informed that the guidance issued on October 28, which had an important bearing on the question whether to order special treatment of the ballots in question, had been modified") (Alito, J., Circuit Justice).

8. By purporting to waive or otherwise modify the existing state law in a manner that was wholly *ultra vires* and not adopted by each state's legislature, Defendant States violated not only the Electors Clause, U.S. CONST. art. II, § 1, cl. 2, but also the Elections Clause, *id.* art. I, § 4 (to the extent that the Article I Elections Clause applies to the Article II process of selecting presidential electors).

9. The voters of Plaintiff State are entitled to a presidential election in which the votes from each of the states are counted only if the ballots are cast and counted in a manner that complies with the pre-existing laws of each state. *See Anderson v. Celebrezze*, 460 U.S. 780, 795 (1983) ("for the President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation."). Voters who cast lawful ballots cannot have their votes diminished by states that administered their 2020 presidential elections in a manner where it is impossible to distinguish a lawful ballot from an unlawful ballot.

10. The number of mail-in ballots that have been handled unconstitutionally in the Defendant States greatly exceeds the difference between the two candidates for President of the United States in each Defendant State.

11. In addition to injunctive relief for this election, Plaintiff State seeks declaratory relief for all presidential elections in the future. This problem is clearly capable of repetition yet evading review. The integrity of our democratic republic requires that states conduct presidential elections in accordance with the rule of law and federal constitutional guarantees.

JURISDICTION AND VENUE

12. This Court has original and exclusive jurisdiction over this action because it is a "controvers[y] between two or more States" under Article III, § 2, cl. 2 of the U.S. Constitution and 28 U.S.C. § 1251(a) (2018).

13. In a presidential election, "the impact of the votes cast in each State is affected by the votes cast for the various candidates in other States." *Anderson*, 460 U.S. at 795. The constitutional failures of Defendant States injure Plaintiff States because "'the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.'" *Bush II*, 531 U.S. at 105 (quoting *Reynolds v. Sims*, 377 U. S. 533, 555 (1964)). In other words, Plaintiff States are acting to protect the interests of respective citizens in the fair and constitutional conduct of elections in all States to appoint Presidential Electors.

14. This Court's Article III decisions indicate that only a state can bring certain claims. *Lance v. Coffman*, 549 U.S. 437, 442 (2007) (distinguishing citizen plaintiffs from citizen relators who sued in the name of a state); *cf. Massachusetts v. EPA,* 549 U.S. 497, 520 (2007) (courts owe "special solicitude in

standing analysis"). Moreover, redressability and mootness would undermine a suit against a single state officer. *Green v. Mansour,* 474 U.S. 64, 66-67 (1985) (*Ex parte Young* exception to sovereign immunity is unavailable for past violations). This action is the only adequate remedy for Plaintiff States.

15. Individual state courts do not—and under the circumstance of contested elections in multiple states, *cannot*—offer an adequate remedy to resolve election disputes within the timeframe set by the Constitution to resolve such disputes and to appoint a President via the electoral college. No court—other than this Court—can redress constitutional injuries spanning multiple States with the sufficient number of states joined as defendants or respondents to make a difference in the Electoral College.

16. This Court is the sole forum in which to exercise the jurisdictional basis for this action.

PARTIES

17. Plaintiffs are the State of Louisiana, the State of A, and the State of B, which are sovereign States of the United States.

18. Defendants are the Commonwealth of Pennsylvania and the States of Georgia, Michigan, Minnesota, Nevada, and Wisconsin, which are sovereign states of the United States.

LEGAL BACKGROUND

19. Under the Supremacy Clause, the "Constitution, and the laws of the United States which shall be made in pursuance thereof … shall be the supreme law of the land." U.S. CONST. Art. VI, cl. 2.

20. "The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the electoral college." *Bush II*, 531 U.S. at 104 (citing U.S. CONST. art. II, § 1).

21. State legislatures have plenary power to set the process for appointing presidential electors: "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors." U.S. CONST. art. II, §1, cl. 2; *see also Bush II*, 531 U.S. at 104 ("[T]he state legislature's power to select the manner for appointing electors is *plenary*." (emphasis added)).

22. At the time of the Founding, most states did not appoint electors through popular statewide elections. In the first presidential election, six of the ten states that appointed electors did so by direct legislative appointment. *McPherson v. Blacker*, 146 U.S. 1, 29-30 (1892).

23. In the second presidential election, nine of the fifteen states that appointed electors did so by direct legislative appointment. *Id.* at 30.

24. In the third presidential election, nine of sixteen states that appointed electors did so by direct legislative appointment. *Id.* at 31. This practice persisted in lesser degrees through the Election of 1860. *Id.* at 32.

25. Though "[h]istory has now favored the voter," *Bush II*, 531 U.S. at 104, "there is no doubt of the right of the legislature to resume the power [of appointing presidential electors] at any time, for *it can neither be taken away nor abdicated*." *McPherson*, 146

U.S. at 35 (emphasis added); *cf.* 3 U.S.C. § 2 ("Whenever any State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct.").

26. Given the State legislatures' constitutional primacy in selecting Presidential Electors, the ability to set rules governing the casting of ballots and counting of votes cannot be usurped by other branches of state government.

27. The Framers of the Constitution decided to select the President through the Electoral College "to afford as little opportunity as possible to tumult and disorder" and to place "every practicable obstacle [to] cabal, intrigue, and corruption," including "foreign powers" that might try to insinuate themselves into our elections. THE FEDERALIST NO. 68, at 410-11 (C. Rossiter, ed. 1961) (Madison, J.).

28. The Defendant States' applicable laws are set out under the facts for each Defendant State.

FACTS

29. The use of absentee and mail-in ballots skyrocketed in 2020, not only as a public-health response to the COVID-19 pandemic but also at the urging of mail-in voting's proponents, and most especially executive branch officials in the Defendant States. According to the Pew Research Center, in the 2020 general election, a record number of votes—about 65 million—were cast via mail compared to 33.5 million mail-in ballots cast in the 2016 general election—an increase of more than 94 percent.

30. In the wake of the contested 2000 election, the bipartisan Jimmy Carter-James Baker

commission identified absentee ballots as "the largest source of potential voter fraud." BUILDING CONFIDENCE IN U.S. ELECTIONS: REPORT OF THE COMMISSION ON FEDERAL ELECTION REFORM, at 46 (Sept. 2005).

31. Concern over the use of mail-in ballots is not novel to the modern era, Dustin Waters, *Mail-in Ballots Were Part of a Plot to Deny Lincoln Reelection in 1864*, WASH. POST (Aug. 22, 2020),[1] but it remains a *current* concern. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 194-96 & n.11 (2008); *see also* Texas Office of the Attorney General, *AG Paxton Announces Joint Prosecution of Gregg County Organized Election Fraud in Mail-In Balloting Scheme* (Sept. 24, 2020); Harriet Alexander & Ariel Zilber, *Minneapolis police opens investigation into reports that Ilhan Omar's supporters illegally harvested Democrat ballots in Minnesota*, DAILY MAIL, Sept. 28, 2020.

32. Absentee and mail-in voting are the primary opportunities for unlawful ballots to be cast. As a result of expanded absentee and mail-in voting in Defendant States, combined with the Defendant States' unconstitutional modification of statutory protections designed to ensure ballot integrity, the Defendant States created a massive opportunity for fraud. In addition, the Defendants have made it difficult or impossible to separate the constitutionally tainted mail-in ballots from all mail-in ballots.

33. Rather than augment safeguards against illegal voting in anticipation of the millions of additional mail-in ballots flooding their States, the Defendant States *all* materially weakened, or did

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[1] https://www.washingtonpost.com/history/2020/08/22/mail-in-voting-civil-war-election-conspiracy-lincoln/

away with, security measures, such as witness or signature verification procedures, required by their respective legislatures. Their legislatures established those commonsense safeguards to prevent—or at least reduce—fraudulent mail-in ballots.

34. Significantly, in the Defendant States, Democrat voters voted by mail at two to three times the rate of Republicans. Former Vice President Biden thus greatly benefited from this unconstitutional usurpation of legislative authority, and the weakening of legislative mandated ballot security measures.

35. The outcome of the Electoral College vote is directly affected by the constitutional violations committed by the Defendant States. Plaintiff State complied in all respects with the Constitution in the process of appointing Presidential Electors for President Trump. Defendant States violated the Constitution in the process of appointing presidential electors, and that violation proximately caused the appointment of presidential electors for former Vice President Biden. Plaintiff State will therefore be injured if the Defendant States' unlawfully appointed electors are certified.

Commonwealth of Pennsylvania

36. Pennsylvania has 20 electoral votes, with a statewide vote tally currently estimated at 3,363,951 for President Trump and 3,445,548 for former Vice President Biden, a margin of 81,597 votes.

37. The number of votes affected by the various constitutional violations exceeds the margin of votes separating the candidates.

38. Pennsylvania's Secretary of State, Kathy Boockvar, without legislative approval, unilaterally abrogated several Pennsylvania statutes requiring signature verification for absentee or mail-in ballots. Pennsylvania's legislature has not ratified these changes, and the legislation did not include a severability clause.

39. On August 7, 2020, the League of Women Voters of Pennsylvania and others filed a complaint against Secretary Boockvar and other local election officials, seeking "a declaratory judgment that Pennsylvania existing signature verification procedures for mail-in voting" were unlawful for a number of reasons. *League of Women Voters of Pennsylvania v. Boockvar*, No. 2:20-cv-03850-PBT, (E.D. Pa. Aug. 7, 2020).

40. The Pennsylvania Department of State quickly settled with the plaintiffs, issuing revised guidance on September 11, 2020, stating in relevant part: "The Pennsylvania Election Code does not authorize the county board of elections to set aside returned absentee or mail-in ballots based solely on signature analysis by the county board of elections."

41. This guidance is contrary to Pennsylvania law. First, Pennsylvania Election Code mandates that, for non-disabled and non-military voters, all applications for an absentee or mail-in ballot "shall be signed by the applicant." 25 PA. STAT. §§ 3146.2(d) & 3150.12(c). Second, Pennsylvania's voter signature verification requirements are expressly set forth at 25 PA. STAT. 350(a.3)(1)-(2) and § 3146.8(g)(3)-(7).

42. The Pennsylvania Department of State's guidance unconstitutionally did away with

Pennsylvania's statutory signature verification requirements. Approximately 70 percent of the requests for absentee ballots were from Democrats and 25 percent from Republicans. Thus, this unconstitutional abrogation of state election law greatly inured to former Vice President Biden's benefit.

43. In addition, in 2019, Pennsylvania's legislature enacted bipartisan election reforms, 2019 Pa. Legis. Serv. Act 2019-77, that set *inter alia* a deadline of 8:00 p.m. on election day for a county board of elections to receive a mail-in ballot. 25 PA. STAT. §§ 3146.6(c), 3150.16(c). Acting under a generally worded clause that "Elections shall be free and equal," PA. CONST. art. I, §5, cl. 1, a 4-3 majority of Pennsylvania's Supreme Court in *Pa. Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020), extended that deadline to three days after Election Day and adopted a presumption that even *non-postmarked ballots* were presumptively timely.

44. Pennsylvania's election law also requires that poll-watcher be granted access to the opening, counting, and recording of absentee ballots: "Watchers shall be permitted to be present when the envelopes containing official absentee ballots and mail-in ballots are opened and when such ballots are counted and recorded." 25 PA. STAT. § 3146.8(b). Local election officials in Philadelphia and Allegheny Counties decided not to follow 25 PA. STAT. § 3146.8(b) for the opening, counting, and recording of absentee and mail-in ballots.

45. Prior to the election, Secretary Boockvar sent an email to local election officials urging them to provide opportunities for various persons—including political parties—to contact voters to "cure" defective

mail-in ballots. This process clearly violated several provisions of the state election code.

- Section 3146.8(a) requires: "The county boards of election, upon receipt of official absentee ballots in sealed official absentee ballot envelopes as provided under this article and mail-in ballots as in sealed official mail-in ballot envelopes as provided under Article XIII-D,1 shall safely keep the ballots in sealed or locked containers until they are to be canvassed by the county board of elections."
- Section 3146.8(g)(1)(ii) provides that mail-in ballots shall be canvassed (if they are received by eight o'clock p.m. on election day) in the manner prescribed by this subsection.
- Section 3146.8(g)(1.1) provides that the first look at the ballots shall be "no earlier than seven o'clock a.m. on election day." And the hour for this "pre-canvas" must be publicly announced at least 48 hours in advance. Then the votes are counted on election day.

46. By removing the ballots for examination prior to seven o'clock a.m. on election day, Secretary Boockvar created a system whereby local officials could open and review ballots without the proper announcements, observation, and security. This entire scheme, which was only followed in Democrat majority counties, was blatantly illegal in that it permitted the illegal removal of ballots from their locked containers prematurely.

47. Statewide election officials and local election officials in Philadelphia and Allegheny Counties, aware of the historical Democrat advantage in those counties, appear to have violated

Pennsylvania's election code and adopted the differential standards favoring voters in Philadelphia and Allegheny Counties with the intent to favor former Vice President Biden.

48. Absentee and mail-in ballots in Pennsylvania were thus evaluated under an illegal standard regarding signature verification. It is now impossible to determine which ballots were properly cast and which ballots were not.

49. In addition, a great number of ballots were received after the statutory deadline and yet were counted by virtue of the previously described decision of the Supreme Court of Pennsylvania.

50. In addition, the changed process allowing the curing of absentee and mail-in ballots in Allegheny and Philadelphia counties is a separate basis resulted in an unknown number of ballots being treated in an unconstitutional manner inconsistent with Pennsylvania statute.

51. Approximately 2.5 million ballots in Pennsylvania were mail-in ballots. This number of constitutionally-tainted ballots far exceeds the approximately 81,660 votes separating the candidates.

52. This blatant disregard of statutory law renders all mail-in ballots constitutionally suspect and cannot form the basis for appointing Pennsylvania's Electors to the Electoral College.

53. According to the U.S. Election Assistance Commission's report to Congress *Election Administration and Voting Survey: 2016 Comprehensive Report*, in 2016 Pennsylvania received 266,208 mail-in ballots; 2,534 of them were rejected (.95%). *Id.* at p. 24. However, in 2020, Pennsylvania

received more than 10 times the number of mail-in ballots compared to 2016. As explained *supra*, this much larger volume of mail-in ballots was treated in an unconstitutionally-modified manner that included: (1) doing away with the Pennsylvania's signature verification requirements; (2) extending that deadline to three days after Election Day and adopting a presumption that even *non-postmarked ballots* were presumptively timely; and (3) blocking poll watchers in Philadelphia and Allegheny Counties in violation of State law.

54. These non-legislative modifications to Pennsylvania's election rules appear to have generated an outcome-determinative number of unlawful ballots that were cast in Pennsylvania. Regardless of the number of such ballots, the non-legislative changes to the election rules violated the Electors Clause.

State of Georgia

55. Georgia has 16 electoral votes, with a statewide vote tally currently estimated at 2,458,121 for President Trump and 2,472,098 for former Vice President Biden, a margin of approximately 12,670 votes.

56. The number of votes affected by the various constitutional violations exceeds the margin of votes dividing the candidates.

57. Georgia's Secretary of State, Brad Raffensperger, without legislative approval, unilaterally abrogated Georgia's statute governing the signature verification process for absentee ballots.

58. O.C.G.A. § 21-2-386(a)(2) prohibits the opening of absentee ballots until after the polls open

on Election Day: In April 2020, however, the State Election Board adopted Secretary of State Rule 183-1-14-0.9-.15, Processing Ballots Prior to Election Day. That rule purports to authorize county election officials to begin processing absentee ballots up to three weeks before Election Day.

59. Georgia law authorizes and requires a single registrar or clerk—after reviewing the outer envelope—to reject an absentee ballot if the voter failed to sign the required oath or to provide the required information, the signature appears invalid, or the required information does not conform with the information on file, or if the voter is otherwise found ineligible to vote. O.C.G.A. § 21-2-386(a)(1)(B)-(C).

60. Georgia law provides absentee voters the chance to "cure a failure to sign the oath, an invalid signature, or missing information" on a ballot's outer envelope by the deadline for verifying provisional ballots (*i.e.*, three days after the election). O.C.G.A. §§ 21-2-386(a)(1)(C), 21-2-419(c)(2). To facilitate cures, Georgia law requires the relevant election official to notify the voter in writing: "The board of registrars or absentee ballot clerk shall promptly notify the elector of such rejection, a copy of which notification shall be retained in the files of the board of registrars or absentee ballot clerk for at least two years." O.C.G.A. § 21-2-386(a)(1)(B).

61. On March 6, 2020, in *Democratic Party of Georgia v. Raffensperger*, No. 1:19-cv-5028-WMR (N.D. Ga.), Georgia's Secretary of State entered a Compromise Settlement Agreement and Release with the Democratic Party of Georgia (the "Settlement") to materially change the statutory requirements for reviewing signatures on absentee ballot envelopes to confirm the voter's identity by making it far more

difficult to challenge defective signatures beyond the express mandatory procedures set forth at GA. CODE § 21-2-386(a)(1)(B).

62. Among other things, before a ballot could be rejected, the Settlement required a registrar who found a defective signature to now seek a review by two other registrars, and only if a majority of the registrars agreed that the signature was defective could the ballot be rejected but not before all three registrars' names were written on the ballot envelope along with the reason for the rejection. These cumbersome procedures are in direct conflict with Georgia's statutory requirements, as is the Settlement's requirement that notice be provided by telephone (*i.e.*, not in writing) if a telephone number is available. Finally, the Settlement purports to require State election officials to consider issuing guidance and training materials drafted by an expert retained by the Democratic Party of Georgia.

63. Georgia's legislature has not ratified these material changes to statutory law mandated by the Compromise Settlement Agreement and Release, including altered signature verification requirements and early opening of ballots. The relevant legislation that was violated by Compromise Settlement Agreement and Release did not include a severability clause.

64. This unconstitutional change in Georgia law appeared to materially benefit former Vice President Biden. According to the Secretary of State's office, former Vice President Biden had almost double the number of absentee votes (849,729) as President Trump (451,157).

65. The effect of this unconstitutional change in Georgia election law, which made it more likely that ballots without matching signatures would be counted, had a material impact on the outcome of the election.

66. Specifically, there were 1,305,659 absentee mail-in ballots submitted in Georgia in 2020. There were 4,786 absentee ballots rejected in 2020. This is a rejection rate of .37%. In contrast, in 2016, the 2016 rejection rate was 6.42% with 13,677 absentee mail-in ballots being rejected out of 213,033 submitted, which more than *seventeen times greater* than in 2020. *See* Decl. of Charles J. Cicchetti, Ph.D. at _____attached hereto as Ex. ___.

67. If the rejection rate of mailed-in absentee ballots remained the same in 2020 as it was in 2016, there would be 83,823 less tabulated ballots in 2020. The statewide split of absentee ballots was 34.68% for Trump and 65.32% for Biden. Rejecting at the higher 2016 rate with the 2020 split between Trump and Biden would decrease Trump votes by 29,062 and Biden votes by 54,761, which would be a net gain for Trump of 25,700 votes. This would be more than needed to overcome the Biden advantage of 12,670 votes, and Trump would win by 13,030 votes. *Id*. Regardless of the number of ballots affected, however, the non-legislative changes to the election rules violated the Electors Clause.

State of Michigan

68. Michigan has 16 electoral votes, with a statewide vote tally currently estimated at 2,650,695 for President Trump and 2,796,702 for former Vice President Biden, a margin of 146,007 votes. In Wayne

County, Mr. Biden's margin (322,925 votes) significantly exceeds his statewide lead.

69. The number of votes affected by the various constitutional violations exceeds the margin of votes dividing the candidates.

70. Michigan's Secretary of State, Jocelyn Benson, without legislative approval, unilaterally abrogated Michigan election statutes related to absentee ballot applications and signature verification. Michigan's legislature has not ratified these changes, and its election laws do not include a severability clause.

71. As amended in 2018, the Michigan Constitution provides all registered voters the right to request and vote by an absentee ballot without giving a reason. MICH. CONST. art. 2, § 4.

72. On May 19, 2020, however, Secretary Benson announced that her office would send unsolicited absentee-voter ballot applications by mail to all 7.7 million registered Michigan voters prior to the primary and general elections. Although her office repeatedly encouraged voters to vote absentee because of the COVID-19 pandemic, it did not ensure that Michigan's election systems and procedures were adequate to ensure the accuracy and legality of the historic flood of mail-in votes. In fact, it did the opposite and did away with protections designed to deter voter fraud.

73. Secretary Benson's flooding of Michigan with millions of absentee ballot applications prior to the 2020 general election violated M.C.L. § 168.759(3). That statute limits the procedures for requesting an absentee ballot to three specified ways:

> An application for an absent voter ballot under this section may be made in *any of the following ways*:
>
> (a) By a written request signed by the voter.
>
> (b) On an absent voter ballot application form provided for that purpose by the clerk of the city or township.
>
> (c) On a federal postcard application.

M.C.L. § 168.759(3) (emphasis added).

74. The Michigan Legislature thus declined to include the Secretary of State as a means for distributing absentee ballot applications. *Id*. § 168.759(3)(b). Under the statute's plain language, the Legislature explicitly gave *only local clerks* the power to distribute absentee voter ballot applications. *Id.*

75. Because the Legislature declined to explicitly include the Secretary of State as a vehicle for distributing absentee ballots applications, Secretary Benson lacked authority to distribute even a single absentee voter ballot application—much less the *millions* of absentee ballot applications Secretary Benson flooded across Michigan.

76. Secretary Benson also violated Michigan law when she launched a program in June 2020 allowing absentee ballots to be requested online, *without* signature verification as expressly required under Michigan law. The Michigan Legislature did not approve or authorize Secretary Benson's unilateral actions.

77. MCL § 168.759(4) states in relevant part: "An applicant for an absent voter ballot shall sign the application. Subject to section 761(2), a clerk or assistant clerk shall not deliver an absent voter ballot to an applicant who does not sign the application."

78. Further, MCL § 168.761(2) states in relevant part: "The qualified voter file must be used to determine the genuineness of a signature on an application for an absent voter ballot", and if "the signatures do not agree sufficiently or [if] the signature is missing" the ballot must be rejected.

79. In 2016 only 587,618 Michigan voters requested absentee ballots. In stark contrast, in 2020, 3.2 million votes were cast by absentee ballot, about 57% of total votes cast – and more than *five times* the number of ballots *even requested* in 2016.

80. Secretary Benson's unconstitutional modifications of Michigan's election rules resulted in the distribution of millions of absentee ballot applications without verifying voter signatures as required by MCL §§ 168.759(4) and 168.761(2). This means that *millions* of absentee ballots were disseminated in violation of Michigan's statutory signature-verification requirements. Democrats in Michigan voted by mail at a ratio of approximately two to one compared to Republican voters. Thus, former Vice President Biden appears to have materially benefited from these unconstitutional changes to Michigan's election law.

81. Michigan also requires that poll watchers and inspectors have access to vote counting and canvassing. M.C.L. §§ 168.674-.675.

82. Local election officials in Wayne County made a conscious and express policy decision not to follow M.C.L. §§ 168.674-.675 for the opening, counting, and recording of absentee ballots.

83. Michigan also has strict signature verification requirements for absentee ballots, including that the Elections Department place a

written statement or stamp on each ballot envelope where the voter signature is placed, indicating that the voter signature was in fact checked and verified with the signature on file with the State. *See* MCL § 168.765a(6).

84. However, Wayne County made the policy decision to ignore Michigan's statutory signature-verification requirements for absentee ballots. Former Vice President Biden received approximately 587,074, or 68%, of the votes cast there compared to President Trump's receiving approximate 264,149, or 30.59%, of the total vote. Thus, Mr. Biden appears to have materially benefited from these unconstitutional changes to Michigan's election law.

85. Numerous poll challengers and an Election Department employee whistleblower have testified that the signature verification requirement was ignored in Wayne County in a case currently pending in the Michigan Supreme Court.[2] For example, Jesse Jacob, a decades-long City of Detroit employee assigned to work in the Elections Department for the 2020 election testified that:

> Absentee ballots that were received in the mail would have the voter's signature on the envelope. While I was at the TCF Center, I was instructed not to look at any of the signatures on the absentee ballots, and I was

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[2] *Johnson v. Benson*, Petition For Extraordinary Writs & Declaratory Relief filed Nov. 26, 2020 (Mich. Sup. Ct.) at ¶¶ 71, 138-39.

> instructed not to compare the signature on the absentee ballot with the signature on file.

Id., Affidavit of Jessy Jacobs, Appendix 14 at ¶15.

86. The TCF was the only facility within Wayne County authorized to count ballots for the City of Detroit.

87. These non-legislative modifications to Michigan's election statutes resulted in a number of constitutionally-tainted votes that far exceeds the margin of voters separating the candidates in Michigan.

88. Additional public information confirms the material adverse impact on the integrity of the vote in Wayne County caused by these unconstitutional changes to Michigan's election law. For example, the Wayne County Statement of Votes Report lists approximately 173,000 votes with no registered voters listed for them (*i.e.*, 173,000 votes that do not link to *any voter registrations*). *See* https://www.waynecounty.com/elected/clerk/election-results.aspx (beginning on Page 93 under the heading City of Detroit). The number of votes not tied to a registered voter by itself exceeds Vice President Biden's margin of margin of 146,007 votes by more than 27,000 votes.

89. In addition, a member of the Wayne County Board of Canvassers ("Canvassers Board"), William Hartman, determined that 71% of Detroit's Absent Voter Counting Boards ("AVCBs") were unbalanced—*i.e.*, the number of people who checked in did not match the number of ballots cast—without explanation.

90. On November 17, 2020, the Canvassers Board deadlocked 2-2 over whether to certify the

results of the presidential election based on numerous reports of fraud and unanswered material discrepancies in the county-wide election results. A few hours later, the Republican Board members reversed their decision and voted to certify the results after severe harassment, including threats of violence.

91. The following day, the two Republican members of the Board *rescinded their votes* to certify the vote and signed affidavits alleging they were bullied and misled into approving election results and do not believe the votes should be certified until serious irregularities in Detroit votes are resolved.

92. Regardless of the number of votes that were affected by the unconstitutional modification of Michigan's election rules, the non-legislative changes to the election rules violated the Electors Clause.

State of Minnesota

93. Minnesota has 10 electoral votes, with a statewide vote tally currently estimated at 1,484,065 for President Trump and 1,717,077 for former Vice President Biden, a margin of 233,012 votes.

94. In Minnesota, voters requested more than 1.5 million absentee ballots, more than three time the number of absentee ballots requested in 2016. Democrats voted by mail at a ratio of more than two to one to Republican voters.

95. For statewide elections including presidential elections, Minnesota requires that mail-in ballots be witnessed by a registered Minnesota voter, a notary, or person otherwise authorized to administer oaths and that the voter display their blank ballot to their witness who must attest that the voter completed the ballot in the witness's presence

without showing how the voter voted. MINN. STAT. § 203B.07(3)(1)-(3) ("Witness Requirement").

96. For statewide elections including presidential elections, Minnesota further requires that hand-delivered ballots received after 3:00 p.m. and mail-in ballots received after 8:00 pm. on Election Day "shall be marked as received late by the county auditor or municipal clerk, and must not be delivered to the ballot board." MINN. STAT. § 203B.08(3) ("Receipt Deadline").

97. On July 17, 2020, in *LaRose v. Simon*, No. 62-CV-20-3149, 2d Judicial Dist, (Ramsey Cty.), Minnesota's Secretary of State entered a Stipulation and Partial Consent Decree (the "Partial Consent Decree") for the 2020 general election to enjoin the Witness Requirement altogether and to extend the Receipt Deadline for mail-in ballots from Election Day to 5 business days after Election Day. In *Carson v. Simon*, 978 F.3d 1051 (8th Cir. Oct. 29, 2020), the U.S. Court of Appeals for the Eighth Circuit entered a preliminary injunction requiring the segregation of ballots received after the statutory deadline, without modifying the alteration of the Witness Requirement, which affects the majority of the absentee ballots cast this election.

98. Minnesota's legislature has not approved or authorized the weakened standards in the Partial Consent Decree, and the relevant legislation did not include a severability clause.

99. This unconstitutional non-legislative usurpation of the legislature's sole authority to set rules for the appointment of Electors generated unlawful votes and violated the Electors Clause.

State of Nevada

100. Nevada has 6 electoral votes, with a statewide vote tally currently estimated at 669,890 for President Trump and 703,486 for former Vice President Biden, a margin of 33,596 votes. Nevada voters sent in 579,533 mail-in ballots. In Clark County, Mr. Biden's margin (90,922 votes) significantly exceeds his statewide lead.

101. In response to the COVID-19 pandemic, the Nevada Legislature enacted—and the Governor signed into law—Assembly Bill 4, 2020 Nev. Ch. 3, to address voting by mail and to require, for the first time in Nevada's history, the applicable county or city clerk to mail ballots to all registered voters in the state.

102. Under Section 23 of Assembly Bill 4, the applicable city or county clerk's office is required to review the signature on ballots, without permitting a computer system to do so: "The *clerk or employee shall check* the signature used for the mail ballot against all signatures of the voter available in the records of the clerk." *Id.* § 23(1)(a) (codified at NEV. REV. STAT. § 293.8874(1)(a)) (emphasis add). Moreover, the system requires that two or more employees be included: "If at least two employees in the office of the clerk believe there is a reasonable question of fact as to whether the signature used for the mail ballot matches the signature of the voter, the clerk shall contact the voter and ask the voter to confirm whether the signature used for the mail ballot belongs to the voter." *Id.* § 23(1)(b) (codified at NEV. REV. STAT. § 293.8874(1)(b)). A signature that differs from on-file signatures in multiple respects is inadequate: "There is a reasonable question of fact as to whether the signature used for the mail ballot matches the

signature of the voter if the signature used for the mail ballot differs in multiple, significant and obvious respects from the signatures of the voter available in the records of the clerk." *Id.* § 23(2)(a) (codified at NEV. REV. STAT. § 293.8874(2)(a)). Finally, under Nevada law, "each voter has the right … [t]o have a uniform, statewide standard for counting and recounting all votes accurately." NEV. REV. STAT. § 293.2546(10).

103. Nevada law does not allow computer systems to substitute for review by clerks' employees.

104. However, county election officials in Clark County ignored this requirement of Nevada law. Clark County, Nevada, processed all its mail-in ballots through a ballot sorting machine known as the Agilis Ballot Sorting System ("Agilis"). The Agilis system purported to match voters' ballot envelope signatures to exemplars maintained by the Clark County Registrar of Voters.

105. Anecdotal evidence suggests that the Agilis system was prone to false positives (*i.e.*, accepting as valid an invalid signature). Victor Joecks, *Clark County Election Officials Accepted My Signature—on 8 Ballot Envelopes*, LAS VEGAS REV.-J. (Nov. 12, 2020) (Agilis system accepted 8 of 9 false signatures).

106. Even after adjusting the Agilis system's tolerances outside the settings that the manufacturer recommends, the Agilis system nonetheless rejected approximately 70% of the approximately 453,248 mail-in ballots.

107. More than 450,000 mail-in ballots from Clark County either were processed under weakened signature-verification criteria in violation of the statutory criteria for validating mail-in ballots. The

number of contested votes exceeds the margin of votes dividing the parties.

108. With respect to approximately 130,000 ballots that the Agilis system approved, Clark County did not subject those signatures to review by two or more employees, as Assembly Bill 4 requires. To count those 130,000 ballots without review not only violated the election law adopted by the legislature but also subjected those votes to a different standard of review than other voters statewide.

109. With respect to approximately 323,000 ballots that the Agilis system rejected, Clark County decided to count ballots if a signature matched at least one letter between the ballot envelope signature and the maintained exemplar signature. This guidance does not match the statutory standard "differ[ing] in multiple, significant and obvious respects from the signatures of the voter available in the records of the clerk."

110. Out of the nearly 580,000 mail-in ballots, registered Democrats returned almost twice as many mail-in ballots as registered Republicans. Thus, this violation of Nevada law appeared to materially benefited former Vice President Biden's vote tally. Regardless of the number of votes that were affected by the unconstitutional modification of Nevada's election rules, the non-legislative changes to the election rules violated the Electors Clause.

State of Wisconsin

111. Wisconsin has 10 electoral votes, with a statewide vote tally currently estimated at 1,610,151 for President Trump and 1,630,716 for former Vice President Biden (*i.e.*, a margin of 20,565 votes). In two

counties, Milwaukee and Dane, Mr. Biden's margin (364,298 votes) significantly exceeds his statewide lead.

112. In the 2016 general election some 146,932 mail-in ballots were returned in Wisconsin out of more than 3 million votes cast.[3] In stark contrast, 1,275,019 mail-in ballots, nearly a 900 percent increase over 2016, were returned in the November 3, 2020 election.[4]

113. Wisconsin statutes guard against fraud in absentee ballots: "[V]oting by absentee ballot is a privilege exercised wholly outside the traditional safeguards of the polling place. The legislature finds that the privilege of voting by absentee ballot must be carefully regulated to prevent the potential for fraud or abuse[.]" WISC. STAT. § 6.84(1).

114. In direct contravention of Wisconsin law, leading up to the 2020 general election, the Wisconsin Elections Commission ("WEC") and other local officials unconstitutionally modified Wisconsin election laws—each time taking steps that weakened, or did away with, established security procedures put in place by the Wisconsin legislature to ensure absentee ballot integrity.

115. For example, the WEC undertook a campaign to position hundreds of drop boxes to collect

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[3] Source: U.S. Elections Project, *available at*: http://www.electproject.org/early_2016.

[4] Source: U.S. Elections Project, *available at*: https://electproject.github.io/Early-Vote-2020G/WI.html.

absentee ballots—including the use of unmanned drop boxes.[5]

116. The mayors of Wisconsin's five largest cities—Green Bay, Kenosha, Madison, Milwaukee, and Racine, which all have Democrat majorities—joined in this effort, and together, developed a plan use purportedly "secure drop-boxes to facilitate return of absentee ballots." Wisconsin Safe Voting Plan 2020, at 4 (June 15, 2020).[6]

117. It is alleged in an action recently filed in the United States District Court for the Eastern District of Wisconsin that over five hundred unmanned, illegal, absentee ballot drop boxes were used in the Presidential election in Wisconsin.[7]

118. However, the use of *any* drop box, manned or unmanned, is directly prohibited by Wisconsin statute. The Wisconsin legislature specifically described in the Election Code "Alternate

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[5] Wisconsin Elections Commission Memoranda, To: All Wisconsin Election Officials, Aug. 19, 2020, *available at*: https://elections.wi.gov/sites/elections.wi.gov/files/2020-08/Drop%20Box%20Final.pdf. at p. 3 of 4.

[6] Wisconsin Safe Voting Plan 2020 Submitted to the Center for Tech & Civic Life, June 15, 2020, by the Mayors of Madison, Milwaukee, Racine, Kenosha and Green Bay *available at*: https://www.techandciviclife.org/wp-content/uploads/2020/07/Approved-Wisconsin-Safe-Voting-Plan-2020.pdf.

[7] *See* Complaint (Doc. No. 1), *Donald J. Trump, Candidate for President of the United States of America v. The Wisconsin Election Commission*, Case 2:20-cv-01785-BHL (E.D. Wisc. Dec. 2, 2020) (Wisconsin Trump Campaign Complaint") at ¶¶ 188-89.

absentee ballot site[s]" and detailed the procedure by which the governing body of a municipality may designate a site or sites for the delivery of absentee ballots "other than the office of the municipal clerk or board of election commissioners as the location from which electors of the municipality may request and vote absentee ballots and to which voted absentee ballots shall be returned by electors for any election." Wis. Stat. 6.855(1).

119. Any alternate absentee ballot site "shall be staffed by the municipal clerk or the executive director of the board of election commissioners, or employees of the clerk or the board of election commissioners." Wis. Stat. 6.855(3). Likewise, Wis. Stat. 7.15(2m) provides, "[i]n a municipality in which the governing body has elected to an establish an alternate absentee ballot sit under s. 6.855, the municipal clerk shall operate such site as though it were his or her office for absentee ballot purposes and shall ensure that such site is adequately staffed."

120. Thus, the unmanned absentee ballot drop-off sites are prohibited by the Wisconsin Legislature as they do not comply with Wisconsin law expressly defining "[a]lternate absentee ballot site[s]". Wis. Stat. 6.855(1), (3).

121. In addition, the use of drop boxes for the collection of absentee ballots, positioned predominantly in Wisconsin's largest cities, is directly contrary to Wisconsin law providing that absentee ballots may only be "mailed by the elector, or delivered *in person* to the municipal clerk issuing the ballot or ballots." Wis. Stat. § 6.87(4)(b)1 (emphasis added).

122. The fact that other methods of delivering absentee ballots, such as through unmanned drop

boxes, are *not* permitted is underscored by Wis. Stat. § 6.87(6) which mandates that, "[a]ny ballot not mailed or delivered as provided in this subsection may not be counted." Likewise, Wis. Stat. § 6.84(2) underscores this point, providing that Wis. Stat. § 6.87(6) "shall be construed as mandatory." The provision continues—"Ballots cast in contravention of the procedures specified in those provisions may not be counted. Ballots counted in contravention of the procedures specified in those provisions may not be included in the certified result of any election." Wis. Stat. § 6.84(2) (emphasis added).

123. These were not the only Wisconsin election laws that the WEC violated in the 2020 general election. The WEC and local election officials also took it upon themselves to encourage voters to unlawfully declare themselves "indefinitely confined"—which under Wisconsin law allows the voter to avoid security measures like signature verification and photo ID requirements.

124. Specifically, registering to vote by absentee ballot requires photo identification, except for those who register as "indefinitely confined" or "hospitalized." WISC. STAT. § 6.86(2)(a), (3)(a). Registering for indefinite confinement requires certifying confinement "because of age, physical illness or infirmity or [because the voter] is disabled for an indefinite period." *Id.* § 6.86(2)(a). Should indefinite confinement cease, the voter must notify the county clerk, *id.*, who must remove the voter from indefinite-confinement status. *Id.* § 6.86(2)(b).

125. Wisconsin election procedures for voting absentee based on indefinite confinement enable the voter to avoid the photo ID requirement and signature requirement. *Id.* § 6.86(1)(ag)/(3)(a)(2).

126. On March 25, 2020, in clear violation of Wisconsin law, Dane County Clerk Scott McDonnell and Milwaukee County Clerk George Christensen both issued guidance indicating that all voters should mark themselves as "indefinitely confined" because of the COVID-19 pandemic.

127. Believing this to be an attempt to circumvent Wisconsin's strict voter ID laws, the Republican Party of Wisconsin petitioned the Wisconsin Supreme Court to intervene. On March 31, 2020, the Wisconsin Supreme Court unanimously confirmed that the clerks' "advice was legally incorrect" and potentially dangerous because "voters may be misled to exercise their right to vote in ways that are inconsistent with WISC. STAT. § 6.86(2)."

128. On May 13, 2020, the Administrator of WEC issued a directive to the Wisconsin clerks prohibiting removal of voters from the registry for indefinite-confinement status if the voter is no longer "indefinitely confined."

129. The WEC's directive violated Wisconsin law. Specifically, WISC. STAT. § 6.86(2)(a) specifically provides that "any [indefinitely confined] elector [who] is no longer indefinitely confined … shall so notify the municipal clerk." WISC. STAT. § 6.86(2)(b) further provides that the municipal clerk "shall remove the name of any other elector from the list upon request of the elector or upon receipt of reliable information that an elector no longer qualifies for the service."

130. According to statistics kept by the WEC, nearly 216,000 voters said they were indefinitely confined in the 2020 election, nearly a fourfold increase from nearly 57,000 voters in 2016. In Dane and Milwaukee counties, more than 68,000 voters

said they were indefinitely confined in 2020, a fourfold increase from the roughly 17,000 indefinitely confined voters in those counties in 2016.

131. Under Wisconsin law, voting by absentee ballot also requires voters to complete a certification, including their address, and have the envelope witnessed by an adult who also must sign and indicate their address on the envelope. *See* WISC. STAT. § 6.87. The sole remedy to cure an "improperly completed certificate or [ballot] with no certificate" is for "the clerk [to] return the ballot to the elector[.]" *Id.* § 6.87(9). "If a certificate is missing the address of a witness, the ballot *may not be counted*." *Id.* § 6.87(6d) (emphasis added).

132. However, in a training video issued April 1, 2020, the Administrator of the City of Milwaukee Elections Commission unilaterally declared that a "witness address may be written in red and that is because we were able to locate the witnesses' address for the voter" to add an address missing from the certifications on absentee ballots. The Administrator's instruction violated WISC. STAT. § 6.87(6d). The WEC issued similar guidance on October 19, 2020, in violation of this statute as well.

133. In the Wisconsin Trump Campaign Complaint, it is alleged, supported by the sworn affidavits of poll watchers, that canvas workers carried out this unlawful policy, and acting pursuant to this guidance, in Milwaukee used red-ink pens to alter the certificates on the absentee envelope and then cast and count the absentee ballot.[8] These acts violated WISC. STAT. § 6.87(6d) ("If a certificate is missing the address of a witness, the ballot may not

[8] See "Wisconsin Trump Campaign Complaint" at ¶¶ 235-48.

be counted"). *See also* WISC. STAT. § 6.87(9) ("If a municipal clerk receives an absentee ballot with an improperly completed certificate or with no certificate, the clerk may return the ballot to the elector . . . whenever time permits the elector to correct the defect and return the ballot within the period authorized.").

134. Wisconsin's legislature has not ratified these changes, and its election laws do not include a severability clause.

COUNT I: ELECTORS CLAUSE

135. Plaintiff State repeats and re-alleges the allegations of paragraphs 1-134, above, as if fully set forth herein.

136. The Electors Clause of Article II, Section 1, Clause 2, of the Constitution makes clear that only the legislatures of the States are permitted to determine the rules for appointing presidential electors. The pertinent rules here are the state election statutes, specifically those relevant to the presidential election.

137. Non-legislative actors lack authority to amend or nullify election statutes. *Bush II*, 531 U.S. at 104 (quoted *supra*).

138. Under *Heckler v. Chaney*, 470 U.S. 821, 833 n.4 (1985), conscious and express executive policies—even if unwritten—to nullify statutes or to abdicate statutory responsibilities are reviewable to the same extent as if the policies had been written or adopted. Thus, conscious and express actions by State or local election officials to nullify or ignore requirements of election statutes violate the Electors Clause to the same extent as formal modifications by judicial officers or State executive officers.

139. The actions set out in Paragraphs 29-134 constitute non-legislative changes to State election law by executive-branch State election officials, or by judicial officials, in Defendant States Pennsylvania, Georgia, Michigan, Minnesota, Nevada, and Wisconsin, in violation of the Electors Clause.

140. Electors appointed to Electoral College in violation of the Electors Clause cannot cast constitutionally-valid votes for the office of President.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff States respectfully request that this Court issue the following relief:

A. Declare that Defendant States Pennsylvania, Georgia, Michigan, Minnesota, Nevada, and Wisconsin administered the 2020 presidential election in violation of the Electors Clause.

B. Declare that any Electoral College votes cast by such Electors appointed in the Defendant States Pennsylvania, Georgia, Michigan, Minnesota, Nevada, and Wisconsin are in violation of the Electors Clause and cannot be counted.

C. Enjoin Defendant States' use of the 2020 election results for the office of President to appoint Electors to the Electoral College, unless the legislatures of Defendant States review the 2020 election results and decide by legislative resolution to use those results in a manner to be determined by the legislatures that is consistent with the Constitution.

D. If any of the Defendant States have already appointed Electors to the Electoral College using the 2020 election results, direct such States' legislatures, pursuant to 3 U.S.C. § 2 and U.S. CONST.

art. II, §1, cl. 2, to appoint a new set of Electors in a manner that does not violate the Electors Clause, or to appoint no Electors at all.

E. Award costs to Plaintiff State.

F. Grant such other relief as the Court deems just and proper.

December __, 2020 Respectfully submitted,

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No. _____, Original

In the Supreme Court of the United States

STATE OF LOUISIANA, STATE OF A, AND STATE OF B,

Plaintiffs,

v.

COMMONWEALTH OF PENNSYLVANIA, STATE OF GEORGIA, STATE OF MICHIGAN, STATE OF MINNESOTA, STATE OF NEVADA, AND STATE OF WISCONSIN,

Defendants.

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

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Defendants.

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE

Pursuant to S.Ct. Rule 17.3 and U.S. CONST. art. III, § 2, the States of Louisiana, A, and B (collectively, the "Plaintiff States") respectfully submits this brief in support of its Motion for Leave to File a Bill of Complaint against the States of Georgia, Michigan, Minnesota, and Wisconsin and the Commonwealth of Pennsylvania (collectively, the "Defendant States").

STATEMENT OF THE CASE

Lawful elections are at the heart of our freedoms. "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 10 (1964). Trust in the integrity of that process

is the glue that binds our citizenry and the States in this Union.

Elections face the competing goals of maximizing and counting *lawful* votes but minimizing and excluding *unlawful* ones. *Reynolds v. Sims*, 377 U.S. 533, 554-55 (1964); *Bush v. Gore*, 531 U.S. 98, 103 (2000) ("the votes eligible for inclusion in the certification are the votes meeting the properly established legal requirements") ("*Bush II*"); *compare* 52 U.S.C. § 20501(b)(1)-(2) (2018) *with id.* § 20501(b)(3)-(4). Moreover, "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds*, 377 U.S. at 555. Reviewing election results requires not only counting lawful votes but also eliminating unlawful ones.

It is an understatement to say that 2020 was not a good year. In addition to a divided and partisan national mood, the country faced the COVID-19 pandemic. Certain officials in the Defendant States presented the pandemic as the justification for ignoring state laws regarding absentee and mail-in voting. The Defendant States flooded their citizenry with tens of millions of ballot applications and ballots ignoring statutory controls as to how they were received, evaluated, and counted. Whether well intentioned or not, these unconstitutional and unlawful changes had the same *uniform effect*—they made the 2020 election less secure in the Defendant States. Those changes were made in violation of relevant state laws and were made by non-legislative entities, without any consent by the state legislatures.

These unlawful acts thus directly violated the Constitution. U.S. CONST. art. I, § 4; *id.* art. II, § 1, cl. 2.

This case presents a pure question of law: did the Defendant States violate the Electors Clause by taking non-legislative actions to change the election rules that would govern the appointment of presidential electors? Although those non-legislative changes undoubtedly facilitated the casting and counting of ballots in violation of the law, we may never know the full extent of wrongdoing and abusive practices that took place during the election of 2020. What we do know is that each of these States flagrantly violated the statutes enacted by relevant State legislatures, thereby violating the Electors Clause of Article II, Section 1, Clause 2 of the Constitution. By these unlawful acts, the Defendant States have not only tainted the integrity of their own citizens' vote, but their actions have also debased the votes of citizens in the States who remained loyal to the Constitution.

Elections for federal office must comport with federal constitutional standards, s*ee Bush II*, 531 U.S. at 103-105, and executive branch government officials cannot subvert these constitutional requirements, no matter their stated intent. For presidential elections, each State must appoint its Electors to the electoral college in a manner that complies with the Constitution, specifically the Electors Clause requirement that only state *legislatures* may set the

rules governing the appointment of electors and the elections upon which such appointment is based.[1]

Constitutional Background

The Electors Clause requires that each State "shall appoint" its Presidential Electors "in such Manner as the *Legislature thereof* may direct." U.S. CONST. art. II, § 1, cl. 2 (emphasis added); *cf. id.* art. I, cl. 4 (similar for time, place, and manner of federal legislative elections). "[T]he state legislature's power to select the manner for appointing electors is *plenary*," *Bush II*, 531 U.S. at 104 (emphasis added), and sufficiently *federal* for this Court's review. *Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70, 76 (2000) ("*Bush I*"). This textual feature of our Constitution was adopted to ensure the integrity of the presidential selection process: "Nothing was more to be desired than that every practicable obstacle should be opposed to cabal, intrigue, and corruption." FEDERALIST NO. 68 (Alexander Hamilton). When a State conducts a popular election to appoint electors, the State must comply with all constitutional requirements. *Bush II*, 531 U.S. at 104. When a State fails to conduct a valid election—for any reason—"the electors may be appointed on a subsequent day in such

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[1] Subject to override by Congress, State legislatures have the exclusive power to regulate the time, place, and manner for electing Members of Congress, *see* U.S. CONST. art. I, § 4, which is distinct from legislatures' exclusive and plenary authority on the appointment of presidential electors. When non-legislative actors purport to set State election law for presidential elections, they violate both the Elections Clause and the Electors Clause.

a manner *as the legislature of such State may direct*." 3 U.S.C. § 2 (emphasis added).

Non-Legislative Changes Made in Violation of the Electors Clause

As set forth in the Complaint, executive and judicial officials made significant changes to the legislatively-defined election rules in the Defendant States. *See* Compl. at ¶¶ 29-134. Taken together, these non-legislative changes did away with statutory ballot-security measures for absentee and mail-in ballots such as signature verification, witness requirements, and statutorily-authorized secure ballot drop-off locations.

Citing the COVID-19 pandemic, Defendant States gutted the safeguards for absentee ballots through non-legislative actions, despite knowledge that absentee ballots are "the largest source of potential voter fraud," BUILDING CONFIDENCE IN U.S. ELECTIONS: REPORT OF THE COMMISSION ON FEDERAL ELECTION REFORM, at 46 (Sept. 2005) (hereinafter, "CARTER-BAKER"), which is magnified when absentee balloting is shorn of ballot-integrity measures such as signature verification, witness requirements, or outer-envelope protections, or when absentee ballots are processed and tabulated without bipartisan observation by poll watchers.

Without Defendant States' combined 72 electoral votes, President Trump appears to have 232 electoral votes, and former Vice President Biden appears to have 234. Thus, Defendant States' electors will determine the outcome of the election. Alternatively, if Defendant States are unable to certify 37 or more

electors, neither candidate will have a majority in the Electoral College, in which case the election would devolve to the House of Representatives under the Twelfth Amendment.

STANDARD OF REVIEW

This Court considers two primary factors when it decides whether to grant a State leave to file a bill of complaint against another State: (1) "the nature of the interest of the complaining State," and (2) "the availability of an alternative forum in which the issue tendered can be resolved." *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992) (internal quotations omitted) Because original proceedings in this Court follow the Federal Rules of Civil Procedure, S.Ct. Rule 17.2, the facts for purposes of a motion for leave to file are the well-pleaded facts alleged in the complaint. *Hernandez v. Mesa*, 137 S.Ct. 2003, 2005 (2017). The complaint must set out "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2).

ARGUMENT

I. THIS COURT HAS JURISDICTION OVER PLAINTIFF STATES' CLAIMS.

In order to grant leave to file, this Court first must assure itself of its jurisdiction, *Steel Co. v. Citizens for a Better Env't.,* 523 U.S. 83, 95 (1998); *cf. Foman v. Davis*, 371 U.S. 178, 182 (1962) (courts deny leave to file amended pleadings that would be futile). That standard is met here. The Plaintiff States' fundamental rights and interests are at stake. This

Court is the *only* venue that can protect the Plaintiff States' Electoral College votes from being cancelled by the unlawful and constitutionally-tainted votes cast by Electors appointed by the Defendant States.

A. The claims fall within this Court's constitutional and statutory subject-matter jurisdiction.

The federal judicial power extends to "Controversies between two or more States." U.S. CONST. art. III, § 2, and Congress has placed the jurisdiction for such suits exclusively with the Supreme Court: "The Supreme Court shall have original *and exclusive* jurisdiction of all controversies between two or more States." 28 U.S.C. § 1251(a) (emphasis added). This Court not only is a permissible court for hearing this action; it is the only court that can hear this action quickly enough to render relief sufficient to avoid constitutionally tainted votes in the Electoral College and to place the appointment of the Defendant States' Electors before their legislatures pursuant to 3 U.S.C. § 2 in time for a vote in the House of Representatives on January 6, 2021. *See* 3 U.S.C. § 15. With that relief in place, the House can resolve the election on January 6, 2021, in time for the president to be selected by the constitutionally set date of January 20. U.S. CONST. amend. XX, § 1.

B. The claims arise under the Constitution.

When States violate their own election laws, they may argue that these violations are insufficiently federal to allow review in this Court. *Cf. Foster v. Chatman*, 136 S.Ct. 1737, 1745-46 (2016) (this Court lacks jurisdiction to review state-court decisions that "rest[] on an adequate and independent state law

ground"). That attempted evasion would fail for two reasons.

First, in the election context, a state-court remedy or a state executive's administrative action purporting to alter state election statutes implicates the Electors Clause. *See Bush II*, 531 U.S. at 105. Even a plausible federal-law defense to state action arises under federal law within the meaning of Article III. *Mesa v. California*, 489 U.S. 121, 136 (1989) (holding that "it is the raising of a federal question in the officer's removal petition that constitutes the federal law under which the action against the federal officer arises for Art. III purposes"). Constitutional arising-under jurisdiction exceeds statutory federal-question jurisdiction of federal district courts,[2] and—indeed—we did not even have federal-question jurisdiction until 1875. *Merrell Dow Pharm.,* 478 U.S. at 807. The Plaintiff States' Electoral Clause claims arise under the Constitution and so are *federal*, even if the only claim is that the Defendant States violated their own state election statutes. Moreover, as is explained below, the Defendant States' actions injure the interests of Plaintiff States in the appointment of Electors to the Electoral College in a manner that is consistent with the Constitution.

Given this federal-law basis against these state actions, the state actions are not "independent" of the federal constitutional requirements that provide this

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[2] The statute for federal-officer removal at issue in *Mesa* omits the well-pleaded complaint rule, *id.*, which is a *statutory* restriction on federal-question jurisdiction under 28 U.S.C. § 1331. *See Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804, 808 (1986).

Court jurisdiction. *Fox Film Corp. v. Muller*, 296 U.S. 207, 210-11 (1935); *cf. City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 164 (1997) (noting that "even though state law creates a party's causes of action, its case might still 'arise under' the laws of the United States if a well-pleaded complaint established that its right to relief under state law requires resolution of a substantial question of federal law" and collecting cases) (internal quotations and alterations omitted). Plaintiff States' claims therefore fall within this Court's arising-under jurisdiction.

Second, state election law is not purely a matter of state law because it applies "not only to elections to state offices, but also to the election of Presidential electors," meaning that state law operates, in part, "by virtue of a direct grant of authority made under Art. II, § 1, cl. 2, of the United States Constitution." *Bush I*, 531 U.S. at 76. Logically, "any state authority to regulate election to [federal] offices could not precede their very creation by the Constitution," meaning that any "such power had to be delegated to, rather than reserved by, the States." *Cook v. Gralike*, 531 U.S. 510, 522 (2001) (internal quotations omitted). "It is no original prerogative of State power to appoint a representative, a senator, or President for the Union." J. Story, 1 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 627 (3d ed. 1858). For these reasons, any "significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question." *Bush II*, 531 U.S. at 113 (Rehnquist, C.J., concurring).

Under these circumstances, this Court has the power both to review and to remedy a violation of the

Constitution. Significantly, parties do not need winning hands to establish jurisdiction. Instead, jurisdiction exists when "the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction," even if the right "will be defeated if they are given another." *Bell v. Hood*, 327 U.S. 678, 685 (1946). At least as to *jurisdiction*, a plaintiff need survive only the low threshold that "the alleged claim under the Constitution or federal statutes [not] … be immaterial and made solely for the purpose of obtaining jurisdiction or … wholly insubstantial and frivolous." *Id.* at 682. The Bill of Complaint meets that test.

C. The claims raise a "case or controversy" between the States.

Like any other action, an original action must meet the Article III criteria for a case or controversy: "it must appear that the complaining State has suffered a wrong through the action of the other State, furnishing ground for judicial redress, or is asserting a right against the other State which is susceptible of judicial enforcement according to the accepted principles of the common law or equity systems of jurisprudence." *Maryland v. Louisiana*, 451 U.S. 725, 735-36 (1981) (internal quotations omitted). Plaintiff States have standing under those rules.[3]

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[3] At its constitutional minimum, standing doctrine measures the necessary effect on plaintiffs under a tripartite test: cognizable injury to the plaintiffs, causation by the challenged conduct, and redressable by a court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992). The rules for standing in state-versus-state actions is the same as the rules in other

With voting, "'the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.'" *Bush II*, 531 U.S. at 105 (quoting *Reynolds*, 377 U.S. at 555). In presidential elections, "the impact of the votes cast in each State is affected by the votes cast for the various candidates in other States." *Anderson v. Celebrezze*, 460 U.S. 780, 795 (1983). Thus, votes in the Defendant States affect the votes in the Plaintiff States, as set forth in more detail below.

1. <u>Plaintiff States suffer an injury in fact.</u>

The citizens of Plaintiff States have the right to demand that all other States abide by the constitutionally-set rules in appointing Presidential Electors to the Electoral College. "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 10 (1964); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) ("the political franchise of voting" is "a fundamental political right, because preservative of all rights"). "Every voter in a federal … election, whether he votes for a candidate with little chance of winning or for one with little chance of losing, has a right under the Constitution to have his vote fairly counted." *Anderson v. United States*, 417 U.S. 211, 227 (1974);

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actions under Article III. *See Maryland v. Louisiana*, 451 U.S. 725, 736 (1981).

Baker v. Carr, 369 U.S. 186, 208 (1962). Put differently, "a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction," *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972), and—unlike the residency durations required in *Dunn*—the "jurisdiction" here is the entire United States. In short, the rights at issue are congeable under Article III.

Significantly, the Plaintiff States press their own form of voting-rights injury *as States*. As with the one-man, one-vote principle for congressional redistricting in *Wesberry*, the equality of the States arises from the structure of the Constitution, not from the Equal Protection or Due Process Clauses. *See Wesberry*, 376 U.S. at 7-8; *id.* n.10 (expressly not reaching claims under Fourteenth Amendment). Whereas the House represents the People proportionally, the Senate represents the States. *See* U.S. CONST. art. V, cl. 3 ("no state, without its consent, shall be deprived of its equal suffrage in the Senate"). While Americans likely care more about who is elected President, the States have a distinct interest in who is elected *Vice President* and thus who can cast the tie-breaking vote in the Senate. Through that interest, States suffer an Article III injury when another State violates federal law to affect the outcome of a presidential election. This injury is particularly acute in 2020, where a Senate majority often will hang on the Vice President's tie-breaking vote because of the nearly equal—and, depending on the outcome of Georgia run-off elections in January, possibly *equal*—balance between political parties. Quite simply, it is vitally important to the States who becomes Vice President.

Because individual citizens may arguably suffer only a generalized grievance from Electors Clause violations, States have standing where their citizen voters would not, *Lance v. Coffman*, 549 U.S. 437, 442 (2007) (distinguishing citizen plaintiffs from citizen relators who sued in the name of a state). In *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497 (2007), this Court held that states seeking to protect their sovereign interests are "entitled to special solicitude in our standing analysis." *Id.* at 520. While *Massachusetts* arose in a different context—the same principles of federalism apply equally here to require special deference to the sovereign states on standing questions.

In addition to standing for their own injuries, States can assert *parens patriae* standing for their citizens who are Presidential Electors.[4] Like legislators, Presidential Electors assert "legislative injury" whenever allegedly improper actions deny them a working majority. *Coleman v. Miller*, 307 U.S. 433, 435 (1939). The Electoral College is a zero-sum game. If the Defendant States' unconstitutionally appointed Electors vote for a presidential candidate opposed by the Plaintiffs States' Electors, that operates to defeat the Plaintiff States' interests.[5]

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[4] "The '*parens patriae*' doctrine … is a recognition of the principle that the state, when a party to a suit involving a matter of sovereign interest, 'must be deemed to represent all its citizens.'" *New Jersey v. New York*, 345 U.S. 369, 372-73 (1953) (quoting *Kentucky v. Indiana*, 281 U.S. 163, 173 (1930)).

[5] Because the Plaintiff States appointed their Electors fully consistent with the Constitution, they suffer injury if their Electors are defeated by the Defendant States' unconstitutionally appointed Electors. This injury is all the more acute

Indeed, even without an electoral college majority, Presidential Electors suffer the same voting-debasement injury as voters generally: "It must be remembered that 'the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.'" *Bush v. Gore*, 531 U.S. 98, 105 (2000) (quoting *Reynolds v. Sims*, 377 U. S. 533, 555 (1964)) ("*Bush II*"). Those injuries to Electors serve as an Article III basis for a *parens patriae* action by their States.

2. The Defendant States caused the injuries.

Non-legislative officials in the Defendant States either directly caused the challenged violations of the Electors Clause or, in the case of Georgia, acquiesced to them in settling a federal lawsuit. The Defendants thus caused the Plaintiffs' injuries.

3. The requested relief would redress the injuries.

This Court has authority to redress the Plaintiff States' injuries, and the requested relief will do so.

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because Plaintiff States have taken steps to prevent fraud. For example, Louisiana requires voters to show photo identification, LA. REV. STAT. § 18:1309(D)(1)(a), verifies absentee ballots, *id.* § 18:1313.1(G), and expressly allows parishes with more than 1,000 absentee ballots to begin the preparing and verifying those ballots on the day before Election Day. *Id.* 18:1313.1(A). Unlike the Defendant States, the Plaintiff States neither weakened nor allowed the weakening of their ballot-integrity statutes by non-legislative means.

First, while the Defendant States are responsible for their elections, this Court has authority to enjoin reliance on *unconstitutional* elections:

> When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter.

Bush v. Gore, 531 U.S. 98, 104 (2000); *City of Boerne v. Flores,* 521 U.S. 507, 524 (1997) ("power to interpret the Constitution in a case or controversy remains in the Judiciary"). The Plaintiff States do not ask this Court to decide who won the election; they only ask that the Court enjoin the clear violations of the Electors Clause of the Constitution.

Second, the relief that the Plaintiff States request—namely, remand to the State legislatures to allocate Electors in a manner consistent with the Constitution—does not violate the Defendant States' rights or exceed this Court's power. The power to select Electors is a plenary power of the legislatures, and this remains so, without regard to state law:

> This power is conferred upon the legislatures of the States by the Constitution of the United States, and cannot be taken from them or modified by their State constitutions…. Whatever provisions may be made by statute, or by the state constitution, to choose electors by the people, there is no doubt of the right of the legislature to resume the power at any

> time, for it can neither be taken away nor abdicated.

McPherson v. Blacker, 146 U.S. 1, 35 (1892) (internal quotations omitted); *accord Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70, 76-77 (2000); *Bush II*, 531 U.S at 104.

Third, uncertainty of how the Defendant States' legislatures will allocate their electors is irrelevant to the question of redressability:

> If a reviewing court agrees that the agency misinterpreted the law, it will set aside the agency's action and remand the case – even though the agency … might later, in the exercise of its lawful discretion, reach the same result for a different reason.

FEC v. Akins, 524 U.S. 11, 25 (1998). The Defendant States' legislatures would remain free to exercise their plenary authority under the Electors Clause in any *constitutional* manner they wish. For example, they may review the presidential election results in their State and determine that winner would be the same, notwithstanding the violations of state law in the conduct of the election. Or they may appoint the Electors themselves, either appointing all for one presidential candidate or dividing the State's Electors and appointing some for one candidate and some for another candidate. Or they may take any number of actions that would be consistent with the Constitution. Under *Akins*, the simple act of reconsideration under lawful means is redress enough.

Fourth, the requested relief is consistent with federal election law: "Whenever any State has held an

election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct." 3 U.S.C. § 2. Regardless of the statutory deadlines for the Electoral College to vote, this Court could enjoin reliance on the results from constitutionally-tainted November 3 election, remand the appointment of Electors to the Defendant States, and order the Defendant States' legislatures to certify their Electors in a manner consistent with the Constitution, which could be accomplished well in advance of the statutory deadline of January 6 for House to count the electors' votes. 3 U.S.C. § 15.

D. Plaintiff States have prudential standing.

Beyond the constitutional baseline, standing doctrine also poses prudential limits like the zone-of-interests test, *Ass'n of Data Processing Serv. Org., Inc. v. Camp*, 397 U.S. 150, 153 (1970)., and the need for those seeking to assert absent third parties' rights to have their own Article III standing and a close relationship with the absent third parties, whom a sufficient "hindrance" keeps from asserting their rights. *Kowalski v. Tesmer*, 543 U.S. 125, 128-30 (2004). Prudential doctrines pose no barrier here.

First, the injuries asserted here are "arguably within the zone of interests to be protected or regulated by the … constitutional guarantee in question." *Camp*, 397 U.S. at 153. The Court has relied on the structure of the Constitution to provide the one-man, one-vote standard, *Wesberry*, 376 U.S. at 7-8 & n.10, and this case is no different. The structure

of the Electoral College provides that each State is allocated a certain number of Electors depending upon that State's representation in Congress and that each State must abide by constitutional requirements in the appointment of its Electors. When the elections in one State violate those requirements in a presidential election, the interests of the citizens in other States are harmed.

Second, even if *parens patriae* standing were not available, States have their own injury, a close relationship with their citizens, and citizens may arguable lack standing to assert injuries under the Electors Clause. *See*, *e.g.*, *Bognet v. Sec'y Pa.*, No. 20-3214, 2020 U.S. App. LEXIS 35639, at *18-26 (3d Cir. Nov. 13, 2020). States, by contrast, have standing to assert such injuries. *Lance*, 549 U.S. at 442 (distinguishing citizen plaintiffs who suffer a generalized grievance from citizen relators who sued in the name of a state); *cf. Massachusetts,* 549 U.S. at 520 (federal courts owe "special solicitude in standing analysis"). Moreover, anything beyond Article III is merely prudential. *Caplin & Drysdale v. United States*, 491 U.S. 617, 623 n.3 (1989). Thus, States also have third-party standing to assert their citizens' injuries.

E. This action is not moot and will not become moot.

None of the looming election deadlines are constitutional, and they all are within this Court's power to enjoin. Indeed, if this Court vacated a State's appointment of Electors, those Electors could not vote on December 14, 2020; if the Court vacated their vote after the fact, the House of Representatives could not

count those votes on January 6, 2021. There would be ample time for the Defendant States' legislatures to appoint new Electors in a manner consistent with the Constitution. Any remedial action can be complete well before January 6, 2020. Indeed, even the swearing in of the next President on January 20, 2021, will not moot this case because review could outlast even the selection of the next President under "the 'capable of repetition, yet evading review' doctrine," which applies "in the context of election cases … when there are 'as applied' challenges as well as in the more typical case involving only facial attacks." *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 463 (2007) (internal quotations omitted); *accord Norman v. Reed*, 502 U.S. 279, 287-88 (1992). Mootness is not, and will not become, an issue here.

F. This matter is ripe for review.

The Plaintiff States' claims are clearly ripe now, but they were not ripe before the election: "A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998) (internal quotations and citations omitted).[6] Prior to the election, there was no reason to know who would win the vote in any given State.

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[6] It is less clear whether this matter became ripe on or soon after election night when the networks "called" the election for Mr. Biden or significantly later when enough States certified their vote totals to give him 270-plus anticipated votes in the electoral college.

Ripeness also raises the question of laches, which Justice Blackmun called "precisely the opposite argument" from ripeness. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 915 n.16 (1990) (Blackmun, J., dissenting). Laches is an equitable defense against unreasonable delay in commencing suit. *Petrella v. MGM*, 572 U.S. 663, 667 (2014). This action was neither unreasonably delayed nor is prejudicial to the Defendant States.

Before the election, the Plaintiff States had no ripe claim against a Defendant State:

> "One cannot be guilty of laches until his right ripens into one entitled to protection. For only then can his torpor be deemed inexcusable."

What-A-Burger of Va., Inc. v. Whataburger, Inc., 357 F.3d 441, 449-50 (4th Cir. 2004) (quoting 5 J. Thomas McCarthy, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 31: 19 (4th ed. 2003); *Gasser Chair Co. v. Infanti Chair Mfg. Corp.*, 60 F.3d 770, 777 (Fed. Cir. 1995) (same); *Profitness Physical Therapy Ctr. v. Pro-Fit Orthopedic & Sports Physical Therapy P.C.*, 314 F.3d 62, 70 (2d Cir. 2002) (same). The Plaintiffs States could not have brought this action before the election results. Nor did the full extent of the county-level deviations from election statutes in the Defendant States become evident until days after the election. Neither ripeness nor laches presents a timing problem here.

G. This action does not raise a non-justiciable political question.

The "political questions doctrine" does not apply here. Under that doctrine, federal courts will decline to review issues that the Constitution delegates to one

of the other branches—the "political branches"—of government. While picking Electors involves political rights, the Supreme Court has ruled in a line of cases beginning with *Baker* that constitutional claims related to voting (other than claims brought under the Guaranty Clause of Article IV, §4) are justiciable in the federal courts. As the Court held in *Baker*, litigation over political rights is not the same as a political question:

> We hold that this challenge to an apportionment presents no nonjusticiable "political question." The mere fact that the suit seeks protection of a political right does not mean it presents a political question. Such an objection "is little more than a play upon words."

Baker, 369 U.S. at 209. This is no political question; it is a constitutional one that this Court should answer.

H. No adequate alternate remedy or forum exists.

In determining whether to hear a case under this Court's original jurisdiction, the Court has considered whether a plaintiff State "has another adequate forum in which to settle [its] claim." *United States v. Nevada*, 412 U.S. 534, 538 (1973). This equitable limit does not apply here because Plaintiff States cannot sue Defendant States in any other forum.

To the extent that Defendant States wish to avail themselves of 3 U.S.C. § 5's safe harbor, *Bush I*, 531 U.S. at 77-78, this action will not meaningfully stand in their way:

> The State, of course, after granting the franchise in the special context of Article II,

> can take back the power to appoint electors. … There is no doubt of the right of the legislature to resume the power at any time, for it can neither be taken away nor abdicated[.]

Bush II, 531 U.S. at 104 (citations and internal quotations omitted).[7] The Defendant States' legislature will remain free under the Constitution to appoint electors or vote in any *constitutional* manner they wish. The only thing that they cannot do—and should not wish to do—is to rely on an allocation conducted in violation of the Constitution to determine the appointment of presidential electors.

Moreover, if this Court agrees with the Plaintiff States that the Defendant States' appointment of Electors under the recently conducted elections would be unconstitutional, then the statutorily-created safe harbor cannot be used as a justification for a violation of the Constitution. The safe-harbor framework created by statute would have to yield in order to ensure that the Constitution was not violated.

It is of no moment that Defendants' *state laws* may purport to tether state legislatures to popular votes. Those state limits on a state legislature's exercising federal constitutional functions cannot block action because the federal Constitution "transcends any limitations sought to be imposed by the people of a State" under this Court's precedents. *Leser v. Garnett*, 258 U.S. 130, 137 (1922); *see also Bush I*, 531 U.S. at

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[7] Indeed, the Constitution also includes another backstop: "if no person have such majority [of electoral votes], then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot." U.S. CONST. amend. XII.

77; *United States Term Limits v. Thornton*, 514 U.S. 779, 805 (1995) ("the power to regulate the incidents of the federal system is not a reserved power of the States, but rather is delegated by the Constitution").

As this Court recognized in *McPherson v. Blacker*, the authority to choose presidential electors:

> is conferred upon the legislatures of the states by the Constitution of the United States, and cannot be taken from them or modified by their state constitutions. ... *Whatever provisions may be made by statute, or by the state constitution, to choose electors by the people, there is no doubt of the right of the legislature to resume the power at any time, for it can neither be taken away or abdicated.*

146 U.S. 1, 35 (1892) (emphasis added) (internal quotations omitted). The Defendant States would suffer no cognizable injury from this Court's enjoining their reliance on an unconstitutional vote.

II. THIS CASE PRESENTS A CONSTITUTIONAL QUESTION OF IMMENSE NATIONAL CONSEQUENCE THAT WARRANTS THIS COURT'S DISCRETIONARY REVIEW.

Electoral integrity ensures the legitimacy of not just our governmental institutions, but the Republic itself. *See Wesberry*, 376 U.S. at 10. "Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised." *Purcell,* 549 U.S. at 4. Against that backdrop, few cases could warrant this Court's review more than this one. In addition, the constitutionality of the process for

selecting the President is of extreme national importance. If the Defendant States are permitted to violate the requirements of the Constitution in the appointment of their Electors, the resulting vote of the Electoral College not only lacks constitutional legitimacy, but the Constitution itself will be forever sullied.

Though the Court claims "discretion when accepting original cases, even as to actions between States where [its] jurisdiction is exclusive," *Wyoming v. Oklahoma*, 502 U.S. 437, 450 (1992) (internal quotations omitted), this is not a case where the Court should apply that discretion "sparingly." *Id.* While Plaintiff States dispute that exercising this Court's original jurisdiction is discretionary, *see* Section III, *infra*, the clear unlawful abrogation of the Defendant States' election laws designed to ensure election integrity by a few officials, and examples of material irregularities in the 2020 election cumulatively warrant this Court's exercising jurisdiction as this Court's "unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront." *Bush II*, 531 U.S. at 111; *see also Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). While isolated irregularities could be "garden-variety" election irregularities that do not raise a federal question,[8] the closeness of the presidential election

[8] "To be sure, 'garden variety election irregularities' may not present facts sufficient to offend the Constitution's guarantee of due process[.]" *Hunter v. Hamilton Cty. Bd. of Elections*, 635 F.3d 219, 232 (6th Cir. 2011) (quoting *Griffin*, 570 F.2d at 1077-79)).

results, combined with the unconstitutional setting-aside of state election laws by non-legislative actors call both the result and the process into question.

A. The 2020 election suffered from serious irregularities that constitutionally prohibit using the reported results.

The Defendant States' administration of the 2020 election violated the Electors Clause, which renders invalid any appointment of Electors based upon those election results, unless the relevant State legislatures review and modify or expressly ratify those results as sufficient to determine the appointment of Electors. For example, even without fraud or nefarious intent, a mail-in vote not subjected to the State legislature's ballot-integrity measures cannot be counted. It does not matter that a judicial or executive officer sought to bypass that screening in response to the COVID pandemic: the choice was not theirs to make. "Government is not free to disregard the [the Constitution] in times of crisis." *Roman Catholic Diocese of Brooklyn, New York v. Cuomo*, 592 U.S. ___ (Nov. 25, 2020) (Gorsuch, J., concurring). With all unlawful votes discounted, the election result is an open question that this Court must address. Under 3 U.S.C. § 2, the State legislatures may answer the question, but the question must be asked here.

1. **Defendant States violated the Electors Clause by modifying their legislatures' election laws through non-legislative action.**

The Electors Clause grants authority to *State Legislatures* under both horizontal and vertical separation of powers. It provides authority to each

State—not to federal actors—the authority to dictate the manner of selecting Presidential Electors. And within each State, it explicitly allocates that authority to a single branch of State government: to the "Legislature thereof." U.S. Const. Art. II, § 1, cl. 2. State legislatures' primacy *vis-à-vis* non-legislative actors—whether State or federal—is even more significant than congressional primacy *vis-à-vis* State legislatures.

The State legislatures' authority is plenary. *Bush II*, 531 U.S. at 104. It "cannot be taken from them or modified" even through "their state constitutions." *McPherson*, 146 U.S. at 35; *Bush I*, 531 U.S at 76-77; *Bush II*, 531 U.S at 104. The Framers allocated election authority to State legislatures as the branch closest—and most accountable—to the People. *See*, *e.g.*, Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. PA. J. CONST. L. 1, 31 (2010) (collecting Founding-era documents); *cf.* THE FEDERALIST NO. 57, at 350 (C. Rossiter, ed. 2003) (Madison, J.) ("House of Representatives is so constituted as to support in its members an habitual recollection of their dependence on the people"). Thus, only the State legislatures are permitted to create or modify the respective State's rules for the appointment of presidential electors. U.S. CONST. art. II, § 1, cl. 2.

Regulating election procedures is necessary both to avoid chaos and to ensure fairness:

> Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; as

> a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.

Burdick v. Takushi, 504 U.S. 428, 433 (1992) (interior quotations omitted). Thus, for example, deadlines are necessary to avoid chaos, even if some votes sent via absentee ballot do not arrive timely. *Rosario v. Rockefeller*, 410 U.S. 752, 758 (1973). Even more importantly in this pandemic year with expanded mail-in voting, ballot-integrity measures—*e.g.*, witness requirements, signature verification, and the like—are an essential component of any legislative expansion of mail-in voting. *See* CARTER-BAKER, at 46 (absentee ballots are "the largest source of potential voter fraud"). Though it may be tempting to permit a breakdown of the constitutional order in the face of a global pandemic, the rule of law demands otherwise.

Specifically, because the Electors Clause makes clear that state legislative authority is exclusive, non-legislative actors lack authority to *amend* statutes. *Republican Party of Pa. v. Boockvar*, No. 20-542, 2020 U.S. LEXIS 5188, at *4 (Oct. 28, 2020) ("there is a strong likelihood that the State Supreme Court decision violates the Federal Constitution") (Alito, J., concurring); *Wisconsin State Legis.*, No. 20A66, 2020 U.S. LEXIS 5187, at *11-14 (Oct. 26, 2020) (Kavanaugh, J., concurring in denial of application to vacate stay); *cf. Grayned v. City of Rockford,* 408 U.S. 104, 110 (1972) ("it is not within our power to construe and narrow state laws"); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 509-10 (2010)

("editorial freedom … [to "blue-pencil" statutes] belongs to the Legislature, not the Judiciary"). That said, courts can enjoin elections or even enforcement of *unconstitutional* election laws, but they cannot rewrite the law in federal presidential elections.

For example, if a state court enjoins or modifies ballot-integrity measures adopted to allow absentee or mail-in voting, that invalidates ballots cast under the relaxed standard unless the legislature has—prior to the election—ratified the new procedure. Without pre-election legislative ratification, results based on the treatment and tabulation of votes done in violation of state law cannot be used to appoint Presidential Electors.

Elections must be lawful contests, but they should not be mere *litigation contests* where the side with the most lawyers wins. As with the explosion of nation-wide injunctions, the explosion of challenges to State election law for partisan advantage in the lead-up to the 2020 election "is not normal." *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring in the grant of stay). Nor is it healthy. Under the "*Purcell* principle," federal courts generally avoid enjoining state election laws in the period close to an election. *Purcell*, 549 U.S. at 4-5 (citing "voter confusion and consequent incentive to remain away from the polls"). *Purcell* raises valid concerns about confusion in the run-up to elections, but judicial election-related injunctions also raise *post-election* concerns. For example, if a state court enjoins ballot-integrity measures adopted to secure absentee or mail-in voting, that invalidates ballots cast under the relaxed standard unless the State legislature has had

time to ratify the new procedure. Without either pre-election legislative ratification or a severability clause in the legislation that created the rules for absentee voting by mail, the state court's actions operate to violate the Electors Clause.

2. State and local administrator's systemic failure to follow State election qualifies as an unlawful amendment of State law.

When non-legislative state and local executive actors engage in systemic or intentional failure to comply with their State's duly enacted election laws, they adopt by executive fiat a *de facto* equivalent of an impermissible amendment of State election law by an executive or judicial officer. *See* Section II.A.1, *supra*. This Court recognizes an executive's "consciously and expressly adopt[ing] a general policy that is so extreme as to amount to an abdication of its statutory responsibilities" as another form of reviewable final action, even if the policy is not a written policy. *Heckler v. Chaney*, 470 U.S. 821, 833 n.4 (1985) (interior quotations omitted); *accord id.* at 839 (Brennan, J., concurring). Without a *bona fide* amendment to State election law *by the legislature*, executive officers must follow state law. *Cf. Morton v. Ruiz*, 415 U.S. 199, 235 (1974); *Service v. Dulles*, 354 U.S. 363, 388-89 (1957). The wrinkle here is that the non-legislative actors lack the authority under the federal Constitution to enact a *bona fide* amendment, regardless of whatever COVID-related emergency power they may have.

This form of executive nullification of State law by statewide, county, or city officers is a variant of

impermissible amendment by a non-legislative actor. *See* Section II.A.1, *supra.* Such nullification is always unconstitutional, but it is especially egregious when it eliminates legislative safeguards for election integrity (*e.g.*, signature and witness requirements for absentee ballots, poll watchers[9]). Systemic failure by statewide, county, or city election officials to follow State election law is no more permissible than formal amendments by an executive or judicial actor.

B. A ruling on the 2020 election would preserve the Constitution and help prevent irregularities in future elections.

In addition to ensuring that the 2020 presidential election is resolved in a manner consistent with the Constitution, this Court must review the violations that occurred in the Defendant States to enable Congress and State legislatures to avoid future chaos and constitutional violations. Unless this Court acts to review this presidential election, these unconstitutional and unilateral violations of state election laws will continue in the future.

Regardless of how the 2020 election resolves and whatever this Court does with respect to the 2020 election, it is imperative for our system of government

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[9] Poll watchers are "prophylactic measures designed to prevent election fraud," *Harris v. Conradi,* 675 F.2d 1212, 1216 n.10 (11th Cir. 1982), and "to insure against tampering with the voting process." *Baer v. Meyer,* 728 F.2d 471, 476 (10th Cir. 1984). For example, poll monitors reported that 199 Chicago voters cast 300 party-line Democratic votes, as well as three party-line Republican votes in one election. *Barr v. Chatman,* 397 F.2d 515, 515-16 & n.3 (7th Cir. 1968).

that elections follow the clear constitutional mandates for all future elections. Just as this Court in *Bush II* provided constitutional guidance to all states regarding the equal treatment of ballots from county to county in 2000, this Court should now provide a clear statement that non-legislative modification of rules governing presidential elections violate the Electors Clause. Such a ruling will discourage in the future the kind of non-legislative election modifications that proliferated in 2020.

III. REVIEW IS NOT DISCRETIONARY.

Although this Court's original-jurisdiction precedents would justify the Court's hearing this matter under the Court's discretion, *see* Section II, *supra*, Plaintiff States respectfully submit that the Court's review is not discretionary. To the contrary, the plain text of § 1251(a) provides *exclusive* jurisdiction, not discretionary jurisdiction. *See* 28 U.S.C. §1251(a). In addition, no other remedy exists for these interstate challenges, *see* Section I.H, *supra*, and *some* court must have jurisdiction for these weighty issues. *See Mostyn v. Fabrigas*, 98 Eng. Rep. 1021 (K.B. 1774) ("if there is no other mode of trial, that alone will give the King's courts a jurisdiction"). As individual Justices have concluded, the issue "bears reconsideration." *Nebraska v. Colorado*, 136 S.Ct. 1034, 1035 (2016) (Thomas, J., dissenting, joined by Alito, J.); *accord New Mexico v. Colorado*, 137 S.Ct. 2319 (2017) (Thomas, J., dissenting) (same). Plaintiff States respectfully submit that that reconsideration would be warranted to the extent that the Court does not elect to hear this matter in its discretion.

IV. THIS CASE WARRANTS SUMMARY DISPOSITION OR EXPEDITED BRIEFING.

The issues presented here are neither fact-bound nor complex, and their vital importance urgently needs a resolution. Plaintiff States will move this Court for expedited consideration but also suggest that this case is a prime candidate for summary disposition because the material facts—namely, that the COVID-19 pandemic prompted non-legislative actors to unlawfully modify Defendant States' election laws, and carry out an election in violation of basic voter integrity statutes—are not in serious dispute. *California v. United States*, 457 U.S. 273, 278 (1982); *South Carolina v. Katzenbach*, 383 U.S. 301, 307 (1966). This case presents a pure question of law that does not require the finding of additional facts. Nor is the question of law so complex that highly-expedited briefing or summary disposition would be inappropriate.

CONCLUSION

Leave to file the Bill of Complaint should be granted.

December __, 2020 Respectfully submitted,

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No. _____, Original

In the Supreme Court of the United States

STATE OF LOUISIANA, STATE OF A, AND STATE OF B,

Plaintiffs,

v.

COMMONWEALTH OF PENNSYLVANIA, STATE OF GEORGIA, STATE OF MICHIGAN, STATE OF MINNESOTA, STATE OF NEVADA, AND STATE OF WISCONSIN,

Defendants.

MOTION FOR LEAVE TO FILE BILL OF COMPLAINT, BILL OF COMPLAINT, AND BRIEF IN SUPPORT

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v.

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Defendants.

MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

Pursuant to 28 U.S.C. § 1251(a) and this Court's Rule 17, the States of Louisiana, A, and B respectfully requests leave to file the accompanying Bill of Complaint against the States of Georgia, Michigan, Minnesota, Nevada, and Wisconsin and the Commonwealth of Pennsylvania (collectively, the "Defendant States") challenging their administration of the 2020 federal elections.

As set forth more fully in both the accompanying brief and complaint, the 2020 election suffered from significant and unconstitutional irregularities in the Defendant States:

- Non-legislative actors' purported amendments to States' duly enacted election laws, in violation of the Electors Clause's vesting State legislatures

with plenary authority regarding the appointment of Presidential Electors.

- The appearance of voting irregularities in the Defendant States that would be consistent with the unconstitutional relaxation of ballot-integrity protections in those States' election laws.

The non-legislative amendments of state election law violate the Electors Clause, *Bush v Gore*, 531 U.S. 98, 113 (2000) ("significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question") (Rehnquist, C.J., concurring), even if there ultimately is an explanation for the perceived voting irregularities.

Taken together, these flaws affect an outcome-determinative numbers of popular votes in a group of States that cast outcome-determinative numbers of electoral votes. This Court should grant leave to file the complaint and, ultimately, enjoin the use of unlawful election results without review and ratification by the Defendant States' legislatures and remand to the Defendant States' respective legislatures to appoint Presidential Electors in a manner consistent with the Electors Clause and pursuant to 3 U.S.C. § 2.

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In the Supreme Court of the United States

STATE OF LOUISIANA, STATE OF A, AND STATE OF B,

Plaintiffs,

v.

COMMONWEALTH OF PENNSYLVANIA, STATE OF GEORGIA, STATE OF MICHIGAN, STATE OF MINNESOTA, STATE OF NEVADA, AND STATE OF WISCONSIN,

Defendants.

BILL OF COMPLAINT

[This is a placeholder.]

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In the Supreme Court of the United States

STATE OF LOUISIANA, STATE OF A, AND STATE OF B,

Plaintiffs,

v.

COMMONWEALTH OF PENNSYLVANIA, STATE OF GEORGIA, STATE OF MICHIGAN, STATE OF MINNESOTA, STATE OF NEVADA, AND STATE OF WISCONSIN,

Defendants.

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE

[This is a placeholder.]

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No. _____, Original

In the Supreme Court of the United States

THE STATE OF A, AND THE STATE OF B

Plaintiffs,

v.

THE COMMONWEALTH OF PENNSYLVANIA, THE STATE OF GEORGIA, THE STATE OF MICHIGAN, AND THE STATE OF WISCONSIN,

Defendants.

BILL OF COMPLAINT

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BILL OF COMPLAINT

The State of A and the State of B ("Plaintiff States") brings this action against the States of Arizona, Georgia, Michigan, Nevada, and Wisconsin and the Commonwealth of Pennsylvania (collectively, the "Defendant States") based on the following allegations:

NATURE OF THE ACTION

1. Plaintiff States challenges the Defendant States' administration of the 2020 presidential election under the Electors Clause and the Equal Protection Clause of the Fourteenth Amendment and thus ask this Court to provide the American people a result they can trust and an appointment of Electors to the Electoral College that is consistent with the U.S. Constitution.

2. The COVID-19 pandemic has affected nearly every aspect of civic life during 2020, and the Presidential election was not immune. Executive branch and judicial officials in the Defendant States took actions to modify the election process. Although these actions were doubtless well intentioned, they altered the process for selecting electors in violation of Article II, Section 1, clause 2 of the Constitution ("Each State shall appoint, in such a manner as *the Legislature* thereof may direct, a Number of Electors…."). *Id.* (emphasis added).

3. The pandemic has produced a once-in-a-lifetime election that requires once-in-a-lifetime intervention by States and this Court to ensure that the appointment of presidential electors is consistent with the requirements of the U.S. Constitution.

JURISDICTION AND VENUE

4. This Court has original and exclusive jurisdiction over this action because it is a "controvers[y] between two or more States" under Article III, § 2, cl. 2 of the U.S. Constitution and 28 U.S.C. § 1251(a).

5. This Court is the sole forum in which to exercise the jurisdictional basis for this action.

6. This Court's Article III decisions suggest that only a state can bring certain claims. *Lance v. Coffman*, 549 U.S. 437, 442 (2007) (distinguishing citizen plaintiffs from citizen relators who sued in the name of a state); *Massachusetts v. EPA,* 549 U.S. 497, 520 (2007) (courts owe "special solicitude in standing analysis"). Moreover, redressability and mootness would undermine a suit against a single state officer. *Green v. Mansour,* 474 U.S. 64, 66-67 (1985) (*Ex parte Young* exception to sovereign immunity is unavailable for past violations). This action is the only adequate remedy for State plaintiffs.

PARTIES

7. Plaintiff is the State of A, which is a sovereign State of the United States, and the State of B, which is a sovereign State of the United States.

8. Defendants are the States of Arizona, Georgia, Michigan, Nevada, and Wisconsin and the Commonwealth of Pennsylvania, which are sovereign States of the United States.

LEGAL BACKGROUND

9. Under the Supremacy Clause, the "Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the

land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." U.S. CONST. Art. VI, cl. 2.

10. State legislatures have plenary power to set the process for appointing presidential electors: "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors." U.S. CONST. art. II, §1, cl. 2. "[T]he state legislature's power to select the manner for appointing electors is *plenary*":

> The State, of course, after granting the franchise in the special context of Article II, can take back the power to appoint electors. There is *no doubt of the right of the legislature to resume the power at any time, for it can neither be taken away nor abdicated*[.]

Bush v. Gore, 531 U.S. 98, 104 (2000) ("*Bush II*") (emphasis added); *cf.* 3 U.S.C. § 2 ("Whenever any State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct.").

11. The Constitution includes the Electors Clause "to afford as little opportunity as possible to tumult and disorder" and to place "every practicable obstacle [to] cabal, intrigue, and corruption," including "foreign powers" and to __ that might insinuate themselves into our elections. THE FEDERALIST NO. 68, at 410-11 (C. Rossiter, ed. 1961) (Madison, J.).

12. Under the Equal Protection Clause, "No State shall … deny to any person within its

jurisdiction the equal protection of the laws[.]" U.S. CONST. amend. XIV, § 1, cl. 4.

13. The Defendant States' applicable laws are set out under the facts for each Defendant State.

FACTS

14. The use of absentee ballots skyrocketed in 2020, not only as a public-health response to the COVID-19 pandemic but also at the urging of mail-in voting's proponents. Particularly problematic was that certain Defendant States flooded their State with millions of absentee ballot applications, and even ballots themselves, *en masse*, to every registered millions voter, sometimes multiple times. Normal controls, such as signature verification requirements, designed to deter voter fraud were not designed to handle the up to ten-fold increase of millions of ballot applications and ballots.

15. In the wake of the contested 2000 election, the bipartisan Jimmy Carter-James Baker commission identified absentee ballots as "the largest source of potential voter fraud" in the wake of the contested 2000 election, BUILDING CONFIDENCE IN U.S. ELECTIONS: REPORT OF THE COMMISSION ON FEDERAL ELECTION REFORM, at 46 (Sept. 2005).

16. Mail-in voting is the largest source of voter fraud. As the direct result of expanded mail-in voting in Defendant States, the 2020 election experienced elevated levels of fraudulent voting in the form of ineligible people voting, as well as the submission of fraudulent ballots in the name of registered voters, but without their knowledge.

17. In the 2020 election, Defendant States – or their subdivisions – used voting software and hardware marketed as "Democracy Suite 5.5" by

Dominion Voting Systems Corp. ("Dominion"), a privately held company.

18. In the statement accompanying its denial, the Texas Secretary of State concluded that that "the examiner reports raise concerns about whether the Democracy Suite 5.5-A system is suitable for its intended purpose; operates efficiently and accurately; and is safe from fraudulent or unauthorized manipulation. Therefore, the Democracy Suite 5.5-A system and corresponding hardware devices do not meet the standards for certification prescribed by Section 122.001 of the Texas Election Code," as shown in a decision by a decision from the Northern District of Georgia in a challenge to Georgia's adoption of the Dominion system. *Curling v. Raffensperger*, No. 1:17-cv-2989-AT, 2020 U.S. Dist. LEXIS 188508, at *35 n.32 (N.D. Ga. Oct. 11, 2020) (emphasis in *Curling*). The Georgia court found the plaintiff's evidence persuasive and strong but denied a preliminary injunction because there was not enough time for Georgia to adopt a new paper-backed system. *Id.* at *108-11. The court concluded with this warning, "[t]he Plaintiffs' national cybersecurity experts convincingly present evidence that this is not a question of 'might this actually ever happen?' — but 'when it will happen,' …. Given the masking nature of malware and the current systems described here, if the State and Dominion simply stand by and say, 'we have never seen it,' the future does not bode well." *Id.* at *177.

19. Dominion's manual for its election suite shows the ability to alter votes as a feature of that system.

20. Consistent with Texas's finding as quoted in *Curling*, Dominion's election data are open to fraudulent and unauthorized manipulation.

21. Although Dominion's voting systems at the polling place are not supposed to be connected to the internet, they can be either directly or indirectly through a LAN network, and further, data streams for Defendant States' post-polling election *results* are stored on servers that are accessible via the internet and stored abroad (*i.e.*, outside the reach of United States laws and State law).

22. As set forth in Paragraphs XX and XX it appears likely that election results in certain Defendant States were altered materially to change the winner of the 2020 election for President, either by third-party "hackers" with stolen access to Dominion-controlled voting data or by corrupt election officials with access to that voting data. Plaintiff Stateswill submit expert affidavits to demonstrate the technical and statistical plausibility of data manipulation as the explanation for these anomalies in the election data.

23. In a presidential election, "the impact of the votes cast in each State is affected by the votes cast for the various candidates in other States." *Anderson v. Celebrezze*, 460 U.S. 780, 795 (1983). The constitutional failures of Defendant States injures Plaintiff State because "'the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.'" *Bush II*, 531 U.S. at 105 (quoting *Reynolds v. Sims*, 377 U. S. 533, 555 (1964)).

24. Because the Electors to be appointed to the Electoral College by the Defendant States will be voting for or against the candidates supported by the Electors of the Plaintiff States, the outcome of the Electoral College vote is directly affected by the constitutional violations committed by the Defendant States. Put differently, the Plaintiff States complied in all respects with the Constitution in the process of appointing their Electors; whereas the Defendant States did not. The Plaintiff States will therefore be injured if the Defendant States are permitted to appoint Electors in violation of the Constitution.

Commonwealth of Pennsylvania

25. Pennsylvania has 20 electoral votes, with a state-wide vote margin currently estimated at 3,363,951 for President Trump and 3,445,548 for former Vice President Biden, a margin of 81,597 votes. In two urban and more heavily Democrat counties (Philadelphia and Allegheny), Mr. Biden's margin (618,011 votes) significantly exceeds his statewide lead.

26. Without analyzing unlawful election standards, the number of illegal votes counted and legal votes not counted dwarf the margin dividing the parties. *See* Exhibit E.

27. Pennsylvania's election law requires poll-watcher access to the opening, counting, and recording of absentee ballots: "Watchers shall be permitted to be present when the envelopes containing official absentee ballots and mail-in ballots are opened and when such ballots are counted and recorded." 25 PA. STAT. § 3146.8(b). Local election officials in Philadelphia and Allegheny Counties made a conscious and express policy decision not to follow 25 PA. STAT. § 3146.8(b) for the opening, counting, and

recording of absentee ballots. In contrast, election officials in other Pennsylvania counties followed the requirements of Pennsylvania law in this respect.

28. Local election officials in Philadelphia County contacted voters with improperly completed absentee ballots to allow those voters to cure ballots with more lead time than 25 PA. STAT. § 3146.8(h) allows voters statewide. In contrast, election officials in other Pennsylvania counties followed the requirements of Pennsylvania law in this respect.

29. Statewide election officials and local election officials in Philadelphia and Allegheny Counties adopted the differential standards favoring voters in Philadelphia and Allegheny Counties with the intent to favor former Vice President Biden because of the historical Democrat advantage in those counties.

30. In 2019, Pennsylvania's legislature enacted bipartisan election reforms, 2019 Pa. Legis. Serv. Act 2019-77, that set inter alia a deadline of 8:00 p.m. on an election day for a county board of elections to receive a mail-in ballot. 25 PA. STAT. §§ 3146.6(c), 3150.16(c). Acting under a generally worded clause that "Elections shall be free and equal," PA. CONST. art. I, §5, cl. 1, a 4-3 majority of Pennsylvania's Supreme Court in *Pa. Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020), extended that deadline to three days after Election Day and adopted a presumption that even *non-postmarked ballots* were presumptively timely.

31. Pennsylvania's legislature has not ratified the relaxed deadlines in the *Boockvar* decision, and the legislation did not include a severability clause.

32. According to the U.S. Election Assistance Commission's report to Congress *Election Administration and Voting Survey: 2016 Comprehensive Report*, in 2016 Pennsylvania received 266,208 mail-in ballots; 2,534 of them were rejected (.95%). *Id.* at p. 24. However, in 2020, Pennsylvania received more than 10 times the number of mail-in ballots compared to 2016, but the rejection rate was 31 times less compared to 2016 indicating that a material number of illegal absentee ballots were included in the overall tally. Applying the rejection rate of .95% in 2016 to 2020 would equate to at least 24,882 ballots being rejected instead of a minuscule 951 ballots that were rejected by Pennsylvania officials in 2020. Democrats returned nearly three times as many absentee ballots as Republicans.

33. These non-legislative modifications to Pennsylvania's election rules unintentionally facilitated the significant amount of election fraud that appears to have occurred in Pennsylvania. For example, the delayed acceptance date for mail-in ballots made it possible for those who sought to commit fraud to manufacture additional absentee ballots after election day, and to back-date ballots received after election day. [Insert from expert to be supplied on anomalies in Pennsylvania data: __.]

34. Finally, in Pennsylvania, on October 1, 2020 a laptop and several USB drives, used to program Pennsylvania's Dominion voting machines, were mysteriously stolen from a warehouse in Philadelphia. The laptop and the USB drives were the *only* items taken. *See* Jeremy Roebuck and Jonathan Lai, *Memory sticks used to program Philly's voting machines were stolen from elections warehouse*, THE PHILADELPHIA INQUIRER, Sept. 30, 2020. This

unresolved theft raises material questions whether Dominion's BMD voting systems have been compromised.

35. [Anything else: __.]

State of Georgia

36. Georgia has 16 electoral votes, with a statewide vote margin currently estimated at 2,458,121 for President Trump and 2,472,098 for former Vice President Biden, a margin of 13,977 votes. In two urban and more heavily Democrat counties (Fulton and Dekalb), Mr. Biden's margin (493,675 votes) significantly exceeds his statewide lead.

37. Without analyzing unlawful election standards, the number of illegal votes counted and legal votes not counted dwarf the margin dividing the parties. *See* Exhibit B.

38. Georgia requires that poll watchers and inspectors have access to vote counting and canvassing. GA. CODE § 21-2-408. Local election officials in Fulton and Dekalb Counties made a conscious and express policy decision not to follow GA. CODE § 21-2-408 for the opening, counting, and recording of absentee ballots. In contrast, other counties in Georgia followed the requirements of Georgia law in this regard.

39. On March 6, 2020, in *Democratic Party of Georgia v. Raffensperger*, No. 1:19-cv-5028-WMR (N.D. Ga.), Georgia's Secretary of State entered a Compromise Settlement Agreement and Release with the Democratic Party of Georgia to relax the Georgia legislature's standard for reviewing signatures on absentee ballot envelopes to confirm the identity of the person submitting the absentee ballot.

40. Georgia's legislature has not ratified the relaxed standards in the Compromise Settlement Agreement and Release, and the legislation did not include a severability clause.

41. These non-legislative modifications to Georgia's election rules unintentionally facilitated the significant amount of election fraud that appears to have occurred in Georgia.

State of Michigan

42. Michigan has 16 electoral votes, with a statewide vote margin currently estimated at 2,650,695 for President Trump and 2,796,702 for former Vice President Biden, a margin of 146,007 votes. In one urban and more heavily Democrat county (Wayne County), Mr. Biden's margin (322,925 votes) significantly exceeds his statewide lead.

43. Without analyzing unlawful election standards, the number of illegal votes counted and legal votes not counted dwarf the margin dividing the parties. *See* Exhibit C.

44. Michigan requires that poll watchers and inspectors have access to vote counting and canvassing. M.C.L. §§ 168.674-.675. Local election officials in Wayne County made a conscious and express policy decision not to follow M.C.L. §§ 168.674-.675 for the opening, counting, and recording of absentee ballots. In contrast, election officials in other Michigan counties followed the requirements of Michigan law, in this respect.

45. As amended in 2018, the Michigan Constitution provides all registered voters the right to vote absentee without giving a reason. MICH. CONST. art. 2, § 4.

46. On May 19, 2020, Michigan's Secretary of State's ("SOS") announced that her office would send unsolicited absentee-voter ballot applications by mail to all 7.7 million registered Michigan voters prior to the primary and general elections. Although her office repeatedly encouraged voters to vote absentee because of the COVID-19 pandemic, it did not ensure that Michigan's election systems and procedures were adequate to ensure the accuracy and legality of the historic flood of mail-in votes.

47. Michigan law limits the procedures for requesting an absentee ballot to three specified ways:

> An application for an absent voter ballot under this section may be made in *any of the following ways*:
>
> (a) By a written request signed by the voter.
>
> (b) On an absent voter ballot application form provided for that purpose by the clerk of the city or township.
>
> (c) On a federal postcard application.

M.C.L. § 168.759(3) (emphasis added). The Michigan Legislature declined to explicitly include the SOS as a means for distributing absentee ballot applications. Id. § 168.759(3)(b). Under the statute's plain language, the Legislature explicitly gave *only local clerks* the power to distribute absentee voter ballot applications. *Id.* Because the Legislature declined to explicitly include the SOS as a vehicle for distributing absentee ballots, either en masse or even individually, the SOS lacked any authority to distribute absentee voter ballot applications.

48. On November 17, 2020, the Wayne County Board of Canvassers (the "Board") deadlocked 2-2 over whether to certify the results of the

presidential election based on numerous reports of fraud in the election process in the county. A few hours later, the Republican members of the Board reversed their decision and voted to certify the results after being called racists and threatened with violence.

49. On November 18, 2020 the two Republican members of the Board *rescinded their votes* to certify the vote and signed affidavits alleging they were bullied and misled into approving election results and do not believe the votes should be certified until serious irregularities in Detroit votes are resolved.

50. Michigan also has strict signature verification requirements for absentee ballots including that Elections Department place a written statement or stamp on each ballot envelope where the voter signature is placed, indicating that the voter signature was in fact checked and verified with signature on file with the State. *See* MCL 168.765a(6).

51. Numerous poll challengers and an Election Department employee whistleblower have testified that signature verification requirement was ignored in Wayne County. In contrast, election officials in other Michigan counties followed the requirements of Michigan law, in this respect.

52. These non-legislative modifications to Michigan's election rules unintentionally facilitated the significant amount of election fraud that appears to have occurred in Michigan. For example, the relaxation or abandonment of the signature verification rules in Wayne County made it possible for those who sought to commit fraud to manufacture additional absentee ballots.

53. Candidate Biden won the vote in Wayne County 68% to 31% for President Trump with more than 863,000 votes cast. The vote in Detroit was reportedly 233,908 for Biden compared to 12,654 votes for President Trump.

54. In Michigan, which also employed the same Dominion voting system, on November 4, 2020, Michigan election officials been admitted that a purported "glitch" caused 6,000 votes for President Trump to be wrongly switched to Democrat Candidate Biden in just one county. Local officials discovered the so-called "glitch" after reportedly questioning Biden's win in the heavily Republican area reportedly and manually checked the vote tabulation. There has been no formal independent determination the true cause of this so-called "glitch."

State of Wisconsin

55. Wisconsin has 10 electoral votes, with a statewide vote margin currently estimated at 1,610,151 for President Trump and 1,630,716 for former Vice President Biden (*i.e.*, a margin of 20,565 votes). In two heavily Democrat counties (Milwaukee and Dane), Mr. Biden's margin (364,298 votes) significantly exceeds his statewide lead.

56. Without analyzing unlawful election standards, the number of illegal votes counted and legal votes not counted dwarf the margin dividing the parties. *See* Exhibit F.

57. Wisconsin statutes guard against fraud in absentee ballots: "[V]oting by absentee ballot is a privilege exercised wholly outside the traditional safeguards of the polling place. The legislature finds that the privilege of voting by absentee ballot must be

carefully regulated to prevent the potential for fraud or abuse[.]" WISC. STAT. § 6.84(1).

58. Registering to vote by absentee ballot requires photo identification when registering to vote absentee, except for those who register as "indefinitely confined" or "hospitalized." WISC. STAT. § 6.86(2)(a), (3)(a). Registering for indefinite confinement requires certifying confinement "because of age, physical illness or infirmity or is disabled for an indefinite period." *Id.* § 6.86(2)(a). Should indefinite confinement cease, the voter must notify the county clerk, *id.*, who must remove the voter from indefinite-confinement status. *Id.* § 6.86(2)(b).

59. On May 13, 2020, the Administrator of Wisconsin's Election Commission ("WEC") issued a directive to the Wisconsin clerks prohibiting removal of voters from the registry for indefinite-confinement status if the voter is no longer "indefinitely confined."

60. According the Braynard Study, attached as appendix 2, an estimated 45.23 % of the 213,215 who claimed indefinitely confined absentee voter status in the State, were not, in fact, indefinitely confined.

61. Voting by absentee ballot requires voters to complete a certification, including their address, and have the envelope witnessed by an adult who also must sign and indicate their address on the envelope. *See* WISC. STAT. § 6.87. The sole remedy to cure an "improperly completed certificate or [ballot] with no certificate" is for "the clerk may return the ballot to the elector[.]" *Id.* § 6.87(9). "If a certificate is missing the address of a witness, the ballot may not be counted." *Id.* § 6.87(6d).

62. As received, each absentee ballot must be sealed in envelope and delivered on Election Day to the proper ward or election district to be opened "between the opening and closing of the polls on election day … in the same room where votes are being cast, in such a manner that members of the public can hear and see the procedures." WISC. STAT. § 6.88(3)(a) (Wisconsin generally); *id.* 7.52(1)-(3) (similar for Milwaukee). If a ballot is determined not to meet the criteria for a valid vote the inspectors or board of absentee ballot canvassers "shall not count the ballot," *Id.* §§ 6.88(3)(b), 7.52(3)(b), including *inter alia* ballots where a "certification is insufficient, … the applicant is not a qualified elector in the ward or election district, … the ballot envelope is open or has been opened and resealed, … the ballot envelope contains more than one ballot of any one kind or, … an elector voting an absentee ballot has since died." *Id.* §§ 6.88(3)(b), 7.52(3)(b). Notwithstanding these requirements for public access, Milwaukee County officials restricted access to the actions of Milwaukee election officials during the review of absentee ballots. In contrast, election officials in other Wisconsin counties followed the requirements of Wisconsin law, in this respect.

63. Wisconsin's election statute prohibits counting absentee ballots that do not meet all the statutory criteria: "Ballots cast in contravention of the procedures specified in those provisions may not be counted [and] … may not be included in the certified result of any election." WISC. STAT. § 6.84(2).

64. In a training video issued April 1, 2020, the Administrator of the City of Milwaukee Elections Commission "witness address may be written in red and that is because we were able to locate the

witnesses' address for the voter" to add an address missing from the certifications on absentee ballots, in circumvention of § 6.87(6d). WEC issued similar guidance on October 19, 2020.

65. Acting pursuant to this guidance, canvas workers in Milwaukee used red-ink pens to alter the certificates on the absentee envelope and then cast and count the absentee ballot, in violation of Wisconsin law.

66. These non-legislative modifications to Wisconsin's election rules unintentionally facilitated the significant amount of election fraud that appears to have occurred in Wisconsin. For example, the relaxation of signature requirements and witness address requirements for mail-in ballots made it possible for those who sought to commit fraud to manufacture additional absentee ballots.

COUNT I: EQUAL PROTECTION (DIFFERENTIAL STANDARDS)

67. Plaintiff States repeats and re-allege the allegations of paragraphs 1-64, above, as if fully set forth herein.

68. The Equal Protection Clause prohibits the use of differential standards in the treatment and tabulation of ballots within a State. *Bush II*, 531 U.S. at 107.

69. The actions set out in Paragraphs __, __, __, ___, __, and __ violate created differential voting standards in Defendant States Georgia, Michigan, Pennsylvania, and Wisconsin in violation of the Equal Protection Clause.

COUNT II: EQUAL PROTECTION (ONE MAN, ONE VOTE)

70. Plaintiff States repeats and re-alleges the allegations of paragraphs 1-67, above, as if fully set forth herein.

71. The one-man, one-vote principle of this Court's Equal Protection cases requires counting all valid votes and not counting all invalid votes. *Reynolds*, 377 U.S. at 554-55; *Bush II*, 531 U.S. at 103 ("the votes eligible for inclusion in the certification are the votes meeting the properly established legal requirements").

72. The actions set out in Paragraphs __, __, __, __, __, and __ violated the one-man, one-vote principle by systemically *excluding valid* votes and those set out in Paragraphs __, __, __, and __ violate that principle by systemically *including invalid* votes in Defendant States Georgia, Michigan, Pennsylvania, and Wisconsin, in violation of the Equal Protection Clause.

COUNT III: THE ELECTORS CLAUSE

73. Plaintiff States repeat and re-allege the allegations of paragraphs 1-70, above, as if fully set forth herein.

74. The Electors Clause of Article II, Section 1, Clause 2 of the Constitution makes clear that only the legislatures of the States are permitted to determine the rules for appointment of Electors to the Electoral College. The pertinent rules here are the state election laws, specifically those relevant to the presidential election.

75. The actions set out in Paragraphs __, __, __, ___, __, and __ constitute non-legislative changes to State election law by executive-branch State

election officials, or by judicial officials, in Defendant States Georgia, Michigan, Pennsylvania, and Wisconsin, in violation of the Electors Clause.

PRAYER FOR RELIEF

WHEREFORE, the State of A and the State of B respectfully request that this Court issue the following relief:

A. Declare that Defendant States Georgia, Michigan, Pennsylvania, and Wisconsin administered the 2020 presidential election in violation of the Equal Protection Clause.

B. Declare that Defendant States Georgia, Michigan, Pennsylvania, and Wisconsin administered the 2020 presidential election in violation of the Electors Clause.

C. Preliminarily enjoin Defendant States' appointment of Electors, and any use of the 2020 election results for the office of president until the legislatures thereof – pursuant to 3 U.S.C. § 2 and the Electors Clause, U.S. CONST. art. II, §1, cl. 2, advise this Court, after investigation, (1) of the winner of their State's general election – after including all valid votes and excluding all invalid votes – or (2) that a winner cannot be determined, or (3) that the legislature will appoint the State's Electors in another manner that is consistent with the requirements of the Electors Clause and the Equal Protection Clause.

D. Award costs to the Plaintiff States.

E. Grant such other relief as the Court deems just and proper.

November __, 2020 Respectfully submitted,

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Ex. 1a

Ex. A – Pennsylvania		
Type*	**Description**	**Votes**
1) Illegal Votes Counted	Estimate of ballots requested in the name of a registered Republican by someone other than that person	
2) Legal Votes Not Counted	Estimate of Republican ballots that the requester returned but were not counted	
3) Illegal Votes Counted	Electors voted where they did not reside.	
4) Illegal Votes Counted		
5) Illegal Votes Counted	Out of State Residents Voting in State	
6) Illegal Votes Counted	Double Votes	
TOTAL 1 & 2		
TOTAL		

* Types may overlap (*e.g.*, if out-of-state residents vote twice).

Ex. 2a

Ex. B – Georgia		
Type*	**Description**	**Votes**
1) Illegal Votes Counted	Estimate of ballots requested in the name of a registered Republican by someone other than that person	
2) Legal Votes Not Counted	Estimate of Republican ballots that the requester returned but were not counted	
3) Illegal Votes Counted	Electors voted where they did not reside.	
4) Illegal Votes Counted		
5) Illegal Votes Counted	Out of State Residents Voting in State	
6) Illegal Votes Counted	Double Votes	
TOTAL 1 & 2		
TOTAL		

Ex. 3a

Ex. C – Michigan		
Type*	**Description**	**Votes**
1) Illegal Votes Counted	Estimate of ballots requested in the name of a registered Republican by someone other than that person	
2) Legal Votes Not Counted	Estimate of Republican ballots that the requester returned but were not counted	
3) Illegal Votes Counted	Electors voted where they did not reside.	
4) Illegal Votes Counted		
5) Illegal Votes Counted	Out of State Residents Voting in State	
6) Illegal Votes Counted	Double Votes	
TOTAL 1 & 2		
TOTAL		

Ex. 4a

Ex. D – Michigan		
Type*	**Description**	**Votes**
1) Illegal Votes Counted	Estimate of ballots requested in the name of a registered Republican by someone other than that person	
2) Legal Votes Not Counted	Estimate of Republican ballots that the requester returned but were not counted	
3) Illegal Votes Counted	Electors voted where they did not reside.	
4) Illegal Votes Counted		
5) Illegal Votes Counted	Out of State Residents Voting in State	
6) Illegal Votes Counted	Double Votes	
TOTAL 1 & 2		
TOTAL		

Ex. 5a

No. _____, Original

In the Supreme Court of the United States

STATE OF A, AND STATE OF B,

Plaintiffs,

v.

COMMONWEALTH OF PENNSYLVANIA, STATE OF GEORGIA, STATE OF MICHIGAN, AND STATE OF WISCONSIN,

Defendants.

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

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In the Supreme Court of the United States

STATE OF A, STATE OF B, STATE OF C, STATE OF D, AND STATE OF E,

Plaintiffs,

v.

COMMONWEALTH OF PENNSYLVANIA, STATE OF ARIZONA, STATE OF GEORGIA, STATE OF MICHIGAN, STATE OF NEVADA, AND STATE OF WISCONSIN,

Defendants.

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE

Pursuant to S.Ct. Rule 17.3, the States of A and B, (collectively, "Plaintiff States") respectfully submit this brief in support of their Motion for Leave to File a Bill of Complaint against the States of Georgia, Michigan, and Wisconsin and the Commonwealth of Pennsylvania (collectively, "Defendant States").

STATEMENT OF THE CASE

The American People deserve lawful presidential elections: "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*,

376 U.S. 1, 10 (1964). Even in a good year, elections face the competing goals of maximizing and counting *lawful* votes but minimizing and excluding *unlawful* ones. *Reynolds v. Sims*, 377 U.S. 533, 554-55 (1964); *Bush v Gore*, 531 U.S. 98, 103 (2000) ("the votes eligible for inclusion in the certification are the votes meeting the properly established legal requirements"); *compare* 52 U.S.C. § 20501(b)(1)-(2) (2018) *with id.* § 20501(b)(3)-(4).

In terms of election regularity, it is an understatement to say that 2020 was not a good year. In addition to an evenly divided and partisan national mood, the country faced the COVID-19 pandemic and an unparalleled expansion of mail-in voting. The pandemic was also presented as the justification for last-minute changes of the rules for voting and tabulating votes in the Defendant States. Those changes were made in violation of relevant state laws and were made by non-legislative entities, without any consent by the state legislatures. Those changes also facilitated much of the election fraud that occurred in Defendant States.

As set forth in the accompanying complaint and this brief, the 2020 election turned out as badly as it could have. Each side believes it rightfully won, and there may not be a remaining paper trail that will completely assure the losing side that the vote went against it. But elections for federal office must comport with federal constitutional standards, s*ee Bush v. Gore*, 531 U.S. 98, 103-105 (2000) ("*Bush II*"), and partisans cannot subvert constitutional requirements in order to pursue their preferred electoral outcomes.

Each State, in appointing its Electors to the Electoral College, must do so in a manner that complies with the Constitution. The constitutional requirements at issue in 2020 are the same constitutional requirements that were discussed by this Court in Bush II—namely the Equal Protection Clause's requirement that a State may not have county-by-county variation in how votes are tabulated, and the Electors Clause requirement that only state *legislatures* may set the rules governing the appointment of electors and the elections upon which such appointment is based.

LEGAL BACKGROUND

The right to vote is protected by the Equal Protection Clause. U.S. CONST. amend. XIV, § 1. Because "the right to vote is personal," *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964) (alterations omitted), "[e]very voter in a federal … election, whether he votes for a candidate with little chance of winning or for one with little chance of losing, has a right under the Constitution to have his vote fairly counted." *Anderson v. United States*, 417 U.S. 211, 227 (1974); *Baker v. Carr*, 369 U.S. 186, 208 (1962). Invalid or fraudulent votes debase or dilute the weight of each validly cast vote. *Bush II*, 531 U.S. at 105. The unequal treatment of votes within a state, and unequal standards for processing votes raise equal protection concerns. *Id.*

In addition, the Electors Clause found in Article II of the United States Constitution requires that each State "shall appoint" its Presidential electors "in such Manner as the *Legislature thereof* may direct." U.S.

CONST. art. II, § 1, cl. 2 (emphasis added). "[T]he state legislature's power to select the manner for appointing electors is *plenary*," *Bush II*, 531 U.S. at 104 (emphasis added), and sufficiently *federal* for this Court's review. *Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70, 76 (2000) ("*Bush I*"). This textual feature of our constitution was adopted to ensure the integrity of the presidential selection process. *See* Federalist No. 68 (Alexander Hamilton) ("Nothing was more to be desired than that every practicable obstacle should be opposed to cabal, intrigue, and corruption."). When a state conducts a popular election to appoint electors that fails to comport with minimal standards under the U.S. Constitution, *Bush II*, 531 U.S. at ____, "the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct."

STATEMENT OF FACTS

Because original proceedings in this Court follow the Federal Rules of Civil Procedure, S.Ct. Rule 17.2, the facts for purposes of a motion for leave to file are the well-pleaded facts alleged in the complaint. *Hernandez v. Mesa*, 137 S.Ct. 2003, 2005 (2017). The complaint must set out "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2). For each of the Defendant States, the relevant facts are set out below.

Citing the COVID-19 pandemic, Defendant States reduced the safeguards for absentee ballots – despite knowledge that absentee ballots are "the largest source of potential voter fraud," BUILDING CONFIDENCE IN U.S. ELECTIONS: REPORT OF THE

COMMISSION ON FEDERAL ELECTION REFORM, at 46 (Sept. 2005) (hereinafter, "CARTER-BAKER"), and absentee ballot fraud actually occurring in the 2018 congressional elections. *See* Emery P. Dalesio, *North Carolina Elections Head Says Ballots Handled Illegally*, ASSOCIATED PRESS (Feb. 18, 2019) (describing illegal absentee ballot harvesting scheme in the Ninth Congressional District of North Carolina). Especially when shorn of ballot-integrity measures such as signature verification, witness requirements, or outer envelope protections, or when absentee ballots are processed and tabulated without bipartisan observation, voting by mail is highly susceptible to administrative corruption and electoral fraud.

As laid out in Plaintiff States' Complaint at __-__, executive, judicial officials made significant changes to the legislatively-defined election rules in those states. Most notably, those changes greatly relaxed the signature requirements for absentee ballots, operated to prevent Republican poll watchers from observing the opening of absentee ballot envelopes, and permitted the acceptance of ballots days after election day. Those changes facilitated a significant amount of election fraud that appears to have occurred in the Defendant States. In addition, because many of these changes were made or implemented only in certain counties, the treatment and tabulation of ballots varied a great deal from county to county in Defendant States.

In the urban areas of Fulton and Dekalb Counties in Georgia, Wayne County in Michigan, Philadelphia and Allegheny Counties in Pennsylvania, and

Milwaukee County in Wisconsin, former Vice President Biden's margin of victory exceeded his statewide lead in each Defendant State. President Trump led in the rest of each Defendant State, excluding those urban areas.

Pennsylvania (Philadelphia County) and Michigan (Wayne County) failed to allow poll watchers in the manner required by State law to the disadvantage of other areas of those States that did comply with State law.[1] *See* Compl. ¶¶ __, __. Georgia and Pennsylvania modified their election law via non-legislative court orders that their legislatures did not ratify. *See* Compl. ¶¶ __, __.

In Pennsylvania, significant statistical anomalies occurred. According to a panel of experts who analyzed the reported vote totals in Pennsylvania, the reported totals in eleven counties were so out of alignment with the results of past presidential elections in those counties and the results of other counties in Pennsylvania in 2020, that it is highly improbable that those vote totals are accurate. In addition, the results of the votes that were tabulated beginning in the early morning hours of November 4, 2020, were so different from those tabulated on election day, as to be statistically suspect. *See* Pennsylvania 2020 Voting Analysis Report, attached as ____

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[1] These intrastate differences matter. Pennsylvania, for example, is often described as "Philadelphia and Pittsburgh separated by Alabama." Demetri Sevastopulo, *Donald Trump's path to victory runs through Pennsylvania*, FINANCIAL TIMES, Oct. 27, 2020.

In Wisconsin, state law requires that each absentee ballot must be sealed in envelope and delivered on Election Day to the proper ward or election district to be opened "between the opening and closing of the polls on election day … in the same room where votes are being cast, in such a manner that members of the public can hear and see the procedures." Wisc. Stat. § 6.88(3)(a) (Wisconsin generally); *id.* 7.52(1)-(3) (similar for Milwaukee). If a ballot is determined not to meet the criteria for a valid vote the inspectors or board of absentee ballot canvassers "shall not count the ballot," *Id.* §§ 6.88(3)(b), 7.52(3)(b), including *inter alia* ballots where a "certification is insufficient, … the applicant is not a qualified elector in the ward or election district, … the ballot envelope is open or has been opened and resealed, … the ballot envelope contains more than one ballot of any one kind or, … an elector voting an absentee ballot has since died." *Id.* §§ 6.88(3)(b), 7.52(3)(b). Notwithstanding these requirements for public access, Milwaukee County officials restricted access to the actions of Milwaukee election officials during the review of absentee ballots. In contrast, election officials in other Wisconsin counties followed the requirements of Wisconsin law, in this respect.

Wisconsin law also imposes strict signature requirements on absentee ballots. Voting by absentee ballot requires voters to complete a certification, including their address, and have the envelope witnessed by an adult who also must sign and indicate their address on the envelope. *See* Wisc. Stat. § 6.87. The sole remedy to cure an "improperly completed

certificate or [ballot] with no certificate" is for "the clerk may return the ballot to the elector[.]" *Id.* § 6.87(9). "If a certificate is missing the address of a witness, the ballot may not be counted." *Id.* § 6.87(6d).

Nevertheless, in a training video issued April 1, 2020, the Administrator of the City of Milwaukee Elections Commission "witness address may be written in red and that is because we were able to locate the witnesses' address for the voter" to add an address missing from the certifications on absentee ballots, in circumvention of § 6.87(6d). WEC issued similar guidance on October 19, 2020. Acting pursuant to this guidance, canvas workers in Milwaukee used red-ink pens to alter the certificates on the absentee envelope and then cast and count the absentee ballot, in violation of Wisconsin law.

Without Defendant States' combined 62 electoral votes, President Trump appears to have 232 electoral votes, and former Vice President Biden appears to have 244. Thus, Defendant States' electors will determine the outcome of the election. Alternatively, if Defendant States are unable to certify 26 or more electors, neither candidate will have a majority in the Electoral College, in which case the election would devolve to the House of Representatives under the Twelfth Amendment.

ARGUMENT

I. THIS COURT HAS JURISDICTION OVER THE PLAINTIFF STATES' CLAIMS.

In order to grant leave to file, this Court first must assure itself of its jurisdiction, *Steel Co. v. Citizens for a Better Env't.,* 523 U.S. 83, 95 (1998); *cf. Foman v.*

Davis, 371 U.S. 178, 182 (1962) (courts deny leave to file pleadings that would be futile), but that standard is easily met here.

A. The claims fall within this Court's constitutional and statutory subject-matter jurisdiction.

The federal judicial power extends to "Controversies between two or more States." U.S. CONST. art. III, § 2, and Congress has placed the jurisdiction for such suits exclusively with the Supreme Court: "The Supreme Court shall have original *and exclusive* jurisdiction of all controversies between two or more States." 28 U.S.C. § 1251(a) (emphasis added). This Court not only is a permissible court for hearing this action; it is the only court that can hear this action quickly enough to render dispositive and non-appealable relief sufficient for the Electoral College to cast its votes, for the House of Representatives to act if necessary, and for the president to be selected by the constitutionally-set date of January 20. U.S. Const. Amend XX, § 1.

B. The claims arise under the United States Constitution.

When States violate their own election laws, they may argue that these violations do not warrant review in this Court. *Cf. Foster v. Chatman*, 136 S.Ct. 1737, 1745-46 (2016) (this Court lacks jurisdiction to review state-court decisions that "rest[] on an adequate and independent state law ground"). That attempted evasion fails for two reasons.

First, a state court's remedy or a state executive's administrative action implicates several strands of

federal election law, as well as equal-protection and Electors-Clause principles. *See Bush II*, 531 U.S. at 105. Even a plausible federal-law defense to state action arises under federal law within the meaning of Article III. *Mesa v. California*, 489 U.S. 121, 136 (1989) (holding that "it is the raising of a federal question in the officer's removal petition that constitutes the federal law under which the action against the federal officer arises for Art. III purposes").[2] Given federal-law bases that restrict state action, the underlying state action is not "independent" of the federal statutory and constitutional requirements that provide this Court jurisdiction. *Fox Film Corp. v. Muller*, 296 U.S. 207, 210-11 (1935); *cf. City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 164 (1997) (noting that "even though state law creates a party's causes of action, its case might still 'arise under' the laws of the United States if a well-pleaded complaint established that its right to relief under state law requires resolution of a substantial question of federal law" and collecting cases) (internal quotations and alterations omitted). Plaintiff States' claims therefore fall within this Court's arising-under jurisdiction.

Second, state election law is not purely a matter of state law because it applies "not only to elections to state offices, but also to the election of Presidential electors," meaning that state law, in part, "by virtue of a direct grant of authority made under Art. II, § 1,

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[2] The statute for federal-officer removal at issue in *Mesa* overcomes the well-pleaded complaint rule, *id.*, which is a *statutory* restriction on jurisdiction under 28 U.S.C. § 1331. *See Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804, 808 (1986).

cl. 2, of the United States Constitution." *Bush I*, 531 U.S. at 76. Logically, "any state authority to regulate election to [federal] offices could not precede their very creation by the Constitution," meaning that any "such power had to be delegated to, rather than reserved by, the States." *Cook v. Gralike*, 531 U.S. 510, 522 (2001) (internal quotations omitted). "It is no original prerogative of State power to appoint a representative, a senator, or President for the Union." J. Story, 1 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 627 (3d ed. 1858). For these reasons, any "significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question." *Bush II*, 531 U.S. at 113 (Rehnquist, C.J., concurring).

Under these circumstances, this Court has the power to a violation of the Constitution. Significantly, parties do not need winning hands to establish jurisdiction. Instead, jurisdiction exists when "the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction," even if the right "will be defeated if they are given another." *Bell v. Hood*, 327 U.S. 678, 685 (1946). At least as to *jurisdiction*, a plaintiff need survive only the low threshold that "the alleged claim under the Constitution or federal statutes [not] … be immaterial and made solely for the purpose of obtaining jurisdiction or … wholly insubstantial and frivolous." *Id.* at 682. The Bill of Complaint meets that test.

C. The claims raise a "case or controversy" between the States.

Like any other action, an original action also must meet the Article III criteria for a case or controversy: "it must appear that the complaining State has suffered a wrong through the action of the other State, furnishing ground for judicial redress, or is asserting a right against the other State which is susceptible of judicial enforcement according to the accepted principles of the common law or equity systems of jurisprudence." *Maryland v. Louisiana*, 451 U.S. 725, 735-36 (1981) (internal quotations omitted). Plaintiff States meet all Article III criteria. There are three forms of injury that the Plaintiff States suffer in this case.

First, the Electoral College is a zero-sum game. If the unconstitutionally-appointed Electors of the Defendant States vote for a presidential candidate opposed by the Electors of the Plaintiffs States, that operates to defeat the interests of the Plaintiffs States. The Electors of the Plaintiff States are appointed in a manner fully consistent with the Constitution. The Plaintiff States suffer injury if their Electors are defeated by the unconstitutionally-appointed Electors of the Defendant States. This injury is all the more poignant because Plaintiff States have taken steps to prevent the sort of fraud that occurred in Defendant States. For example States A and B both require voters to present photo identification. Stat. cite_____. States A and B also enforce strict signature verification requirements in the absentee ballot process. Stat. cite.____. And Plaintiff States' elections did not violate the Equal

Protection Clause or the Electors Clause as Defendant States' elections did.

Second, a State can assert *parens patriae* standing for its citizens: "The '*parens patriae*' doctrine … is a recognition of the principle that the state, when a party to a suit involving a matter of sovereign interest, 'must be deemed to represent all its citizens.'" *New Jersey v. New York*, 345 U.S. 369, 372-73 (1953) (quoting *Kentucky v. Indiana*, 281 U.S. 163, 173 (1930)). In a presidential election, "the impact of the votes cast in each State is affected by the votes cast for the various candidates in other States." *Anderson v. Celebrezze*, 460 U.S. 780, 795 (1983). To be sure, then, lawful voters in Plaintiff States suffer injury when Defendant States condone or tolerate illegal election practices in some or all of their counties. "Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised." *Purcell v. Gonzalez,* 549 U.S. 1, 4 (2006). Moreover, a citizen voter asserts a personal right – not a generalized grievance – for the concern that fraudulent or unlawful votes debased or diluted that citizen's vote. *Compare Reynolds*, 377 U.S. at 561-62 ("the right to vote is personal") (alterations omitted) *with Lance*, 549 U.S. at 441-42 (failure to follow Elections Clause, without more, is a generalized grievance). A State can assert the injuries to its citizens – and *a fortiorari* to its Electors – against other States' election practices that debase the voting rights of those two classes of citizens.[3]

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[3] Because Plaintiff States and their citizens suffer concrete injuries, Plaintiff States also can assert standing to enforce

Third, whereas the House represents the People through proportional representation, the Senate represents the States equally. The States have a distinct interest in who is elected Vice President and thus who can cast the tie-breaking vote in the Senate. Through this interest, each State suffers an Article III injury when another State violates the Constitution to affect the outcome of a presidential election. This injury is particularly acute in 2020, where the control of the Senate may depend on the Vice President's tie-breaking vote because of the nearly equal balance between political parties. Moreover, as to injuries to a State, federal courts owe "special solicitude in standing analysis" under *Massachusetts v. EPA,* 549 U.S. 497, 520 (2007). Plaintiff States thus can assert Article III injury in their own right. In addition, this Court has suggested that States have standing where their citizen voters would not, *Lance v. Coffman*, 549 U.S. 437, 442 (2007) (distinguishing citizen plaintiffs from citizen relators who sued in the name of a state).

As to the 2020 election, review could outlast even the selection of the next President under an exception to mootness: "the 'capable of repetition, yet evading review' doctrine, in the context of election cases, is appropriate when there are 'as applied' challenges as well as in the more typical case involving only facial attacks." *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 463 (2007) (internal quotations omitted); *accord Norman v. Reed*, 502 U.S. 279, 287-88 (1992). Consequently, this Court should review the 2020

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election *procedures*. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 & n.7 (1992). Indeed, these procedural injuries lower the Article III threshold for immediacy and redressability. *Id.*

election to explicate the legal standards that apply to future elections, even if those standards do not end up curing the 2020 election.

D. No adequate alternate remedy or forum exists.

In determining whether to hear a case under this Court's original jurisdiction, the Court has considered whether the plaintiff State "has another adequate forum in which to settle [its] claim." *United States v. Nevada*, 412 U.S. 534, 538 (1973). This equitable limit does not apply here because Plaintiff States cannot sue Defendant States in any other forum.

To the extent that Defendant States wish to avail themselves of 3 U.S.C. § 5's safe harbor, *Bush I*, 531 U.S. at 77-78, this action will not meaningfully stand in their way:

> The State, of course, after granting the franchise in the special context of Article II, can take back the power to appoint electors. … There is no doubt of the right of the legislature to resume the power at any time, for it can neither be taken away nor abdicated[.]

Bush II, 531 U.S. at 104 (citations and internal quotations omitted).[4] The Defendant States' legislature will remain free under the federal Constitution to appoint electors or vote in any *lawful* manner they

[4] Indeed, the Constitution also includes another backstop: "if no person have such majority [of electoral votes], then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot." U.S. CONST. amend. XII.

wish. The only thing that they cannot do – and should not wish to do – is to rely on an allocation conducted in violation of the Constitution determine the allocation of presidential electors.

Moreover, if this Court agrees with Plaintiff States that the Defendant States' appointment of electors under the recently-conducted elections would be unconstitutional, then the statutorily-created safe harbor cannot be used as a justification for a violation of the Constitution. The safe-harbor framework created by statute would have to yield in order to ensure that the Constitution was not violated.

It is of no moment that Defendants' *state laws* may purport to tether state legislatures to popular votes. Those state limits on a state legislature's exercising federal constitutional functions cannot block action because the federal Constitution "transcends any limitations sought to be imposed by the people of a State" under this Court's precedents. *Leser v. Garnett*, 258 U.S. 130, 137 (1922); *see also Bush I*, 531 U.S. at 77; *United States Term Limits v. Thornton*, 514 U.S. 779, 805 (1995) ("the power to regulate the incidents of the federal system is not a reserved power of the States, but rather is delegated by the Constitution").

As this Court recognized in *McPherson v. Blacker*, the authority to choose presidential electors:

> is conferred upon the legislatures of the states by the Constitution of the United States, and cannot be taken from them or modified by their state constitutions. ... *Whatever provisions may be made by statute, or by the state constitution, to choose electors by the people, there is no doubt of the right of the*

> *legislature to resume the power at any time, for it can neither be taken away or abdicated.*

146 U.S. 1, 35 (1892) (emphasis added) (internal quotations omitted). The Defendant States would suffer no cognizable injury from this Court's enjoining their reliance on an unconstitutional vote.

II. THIS CASE PRESENTS TWO CONSTITUTIONAL QUESTIONS OF IMMENSE NATIONAL CONSEQUENCE THAT WARRANT DISCRETIONARY REVIEW.

Electoral integrity ensures the legitimacy of our governmental institutions. *See Wesberry v. Sanders*, 376 U.S. at 10. "Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised." *Purcell,* 549 U.S. at 4. Against that backdrop, few cases could warrant this Court's review more than this one. In addition, the constitutionality of the process for selecting the President is of obvious national importance. If some States violate the requirements of the Constitution in the appointment of their Electors, the resulting vote of the Electoral College lacks constitutional legitimacy.

Though the Court claims "discretion when accepting original cases, even as to actions between States where [its] jurisdiction is exclusive," *Wyoming v. Oklahoma*, 502 U.S. 437, 450 (1992) (internal quotations omitted), this is not a case where the Court should apply that discretion "sparingly." *Id.* This Court, like other federal courts, has a "virtually unflagging obligation ... to exercise the jurisdiction

given [it]," *Colorado River Water Conserv. Dist. v. U.S.*, 424 U.S. 800, 817 (1976). When, as here, federal questions arise in a presidential election, it becomes this Court's "unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront." *Bush II*, 531 U.S. at 111; *see also Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). As outlined in the following five subsections, each category of election irregularities warrants this Court's review.

A. Defendant States Violated the Electors Clause in Modifying the Requirements of the 2020 Election.

The Electors Clause grants sole authority to the state Legislatures to dictate the manner of selecting Presidential electors. The Clause explicitly allocate that authority to a single branch of state government: to the "Legislature thereof." U.S. Const. Art. II, § 1, cl. 2. The state legislatures' authority is plenary. *Bush II*, 531 U.S. at 104. It "cannot be taken from them or modified" even through "their state constitutions." *McPherson*, 146 U.S. at 35; *Bush I*, 531 U.S at 76-77. The Framers allocated election authority to state legislatures as the branch closest – and most accountable – to the People. *See*, *e.g.*, Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. PA. J. CONST. L. 1, 31 (2010) (collecting Founding-era documents); *cf.* THE FEDERALIST NO. 57, at 350 (C. Rossiter, ed. 2003) (Madison, J.) ("House of Representatives is so

constituted as to support in its members an habitual recollection of their dependence on the people"). Thus, only the state legislatures are permitted to create or modify the respective states' rules for the appointment of constitutional electors. U.S. Const. Art. II, § 1, cl. 2.

Regulating election procedures is necessary both to avoid chaos and to ensure fairness:

> Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.

Burdick v. Takushi, 504 U.S. 428, 433 (1992) (interior quotations omitted). Thus, for example, deadlines are a necessary to avoid chaos, even if some votes sent via absentee ballot do not arrive timely. *Rosario v. Rockefeller*, 410 U. S. 752, 758 (1973). Even more importantly in this pandemic year with expanded mail-in voting, ballot-integrity measures – *e.g.*, witness requirements, signature verification, and the like – are an essential component of any legislative expansion of mail-in voting. *See* CARTER-BAKER, at 46 (absentee ballots are "the largest source of potential voter fraud"). Though it may be tempting to permit a breakdown of the constitutional order during a global pandemic, the rule of law demands otherwise.

Specifically, because the Electors Clause makes clear that state legislative authority is exclusive, non-legislative actors lack authority to *amend* statutes.

Republican Party of Pa. v. Boockvar, No. 20-542, 2020 U.S. LEXIS 5188, at *4 (Oct. 28, 2020) ("there is a strong likelihood that the State Supreme Court decision violates the Federal Constitution") (Alito, J., concurring); *Wisconsin State Legis.*, No. 20A66, 2020 U.S. LEXIS 5187, at *11-14 (Oct. 26, 2020) (Kavanaugh, J., concurring in denial of application to vacate stay).

For example, if a state court enjoins or modifies ballot-integrity measures adopted to allow absentee or mail-in voting, that invalidates ballots cast under the relaxed standard unless the state legislature has had time to ratify the new procedure. Without either pre-election legislative ratification or a severability clause to the legislation that authorized absentee voting by mail, inadequately vetted absentee ballots are unlawful and should not count.

When non-legislative state and local executive actors engage in systemic or intentional failure to comply with their State's duly enacted election laws, they adopt by executive fiat a *de facto* equivalent of an impermissible amendment of State election law by an executive or judicial officer. *See* Section II.A.1, *supra*. This Court recognizes an executive's "consciously and expressly adopt[ing] a general policy that is so extreme as to amount to an abdication of its statutory responsibilities" as another form of reviewable final action, even if the policy is not a written policy. *Heckler v. Chaney*, 470 U.S. 821, 833 n.4 (1985) (interior quotations omitted); *accord id.* at 839 (Brennan, J., concurring). Without a *bona fide* amendment to State election law *by the legislature*, executive officers must follow state law. *Cf. Morton v.*

Ruiz, 415 U.S. 199, 235 (1974); *Service v. Dulles*, 354 U.S. 363, 388-89 (1957). The wrinkle here is that the non-legislative actors lack the authority under the federal Constitution to enact a *bona fide* amendment, regardless of whatever COVID-related emergency power they may have. For example, if a state or local election official suspends or modifies statutory poll-watching requirements for counting absentee ballots, that invalidates ballots cast under the relaxed standard.

This form of executive nullification of State law by statewide or county officers is a variant of impermissible amendment by a non-legislative actor. Such nullification is always unconstitutional, but it is especially egregious when it eliminates legislative safeguards for election integrity (*e.g.*, signature and witness requirements for absentee ballots, poll watchers[5]). Systemic failure by statewide or county election officials to follow State election law is no more permissible than formal amendments by an executive or judicial actor.

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[5] Poll watchers are "prophylactic measures designed to prevent election fraud," *Harris v. Conradi,* 675 F.2d 1212, 1216 n.10 (11th Cir. 1982), and "to insure against tampering with the voting process." *Baer v. Meyer,* 728 F.2d 471, 476 (10th Cir. 1984). For example, poll monitors reported that 199 Chicago voters cast 300 party-line Democratic votes, as well as three party-line Republican votes in one election. *Barr v. Chatman,* 397 F.2d 515, 515-16 & n.3 (7th Cir. 1968).

B. Defendant States Violated the Equal Protection Clause by Allowing Different Election Rules to Apply in Different Counties.

In each of the Defendant States, important rules governing the validity, receipt, and counting of ballots were modified in a manner that varied from county to county. These variations from county to county violated the Equal Protection Clause, as this Court explained at length in *Bush II*. Each vote must be treated equally. "When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter." *Bush II*, 531 U.S. at ___. The Equal Protection Clause demands uniform "statewide standards for determining what is a legal vote." *Id*. at ___.

Differential intrastate voting standards are "hostile to the one man, one vote basis of our representative government." *Bush II*, 531 U.S. at 107 (internal quotations omitted). These variations from county to county also appear to have operated to affect the election result. For example, the relaxations of poll-watcher requirements that occurred in Michigan's Wayne County may have contributed to the unusually high number of votes that Vice-President Biden gained in that county, compared to the votes for President Obama 2008 and 2012, and Secretary Clinton in 2016.

Regardless of whether the modification of legal standards in some counties in the Defendant States

tilted the election outcome in those States, it is clear that the standards for determining what is a legal vote varied greatly from county to county. That constitutes a clear violation of the Equal Protection Clause; and it calls into question the constitutionality of any Electors appointed by Defendant States based on such an election.

While Plaintiff States dispute that exercising this Court's original jurisdiction is discretionary, see Section III, *infra*, the many anecdotal irregularities in the 2020 election[6] cumulatively warrant exercising jurisdiction. Although isolated irregularities could be "garden-variety" election disputes that do not raise a federal question,[7] the closeness of election results in swing states combines with unprecedented expansion in the use of fraud-prone mail-in ballots – many of which were also mailed *out* without verification – combined with COVID-related relaxations of state law by non-legislative actors, call both the result and the process into question. For an office as important as the presidency, the clear violations of the Constitution, coupled with the mere inference of a fraudulent election outcome demands the attention of this Court.

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[6] The irregularities include illegal votes that were counted, lawful votes that were not counted, polling officials backdating absentee ballots, and computer inaccuracies reflecting fraud, error, or "hacking."

[7] "To be sure, 'garden variety election irregularities' may not present facts sufficient to offend the Constitution's guarantee of due process[.]" *Hunter v. Hamilton Cty. Bd. of Elections*, 635 F.3d 219, 232 (6th Cir. 2011) (quoting *Griffin v. Burns*, 570 F.2d 1065, 1077-79 (1st Cir. 1978)).

III. REVIEW IS NOT DISCRETIONARY.

Although this Court's original-jurisdiction precedents would justify the Court's hearing this matter under the Court's discretion, *see* Section II, *supra*, Plaintiff States respectfully submit that the Court's review is not discretionary. To the contrary, the plain text of § 1251(a) provides *exclusive* jurisdiction, not discretionary jurisdiction. *See* 28 U.S.C. §1251(a). In addition, no other remedy exists for these interstate challenges, *see* Section I.E, *supra*, and *some* court must have jurisdiction for these weighty issues. *See Mostyn v. Fabrigas*, 98 Eng. Rep. 1021 (K.B. 1774). As individual Justices have concluded, the issue "bears reconsideration." *Nebraska v. Colorado*, 136 S.Ct. 1034, 1035 (2016) (Thomas, J., dissenting, joined by Alito, J.); *accord New Mexico v. Colorado*, 137 S.Ct. 2319 (2017) (Thomas, J., dissenting) (same). Plaintiff States respectfully submit that that reconsideration would be warranted, to the extent that the Court does not elect to hear this matter in its discretion.

CONCLUSION

Leave to file the Bill of Complaint should be granted.

November __, 2020 Respectfully submitted,

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