ASHLEY MOODY
ATTORNEY GENERAL
STATE OF FLORIDA

OFFICE OF THE ATTORNEY GENERAL
Office of Public Records

Nicholas J. Weilhammer
Office of the Attorney General
State of Florida
The Capitol, PL-01
Tallahassee, Florida 32399-1050
Phone: (850) 414-3300
Facsimile: 850-487-1705
Nicholas.weilhammer@myfloridalegal.com

February 18, 2021

VIA FTP

Christine Monahan
American Oversight
(records@americanoversight.org)

Dear Ms. Monahan:

Attached to this communication please find responsive records to your request for the following public records:

> "**All records reflecting any summaries, memoranda, or analyses prepared or distributed by any personnel in the Florida Attorney General's Office regarding the lawsuit Texas v. Pennsylvania, 592 U.S. ___ (2020).**
>
> **Please provide all responsive records from November 3, 2020, through December 12, 2020.**"

This office has compiled the responsive non-exempt public records materials, as well as additional records that may be of assistance, and has attached the records to this communication for production.

In connection with this response to your public records request, please note the following:

- The home addresses, telephone numbers, social security numbers, dates of birth, and photographs of current or former public defenders, assistant public defenders, criminal conflict and civil regional counsel, and assistant criminal conflict and civil regional counsel is exempt under section 119.071(4)(d)2.l., Fla. Stat.
- Written procedures that could facilitate the unauthorized modification, disclosure, or destruction of data or information technology resources are redacted pursuant to section 282.318(4)(e), Fla. Stat.

This office will not be imposing any costs for time spent incurred in compiling these documents for this request.

This letter will also serve as notification that we will be in touch with you as soon as we determine if additional records exists that are responsive to your request. Please note that there may be a fee for copying and review involved in the production of these records.

To minimize exposure to COVID-19 and help protect visitors and employees, the Department of Management Services (DMS) has **temporarily closed all buildings to the public until further notice.**

In the event that you have any additional questions, feel free to contact me directly at (850) 414-3634.

Sincerely,

s/ Nicholas J. Weilhammer

Nicholas J. Weilhammer

Attachment: Records

Jenna Hodges

From: Meredith, Chad (KYOAG) <Chad.Meredith@ky.gov>
Sent: Wednesday, December 9, 2020 9:24 AM
To: Amit Agarwal
Subject: RE: quick call?

Certainly. Call at your convenience. My direct dial is 502-696-5614, and my cell number is 270-259-1391.

S. Chad Meredith
Solicitor General
Kentucky Office of the Attorney General
700 Capital Avenue, Suite 118
Frankfort, Kentucky 40601
502.696.530[redacted]

Follow the Attorney General's Office @KYOAG

From: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Sent: Wednesday, December 9, 2020 8:40 AM
To: Meredith, Chad (KYOAG) <Chad.Meredith@ky.gov>
Subject: quick call?

I hate to bother you, but can we talk by phone for a minute or two this morning? Shouldn't take long but it is time-sensitive.

Hope you and yours are well.

Best,
Amit (cell: [redacted])

Amit Agarwal
Office of the Attorney General
Solicitor General
PL-01, The Capitol
Tallahassee, FL 32399-1050
Amit.Agarwal@myfloridalegal.com

Jeffrey DeSousa

From: Amit Agarwal
Sent: Wednesday, December 9, 2020 8:34 AM
To: Benjamin M Flowers (Benjamin.Flowers@ohioattorneygeneral.gov)
Subject: quick call?

Ben,

I hate to bother you, but can we talk by phone for a minute or two this morning? Shouldn't take long but it is time-sensitive.

Hope you and yours are well.

Best,
Amit (cell [redacted]

Amit Agarwal
Office of the Attorney General
Solicitor General
PL-01, The Capitol
Tallahassee, FL 32399-1050
Amit.Agarwal@myfloridalegal.com

Jeffrey DeSousa

From: Amit Agarwal
Sent: Wednesday, December 9, 2020 8:40 AM
To: Chad.Meredith@ky.gov
Subject: quick call?

I hate to bother you, but can we talk by phone for a minute or two this morning? Shouldn't take long but it is time-sensitive.

Hope you and yours are well.

Best,
Amit (cell: [redacted]

Amit Agarwal
Office of the Attorney General
Solicitor General
PL-01, The Capitol
Tallahassee, FL 32399-1050
Amit.Agarwal@myfloridalegal.com

Jeffrey DeSousa

From: Amit Agarwal
Sent: Wednesday, December 9, 2020 8:50 AM
To: Sauer, John
Subject: quick call?

John,

I hate to bother you, but can we talk by phone for a minute or two this morning? Shouldn't take long but it is time-sensitive.

Thanks very much. Hope you and yours are well.

Best,
Amit (cell: [redacted]

Amit Agarwal
Office of the Attorney General
Solicitor General
PL-01, The Capitol
Tallahassee, FL 32399-1050
Amit.Agarwal@myfloridalegal.com

Jeffrey DeSousa

Subject:	OSG Meeting
Start:	Wed 12/9/2020 10:10 AM
End:	Wed 12/9/2020 10:40 AM
Show Time As:	Tentative
Recurrence:	(none)
Organizer:	Jeffrey DeSousa
Required Attendees:	Amit Agarwal; Kevin Golembiewski; Evan Ezray; David Costello; Christopher Baum; James Percival

https://us02web.zoom.us/j[redacted]

Jeffrey DeSousa

From: Amit Agarwal
Sent: Wednesday, December 9, 2020 2:37 PM
To: Evan Ezray
Cc: James Percival; Jeffrey DeSousa
Subject: Re: RE:

Evan,

Thanks for taking the time to do this, and for the quick and helpful analysis.

--Amit

From: Evan Ezray <Evan.Ezray@myfloridalegal.com>
Sent: Wednesday, December 9, 2020 9:51 AM
To: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Cc: James Percival <James.Percival@myfloridalegal.com>; Jeffrey DeSousa <Jeffrey.DeSousa@myfloridalegal.com>
Subject: RE:

Amit,

The safe harbor deadline provides that if a state has a pre-election procedure for appointing electors and, consistent with that pre-election law, makes a determination of the appointment of electors "at least six days before the time fixed for the meeting of the electors," then that determination "shall govern in the counting of the electoral votes." 3 U.S.C. § 5. This year, the meeting of electors will take place on December 14 (which is the first Monday after the second Wednesday in December). 3 U.S.C. § 7. That made the safe harbor day December 8.

The upshot is that if a state meets the safe harbor deadline and then its electors meet, those electors "shall govern" in the counting of electoral votes.

As far as I can tell every state save Wisconsin met the safe harbor. *See* https://www.jsonline.com/story/news/politics/elections/2020/12/08/wisconsin-only-state-miss-election-safe-harbor-deadline/6496378002/.

Last, I would note that the safe harbor provision played a key role in *Bush v. Gore*. To summarize, the majority thought that Florida had a legislatively-expressed desire to meet the safe harbor, and therefore, was unwilling to allow a recount to extend beyond the deadline. The dissent gave the safe harbor a much smaller role.

I have included the full text of the safe harbor and some key quotes from the *Bush v. Gore* debate below.

Happy to answer any additional questions,

Evan

- Safe harbor text. "If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned." 3 U.S.C. § 5.
    - Meeting of electors is the first Monday after the second Wednesday in December. 3 U.S. 7. That is December 14, so the safe harbor is December 8.
- *Bush v. Gore* debate on safe harbor
    - PC: "Seven Justices of the Court agree that there are constitutional problems with the recount ordered by the Florida Supreme Court that demand a remedy. The only disagreement is as to the remedy. Because the Florida Supreme Court has said that the Florida Legislature intended to obtain the safe-harbor benefits of 3 U.S.C. § 5, Justice BREYER's proposed remedy—remanding to the Florida Supreme Court for its ordering of a constitutionally proper contest until December 18–contemplates action in violation of the Florida Election Code, and hence could not be part of an "appropriate" order authorized by Fla. Stat. Ann. § 102.168(8) (Supp.2001)."
    - Rehnquist concurrence:
        - "If we are to respect the legislature's Article II powers, therefore, we must ensure that postelection state-court actions do not frustrate the legislative desire to attain the 'safe harbor' provided by § 5."
        - "in light of the legislative intent identified by the Florida Supreme Court to bring Florida within the "safe harbor" provision of 3 U.S.C. § 5, the remedy prescribed by the Supreme Court of Florida cannot be deemed an "appropriate" one as of December 8. It significantly departed from the statutory framework in place on November 7, and authorized open-ended further proceedings which could not be completed by December 12, thereby preventing a final determination by that date."
    - Stevens dissent:
        - "It hardly needs stating that Congress, pursuant to 3 U.S.C. § 5, did not impose any affirmative duties upon the States that their governmental branches could "violate." Rather, § 5 provides a safe harbor for States to select electors in contested elections "by judicial or other methods" established by laws prior to the election day. Section 5, like Article II, assumes the involvement of the state judiciary in interpreting state election laws and resolving election disputes under those laws. Neither § 5 nor Article II grants federal judges any special authority to substitute their views for those of the state judiciary on matters of state law."
    - Souter dissent:

        - "The 3 U.S.C. § 5 issue is not serious. That provision sets certain conditions for treating a State's certification of Presidential electors as conclusive in the event that a dispute over recognizing those electors must be resolved in the Congress under 3 U.S.C. § 15. Conclusiveness requires selection under a legal scheme in place before the election, with results determined at least six days before the date set for casting electoral votes. But no State is required to conform to § 5 if it cannot do that (for whatever reason); the sanction for failing to satisfy the conditions of § 5 is simply loss of what has been called its "safe harbor." And even that determination is to be made, if made anywhere, in the Congress."
    - Ginsburg dissent:
        - "the December 12 "deadline" for bringing Florida's electoral votes into 3 U.S.C. § 5's safe harbor lacks the significance the Court assigns it. Were that date to pass, Florida would still be entitled to deliver electoral votes Congress must count unless both Houses find that the votes "ha [d] not been ... regularly given." 3 U.S.C. § 15. The statute identifies other significant dates. See, e.g., § 7 (specifying *144 December 18 as the date electors "shall meet and give their votes"); § 12 (specifying "the fourth Wednesday in December"—this year, December 27—as the date on which Congress, if it has not received a State's electoral votes, shall request the state secretary of state to send a certified return immediately). But none of these dates has ultimate significance in light of Congress' detailed provisions for determining, on "the sixth day of January," the validity of electoral votes."
    - Breyer dissent:
        - "However, § 5 is part of the rules that govern Congress' recognition of slates of electors. Nowhere in Bush I did we *149 establish that this Court had the authority to enforce § 5. Nor did we suggest that the permissive "counsel against" could be transformed into the mandatory "must ensure." And nowhere did we intimate, as the concurrence does here, that a state-court decision that threatens the safe harbor provision of § 5 does so in violation of Article II."
- "The parties before us agree that whatever else may be the effect of this section, it creates a "safe harbor" for a State insofar as congressional consideration of its electoral votes is concerned. If the state legislature has provided for final determination of contests or controversies by a law made prior to election day, that determination shall be conclusive if made at least six days prior to said time of meeting *78 of the electors. The Florida Supreme Court cited 3 U.S.C. §§ 1-10 in a footnote of its opinion, 772 So.2d, at 1238, n. 55, but did not discuss § 5. Since § 5 contains a principle of federal law that would assure finality of the State's determination if made pursuant to a state law in effect before the election, a legislative wish to take advantage of the "safe harbor" would counsel against any construction of the Election Code that Congress might deem to be a change in the law." *Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70, 77–78 (2000).

From: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Sent: Wednesday, December 9, 2020 12:19 AM
To: Evan Ezray <Evan.Ezray@myfloridalegal.com>
Subject: Fw:

Can you please take a look at this tomorrow morning?

From: John Guard <John.Guard@myfloridalegal.com>
Sent: Wednesday, December 9, 2020 12:15 AM
To: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Subject:

Can you have someone look at the safe harbor and its effect here?

Get Outlook for iOS

Jeffrey DeSousa

From: Amit Agarwal
Sent: Wednesday, December 9, 2020 12:19 AM
To: Evan Ezray
Subject: Fw:

Can you please take a look at this tomorrow morning?

From: John Guard <John.Guard@myfloridalegal.com>
Sent: Wednesday, December 9, 2020 12:15 AM
To: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Subject:

Can you have someone look at the safe harbor and its effect here?

Get Outlook for iOS

Jeffrey DeSousa

From: Amit Agarwal
Sent: Wednesday, December 9, 2020 12:19 AM
To: John Guard
Subject: Re:

Sure -- will do.

From: John Guard <John.Guard@myfloridalegal.com>
Sent: Wednesday, December 9, 2020 12:15 AM
To: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Subject:

Can you have someone look at the safe harbor and its effect here?

Get Outlook for iOS

Jeffrey DeSousa

From: Amit Agarwal
Sent: Tuesday, December 8, 2020 7:14 PM
To: John Guard; Richard Martin; Charles Trippe
Cc: Christopher Baum; Evan Ezray; James Percival; Jeffrey DeSousa
Subject: Fw: Texas v. Pennsylvania, et al. - Amicus Brief of Missouri, at al. - Joins requested by 1:00 p.m. Central Tomorrow, 12/9
Attachments: 2020-12-07 - Texas v. Pennsylvania, et al. - Bill of Complaint.pdf; 2020-12-08 - Texas v. Pennsylvania - Amicus Brief of Missouri et al.docx

---

From: Sauer, John <John.Sauer@ago.mo.gov>
Sent: Tuesday, December 8, 2020 7:10 PM
To: 'Mithun Mansinghani' <mithun.mansinghani@oag.ok.gov>; 'Murrill, Elizabeth' <MurrillE@ag.louisiana.gov>; 'Melissa Holyoak' <melissaholyoak@agutah.gov>; 'nicholas.bronni@arkansasag.gov' <nicholas.bronni@arkansasag.gov>; 'Vincent Wagner' <vincent.wagner@arkansasag.gov>; 'ed.sniffen@alaska.gov' <ed.sniffen@alaska.gov>; Smith, Justin <Justin.Smith@ago.mo.gov>; Amit Agarwal <Amit.Agarwal@myfloridalegal.com>; 'Kane, Brian' <brian.kane@ag.idaho.gov>; 'tom.fisher@atg.in.gov' <tom.fisher@atg.in.gov>; 'julia.payne@atg.in.gov' <julia.payne@atg.in.gov>; 'toby.crouse@ag.ks.gov' <toby.crouse@ag.ks.gov>; 'Chad.Meredith@ky.gov' <Chad.Meredith@ky.gov>; 'Andrew Pinson' <APinson@LAW.GA.GOV>; 'jeff.chanay' <jeff.chanay@ag.ks.gov>; 'St. John, Joseph' <StJohnJ@ag.louisiana.gov>; 'Kristi.Johnson@ago.ms.gov' <Kristi.Johnson@ago.ms.gov>; 'ABurton@mt.gov' <ABurton@mt.gov>; 'MSchlichting@mt.gov' <MSchlichting@mt.gov>; 'Lindsay S. See' <Lindsay.S.See@wvago.gov>; 'jonbennion@mt.gov' <jonbennion@mt.gov>; 'wstenehjem@nd.gov' <wstenehjem@nd.gov>; 'Benjamin.flowers@ohioattorneygeneral.gov' <Benjamin.flowers@ohioattorneygeneral.gov>; 'ESmith@scag.gov' <ESmith@scag.gov>; 'BCook@scag.gov' <BCook@scag.gov>; 'steven.blair@state.sd.us' <steven.blair@state.sd.us>; 'Sherri.Wald@state.sd.us' <Sherri.Wald@state.sd.us>; 'Sarah.Campbell@ag.tn.gov' <Sarah.Campbell@ag.tn.gov>; 'tom.fisher@atg.in.gov' <tom.fisher@atg.in.gov>; 'Andree.Blumstein@ag.tn.gov' <Andree.Blumstein@ag.tn.gov>; 'matthew.frederick@texasattorneygeneral.gov' <matthew.frederick@texasattorneygeneral.gov>; 'Kyle.Hawkins@oag.texas.gov' <Kyle.Hawkins@oag.texas.gov>; 'Ric Cantrell' <rcantrell@agutah.gov>; 'james.kaste@wyo.gov' <james.kaste@wyo.gov>; 'Jim.Campbell@nebraska.gov' <Jim.Campbell@nebraska.gov>; 'Thomas T. Lampman' <Thomas.T.Lampman@wvago.gov>; 'Jessica A. Lee' <Jessica.A.Lee@wvago.gov>; 'Lindsay S. See' <Lindsay.S.See@wvago.gov>; 'Roysden, Beau' <Beau.Roysden@azag.gov>; 'Bash, Zina' <Zina.Bash@oag.texas.gov>; 'masagsve@nd.gov' <'masagsve@nd.gov'>; 'Harley Kirkland' <HKirkland@scag.gov>; 'Eddie Lacour' <elacour@ago.state.al.us>; 'Hudson, Kian' <Kian.Hudson@atg.in.gov>; 'Kuhn, Matt F (KYOAG)' <Matt.Kuhn@ky.gov>
Subject: Texas v. Pennsylvania, et al. - Amicus Brief of Missouri, at al. - Joins requested by 1:00 p.m. Central Tomorrow, 12/9

All-

Attached please find a draft multistate amicus brief in support of Texas's motion for leave to file a bill of complaint in the U.S. Supreme Court challenging the administration of the recent Presidential election in Pennsylvania, Michigan, Wisconsin, and Georgia. The brief argues that (1) the separation-of-powers provision of the Electors Clause of Article II, Section 1 is an important structural check on government that safeguards individual liberty; (2) voting by mail presents real concerns for fraud and abuse that require statutory safeguards to protect against such fraud and abuse; and (3) the abrogation of statutory safeguards against fraud in voting by mail by non-legislative actors violates the Electors Clause and undermines public confidence in elections. For your reference, I have also attached Texas's Motion for Leave to File Bill of Complaint and related documents.

With apologies for the short deadline, given the time-sensitivity of this case, we are requesting joins by **1:00 p.m. Central TOMORROW**, 12/9. We are planning to file tomorrow afternoon.

Thanks a lot,

John Sauer

No. _____, Original

In the Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

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

Defendants.

MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

Ken Paxton*
Attorney General of Texas

Brent Webster
First Assistant Attorney General of Texas

Lawrence Joseph
Special Counsel to the Attorney General of Texas

Office of the Attorney General
P.O. Box 12548 (MC 059)
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(512) 936-1414

* *Counsel of Record*

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In the Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

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

Defendants.

MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

Pursuant to 28 U.S.C. § 1251(a) and this Court's Rule 17, the State of Texas respectfully seeks leave to file the accompanying Bill of Complaint against the States of Georgia, Michigan, and Wisconsin and the Commonwealth of Pennsylvania (collectively, the "Defendant States") challenging their administration of the 2020 presidential election.

As set forth in 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.

- Intrastate differences in the treatment of voters, with more favorable allotted to voters – whether lawful or unlawful – in areas administered by local government under Democrat control and with populations with higher ratios of Democrat voters than other areas of Defendant States.
- 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.

All these flaws – even the violations of *state* election law – violate one or more of the federal requirements for elections (*i.e.*, equal protection, due process, and the Electors Clause) and thus arise under federal law. *See 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). Plaintiff State respectfully submits that the foregoing types of electoral irregularities exceed the hanging-chad saga of the 2000 election in their degree of departure from both state and federal law. Moreover, these flaws cumulatively preclude knowing who legitimately won the 2020 election and threaten to cloud all future elections.

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.

December 7, 2020

Respectfully submitted,

Ken Paxton*
Attorney General of Texas

Brent Webster
First Assistant Attorney
General of Texas

Lawrence Joseph
Special Counsel to the
Attorney General of Texas

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(512) 936-1414

* Counsel of Record

No. _____, Original

In the Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

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

Defendants.

BILL OF COMPLAINT

Ken Paxton*
Attorney General of Texas

Brent Webster
First Assistant Attorney General of Texas

Lawrence Joseph
Special Counsel to the Attorney General of Texas

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* Counsel of Record

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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 democracy. The public, and indeed the candidates themselves, have a compelling interest in ensuring that the selection of a President—any President—is legitimate. If that trust is lost, the American Experiment will founder. A dark cloud hangs over the 2020 Presidential election.

Here is what we know. Using the COVID-19 pandemic as a justification, government officials in the defendant states of Georgia, Michigan, and Wisconsin, and the Commonwealth of Pennsylvania (collectively, "Defendant States"), usurped their legislatures' authority and unconstitutionally revised their state's election statutes. They accomplished these statutory revisions through executive fiat or friendly lawsuits, thereby weakening ballot integrity. Finally, these same government officials flooded the Defendant States with millions of ballots to be sent through the mails, or placed in drop boxes, with little

or no chain of custody[1] and, at the same time, weakened the strongest security measures protecting the integrity of the vote—signature verification and witness requirements.

Presently, evidence of material illegality in the 2020 general elections held in Defendant States grows daily. And, to be sure, the two presidential candidates who have garnered the most votes have an interest in assuming the duties of the Office of President without a taint of impropriety threatening the perceived legitimacy of their election. However, 3 U.S.C. § 7 requires that presidential electors be appointed on December 14, 2020. That deadline, however, should not cement a potentially illegitimate election result in the middle of this storm—a storm that is of the Defendant States' own making by virtue of their own unconstitutional actions.

This Court is the only forum that can delay the deadline for the appointment of presidential electors under 3 U.S.C. §§ 5, 7. To safeguard public legitimacy at this unprecedented moment and restore public trust in the presidential election, this Court should extend the December 14, 2020 deadline for Defendant States' certification of presidential electors to allow these investigations to be completed. Should one of the two leading candidates receive an absolute majority of the presidential electors' votes to be cast on December 14, this would finalize the selection of our President. The only date that is mandated under

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[1] *See* https://georgiastarnews.com/2020/12/05/dekalb-county-cannot-find-chain-of-custody-records-for-absentee-ballots-deposited-in-drop-boxes-it-has-not-been-determined-if-responsive-records-to-your-request-exist/

the Constitution, however, is January 20, 2021. U.S. CONST. amend. XX.

Against that background, the State of Texas ("Plaintiff State") brings this action against Defendant States based on the following allegations:

NATURE OF THE ACTION

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

2. This case presents a question of law: Did Defendant States violate the Electors Clause (or, in the alternative, the Fourteenth Amendment) by taking—or allowing—non-legislative actions to change the election rules that would govern the appointment of presidential electors?

3. Those unconstitutional changes opened the door to election irregularities in various forms. Plaintiff State alleges 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 and to restore public trust in this election.

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 Defendant States acted in a common pattern. State officials, sometimes through pending litigation (*e.g.*, settling "friendly" suits) and sometimes unilaterally by executive fiat, announced new rules for the conduct of the 2020 election that were inconsistent with existing state statutes defining what constitutes a lawful vote.

6. Defendant States also failed to segregate ballots in a manner that would permit 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 the Defendant States' presidential electors.

7. The rampant lawlessness arising out of Defendant States' unconstitutional acts is described in a number of currently pending lawsuits in Defendant States or in public view including:

- *Dozens of witnesses testifying under oath about*: the physical blocking and kicking out of Republican poll challengers; thousands of the same ballots run multiple times through tabulators; mysterious late night dumps of thousands of ballots at tabulation centers; illegally backdating thousands of ballots; signature verification procedures ignored; more

than 173,000 ballots in the Wayne County, MI center that cannot be tied to a registered voter;[2]

- *Videos of*: poll workers erupting in cheers as poll challengers are removed from vote counting centers; poll watchers being blocked from entering vote counting centers—despite even having a court order to enter; suitcases full of ballots being pulled out from underneath tables after poll watchers were told to leave.
- *Facts for which no independently verified reasonable explanation yet exists*: On October 1, 2020, in Pennsylvania 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, and potentially could be used to alter vote tallies; In Michigan, which also employed the same Dominion voting system, on November 4, 2020, Michigan election officials have admitted that a purported "glitch" caused 6,000 votes for President Trump to be wrongly switched to Democrat Candidate Biden. A flash drive containing tens of thousands of votes was left unattended in the Milwaukee tabulations center in the early morning hours of Nov. 4, 2020, without anyone aware it was not in a proper chain of custody.

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[2] All exhibits cited in this Complaint are in the Appendix to the Plaintiff State's forthcoming motion to expedite ("App. 1a-151a"). *See* Complaint (Doc. No. 1), *Donald J. Trump for President, Inc. v. Benson*, 1:20-cv-1083 (W.D. Mich. Nov. 11, 2020) at ¶¶ 26-55 & Doc. Nos. 1-2, 1-4.

8. Nor was this Court immune from the blatant disregard for the rule of law. Pennsylvania itself played fast and loose with its promise to this Court. 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).

9. Expert analysis using a commonly accepted statistical test further raises serious questions as to the integrity of this election.

10. The probability of former Vice President Biden winning the popular vote in the four Defendant States—Georgia, Michigan, Pennsylvania, and Wisconsin—independently given President Trump's early lead in those States as of 3 a.m. on November 4, 2020, is less than one in a quadrillion, or 1 in 1,000,000,000,000,000. For former Vice President Biden to win these four States collectively, the odds of

that event happening decrease to less than one in a quadrillion to the fourth power (*i.e.*, 1 in 1,000,000,000,000,000[4]). *See* Decl. of Charles J. Cicchetti, Ph.D. ("Cicchetti Decl.") at ¶¶ 14-21, 30-31. *See* App. 4a-7a, 9a.

11. The same less than one in a quadrillion statistical improbability of Mr. Biden winning the popular vote in the four Defendant States—Georgia, Michigan, Pennsylvania, and Wisconsin—independently exists when Mr. Biden's performance in each of those Defendant States is compared to former Secretary of State Hilary Clinton's performance in the 2016 general election and President Trump's performance in the 2016 and 2020 general elections. Again, the statistical improbability of Mr. Biden winning the popular vote in these **four** States collectively is 1 in 1,000,000,000,000,000[5]. *Id.* 10-13, 17-21, 30-31.

12. Put simply, there is substantial reason to doubt the voting results in the Defendant States.

13. 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 textually applies to the Article II process of selecting presidential electors).

14. Plaintiff States and their voters 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.

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

16. 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 constitutional democracy requires that states conduct presidential elections in accordance with the rule of law and federal constitutional guarantees.

JURISDICTION AND VENUE

17. 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).

18. 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 v. Gore*, 531 U.S. 98, 105 (2000) (quoting *Reynolds v. Sims*, 377 U. S. 533, 555 (1964)) (*Bush II*). In other words, Plaintiff State is acting to protect the interests of its respective citizens in the fair and constitutional conduct of elections used to appoint presidential electors.

19. 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 states "special solicitude in standing analysis"). Moreover, redressability likely would undermine a suit against a single state officer or State because no one State's electoral votes will make a difference in the election outcome. This action against multiple State defendants is the only adequate remedy for Plaintiff States, and this Court is the only court that can accommodate such a suit.

20. 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.

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

PARTIES

22. Plaintiff is the State of Texas, which is a sovereign State of the United States.

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

LEGAL BACKGROUND

24. 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.

25. "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).

26. 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)).

27. 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).

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

29. 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.

30. 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.").

31. 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.

32. 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.).

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

FACTS

34. 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 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.

35. 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).

36. 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),[3] 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.

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

37. 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 Defendant States' unconstitutional modification of statutory protections designed to ensure ballot integrity, Defendant States created a massive opportunity for fraud. In addition, the Defendant States have made it difficult or impossible to separate the constitutionally tainted mail-in ballots from all mail-in ballots.

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

39. Significantly, in 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.

40. The outcome of the Electoral College vote is directly affected by the constitutional violations committed by Defendant States. Plaintiff State complied 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 by unlawfully abrogating state election laws designed to

protect the integrity of the ballots and the electoral process, and those violations proximately caused the appointment of presidential electors for former Vice President Biden. Plaintiff State will therefore be injured if Defendant States' unlawfully certify these presidential electors.

Commonwealth of Pennsylvania

41. 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.

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

43. 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.

44. 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).

45. 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."

46. 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).

47. 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.

48. 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.

49. Pennsylvania's election law also requires that poll-watchers 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.

50. 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.

51. 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 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.

52. Statewide election officials and local election officials in Philadelphia and Allegheny Counties, aware of the historical Democrat advantage in those counties, 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. *See* Verified Complaint (Doc. No. 1), *Donald J. Trump for President, Inc. v. Boockvar*, 4:20-cv-02078-MWB (M.D. Pa. Nov. 18, 2020) at ¶¶ 3-6, 9, 11, 100-143.

53. 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.

54. The changed process allowing the curing of absentee and mail-in ballots in Allegheny and Philadelphia counties is a separate basis resulting in an unknown number of ballots being treated in an unconstitutional manner inconsistent with Pennsylvania statute. *Id.*

55. In addition, a great number of ballots were received after the statutory deadline and yet

were counted by virtue of the fact that Pennsylvania did not segregate all ballots received after 8:00 pm on November 3, 2020. Boockvar's claim that only about 10,000 ballots were received after this deadline has no way of being proven since Pennsylvania broke its promise to the Court to segregate ballots and co-mingled perhaps tens, or even hundreds of thousands, of illegal late ballots.

56. On December 4, 2020, fifteen members of the Pennsylvania House of Representatives led by Rep. Francis X. Ryan issued a report to Congressman Scott Perry (the "Ryan Report," App. 139a-144a) stating that "[t]he general election of 2020 in Pennsylvania was fraught with inconsistencies, documented irregularities and improprieties associated with mail-in balloting, pre-canvassing, and canvassing that the reliability of the mail-in votes in the Commonwealth of Pennsylvania is impossible to rely upon."

57. The Ryan Report's findings are startling, including:

- Ballots with NO MAILED date. That total is 9,005.
- Ballots Returned on or BEFORE the Mailed Date. That total is 58,221.
- Ballots Returned one day after Mailed Date. That total is 51,200.

Id. 143a.

58. These nonsensical numbers alone total 118,426 ballots and exceed Mr. Biden's margin of 81,660 votes over President Trump. But these discrepancies pale in comparison to the discrepancies in Pennsylvania's reported data concerning the

number of mail-in ballots distributed to the populace—now with no longer subject to legislated mandated signature verification requirements.

59. The Ryan Report also states as follows:

> [I]n a data file received on November 4, 2020, the Commonwealth's PA Open Data sites reported over 3.1 million mail in ballots sent out. The CSV file from the state on November 4 depicts 3.1 million mail in ballots sent out but on November 2, the information was provided that only 2.7 million ballots had been sent out. ***This discrepancy of approximately 400,000 ballots from November 2 to November 4 has not been explained.***

Id. at 143a-44a. (Emphasis added).

60. These stunning figures illustrate the out-of-control nature of Pennsylvania's mail-in balloting scheme. Democrats submitted mail-in ballots at more than two times the rate of Republicans. This number of constitutionally tainted ballots far exceeds the approximately 81,660 votes separating the candidates.

61. This blatant disregard of statutory law renders all mail-in ballots constitutionally tainted and cannot form the basis for appointing or certifying Pennsylvania's presidential electors to the Electoral College.

62. 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.

63. 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

64. 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.

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

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

67. 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.

68. 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).

69. 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).

70. 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).

71. 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.

72. 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.

73. This unconstitutional change in Georgia law materially benefitted former Vice President Biden. According to the Georgia Secretary of State's office, former Vice President Biden had almost double the number of absentee votes (65.32%) as President Trump (34.68%). *See* Cicchetti Decl. at ¶ 25, App. 7a-8a.

74. 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.

75. 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* Cicchetti Decl. at ¶ 24, App. 7a.

76. If the rejection rate of mailed-in absentee ballots remained the same in 2020 as it was in 2016, there would be 83,517 less tabulated ballots in 2020. The statewide split of absentee ballots was 34.68% for Trump and 65.2% for Biden. Rejecting at the higher 2016 rate with the 2020 split between Trump and Biden would decrease Trump votes by 28,965 and Biden votes by 54,552, which would be a net gain for Trump of 25,587 votes. This would be more than needed to overcome the Biden advantage of 12,670 votes, and Trump would win by 12,917 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

77. 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.

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

79. 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.

80. 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.

81. 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.

82. 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).

83. 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.*

84. 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 chose to flood across Michigan.

85. 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.

86. 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."

87. 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.

88. 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.

89. 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 materially benefited from these unconstitutional changes to Michigan's election law.

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

91. 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.

92. 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).

93. 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 materially benefited from these unconstitutional changes to Michigan's election law.

94. 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.[4] 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 instructed not to compare the signature on the absentee ballot with the signature on file.[5]

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[4] *Johnson v. Benson*, Petition for Extraordinary Writs & Declaratory Relief filed Nov. 26, 2020 (Mich. Sup. Ct.) at ¶¶ 71, 138-39, App. 25a-51a.

[5] *Id.*, Affidavit of Jessy Jacob, Appendix 14 at ¶15, attached at App. 34a-36a.

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

96. 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.

97. 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 174,384 absentee ballots out of 566,694 absentee ballots tabulated (about 30.8%) as counted without a registration number for precincts in the City of Detroit. *See* Cicchetti Decl. at ¶ 27, App. 8a. 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 28,377 votes.

98. The extra ballots cast most likely resulted from the phenomenon of Wayne County election workers running the same ballots through a tabulator multiple times, with Republican poll watchers obstructed or denied access, and election officials ignoring poll watchers' challenges, as documented by numerous declarations. App. 25a-51a.

99. 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. *Id.* at ¶ 29.

100. 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.

101. 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. *See* Cicchetti Decl. at ¶ 29, App. 8a.

102. 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 Wisconsin

103. 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.

104. In the 2016 general election some 146,932 mail-in ballots were returned in Wisconsin out of more than 3 million votes cast.[6] In stark contrast, 1,275,019 mail-in ballots, nearly a 900

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

percent increase over 2016, were returned in the November 3, 2020 election.[7]

105. 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).

106. 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.

107. For example, the WEC undertook a campaign to position hundreds of drop boxes to collect absentee ballots—including the use of unmanned drop boxes.[8]

108. 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

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

[8] 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.

of absentee ballots." Wisconsin Safe Voting Plan 2020, at 4 (June 15, 2020).[9]

109. 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.[10]

110. 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 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).

111. 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.

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[9] 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.

[10] *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.

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."

112. 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).

113. 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).

114. 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).

115. 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.

116. 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).

117. 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).

118. 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.

119. 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)."

120. 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."

121. 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."

122. 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.

123. 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).

124. 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.

125. 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. These acts violated WISC. STAT. § 6.87(6d) ("If a certificate is missing the address of a witness, the ballot may not 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.").

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

127. In addition, Ethan J. Pease, a box truck delivery driver subcontracted to the U.S. Postal Service ("USPS") to deliver truckloads of mail-in ballots to the sorting center in Madison, WI, testified

that USPS employees were backdating ballots received after November 3, 2020. Decl. of Ethan J. Pease at ¶¶ 3-13. Further, Pease testified how a senior USPS employee told him on November 4, 2020 that "[a]n order came down from the Wisconsin/Illinois Chapter of the Postal Service that 100,000 ballots were missing" and how the USPS dispatched employees to "find[] . . . the ballots." *Id.* ¶¶ 8-10. One hundred thousand ballots supposedly "found" after election day would far exceed former Vice President Biden margin of 20,565 votes over President Trump.

COUNT I: ELECTORS CLAUSE

128. Plaintiff State repeats and re-alleges the allegations above, as if fully set forth herein.

129. 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.

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

131. 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.

132. The actions set out in Paragraphs 41-128 constitute non-legislative changes to State election law by executive-branch State election officials, or by judicial officials, in Defendant States Pennsylvania, Georgia, Michigan, and Wisconsin, in violation of the Electors Clause.

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

COUNT II: EQUAL PROTECTION

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

135. 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.

136. The one-person, one-vote principle requires counting valid votes and not counting 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").

137. The actions set out in Paragraphs 66-73 (Georgia), 80-93 (Michigan), 44-55 (Pennsylvania), and 106-24 (Wisconsin) created differential voting standards in Defendant States Pennsylvania, Georgia, Michigan, and Wisconsin in violation of the Equal Protection Clause.

138. The actions set out in Paragraphs 66-73 (Georgia), 80-93 (Michigan), 44-55 (Pennsylvania), and 106-24 (Wisconsin) violated the one-person, one-

vote principle in Defendant States Pennsylvania, Georgia, Michigan, and Wisconsin.

139. By the shared enterprise of the entire nation electing the President and Vice President, equal protection violations in one State can and do adversely affect and diminish the weight of votes cast in States that lawfully abide by the election structure set forth in the Constitution. Plaintiff State is therefore harmed by this unconstitutional conduct in violation of the Equal Protection or Due Process Clauses.

COUNT III: DUE PROCESS

140. Plaintiff State repeats and re-alleges the allegations above, as if fully set forth herein.

141. When election practices reach "the point of patent and fundamental unfairness," the integrity of the election itself violates substantive due process. *Griffin v. Burns*, 570 F.2d 1065, 1077 (1st Cir. 1978); *Duncan v. Poythress*, 657 F.2d 691, 702 (5th Cir. 1981); *Florida State Conference of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1183-84 (11th Cir. 2008); *Roe v. State of Ala. By & Through Evans*, 43 F.3d 574, 580-82 (11th Cir. 1995); *Roe v. State of Ala.*, 68 F.3d 404, 407 (11th Cir. 1995); *Marks v. Stinson*, 19 F. 3d 873, 878 (3rd Cir. 1994).

142. Under this Court's precedents on procedural due process, not only intentional failure to follow election law as enacted by a State's legislature but also random and unauthorized acts by state election officials and their designees in local government can violate the Due Process Clause. *Parratt v. Taylor*, 451 U.S. 527, 537-41 (1981), *overruled in part on other grounds by Daniels v. Williams*, 474 U.S. 327, 330-31 (1986); *Hudson v. Palmer*, 468 U.S. 517, 532 (1984).

The difference between intentional acts and random and unauthorized acts is the degree of pre-deprivation review.

143. Defendant States acted unconstitutionally to lower their election standards—including to allow invalid ballots to be counted and valid ballots to not be counted—with the express intent to favor their candidate for President and to alter the outcome of the 2020 election. In many instances these actions occurred in areas having a history of election fraud.

144. The actions set out in Paragraphs 66-73 (Georgia), 80-93 (Michigan), 44-55 (Pennsylvania), and 106-24 (Wisconsin) constitute intentional violations of State election law by State election officials and their designees in Defendant States Pennsylvania, Georgia, Michigan, and Wisconsin, in violation of the Due Process Clause.

PRAYER FOR RELIEF

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

A. Declare that Defendant States Pennsylvania, Georgia, Michigan, and Wisconsin administered the 2020 presidential election in violation of the Electors Clause and the Fourteenth Amendment of the U.S. Constitution.

B. Declare that any electoral college votes cast by such presidential electors appointed in Defendant States Pennsylvania, Georgia, Michigan, and Wisconsin are in violation of the Electors Clause and the Fourteenth Amendment of the U.S. Constitution and cannot be counted.

C. Enjoin Defendant States' use of the 2020 election results for the Office of President to appoint presidential electors to the Electoral College.

D. Enjoin Defendant States' use of the 2020 election results for the Office of President to appoint presidential electors to the Electoral College and authorize, pursuant to the Court's remedial authority, the Defendant States to conduct a special election to appoint presidential electors.

E. If any of Defendant States have already appointed presidential 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 presidential electors in a manner that does not violate the Electors Clause and the Fourteenth Amendment, or to appoint no presidential electors at all.

F. Enjoin the Defendant States from certifying presidential electors or otherwise meeting for purposes of the electoral college pursuant to 3 U.S.C. § 5, 3 U.S.C. § 7, or applicable law pending further order of this Court.

G. Award costs to Plaintiff State.

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

December 7, 2020

Respectfully submitted,

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No. _____, Original

In the Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

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

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 State of Texas ("Plaintiff State") respectfully submits this brief in support of its Motion for Leave to File a Bill of Complaint against the Commonwealth of Pennsylvania and the States of Georgia, Michigan, and Wisconsin (collectively, "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 Defendant States presented the pandemic as the justification for ignoring state laws regarding absentee and mail-in voting. 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 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 question of law: Did Defendant States violate the Electors Clause by taking non-legislative actions to change the election rules that would govern the appointment of presidential electors? 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, Defendant States have not only tainted the integrity of their own citizens' votes, but their actions have also debased the votes of citizens in the States that 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]

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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.

Constitutional Background

The right to vote is protected by the by the Equal Protection Clause and the Due Process Clause. U.S. CONST. amend. XIV, § 1, cl. 3-4. Because "the right to vote is personal," *Reynolds*, 377 U.S. at 561-62 (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.* Though *Bush II* did not involve an action between States, the concern that illegal votes can cancel out lawful votes does not stop at a State's boundary in the context of a Presidential election.

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, § 4, cl. 1 (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 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 Defendant States. *See* Compl. at ¶¶ 66-73 (Georgia), 80-93 (Michigan), 44-55 (Pennsylvania), 106-24 (Wisconsin). 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 62 electoral votes, President Trump presumably has 232 electoral votes, and former Vice President Biden presumably has 244. Thus, Defendant States' presidential electors will determine the outcome of the election. Alternatively, if Defendant States are unable to certify 37 or more presidential 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.

Defendant States experienced serious voting irregularities. *See* Compl. at ¶¶ 75-76 (Georgia), 97-101 (Michigan), 55-60 (Pennsylvania), 122-28 (Wisconsin). At the time of this filing, Plaintiff State continues to investigate allegations of not only unlawful votes being counted but also fraud. Plaintiff State reserves the right to seek leave to amend the complaint as those investigations resolve. *See* S.Ct. Rule 17.2; FED. R. CIV. P. 15(a)(1)(A)-(B), (a)(2). But even the *appearance* of fraud in a close election is poisonous to democratic principles: "Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised." *Purcell v. Gonzalez,* 549 U.S. 1, 4 (2006); *Crawford v. Marion County Election Bd.,* 553 U.S. 181, 189 (2008) (States have an interest in preventing voter fraud and ensuring voter confidence).

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).

ARGUMENT

I. THIS COURT HAS JURISDICTION OVER PLAINTIFF STATE'S 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. Plaintiff State's fundamental rights and interests are at stake. This Court is the *only* venue that can protect Plaintiff State's electoral college votes from being cancelled by the unlawful and constitutionally tainted votes cast by electors appointed and certified by 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 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. Plaintiff States' Electoral Clause claims arise under the Constitution and so are *federal*, even if the only claim is that Defendant States violated their own state election statutes. Moreover, as is explained below, Defendant States' actions injure the interests of Plaintiff State in the appointment of electors to the electoral college in a manner that is inconsistent 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 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 State's claims therefore fall within this Court's 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

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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).

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 State has standing under those rules.[3]

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 Defendant States affect the votes in Plaintiff State, as set forth in more detail below.

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

1. **Plaintiff State suffers an injury in fact.**

The citizens of Plaintiff State 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*, 376 U.S. at 10; *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. at 227; *Baker*, 369 U.S. at 208. 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, Plaintiff State presses its own form of voting-rights injury *as States*. As with the one-person, 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 Defendant States' unconstitutionally appointed electors vote for a presidential candidate opposed by the Plaintiff State's electors, that operates to defeat Plaintiff State's interests.[5] Indeed, even without an electoral college majority, presidential electors suffer the same voting-debasement injury as voters generally: "It must be remembered that 'the

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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 Plaintiff State appointed its electors consistent with the Constitution, they suffer injury if its electors are defeated by Defendant States' unconstitutionally appointed electors. This injury is all the more acute because Plaintiff State has taken steps to prevent fraud. For example, Texas does not allow no excuse vote by mail (Texas Election Code Sections 82.001-82.004); has strict signature verification procedures (Tex. Election Code §87.027(j); Early voting ballot boxes have two locks and different keys and other strict security measures (Tex. Election Code §§85.032(d) & 87.063); requires voter ID (House Comm. on Elections, Bill Analysis, Tex. H.B. 148, 83d R.S. (2013)); has witness requirements for assisting those in need (Tex. Election Code §§ 86.0052 & 86.0105), and does not allow ballot harvesting Tex. Election Code 86.006(f)(1-6). Unlike Defendant States, Plaintiff State neither weakened nor allowed the weakening of its ballot-integrity statutes by non-legislative means.

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)) ("*Bush II*"). Finally, once Plaintiff State has standing to challenge Defendant States' unlawful actions, Plaintiff State may do so on any legal theory that undermines those actions. *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 78-81 (1978); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 & n.5 (2006). Injuries to Plaintiff State's electors serve as an Article III basis for a *parens patriae* action.

2. Defendant States caused the injuries.

Non-legislative officials in 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 Plaintiff's injuries.

3. The requested relief would redress the injuries.

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

First, while 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 II, 531 U.S. at 104; *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"). Plaintiff State does 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 Plaintiff State requests—namely, remand to the State legislatures to allocate electors in a manner consistent with the Constitution—does not violate Defendant States' rights or exceed this Court's power. The power to select electors is a plenary power of the State 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 I*, 531 U.S. at 76-77; *Bush II*, 531 U.S at 104.

Third, uncertainty of how 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). Defendant States' legislatures would remain free to exercise their plenary authority under the Electors Clause in any *constitutional* manner they wish. 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 the constitutionally tainted November 3 election, remand the appointment of electors to Defendant States, and order 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 presidential electors' votes. 3 U.S.C. § 15.

D. 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 presidential 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. Moreover, 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.

E. This matter is ripe for review.

Plaintiff State's 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). Prior to the election, there was no reason to know who would win the vote in any given State.

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 Defendant States.

Before the election, 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). Plaintiff State could not have brought this action before the election results. The extent of the county-level deviations from election statutes in Defendant States became evident well after the election. Neither ripeness nor laches presents a timing problem here.

F. 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) 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.

G. 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 State 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).[6] Defendant States' legislature

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[6] Indeed, the Constitution also includes another backstop: "if no person have such majority [of electoral votes], then from the

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 Plaintiff State that Defendant States' appointment of presidential 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:

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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.

> 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). Defendant States would suffer no cognizable injury from this Court's enjoining their reliance on an unconstitutional vote.

II. THIS CASE PRESENTS CONSTITUTIONAL QUESTIONS OF IMMENSE NATIONAL CONSEQUENCE THAT WARRANT 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 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 State disputes that exercising this Court's original jurisdiction is discretionary, *see* Section III, *infra*, the clear unlawful abrogation of 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,[7] the closeness of the presidential election results, combined with the unconstitutional setting-aside of state election laws by non-legislative actors call both the result and the process into question.

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[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*, 570 F.2d at 1077-79)).

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

Defendant States' administration of the 2020 election violated several constitutional requirements and, thus, violated the rights that Plaintiff State seeks to protect. "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 104.[8] Even a State legislature vested with authority to regulate election procedures lacks authority to "abridg[e ...] fundamental rights, such as the right to vote." *Tashjian v. Republican Party*, 479 U.S. 208, 217 (1986). As demonstrated in this section, 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

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[8] The right to vote is "a fundamental political right, because preservative of all rights." *Reynolds*, 377 U.S. at 561-62 (internal quotations omitted).

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) (J. Madison) ("House of Representatives is so constituted as to support in its members a 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.

"[T]here 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, 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.

3. Defendant States' administration of the 2020 election violated the Fourteenth Amendment.

In each of Defendant States, important rules governing the sending, receipt, validity, 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

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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).

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 104. The Equal Protection Clause demands uniform "statewide standards for determining what is a legal vote." *Id.* at 110.

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 obstruction of poll-watcher requirements that occurred in Michigan's Wayne County may have contributed to the unusually high number of more than 173,000 votes which are not tied to a registered voter and that 71 percent of the precincts are out of balance with no explanation. Compl. ¶ 97.

Regardless of whether the modification of legal standards in some counties in 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 unconstitutional election.

The Fourteenth Amendment's due process clause protects the fundamental right to vote against "[t]he

disenfranchisement of a state electorate." *Duncan v. Poythress*, 657 F.2d 691, 702 (5th Cir. 1981). Weakening or eliminating signature-validating requirements, then restricting poll watchers also undermines the 2020 election's integrity—especially as practiced in urban centers with histories of electoral fraud—also violates substantive due process. *Griffin v. Burns*, 570 F.2d 1065, 1077 (1st Cir. 1978) ("violation of the due process clause may be indicated" if "election process itself reaches the point of patent and fundamental unfairness"); *see also Florida State Conference of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1183-84 (11th Cir. 2008); *Roe v. State of Ala. By & Through Evans*, 43 F.3d 574, 580-82 (11th Cir. 1995); *Roe v. State of Ala.*, 68 F.3d 404, 407 (11th Cir. 1995); *Marks v. Stinson*, 19 F. 3d 873, 878 (3rd Cir. 1994). Defendant States made concerted efforts to weaken or nullify their legislatures' ballot-integrity measures for the unprecedented deluge of mail-in ballots, citing the COVID-19 pandemic as a rationale. But "Government is not free to disregard the [the Constitution] in times of crisis." *Roman Catholic Diocese of Brooklyn*, 592 U.S. at ___ (Gorsuch, J., concurring).

Similarly, failing to follow procedural requirements for amending election standards violates procedural due process. *Brown v. O'Brien*, 469 F.2d 563, 567 (D.C. Cir.), *vacated as moot*, 409 U.S. 816 (1972). Under this Court's precedents on procedural due process, not only intentional failure to follow election law as enacted by a State's legislature but also random and unauthorized acts by state election officials and their designees in local government can violate the Due Process Clause. *Parratt v. Taylor*, 451

U.S. 527, 537-41 (1981), *overruled in part on other grounds by Daniels v. Williams*, 474 U.S. 327, 330-31 (1986); *Hudson v. Palmer*, 468 U.S. 517, 532 (1984). Here, the violations all were intentional, even if done for the reason of addressing the COVID-19 pandemic.

While Plaintiff State disputes that exercising this Court's original jurisdiction is discretionary, *see* Section III, *infra*, the clear unlawful abrogation of Defendant States' election laws designed to ensure election integrity by a few officials, and examples of material irregularities in the 2020 election cumulatively warrant exercising jurisdiction. Although isolated irregularities could be "garden-variety" election disputes that do not raise a federal question,[10] the closeness of election results in swing states combines with unprecedented expansion in the use of fraud-prone mail-in ballots—millions of which were also mailed out—and received and counted—without verification—often in violation of express state laws by non-legislative actors, *see* Sections II.A.1-II.A.2, *supra*, call both the result and the process into question. For an office as important as the presidency, these clear violations of the Constitution, coupled with a reasonable inference of unconstitutional ballots being cast in numbers that far exceed the margin of former Vice President Biden's vote tally over President Trump demands the attention of this Court.

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[10] "To be sure, 'garden variety election irregularities' may not present facts sufficient to offend the Constitution's guarantee of due process[.]" *Hunter*, 635 F.3d at 232 (quoting *Griffin*, 570 F.2d at 1077-79)).

While investigations into allegations of unlawful votes being counted and fraud continue, even the appearance of fraud in a close election would justify exercising the Court's discretion to grant the motion for leave to file. Regardless, Defendant States' violations of the Constitution would warrant this Court's review, even if no election fraud had resulted.

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 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 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 State respectfully submits 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.G, *supra*, and *some* court must have jurisdiction for these weighty issues. *See Mostyn v. Fabrigas*, 98 Eng. Rep. 1021, 1028 (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 State respectfully submits 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 State 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 and straightforward question of law that requires neither finding additional facts nor briefing beyond the threshold issues presented here.

CONCLUSION

Leave to file the Bill of Complaint should be granted.

December 7, 2020

Respectfully submitted,

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No. 20A , Original

In the Supreme Court of the United States

STATE OF TEXAS,
Plaintiff,

v.

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

MOTION FOR EXPEDITED CONSIDERATION OF THE MOTION FOR LEAVE TO FILE A BILL OF COMPLAINT AND FOR EXPEDITION OF ANY PLENARY CONSIDERATION OF THE MATTER ON THE PLEADINGS IF PLAINTIFFS' FORTHCOMING MOTION FOR INTERIM RELIEF IS NOT GRANTED

The State of Texas ("Plaintiff State") hereby moves, pursuant to Supreme Court Rule 21, for expedited consideration of the motion for leave to file a bill of complaint, filed today, in an original action on the administration of the 2020 presidential election by defendants Commonwealth of Pennsylvania, *et al.* (collectively, "Defendant States"). The relevant statutory deadlines for the defendants' action based on unconstitutional election results are imminent: (a) December 8 is the safe harbor for certifying presidential electors, 3 U.S.C. § 5; (b) the electoral college votes on December 14, 3 U.S.C. § 7; and (c) the House of Representatives counts votes on January 6, 3 U.S.C. § 15. Absent some form of relief, the defendants will appoint electors based on unconstitutional and deeply uncertain election results, and the House will count those votes on January 6, tainting the election and the future of free elections.

Expedited consideration of the motion for leave to file the bill of complaint is needed to enable the Court to resolve this original action before the applicable statutory deadlines, as well as the constitutional deadline of January 20, 2021, for the next presidential term to commence. U.S. CONST. amend. XX, § 1, cl. 1. Texas respectfully requests that the Court order Defendant States to respond to the motion for leave to file by December 9. Texas waives the waiting period for reply briefs under this Court's Rule 17.5, so that the Court could consider the case on an expedited basis at its December 11 conference.

Working in tandem with the merits briefing schedule proposed here, Texas also will move for interim relief in the form of a temporary restraining order, preliminary injunction, stay, and administrative stay to enjoin Defendant States from certifying their presidential electors or having them vote in the electoral college. *See* S.Ct. Rule 17.2 ("The form of pleadings and motions prescribed by the Federal Rules of Civil Procedure is followed."); *cf.* S.Ct. Rule 23 (stays in this Court). Texas also asked in their motion for leave to file that the Court summarily resolve this matter at that threshold stage. Any relief that the Court grants under those two alternate motions would inform the expedited briefing needed on the merits.

Enjoining or staying Defendant States' appointment of electors would be an especially appropriate and efficient way to ensure that the eventual appointment and vote of such electors reflects a constitutional and accurate tally of lawful votes and otherwise complies with the applicable constitutional and statutory requirements in time for the House to act on January 6. Accordingly, Texas respectfully requests

expedition of this original action on one or more of these related motions. The degree of expedition required depends, in part, on whether Congress reschedules the day set for presidential electors to vote and the day set for the House to count the votes. *See* 3 U.S.C. §§ 7, 15; U.S. Const. art. II, §1m cl. 4.

STATEMENT

Like much else in 2020, the 2020 election was compromised by the COVID-19 pandemic. Even without Defendant States' challenged actions here, the election nationwide saw a massive increase in fraud-prone voting by mail. *See* BUILDING CONFIDENCE IN U.S. ELECTIONS: REPORT OF THE COMMISSION ON FEDERAL ELECTION REFORM, at 46 (Sept. 2005) (absentee ballots are "the largest source of potential voter fraud"). Combined with that increase, the election in Defendant States was also compromised by numerous changes to the State legislatures' duly enacted election statutes by non-legislative actors—including both "friendly" suits settled in courts and executive fiats via guidance to election officials—in ways that undermined state statutory ballot-integrity protections such as signature and witness requirements for casting ballots and poll-watcher requirements for counting them. State legislatures have plenary authority to set the method for selecting presidential electors, *Bush v. Gore*, 531 U.S. 98, 104 (2000) ("*Bush II*"), and "significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question." *Id.* at 113 (Rehnquist, C.J., concurring); *accord Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70, 76 (2000) ("*Bush I*").

Plaintiff State has not had the benefit of formal discovery prior to submitting this original action. Nonetheless, Plaintiff State has uncovered substantial evidence

discussed below that raises serious doubts as to the integrity of the election processes in Defendant States. Although new information continues to come to light on a daily basis, as documented in the accompanying Appendix ("App."), the voting irregularities that resulted from Defendant States' unconstitutional actions include the following:

- Jesse Jacob, a decades-long City of Detroit employee assigned to work in the Elections Department for the 2020 election testified (App. 34a-36a) that she was "instructed not to look at any of the signatures on the absentee ballots, and I was instructed not to compare the signature on the absentee ballot with the signature on file" in direct contravention of MCL § 168.765a(6), which requires all signatures on ballots be verified.
- Ethan J. Pease, a box truck delivery driver subcontracted to the U.S. Postal Service ("USPS") to deliver truckloads of mail-in ballots to the sorting center in Madison, WI, testified that USPS employees were backdating ballots received after November 3, 2020. Decl. of Ethan J. Pease at ¶¶ 3-13. (App. 149a-51a). Further, Pease testified how a senior USPA employee told him on November 4, 2020 that "An order came down from the Wisconsin/Illinois Chapter of the Postal Service that 100,000 ballots" and how the USPSA dispatched employees to "find[] ... the ballots." ¶¶ 8-10. One hundred thousand ballots "found" after election day far exceeds former Vice President Biden margin of 20,565 votes over President Trump.

- 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), which the Pennsylvania defendants quickly settled resulting in guidance (App. 109a-114a)[1] issued 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." App. 113a.
- 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 the statutory deadline for mail-in ballots from Election Day to three days after Election Day and adopted a presumption that even *non-postmarked ballots* were presumptively timely. In addition, a great number of ballots were received after the statutory deadline. Because Pennsylvania misled this Court

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[1] Although the materials cited here are a complaint, that complaint is verified (*i.e.*, declared under penalty of perjury), App. 75a, which is evidence for purposes of a motion for summary judgment. *Neal v. Kelly*, 963 F.2d 453, 457 (D.C. Cir. 1992) ("allegations in [the] verified complaint should have been considered on the motion for summary judgment as if in a new affidavit").

about segregating the late-arriving ballots and instead commingled those ballots, it is now impossible to verify Pennsylvania's claim about the number of ballots affected.

- Contrary to Pennsylvania election law on providing poll-watchers access to the opening, counting, and recording of absentee ballots, local election officials in Philadelphia and Allegheny Counties decided not to follow 25 PA. STAT. § 3146.8(b). App. 127a-28a.
- 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. App. 122a-24a. 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 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. App. 122a-24a.
- On December 4, 2020, fifteen members of the Pennsylvania House of Representatives issued a report (App. 139a-45a) to Congressman Scott Perry stating that "[t]he general election of 2020 in Pennsylvania was fraught with ... documented irregularities and improprieties associated with mail-in balloting ... [and] that the reliability of the mail-in votes in the Commonwealth

of Pennsylvania is impossible to rely upon." The report detailed, *inter alia*, that more than 118,426 mail-in votes either had no mail date, were returned *before* they were mailed, or returned one day after the mail date. The Report also stated that, based on government reported data, the number of mail-in ballots *sent* by November 2, 2020 (2.7 million) somehow ballooned by 400,000, to 3.1 million on November 4, 2020, without explanation.

- 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 (App. 19a-24a) 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), which is particularly disturbing because the legislature allowed persons *other than the voter* to apply for an absentee ballot, GA. CODE § 21-2-381(a)(1)(C), which means that the legislature likely was relying heavily on the signature-verification on ballots under GA. CODE § 21-2-386.
- 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. App. 25a-51a.

- The probability of former Vice President Biden winning the popular vote in the four Defendant States—Georgia, Michigan, Pennsylvania, and Wisconsin—independently given President Trump's early lead in those States as of 3 a.m. on November 4, 2020, is less than one in a quadrillion, or 1 in 1,000,000,000,000,000. For former Vice President Biden to win these four States collectively, the odds of that event happening decrease to less than one in a quadrillion to the fourth power (*i.e.*, 1 in 1,000,000,000,000,000[4]). *See* Decl. of Charles J. Cicchetti, Ph.D. ("Cicchetti Decl.") at ¶¶ 14-21, 30-31 (App. 4a-7a, 9a).
- The same less than one in a quadrillion statistical improbability of Mr. Biden winning the popular vote in the four Defendant States—Georgia, Michigan, Pennsylvania, and Wisconsin—independently exists when Mr. Biden's performance in each of those Defendant States is compared to former Secretary of State Hilary Clinton's performance in the 2016 general election and President Trump's performance in the 2016 and 2020 general elections. Again, the statistical improbability of Mr. Biden winning the popular vote in these **four** States collectively is 1 in 1,000,000,000,000,000[5]. *Id.* 10-13, 17-21, 30-31 (App. 3a-7a, 9a).
- Georgia's unconstitutional abrogation of the express mandatory procedures for challenging defective signatures on ballots set forth at GA. CODE § 21-2-386(a)(1)(B) resulted in far more ballots with unmatching signatures being counted in the 2020 election than if the statute had been properly applied. The

2016 rejection rate was more than *seventeen times greater* than in 2020. *See* Cicchetti Decl. at ¶ 24 (App. 7a). As a consequence, applying the rejection rate in 2016, which applied the mandatory procedures, to the ballots received in 2020 would result in a net gain for President Trump of 25,587 votes. This would be more than needed to overcome the Biden advantage of 12,670 votes, and Trump would win by 12,917 votes. *See* App. 8a.

- The two Republican members of the Board *rescinded their votes* to certify the vote in Wayne County, 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. *See* Cicchetti Decl. at ¶ 29 (App. 8a).
- The Wayne County Statement of Votes Report lists 174,384 absentee ballots out of 566,694 absentee ballots tabulated (about 30.8%) as counted without a registration number for precincts in the City of Detroit. *See* Cicchetti Decl. at ¶ 27 (App. 8a). 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 28,377 votes. The extra ballots cast most likely resulted from the phenomenon of Wayne County election workers running the same ballots through a tabulator multiple times, with Republican poll watchers obstructed or denied access, and election officials ignoring poll watchers' challenges, as documented by numerous declarations. App. 25a-51a.

As a net result of these challenges, the close election result in Defendant States—on

which the presidential election turns—is indeterminate. Put another way, Defendant States' unconstitutional actions affect outcome-determinative numbers of popular votes, that in turn affect outcome-determinative numbers of electoral votes.

To remedy Texas's claims and remove the cloud over the results of the 2020 election, expedited review and interim relief are required. December 8, 2020 is a statutory safe harbor for States to appoint presidential electors, and by statute the electoral college votes on December 14. *See* 3 U.S.C. §§ 7, 15. In a contemporaneous filing, Texas asks this Court to vacate or enjoin—either permanently, preliminarily, or administratively—Defendant States from certifying their electors and participating in the electoral college vote. As permanent relief, Texas asks this Court to remand the allocation of electors to the legislatures of Defendant States pursuant to the statutory and constitutional backstop for this scenario: "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 (emphasis added); U.S. CONST. art. II, § 1, cl. 2.

Significantly, State legislatures retain the authority to appoint electors under the federal Electors Clause, even if state laws or constitutions provide otherwise. *McPherson v. Blacker*, 146 U.S. 1, 35 (1892); *accord Bush I*, 531 U.S. at 76-77; *Bush II*, 531 U.S at 104. For its part, Congress could move the December 14 date set for the electoral college's vote, as it has done before when faced with contested elections. Ch. 37, 19 Stat. 227 (1877). Alternatively, the electoral college could vote on December 14

without Defendant States' electors, with the presidential election going to the House of Representatives under the Twelfth Amendment if no candidate wins the required 270-vote majority.

What cannot happen, constitutionally, is what Defendant States appear to want (namely, the electoral college to proceed based on the unconstitutional election in Defendant States):

> 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 104. Proceeding under the unconstitutional election is not an option.

Pursuant to 28 U.S.C. 1251(a), Plaintiff State has filed a motion for leave to file a bill of complaint today. As set forth in the complaint and outlined above, all Defendant States ran their 2020 election process in noncompliance with the ballot-integrity requirements of their State legislature's election statutes, generally using the COVID-19 pandemic as a pretext or rationale for doing so. In so doing, Defendant States disenfranchised not only their own voters, but also the voters of all other States: "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).

ARGUMENT

The Constitution vests plenary authority over the appointing of presidential electors with State legislatures. *McPherson*, 146 U.S. at 35; *Bush I*, 531 U.S. at 76-77; *Bush II*, 531 U.S at 104. While State legislatures need not proceed by popular

vote, the Constitution requires protecting the fundamental right to vote when State legislatures decide to proceed via elections. *Bush II*, 531 U.S. at 104. On the issue of the constitutionality of an election, moreover, the Judiciary has the final say: "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); *Bush II*, 531 U.S. at 104. For its part, Congress has the ability to set the time for the electoral college to vote. U.S. CONST. art. II, § 1, cl. 3. To proceed constitutionally with the 2020 election, all three actors potentially have a role, given the complications posed by Defendant States' unconstitutional actions.

With this year's election on November 3, and the electoral college's vote set by statute for December 14, 3 U.S.C. § 7, Congress has not allowed much time to investigate irregularities like those in Defendant States before the electoral college is statutorily set to act. But the time constraints are not constitutional in nature—the Constitution's only time-related provision is that the President's term ends on January 20, U.S. CONST. amend. XX, § 1, cl. 1—and Congress has both the obvious authority and even a history of moving the date of the electoral college's vote when election irregularities require it.

Expedited consideration of this matter is warranted by the seriousness of the issues raised here, not only for the results of the 2020 presidential election but also for the implications for our constitutional democracy going forward. If this Court does not halt the Defendant States' participation in the electoral college's vote on December 14, a grave cloud will hang over not only the presidency but also the

Republic.

With ordinary briefing, Defendant States would not need to respond for 60 days, S.Ct. Rule 17.5, which is after the next presidential term commences on January 20, 2021. Accordingly, this Court should adopt an expedited briefing schedule on the motion for leave to file the bill of complaint, as well as the contemporaneously filed motion for interim relief, including an administrative stay or temporary restraining order pending further order of the Court. If this Court declines to resolve this original action summarily, the Court should adopt an expedited briefing schedule for plenary consideration, allowing the Court to resolve this matter before the relevant deadline passes. The contours of that schedule depend on whether the Court grants interim relief. Texas respectfully proposes two alternate schedules.

If the Court has not yet granted administrative relief, Texas proposes that the Court order Defendant States to respond to the motion for leave to file a bill of complaint and motion for interim relief by December 9. *See* S.Ct. Rule 17.2 (adopting Federal Rules of Civil Procedure); FED. R. CIV. P. 65; *cf.* S.Ct. Rule 23 (stays). Texas waives the waiting period for reply briefs under this Court's Rule 17.5 and would reply by December 10, which would allow the Court to consider this case on an expedited basis at its December 11 Conference.

With respect to the merits if the Court neither grants the requested interim relief nor summarily resolves this matter in response to the motion for leave to file the bill of complaint, thus requiring briefing of the merits, Texas respectfully proposes

the following schedule for briefing and argument:

December 8, 2020	Plaintiffs' opening brief
December 8, 2020	*Amicus* briefs in support of plaintiffs or of neither party
December 9, 2020	Defendants' response brief(s)
December 9, 2020	*Amicus* briefs in support of defendants
December 10, 2020	Plaintiffs' reply brief(s) to each response brief
December 11, 2020	Oral argument, if needed

If the Court grants an administrative stay or other interim relief, but does not summarily resolve this matter in response to the motion for leave to file the bill of complaint, Texas respectfully proposes the following schedule for briefing and argument on the merits:

December 11, 2020	Plaintiffs' opening brief
December 11, 2020	*Amicus* briefs in support of plaintiffs or of neither party
December 17, 2020	Defendants' response brief(s)
December 17, 2020	*Amicus* briefs in support of defendants
December 22, 2020	Plaintiffs' reply brief(s) to each response brief
December 2020	Oral argument, if needed

In the event that Congress moves the date for the electoral college and the House to vote or count votes, then the parties could propose an alternate schedule. If any motions to intervene are granted by the applicable deadline, intervenors would file by the applicable deadline as plaintiffs-intervenors or defendants-intervenors, with any still-pending intervenor filings considered as *amicus* briefs unless such

prospective intervenors file or seek leave to file an *amicus* brief in lieu of their still-pending intervenor filings.

CONCLUSION

Texas respectfully requests that the Court expedite consideration of its motion for leave to file a bill of complaint based on the proposed schedule and, if the Court neither stays nor summarily resolves the matter and thus sets the case for plenary consideration, that the Court expedite briefing and oral argument based on the proposed schedule.

Dated: December 7, 2020

Respectfully submitted,

/s/ Ken Paxton

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CERTIFICATE AS TO FORM

Pursuant to Sup. Ct. Rules 22 and 33, I certify that the foregoing motion are proportionately spaced, has a typeface of Century Schoolbook, 12 points, and contains 15 pages (and 3,550 words), excluding this Certificate as to Form, the Table of Contents, and the Certificate of Service.

Dated: December 7, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that, on this 7th day of December 2020, in addition to filing the foregoing document via the Court's electronic filing system, one true and correct copy of the foregoing document was served by Federal Express, with a PDF courtesy copy served via electronic mail on the following counsel and parties:

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Executed December 7, 2020, at Washington, DC,

/s/ Lawrence J. Joseph

Lawrence J. Joseph

No. _____, Original

In the Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

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

Defendants.

MOTION FOR PRELIMINARY INJUNCTION AND TEMPORARY RESTRAINING ORDER OR, ALTERNATIVELY, FOR STAY AND ADMINISTRATIVE STAY

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Pursuant to S.Ct. Rules 21, 23, and 17.2 and pursuant to FED. R. CIV. P. 65, the State of Texas ("Plaintiff State") respectfully moves this Court to enter an administrative stay and temporary restraining order ("TRO") to enjoin the States of Georgia, Michigan, and Wisconsin and the Commonwealth of Pennsylvania (collectively, the "Defendant States") and all of their agents, officers, presidential electors, and others acting in concert from taking action to certify presidential electors or to have such electors take any official action—including without limitation participating in the electoral college or voting for a presidential candidate—until further order of this Court, and to preliminarily enjoin

and to stay such actions pending the final resolution of this action on the merits.

STATEMENT OF THE CASE

Lawful elections are 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 in derogation of statutory controls as to how they are lawfully received, evaluated, and counted. Whether well intentioned or not, these unconstitutional acts had the same *uniform effect*—they made the 2020 election less secure in the Defendant States. Those changes are inconsistent with relevant state laws and were made by non-legislative entities, without any consent by the state legislatures. The acts of these officials thus directly violated the Constitution. U.S. CONST. art. I, § 4; *id.* art. II, § 1, cl. 2.

This case presents a 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? These non-legislative changes to the Defendant States' election laws facilitated the casting and counting of ballots in violation of state law, which, in turn, violated the Electors Clause of Article II, Section 1, Clause 2 of the U.S. 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 Plaintiff State and other States that remained loyal to the Constitution.

Elections for federal office must comport with federal constitutional standards, s*ee Bush II*, 531 U.S. at 103-05, 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, § 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).

Defendant States' Violations of Electors Clause

As set forth in the Complaint, executive and judicial officials made significant changes to the legislatively defined election laws 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.

Factual Background

Without Defendant States' combined 72 electoral votes, President Trump presumably has 232 electoral votes, and former Vice President Biden presumably has 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 U.S. House of Representatives under the Twelfth Amendment to the U.S. Constitution.

STANDARD OF REVIEW

Original actions follow the motions practice of the Federal Rules of Civil Procedure. S.Ct. 17.2. Plaintiffs can obtain preliminary injunctions in original actions. *See California v. Texas*, 459 U.S. 1067 (1982) ("[m]otion of plaintiff for issuance of a preliminary injunction granted"); *United States v. Louisiana*, 351 U.S. 978 (1956) (enjoining named state officers "and others acting with them ... from prosecuting any other case or cases involving the controversy before this Court until further order of the Court"). Similarly, a moving party can seek a stay pending appeal under this Court's Rule 23.[2]

Plaintiffs who seek interim relief under Federal Rule 65 must establish that they likely will succeed on the merits and likely will suffer irreparable harm without interim relief, that the balance of equities between their harm in the absence of interim relief and the defendants' harm from interim relief favors the movants, and that the public interest favors interim relief. *Winter v. Natural Resources Def. Council, Inc.*, 555 U.S. 7, 20 (2008). To obtain a stay pending appeal under this Court's Rule 23, the applicant must meet a similar test:

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[2] *See, e.g., Frank v. Walker*, 135 S.Ct. 7 (2014); *Husted v. Ohio State Conf. of the NAACP*, 135 S.Ct. 42 (2014); *North Carolina v. League of Women Voters*, 135 S.Ct. 6 (2014); *Arizona Sect'y of State's Office v. Feldman*, 137 S.Ct. 446 (2016); *North Carolina v. Covington*, 138 S.Ct. 974 (2018); *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S.Ct. 1205 (2020).

> (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay. In close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent.

Hollingsworth v. Perry, 558 U.S. 183, 190 (2010).

ARGUMENT

I. THIS COURT IS LIKELY TO EXERCISE ITS DISCRETION TO HEAR THIS CASE.

Although Plaintiff State disputes that this Court has discretion to decide not to hear this case instituted by a sovereign State, *see* 28 U.S.C. § 1251(a) (this Court's jurisdiction is exclusive for actions between States); *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), this Court is nonetheless likely to exercise its discretion to hear this case for two reasons, which is analogous to the first *Hollingsworth* factor for a stay.

First, in the analogous case of *Republican Party v. Boockvar*, No. 20A54, 2020 U.S. LEXIS 5181 (Oct. 19, 2020), four justices voted to stay a decision by the Pennsylvania Supreme Court that worked an example of the type of non-legislative revision to State election law that the Plaintiff State challenges here. In addition, since then, a new Associate Justice joined the Court, and the Chief Justice indicated a rationale

for voting against a stay in *Democratic Nat'l Comm. v. Wisconsin State Legis.*, No. 20A66, 2020 U.S. LEXIS 5187, at *1 (Oct. 26, 2020) (Roberts, C.J., concurring in denial of application to vacate stay) that either does not apply to original actions or that was wrong for the reasons set forth in Section II.A.2, *supra* (non-legislative amendment of State election statutes poses a question that arises under the federal Constitution, see *Bush II*, 531 U.S. at 113 (Rehnquist, C.J., concurring).

Second, this Court has repeatedly acknowledged the "uniquely important national interest" in elections for president and the rules for them. *Bush II*, 531 U.S. at 112 (interior quotations omitted); *see also Oregon v. Mitchell*, 400 U.S. 112 (1970) (original jurisdiction in voting-rights cases). Few cases on this Court's docket will be as important to our future as this case.

Third, no other remedy or forum exists for a State to challenge multiple States' maladministration of a presidential election, *see* Section II.A.8, *infra*, and *some* court must have jurisdiction for these fundamental issues about the viability of our democracy: "if there is no other mode of trial, that alone will give the King's courts a jurisdiction." *Mostyn v. Fabrigas*, 98 Eng. Rep. 1021, 1028 (K.B. 1774) (Lord Mansfield).

II. THE PLAINTIFF STATE IS LIKELY TO PREVAIL.

Under the *Winter-Hollingsworth* test, the plaintiff's likelihood of prevailing is the primary factor to assess the need for interim relief. Here, the Plaintiff State will prevail because this Court has jurisdiction and the Plaintiff State's merit case is likely to prevail.

A. This Court has jurisdiction over Plaintiff State's 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 State's fundamental rights and interests are at stake. This Court is the *only* venue that can protect the Plaintiff State's Electoral College votes from being cancelled by the unlawful and constitutionally tainted votes cast by Electors appointed by the Defendant States.

1. 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 and certification of the Defendant States' presidential electors before their legislatures pursuant to 3 U.S.C. §§ 2, 5, and 7 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.

2. 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,[3] and—indeed—we did not even have federal-question jurisdiction until 1875. *Merrell Dow Pharm.*, 478 U.S. at 807. The

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[3] 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).

Plaintiff State's 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 State in the appointment and certification of presidential electors to the Electoral College.

Given this federal-law basis against these state actions, the state actions are not "independent" of the federal 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 State's 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.

3. 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 State has standing under those rules.[4]

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 State, as set forth in more detail below.

a. Plaintiff State suffers an injury in fact.

The citizens of Plaintiff State 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,

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

even the most basic, are illusory if the right to vote is undermined." *Wesberry*, 376 U.S. at 10; *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); *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 cognizable under Article III.

Significantly, Plaintiff State presses its own form of voting-rights injury *as a State*. As with the one-person, 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, Plaintiff State suffers 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, Plaintiff State has standing where its 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.[5] Like

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[5] "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)).

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 Plaintiff State's presidential electors, that operates to defeat the Plaintiff State's interests.[6] 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 II*, 531 U.S. at 105 (quoting *Reynold*, 377 U.S. at 555). Those injuries to electors serve as an Article III basis for a *parens patriae* action by their States.

b. <u>The Defendant States caused the injuries.</u>

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 Plaintiff's injuries.

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[6] Because Plaintiff State appointed its presidential electors fully consistent with the Constitution, it suffers injury if its presidential electors are defeated by the Defendant States' unconstitutionally appointed presidential electors. This injury is all the more acute because Plaintiff State has taken steps to prevent fraud. Unlike the Defendant States, the Plaintiff State neither weakened nor allowed the weakening of its ballot-integrity statutes by non-legislative means.

c. The requested relief would redress the injuries.

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

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 II, 531 U.S. at 104; *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 State does 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 State requests—namely, remand to the State legislatures to allocate presidential 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 presidential 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 I*, 531 U.S. at 76-77; *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 the 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 the House to count the presidential electors' votes. 3 U.S.C. § 15.

4. Plaintiff State has 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-person, 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 presidential 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.

5. 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 or certification of presidential 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 presidential 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.

6. This matter is ripe for review.

The Plaintiff State's 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).[7] Prior to the election, there was no reason to know who would win the vote in any given State.

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 State 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 Plaintiff State 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

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[7] 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.

States become evident until days after the election. Moreover, a State may reasonably assess the status of litigation commenced by candidates to the presidential election prior to commencing its own litigation. Neither ripeness nor laches presents a timing problem here.

7. <u>This action does not raise a non-justiciable political question.</u>

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 appointing presidential electors involves political rights, this 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.

8. <u>No adequate alternate remedy or forum exists.</u>

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 State 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).[8] 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 State that the Defendant States' appointment of presidential electors under the recently conducted elections would be unconstitutional, then the statutorily created safe harbor cannot be used as a

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[8] 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.

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 U.S. 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.

B. The Plaintiff State is likely to prevail on the merits.

For interim relief, the most important factor is the likelihood of movants' prevailing. *Winter*, 555 U.S. at 20. The Defendant States' administration of the 2020 election violated the Electors Clause, which renders invalid any appointment of presidential electors based upon those election results. 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 law 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.B.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.[9]

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[9] To advance the principles enunciated in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (concerning state police power to enforce compulsory vaccination laws), as authority for non-legislative state actors re-writing state election statutes—in direct conflict with the Electors Clause—is a nonstarter. Clearly, "the Constitution does not conflict with itself by conferring, upon the one hand, a ... power, and taking the same power away, on the other, by the limitations of the due process clause."

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.B.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[10]). 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.

III. THE OTHER *WINTER-HOLLINGSWORTH* FACTORS WARRANT INTERIM RELIEF.

Although Plaintiff State's likelihood of prevailing would alone justify granting interim relief, relief is also warranted by the other *Winter-Hollingsworth* factors.

Brushaber v. Union Pac. R. Co., 240 U.S. 1, 24 (1916). In other words, the States' reserved police power does not abrogate the Constitution's express Electors Clause. *See also Cook v. Gralike*, 531 U.S. at 522 (election authority is delegated to States, not reserved by them); *accord* Story, 1 COMMENTARIES § 627.

[10] 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).

A. Plaintiff State will suffer irreparable harm if the Defendant States' unconstitutional presidential electors vote in the Electoral College.

Allowing the unconstitutional election results in Defendant States to proceed would irreparably harm Plaintiff State and the Republic both by denying representation in the presidency and in the Senate in the near term and by permanently sowing distrust in federal elections. This Court has found such threats to constitute irreparable harm on numerous occasions. *See* note 2, *supra* (collecting cases). The stakes in this case are too high to ignore.

B. The balance of equities tips to the Plaintiff State.

All State parties represent citizens who voted in the 2020 presidential election. Because of their unconstitutional actions, Defendant States represent some citizens who cast ballots not in compliance with the Electors Clause. It does not disenfranchise anyone to require the State legislatures to attempt to resolve this matter as 3 U.S.C. § 2, the Electors Clause, and even the Twelfth Amendment provide. By contrast, it would irreparably harm Plaintiff State if the Court denied interim relief.

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.

C. The public interest favors interim relief.

The last *Winter* factor is the public interest. When parties dispute the lawfulness of government action, the public interest collapses into the merits. *ACLU v. Ashcroft*, 322 F.3d 240, 247 (3d Cir. 2003); *Washington v. Reno*, 35 F.3d 1093, 1103 (6th Cir. 1994); *League of Women Voters of the United States v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016). If the Court agrees with Plaintiff State that non-legislative actors lack authority to amend state statutes for selecting presidential electors, the public interest requires interim relief. Withholding relief would leave a taint over the election, disenfranchise voters, and lead to still more electoral legerdemain in future elections.

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 extraordinary case arising from a presidential election. 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 presidential electors, the resulting vote of the Electoral College not only lacks constitutional legitimacy, but the Constitution itself will be forever sullied.

The nation needs this Court's clarity: "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). While isolated irregularities could be "garden-variety" election irregularities that do not raise a federal question,[11] the unconstitutional setting-aside of state election statutes by non-legislative actors calls both the result and the process into question, requiring 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. The public interest requires this Court's action.

IV. ALTERNATIVELY, THIS CASE WARRANTS SUMMARY DISPOSITION.

In lieu of granting interim relief, this Court could simply reach the merits summarily. *Cf.* FED. R. CIV. P. 65(a)(2); S.Ct. Rule 17.5. Two things are clear from the evidence presented at this initial phase: (1) non-legislative actors modified the Defendant States' election statutes; and (2) the resulting uncertainty casts doubt on the lawful winner. Those two facts are enough to decide the merits of the Electors Clause claim. The Court should thus vacate the Defendant States' appointment and impending certifications of presidential electors and remand to their State legislatures to allocate presidential electors via any constitutional means that does not rely on 2020

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[11] "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 (1st Cir. 1978)).

election results that includes votes cast in violation of State election statutes in place on Election Day.

CONCLUSION

This Court should first administratively stay or temporarily restrain the Defendant States from voting in the electoral college until further order of this Court and then issue a preliminary injunction or stay against their doing so until the conclusion of this case on the merits. Alternatively, the Court should reach the merits, vacate the Defendant States' elector certifications from the unconstitutional 2020 election results, and remand to the Defendant States' legislatures pursuant to 3 U.S.C. § 2 to appoint electors.

December 7, 2020

Respectfully submitted,

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No. 22O155, Original

In the Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

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

Defendants.

On Motion for Leave to File Bill of Complaint

BRIEF OF STATES OF MISSOURI, ____ AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF'S MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

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STATEMENT OF INTEREST OF *AMICI*

"In the context of a Presidential election," state actions "implicate a uniquely important national interest," because "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, 794–95 (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." *Id.* "Every voter" in a federal election "has a right under the Constitution to have his vote fairly counted, without its being distorted by fraudulently cast votes." *Anderson* v. *United States*, 417 U.S. 211, 227 (1974).

Amici curiae are the States of Missouri, _____.[1] *Amici* have several important interests in this case. *First*, the States have a strong interest in safeguarding the separation of powers among state actors in the regulation of Presidential elections. The Electors Clause of Article II, § 1 carefully balances power among state actors, and it assigns a specific function to the "Legislature thereof" in each State. U.S. CONST. art. II, § 1, cl. 4. Our system of federalism relies on separation of powers to preserve liberty at every level of government, and the separation of powers in the Electors Clause is no exception. The States have a strong interest in preserving the proper roles of state legislatures in the administration of federal elections, and thus safeguarding the individual liberty of their citizens.

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[1] This brief is filed under Supreme Court Rule 37.4, and all counsel of record received timely notice of the intent to file this amicus brief under Rule 37.2.

Second, *amici* States have a strong interest in ensuring that the votes of their own citizens are not diluted by the unconstitutional administration of elections in other States. When non-legislative actors in other States encroach on the authority of the "Legislature thereof" in that State to administer a Presidential election, they threaten the liberty, not just of their own citizens, but of every citizen of the United States who casts a lawful ballot in that election—including the citizens of *amici* States.

Third, for similar reasons, *amici* States have a strong interest in safeguarding against fraud in voting by mail during Presidential elections. "Every voter" in a federal election, "has a right under the Constitution to have his vote fairly counted, without its being distorted by fraudulently cast votes." *Anderson*, 417 U.S. at 227. Plaintiff's Bill of Complaint alleges that non-legislative actors in the Defendant States stripped away important safeguards against fraud in voting by mail that had been enacted by the Legislature in each State. *Amici* States share a vital interest in protecting the integrity of the truly national election for President and Vice President of the United States.

SUMMARY OF ARGUMENT

The Bill of Complaint raises constitutional questions of great public importance that warrant this Court's review. First, like every similar provision in the Constitution, the separation-of-powers provision of the Electors Clause provides an important structural check on government designed to protect individual liberty. By allocating authority over Presidential electors to the "Legislature thereof" in

each State, the Clause separates powers both vertically and horizontally, and it confers authority on the branch of state government most responsive to the democratic will. Encroachments on the authority of state Legislatures by other state actors violate the separation of powers and threaten individual liberty.

The unconstitutional encroachments on the authority of state Legislatures in this case raise particularly grave concerns. For decades, responsible observers have cautioned about the risks of fraud and abuse in voting by mail, and they have urged the adoption of statutory safeguards to prevent such fraud and abuse. In the numerous cases identified in the Bill of Complaint, non-legislative actors in each Defendant State repeatedly stripped away statutory safeguards that the "Legislature thereof" had enacted to protect against fraud in voting by mail. These changes removed protections that responsible actors had recommended for decades to guard against fraud and abuse in voting by mail, and they did so in a manner that uniformly and predictably benefited one candidate in the recent Presidential election. The allegations in the Bill of Complaint raise grave questions about election integrity and public confidence in the administration of Presidential elections. This Court should grant Plaintiff leave to file the Bill of Complaint.

ARGUMENT

The Electors Clause provides that each State "shall appoint" its Presidential electors "in such Manner as the *Legislature thereof* may direct." U.S. CONST. art. II, § 1, cl. 4 (emphasis added). Moreover, "[o]ur constitutional system of representative government only works when the worth of honest

ballots is not diluted by invalid ballots procured by corruption." U.S. Dep't of Justice, *Federal Prosecution of Election Offenses*, at 1 (8th ed. Dec. 2017). "When the election process is corrupted, democracy is jeopardized." *Id.* The proposed Bill of Complaint raises serious concerns about constitutionality and ballot security of election procedures in the Defendant States. Given the importance of public confidence in American elections, these allegations raise questions of great public importance that warrant this Court's expedited review.

I. The Separation-of-Powers Provision of the Electors Clause Is a Structural Check on Government That Safeguards Liberty.

Article II 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. 4 (emphasis added); *see also id.* art. I, § 4, cl. 2 (providing that, in each State, the "Legislature thereof" shall establish "[t]he Times, Places and Manner of holding Elections for Senators and Representatives").

Thus, "in the case of a law enacted by a state legislature applicable not only to elections to state offices, but also to the selection of Presidential electors, the legislature is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under Art. II, § 1, cl. 2, of the United States Constitution." *Bush* v. *Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70, 76 (2000). "[T]he state legislature's power to select the manner for appointing electors is plenary." *Bush* v. *Gore*, 531 U.S. 98, 104 (2000).

Here, as set forth in the Bill of Complaint, non-legislative actors in each Defendant State have purported to "alter[] an important statutory provision enacted by the [State's] Legislature pursuant to its authority under the Constitution of the United States to make rules governing the conduct of elections for federal office." *Republican Party of Pennsylvania* v. *Boockvar*, No. 20-542, 2020 WL 6304626, at *1 (U.S. Oct. 28, 2020) (Statement of Alito, J.). *See* Bill of Complaint, ¶¶ 41-127. In doing so, these non-legislative actors encroached upon the "plenary" authority of those States' respective legislatures over the conduct of the Presidential election in each State. *Bush* v. *Gore*, 531 U.S. at 104. This encroachment on the authority of each State's Legislature violated the separation of powers set forth in the Electors Clause. "[I]n the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest. For the President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation." *Anderson*, 460 U.S. at 794–795.

In every other context, this Court recognizes that the Constitution's separation-of-powers provisions, which allocate authority to specific governmental actors to the exclusion of others, are designed to preserve liberty. "It is the proud boast of our democracy that we have 'a government of laws, and not of men.'" *Morrison* v. *Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting). "The Framers of the Federal Constitution . . . viewed the principle of separation of powers as the absolutely central guarantee of a just Government." *Id.* "Without a secure structure of separated powers, our Bill of Rights would be worthless, as are the bills of rights of

many nations of the world that have adopted, or even improved upon, the mere words of ours." *Id.* "The purpose of the separation and equilibration of powers in general . . . was not merely to assure effective government but to preserve individual freedom." *Id.* at 727.

This principle of preserving liberty applies both to the horizontal separation of powers among the branches of government, and the vertical separation of powers between the federal government and the States. "The federal system rests on what might at first seem a counterintuitive insight, that 'freedom is enhanced by the creation of two governments, not one.'" *Bond* v. *United States*, 564 U.S. 211, 220–21 (2011) (quoting *Alden* v. *Maine*, 527 U.S. 706, 758 (1999)). "[F]ederalism secures to citizens the liberties that derive from the diffusion of sovereign power." *Bond*, 564 U.S. at 221 (2011) (quoting *New York* v. *United States*, 505 U.S. 144, 181 (1992)). "Federalism also protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions." *Id.* Moreover, "federalism enhances the opportunity of all citizens to participate in representative government." *FERC* v. *Mississippi*, 456 U.S. 742, 789 (1982) (O'Connor, J., concurring in part and dissenting in part). "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Gregory* v. *Ashcroft*, 501 U.S. 452, 458 (1991).

The explicit grant of authority to state *Legislatures* in the Electors Clause of Article II, §1 effects both a horizontal and a vertical separation of powers. The Clause allocates 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. 4.

It is no accident that the Constitution allocates such authority to state Legislatures, rather than executive officers such as Secretaries of State, or judicial officers such as state Supreme Courts. The Constitutional Convention's delegates frequently recognized that the Legislature is the branch most responsive to the People and most democratically accountable. *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 ratification documents expressing that state legislatures were most likely to be in sympathy with the interests of the people); Federal Farmer, No. 12 (1788), *reprinted in* 2 THE FOUNDERS' CONSTITUTION (Philip B. Kurland & Ralph Lerner eds., 1987) (arguing that electoral regulations "ought to be left to the state legislatures, they coming far nearest to the people themselves"); THE FEDERALIST NO. 57, at 350 (C. Rossiter, ed. 2003) (Madison, J.) (stating that the "House of Representatives is so constituted as to support in its members an habitual recollection of their dependence on the people"); *id.* (stating that the "vigilant and manly spirit that actuates the people of America" is greatest restraint on the House of Representatives).

Democratic accountability in the method of selecting the President of the United States is a powerful bulwark safeguarding individual liberty. By identifying the "Legislature thereof" in each State as the regulator of elections for federal officers, the Electors Clause of Article II, § 1 prohibits the very arrogation of power over Presidential elections by non-legislative officials that the Defendant States perpetrated in this case. By violating the Constitution's separation of powers, these non-legislative actors undermined the liberty of all Americans, including the voters in *amici* States.

II. Stripping Away Safeguards From Voting by Mail Exacerbates the Risks of Fraud.

By stripping away critical safeguards against ballot fraud in voting by mail, non-legislative actors in the Defendant States inflicted another grave injury on the conduct of the recent election: They enhanced the risks of fraudulent voting by mail without authority. An impressive body of public evidence demonstrates that voting by mail presents unique opportunities for fraud and abuse, and that statutory safeguards are critical to reduce such risks of fraud.

For decades prior to 2020, responsible observers emphasized the risks of fraud in voting by mail, and the importance of imposing safeguards on the process of voting by mail to allay such risks. For example, in *Crawford* v. *Marion County Election Board*, this Court held that fraudulent voting "perpetrated using absentee ballots" demonstrates "that not only is the risk of voter fraud real but that *it could affect the outcome of a close election.*" *Crawford* v. *Marion County Election Bd.*, 553 U.S. 181, 195-96 (2008) (opinion of Stevens, J.) (emphasis added).

As noted by Plaintiff, the Carter-Baker Commission on Federal Election Reform emphasized the same concern. The bipartisan Commission—co-chaired by former President Jimmy Carter and former Secretary of State James A. Baker—determined that "[a]bsentee ballots remain 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) ("Carter-Baker Report").[2] According to the Carter-Baker Commission, "[a]bsentee balloting is vulnerable to abuse in several ways." *Id.* "Blank ballots mailed to the wrong address or to large residential buildings might bet intercepted." *Id.* "Citizens who vote at home, at nursing homes, at the workplace, or in church are more susceptible to pressure, overt and subtle, or to intimidation." *Id.* "Vote buying schemes are far more difficult to detect when citizens vote by mail." *Id.*

Thus, the Commission noted that "absentee balloting in other states has been a major source of fraud." *Id.* at 35. It emphasized that voting by mail "increases the risk of fraud." *Id.* And the Commission recommended that "States ... need to do more to prevent ... absentee ballot fraud." *Id.* at v.

The Commission specifically recommended that States should implement and reinforce safeguards to prevent fraud in voting by mail. The Commission recommended that "States should make sure that absentee ballots received by election officials before Election Day are kept secure until they are opened and counted." *Id.* at 46. It also recommended that States "prohibit[] 'third-party' organizations,

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[2] *Available at* https://www.legislationline.org/download/id/1472/file/-3b50795b2d0374cbef5c29766256.pdf.

candidates, and political party activists from handling absentee ballots." *Id.* And the Commission highlighted that a particular state "appear[ed] to have avoided significant fraud in its vote-by-mail elections by introducing safeguards to protect ballot integrity, *including signature verification*." *Id.* at 35 (emphasis added). The Commission concluded that "[v]ote by mail is ... likely to increase the risks of fraud and contested elections ... where the safeguards for ballot integrity are weaker." *Id.*

The most recent edition of the U.S. Department of Justice's Manual on *Federal Prosecution of Election Offenses*, published by its Public Integrity Section, highlights the very same concerns about fraud in voting by mail. U.S. Dep't of Justice, *Federal Prosecution of Election Offenses* (8th ed. Dec. 2017), at 28-29 ("DOJ Manual").[3] The Manual states: "Absentee ballots are particularly susceptible to fraudulent abuse because, by definition, they are marked and cast outside the presence of election officials and the structured environment of a polling place." *Id.* The Manual reports that "the more common ways" that election-fraud "crimes are committed include ... [o]btaining and marking absentee ballots without the active input of the voters involved." *Id.* at 28. And the Manual notes that "[a]bsentee ballot frauds" committed both with and without the voter's participation are "common." *Id.* at 29.

Similarly, the U.S. Government Accountability Office concluded that many crimes of election fraud likely go undetected. In 2014, discussing election fraud, the GAO reported that "crimes of fraud, in

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[3] *Available at* https://www.justice.gov/criminal/file/1029066/download.

particular, are difficult to detect, as those involved are engaged in intentional deception." GAO-14-634, *Elections: Issues Related to State Voter Identification Laws* 62-63 (U.S. Gov't Accountability Office Sept. 2014).[4]

Despite the difficulties of detecting fraud schemes, recent experience contains many well-documented examples of absentee ballot fraud. For example, the News21 database, which was compiled to *refute* arguments that voter fraud is prevalent, identified 491 cases of absentee ballot over the 12-year period from 2000 to 2012—approximately 41 cases per year. *See* News21, *Election Fraud in America*.[5] This database reports that "Absentee Ballot Fraud" was "[t]he most prevalent fraud" in America, comprising "24 percent (491 cases)" of all cases reported in the public records surveyed. *Id.* Moreover, the database indicates that this number undercounts the total incidence of reported cases of absentee ballot fraud, because it was based on public-record requests to state and local government entities, many of which did not respond. *Id.*

Likewise, the Heritage Foundation's online database of election-fraud cases—which includes only a "sampling" of cases that resulted in an *adjudication* of fraud, such as a criminal conviction or civil penalty—identified 207 cases of proven "fraudulent use of absentee ballots" in the United States. The

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[4] *Available at* https://www.gao.gov/assets/670/665966.pdf.

[5] *Available at* https://votingrights.news21.com/interactive/election-fraud-database/&xid=17259,15700023,15700124,15700149,15700186,15700191,15700201,15700237,15700242

Heritage Foundation, *Election Fraud Cases*.[6] Again, this database undercounts the incidence of cases of election fraud: "The Heritage Foundation's Election Fraud Database presents a sampling of recent proven instances of election fraud from across the country. This database is not an exhaustive or comprehensive list." *Id.*

The public record abounds with recent examples of such fraudulent absentee-ballot schemes. For example, in November 2019, the mayor of Berkeley, Missouri was indicted on five felony counts of absentee ballot fraud for changing votes on absentee ballots to help him and his political allies to get elected. Brian Heffernan, *Berkeley Mayor Hoskins Charged with 5 Felony Counts of Election Fraud*, ST. LOUIS PUBLIC RADIO (Nov. 21, 2019).[7] Mayor Hoskins' scheme included "going to the home of elderly ... residents" to harvest absentee ballots, "filling out absentee ballot applications for voters and having his campaign workers do the same," and "altering absentee ballots" after he had procured them from voters. *Id.* Again, in 2016, a state House race in Missouri was overturned amid allegations of widespread absentee-ballot fraud that had occurred across multiple election cycles in the same community. Sarah Fenske, *FBI, Secretary of State Asking Questions About St. Louis Statehouse Race*,

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[6] *Available at* https://www.heritage.org/voterfraud/search?combine=&state=All&year=&case_type=All&fraud_type=24489&page=12.

[7] *Available at* https://news.stlpublicradio.org/post/berkeley-mayor-hoskins-charged-5-felony-counts-election-fraud#stream/0

RIVERFRONT TIMES (Aug. 16, 2016).[8] One candidate stated that it was widely known in the community that the incumbent ran an "absentee game" that resulted in the mail-in vote tipping the outcome in her favor in multiple close elections. *Id.*

Other States have similar experiences. In 2018, a federal Congressional race was overturned in North Carolina, and eight political operatives were indicted for fraud, in an absentee-ballot fraud scheme that sufficed to change the outcome of the election. Richard Gonzales, *North Carolina GOP Operative Faces New Felony Charges That Allege Ballot Fraud*, NPR.ORG, (July 30, 2019).[9] The indicted operatives "had improperly collected and possibly tampered with ballots," and were charged with "improperly mailing in absentee ballots for someone who had not mailed it themselves." *Id.*

In the North Carolina case, the lead investigator testified that the investigation was "a continuous case" over two election cycles, and that the scheme involved collecting absentee ballots from voters, altering the absentee ballots, and forging witness signatures on the ballots. *See In re: Investigation of Irregularities Affecting Counties Within the 9th Congressional District*, North Carolina Board of Elections, Evidentiary Hearing, at 2-3.[10] The investigators described it as a "coordinated, unlawful,

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[8] *Available at* https://www.riverfronttimes.com/newsblog/2016/08/16/fbi-secretary-of-state-asking-questions-about-st-louis-statehouse-race.

[9] *Available at* https://www.npr.org/2019/07/30/746800630/north-carolina-gop-operative-faces-new-felony-charges-that-allege-ballot-fraud.

[10] *Available at* https://images.radio.com/wbt/Voter%20ID_%20Website.pdf.

and substantially resourced absentee ballots scheme." *Id.* at 2. According to the investigators' trial presentation, the investigation involved 142 voter interviews, 30 subject and witness interviews, and subpoenas of documents, financial records, and phone records. *Id.* at 3. The perpetrators collected absentee ballots and falsified ballot witness certifications outside the presence of the voters. *Id.* at 10, 13. The congressional election at issue was decided by margin of less than 1,000 votes. *Id.* at 4. The scheme involved the submission of well over 1,000 fraudulent absentee ballots and request forms. *Id.* at 11. The perpetrators took extensive steps to conceal the fraudulent scheme, which lasted over multiple election cycles before it was detected. *Id.* at 14.

Similarly, in 2016, a politician in the Bronx was indicted and pled guilty to 242 counts of election fraud based on an absentee ballot fraud scheme. Ben Kochman, *Bronx politician pleads guilty in absentee ballot scheme for Assembly election,* NEW YORK DAILY NEWS (Nov. 22, 2016).[11] Despite pleading guilty to 242 felonies involving absentee ballot fraud in an election that was decided by two votes, the defendant received no jail time and vowed to run for office again after a short disqualification period. *Id.*

The increases in mail-in voting due to the COVID-19 pandemic likewise increased opportunities for fraud. For instance, in May 2020, the leader of the New Jersey NAACP called for an election in Paterson, New Jersey to be overturned due to widespread mail-in ballot fraud. *See* Jonathan Dienst et al., *NJ NAACP*

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[11] *Available at* http://www.nydailynews.com/new-york/nyc-crime/bronx-pol-pleads-guilty-absentee-ballot-scheme-article-1.2884009.

Leader Calls for Paterson Mail-In Vote to Be Canceled Amid Corruption Claims, NBC NEW YORK (May 27, 2020).[12] "'Invalidate the election. Let's do it again,' [the NAACP leader] said amid reports more that 20 percent of all ballots were disqualified, some in connection with voter fraud allegations." *Id.*

Hundreds of other reported cases highlight the same concerns about the vulnerability of voting by mail to fraud and abuse. Recently, a Missouri court considered extensive expert testimony reviewing absentee-ballot fraud cases like these. *Findings of Fact, Conclusions of Law, and Final Judgment in Mo. State Conference of the NAACP* v. *State*, No. 20AC-CC00169-01 (Circuit Court of Cole County, Missouri Sept. 24, 2020), *aff'd*, 607 S.W.3d 728 (Mo. banc Oct. 9, 2020) ("*Mo. NAACP*"). The court held that cases of absentee-ballot fraud "have several common features that persist across multiple recent cases: (1) close elections; (2) perpetrators who are candidates, campaign workers, or political consultants, not ordinary voters; (3) common techniques of ballot harvesting, (4) common techniques of signature forging, (5) fraud that persisted across multiple elections before it was detected, (6) massive resources required to investigate and prosecute the fraud, and (7) lenient criminal penalties." *Id.* at 17. Thus, "fraud in voting by mail is a recurrent problem, that it is hard to detect and prosecute, that there are strong incentives and weak penalties for doing so, and that it has the capacity to affect the outcome of close

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[12] *Available at* https://www.nbcnewyork.com/news/politics/nj-naacp-leader-calls-for-paterson-mail-in-vote-to-be-canceled-amid-fraud-claims/2435162/.

elections." *Id.* The court concluded that "the threat of mail-in ballot fraud is real." *Id.* at 2.

III. The Bill of Complaint Alleges that the Defendant States Abolished Critical Safeguards Against Fraud in Voting by Mail.

The Bill of Complaint alleges that non-legislative actors in each Defendant State unconstitutionally abolished or diluted statutory safeguards against fraud enacted by the state legislature, in violation of the Presidential Electors Clause. U.S. CONST. art. II, § 1, cl. 4. All the unconstitutional changes to election procedures identified in the Bill of Complaint have two common features: (1) They abrogated statutory safeguards against fraud that responsible observers have long recommended for voting by mail, and (2) they did so in a way that predictably conferred partisan advantage on one candidate in the Presidential election. Such allegations are serious, and they warrant this Court's review.

Abolishing signature verification. First, the proposed Bill of Complaint alleges that non-legislative actors in Pennsylvania, Georgia, and Michigan unilaterally abolished or undermined signature-verification requirements for mailed ballots. It alleges that Pennsylvania's Secretary of State abrogated Pennsylvania's statutory signature-verification requirement for mail-in ballots in a "friendly" settlement of a lawsuit brought by activists. Bill of Complaint, ¶¶ 44-46. It alleges that Georgia's Secretary of State unilaterally abrogated Georgia's statute authorizing county registrars to engage in signature verification for absentee ballots in a similar settlement. *Id.* ¶¶ 66-72. It alleges that Michigan's Secretary of State permitted absentee ballot

applications online, with no signature at all, in violation of Michigan statutes, *id.* ¶¶ 85-89; and that election officials in Wayne County, Michigan simply disregarded statutory signature verification requirements, *id.* ¶¶ 92-95.

In addition to violating the Electors Clause, these actions contradicted fundamental principles of ballot security. As noted above, the Carter-Baker Report highlighted the importance of "*signature verification*" as a critical "safeguard[] to protect ballot integrity" for ballots cast by mail. Carter-Baker Report, *supra*, at 35 (emphasis added). Without safeguards such as signature verification, the Report stated that "[v]ote by mail is ... likely to increase the risks of fraud and contested elections ... where the safeguards for ballot integrity are weaker." *Id.* The importance of signature verification is hard to overstate, because absentee-ballot fraud schemes commonly involve "common techniques of signature forging," typically by nefarious actors who are unfamiliar with the voter's signature. *Mo. NAACP*, *supra*, at 17. Verifying the voter's signature by comparison to the signature on the voter rolls thus provides the most critical safeguard against fraud.

Insecure ballot handling. The Bill of Complaint alleges that non-legislative actors changed or abolished statutory rules for the secure handling of absentee and mail-in ballots in Pennsylvania, Michigan, and Wisconsin. It alleges that election officials in Democratic areas of Pennsylvania violated state statutes by opening and reviewing mail-in ballots that were required to be kept locked and secure until Election Day. Bill of Complaint, ¶¶ 50-51. It alleges that Michigan's Secretary of State, acting in violation of state law, sent 7.7 million unsolicited

absentee-ballot applications to Michigan voters, thus "flooding Michigan with millions of absentee ballot applications prior to the 2020 general election." *Id.* ¶¶ 80-84. And it alleges that the Wisconsin Election Commission violated state law by placing hundreds of unmonitored boxes for the submission of absentee and mail-in ballots around the State, concentrated in heavily Democratic areas. *Id.* ¶¶ 107-114.

In addition to violating the Electors Clause, these actions contradicted commonsense ballot-security recommendations. The Department of Justice's Manual on *Federal Prosecution of Election Offenses* notes that vulnerability to mishandling is what makes absentee ballots "particularly susceptible to fraudulent abuse" because "they are marked and cast outside the presence of election officials and the structured environment of a polling place." DOJ Manual, at 28-29. According to the Manual, "[o]btaining and marking absentee ballots without the active input of the voters involved" is one of "the more common ways" that election fraud "crimes are committed." *Id.* at 28. For this reason, the Carter-Baker Commission made a series of recommendations in favor of preventing such insecurity in the handling of ballots. For example, the Commission recommended that "States should make sure that absentee ballots received by election officials before Election Day are kept secure until they are opened and counted." *Id.* at 46. It also recommended that States "prohibit[] 'third-party' organizations, candidates, and political party activists from handling absentee ballots." *Id.*

Inconsistent Statewide Standards. The Bill of Complaint alleges that the Defendant States provided different standards and treatment for mail-

in ballots submitted in different areas of each State, and that this differential treatment uniformly provided a partisan advantage to one side in the Presidential election. It alleges that election officials in Philadelphia and Allegheny County, Pennsylvania, applied different standards to voters in those Democratic strongholds than applied to other voters in Pennsylvania, in violation of state law. Bill of Complaint, ¶¶ 52-54. Similarly, it alleges that Milwaukee, Wisconsin violated state law by authorizing election officials to "correct" disqualifying omissions on ballot envelopes by entering information that the voter should have entered with a red pen, while no similar "correction" process was granted to other voters in that State. *Id.* ¶¶ 123-127. And it alleges that Wayne County, Michigan provided favorable treatment to its voters, in violation of state statutes, by simply ignoring statutorily required signature-verification requirements. *Id.* ¶¶ 92-95.

Again, such differential treatment, under circumstances raising concerns of partisan bias, contradicts universal recommendations for integrity and public confidence in elections. As this Court stated in *Bush* v. *Gore*, "[t]he idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government." 531 U.S. at 107 (quoting *Moore* v. *Ogilvie*, 394 US 814 (1969)). The Carter-Baker Report noted that "inconsistent or incorrect application of electoral procedures may have the effect of discouraging voter participation and may, on occasion, raise questions about bias in the way elections are conducted." Carter-Baker Report, at 49. "Such problems raise public suspicions or may provide

grounds for the losing candidate to contest the result in a close election." *Id.*

Excluding Bipartisan Observers. The Bill of Complaint alleges that certain counties in Defendant States excluded bipartisan observers from the ballot-opening and ballot-counting processes. For example, it alleges that election officials in Philadelphia and Allegheny County, Pennsylvania, violated state law by excluding Republican observers from the opening, counting, and recording of absentee ballots in those counties. Bill of Complaint, ¶ 49. And it alleges that election officials in Wayne County, Michigan violated state statutes by systematically excluding poll watchers from the counting and recording of absentee ballots. *Id.* ¶¶ 90-91.

Such actions, as alleged, raise grave concerns about the integrity of the vote count in those counties. As the Carter-Baker Report emphasized, States should "provide observers with meaningful opportunities to monitor the conduct of the election." Carter-Baker Report, at 47. "To build confidence in the electoral process, it is important that elections be administered in a neutral and professional manner," without the appearance of partisan bias." *Id.* at 49. When observers of one political party are illegally and systematically excluded from observing the vote count, "the appearance of partisan bias" is inevitable. *Id.* For counties in Defendant States to exclude Republican observers weakens public confidence in the electoral process and raises grave concerns about the integrity of ballot counting in those counties.

Extending the deadline to receive ballots. The Bill of Complaint alleges that a non-legislative actor in Pennsylvania—its Supreme Court—extended the statutory deadline to receive absentee and mail-in

ballots without authorization of the "Legislature thereof," and directed that ballots with illegible postmarks or no postmarks at all would be deemed timely if received within the extended deadline. Bill of Complaint, ¶¶ 48, 55. Again, these non-legislative changes raise grave concerns about election integrity in Pennsylvania. First, they created a post-election window of time during which nefarious actors could wait and see whether the Presidential election would be close, and whether perpetrating fraud in Pennsylvania would be worthwhile. Second, they enhanced the opportunities for fraud by mandating that late ballots must be counted even when they are not postmarked or have no legible postmark, and thus there is no evidence they were mailed by Election Day.

These changes created needless vulnerability to actual fraud and undermined public confidence in a Presidential election. As the Department of Justice's Manual of *Federal Prosecution of Election Offenses* states, "the conditions most conducive to election fraud are close factional competition within an electoral jurisdiction for an elected position that matters." DOJ Manual, at 2-3. "[E]lection fraud is most likely to occur in electoral jurisdictions where there is close factional competition for an elected position that matters." *Id.* at 27. That statement exactly describes the conditions in each of the Defendant States in the recent Presidential election.

CONCLUSION

"Fraud in any degree and in any circumstance is subversive to the electoral process." Carter-Baker Report, at 45. The allegations in the Bill of Complaint raise serious constitutional issues under the Electors

Clause of Article II, § 1. In addition, the long series allegations of unconstitutional actions that stripped away safeguards against fraud in voting by mail raise concerns about the integrity of the recent election and the public confidence in its outcome. These are questions of great public importance that warrant this Court's attention. The Court should grant the Plaintiff's Motion for Leave to File Bill of Complaint.

December 9, 2020

Respectfully submitted,

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ADDITIONAL COUNSEL

[To be inserted]

Jeffrey DeSousa

From: Amit Agarwal
Sent: Tuesday, December 8, 2020 7:12 PM
To: Evan Ezray; Jeffrey DeSousa
Subject: Fw: Follow Up Docs
Attachments: Doc 56 Ex A Settlement Agreement.pdf; US_DIS_GAND_1_20cv4809_RESPONSE_in_Opposition_re_6_MOTION_for_Temporary_....pdf

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From: Andrew Pinson <APinson@LAW.GA.GOV>
Sent: Tuesday, December 8, 2020 3:01 PM
To: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Subject: FW: Follow Up Docs

Amit,

Our chief of staff asked me to pass this along. Let me know if you need anything else.

Thanks,
Andrew

Andrew Pinson
Solicitor General
Office of the Attorney General Chris Carr
Solicitor General Unit
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apinson@law.ga.gov
Georgia Department of Law
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From: Travis Johnson
Sent: Tuesday, December 8, 2020 3:00 PM
To: Andrew Pinson <APinson@LAW.GA.GOV>
Cc: Wright Banks <wbanks@law.ga.gov>
Subject: Follow Up Docs

Can you get these over to FL's SG per General Moody's request to Chris?

Travis Johnson
Chief of Staff
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Executive Office
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tjohnson@law.ga.gov
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Attachment A

COMPROMISE SETTLEMENT AGREEMENT AND RELEASE

This **Compromise Settlement Agreement and Release** ("Agreement") is made and entered into by and between the Democratic Party of Georgia, Inc. ("DPG"), the DSCC, and the DCCC (collectively, the "Political Party Committees"), on one side, and Brad Raffensperger, Rebecca N. Sullivan, David J. Worley, Seth Harp, and Anh Le (collectively, "State Defendants"), on the other side. The parties to this Agreement may be referred to individually as a "Party" or collectively as the "Parties." The Agreement will take effect when each and every Party has signed it, as of the date of the last signature (the "Effective Date").

WHEREAS, in the lawsuit styled as *Democratic Party of Georgia, et al. v. Raffensperger, et al.*, Civil Action File No. 1:19-cv-5028-WMR (the "Lawsuit"), the Political Party Committees have asserted claims in their Amended Complaint [Doc. 30] that the State Defendants' (i) absentee ballot signature matching procedure, (ii) notification process when an absentee ballot is rejected for any reason, and (iii) procedure for curing a rejected absentee ballot, violate the First and Fourteenth Amendments to the United States Constitution by unduly burdening the right to vote, subjecting similarly situated voters to disparate treatment, and failing to afford Georgia voters due process (the "Claims"), which the State Defendants deny;

WHEREAS, the State Defendants, in their capacity as members of the State Election Board, adopted on February 28, 2020 Rule 183-1-14-.13, which sets forth specific and standard notification procedures that all counties must follow after rejection of a timely mail-in absentee ballot;

WHEREAS, the State Defendants have a Motion to Dismiss [Doc. 45] pending before the Court, which sets forth various grounds for dismissal of the Amended Complaint, including mootness in light of the State Election Board's promulgation subsequent to adoption on February 28, 2020 of Rule 183-1-14-.13, which Motion the Political Party Committees deny is meritorious;

WHEREAS, all Parties desire to compromise and settle all disputed issues and claims arising from the Lawsuit, finally and fully, without admission of liability, having agreed on the procedures and guidance set forth below with respect to the signature matching and absentee ballot rejection notification and cure procedures; and

WHEREAS, by entering into this Agreement, the Political Party Committees do not concede that the challenged laws and procedures are constitutional, and

similarly, the State Defendants do not concede that the challenged laws and procedures are unconstitutional.

NOW THEREFORE, for and in consideration of the promises and covenants contained herein, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties do hereby agree as follows:

1. **Dismissal.** Within five (5) business days of March 22, 2020, the effective date of the Prompt Notification of Absentee Ballot Rejection rule specified in paragraph 2(a), the Political Party Committees shall dismiss the Lawsuit with prejudice as to the State Defendants.

2. **Prompt Notification of Absentee Ballot Rejection.**

(a) The State Defendants, in their capacity as members of the State Election Board, agree to promulgate and enforce, in accordance with the Georgia Administrative Procedures Act and State Election Board policy, the following State Election Board Rule 183-1-14-.13 of the Georgia Rules and Regulations:

> When a timely submitted absentee ballot is rejected, the board of registrars or absentee ballot clerk shall send the elector notice of such rejection and opportunity to cure, as provided by O.C.G.A. § 21-2-386, by mailing written notice, and attempt to notify the elector by telephone and email if a telephone number or email is on the elector's voter registration record, no later than the close of business on the third business day after receiving the absentee ballot. However, for any timely submitted absentee ballot that is rejected on or after the second Friday prior to Election Day, the board of registrars or absentee ballot clerk shall send the elector notice of such rejection and opportunity to cure, as provided by O.C.G.A. § 21-2-386, by mailing written notice, and attempt to notify the elector by telephone and email if a telephone number or email is on the elector's voter registration record, no later than close of business on the next business day.
>
> Ga. R. & Reg. § 183-1-14-.13 Prompt Notification of Absentee Ballot Rejection

(b) Unless otherwise required by law, State Defendants agree that any amendments to Rule 183-1-14-.13 will be made in good faith in the spirit of ensuring that voters are notified of rejection of their absentee ballots with ample time to cure

their ballots. The Political Party Committees agree that the State Election Board's proposed amendment to Rule 183-1-14-.13 to use contact information on absentee ballot applications to notify the voter fits within that spirit.

3. Signature Match.

(a) Secretary of State Raffensperger, in his official capacity as Secretary of State, agrees to issue an Official Election Bulletin containing the following procedure applicable to the review of signatures on absentee ballot envelopes by county elections officials and to incorporate the procedure below in training materials regarding the review of absentee ballot signatures for county registrars:

> County registrars and absentee ballot clerks are required, upon receipt of each mail-in absentee ballot, to compare the signature or mark of the elector on the mail-in absentee ballot envelope with the signatures or marks in eNet and on the application for the mail-in absentee ballot. If the signature does not appear to be valid, registrars and clerks are required to follow the procedure set forth in O.C.G.A. § 21-2-386(a)(1)(C). When reviewing an elector's signature on the mail-in absentee ballot envelope, the registrar or clerk must compare the signature on the mail-in absentee ballot envelope to each signature contained in such elector's voter registration record in eNet and the elector's signature on the application for the mail-in absentee ballot. If the registrar or absentee ballot clerk determines that the voter's signature on the mail-in absentee ballot envelope does not match any of the voter's signatures on file in eNet or on the absentee ballot application, the registrar or absentee ballot clerk must seek review from two other registrars, deputy registrars, or absentee ballot clerks. A mail-in absentee ballot shall not be rejected unless a majority of the registrars, deputy registrars, or absentee ballot clerks reviewing the signature agree that the signature does not match any of the voter's signatures on file in eNet or on the absentee ballot application. If a determination is made that the elector's signature on the mail-in absentee ballot envelope does not match any of the voter's signatures on file in eNet or on the absentee ballot application, the registrar or absentee ballot clerk shall write the names of the three elections officials who conducted the signature review across the face of the absentee ballot envelope, which shall be in addition to writing "Rejected" and the reason for the rejection as required under OCGA 21-2-386(a)(1)(C). Then, the registrar or absentee ballot clerk shall

commence the notification procedure set forth in O.C.G.A. § 21-2-386(a)(1)(C) and State Election Board Rule 183-1-14-.13.

(b) The Parties agree that the guidance in paragraph 3(a) shall be issued in advance of all statewide elections in 2020, including the March 24, 2020 Presidential Primary Elections and the November 3, 2020 General Election.

4. Consideration of Additional Guidance for Signature Matching. The State Defendants agree to consider in good faith providing county registrars and absentee ballot clerks with additional guidance and training materials to follow when comparing voters' signatures that will be drafted by the Political Party Committees' handwriting and signature review expert.

5. Attorneys' Fees and Expenses. The Parties to this Agreement shall bear their own attorney's fees and costs incurred in bringing or defending this action, and no party shall be considered to be a prevailing party for the purpose of any law, statute, or regulation providing for the award or recovery of attorney's fees and/or costs.

6. Release by The Political Party Committees. The Political Party Committees, on behalf of themselves and their successors, affiliates, and representatives, release and forever discharge the State Defendants, and each of their successors and representatives, from the prompt notification of absentee ballot rejection and signature match claims and causes of action, whether legal or equitable, in the Lawsuit.

7. No Admission of Liability. It is understood and agreed by the Parties that this Agreement is a compromise and is being executed to settle a dispute. Nothing contained herein may be construed as an admission of liability on the part of any of the Parties.

8. Authority to Bind; No Prior Assignment of Released Claims. The Parties represent and warrant that they have full authority to enter into this Agreement and bind themselves to its terms.

9. No Presumptions. The Parties acknowledge that they have had input into the drafting of this Agreement or, alternatively, have had an opportunity to have input into the drafting of this Agreement. The Parties agree that this Agreement is and shall be deemed jointly drafted and written by all Parties to it, and it shall be interpreted fairly, reasonably, and not more strongly against one Party than the other.

Accordingly, if a dispute arises about the meaning, construction, or interpretation of this Agreement, no presumption will apply to construe the language of this Agreement for or against any Party.

10. Knowing and Voluntary Agreement. Each Party to this Agreement acknowledges that it is entering into this Agreement voluntarily and of its own free will and accord, and seeks to be bound hereunder. The Parties further acknowledge that they have retained their own legal counsel in this matter or have had the opportunity to retain legal counsel to review this Agreement.

11. Choice of Law, Jurisdiction and Venue. This Agreement will be construed in accordance with the laws of the State of Georgia. In the event of any dispute arising out of or in any way related to this Agreement, the Parties consent to the sole and exclusive jurisdiction of the state courts located in Fulton County, Georgia. The Parties waive any objection to jurisdiction and venue of those courts.

12. Entire Agreement; Modification. This Agreement sets forth the entire agreement between the Parties hereto, and fully supersedes any prior agreements or understandings between the Parties. The Parties acknowledge that they have not relied on any representations, promises, or agreements of any kind made to them in connection with their decision to accept this Agreement, except for those set forth in this Agreement.

13. Counterparts. This Agreement may be executed in counterparts which, taken together, will constitute one and the same Agreement and will be effective as of the date last set forth below, and signatures by facsimile and electronic mail will have the same effect as the originals.

IN WITNESS WHEREOF, the Parties have set their hands and seals to this instrument on the date set forth below.

Dated: March 6, 2020

/s/ Bruce V. Spiva

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Counsel for State Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CORECO JA'QAN PEARSON, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	CIVIL ACTION NO.
v.	)	1:20-cv-4809-TCB
	)	
BRIAN KEMP, *et al.*,	)	
	)	
Defendants.	)	

DEFENDANTS' CONSOLIDATED BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS AND RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR INJUNCTIVE RELIEF

Christopher M. Carr Attorney General Bryan K. Webb Deputy Attorney General Russell D. Willard Senior Assistant Attorney General Charlene S. McGowan Assistant Attorney General Office of the Georgia Attorney General 40 Capitol Square SW Atlanta, GA 30334 *Counsel for the State Defendants*	Carey Miller Josh Belinfante Melanie Johnson Robbins Ross Alloy Belinfante Littlefield LLC 500 14th Street NW Atlanta, GA 30318

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INTRODUCTION

Plaintiffs, a group of disappointed Republican presidential electors, filed a Complaint alleging widespread fraud in the November general election in Georgia, weaving an unsupported tale of "ballot stuffing," the switching of votes by an "algorithm" uploaded to the state's electronic voting equipment that switched votes from President Trump to Joe Biden, hacking by foreign actors from Iran and China, and other nefarious acts by unnamed actors. Plaintiffs did not bring this election challenge in state court as provided by Georgia's Election Code. Instead, they ask this Court to change the election outcome by judicial fiat and order the Governor, the Secretary, and the State Election Board to "de-certify" the results of the election and replace the presidential electors for Joe Biden (who were selected by a majority of Georgia voters by popular vote as provided by state law) with presidential electors for President Trump. Their claims would be extraordinary if true, but they are not. Much like the mythological "kraken" monster[1] after which Plaintiffs have named this lawsuit, their claims of election fraud and malfeasance belong more to the kraken's realm of mythos than they do to reality.

[1] A "kraken" is a mythical sea monster appearing in Scandinavian folklore, being "closely linked to sailors' ability to tell tall tales." *See* https://en.wikipedia.org/wiki/Kraken.

The truth is that the 2020 general election was, according to the federal agency tasked with overseeing election security, "the most secure in history." (*See* **Exhibit B**.)[2] Cybersecurity experts have determined that there is "***no evidence that any voting system deleted or lost votes, changed votes, or was in any way compromised***." (*Id.*) The accuracy of the presidential election results has been confirmed through at least (1) the statewide risk-limiting audit; (2) a hand recount; and (3) independent testing, which has confirmed that the security of the state's electronic voting equipment was not compromised.

As a threshold matter, the Eleventh Circuit issued an opinion today that mandates dismissal of this action for lack of standing and mootness in the related case of *Wood v. Raffensperger*, No. 20-14418, which raised many of the same claims as this case and sought similar relief. (*See* slip opinion attached as **Exhibit A**). In affirming the district court's decision denying Wood's motion to enjoin certification of the election results, the panel held:

> We agree with the district court that Wood lacks standing to sue because he fails to allege a particularized injury. And because Georgia has already certified its election results and its slate of presidential electors, Wood's requests for emergency relief are moot to the extent they concern the 2020 election. The Constitution makes clear that

[2] *See* Cybersecurity & Infrastructure Security Agency's Joint Statement From Elections Infrastructure Government Coordinating Council & the Election Infrastructure Selector Coordinating Committees, November 12, 2020. A true and correct copy of this statement is attached as **Exhibit B**.

> federal courts are courts of limited jurisdiction, U.S. Const. art. III; we may not entertain post-election contests about garden-variety issues of vote counting and misconduct that may properly be filed in state courts.

(slip op. at 1). This decision squarely controls, and the Court should dismiss the action because Plaintiffs lack an injury in fact sufficient to establish Article III standing. Certification of the election results also moots Plaintiffs' claims, as the Court has no authority under federal law to undo what has already been done.

Other threshold issues bar the relief Plaintiffs seek. Even if they were not moot, Plaintiffs' claims are barred by laches because of their inexcusable delay in raising their challenge to the State's electronic voting system and absentee ballot procedures until after their preferred candidate lost. Plaintiffs' claims are also barred by the Eleventh Amendment to the U.S. Constitution, which bars suits for retrospective relief against state officials acting in their official capacity absent a waiver by the State. Similarly, despite their attempts to raise constitutional claims, Plaintiffs' lawsuit is really an election contest challenging the Presidential election, which can and should be brought in a Georgia court as some of Plaintiffs' allies have recently done.

But most importantly, there is no credible evidence to support the drastic and unprecedented remedy of substituting certified presidential election results with the Plaintiffs' preferred candidate. Without this, Plaintiffs cannot clearly establish the

required elements for injunctive relief. Like every state, Georgia has a compelling interest in preserving the integrity of its election process. "Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). Public confidence in the electoral process would certainly be undermined by a court invalidating the certified results of a presidential election in which nearly 5 million Georgians cast ballots. This Court should decline Plaintiffs' unsupportable efforts to overturn the expressed will of the voters, and should deny their request for relief and dismiss this action.

FACTUAL BACKGROUND

I. Georgia's Electronic Voting System is Secure and Has Not Been Compromised.

Plaintiffs allege wide-ranging conspiracy theories that Georgia's electronic voting system has been compromised by Hugo Chavez and the Venezuelan government (or China and Iran, depending on which "expert" is asked), is infected with a vaguely described "weighted" algorithm that switches votes between candidates, and otherwise produces fraudulent results. In support of their argument, Plaintiffs cite to the un-signed declaration of Dr. Shiva Ayyadurai,[3] other redacted

[3] Dr. Ayyadurai claims he is "an engineer with vast experience in engineering systems, pattern recognition, mathematical and computational modeling and analysis." [Doc. 6-1, ¶ 2]. Elsewhere, Dr. Ayyadurai claims to be the inventor of

declarations, hearsay in the form of various news articles, and contested evidentiary filings in the case *Curling v. Raffensperger*, No. 1:17-cv-2989 (N.D. Ga.).[4]

The Plaintiffs—blinded by either willful ignorance or a lack of basic knowledge of Georgia elections—are incorrect. Georgia's electronic voting system was adopted in compliance with state and federal law, is certified by the Election Assistance Commission following inspection and testing conducted by independent Voting System Test Laboratories ("VSTLs"), and has not been compromised. A review of the *facts*, as opposed to Plaintiffs' conspiracies, confirms the inaccuracy of Plaintiffs' allegations.

A. Adoption and selection of Georgia's electronic voting system.

In 2019, the Georgia General Assembly enacted House Bill 316 ("HB 316"), a sweeping and comprehensive reform of Georgia's election laws, which also modernized and further secured Georgia's voting system. Specifically, the General Assembly chose to require a new unified system of voting throughout the State—

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electronic mail. *See* Sam Biddle, *The Crazy Story of the Man Who Pretended to Invent Email*, Business Insider (Mar. 6, 2012), https://www.businessinsider.com/the-crazy-story-of-the-man-who-pretended-to-invent-email-2012-3. State Defendants object to any consideration of Dr. Ayyadurai's report as he is not qualified to offer the opinions proffered and utilizes unreliable methodology.

[4] The *Curling* matter is now subject to two appeals pending in the Eleventh Circuit Court of Appeals, docket numbers 20-13730 and 20-14067.

moving the State away from the secure, but older, direct-recording electronic ("DRE") voting system to a voting system utilizing Ballot-Marking Devices ("BMDs") and optical scanners. The General Assembly determined this replacement of DREs with BMDs should occur "as soon as possible." O.C.G.A. § 21-2-300(a)(2). The legislation placed the responsibility of selecting the equipment for the new voting system on the Secretary of State. O.C.G.A. § 21-2-300(a). However, contrary to Plaintiffs' assertions that Governor Kemp and Secretary Raffensperger "rushed through the purchase of Dominion voting machines and software," (Doc. 6, p. 15), the procurement of Georgia's new voting system was completed through an open and competitive bidding process as required by Georgia's State Purchasing Act, O.C.G.A. § 50-5-50. Secretary Raffensperger did not make the purchasing decision alone, but established a Selection Committee comprised of seven individuals who were tasked with reviewing bid proposals.[5] Selection Committee members evaluated those proposals using criteria and processes set forth on a Master Technical Evaluation spreadsheet.[6] Of the three requests for proposals evaluated by the Selection Committee, Dominion Voting Systems ("Dominion") received the highest overall score. *Id.*

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[5] *See* https://sos.ga.gov/admin/uploads/Selection%20Committee%20Bios.pdf

[6] *See* https://sos.ga.gov/admin/uploads/MasterTechnicalEvaluation_redacted.xls

On July 29, 2019, Secretary Raffensperger posted a Notice of Intent to Award the contract for the statewide voting system to Dominion. No bid protests were received by the State, and Secretary Raffensperger issued a final Notice of Intent to Award on August 9, 2019. *Id.* The voting system consists of BMDs that print ballots by way of a connected printer and optical scanners connected to a locked ballot box. The Dominion BMD allows the voter to make selections on a screen and then prints those selections onto a paper ballot. The voter has an opportunity to review the paper ballot for accuracy before placing it into the scanner. After scanning, the paper ballot drops into a locked ballot box connected to the scanner. BMDs thus create an auditable, verifiable ballot, as required by statute. O.C.G.A. § 21-2-300(a)(2) ("electronic ballot markers shall produce paper ballots which are marked with the elector's choices **in a format readable by the elector**") (emphasis added).

B. Testing and certification of Georgia's voting system.

Georgia's voting system is subject to two different certification requirements. First, the voting system must have been certified by the United States Election Assistance Commission ("EAC") at the time of procurement. O.C.G.A. § 21-2-300(a)(3). Second, the voting system must also be certified by the Secretary of State as safe and practicable for use. Georgia's BMD system meets both requirements.

The Help America Vote Act ("HAVA") created the EAC, which set up a rigorous process for voting-equipment certification, working with committees of experts and coordinating with the National Institute of Standards and Technology. 52 U.S.C. § 20962; *see also* 52 U.S.C. §§ 20962, 20971 (test lab standards). The EAC certifies voting systems as in compliance with the Voluntary Voting System Guidelines ("VVSG"), version 1.0, and does so by utilizing approved, independent Voting System Test Laboratories ("VSTL"). In the case of the voting system utilized in Georgia, SLI Compliance served as the VSTL tasked with testing the system for EAC purposes. The system utilized by Georgia, Democracy Suite 5.5-A, was certified by the EAC on January 30, 2019.[7]

Separately, the Secretary of State utilized another independent EAC-certified VSTL, Pro V&V, to conduct testing for *state* certification of the voting system. Following the VSTL's testing, the Secretary issued a Certification of the Dominion Voting Systems as meeting all applicable provisions of the Georgia Election Code and Rules of the Secretary of State on August 9, 2019.[8] That certification has been

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[7] *See* United States Election Assistance Commission, Agency Decision — Grant of Certification, https://www.eac.gov/sites/default/files/voting_system/files/Decision.Authority.Grant.of.Cert.D-Suite5.5-A.pdf

[8] Plaintiffs erroneously claim that both the Certificate and a test report signed by Michael Walker were "undated" and have attached altered documents that have been cropped to remove the dates of the documents. *See* Compl., ¶12 and Exhibits 5 and 6 thereto. A correct copy of the Certificate showing the date of August 9,

updated due to de minimis changes in system components on two different occasions since, on February 19, 2020, and again on October 5, 2020.

C. Georgia's electronic voting system has not been compromised and Plaintiffs' assertions to the contrary are disproven by the Risk-Limiting Audit.

Plaintiffs' conjecture and speculation does not rebut the reality that Georgia's voting system has not been compromised. Not only have two separate EAC-Certified independent VSTLs confirmed that the system operates as intended, but Georgia's risk-limiting audit ("RLA") further confirms that no "weighted" vote switching occurred.

Shockingly, the basis for Plaintiffs' outlandish claims of system compromise are rooted in suspect statistical—not software—analyses that they suggest irrefutably proves vote switching occurred. For example, in Dr. Ayyadurai's unsigned declaration, the author references (without citation) vote totals in certain precincts for the proposition that a "weighted race" algorithm must be responsible. (*See generally* Doc. 6-1.) The author, however, makes no attempt to evaluate any other reasons voters may have chosen not to vote for President Trump. Indeed, the

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2019 may be viewed at https://sos.ga.gov/admin/uploads/Dominion_Certification.pdf. A copy of the test report showing a date of August 7, 2019 may be found at https://sos.ga.gov/admin/uploads/Dominion_Test_Cert_Report.pdf.

author of that declaration speculates that 48,000 of 373,000 votes cast in Dekalb County were switched in this manner from Trump to Biden, (Doc. 6-1, p. 28), meaning that (under the author's theory) the results in Dekalb County would be 106,373 for Trump to 260,227 for Biden (or approximately 28.6% to 70%). Of course, this would be extraordinarily unusual for heavily democratic Dekalb County, in which President Trump received 51,468 votes (16.47%) in 2016, when the State was using an entirely different voting system.[9]

Moreover, the existence of such a "weighted" algorithm would have been detected in the RLA conducted this year. Following the counties' tabulation of the November election results, but prior to certification, Secretary Raffensperger was required by law to conduct a risk-limiting audit in accordance with O.C.G.A. § 21-2-498. State Election Board Rule 183-1-15-.04 provides that the Secretary of State shall choose the particular election contest to audit. Recognizing the importance of clear and reliable results for such an important contest, Secretary Raffensperger selected the presidential race for the audit.[10] *See* **Exhibit C**.

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[9] *See* Dekalb County Election Results, 2016, *available at* https://results.enr.clarityelections.com/GA/DeKalb/64036/183321/en/summary.html.

[10] *See* Statement of Secretary Raffensperger, "Historic First Statewide Audit of Paper Ballots Upholds Results of Presidential Race, attached as Exhibit C hereto and available at

County election officials were then required to count by hand all absentee ballots and paper ballots printed by the Dominion BMDs. *See id.* The audit confirmed the same outcome of the presidential race as the original tabulation using the Dominion voting systems equipment. *Id.* While there was a slight differential between the audit results and the original machine counts, the differential was well within the expected margin of error that occurs when hand-counting ballots. *Id.* A 2012 study by Rice University and Clemson University found that hand counting ballots in post-election audit or recount procedures can result in error rates of up to 2 percent. *Id.* In Georgia's audit, the highest error rate reported in any county recount was 0.73%, and most counties found no change in their final tally. *Id.*

The audit results refute Plaintiffs' speculation that Dominion machines or software might have somehow flipped, switched, or "stuffed" ballots in the 2020 presidential election. *Id.* Because Georgia voters can verify that their paper ballots (whether hand-marked absentee ballots or ballots marked by BMDs) accurately reflect their intended votes, any actual manipulation of the initial electronic vote count would have been revealed when the hand count of paper ballots presented a different result. The fact that this did not happen forecloses the possibility that

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https://sos.ga.gov/index.php/elections/historic_first_statewide_audit_of_paper_ballots_upholds_result_of_presidential_race

Dominion equipment or software had been manipulated to somehow record false votes for one candidate or to eliminate votes from another.

In sum, the components of Georgia's voting system have been evaluated, tested, and certified by two different independent laboratories as compliant with both state and federal requirements and safe for use in elections. Neither of those two VSTLs identified any "weighted" vote counting algorithm, nor any other impropriety. And, in Georgia's 2020 general election, the correct operation of the voting system was again confirmed by the state's risk-limiting audit.

II. Absentee Ballots Were Validly Processed According to Law

Plaintiffs' claim that the rules under which county elections officials verified absentee ballots are contrary to Georgia law is also without merit. Absentee ballots for the 2020 general election were processed by county election officials according to the procedures established by the Georgia legislature. These procedures were part of HB 316, bipartisan legislation passed in 2019 to reform the state's election code and implement a new electronic voting system. The reforms kept in place Georgia's policy of "no excuse" absentee voting, but modified the technical requirements for absentee ballots. HB 316 modified the language of the oath on the outer absentee ballot envelope to leave the signature requirement but remove the elector's address and date of birth. *See* O.C.G.A. § 21-2-384. Further, HB 316 added a "cure"

provision, which requires election officials to give a voter until three days after the date of the election to cure an issue with the voter's signature before rejecting an absentee ballot for a missing or mismatched signature on the outer envelope. *See* O.C.G.A. § 21-2-386(a)(1)(C). The "cure" provision was added to the statute's requirement that election officials "promptly notify" the voter of a rejected absentee ballot due to a missing or mismatched signature.

On November 6, 2019, the Democratic Party of Georgia, DSCC, and DCCC (collectively, "Political Party Organizations") sued the State Defendants, alleging that the "promptly notify" language of O.C.G.A. § 21-2-386(a)(1)(C) was vague and ill-defined and left counties without standards for verifying signatures on absentee ballots. (App'x Vol. I at 144-49).

While that action was pending, the State Election Board ("SEB") approved a rule that established a uniform standard for counties to follow to "promptly notify" voters when their absentee ballot is rejected as required by O.C.G.A. § 21-2-386(a)(1)(C). The rule provides that when a timely submitted absentee ballot is rejected, the board of registrars or absentee ballot clerk must send the voter notice of the rejection and opportunity to cure within three business days, or by the next business day if within ten days of Election Day. Ga. Comp. R. & Regs. r. 183-1-14-.13 (the "Prompt Notification Rule").

The Prompt Notification Rule was adopted pursuant to the SEB's rule-making authority under O.C.G.A. § 21-2-31(2). It provides a uniform three-day standard for "prompt" notification required by O.C.G.A. § 21-2-386(a)(1)(C) when an absentee ballot is rejected, so that all counties give notice in a uniform manner. The Prompt Notification Rule was promulgated pursuant to the Georgia Administrative Procedure Act, published for public comment, and discussed at multiple public hearings before it became effective on March 22, 2020.

Because the Prompt Notification Rule resolved the issues in the pending lawsuit, the parties resolved the matter in a settlement agreement that included, among other terms, an agreement that (1) the State Election Board would promulgate and enforce the Prompt Notification Rule; and (2) the Secretary of State would issue guidance to county election officials regarding the signature matching process.

On May 1, 2020, the Secretary of State distributed an Official Election Bulletin ("OEB"), advising county election officials of the Prompt Notification Rule and providing guidance for reviewing signatures on absentee-ballot envelopes. (Declaration of Chris Harvey ¶ 5).[11] The OEB instructed that after an election official makes an initial determination that the signature on the absentee ballot envelope does

[11] The Harvey Declaration was submitted in the related case of *Wood v. Raffensperger*, Civil Action No. 1:20-CV-4651-SDG and is attached as **Exhibit D**.

not match the signature on file for the voter pursuant to O.C.G.A. § 21-2-386(a)(1)(B) and (C), two additional registrars, deputy registrars, or absentee ballot clerks should also review the signature, and the ballot should be rejected if at least two of the three officials agree that the signature does not match. (*Id.*) The OEB expressly instructs county officials to comply with state law. (*Id.*)

Contrary to Plaintiff's claim that the Prompt Notification Rule and the OEB have significantly disrupted the signature verification process, these measures have had no detectable effect on the absentee ballot rejection rate since the last general election in 2018. (Harvey Dec. ¶¶ 6, 7). An analysis of the number of absentee-ballot rejections for signature issues for 2020 as compared to 2018 found that the rejection rate for absentee ballots with missing or non-matching signatures in the 2020 general election was 0.15%; the same rejection rate for signature issues as in 2018 before the new measures were implemented. (*Id.*)

ARGUMENT AND CITATION OF AUTHORITIES

I. The Court Lacks Subject Matter Jurisdiction because Plaintiffs Cannot Establish Article III Standing.

Plaintiffs raise three constitutional counts in their Complaint: (1) that the State Defendants violated the Electors and Elections Clauses of Articles I and II ("Count I"); that the State Defendants violated the equal protection clause of the U.S. Constitution ("Count II"); that the State Defendants denied Plaintiffs Due Process

related to "alleged disparate treatment of absentee/mail-in voters among different counties" ("Count III"); and that the State Defendants denied Plaintiffs Due Process "on the right to vote" ("Count IV"). Plaintiffs also bring a state law election contest claim against Defendants pursuant to O.C.G.A. § 21-5-522, invoking the Court's supplemental jurisdiction under 28 U.S.C. § 1367. However, because Plaintiffs cannot establish standing as to any of these causes of action, the Court lacks jurisdiction to consider the merits of Plaintiffs' claims and the case should be dismissed.

Federal courts have an independent obligation to ensure that subject-matter jurisdiction exists before reaching the merits of a dispute. *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1245 (11th Cir. 2020) (vacating and ordering dismissal of voting rights case due to lack of standing). "For a court to pronounce upon . . . the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires." *Id.* (citation omitted). "If at any point a federal court discovers a lack of jurisdiction, it must dismiss the action." *Id.*

Article III of the Constitution limits the subject-matter jurisdiction of federal courts to "Cases" and "Controversies." U.S. Const. art. III, § 2. A party invoking federal jurisdiction bears the burden of establishing standing at the commencement of the lawsuit. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). As an

irreducible constitutional minimum, Plaintiffs must show they have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision. *Lujan*, 504 U.S. at 561. As the party invoking federal jurisdiction, Plaintiffs bear the burden at the pleadings phase of "clearly alleg[ing] facts demonstrating each element." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016).

A. Plaintiffs have not Alleged an Injury in Fact Sufficient to Form a Basis for Standing.

Injury in fact is the "first and foremost" of the standing elements. *Spokeo*, 136 S. Ct. at 1547. An injury in fact is "an invasion of a legally protected interest that is both concrete and particularized and actual or imminent, not conjectural or hypothetical." *Trichell v. Midland Credit Mgmt., Inc.*, 964 F.3d 990, 996 (11th Cir. 2020); *see also Bognet v. Sec'y Commonwealth of Pa.*, No. 20-3214, 2020 U.S. App. LEXIS 35639 at *16 (3d Cir. Nov. 13, 2020) ("To bring suit, you—and you personally—must be injured, and you must be injured in a way that concretely impacts your own protected legal interests.").

The alleged injury must be "distinct from a generally available grievance about government." *Gill v. Whitford*, 138 S. Ct. 1916, 1923 (2018). This requires more than a mere "keen interest in the issue." *Trump v. Hawaii*, 138 S. Ct. 2392, 2416 (2018); *see also Lance v. Coffman*, 549 U.S. 437, 440–41 (2007) ("Our refusal

to serve as a forum for generalized grievances has a lengthy pedigree. . . . [A] generalized grievance that is plainly undifferentiated and common to all members of the public" is not sufficient for standing).

It is for this reason that the Eleventh Circuit found lack of standing in the *Wood* case. The plaintiff in that case could not "explain how his interest in compliance with state election laws is different from that of any other person. Indeed, he admits that any Georgia voter could bring an identical suit. But the logic of his argument sweeps past even that boundary. All Americans, whether they voted in this election or whether they reside in Georgia, could be said to share [plaintiff's] interest in "ensur[ing] that [a presidential election] is properly administered." (slip op., **Ex. A**, at 11).

Plaintiffs have fared no better at articulating a particularized grievance that is somehow different than that of the general voting public. In fact, throughout their Complaint, Plaintiffs allege that their interests are one and the same as any Georgia voter. *See, e.g.* Compl. at ¶ 156 ("Defendants…diluted the lawful ballots of Plaintiffs and of other Georgia voters and electors…"); ¶ 163 ("Defendants further violated Georgia voters' rights…"), ¶ 199 ("all candidates, political parties, and voters, including without limitation Plaintiffs, have a vested interest in being present and having meaningful access to observe and monitor the electoral process"). Having

confirmed that their interests are no different than the interests of all Georgia voters, Plaintiffs have articulated only generalized grievances insufficient to confer standing upon them to pursue their claims.

B. Plaintiffs do not have Standing as Presidential Electors.

Plaintiffs assert that by virtue of their status as Republican presidential electors, they are "candidates" that have standing to raise whatever variety of election complaints that they may choose. For this proposition, they cite to only a single case: *Carson v. Simon*, 978 F.3d 1051 (8th Cir. 2020). However, *Carson* was predicated on Minnesota election laws that differ from Georgia's and upon facts that are distinguishable from the Plaintiffs' case. Further, the Third Circuit in *Bognet* recently rejected Plaintiff's broad reading of *Carson*. In that case, the court found that a congressional candidate lacked standing to pursue claims under the Elections and Elector clauses based on a generalized "right to run." It specifically noted its disagreement with *Carson*, saying "The Carson court appears to have cited language from [*Bond v. United States*, 564 U.S. 211 (2011)] without considering the context—specifically, the Tenth Amendment and the reserved police powers—in which the U.S. Supreme Court employed that language. There is no precedent for expanding Bond beyond this context, and the *Carson* court cited none." 2020 U.S. App. LEXIS 35639 at *24, fn. 6; *see also Hotze v. Hollins*, No. 4:20-CV-03709, 2020 WL

6437668 at *2 (S.D. Tex. Nov. 2, 2020) (holding candidate lacked standing under Elections Clause); *Looper v. Boman*, 958 F.Supp. 341, 344 (M.D. Tn. 1997) (candidate lacked standing to claim that violations of state election laws had disenfranchised voters as "[h]ow other people vote…does not in any way relate to plaintiff's own exercise of the franchise and further does not constitute concrete and specific judicially cognizable injury."); *Moncier v. Haslam*, 1 F.Supp.3d 854 (E.D. Tn. 2014) (plaintiff denied opportunity to be placed on ballot as candidate for judicial office shared the same generalized grievance as a large class of citizens and failed to demonstrate concrete and particularized injury).

In finding that presidential elector did have standing to challenge purported violations of state election laws, *Carson* relies heavily on specific provisions of Minnesota elections law that treated presidential electors the same as other candidates for office. However, in Georgia, unlike in Minnesota, all persons possessing the qualifications for voting and who have registered in accordance with the law are considered "Electors." O.C.G.A. § 21-2-2(7). Presidential electors in Georgia are not elected to public office, but perform only a limited ministerial role in which they appear at the Capitol on the designated date and time to carry out the expressed will of Georgia's electors by casting their votes for President and Vice President in the Electoral College. O.C.G.A. § 21-2-11. Presidential electors need

not file notices of candidacy otherwise required of political candidates. O.C.G.A. § 21-2-132. Their names do not appear on the ballot; instead, the names of the candidates for President and Vice President appear on the ballot. O.C.G.A. § 21-2-325. Georgia electors do not elect any presidential electors individually; instead, "that slate of candidates shall be elected to such office which receives the highest number of votes cast." O.C.G.A. § 21-2-501(f).

The Eleventh Circuit has held that voters do not suffer a "concrete and particularized injury" simply because their preferred candidate loses an election (*see Jacobson,* 974 F.3d at 1252), and that such a harm would be based on "generalized partisan preferences" which are insufficient to establish standing. *Id.*; *see also Gill v. Whitford,* 138 S.Ct. 1916, 1933 (2018) (rejecting standing based on "group political interests, not individual legal rights"). Plaintiffs have failed to articulate how they, as presidential electors, have suffered any injury not common to their partisan group political interests, or that would not have also been suffered by all Georgia electors generally.

C. Plaintiffs' Alleged Injuries are not Traceable to the State Defendants.

Not only have Plaintiffs failed to demonstrate an injury in fact, they cannot satisfy the causation requirement of standing, which requires that "a plaintiff's injury must be 'fairly traceable to the challenged action of the defendant, and not the result

of the independent action of some third party not before the court.'" *Jacobson*, 974 F.3d at 1253 (citation omitted); *see also Hollywood Mobile Estates Ltd. v. Seminole Tribe of Fla.*, 641 F.3d 1259, 1265 (11th Cir. 2011) (holding that an injury sufficient to establish standing cannot "result [from] the independent action of some third party not before the court.").

Plaintiffs have introduced declarations and affidavits from witnesses that raise disparate complaints about a variety of events that occurring at various times and places during the November election and subsequent audit. These complaints focus on actions allegedly taken by local elections officials and other third parties that are not named as defendants in this case.[12] Whatever one might conclude from these varied allegations, they all have one thing in common: none of the actions complained of are attributable in any way to any of the State Defendants. Instead, they were taken by local elections officials not named as parties to this case, and any

[12] Examples of these complaints include allegations that Dekalb County elections workers were "more hostile" to Republican observers than Democratic observers (Silva Aff. 06-9 Ex. 18, ¶14), that a Cobb County volunteer audit monitor witnessed "already separated paper machine receipt ballots with barcodes in the Trump tray, placing them in to the Biden tray" (Johnson Aff., Compl., Ex. 17, ¶¶4-5), and that an audit observer at the Lithonia location was too far away from ballots to see how they had been voted and that some auditors were validating ballots without reading them aloud to another auditor. (O'Neal Aff., 6-10, Exhibit J, ¶5-8).

injuries that might have resulted from those actions are not traceable to and cannot be redressed by the State Defendants.

With regard to Plaintiffs' conspiratorial claims related to Dominion equipment and software, there has been no allegation whatsoever that any of the State Defendants participated in any conspiracy or collusion with Dominion or any other third party malicious actor to cause any harm to Plaintiffs or any Georgia voters. The only allegation made against any of the State Defendants is that Governor Kemp and Secretary Raffensperger somehow "rushed" through the equipment selection process. However, this process was an open, competitive bidding process, conducted pursuant to Georgia procurement law, and during *Curling* hearings, and no allegation has been made as to how *any* action or inaction taken by any of the State Defendants during that bidding process might have caused any of Plaintiffs' alleged injuries.

Finally, to the extent that Plaintiffs claim injury as a result of any improprieties in the mailing, processing, validation or tabulation of absentee ballots, these injuries again would not be traceable to any of the State Defendants. Absentee ballots are mailed, processed, validated, and tabulated by local elections officials. *See* O.C.G.A. § 21-2-386. Having failed to establish that any of their purported injuries are traceable to or redressable by the State Defendants, Plaintiffs lack standing and their

claims should be dismissed. *See Jacobson*, 974 F.3d at 1253. *See also Anderson v. Raffensperger*, 1:20-CV-03263, 2020 WL 6048048, at *22 (N.D. Ga. Oct. 13, 2020) (applying *Jacobson* to dismiss election related claims against State Defendants).

II. Plaintiffs' Claims are Moot.

The Eleventh Circuit held in the *Wood* decision today that federal challenges to the certification of the presidential election results in Georgia are now moot. "'We cannot turn back the clock and create a world in which' the 2020 election results are not certified." *Wood v. Raffensperger*, slip op. at 17 (quoting *Fleming v. Gutierrez*, 785 F.3d 442, 445 (10th Cir. 2015)). Accordingly, the case "no longer presents a live controversy with respect to which the court can give meaningful relief." *Troiano v. Supervisor of Elections in Palm Beach Cty., Fla.*, 382 F.3d 1276, 1282 (11th Cir. 2004). Mootness is jurisdictional—because a federal court may only adjudicate cases and controversies, and a ruling that cannot provide meaningful relief is an impermissible advisory opinion. *Id.*

The Court "cannot prevent what has already occurred." *De La Fuente v. Kemp*, 679 F. App'x 932, 933 (11th Cir. 2017); *Yates v. GMAC Mortg. LLC*, No. 1:10-CV-02546-RWS, 2010 WL 5316550, at *2 (N.D. Ga. Dec. 17, 2010) ("The Court is powerless to enjoin what has already occurred."). While Plaintiffs purportedly seek "decertification" of the certifications that Secretary Raffensperger

and Governor Kemp have already executed, they cite no authority whatsoever to support the notion that a court could order such relief. If the Plaintiffs believed that the results certified by Secretary Raffensperger and Governor Kemp were invalid for fraud or other grounds specified in O.C.G.A. § 21-2-522, Georgia provides an adequate remedy at law by setting forth the procedures for a state law election contest to be initiated in the Superior Court of Fulton County. O.C.G.A. §§ 21-2-520, *et seq*. However, there is simply no precedent for a federal court to issue an injunction requiring either Governor Kemp or Secretary Raffensperger to "decertify" their already-issued certifications or to certify results in direct contravention of the actual election result.

III. Plaintiffs' Claims are Barred by the Eleventh Amendment.

Plaintiffs' federal claims are asserted against the individually named State Defendants in their official capacities. (Doc. 1 at ¶¶ 31-33). These claims are barred by the Eleventh Amendment. The Eleventh Amendment bars suit against a State or one of its agencies, departments or officials, absent a waiver by the State or a valid congressional override, when the State is the real party in interest. *Kentucky v. Graham*, 473 U.S. 159, 169 (1985). Because claims against public officials in their official capacities are merely another way of pleading an action against the entity of which the officer is an agent, "official capacity" claims against a state officer are

included in the Eleventh Amendment's bar. *Kentucky*, 473 U.S. at 165. While an exception to Eleventh Amendment immunity exists under *Ex parte Young*, 209 U.S. 123 (1908), it is limited to suits against state officers for **prospective** injunctive relief. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 69 n. 24 (1997). "A federal court cannot award retrospective relief, designed to remedy past violations of federal law." *Id.*

Plaintiffs' claims for injunctive and declaratory relief, premised on the conduct of the November 3, 2020 General Election and the certification of results that have already taken place, are barred because they are retrospective in nature. "Retrospective relief is backward-looking, and seeks to remedy harm 'resulting from a past breach of a legal duty on the part of the defendant state officials.'" *Seminole Tribe of Fla. v. Fla. Dep't of Revenue*, 750 F.3d 1238, 1249 (11th Cir. 2014) (quoting *Edelman v. Jordan,* 415 U.S. 651, 668 (1974)). "Simply because the remedy will occur in the future, does not transform it into 'prospective' relief. The term, 'prospective relief,' refers to the ongoing or future threat of harm, not relief." *Fedorov v. Bd. of Regents*, 194 F. Supp. 2d 1378, 1387 (S.D. Ga. 2002). Plaintiffs' claims for any relief related to the rules and regulations governing the conduct of the November 3, 2020, election or any alleged past security lapses, miscounting of votes,

or election irregularities are entirely retrospective and barred by the Eleventh Amendment.

IV. Laches Bars Plaintiffs' Claims for Post-Election Relief.

In *Wood v. Raffensperger*, 2020 U.S.Dist. LEXIS 218058 (Nov. 20. 2020), this Court found that claims raised by Plaintiffs' counsel Lin Wood were barred by the doctrine of laches. While Plaintiffs' claims overlap significantly with Wood's claims, the facts here are even more compelling when it comes to a finding of laches. Plaintiffs waited even longer than Wood did to file this action. As in *Wood,* virtually all of the complaints that Plaintiffs allege regarding the security of Georgia's voting system or the propriety of State Election Board rules or regulations could have been raised prior to the election.

To establish laches, State Defendants must show "(1) there was a delay in asserting a right or a claim, (2) the delay was not excusable, and (3) the delay caused [them] undue prejudice." *United States v. Barfield*, 396 F.3d 1144, 1150 (11th Cir. 2005); *see also Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1326 (11th Cir. 2019) ("To succeed on a laches claim, [defendant] must demonstrate that [p]laintiffs inexcusably delayed bringing their claim and that the delay caused it undue prejudice.").

Where, as here, a challenge to an election procedure is not filed until *after* an election has already been conducted, the prejudice to the state and to the voters that have cast their votes in the election becomes particularly severe. Once the election has been conducted, any harm that might arise from a purported constitutional violation must be weighed against "such countervailing equitable factors as the extremely disruptive effect of election invalidation and the havoc it wreaks upon local political continuity." *Soules v. Kauaians for Nukolii Campaign Committee*, 849 F.2d 1176, 1177 (9th Cir. 1988). For this reason, "if aggrieved parties, without adequate explanation, do not come forward before the election, they will be barred from the equitable relief of overturning the results of the election." *Id.* at 1180-81 (*citing Hendon v. North Carolina State Bd. of Elections*, 710 F.2d 177, 182-83 (4th Cir. 1983); *see also Curtin v. Va. State Bd. of Elections*, No. 1:20-cv-0546, 2020 U.S. Dist. LEXIS 98627, *16-17 (E.D. Va. May 29, 2020) (rejecting a similar challenge to state official guidance as barred by laches due to plaintiffs' failure to raise the challenge prior to the election). To hold otherwise "permit[s], if not encourage[s], parties who could raise a claim to lay by and gamble upon receiving a favorable decision of the electorate and then, upon losing, seek to undo the ballot results in a court action." *Toney v. White*, 488 F.2d 310, 314 (5th Cir. 1973).

Plaintiffs delayed considerably in asserting their claims. To the extent that they had any concerns regarding the vulnerability of Dominion's voting systems, they could have raised those claims long before the election. Each of the absentee ballot regulations and procedures that Plaintiffs now complain of were adopted well before the November 3, 2020 election, and any claims related to the application of those rules during that election are subject to dismissal here for the same reasons that they were dismissed in *Wood*. And, with regard to the purported "irregularities" reported by Plaintiffs' voter and observer declarants, Plaintiffs offer no explanation why they did not attempt to address those issues with the relevant local election officials at the time, but instead waited until after the election officials completed the initial count and audit and certified those results.

As the *Wood* court recognized, Defendants and the public at large would be significantly injured if Plaintiffs were permitted to raise these challenges after the election has already taken place. 2020 U.S.Dist. LEXIS 218058 at *23 ("Wood's requested relief could disenfranchise a substantial portion of the electorate and erode the public's confidence in the electoral process."); *see also Arkansas United v. Thurston*, No. 5:20-cv-5193, 2020 WL 6472651, at *5 (W.D. Ark. Nov. 3, 2020) ("[T]he equities do not favor intervention where the election is already in progress and the requested relief would change the rules of the game mid-play.").

V. The Court should Abstain from Granting Relief.

The relief Plaintiffs seek is nothing short of overturning the November election. The ad damnum clause asks this Court to (1) order the Defendants to de-certify the election results; (2) enjoin the Governor from transmitting the certified results to the Electoral College; and instead (3) require the Governor to transmit a certification that President Trump received the majority of votes in Georgia. (Doc. 1 ¶ 211(1-3); Doc. 101 at 100.) There are numerous problems with this proposed relief. First, it violates the principles of federalism. Second, the *Pullman* doctrine warrants dismissal. Finally, and at the very least, this lawsuit should be stayed pending the outcome of state election challenges pursuant to the *Colorado River* doctrine.

On federalism, the Eleventh Circuit recently held that it is "doubtful" that a federal court could compel a state to promulgate a regulation. *Jacobson*, 974 F.3d at 1257. First, federal courts are only able to order state defendants from "refrain[ing] from violating federal law." *Id.* (citing *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 255 (2011)). Much of Plaintiffs' proposed relief cannot be reconciled with this binding precedent. Specifically, Plaintiffs do not seek to just refrain the Governor and the Secretary, they seek to compel them to certify a different candidate than the election laws demand, which is wholly inconsistent with Georgia's Election

Code and the thrice-audited results. The relief sought is particularly offensive to federalism principles in the light of the election challenges pending in state court that significantly mirror the claims brought in this lawsuit. As the Plaintiffs themselves now recognize, "Georgia law makes clear that post-election litigation may proceed in state Court." *Wood v. Raffensperger*, slip op. at 9. Indeed, Plaintiffs' Complaint repeatedly claims that they are bringing their lawsuit pursuant to Georgia statutes that provide the very basis to challenge elections. (Doc. No. 1 ¶¶ 150 (O.C.G.A. § 21-2-522), 183-207 (O.C.G.A. §§ 21-2-521, 21-2-522). It is hard to imagine a more significant challenge to federalism than for a party to come to federal court asking that court to reverse certified election results without giving the State an opportunity to act pursuant to its own statutory scheme.

These concerns are recognized by the *Pullman* doctrine, which is "appropriate 'in cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law.'" *3637 Corp., Inc. v. City of Miami*, 314 F. Supp. 3d 1320, 1334 (S.D. Fla. 2018) (citing *Moheb, Inc. v. City of Miami*, 756 F.Supp.2d 1370, 1372 (S.D. Fla. 2010) (quoting *Abell v. Frank*, 625 F.2d 653, 656–57 (5th Cir. 1980)). Here, the constitutional issue presented—whether the legislature's delegation of rulemaking authority to the SEB is valid, and whether the SEB exceeded that authority when

promulgating various emergency rules—violates the federal constitution. In other words, the Court cannot answer the constitutional question without first deciding that the state agency exceeded its authority *under State law*. This is a classic *Pullman* situation, which examines and requires that "(1) there must be an unsettled issue of state law; and (2) there must be a possibility that the state law determination will moot or present in a different posture the federal constitutional questions raised." *Id.* at 1372–73 (citing *Abell*, 625 F.2d at 657). Judge Jones reached the same conclusion last December in another election-related lawsuit, *Fair Fight, Inc. v. Raffensperger*.[13] This Court should do the same and dismiss the lawsuit.

For a similar reason, Plaintiffs' requested relief violates the *Colorado River Doctrine.* There are numerous pending challenges to the November election that have properly been filed in Georgia's courts, including, according to press statements by Mr. Wood's counsel in the *Wood* litigation, one filed late on December 4, 2020, by President Trump. At least one seeks nearly identical relief as the Plaintiffs' lawsuit. Under similar circumstances, the Eleventh Circuit has indicated that a stay of federal proceedings is warranted under the *Colorado River* doctrine, which "authorizes a federal 'district court to dismiss or stay an action when there is an ongoing parallel action in state court.'" *Moorer v. Demopolis Waterworks &*

[13] A true and accurate copy of the December Order is attached as **Exhibit E**.

Sewer Bd., 374 F.3d 994, 997–98 (11th Cir. 2004) (citing *LaDuke v. Burlington Northern Railroad Co.*, 879 F.2d 1556, 1558 (7th Cir.1989)). Factors considered in the *Colorado River* analysis include: the desire to "avoid piecemeal litigation," whether state or federal law governs the issue, and whether the state court can protect all parties' rights. *Id.* at 987 (citation omitted).

Each of these factors warrants staying the litigation. The bulk of Plaintiffs' complaint addresses issues of state law: how absentee ballot requests and ballots are inspected, the authority of the General Assembly to delegate authority to the SEB and the Secretary, and the criteria for certifying elections. Moreover, the state court election challenges are to move swiftly. Thus, the possibility of piecemeal litigation is real and concrete. Finally, the relief that the parties in the state court challenges can obtain would protect all parties' rights. The remedies available to Georgia courts when ruling on election challenges are spelled out in state law. *See* O.C.G.A. § 21-2-527(d). Under these circumstances, *Colorado River* factors are satisfied, and the election challenge should proceed in state court under the same state laws that the Plaintiffs raised in their Complaint.

VI. Plaintiffs' Motion for Injunctive Relief Should be Denied.

Even if Plaintiffs could overcome the jurisdictional defects that are fatal to their claims, they still fail to satisfy the requirements for the extraordinary injunctive relief they seek.

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 24 (2008). To prevail on their motion, Plaintiffs are required to show: (1) a substantial likelihood of prevailing on the merits; (2) that the plaintiff will suffer irreparable injury unless the injunction issues; (3) that the threatened injury to the movant outweighs whatever damages the proposed injunction may cause the opposing party; and (4) the injunction would not be adverse to the public interest. *Duke v. Cleland*, 954 F.2d 1526, 1529 (11th Cir. 1992). The Court "should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Winter*, 555 U.S. at 24.

A. Plaintiffs are not likely to succeed on the merits of their claims.

1. Plaintiffs' equal protection claims fail because they cannot show arbitrary and disparate treatment among different classes of voters.

Plaintiffs' equal protection claims fail for the same reason their counsel's equal protections claims failed in *Wood.* In the voting rights context, equal protection means that "[h]aving once granted the right to vote on equal terms, the state may

not, by later arbitrary and disparate treatment, value one person's vote over that of another." *Bush v. Gore,* 531 U.S. 98, 104 (2000) (citation omitted). Typically, when deciding a constitutional challenge to state election laws, federal courts apply the *Anderson-Burdick* framework that balances the burden on the voter with the state's interest in the voting regulation. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 190 (2008); *Democratic Exec. Comm. of Fla. v. Lee,* 915 F.3d 1312, 1318-19 (11th Cir. 2019).

But, as the *Wood* court recognized, Plaintiffs' claims do not fit within this framework. 2020 U.S. Dist. LEXIS 218058 at *25. Plaintiffs have not articulated a cognizable harm that invokes the Equal Protection Clause. Any actions taken by the State Defendants were taken "in a wholly uniform manner across the entire state." *Id.* at 26. No voters – including the Plaintiffs – were treated differently than any other voter. *Id.* (*citing Wise v. Circosta*, 978 F.3d 93, 100 (4th Cir. 2020).

Nor have Plaintiffs set forth a "vote dilution" claim. None of the Plaintiffs have alleged that any action of Defendants have burdened their ability to cast their own votes. Instead, their claims, like Wood's, appear to be that because some votes were improperly counted or illegally cast, these illegal or improperly counted votes somehow caused the weight of ballots cast lawfully by Georgia voters to be somehow weighted differently than others. *Id.* at 27. Both the district court in *Wood*

court and the Third Circuit Court of Appeals in *Bognet* "squarely rejected" this theory. *Bognet*, 2020 WL 6686120, at *31-2 ("if dilution of lawfully cast ballots by the 'unlawful' counting of invalidly cast ballots were a true equal-protection problem, then it would transform every violation of state election law…into a potential federal equal-protection claim"); *see also Jacobson*, 974 F.3d at 1247 (rejecting partisan vote dilution claim).

The Supreme Court's decision in *Bush v. Gore* does not support Plaintiff's case (*see* Doc. 6 at 16-17), as that case found a violation of equal protection where certain counties were utilizing varying standards for what constituted a legal vote in the 2000 Florida recount. 531 U.S. at 105 ("The question before us … is whether the recount procedures … are consistent with its obligation to avoid arbitrary and disparate treatment of the members of its electorate"). Here, any actions taken by the State Defendants were undertaken state-wide. The isolated "irregularities" complained of by Plaintiff's various declarants, if true, would have taken place at the county level under the supervision of elections officials that are not parties to this case. All actions of the State Defendants have been uniform and applicable to all Georgia counties and voters, in order to avoid the kind of ad hoc standards that varied from county to county as found unconstitutional in *Bush*. They are the exact opposite of arbitrary and disparate treatment.

2. *Plaintiffs' claim under the Electors and Elections Clauses fails.*

The electors clause of the United States Constitution provides that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, "who, in turn, cast the State's votes for president. U.S. Const. art. II, § 1, cl. 2. The General Assembly established the manner for the appointment of presidential electors in O.C.G.A. § 21-2-10, which provides that electors are *selected by popular vote* in a general election. Plaintiffs fail to show how any act of the State Defendants has altered this process.

Similarly, Plaintiffs fail to show how State Defendants have violated the elections clause, which provides that "[t]he Times, Places, and Manner of holding elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof." U.S. Const. art. I, § 4, cl. 1. Plaintiffs complain about a variety of regulations or procedures related to absentee ballot processing, without articulating precisely how those regulations or procedures run afoul of the elections clause. In any event, the State Election Board has the authority, delegated by the legislature, "[t]o formulate, adopt, and promulgate such rules and regulations … as will be conducive to the fair, legal, and orderly conduct of primaries and elections" so long as those rules are "consistent with law." O.C.G.A. 21-2-31(2). Thus, while no one disagrees that State Defendants are not members of the Georgia legislature,

Plaintiff's claim depends on the assumption that the rules and procedures used to process absentee ballots during the November 3, 2020, election were somehow inconsistent with Georgia's election code.

But this simply is not so. The SEB Rule is consistent with State law, and a Georgia court would likely say the same. Under Georgia precedent, when an agency empowered with rulemaking authority (like the SEB is), the test applied to regulation challenges is quite deferential. Georgia courts ask whether the regulation is authorized by statute and reasonable. *Albany Surgical, P.C. v. Dep't of Cmty. Health*, 257 Ga. App. 636, 637 (2002). The answer to both questions is an unqualified "yes."

As shown, the SEB is empowered to promulgate regulations. O.C.G.A. § 21-2-31(1). As recognized by Judge Grimberg in *Wood*, it is normal and constitutional for state legislatures to delegate their authority in such a manner. 2020 U.S.Dist. LEXIS 218058 at *10. The regulations are also reasonable. There is no conflict between the signature verification regulation and statutes cited by the Plaintiffs, O.C.G.A. §§ 21-2-386(a)(1)(C). (Doc. No. 1 at 23.) The statute requires an absentee ballot where a signature "does not appear to be valid" to be rejected and notice provided to the voter. *Id.* The challenged SEB Rule, which merely requires "an additional safeguard to ensure election security by having more than one individual review an absentee ballot's information and signature for accuracy before the ballot

is rejected," is consistent with this approach. *Wood*, 2020 U.S.Dist. LEXIS 218058 at *10. No statute cited by the Plaintiffs mandates that only one county official examine the absentee ballot, and that the review process involves several officials does not make it any less rigorous or inconsistent with the statutory law. (*See* Harvey Decl. ¶¶ 3, 5). A Georgia court would likely hold the same, because state courts have said that a "regulation must be upheld if the agency presents *any evidence* to support the regulation." *Albany Surgical, P.C. v. Dep't of Cmty. Health*, 257 Ga. App. 636, 640 (2002). Mr. Harvey's declaration certainly satisfies that standard, and it should be obvious that having a verification process in place designed to ensure uniform statewide application of the laws for determining consideration of an absentee ballot does not lead to invalid votes.

Any remaining doubt must be resolved in the State's favor, as the Plaintiffs have not identified any conflict in the language. This is what Judge Grimberg rightly concluded when he held that: "The record in this case demonstrate that, if anything, Defendants' actions in entering into the Settlement Agreement sought to achieve consistency among county election officials in Georgia, which ***furthers*** Wood's stated goals of conducting "[f]ree, fair, and transparent elections." *Wood* at * 10 (emphasis and brackets in original). This ends the inquiry and is fatal to Plaintiffs' claims in Counts I, III, IV, and V.

3. Plaintiffs' due process claims fail.

Plaintiffs' motion fails to articulate a discernable claim under the due process clause. It is unclear what process Plaintiffs claim that they were due or how any of the State Defendants failed to provide that process. Count II of Plaintiffs' Complaint, while captioned "Denial of Due Process" vaguely describes an undefined "disparate treatment" with regard to cure processes and argues that the disparate treatment "violates Equal Protection guarantees." *See* Compl. at ¶172. Count IV of Plaintiffs' Complaint is captioned "Denial of Due Process on the Right to Vote", and appears to describe a claim of vote dilution or debasement – citing to various equal protection cases. *See* Compl. at ¶§176-80. Plaintiffs' Motion for Preliminary Injunction does not include any discussion of due process at all.

Plaintiffs have not articulated a cognizable procedural due process claim. A procedural due process claim raises two inquires: "(1) whether there exists a liberty or property interest which has been interfered with by the State and (2) whether the procedures attendant upon that deprivation were constitutionally sufficient." *Richardson v. Texas Sec'y of State*, 978 F.3d 220, 229 (5th Cir. 2020) (citing *Kentucky Dep't of Corr. v. Thompson*, 490 U.S. 454, 460 (1989)). The party invoking the Due Process Clause's procedural protections bears the "burden . . . of establishing a cognizable liberty or property interest." *Richardson*, 978 F.3d at 229

(citing *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005)). Plaintiffs have not clearly articulated what liberty or property interest has been interfered with by the State Defendants, or how any procedures attendant to the purported deprivation were constitutionally sufficient. As the *Wood* court noted:

> …the Eleventh Circuit does "assume that the right to vote is a liberty interest protected by the Due Process Clause." *Jones v. Governor of Fla.*, 975 F.3d 1016, 1048 (11th Cir. 2020). But the circuit court has expressly declined to extend the strictures of procedural due process to "a State's election procedures." *New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1282 (11th Cir. 2020) ("The generalized due process argument that the plaintiffs argued for and the district court applied would stretch concepts of due process to their breaking point.").

2020 U.S. Dist. LEXIS 218058 at *33.

Nor have Plaintiffs articulated a cognizable substantive due process claim. The types of voting rights covered by the substantive due process clause are considered narrow. *Curry v. Baker*, 802 F.2d 1302, 1314 (11th Cir. 1986). This does not extend to examining the validity of individual ballots or supervising the administrative details of an election. *Id.* In only "extraordinary circumstances will a challenge to a state election rise to the level of a constitutional deprivation." *Id.*

As the *Wood* court recognized:

> Although Wood generally claims fundamental unfairness, and the declarations and testimony submitted in support of his motion speculate as to wide-spread impropriety, the actual harm alleged by Wood concerns merely a "garden variety" election dispute.

2020 U.S. Dist. LEXIS 218058 at *35. Further, "[p]recedent militates against a finding of a due process violation regarding such an ordinary dispute over the counting and marking of ballots." *Id.* (*citing Gamza v. Aguirre*, 619 F.2d 449, 453 (5th Cir. 1980) for the proposition that "If every state election irregularity were considered a federal constitutional deprivation, federal courts would adjudicate every state election dispute.").

The same is true here. Plaintiffs have introduced only speculative, conclusory and contradictory testimony from "experts" that would do no more than establish a possibility of irregularities if their analysis were correct, along with a hodge-podge of disparate claims by third-party voters and observers claiming that they observed a variety of different purported irregularities in a handful of different counties (none of which are parties to this action). Plaintiffs have failed to demonstrate the "extraordinary circumstances" rising to the level of a constitutional deprivation that are necessary to support a substantive due process claim. Plaintiffs have therefore failed to demonstrate a substantial likelihood of success on the merits of any claim for violation of the 14th Amendment's guarantee of either procedural or substantive Due Process.

4. Plaintiffs' Election Contest Claims Fail.

As shown, the Plaintiffs have effectively filed an election challenge under Georgia law. Seeking to stop certification does not save the Plaintiffs' Complaint for at least two additional reasons. First, it has long been the rule that electors are state and not federal officials. *See Walker v. United States*, 93 F.2d 383, 388 (8th Cir. 1937). Consequently, it is state law that determines how challenges to electors are made, and Georgia law sets forth that process as explained above. This also demonstrates why abstention is appropriate. Second, to the extent that the Plaintiffs argue that county election officials did not properly count mail-in and absentee ballots, there are state remedies available to challenge the acts of those county officials. Indeed, Georgia's laws governing election challenges provide for just that.

Finally, and as addressed elsewhere in this brief, the *Jacobson* decision makes clear that challenges to acts of county officials must be brought against those county officials. 974 F.3d at 1254. It is insufficient to rely on the Secretary's general powers "to establish traceability." *Anderson*, 2020 WL 6048048 at *23. Similarly, reliance on the phrase "chief election official" or statements about the uniformity in the administration of election laws have been deemed insufficient by the *Anderson* court when it applied *Jacobson*. *Id.*

In sum, because Plaintiffs are not likely to succeed on the merits of any of their claims, injunctive relief must be denied.

B. The loss of Plaintiffs' preferred candidate is not irreparable harm.

Plaintiffs fail to articulate any specific harm that he faces if his requested relief is not granted, other than the vague claim that an infringement on the right to vote constitutes irreparable harm. However, Plaintiffs do not allege that their right to vote was denied or infringed in any way—only that their preferred candidate lost. It is not irreparable harm if they are not able to "cast their votes in the Electoral College for President Trump," because "[v]oters have no judicially enforceable interest in the outcome of an election." *Jacobson*, 974 F.3d at 1246 ("Voters have no judicially enforceable interest in the outcome of an election.").

Irreparable harm goes to the availability of a remedy—not a particular outcome. Certifying the expressed will of the electorate is not irreparable harm, but rather inevitable and legally required within our constitutional framework. There is a remedy available to extent that the losing candidate—rather than a dissatisfied voter, supporter, or presidential elector—seeks post-certification remedies, and such election contests have been filed in state court and remain pending.

C. The balance of equities and public interest weigh heavily against an injunction.

These remaining injunction factors—balancing the equities and public interest—are frequently considered "in tandem" by courts, "as the real question posed in this context is how injunctive relief at this eleventh-hour would impact the public interest in an orderly and fair election, with the fullest voter participation possible." *Curling v. Kemp*, 334 F. Supp. 3d 1303, 1326 (N.D. Ga. 2018), *aff'd in part, appeal dismissed in part*, 761 F. App'x 927 (11th Cir. 2019); *see also Purcell*, 549 U.S. at 4. The Court must "balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief," paying "particular regard as well for the public consequences in employing the extraordinary remedy of injunction." *Winter*, 555 U.S. at 24.

Here, "the threatened injury to Defendants as state officials and the public at large far outweigh any minimal burden on [Plaintiffs]. *Wood*, 2020 U.S. Dist. LEXIS 218058 at *38. "Confidence in the integrity of our electoral process is essential to the functioning of our participatory democracy," and court orders affecting elections "can themselves result in voter confusion and consequent incentive to remain away from the polls." *Purcell*, 549 U. S. at 4-5. For this reason, the Supreme Court "has repeatedly emphasized that lower federal courts should ordinarily not alter the

election rules on the eve of an election." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S.Ct. 1205, 1207 (April 6, 2020) (per curiam).

The Eleventh Circuit recently held that the *Purcell* principle applies with even greater force when voting has already occurred. *See New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1283 (11th Cir. 2020) ("[W]e are not on the eve of the election—we are in the middle of it, with absentee ballots already printed and mailed. An injunction here would thus violate *Purcell*'s well-known caution against federal courts mandating new election rules—especially at the last minute."); *see also Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 919 (9th Cir. 2003) ("Interference with impending elections is extraordinary, and interference with an election after voting has begun is unprecedented.").

Here, the election *has already been conducted*, and the slate of presidential electors has been certified. Granting Plaintiffs' extraordinary relief would only serve to "disenfranchise [] voters or sidestep the expressed will of the people." *Donald J. Trump for President,* 2020 U.S. App. LEXIS 37346 at *28. As the district court in *Wood* correctly recognized, "To interfere with the result of an election that has already concluded would be unprecedented and harm the public in countless ways." 2020 U.S. Dist. LEXIS 218058 at *37-38. Plaintiffs seek even broader relief than that sought in *Wood.* If granted, Plaintiffs' requested relief would disenfranchise not

only Georgia's absentee voters but would invalidate **all** votes cast by Georgia electors.

CONCLUSION

For the foregoing reasons, Plaintiffs' emergency motion for injunctive relief must be denied and the Court should dismiss the action with prejudice. Furthermore, the current TRO entered by the Court should be immediately dissolved to prevent ongoing harm to the ability of county elections officials to begin early voting for the January run-off, for the reasons shown in State Defendants' motion to modify the TRO.

Respectfully submitted, this 5th day of December, 2020.

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Senior Assistant Attorney General

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Attorneys for State Defendants

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing has been formatted using Times New Roman font in 14-point type in compliance with Local Rule 7.1(D).

/s/ Charlene S. McGowan
Charlene S. McGowan
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that I have this day electronically filed the foregoing **STATE DEFENDANTS' CONSOLIDATED BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS AND RESPONSE TO PLAINTIFF'S EMERGENCY MOTION FOR INJUNCTIVE RELIEF** with the Clerk of Court using the CM/ECF system, which will send notification of such filing to counsel for all parties of record via electronic notification.

Dated: December 5, 2020.

/s/ Charlene S. McGowan
Charlene S. McGowan
Assistant Attorney General

Jeffrey DeSousa

From: Amit Agarwal
Sent: Tuesday, December 8, 2020 3:45 PM
To: Andrew Pinson
Subject: Re: Follow Up Docs

Thanks Andrew -- I'll pass this on.

From: Andrew Pinson <APinson@LAW.GA.GOV>
Sent: Tuesday, December 8, 2020 3:01 PM
To: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Subject: FW: Follow Up Docs

Amit,

Our chief of staff asked me to pass this along. Let me know if you need anything else.

Thanks,
Andrew

Andrew Pinson
Solicitor General
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Solicitor General Unit
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Georgia Department of Law
40 Capitol Square SW
Atlanta, Georgia, 30334

From: Travis Johnson
Sent: Tuesday, December 8, 2020 3:00 PM
To: Andrew Pinson <APinson@LAW.GA.GOV>
Cc: Wright Banks <wbanks@law.ga.gov>
Subject: Follow Up Docs

Can you get these over to FL's SG per General Moody's request to Chris?

Travis Johnson
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tjohnson@law.ga.gov
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Jeffrey DeSousa

From: Amit Agarwal
Sent: Tuesday, December 8, 2020 3:45 PM
To: John Guard; Richard Martin; Charles Trippe
Cc: Catherine McNeill
Subject: Fw: Follow Up Docs
Attachments: Doc 56 Ex A Settlement Agreement.pdf; US_DIS_GAND_1_20cv4809 _RESPONSE_in_Opposition_re_6_MOTION_for_Temporary_....pdf

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From: Andrew Pinson <APinson@LAW.GA.GOV>
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Attachment A

COMPROMISE SETTLEMENT AGREEMENT AND RELEASE

This **Compromise Settlement Agreement and Release** ("Agreement") is made and entered into by and between the Democratic Party of Georgia, Inc. ("DPG"), the DSCC, and the DCCC (collectively, the "Political Party Committees"), on one side, and Brad Raffensperger, Rebecca N. Sullivan, David J. Worley, Seth Harp, and Anh Le (collectively, "State Defendants"), on the other side. The parties to this Agreement may be referred to individually as a "Party" or collectively as the "Parties." The Agreement will take effect when each and every Party has signed it, as of the date of the last signature (the "Effective Date").

WHEREAS, in the lawsuit styled as *Democratic Party of Georgia, et al. v. Raffensperger, et al.*, Civil Action File No. 1:19-cv-5028-WMR (the "Lawsuit"), the Political Party Committees have asserted claims in their Amended Complaint [Doc. 30] that the State Defendants' (i) absentee ballot signature matching procedure, (ii) notification process when an absentee ballot is rejected for any reason, and (iii) procedure for curing a rejected absentee ballot, violate the First and Fourteenth Amendments to the United States Constitution by unduly burdening the right to vote, subjecting similarly situated voters to disparate treatment, and failing to afford Georgia voters due process (the "Claims"), which the State Defendants deny;

WHEREAS, the State Defendants, in their capacity as members of the State Election Board, adopted on February 28, 2020 Rule 183-1-14-.13, which sets forth specific and standard notification procedures that all counties must follow after rejection of a timely mail-in absentee ballot;

WHEREAS, the State Defendants have a Motion to Dismiss [Doc. 45] pending before the Court, which sets forth various grounds for dismissal of the Amended Complaint, including mootness in light of the State Election Board's promulgation subsequent to adoption on February 28, 2020 of Rule 183-1-14-.13, which Motion the Political Party Committees deny is meritorious;

WHEREAS, all Parties desire to compromise and settle all disputed issues and claims arising from the Lawsuit, finally and fully, without admission of liability, having agreed on the procedures and guidance set forth below with respect to the signature matching and absentee ballot rejection notification and cure procedures; and

WHEREAS, by entering into this Agreement, the Political Party Committees do not concede that the challenged laws and procedures are constitutional, and

similarly, the State Defendants do not concede that the challenged laws and procedures are unconstitutional.

NOW THEREFORE, for and in consideration of the promises and covenants contained herein, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties do hereby agree as follows:

1. **Dismissal.** Within five (5) business days of March 22, 2020, the effective date of the Prompt Notification of Absentee Ballot Rejection rule specified in paragraph 2(a), the Political Party Committees shall dismiss the Lawsuit with prejudice as to the State Defendants.

2. **Prompt Notification of Absentee Ballot Rejection.**

(a) The State Defendants, in their capacity as members of the State Election Board, agree to promulgate and enforce, in accordance with the Georgia Administrative Procedures Act and State Election Board policy, the following State Election Board Rule 183-1-14-.13 of the Georgia Rules and Regulations:

> When a timely submitted absentee ballot is rejected, the board of registrars or absentee ballot clerk shall send the elector notice of such rejection and opportunity to cure, as provided by O.C.G.A. § 21-2-386, by mailing written notice, and attempt to notify the elector by telephone and email if a telephone number or email is on the elector's voter registration record, no later than the close of business on the third business day after receiving the absentee ballot. However, for any timely submitted absentee ballot that is rejected on or after the second Friday prior to Election Day, the board of registrars or absentee ballot clerk shall send the elector notice of such rejection and opportunity to cure, as provided by O.C.G.A. § 21-2-386, by mailing written notice, and attempt to notify the elector by telephone and email if a telephone number or email is on the elector's voter registration record, no later than close of business on the next business day.
>
> Ga. R. & Reg. § 183-1-14-.13 Prompt Notification of Absentee Ballot Rejection

(b) Unless otherwise required by law, State Defendants agree that any amendments to Rule 183-1-14-.13 will be made in good faith in the spirit of ensuring that voters are notified of rejection of their absentee ballots with ample time to cure

their ballots. The Political Party Committees agree that the State Election Board's proposed amendment to Rule 183-1-14-.13 to use contact information on absentee ballot applications to notify the voter fits within that spirit.

3. Signature Match.

(a) Secretary of State Raffensperger, in his official capacity as Secretary of State, agrees to issue an Official Election Bulletin containing the following procedure applicable to the review of signatures on absentee ballot envelopes by county elections officials and to incorporate the procedure below in training materials regarding the review of absentee ballot signatures for county registrars:

> County registrars and absentee ballot clerks are required, upon receipt of each mail-in absentee ballot, to compare the signature or mark of the elector on the mail-in absentee ballot envelope with the signatures or marks in eNet and on the application for the mail-in absentee ballot. If the signature does not appear to be valid, registrars and clerks are required to follow the procedure set forth in O.C.G.A. § 21-2-386(a)(1)(C). When reviewing an elector's signature on the mail-in absentee ballot envelope, the registrar or clerk must compare the signature on the mail-in absentee ballot envelope to each signature contained in such elector's voter registration record in eNet and the elector's signature on the application for the mail-in absentee ballot. If the registrar or absentee ballot clerk determines that the voter's signature on the mail-in absentee ballot envelope does not match any of the voter's signatures on file in eNet or on the absentee ballot application, the registrar or absentee ballot clerk must seek review from two other registrars, deputy registrars, or absentee ballot clerks. A mail-in absentee ballot shall not be rejected unless a majority of the registrars, deputy registrars, or absentee ballot clerks reviewing the signature agree that the signature does not match any of the voter's signatures on file in eNet or on the absentee ballot application. If a determination is made that the elector's signature on the mail-in absentee ballot envelope does not match any of the voter's signatures on file in eNet or on the absentee ballot application, the registrar or absentee ballot clerk shall write the names of the three elections officials who conducted the signature review across the face of the absentee ballot envelope, which shall be in addition to writing "Rejected" and the reason for the rejection as required under OCGA 21-2-386(a)(1)(C). Then, the registrar or absentee ballot clerk shall

commence the notification procedure set forth in O.C.G.A. § 21-2-386(a)(1)(C) and State Election Board Rule 183-1-14-.13.

(b) The Parties agree that the guidance in paragraph 3(a) shall be issued in advance of all statewide elections in 2020, including the March 24, 2020 Presidential Primary Elections and the November 3, 2020 General Election.

4. **Consideration of Additional Guidance for Signature Matching.** The State Defendants agree to consider in good faith providing county registrars and absentee ballot clerks with additional guidance and training materials to follow when comparing voters' signatures that will be drafted by the Political Party Committees' handwriting and signature review expert.

5. **Attorneys' Fees and Expenses.** The Parties to this Agreement shall bear their own attorney's fees and costs incurred in bringing or defending this action, and no party shall be considered to be a prevailing party for the purpose of any law, statute, or regulation providing for the award or recovery of attorney's fees and/or costs.

6. **Release by The Political Party Committees.** The Political Party Committees, on behalf of themselves and their successors, affiliates, and representatives, release and forever discharge the State Defendants, and each of their successors and representatives, from the prompt notification of absentee ballot rejection and signature match claims and causes of action, whether legal or equitable, in the Lawsuit.

7. **No Admission of Liability.** It is understood and agreed by the Parties that this Agreement is a compromise and is being executed to settle a dispute. Nothing contained herein may be construed as an admission of liability on the part of any of the Parties.

8. **Authority to Bind; No Prior Assignment of Released Claims.** The Parties represent and warrant that they have full authority to enter into this Agreement and bind themselves to its terms.

9. **No Presumptions.** The Parties acknowledge that they have had input into the drafting of this Agreement or, alternatively, have had an opportunity to have input into the drafting of this Agreement. The Parties agree that this Agreement is and shall be deemed jointly drafted and written by all Parties to it, and it shall be interpreted fairly, reasonably, and not more strongly against one Party than the other.

Accordingly, if a dispute arises about the meaning, construction, or interpretation of this Agreement, no presumption will apply to construe the language of this Agreement for or against any Party.

10. Knowing and Voluntary Agreement. Each Party to this Agreement acknowledges that it is entering into this Agreement voluntarily and of its own free will and accord, and seeks to be bound hereunder. The Parties further acknowledge that they have retained their own legal counsel in this matter or have had the opportunity to retain legal counsel to review this Agreement.

11. Choice of Law, Jurisdiction and Venue. This Agreement will be construed in accordance with the laws of the State of Georgia. In the event of any dispute arising out of or in any way related to this Agreement, the Parties consent to the sole and exclusive jurisdiction of the state courts located in Fulton County, Georgia. The Parties waive any objection to jurisdiction and venue of those courts.

12. Entire Agreement; Modification. This Agreement sets forth the entire agreement between the Parties hereto, and fully supersedes any prior agreements or understandings between the Parties. The Parties acknowledge that they have not relied on any representations, promises, or agreements of any kind made to them in connection with their decision to accept this Agreement, except for those set forth in this Agreement.

13. Counterparts. This Agreement may be executed in counterparts which, taken together, will constitute one and the same Agreement and will be effective as of the date last set forth below, and signatures by facsimile and electronic mail will have the same effect as the originals.

IN WITNESS WHEREOF, the Parties have set their hands and seals to this instrument on the date set forth below.

Dated: March 6, 2020

/s/ Bruce V. Spiva

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Amanda R. Callais*
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Counsel for State Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CORECO JA'QAN PEARSON, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	CIVIL ACTION NO.
v.	)	1:20-cv-4809-TCB
	)	
BRIAN KEMP, *et al.*,	)	
	)	
Defendants.	)	

DEFENDANTS' CONSOLIDATED BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS AND RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR INJUNCTIVE RELIEF

Christopher M. Carr Attorney General Bryan K. Webb Deputy Attorney General Russell D. Willard Senior Assistant Attorney General Charlene S. McGowan Assistant Attorney General Office of the Georgia Attorney General 40 Capitol Square SW Atlanta, GA 30334 *Counsel for the State Defendants*	Carey Miller Josh Belinfante Melanie Johnson Robbins Ross Alloy Belinfante Littlefield LLC 500 14th Street NW Atlanta, GA 30318

TABLE OF CONTENTS

INTRODUCTION

Plaintiffs, a group of disappointed Republican presidential electors, filed a Complaint alleging widespread fraud in the November general election in Georgia, weaving an unsupported tale of "ballot stuffing," the switching of votes by an "algorithm" uploaded to the state's electronic voting equipment that switched votes from President Trump to Joe Biden, hacking by foreign actors from Iran and China, and other nefarious acts by unnamed actors. Plaintiffs did not bring this election challenge in state court as provided by Georgia's Election Code. Instead, they ask this Court to change the election outcome by judicial fiat and order the Governor, the Secretary, and the State Election Board to "de-certify" the results of the election and replace the presidential electors for Joe Biden (who were selected by a majority of Georgia voters by popular vote as provided by state law) with presidential electors for President Trump. Their claims would be extraordinary if true, but they are not. Much like the mythological "kraken" monster[1] after which Plaintiffs have named this lawsuit, their claims of election fraud and malfeasance belong more to the kraken's realm of mythos than they do to reality.

[1] A "kraken" is a mythical sea monster appearing in Scandinavian folklore, being "closely linked to sailors' ability to tell tall tales." *See* https://en.wikipedia.org/wiki/Kraken.

The truth is that the 2020 general election was, according to the federal agency tasked with overseeing election security, "the most secure in history." (*See* **Exhibit B**.)[2] Cybersecurity experts have determined that there is "***no evidence that any voting system deleted or lost votes, changed votes, or was in any way compromised***." (*Id.*) The accuracy of the presidential election results has been confirmed through at least (1) the statewide risk-limiting audit; (2) a hand recount; and (3) independent testing, which has confirmed that the security of the state's electronic voting equipment was not compromised.

As a threshold matter, the Eleventh Circuit issued an opinion today that mandates dismissal of this action for lack of standing and mootness in the related case of *Wood v. Raffensperger*, No. 20-14418, which raised many of the same claims as this case and sought similar relief. (*See* slip opinion attached as **Exhibit A**). In affirming the district court's decision denying Wood's motion to enjoin certification of the election results, the panel held:

> We agree with the district court that Wood lacks standing to sue because he fails to allege a particularized injury. And because Georgia has already certified its election results and its slate of presidential electors, Wood's requests for emergency relief are moot to the extent they concern the 2020 election. The Constitution makes clear that

[2] *See* Cybersecurity & Infrastructure Security Agency's Joint Statement From Elections Infrastructure Government Coordinating Council & the Election Infrastructure Selector Coordinating Committees, November 12, 2020. A true and correct copy of this statement is attached as **Exhibit B**.

> federal courts are courts of limited jurisdiction, U.S. Const. art. III; we may not entertain post-election contests about garden-variety issues of vote counting and misconduct that may properly be filed in state courts.

(slip op. at 1). This decision squarely controls, and the Court should dismiss the action because Plaintiffs lack an injury in fact sufficient to establish Article III standing. Certification of the election results also moots Plaintiffs' claims, as the Court has no authority under federal law to undo what has already been done.

Other threshold issues bar the relief Plaintiffs seek. Even if they were not moot, Plaintiffs' claims are barred by laches because of their inexcusable delay in raising their challenge to the State's electronic voting system and absentee ballot procedures until after their preferred candidate lost. Plaintiffs' claims are also barred by the Eleventh Amendment to the U.S. Constitution, which bars suits for retrospective relief against state officials acting in their official capacity absent a waiver by the State. Similarly, despite their attempts to raise constitutional claims, Plaintiffs' lawsuit is really an election contest challenging the Presidential election, which can and should be brought in a Georgia court as some of Plaintiffs' allies have recently done.

But most importantly, there is no credible evidence to support the drastic and unprecedented remedy of substituting certified presidential election results with the Plaintiffs' preferred candidate. Without this, Plaintiffs cannot clearly establish the

required elements for injunctive relief. Like every state, Georgia has a compelling interest in preserving the integrity of its election process. "Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). Public confidence in the electoral process would certainly be undermined by a court invalidating the certified results of a presidential election in which nearly 5 million Georgians cast ballots. This Court should decline Plaintiffs' unsupportable efforts to overturn the expressed will of the voters, and should deny their request for relief and dismiss this action.

FACTUAL BACKGROUND

I. Georgia's Electronic Voting System is Secure and Has Not Been Compromised.

Plaintiffs allege wide-ranging conspiracy theories that Georgia's electronic voting system has been compromised by Hugo Chavez and the Venezuelan government (or China and Iran, depending on which "expert" is asked), is infected with a vaguely described "weighted" algorithm that switches votes between candidates, and otherwise produces fraudulent results. In support of their argument, Plaintiffs cite to the un-signed declaration of Dr. Shiva Ayyadurai,[3] other redacted

[3] Dr. Ayyadurai claims he is "an engineer with vast experience in engineering systems, pattern recognition, mathematical and computational modeling and analysis." [Doc. 6-1, ¶ 2]. Elsewhere, Dr. Ayyadurai claims to be the inventor of

declarations, hearsay in the form of various news articles, and contested evidentiary filings in the case *Curling v. Raffensperger*, No. 1:17-cv-2989 (N.D. Ga.).[4]

The Plaintiffs—blinded by either willful ignorance or a lack of basic knowledge of Georgia elections—are incorrect. Georgia's electronic voting system was adopted in compliance with state and federal law, is certified by the Election Assistance Commission following inspection and testing conducted by independent Voting System Test Laboratories ("VSTLs"), and has not been compromised. A review of the *facts*, as opposed to Plaintiffs' conspiracies, confirms the inaccuracy of Plaintiffs' allegations.

A. Adoption and selection of Georgia's electronic voting system.

In 2019, the Georgia General Assembly enacted House Bill 316 ("HB 316"), a sweeping and comprehensive reform of Georgia's election laws, which also modernized and further secured Georgia's voting system. Specifically, the General Assembly chose to require a new unified system of voting throughout the State—

---

electronic mail. *See* Sam Biddle, *The Crazy Story of the Man Who Pretended to Invent Email*, Business Insider (Mar. 6, 2012), https://www.businessinsider.com/the-crazy-story-of-the-man-who-pretended-to-invent-email-2012-3. State Defendants object to any consideration of Dr. Ayyadurai's report as he is not qualified to offer the opinions proffered and utilizes unreliable methodology.

[4] The *Curling* matter is now subject to two appeals pending in the Eleventh Circuit Court of Appeals, docket numbers 20-13730 and 20-14067.

moving the State away from the secure, but older, direct-recording electronic ("DRE") voting system to a voting system utilizing Ballot-Marking Devices ("BMDs") and optical scanners. The General Assembly determined this replacement of DREs with BMDs should occur "as soon as possible." O.C.G.A. § 21-2-300(a)(2). The legislation placed the responsibility of selecting the equipment for the new voting system on the Secretary of State. O.C.G.A. § 21-2-300(a). However, contrary to Plaintiffs' assertions that Governor Kemp and Secretary Raffensperger "rushed through the purchase of Dominion voting machines and software," (Doc. 6, p. 15), the procurement of Georgia's new voting system was completed through an open and competitive bidding process as required by Georgia's State Purchasing Act, O.C.G.A. § 50-5-50. Secretary Raffensperger did not make the purchasing decision alone, but established a Selection Committee comprised of seven individuals who were tasked with reviewing bid proposals.[5] Selection Committee members evaluated those proposals using criteria and processes set forth on a Master Technical Evaluation spreadsheet.[6] Of the three requests for proposals evaluated by the Selection Committee, Dominion Voting Systems ("Dominion") received the highest overall score. *Id.*

[5] *See* https://sos.ga.gov/admin/uploads/Selection%20Committee%20Bios.pdf
[6] *See* https://sos.ga.gov/admin/uploads/MasterTechnicalEvaluation_redacted.xls

On July 29, 2019, Secretary Raffensperger posted a Notice of Intent to Award the contract for the statewide voting system to Dominion. No bid protests were received by the State, and Secretary Raffensperger issued a final Notice of Intent to Award on August 9, 2019. *Id.* The voting system consists of BMDs that print ballots by way of a connected printer and optical scanners connected to a locked ballot box. The Dominion BMD allows the voter to make selections on a screen and then prints those selections onto a paper ballot. The voter has an opportunity to review the paper ballot for accuracy before placing it into the scanner. After scanning, the paper ballot drops into a locked ballot box connected to the scanner. BMDs thus create an auditable, verifiable ballot, as required by statute. O.C.G.A. § 21-2-300(a)(2) ("electronic ballot markers shall produce paper ballots which are marked with the elector's choices **in a format readable by the elector**") (emphasis added).

B. Testing and certification of Georgia's voting system.

Georgia's voting system is subject to two different certification requirements. First, the voting system must have been certified by the United States Election Assistance Commission ("EAC") at the time of procurement. O.C.G.A. § 21-2-300(a)(3). Second, the voting system must also be certified by the Secretary of State as safe and practicable for use. Georgia's BMD system meets both requirements.

The Help America Vote Act ("HAVA") created the EAC, which set up a rigorous process for voting-equipment certification, working with committees of experts and coordinating with the National Institute of Standards and Technology. 52 U.S.C. § 20962; *see also* 52 U.S.C. §§ 20962, 20971 (test lab standards). The EAC certifies voting systems as in compliance with the Voluntary Voting System Guidelines ("VVSG"), version 1.0, and does so by utilizing approved, independent Voting System Test Laboratories ("VSTL"). In the case of the voting system utilized in Georgia, SLI Compliance served as the VSTL tasked with testing the system for EAC purposes. The system utilized by Georgia, Democracy Suite 5.5-A, was certified by the EAC on January 30, 2019.[7]

Separately, the Secretary of State utilized another independent EAC-certified VSTL, Pro V&V, to conduct testing for *state* certification of the voting system. Following the VSTL's testing, the Secretary issued a Certification of the Dominion Voting Systems as meeting all applicable provisions of the Georgia Election Code and Rules of the Secretary of State on August 9, 2019.[8] That certification has been

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[7] *See* United States Election Assistance Commission, Agency Decision — Grant of Certification, https://www.eac.gov/sites/default/files/voting_system/files/Decision.Authority.Grant.of.Cert.D-Suite5.5-A.pdf

[8] Plaintiffs erroneously claim that both the Certificate and a test report signed by Michael Walker were "undated" and have attached altered documents that have been cropped to remove the dates of the documents. *See* Compl., ¶12 and Exhibits 5 and 6 thereto. A correct copy of the Certificate showing the date of August 9,

updated due to de minimis changes in system components on two different occasions since, on February 19, 2020, and again on October 5, 2020.

C. Georgia's electronic voting system has not been compromised and Plaintiffs' assertions to the contrary are disproven by the Risk-Limiting Audit.

Plaintiffs' conjecture and speculation does not rebut the reality that Georgia's voting system has not been compromised. Not only have two separate EAC-Certified independent VSTLs confirmed that the system operates as intended, but Georgia's risk-limiting audit ("RLA") further confirms that no "weighted" vote switching occurred.

Shockingly, the basis for Plaintiffs' outlandish claims of system compromise are rooted in suspect statistical—not software—analyses that they suggest irrefutably proves vote switching occurred. For example, in Dr. Ayyadurai's unsigned declaration, the author references (without citation) vote totals in certain precincts for the proposition that a "weighted race" algorithm must be responsible. (*See generally* Doc. 6-1.) The author, however, makes no attempt to evaluate any other reasons voters may have chosen not to vote for President Trump. Indeed, the

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2019 may be viewed at https://sos.ga.gov/admin/uploads/Dominion_Certification.pdf. A copy of the test report showing a date of August 7, 2019 may be found at https://sos.ga.gov/admin/uploads/Dominion_Test_Cert_Report.pdf.

author of that declaration speculates that 48,000 of 373,000 votes cast in Dekalb County were switched in this manner from Trump to Biden, (Doc. 6-1, p. 28), meaning that (under the author's theory) the results in Dekalb County would be 106,373 for Trump to 260,227 for Biden (or approximately 28.6% to 70%). Of course, this would be extraordinarily unusual for heavily democratic Dekalb County, in which President Trump received 51,468 votes (16.47%) in 2016, when the State was using an entirely different voting system.[9]

Moreover, the existence of such a "weighted" algorithm would have been detected in the RLA conducted this year. Following the counties' tabulation of the November election results, but prior to certification, Secretary Raffensperger was required by law to conduct a risk-limiting audit in accordance with O.C.G.A. § 21-2-498. State Election Board Rule 183-1-15-.04 provides that the Secretary of State shall choose the particular election contest to audit. Recognizing the importance of clear and reliable results for such an important contest, Secretary Raffensperger selected the presidential race for the audit.[10] *See* **Exhibit C**.

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[9] *See* Dekalb County Election Results, 2016, *available at* https://results.enr.clarityelections.com/GA/DeKalb/64036/183321/en/summary.html.

[10] *See* Statement of Secretary Raffensperger, "Historic First Statewide Audit of Paper Ballots Upholds Results of Presidential Race, attached as Exhibit C hereto and available at

County election officials were then required to count by hand all absentee ballots and paper ballots printed by the Dominion BMDs. *See id.* The audit confirmed the same outcome of the presidential race as the original tabulation using the Dominion voting systems equipment. *Id.* While there was a slight differential between the audit results and the original machine counts, the differential was well within the expected margin of error that occurs when hand-counting ballots. *Id.* A 2012 study by Rice University and Clemson University found that hand counting ballots in post-election audit or recount procedures can result in error rates of up to 2 percent. *Id.* In Georgia's audit, the highest error rate reported in any county recount was 0.73%, and most counties found no change in their final tally. *Id.*

The audit results refute Plaintiffs' speculation that Dominion machines or software might have somehow flipped, switched, or "stuffed" ballots in the 2020 presidential election. *Id.* Because Georgia voters can verify that their paper ballots (whether hand-marked absentee ballots or ballots marked by BMDs) accurately reflect their intended votes, any actual manipulation of the initial electronic vote count would have been revealed when the hand count of paper ballots presented a different result. The fact that this did not happen forecloses the possibility that

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https://sos.ga.gov/index.php/elections/historic_first_statewide_audit_of_paper_ballots_upholds_result_of_presidential_race

Dominion equipment or software had been manipulated to somehow record false votes for one candidate or to eliminate votes from another.

In sum, the components of Georgia's voting system have been evaluated, tested, and certified by two different independent laboratories as compliant with both state and federal requirements and safe for use in elections. Neither of those two VSTLs identified any "weighted" vote counting algorithm, nor any other impropriety. And, in Georgia's 2020 general election, the correct operation of the voting system was again confirmed by the state's risk-limiting audit.

II. Absentee Ballots Were Validly Processed According to Law

Plaintiffs' claim that the rules under which county elections officials verified absentee ballots are contrary to Georgia law is also without merit. Absentee ballots for the 2020 general election were processed by county election officials according to the procedures established by the Georgia legislature. These procedures were part of HB 316, bipartisan legislation passed in 2019 to reform the state's election code and implement a new electronic voting system. The reforms kept in place Georgia's policy of "no excuse" absentee voting, but modified the technical requirements for absentee ballots. HB 316 modified the language of the oath on the outer absentee ballot envelope to leave the signature requirement but remove the elector's address and date of birth. *See* O.C.G.A. § 21-2-384. Further, HB 316 added a "cure"

provision, which requires election officials to give a voter until three days after the date of the election to cure an issue with the voter's signature before rejecting an absentee ballot for a missing or mismatched signature on the outer envelope. *See* O.C.G.A. § 21-2-386(a)(1)(C). The "cure" provision was added to the statute's requirement that election officials "promptly notify" the voter of a rejected absentee ballot due to a missing or mismatched signature.

On November 6, 2019, the Democratic Party of Georgia, DSCC, and DCCC (collectively, "Political Party Organizations") sued the State Defendants, alleging that the "promptly notify" language of O.C.G.A. § 21-2-386(a)(1)(C) was vague and ill-defined and left counties without standards for verifying signatures on absentee ballots. (App'x Vol. I at 144-49).

While that action was pending, the State Election Board ("SEB") approved a rule that established a uniform standard for counties to follow to "promptly notify" voters when their absentee ballot is rejected as required by O.C.G.A. § 21-2-386(a)(1)(C). The rule provides that when a timely submitted absentee ballot is rejected, the board of registrars or absentee ballot clerk must send the voter notice of the rejection and opportunity to cure within three business days, or by the next business day if within ten days of Election Day. Ga. Comp. R. & Regs. r. 183-1-14-.13 (the "Prompt Notification Rule").

The Prompt Notification Rule was adopted pursuant to the SEB's rule-making authority under O.C.G.A. § 21-2-31(2). It provides a uniform three-day standard for "prompt" notification required by O.C.G.A. § 21-2-386(a)(1)(C) when an absentee ballot is rejected, so that all counties give notice in a uniform manner. The Prompt Notification Rule was promulgated pursuant to the Georgia Administrative Procedure Act, published for public comment, and discussed at multiple public hearings before it became effective on March 22, 2020.

Because the Prompt Notification Rule resolved the issues in the pending lawsuit, the parties resolved the matter in a settlement agreement that included, among other terms, an agreement that (1) the State Election Board would promulgate and enforce the Prompt Notification Rule; and (2) the Secretary of State would issue guidance to county election officials regarding the signature matching process.

On May 1, 2020, the Secretary of State distributed an Official Election Bulletin ("OEB"), advising county election officials of the Prompt Notification Rule and providing guidance for reviewing signatures on absentee-ballot envelopes. (Declaration of Chris Harvey ¶ 5).[11] The OEB instructed that after an election official makes an initial determination that the signature on the absentee ballot envelope does

[11] The Harvey Declaration was submitted in the related case of *Wood v. Raffensperger*, Civil Action No. 1:20-CV-4651-SDG and is attached as **Exhibit D**.

not match the signature on file for the voter pursuant to O.C.G.A. § 21-2-386(a)(1)(B) and (C), two additional registrars, deputy registrars, or absentee ballot clerks should also review the signature, and the ballot should be rejected if at least two of the three officials agree that the signature does not match. (*Id.*) The OEB expressly instructs county officials to comply with state law. (*Id.*)

Contrary to Plaintiff's claim that the Prompt Notification Rule and the OEB have significantly disrupted the signature verification process, these measures have had no detectable effect on the absentee ballot rejection rate since the last general election in 2018. (Harvey Dec. ¶¶ 6, 7). An analysis of the number of absentee-ballot rejections for signature issues for 2020 as compared to 2018 found that the rejection rate for absentee ballots with missing or non-matching signatures in the 2020 general election was 0.15%; the same rejection rate for signature issues as in 2018 before the new measures were implemented. (*Id.*)

ARGUMENT AND CITATION OF AUTHORITIES

I. The Court Lacks Subject Matter Jurisdiction because Plaintiffs Cannot Establish Article III Standing.

Plaintiffs raise three constitutional counts in their Complaint: (1) that the State Defendants violated the Electors and Elections Clauses of Articles I and II ("Count I"); that the State Defendants violated the equal protection clause of the U.S. Constitution ("Count II"); that the State Defendants denied Plaintiffs Due Process

related to "alleged disparate treatment of absentee/mail-in voters among different counties" ("Count III"); and that the State Defendants denied Plaintiffs Due Process "on the right to vote" ("Count IV"). Plaintiffs also bring a state law election contest claim against Defendants pursuant to O.C.G.A. § 21-5-522, invoking the Court's supplemental jurisdiction under 28 U.S.C. § 1367. However, because Plaintiffs cannot establish standing as to any of these causes of action, the Court lacks jurisdiction to consider the merits of Plaintiffs' claims and the case should be dismissed.

Federal courts have an independent obligation to ensure that subject-matter jurisdiction exists before reaching the merits of a dispute. *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1245 (11th Cir. 2020) (vacating and ordering dismissal of voting rights case due to lack of standing). "For a court to pronounce upon . . . the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires." *Id.* (citation omitted). "If at any point a federal court discovers a lack of jurisdiction, it must dismiss the action." *Id.*

Article III of the Constitution limits the subject-matter jurisdiction of federal courts to "Cases" and "Controversies." U.S. Const. art. III, § 2. A party invoking federal jurisdiction bears the burden of establishing standing at the commencement of the lawsuit. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). As an

irreducible constitutional minimum, Plaintiffs must show they have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision. *Lujan*, 504 U.S. at 561. As the party invoking federal jurisdiction, Plaintiffs bear the burden at the pleadings phase of "clearly alleg[ing] facts demonstrating each element." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016).

A. Plaintiffs have not Alleged an Injury in Fact Sufficient to Form a Basis for Standing.

Injury in fact is the "first and foremost" of the standing elements. *Spokeo*, 136 S. Ct. at 1547. An injury in fact is "an invasion of a legally protected interest that is both concrete and particularized and actual or imminent, not conjectural or hypothetical." *Trichell v. Midland Credit Mgmt., Inc.*, 964 F.3d 990, 996 (11th Cir. 2020); *see also Bognet v. Sec'y Commonwealth of Pa.*, No. 20-3214, 2020 U.S. App. LEXIS 35639 at *16 (3d Cir. Nov. 13, 2020) ("To bring suit, you—and you personally—must be injured, and you must be injured in a way that concretely impacts your own protected legal interests.").

The alleged injury must be "distinct from a generally available grievance about government." *Gill v. Whitford*, 138 S. Ct. 1916, 1923 (2018). This requires more than a mere "keen interest in the issue." *Trump v. Hawaii*, 138 S. Ct. 2392, 2416 (2018); *see also Lance v. Coffman*, 549 U.S. 437, 440–41 (2007) ("Our refusal

to serve as a forum for generalized grievances has a lengthy pedigree. . . . [A] generalized grievance that is plainly undifferentiated and common to all members of the public" is not sufficient for standing).

It is for this reason that the Eleventh Circuit found lack of standing in the *Wood* case. The plaintiff in that case could not "explain how his interest in compliance with state election laws is different from that of any other person. Indeed, he admits that any Georgia voter could bring an identical suit. But the logic of his argument sweeps past even that boundary. All Americans, whether they voted in this election or whether they reside in Georgia, could be said to share [plaintiff's] interest in "ensur[ing] that [a presidential election] is properly administered." (slip op., **Ex. A**, at 11).

Plaintiffs have fared no better at articulating a particularized grievance that is somehow different than that of the general voting public. In fact, throughout their Complaint, Plaintiffs allege that their interests are one and the same as any Georgia voter. *See, e.g.* Compl. at ¶ 156 ("Defendants…diluted the lawful ballots of Plaintiffs and of other Georgia voters and electors…"); ¶ 163 ("Defendants further violated Georgia voters' rights…"), ¶ 199 ("all candidates, political parties, and voters, including without limitation Plaintiffs, have a vested interest in being present and having meaningful access to observe and monitor the electoral process"). Having

confirmed that their interests are no different than the interests of all Georgia voters, Plaintiffs have articulated only generalized grievances insufficient to confer standing upon them to pursue their claims.

B. Plaintiffs do not have Standing as Presidential Electors.

Plaintiffs assert that by virtue of their status as Republican presidential electors, they are "candidates" that have standing to raise whatever variety of election complaints that they may choose. For this proposition, they cite to only a single case: *Carson v. Simon*, 978 F.3d 1051 (8th Cir. 2020). However, *Carson* was predicated on Minnesota election laws that differ from Georgia's and upon facts that are distinguishable from the Plaintiffs' case. Further, the Third Circuit in *Bognet* recently rejected Plaintiff's broad reading of *Carson*. In that case, the court found that a congressional candidate lacked standing to pursue claims under the Elections and Elector clauses based on a generalized "right to run." It specifically noted its disagreement with *Carson*, saying "The Carson court appears to have cited language from [*Bond v. United States*, 564 U.S. 211 (2011)] without considering the context—specifically, the Tenth Amendment and the reserved police powers—in which the U.S. Supreme Court employed that language. There is no precedent for expanding Bond beyond this context, and the *Carson* court cited none." 2020 U.S. App. LEXIS 35639 at *24, fn. 6; *see also Hotze v. Hollins*, No. 4:20-CV-03709, 2020 WL

6437668 at *2 (S.D. Tex. Nov. 2, 2020) (holding candidate lacked standing under Elections Clause); *Looper v. Boman*, 958 F.Supp. 341, 344 (M.D. Tn. 1997) (candidate lacked standing to claim that violations of state election laws had disenfranchised voters as "[h]ow other people vote…does not in any way relate to plaintiff's own exercise of the franchise and further does not constitute concrete and specific judicially cognizable injury."); *Moncier v. Haslam*, 1 F.Supp.3d 854 (E.D. Tn. 2014) (plaintiff denied opportunity to be placed on ballot as candidate for judicial office shared the same generalized grievance as a large class of citizens and failed to demonstrate concrete and particularized injury).

In finding that presidential elector did have standing to challenge purported violations of state election laws, *Carson* relies heavily on specific provisions of Minnesota elections law that treated presidential electors the same as other candidates for office. However, in Georgia, unlike in Minnesota, all persons possessing the qualifications for voting and who have registered in accordance with the law are considered "Electors." O.C.G.A. § 21-2-2(7). Presidential electors in Georgia are not elected to public office, but perform only a limited ministerial role in which they appear at the Capitol on the designated date and time to carry out the expressed will of Georgia's electors by casting their votes for President and Vice President in the Electoral College. O.C.G.A. § 21-2-11. Presidential electors need

not file notices of candidacy otherwise required of political candidates. O.C.G.A. § 21-2-132. Their names do not appear on the ballot; instead, the names of the candidates for President and Vice President appear on the ballot. O.C.G.A. § 21-2-325. Georgia electors do not elect any presidential electors individually; instead, "that slate of candidates shall be elected to such office which receives the highest number of votes cast." O.C.G.A. § 21-2-501(f).

The Eleventh Circuit has held that voters do not suffer a "concrete and particularized injury" simply because their preferred candidate loses an election (*see Jacobson,* 974 F.3d at 1252), and that such a harm would be based on "generalized partisan preferences" which are insufficient to establish standing. *Id.*; *see also Gill v. Whitford,* 138 S.Ct. 1916, 1933 (2018) (rejecting standing based on "group political interests, not individual legal rights"). Plaintiffs have failed to articulate how they, as presidential electors, have suffered any injury not common to their partisan group political interests, or that would not have also been suffered by all Georgia electors generally.

C. Plaintiffs' Alleged Injuries are not Traceable to the State Defendants.

Not only have Plaintiffs failed to demonstrate an injury in fact, they cannot satisfy the causation requirement of standing, which requires that "a plaintiff's injury must be 'fairly traceable to the challenged action of the defendant, and not the result

of the independent action of some third party not before the court.'" *Jacobson*, 974 F.3d at 1253 (citation omitted); *see also Hollywood Mobile Estates Ltd. v. Seminole Tribe of Fla.*, 641 F.3d 1259, 1265 (11th Cir. 2011) (holding that an injury sufficient to establish standing cannot "result [from] the independent action of some third party not before the court.").

Plaintiffs have introduced declarations and affidavits from witnesses that raise disparate complaints about a variety of events that occurring at various times and places during the November election and subsequent audit. These complaints focus on actions allegedly taken by local elections officials and other third parties that are not named as defendants in this case.[12] Whatever one might conclude from these varied allegations, they all have one thing in common: none of the actions complained of are attributable in any way to any of the State Defendants. Instead, they were taken by local elections officials not named as parties to this case, and any

[12] Examples of these complaints include allegations that Dekalb County elections workers were "more hostile" to Republican observers than Democratic observers (Silva Aff. 06-9 Ex. 18, ¶14), that a Cobb County volunteer audit monitor witnessed "already separated paper machine receipt ballots with barcodes in the Trump tray, placing them in to the Biden tray" (Johnson Aff., Compl., Ex. 17, ¶¶4-5), and that an audit observer at the Lithonia location was too far away from ballots to see how they had been voted and that some auditors were validating ballots without reading them aloud to another auditor. (O'Neal Aff., 6-10, Exhibit J, ¶5-8).

injuries that might have resulted from those actions are not traceable to and cannot be redressed by the State Defendants.

With regard to Plaintiffs' conspiratorial claims related to Dominion equipment and software, there has been no allegation whatsoever that any of the State Defendants participated in any conspiracy or collusion with Dominion or any other third party malicious actor to cause any harm to Plaintiffs or any Georgia voters. The only allegation made against any of the State Defendants is that Governor Kemp and Secretary Raffensperger somehow "rushed" through the equipment selection process. However, this process was an open, competitive bidding process, conducted pursuant to Georgia procurement law, and during *Curling* hearings, and no allegation has been made as to how *any* action or inaction taken by any of the State Defendants during that bidding process might have caused any of Plaintiffs' alleged injuries.

Finally, to the extent that Plaintiffs claim injury as a result of any improprieties in the mailing, processing, validation or tabulation of absentee ballots, these injuries again would not be traceable to any of the State Defendants. Absentee ballots are mailed, processed, validated, and tabulated by local elections officials. *See* O.C.G.A. § 21-2-386. Having failed to establish that any of their purported injuries are traceable to or redressable by the State Defendants, Plaintiffs lack standing and their

claims should be dismissed. *See Jacobson*, 974 F.3d at 1253. *See also Anderson v. Raffensperger*, 1:20-CV-03263, 2020 WL 6048048, at *22 (N.D. Ga. Oct. 13, 2020) (applying *Jacobson* to dismiss election related claims against State Defendants).

II. Plaintiffs' Claims are Moot.

The Eleventh Circuit held in the *Wood* decision today that federal challenges to the certification of the presidential election results in Georgia are now moot. "'We cannot turn back the clock and create a world in which' the 2020 election results are not certified." *Wood v. Raffensperger*, slip op. at 17 (quoting *Fleming v. Gutierrez*, 785 F.3d 442, 445 (10th Cir. 2015)). Accordingly, the case "no longer presents a live controversy with respect to which the court can give meaningful relief." *Troiano v. Supervisor of Elections in Palm Beach Cty., Fla.*, 382 F.3d 1276, 1282 (11th Cir. 2004). Mootness is jurisdictional—because a federal court may only adjudicate cases and controversies, and a ruling that cannot provide meaningful relief is an impermissible advisory opinion. *Id.*

The Court "cannot prevent what has already occurred." *De La Fuente v. Kemp*, 679 F. App'x 932, 933 (11th Cir. 2017); *Yates v. GMAC Mortg. LLC*, No. 1:10-CV-02546-RWS, 2010 WL 5316550, at *2 (N.D. Ga. Dec. 17, 2010) ("The Court is powerless to enjoin what has already occurred."). While Plaintiffs purportedly seek "decertification" of the certifications that Secretary Raffensperger

and Governor Kemp have already executed, they cite no authority whatsoever to support the notion that a court could order such relief. If the Plaintiffs believed that the results certified by Secretary Raffensperger and Governor Kemp were invalid for fraud or other grounds specified in O.C.G.A. § 21-2-522, Georgia provides an adequate remedy at law by setting forth the procedures for a state law election contest to be initiated in the Superior Court of Fulton County. O.C.G.A. §§ 21-2-520, *et seq*. However, there is simply no precedent for a federal court to issue an injunction requiring either Governor Kemp or Secretary Raffensperger to "decertify" their already-issued certifications or to certify results in direct contravention of the actual election result.

III. Plaintiffs' Claims are Barred by the Eleventh Amendment.

Plaintiffs' federal claims are asserted against the individually named State Defendants in their official capacities. (Doc. 1 at ¶¶ 31-33). These claims are barred by the Eleventh Amendment. The Eleventh Amendment bars suit against a State or one of its agencies, departments or officials, absent a waiver by the State or a valid congressional override, when the State is the real party in interest. *Kentucky v. Graham*, 473 U.S. 159, 169 (1985). Because claims against public officials in their official capacities are merely another way of pleading an action against the entity of which the officer is an agent, "official capacity" claims against a state officer are

included in the Eleventh Amendment's bar. *Kentucky*, 473 U.S. at 165. While an exception to Eleventh Amendment immunity exists under *Ex parte Young*, 209 U.S. 123 (1908), it is limited to suits against state officers for **prospective** injunctive relief. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 69 n. 24 (1997). "A federal court cannot award retrospective relief, designed to remedy past violations of federal law." *Id.*

Plaintiffs' claims for injunctive and declaratory relief, premised on the conduct of the November 3, 2020 General Election and the certification of results that have already taken place, are barred because they are retrospective in nature. "Retrospective relief is backward-looking, and seeks to remedy harm 'resulting from a past breach of a legal duty on the part of the defendant state officials.'" *Seminole Tribe of Fla. v. Fla. Dep't of Revenue*, 750 F.3d 1238, 1249 (11th Cir. 2014) (quoting *Edelman v. Jordan,* 415 U.S. 651, 668 (1974)). "Simply because the remedy will occur in the future, does not transform it into 'prospective' relief. The term, 'prospective relief,' refers to the ongoing or future threat of harm, not relief." *Fedorov v. Bd. of Regents*, 194 F. Supp. 2d 1378, 1387 (S.D. Ga. 2002). Plaintiffs' claims for any relief related to the rules and regulations governing the conduct of the November 3, 2020, election or any alleged past security lapses, miscounting of votes,

or election irregularities are entirely retrospective and barred by the Eleventh Amendment.

IV. Laches Bars Plaintiffs' Claims for Post-Election Relief.

In *Wood v. Raffensperger*, 2020 U.S.Dist. LEXIS 218058 (Nov. 20. 2020), this Court found that claims raised by Plaintiffs' counsel Lin Wood were barred by the doctrine of laches. While Plaintiffs' claims overlap significantly with Wood's claims, the facts here are even more compelling when it comes to a finding of laches. Plaintiffs waited even longer than Wood did to file this action. As in *Wood,* virtually all of the complaints that Plaintiffs allege regarding the security of Georgia's voting system or the propriety of State Election Board rules or regulations could have been raised prior to the election.

To establish laches, State Defendants must show "(1) there was a delay in asserting a right or a claim, (2) the delay was not excusable, and (3) the delay caused [them] undue prejudice." *United States v. Barfield*, 396 F.3d 1144, 1150 (11th Cir. 2005); *see also Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1326 (11th Cir. 2019) ("To succeed on a laches claim, [defendant] must demonstrate that [p]laintiffs inexcusably delayed bringing their claim and that the delay caused it undue prejudice.").

Where, as here, a challenge to an election procedure is not filed until *after* an election has already been conducted, the prejudice to the state and to the voters that have cast their votes in the election becomes particularly severe. Once the election has been conducted, any harm that might arise from a purported constitutional violation must be weighed against "such countervailing equitable factors as the extremely disruptive effect of election invalidation and the havoc it wreaks upon local political continuity." *Soules v. Kauaians for Nukolii Campaign Committee*, 849 F.2d 1176, 1177 (9th Cir. 1988). For this reason, "if aggrieved parties, without adequate explanation, do not come forward before the election, they will be barred from the equitable relief of overturning the results of the election." *Id.* at 1180-81 (*citing Hendon v. North Carolina State Bd. of Elections*, 710 F.2d 177, 182-83 (4th Cir. 1983); *see also Curtin v. Va. State Bd. of Elections*, No. 1:20-cv-0546, 2020 U.S. Dist. LEXIS 98627, *16-17 (E.D. Va. May 29, 2020) (rejecting a similar challenge to state official guidance as barred by laches due to plaintiffs' failure to raise the challenge prior to the election). To hold otherwise "permit[s], if not encourage[s], parties who could raise a claim to lay by and gamble upon receiving a favorable decision of the electorate and then, upon losing, seek to undo the ballot results in a court action." *Toney v. White*, 488 F.2d 310, 314 (5th Cir. 1973).

Plaintiffs delayed considerably in asserting their claims. To the extent that they had any concerns regarding the vulnerability of Dominion's voting systems, they could have raised those claims long before the election. Each of the absentee ballot regulations and procedures that Plaintiffs now complain of were adopted well before the November 3, 2020 election, and any claims related to the application of those rules during that election are subject to dismissal here for the same reasons that they were dismissed in *Wood*. And, with regard to the purported "irregularities" reported by Plaintiffs' voter and observer declarants, Plaintiffs offer no explanation why they did not attempt to address those issues with the relevant local election officials at the time, but instead waited until after the election officials completed the initial count and audit and certified those results.

As the *Wood* court recognized, Defendants and the public at large would be significantly injured if Plaintiffs were permitted to raise these challenges after the election has already taken place. 2020 U.S.Dist. LEXIS 218058 at *23 ("Wood's requested relief could disenfranchise a substantial portion of the electorate and erode the public's confidence in the electoral process."); *see also Arkansas United v. Thurston*, No. 5:20-cv-5193, 2020 WL 6472651, at *5 (W.D. Ark. Nov. 3, 2020) ("[T]he equities do not favor intervention where the election is already in progress and the requested relief would change the rules of the game mid-play.").

V. The Court should Abstain from Granting Relief.

The relief Plaintiffs seek is nothing short of overturning the November election. The ad damnum clause asks this Court to (1) order the Defendants to de-certify the election results; (2) enjoin the Governor from transmitting the certified results to the Electoral College; and instead (3) require the Governor to transmit a certification that President Trump received the majority of votes in Georgia. (Doc. 1 ¶ 211(1-3); Doc. 101 at 100.) There are numerous problems with this proposed relief. First, it violates the principles of federalism. Second, the *Pullman* doctrine warrants dismissal. Finally, and at the very least, this lawsuit should be stayed pending the outcome of state election challenges pursuant to the *Colorado River* doctrine.

On federalism, the Eleventh Circuit recently held that it is "doubtful" that a federal court could compel a state to promulgate a regulation. *Jacobson*, 974 F.3d at 1257. First, federal courts are only able to order state defendants from "refrain[ing] from violating federal law." *Id.* (citing *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 255 (2011)). Much of Plaintiffs' proposed relief cannot be reconciled with this binding precedent. Specifically, Plaintiffs do not seek to just refrain the Governor and the Secretary, they seek to compel them to certify a different candidate than the election laws demand, which is wholly inconsistent with Georgia's Election

Code and the thrice-audited results. The relief sought is particularly offensive to federalism principles in the light of the election challenges pending in state court that significantly mirror the claims brought in this lawsuit. As the Plaintiffs themselves now recognize, "Georgia law makes clear that post-election litigation may proceed in state Court." *Wood v. Raffensperger*, slip op. at 9. Indeed, Plaintiffs' Complaint repeatedly claims that they are bringing their lawsuit pursuant to Georgia statutes that provide the very basis to challenge elections. (Doc. No. 1 ¶¶ 150 (O.C.G.A. § 21-2-522), 183-207 (O.C.G.A. §§ 21-2-521, 21-2-522). It is hard to imagine a more significant challenge to federalism than for a party to come to federal court asking that court to reverse certified election results without giving the State an opportunity to act pursuant to its own statutory scheme.

These concerns are recognized by the *Pullman* doctrine, which is "appropriate 'in cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law.'" *3637 Corp., Inc. v. City of Miami*, 314 F. Supp. 3d 1320, 1334 (S.D. Fla. 2018) (citing *Moheb, Inc. v. City of Miami*, 756 F.Supp.2d 1370, 1372 (S.D. Fla. 2010) (quoting *Abell v. Frank*, 625 F.2d 653, 656–57 (5th Cir. 1980)). Here, the constitutional issue presented—whether the legislature's delegation of rulemaking authority to the SEB is valid, and whether the SEB exceeded that authority when

promulgating various emergency rules—violates the federal constitution. In other words, the Court cannot answer the constitutional question without first deciding that the state agency exceeded its authority *under State law*. This is a classic *Pullman* situation, which examines and requires that "(1) there must be an unsettled issue of state law; and (2) there must be a possibility that the state law determination will moot or present in a different posture the federal constitutional questions raised." *Id.* at 1372–73 (citing *Abell*, 625 F.2d at 657). Judge Jones reached the same conclusion last December in another election-related lawsuit, *Fair Fight, Inc. v. Raffensperger*.[13] This Court should do the same and dismiss the lawsuit.

For a similar reason, Plaintiffs' requested relief violates the *Colorado River Doctrine.* There are numerous pending challenges to the November election that have properly been filed in Georgia's courts, including, according to press statements by Mr. Wood's counsel in the *Wood* litigation, one filed late on December 4, 2020, by President Trump. At least one seeks nearly identical relief as the Plaintiffs' lawsuit. Under similar circumstances, the Eleventh Circuit has indicated that a stay of federal proceedings is warranted under the *Colorado River* doctrine, which "authorizes a federal 'district court to dismiss or stay an action when there is an ongoing parallel action in state court.'" *Moorer v. Demopolis Waterworks &*

[13] A true and accurate copy of the December Order is attached as **Exhibit E**.

Sewer Bd., 374 F.3d 994, 997–98 (11th Cir. 2004) (citing *LaDuke v. Burlington Northern Railroad Co.*, 879 F.2d 1556, 1558 (7th Cir.1989)). Factors considered in the *Colorado River* analysis include: the desire to "avoid piecemeal litigation," whether state or federal law governs the issue, and whether the state court can protect all parties' rights. *Id.* at 987 (citation omitted).

Each of these factors warrants staying the litigation. The bulk of Plaintiffs' complaint addresses issues of state law: how absentee ballot requests and ballots are inspected, the authority of the General Assembly to delegate authority to the SEB and the Secretary, and the criteria for certifying elections. Moreover, the state court election challenges are to move swiftly. Thus, the possibility of piecemeal litigation is real and concrete. Finally, the relief that the parties in the state court challenges can obtain would protect all parties' rights. The remedies available to Georgia courts when ruling on election challenges are spelled out in state law. *See* O.C.G.A. § 21-2-527(d). Under these circumstances, *Colorado River* factors are satisfied, and the election challenge should proceed in state court under the same state laws that the Plaintiffs raised in their Complaint.

VI. Plaintiffs' Motion for Injunctive Relief Should be Denied.

Even if Plaintiffs could overcome the jurisdictional defects that are fatal to their claims, they still fail to satisfy the requirements for the extraordinary injunctive relief they seek.

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 24 (2008). To prevail on their motion, Plaintiffs are required to show: (1) a substantial likelihood of prevailing on the merits; (2) that the plaintiff will suffer irreparable injury unless the injunction issues; (3) that the threatened injury to the movant outweighs whatever damages the proposed injunction may cause the opposing party; and (4) the injunction would not be adverse to the public interest. *Duke v. Cleland*, 954 F.2d 1526, 1529 (11th Cir. 1992). The Court "should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Winter*, 555 U.S. at 24.

A. Plaintiffs are not likely to succeed on the merits of their claims.

1. Plaintiffs' equal protection claims fail because they cannot show arbitrary and disparate treatment among different classes of voters.

Plaintiffs' equal protection claims fail for the same reason their counsel's equal protections claims failed in *Wood.* In the voting rights context, equal protection means that "[h]aving once granted the right to vote on equal terms, the state may

not, by later arbitrary and disparate treatment, value one person's vote over that of another." *Bush v. Gore,* 531 U.S. 98, 104 (2000) (citation omitted). Typically, when deciding a constitutional challenge to state election laws, federal courts apply the *Anderson-Burdick* framework that balances the burden on the voter with the state's interest in the voting regulation. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 190 (2008); *Democratic Exec. Comm. of Fla. v. Lee,* 915 F.3d 1312, 1318-19 (11th Cir. 2019).

But, as the *Wood* court recognized, Plaintiffs' claims do not fit within this framework. 2020 U.S. Dist. LEXIS 218058 at *25. Plaintiffs have not articulated a cognizable harm that invokes the Equal Protection Clause. Any actions taken by the State Defendants were taken "in a wholly uniform manner across the entire state." *Id.* at 26. No voters – including the Plaintiffs – were treated differently than any other voter. *Id.* (*citing Wise v. Circosta*, 978 F.3d 93, 100 (4th Cir. 2020).

Nor have Plaintiffs set forth a "vote dilution" claim. None of the Plaintiffs have alleged that any action of Defendants have burdened their ability to cast their own votes. Instead, their claims, like Wood's, appear to be that because some votes were improperly counted or illegally cast, these illegal or improperly counted votes somehow caused the weight of ballots cast lawfully by Georgia voters to be somehow weighted differently than others. *Id.* at 27. Both the district court in *Wood*

court and the Third Circuit Court of Appeals in *Bognet* "squarely rejected" this theory. *Bognet*, 2020 WL 6686120, at *31-2 ("if dilution of lawfully cast ballots by the 'unlawful' counting of invalidly cast ballots were a true equal-protection problem, then it would transform every violation of state election law…into a potential federal equal-protection claim"); *see also Jacobson*, 974 F.3d at 1247 (rejecting partisan vote dilution claim).

The Supreme Court's decision in *Bush v. Gore* does not support Plaintiff's case (*see* Doc. 6 at 16-17), as that case found a violation of equal protection where certain counties were utilizing varying standards for what constituted a legal vote in the 2000 Florida recount. 531 U.S. at 105 ("The question before us … is whether the recount procedures … are consistent with its obligation to avoid arbitrary and disparate treatment of the members of its electorate"). Here, any actions taken by the State Defendants were undertaken state-wide. The isolated "irregularities" complained of by Plaintiff's various declarants, if true, would have taken place at the county level under the supervision of elections officials that are not parties to this case. All actions of the State Defendants have been uniform and applicable to all Georgia counties and voters, in order to avoid the kind of ad hoc standards that varied from county to county as found unconstitutional in *Bush*. They are the exact opposite of arbitrary and disparate treatment.

2. Plaintiffs' claim under the Electors and Elections Clauses fails.

The electors clause of the United States Constitution provides that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, "who, in turn, cast the State's votes for president. U.S. Const. art. II, § 1, cl. 2. The General Assembly established the manner for the appointment of presidential electors in O.C.G.A. § 21-2-10, which provides that electors are *selected by popular vote* in a general election. Plaintiffs fail to show how any act of the State Defendants has altered this process.

Similarly, Plaintiffs fail to show how State Defendants have violated the elections clause, which provides that "[t]he Times, Places, and Manner of holding elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof." U.S. Const. art. I, § 4, cl. 1. Plaintiffs complain about a variety of regulations or procedures related to absentee ballot processing, without articulating precisely how those regulations or procedures run afoul of the elections clause. In any event, the State Election Board has the authority, delegated by the legislature, "[t]o formulate, adopt, and promulgate such rules and regulations … as will be conducive to the fair, legal, and orderly conduct of primaries and elections" so long as those rules are "consistent with law." O.C.G.A. 21-2-31(2). Thus, while no one disagrees that State Defendants are not members of the Georgia legislature,

Plaintiff's claim depends on the assumption that the rules and procedures used to process absentee ballots during the November 3, 2020, election were somehow inconsistent with Georgia's election code.

But this simply is not so. The SEB Rule is consistent with State law, and a Georgia court would likely say the same. Under Georgia precedent, when an agency empowered with rulemaking authority (like the SEB is), the test applied to regulation challenges is quite deferential. Georgia courts ask whether the regulation is authorized by statute and reasonable. *Albany Surgical, P.C. v. Dep't of Cmty. Health*, 257 Ga. App. 636, 637 (2002). The answer to both questions is an unqualified "yes."

As shown, the SEB is empowered to promulgate regulations. O.C.G.A. § 21-2-31(1). As recognized by Judge Grimberg in *Wood*, it is normal and constitutional for state legislatures to delegate their authority in such a manner. 2020 U.S.Dist. LEXIS 218058 at *10. The regulations are also reasonable. There is no conflict between the signature verification regulation and statutes cited by the Plaintiffs, O.C.G.A. §§ 21-2-386(a)(1)(C). (Doc. No. 1 at 23.) The statute requires an absentee ballot where a signature "does not appear to be valid" to be rejected and notice provided to the voter. *Id.* The challenged SEB Rule, which merely requires "an additional safeguard to ensure election security by having more than one individual review an absentee ballot's information and signature for accuracy before the ballot

is rejected," is consistent with this approach. *Wood*, 2020 U.S.Dist. LEXIS 218058 at *10. No statute cited by the Plaintiffs mandates that only one county official examine the absentee ballot, and that the review process involves several officials does not make it any less rigorous or inconsistent with the statutory law. (*See* Harvey Decl. ¶¶ 3, 5). A Georgia court would likely hold the same, because state courts have said that a "regulation must be upheld if the agency presents *any evidence* to support the regulation." *Albany Surgical, P.C. v. Dep't of Cmty. Health*, 257 Ga. App. 636, 640 (2002). Mr. Harvey's declaration certainly satisfies that standard, and it should be obvious that having a verification process in place designed to ensure uniform statewide application of the laws for determining consideration of an absentee ballot does not lead to invalid votes.

Any remaining doubt must be resolved in the State's favor, as the Plaintiffs have not identified any conflict in the language. This is what Judge Grimberg rightly concluded when he held that: "The record in this case demonstrate that, if anything, Defendants' actions in entering into the Settlement Agreement sought to achieve consistency among county election officials in Georgia, which ***furthers*** Wood's stated goals of conducting "[f]ree, fair, and transparent elections." *Wood* at * 10 (emphasis and brackets in original). This ends the inquiry and is fatal to Plaintiffs' claims in Counts I, III, IV, and V.

3. Plaintiffs' due process claims fail.

Plaintiffs' motion fails to articulate a discernable claim under the due process clause. It is unclear what process Plaintiffs claim that they were due or how any of the State Defendants failed to provide that process. Count II of Plaintiffs' Complaint, while captioned "Denial of Due Process" vaguely describes an undefined "disparate treatment" with regard to cure processes and argues that the disparate treatment "violates Equal Protection guarantees." *See* Compl. at ¶172. Count IV of Plaintiffs' Complaint is captioned "Denial of Due Process on the Right to Vote", and appears to describe a claim of vote dilution or debasement – citing to various equal protection cases. *See* Compl. at ¶§176-80. Plaintiffs' Motion for Preliminary Injunction does not include any discussion of due process at all.

Plaintiffs have not articulated a cognizable procedural due process claim. A procedural due process claim raises two inquires: "(1) whether there exists a liberty or property interest which has been interfered with by the State and (2) whether the procedures attendant upon that deprivation were constitutionally sufficient." *Richardson v. Texas Sec'y of State*, 978 F.3d 220, 229 (5th Cir. 2020) (citing *Kentucky Dep't of Corr. v. Thompson*, 490 U.S. 454, 460 (1989)). The party invoking the Due Process Clause's procedural protections bears the "burden . . . of establishing a cognizable liberty or property interest." *Richardson*, 978 F.3d at 229

(citing *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005)). Plaintiffs have not clearly articulated what liberty or property interest has been interfered with by the State Defendants, or how any procedures attendant to the purported deprivation were constitutionally sufficient. As the *Wood* court noted:

> …the Eleventh Circuit does "assume that the right to vote is a liberty interest protected by the Due Process Clause." *Jones v. Governor of Fla.*, 975 F.3d 1016, 1048 (11th Cir. 2020). But the circuit court has expressly declined to extend the strictures of procedural due process to "a State's election procedures." *New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1282 (11th Cir. 2020) ("The generalized due process argument that the plaintiffs argued for and the district court applied would stretch concepts of due process to their breaking point.").

2020 U.S. Dist. LEXIS 218058 at *33.

Nor have Plaintiffs articulated a cognizable substantive due process claim. The types of voting rights covered by the substantive due process clause are considered narrow. *Curry v. Baker*, 802 F.2d 1302, 1314 (11th Cir. 1986). This does not extend to examining the validity of individual ballots or supervising the administrative details of an election. *Id.* In only "extraordinary circumstances will a challenge to a state election rise to the level of a constitutional deprivation." *Id.*

As the *Wood* court recognized:

> Although Wood generally claims fundamental unfairness, and the declarations and testimony submitted in support of his motion speculate as to wide-spread impropriety, the actual harm alleged by Wood concerns merely a "garden variety" election dispute.

2020 U.S. Dist. LEXIS 218058 at *35. Further, "[p]recedent militates against a finding of a due process violation regarding such an ordinary dispute over the counting and marking of ballots." *Id.* (*citing Gamza v. Aguirre*, 619 F.2d 449, 453 (5th Cir. 1980) for the proposition that "If every state election irregularity were considered a federal constitutional deprivation, federal courts would adjudicate every state election dispute.").

The same is true here. Plaintiffs have introduced only speculative, conclusory and contradictory testimony from "experts" that would do no more than establish a possibility of irregularities if their analysis were correct, along with a hodge-podge of disparate claims by third-party voters and observers claiming that they observed a variety of different purported irregularities in a handful of different counties (none of which are parties to this action). Plaintiffs have failed to demonstrate the "extraordinary circumstances" rising to the level of a constitutional deprivation that are necessary to support a substantive due process claim. Plaintiffs have therefore failed to demonstrate a substantial likelihood of success on the merits of any claim for violation of the 14th Amendment's guarantee of either procedural or substantive Due Process.

4. Plaintiffs' Election Contest Claims Fail.

As shown, the Plaintiffs have effectively filed an election challenge under Georgia law. Seeking to stop certification does not save the Plaintiffs' Complaint for at least two additional reasons. First, it has long been the rule that electors are state and not federal officials. *See Walker v. United States*, 93 F.2d 383, 388 (8th Cir. 1937). Consequently, it is state law that determines how challenges to electors are made, and Georgia law sets forth that process as explained above. This also demonstrates why abstention is appropriate. Second, to the extent that the Plaintiffs argue that county election officials did not properly count mail-in and absentee ballots, there are state remedies available to challenge the acts of those county officials. Indeed, Georgia's laws governing election challenges provide for just that.

Finally, and as addressed elsewhere in this brief, the *Jacobson* decision makes clear that challenges to acts of county officials must be brought against those county officials. 974 F.3d at 1254. It is insufficient to rely on the Secretary's general powers "to establish traceability." *Anderson*, 2020 WL 6048048 at *23. Similarly, reliance on the phrase "chief election official" or statements about the uniformity in the administration of election laws have been deemed insufficient by the *Anderson* court when it applied *Jacobson*. *Id.*

In sum, because Plaintiffs are not likely to succeed on the merits of any of their claims, injunctive relief must be denied.

B. The loss of Plaintiffs' preferred candidate is not irreparable harm.

Plaintiffs fail to articulate any specific harm that he faces if his requested relief is not granted, other than the vague claim that an infringement on the right to vote constitutes irreparable harm. However, Plaintiffs do not allege that their right to vote was denied or infringed in any way—only that their preferred candidate lost. It is not irreparable harm if they are not able to "cast their votes in the Electoral College for President Trump," because "[v]oters have no judicially enforceable interest in the outcome of an election." *Jacobson*, 974 F.3d at 1246 ("Voters have no judicially enforceable interest in the outcome of an election.").

Irreparable harm goes to the availability of a remedy—not a particular outcome. Certifying the expressed will of the electorate is not irreparable harm, but rather inevitable and legally required within our constitutional framework. There is a remedy available to extent that the losing candidate—rather than a dissatisfied voter, supporter, or presidential elector—seeks post-certification remedies, and such election contests have been filed in state court and remain pending.

C. The balance of equities and public interest weigh heavily against an injunction.

These remaining injunction factors—balancing the equities and public interest—are frequently considered "in tandem" by courts, "as the real question posed in this context is how injunctive relief at this eleventh-hour would impact the public interest in an orderly and fair election, with the fullest voter participation possible." *Curling v. Kemp*, 334 F. Supp. 3d 1303, 1326 (N.D. Ga. 2018), *aff'd in part, appeal dismissed in part*, 761 F. App'x 927 (11th Cir. 2019); *see also Purcell*, 549 U.S. at 4. The Court must "balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief," paying "particular regard as well for the public consequences in employing the extraordinary remedy of injunction." *Winter*, 555 U.S. at 24.

Here, "the threatened injury to Defendants as state officials and the public at large far outweigh any minimal burden on [Plaintiffs]. *Wood*, 2020 U.S. Dist. LEXIS 218058 at *38. "Confidence in the integrity of our electoral process is essential to the functioning of our participatory democracy," and court orders affecting elections "can themselves result in voter confusion and consequent incentive to remain away from the polls." *Purcell*, 549 U. S. at 4-5. For this reason, the Supreme Court "has repeatedly emphasized that lower federal courts should ordinarily not alter the

election rules on the eve of an election." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S.Ct. 1205, 1207 (April 6, 2020) (per curiam).

The Eleventh Circuit recently held that the *Purcell* principle applies with even greater force when voting has already occurred. *See New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1283 (11th Cir. 2020) ("[W]e are not on the eve of the election—we are in the middle of it, with absentee ballots already printed and mailed. An injunction here would thus violate *Purcell*'s well-known caution against federal courts mandating new election rules—especially at the last minute."); *see also Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 919 (9th Cir. 2003) ("Interference with impending elections is extraordinary, and interference with an election after voting has begun is unprecedented.").

Here, the election *has already been conducted*, and the slate of presidential electors has been certified. Granting Plaintiffs' extraordinary relief would only serve to "disenfranchise [] voters or sidestep the expressed will of the people." *Donald J. Trump for President,* 2020 U.S. App. LEXIS 37346 at *28. As the district court in *Wood* correctly recognized, "To interfere with the result of an election that has already concluded would be unprecedented and harm the public in countless ways." 2020 U.S. Dist. LEXIS 218058 at *37-38. Plaintiffs seek even broader relief than that sought in *Wood.* If granted, Plaintiffs' requested relief would disenfranchise not

only Georgia's absentee voters but would invalidate **all** votes cast by Georgia electors.

CONCLUSION

For the foregoing reasons, Plaintiffs' emergency motion for injunctive relief must be denied and the Court should dismiss the action with prejudice. Furthermore, the current TRO entered by the Court should be immediately dissolved to prevent ongoing harm to the ability of county elections officials to begin early voting for the January run-off, for the reasons shown in State Defendants' motion to modify the TRO.

Respectfully submitted, this 5th day of December, 2020.

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Attorneys for State Defendants

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing has been formatted using Times New Roman font in 14-point type in compliance with Local Rule 7.1(D).

/s/ Charlene S. McGowan
Charlene S. McGowan
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that I have this day electronically filed the foregoing **STATE DEFENDANTS' CONSOLIDATED BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS AND RESPONSE TO PLAINTIFF'S EMERGENCY MOTION FOR INJUNCTIVE RELIEF** with the Clerk of Court using the CM/ECF system, which will send notification of such filing to counsel for all parties of record via electronic notification.

Dated: December 5, 2020.

/s/ Charlene S. McGowan
Charlene S. McGowan
Assistant Attorney General

Jeffrey DeSousa

From:	Amit Agarwal
Sent:	Tuesday, December 8, 2020 1:32 PM
To:	Executive.Staff
Subject:	Accepted: Phone Conference with Amit Agarwal, John Guard, Richard Martin and Charlie Trippe

Jeffrey DeSousa

From: Amit Agarwal
Sent: Tuesday, December 8, 2020 1:13 PM
To: Catherine McNeill
Cc: John Guard; Charles Trippe; Richard Martin
Subject: Re: amicus meeting

I am not available from 4:30 to 5:30 or 3:00 to 4:00.

In light of a recent update, this could wait till tomorrow morning if that's more convenient for the group.

From: Catherine McNeill <cate.mcneill@myfloridalegal.com>
Sent: Tuesday, December 8, 2020 1:10 PM
To: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Cc: John Guard <John.Guard@myfloridalegal.com>; Charles Trippe <Charles.Trippe@myfloridalegal.com>; Richard Martin <Richard.Martin@myfloridalegal.com>
Subject: RE: amicus meeting

Maybe have Charlie join at 4:30?

From: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Sent: Tuesday, December 8, 2020 12:45 PM
To: Catherine McNeill <cate.mcneill@myfloridalegal.com>
Cc: John Guard <John.Guard@myfloridalegal.com>; Charles Trippe <Charles.Trippe@myfloridalegal.com>; Richard Martin <Richard.Martin@myfloridalegal.com>
Subject: amicus meeting

Catherine,

Can we please schedule a short meeting this afternoon to discuss some amicus briefs that have come in with impending deadlines (one of which has a join deadline of today at COB)? I can arrange to be free any time **other than** from 3:00 to 4:00 and 4:30 to 5:30. 4:00 would be ideal if that works for the group.

Thanks.

--Amit

Amit Agarwal
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Amit.Agarwal@myfloridalegal.com
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Jeffrey DeSousa

From: Amit Agarwal
Sent: Tuesday, December 8, 2020 12:45 PM
To: Catherine McNeill
Cc: John Guard; Charles Trippe; Richard Martin
Subject: amicus meeting

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--Amit

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Jeffrey DeSousa

From: James Percival
Sent: Wednesday, December 9, 2020 6:09 PM
To: Amit Agarwal
Subject: Fwd: AZ Amicus

FYI

From: Evan Ezray <Evan.Ezray@myfloridalegal.com>
Sent: Wednesday, December 9, 2020 5:37:51 PM
To: James Percival <James.Percival@myfloridalegal.com>
Subject: AZ Amicus

https://www.supremecourt.gov/DocketPDF/22/22O155/163258/20201209171850333_TX%20v%20PA%20Motion%20for%20Leave%20FINAL.pdf

Jeffrey DeSousa

From: Evan Ezray
Sent: Wednesday, December 9, 2020 5:52 PM
To: Amit Agarwal
Subject: Arizona filing in Texas v. PA

Amit,

I wanted you to see an Arizona filing in the Texas v. PA Supreme Court case.

It seeks leave to file an amicus brief (which is not attached) and says if granted leave, Arizona will argue that (1) "election integrity is of paramount importance" and (2) if the Court grants review, it should act quickly.

A link is below, and please call me if you would like to discuss.

Evan

https://www.supremecourt.gov/DocketPDF/22/22O155/163258/20201209171850333_TX%20v%20PA%20Motion%20for%20Leave%20FINAL.pdf

Jeffrey DeSousa

From: Evan Ezray
Sent: Wednesday, December 9, 2020 2:46 PM
To: Amit Agarwal
Cc: James Percival; Jeffrey DeSousa
Subject: RE: RE:

Thanks Amit, glad it was helpful.

From: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Sent: Wednesday, December 9, 2020 2:37 PM
To: Evan Ezray <Evan.Ezray@myfloridalegal.com>
Cc: James Percival <James.Percival@myfloridalegal.com>; Jeffrey DeSousa <Jeffrey.DeSousa@myfloridalegal.com>
Subject: Re: RE:

Evan,

Thanks for taking the time to do this, and for the quick and helpful analysis.

--Amit

From: Evan Ezray <Evan.Ezray@myfloridalegal.com>
Sent: Wednesday, December 9, 2020 9:51 AM
To: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Cc: James Percival <James.Percival@myfloridalegal.com>; Jeffrey DeSousa <Jeffrey.DeSousa@myfloridalegal.com>
Subject: RE:

Amit,

The safe harbor deadline provides that if a state has a pre-election procedure for appointing electors and, consistent with that pre-election law, makes a determination of the appointment of electors "at least six days before the time fixed for the meeting of the electors," then that determination "shall govern in the counting of the electoral votes." 3 U.S.C. § 5. This year, the meeting of electors will take place on December 14 (which is the first Monday after the second Wednesday in December). 3 U.S.C. § 7. That made the safe harbor day December 8.

The upshot is that if a state meets the safe harbor deadline and then its electors meet, those electors "shall govern" in the counting of electoral votes.

As far as I can tell every state save Wisconsin met the safe harbor. *See* https://www.jsonline.com/story/news/politics/elections/2020/12/08/wisconsin-only-state-miss-election-safe-harbor-deadline/6496378002/.

Last, I would note that the safe harbor provision played a key role in *Bush v. Gore*. To summarize, the majority thought that Florida had a legislatively-expressed desire to meet the safe harbor, and therefore, was unwilling to allow a recount to extend beyond the deadline. The dissent gave the safe harbor a much smaller role.

I have included the full text of the safe harbor and some key quotes from the *Bush v. Gore* debate below.

Happy to answer any additional questions,

Evan

- Safe harbor text. "If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned." 3 U.S.C. § 5.
    - Meeting of electors is the first Monday after the second Wednesday in December. 3 U.S. 7. That is December 14, so the safe harbor is December 8.
- *Bush v. Gore* debate on safe harbor
    - PC: "Seven Justices of the Court agree that there are constitutional problems with the recount ordered by the Florida Supreme Court that demand a remedy. The only disagreement is as to the remedy. Because the Florida Supreme Court has said that the Florida Legislature intended to obtain the safe-harbor benefits of 3 U.S.C. § 5, Justice BREYER's proposed remedy—remanding to the Florida Supreme Court for its ordering of a constitutionally proper contest until December 18–contemplates action in violation of the Florida Election Code, and hence could not be part of an "appropriate" order authorized by Fla. Stat. Ann. § 102.168(8) (Supp.2001)."
    - Rehnquist concurrence:
        - "If we are to respect the legislature's Article II powers, therefore, we must ensure that postelection state-court actions do not frustrate the legislative desire to attain the 'safe harbor' provided by § 5."
        - "in light of the legislative intent identified by the Florida Supreme Court to bring Florida within the "safe harbor" provision of 3 U.S.C. § 5, the remedy prescribed by the Supreme Court of Florida cannot be deemed an "appropriate" one as of December 8. It significantly departed from the statutory framework in place on November 7, and authorized open-ended further proceedings which could not be completed by December 12, thereby preventing a final determination by that date."
    - Stevens dissent:
        - "It hardly needs stating that Congress, pursuant to 3 U.S.C. § 5, did not impose any affirmative duties upon the States that their governmental branches could "violate."

Rather, § 5 provides a safe harbor for States to select electors in contested elections "by judicial or other methods" established by laws prior to the election day. Section 5, like Article II, assumes the involvement of the state judiciary in interpreting state election laws and resolving election disputes under those laws. Neither § 5 nor Article II grants federal judges any special authority to substitute their views for those of the state judiciary on matters of state law."

- Souter dissent:
  - "The 3 U.S.C. § 5 issue is not serious. That provision sets certain conditions for treating a State's certification of Presidential electors as conclusive in the event that a dispute over recognizing those electors must be resolved in the Congress under 3 U.S.C. § 15. Conclusiveness requires selection under a legal scheme in place before the election, with results determined at least six days before the date set for casting electoral votes. But no State is required to conform to § 5 if it cannot do that (for whatever reason); the sanction for failing to satisfy the conditions of § 5 is simply loss of what has been called its "safe harbor." And even that determination is to be made, if made anywhere, in the Congress."
- Ginsburg dissent:
  - "the December 12 "deadline" for bringing Florida's electoral votes into 3 U.S.C. § 5's safe harbor lacks the significance the Court assigns it. Were that date to pass, Florida would still be entitled to deliver electoral votes Congress must count unless both Houses find that the votes "ha [d] not been ... regularly given." 3 U.S.C. § 15. The statute identifies other significant dates. See, e.g., § 7 (specifying *144 December 18 as the date electors "shall meet and give their votes"); § 12 (specifying "the fourth Wednesday in December"—this year, December 27—as the date on which Congress, if it has not received a State's electoral votes, shall request the state secretary of state to send a certified return immediately). But none of these dates has ultimate significance in light of Congress' detailed provisions for determining, on "the sixth day of January," the validity of electoral votes."
- Breyer dissent:
  - "However, § 5 is part of the rules that govern Congress' recognition of slates of electors. Nowhere in Bush I did we *149 establish that this Court had the authority to enforce § 5. Nor did we suggest that the permissive "counsel against" could be transformed into the mandatory "must ensure." And nowhere did we intimate, as the concurrence does here, that a state-court decision that threatens the safe harbor provision of § 5 does so in violation of Article II."

- "The parties before us agree that whatever else may be the effect of this section, it creates a "safe harbor" for a State insofar as congressional consideration of its electoral votes is concerned. If the state legislature has provided for final determination of contests or controversies by a law made prior to election day, that determination shall be conclusive if made at least six days prior to said time of meeting *78 of the electors. The Florida Supreme Court cited 3 U.S.C. §§ 1-10 in a footnote of its opinion, 772 So.2d, at 1238, n. 55, but did not discuss § 5. Since § 5 contains a principle of federal law that would assure finality of the State's determination if made pursuant to a state law in effect before the election, a legislative wish to take advantage of the "safe harbor" would counsel against any construction of the Election Code that Congress might deem to be a change in the law." *Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70, 77–78 (2000).

From: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Sent: Wednesday, December 9, 2020 12:19 AM
To: Evan Ezray <Evan.Ezray@myfloridalegal.com>
Subject: Fw:

Can you please take a look at this tomorrow morning?

From: John Guard <John.Guard@myfloridalegal.com>
Sent: Wednesday, December 9, 2020 12:15 AM
To: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Subject:

Can you have someone look at the safe harbor and its effect here?

Get Outlook for iOS

Jeffrey DeSousa

From: Mithun Mansinghani <mithun.mansinghani@oag.ok.gov>
Sent: Wednesday, December 9, 2020 2:03 PM
To: Sauer, John; 'Murrill, Elizabeth'; 'Melissa Holyoak'; 'nicholas.bronni@arkansasag.gov'; 'Vincent Wagner'; 'ed.sniffen@alaska.gov'; Smith, Justin; Amit Agarwal; 'Kane, Brian'; 'tom.fisher@atg.in.gov'; 'julia.payne@atg.in.gov'; 'toby.crouse@ag.ks.gov'; 'Chad.Meredith@ky.gov'; 'Andrew Pinson'; 'jeff.chanay'; 'St. John, Joseph'; 'Kristi.Johnson@ago.ms.gov'; 'ABurton@mt.gov'; 'MSchlichting@mt.gov'; 'Lindsay S. See'; 'jonbennion@mt.gov'; 'wstenehjem@nd.gov'; 'Benjamin.flowers@ohioattorneygeneral.gov'; 'ESmith@scag.gov'; 'BCook@scag.gov'; 'steven.blair@state.sd.us'; 'Sherri.Wald@state.sd.us'; 'Sarah.Campbell@ag.tn.gov'; 'tom.fisher@atg.in.gov'; 'Andree.Blumstein@ag.tn.gov'; 'matthew.frederick@texasattorneygeneral.gov'; 'Kyle.Hawkins@oag.texas.gov'; 'Ric Cantrell'; 'james.kaste@wyo.gov'; 'Jim.Campbell@nebraska.gov'; 'Thomas T. Lampman'; 'Jessica A. Lee'; 'Lindsay S. See'; 'Roysden, Beau'; 'Bash, Zina'; 'masagsve@nd.gov'; 'Harley Kirkland'; 'Eddie Lacour'; 'Hudson, Kian'; 'Kuhn, Matt F (KYOAG)'; 'Michelle Williams'; 'krissy.nobile@ago.ms.gov'
Subject: RE: Texas v. Pennsylvania, et al. - Amicus Brief of Missouri, at al. - Joins requested by 1:00 p.m. Central Tomorrow, 12/9

Oklahoma joins as well.

From: Sauer, John <John.Sauer@ago.mo.gov>
Sent: Wednesday, December 9, 2020 12:56 PM
To: Mithun Mansinghani <mithun.mansinghani@oag.ok.gov>; 'Murrill, Elizabeth' <MurrillE@ag.louisiana.gov>; 'Melissa Holyoak' <melissaholyoak@agutah.gov>; 'nicholas.bronni@arkansasag.gov' <nicholas.bronni@arkansasag.gov>; 'Vincent Wagner' <vincent.wagner@arkansasag.gov>; 'ed.sniffen@alaska.gov' <ed.sniffen@alaska.gov>; Smith, Justin <Justin.Smith@ago.mo.gov>; 'Amit.Agarwal@myfloridalegal.com' <Amit.Agarwal@myfloridalegal.com>; 'Kane, Brian' <brian.kane@ag.idaho.gov>; 'tom.fisher@atg.in.gov' <tom.fisher@atg.in.gov>; 'julia.payne@atg.in.gov' <julia.payne@atg.in.gov>; 'toby.crouse@ag.ks.gov' <toby.crouse@ag.ks.gov>; 'Chad.Meredith@ky.gov' <Chad.Meredith@ky.gov>; 'Andrew Pinson' <APinson@LAW.GA.GOV>; 'jeff.chanay' <jeff.chanay@ag.ks.gov>; 'St. John, Joseph' <StJohnJ@ag.louisiana.gov>; 'Kristi.Johnson@ago.ms.gov' <Kristi.Johnson@ago.ms.gov>; 'ABurton@mt.gov' <ABurton@mt.gov>; 'MSchlichting@mt.gov' <MSchlichting@mt.gov>; 'Lindsay S. See' <Lindsay.S.See@wvago.gov>; 'jonbennion@mt.gov' <jonbennion@mt.gov>; 'wstenehjem@nd.gov' <wstenehjem@nd.gov>; 'Benjamin.flowers@ohioattorneygeneral.gov' <Benjamin.flowers@ohioattorneygeneral.gov>; 'ESmith@scag.gov' <ESmith@scag.gov>; 'BCook@scag.gov' <BCook@scag.gov>; 'steven.blair@state.sd.us' <steven.blair@state.sd.us>; 'Sherri.Wald@state.sd.us' <Sherri.Wald@state.sd.us>; 'Sarah.Campbell@ag.tn.gov' <Sarah.Campbell@ag.tn.gov>; 'tom.fisher@atg.in.gov' <tom.fisher@atg.in.gov>; 'Andree.Blumstein@ag.tn.gov' <Andree.Blumstein@ag.tn.gov>; 'matthew.frederick@texasattorneygeneral.gov' <matthew.frederick@texasattorneygeneral.gov>; 'Kyle.Hawkins@oag.texas.gov' <Kyle.Hawkins@oag.texas.gov>; 'Ric Cantrell' <rcantrell@agutah.gov>; 'james.kaste@wyo.gov' <james.kaste@wyo.gov>; 'Jim.Campbell@nebraska.gov' <Jim.Campbell@nebraska.gov>; 'Thomas T. Lampman' <Thomas.T.Lampman@wvago.gov>; 'Jessica A. Lee' <Jessica.A.Lee@wvago.gov>; 'Lindsay S. See' <Lindsay.S.See@wvago.gov>; 'Roysden, Beau' <Beau.Roysden@azag.gov>; 'Bash, Zina' <Zina.Bash@oag.texas.gov>; 'masagsve@nd.gov'; 'Harley Kirkland' <HKirkland@scag.gov>; 'Eddie Lacour' <elacour@ago.state.al.us>; 'Hudson, Kian' <Kian.Hudson@atg.in.gov>; 'Kuhn, Matt F (KYOAG)' <Matt.Kuhn@ky.gov>; 'Michelle Williams' <Michelle.Williams@ago.ms.gov>; 'krissy.nobile@ago.ms.gov' <krissy.nobile@ago.ms.gov>
Subject: [EXTERNAL] RE: Texas v. Pennsylvania, et al. - Amicus Brief of Missouri, at al. - Joins requested by 1:00 p.m. Central Tomorrow, 12/9

Indiana has joined

From: Sauer, John
Sent: Wednesday, December 9, 2020 12:49 PM
To: 'Mithun Mansinghani' <mithun.mansinghani@oag.ok.gov>; 'Murrill, Elizabeth' <MurrillE@ag.louisiana.gov>; 'Melissa Holyoak' <melissaholyoak@agutah.gov>; 'nicholas.bronni@arkansasag.gov' <nicholas.bronni@arkansasag.gov>; 'Vincent Wagner' <vincent.wagner@arkansasag.gov>; 'ed.sniffen@alaska.gov' <ed.sniffen@alaska.gov>; Smith, Justin <justin.smith@ago.mo.gov>; 'Amit.Agarwal@myfloridalegal.com' <Amit.Agarwal@myfloridalegal.com>; 'Kane, Brian' <brian.kane@ag.idaho.gov>; 'tom.fisher@atg.in.gov' <tom.fisher@atg.in.gov>; 'julia.payne@atg.in.gov' <julia.payne@atg.in.gov>; 'toby.crouse@ag.ks.gov' <toby.crouse@ag.ks.gov>; 'Chad.Meredith@ky.gov' <Chad.Meredith@ky.gov>; 'Andrew Pinson' <APinson@LAW.GA.GOV>; 'jeff.chanay' <jeff.chanay@ag.ks.gov>; 'St. John, Joseph' <StJohnJ@ag.louisiana.gov>; 'Kristi.Johnson@ago.ms.gov' <Kristi.Johnson@ago.ms.gov>; 'ABurton@mt.gov' <ABurton@mt.gov>; 'MSchlichting@mt.gov' <MSchlichting@mt.gov>; 'Lindsay S. See' <Lindsay.S.See@wvago.gov>; 'jonbennion@mt.gov' <jonbennion@mt.gov>; 'wstenehjem@nd.gov' <wstenehjem@nd.gov>; 'Benjamin.flowers@ohioattorneygeneral.gov' <Benjamin.flowers@ohioattorneygeneral.gov>; 'ESmith@scag.gov' <ESmith@scag.gov>; 'BCook@scag.gov' <BCook@scag.gov>; 'steven.blair@state.sd.us' <steven.blair@state.sd.us>; 'Sherri.Wald@state.sd.us' <Sherri.Wald@state.sd.us>; 'Sarah.Campbell@ag.tn.gov' <Sarah.Campbell@ag.tn.gov>; 'tom.fisher@atg.in.gov' <tom.fisher@atg.in.gov>; 'Andree.Blumstein@ag.tn.gov' <Andree.Blumstein@ag.tn.gov>; 'matthew.frederick@texasattorneygeneral.gov' <matthew.frederick@texasattorneygeneral.gov>; 'Kyle.Hawkins@oag.texas.gov' <Kyle.Hawkins@oag.texas.gov>; 'Ric Cantrell' <rcantrell@agutah.gov>; 'james.kaste@wyo.gov' <james.kaste@wyo.gov>; 'Jim.Campbell@nebraska.gov' <Jim.Campbell@nebraska.gov>; 'Thomas T. Lampman' <Thomas.T.Lampman@wvago.gov>; 'Jessica A. Lee' <Jessica.A.Lee@wvago.gov>; 'Lindsay S. See' <Lindsay.S.See@wvago.gov>; 'Roysden, Beau' <Beau.Roysden@azag.gov>; 'Bash, Zina' <Zina.Bash@oag.texas.gov>; 'masagsve@nd.gov'; 'Harley Kirkland' <HKirkland@scag.gov>; 'Eddie Lacour' <elacour@ago.state.al.us>; 'Hudson, Kian' <Kian.Hudson@atg.in.gov>; 'Kuhn, Matt F (KYOAG)' <Matt.Kuhn@ky.gov>; 'Michelle Williams' <Michelle.Williams@ago.ms.gov>; 'krissy.nobile@ago.ms.gov' <krissy.nobile@ago.ms.gov>
Subject: RE: Texas v. Pennsylvania, et al. - Amicus Brief of Missouri, at al. - Joins requested by 1:00 p.m. Central Tomorrow, 12/9

Utah and Tennessee have joined as well

From: Sauer, John
Sent: Wednesday, December 9, 2020 12:46 PM
To: 'Mithun Mansinghani' <mithun.mansinghani@oag.ok.gov>; 'Murrill, Elizabeth' <MurrillE@ag.louisiana.gov>; 'Melissa Holyoak' <melissaholyoak@agutah.gov>; 'nicholas.bronni@arkansasag.gov' <nicholas.bronni@arkansasag.gov>; 'Vincent Wagner' <vincent.wagner@arkansasag.gov>; 'ed.sniffen@alaska.gov' <ed.sniffen@alaska.gov>; Smith, Justin <justin.smith@ago.mo.gov>; 'Amit.Agarwal@myfloridalegal.com' <Amit.Agarwal@myfloridalegal.com>; 'Kane, Brian' <brian.kane@ag.idaho.gov>; 'tom.fisher@atg.in.gov' <tom.fisher@atg.in.gov>; 'julia.payne@atg.in.gov' <julia.payne@atg.in.gov>; 'toby.crouse@ag.ks.gov' <toby.crouse@ag.ks.gov>; 'Chad.Meredith@ky.gov' <Chad.Meredith@ky.gov>; 'Andrew Pinson' <APinson@LAW.GA.GOV>; 'jeff.chanay' <jeff.chanay@ag.ks.gov>; 'St. John, Joseph' <StJohnJ@ag.louisiana.gov>; 'Kristi.Johnson@ago.ms.gov' <Kristi.Johnson@ago.ms.gov>; 'ABurton@mt.gov' <ABurton@mt.gov>; 'MSchlichting@mt.gov' <MSchlichting@mt.gov>; 'Lindsay S. See' <Lindsay.S.See@wvago.gov>; 'jonbennion@mt.gov' <jonbennion@mt.gov>; 'wstenehjem@nd.gov' <wstenehjem@nd.gov>; 'Benjamin.flowers@ohioattorneygeneral.gov' <Benjamin.flowers@ohioattorneygeneral.gov>; 'ESmith@scag.gov' <ESmith@scag.gov>; 'BCook@scag.gov' <BCook@scag.gov>; 'steven.blair@state.sd.us' <steven.blair@state.sd.us>; 'Sherri.Wald@state.sd.us' <Sherri.Wald@state.sd.us>; 'Sarah.Campbell@ag.tn.gov' <Sarah.Campbell@ag.tn.gov>; 'tom.fisher@atg.in.gov' <tom.fisher@atg.in.gov>; 'Andree.Blumstein@ag.tn.gov' <Andree.Blumstein@ag.tn.gov>; 'matthew.frederick@texasattorneygeneral.gov' <matthew.frederick@texasattorneygeneral.gov>; 'Kyle.Hawkins@oag.texas.gov' <Kyle.Hawkins@oag.texas.gov>; 'Ric Cantrell' <rcantrell@agutah.gov>; 'james.kaste@wyo.gov' <james.kaste@wyo.gov>; 'Jim.Campbell@nebraska.gov' <Jim.Campbell@nebraska.gov>; 'Thomas T. Lampman' <Thomas.T.Lampman@wvago.gov>; 'Jessica A. Lee' <Jessica.A.Lee@wvago.gov>; 'Lindsay S. See' <Lindsay.S.See@wvago.gov>; 'Roysden, Beau' <Beau.Roysden@azag.gov>; 'Bash, Zina' <Zina.Bash@oag.texas.gov>;

'masagsve@nd.gov'; 'Harley Kirkland' <HKirkland@scag.gov>; 'Eddie Lacour' <elacour@ago.state.al.us>; 'Hudson, Kian' <Kian.Hudson@atg.in.gov>; 'Kuhn, Matt F (KYOAG)' <Matt.Kuhn@ky.gov>; 'Michelle Williams' <Michelle.Williams@ago.ms.gov>; 'krissy.nobile@ago.ms.gov' <krissy.nobile@ago.ms.gov>
Subject: RE: Texas v. Pennsylvania, et al. - Amicus Brief of Missouri, at al. - Joins requested by 1:00 p.m. Central Tomorrow, 12/9

Florida and North Dakota have joined as well

From: Sauer, John
Sent: Wednesday, December 9, 2020 12:33 PM
To: 'Mithun Mansinghani' <mithun.mansinghani@oag.ok.gov>; 'Murrill, Elizabeth' <MurrillE@ag.louisiana.gov>; 'Melissa Holyoak' <melissaholyoak@agutah.gov>; 'nicholas.bronni@arkansasag.gov' <nicholas.bronni@arkansasag.gov>; 'Vincent Wagner' <vincent.wagner@arkansasag.gov>; 'ed.sniffen@alaska.gov' <ed.sniffen@alaska.gov>; Smith, Justin <justin.smith@ago.mo.gov>; 'Amit.Agarwal@myfloridalegal.com' <Amit.Agarwal@myfloridalegal.com>; 'Kane, Brian' <brian.kane@ag.idaho.gov>; 'tom.fisher@atg.in.gov' <tom.fisher@atg.in.gov>; 'julia.payne@atg.in.gov' <julia.payne@atg.in.gov>; 'toby.crouse@ag.ks.gov' <toby.crouse@ag.ks.gov>; 'Chad.Meredith@ky.gov' <Chad.Meredith@ky.gov>; 'Andrew Pinson' <APinson@LAW.GA.GOV>; 'jeff.chanay' <jeff.chanay@ag.ks.gov>; 'St. John, Joseph' <StJohnJ@ag.louisiana.gov>; 'Kristi.Johnson@ago.ms.gov' <Kristi.Johnson@ago.ms.gov>; 'ABurton@mt.gov' <ABurton@mt.gov>; 'MSchlichting@mt.gov' <MSchlichting@mt.gov>; 'Lindsay S. See' <Lindsay.S.See@wvago.gov>; 'jonbennion@mt.gov' <jonbennion@mt.gov>; 'wstenehjem@nd.gov' <wstenehjem@nd.gov>; 'Benjamin.flowers@ohioattorneygeneral.gov' <Benjamin.flowers@ohioattorneygeneral.gov>; 'ESmith@scag.gov' <ESmith@scag.gov>; 'BCook@scag.gov' <BCook@scag.gov>; 'steven.blair@state.sd.us' <steven.blair@state.sd.us>; 'Sherri.Wald@state.sd.us' <Sherri.Wald@state.sd.us>; 'Sarah.Campbell@ag.tn.gov' <Sarah.Campbell@ag.tn.gov>; 'tom.fisher@atg.in.gov' <tom.fisher@atg.in.gov>; 'Andree.Blumstein@ag.tn.gov' <Andree.Blumstein@ag.tn.gov>; 'matthew.frederick@texasattorneygeneral.gov' <matthew.frederick@texasattorneygeneral.gov>; 'Kyle.Hawkins@oag.texas.gov' <Kyle.Hawkins@oag.texas.gov>; 'Ric Cantrell' <rcantrell@agutah.gov>; 'james.kaste@wyo.gov' <james.kaste@wyo.gov>; 'Jim.Campbell@nebraska.gov' <Jim.Campbell@nebraska.gov>; 'Thomas T. Lampman' <Thomas.T.Lampman@wvago.gov>; 'Jessica A. Lee' <Jessica.A.Lee@wvago.gov>; 'Lindsay S. See' <Lindsay.S.See@wvago.gov>; 'Roysden, Beau' <Beau.Roysden@azag.gov>; 'Bash, Zina' <Zina.Bash@oag.texas.gov>; 'masagsve@nd.gov'; 'Harley Kirkland' <HKirkland@scag.gov>; 'Eddie Lacour' <elacour@ago.state.al.us>; 'Hudson, Kian' <Kian.Hudson@atg.in.gov>; 'Kuhn, Matt F (KYOAG)' <Matt.Kuhn@ky.gov>; 'Michelle Williams' <Michelle.Williams@ago.ms.gov>; 'krissy.nobile@ago.ms.gov' <krissy.nobile@ago.ms.gov>
Subject: RE: Texas v. Pennsylvania, et al. - Amicus Brief of Missouri, at al. - Joins requested by 1:00 p.m. Central Tomorrow, 12/9

P.S. South Carolina just joined too. Thanks, John

From: Sauer, John
Sent: Wednesday, December 9, 2020 12:32 PM
To: 'Mithun Mansinghani' <mithun.mansinghani@oag.ok.gov>; 'Murrill, Elizabeth' <MurrillE@ag.louisiana.gov>; 'Melissa Holyoak' <melissaholyoak@agutah.gov>; 'nicholas.bronni@arkansasag.gov' <nicholas.bronni@arkansasag.gov>; 'Vincent Wagner' <vincent.wagner@arkansasag.gov>; 'ed.sniffen@alaska.gov' <ed.sniffen@alaska.gov>; Smith, Justin <justin.smith@ago.mo.gov>; 'Amit.Agarwal@myfloridalegal.com' <Amit.Agarwal@myfloridalegal.com>; 'Kane, Brian' <brian.kane@ag.idaho.gov>; 'tom.fisher@atg.in.gov' <tom.fisher@atg.in.gov>; 'julia.payne@atg.in.gov' <julia.payne@atg.in.gov>; 'toby.crouse@ag.ks.gov' <toby.crouse@ag.ks.gov>; 'Chad.Meredith@ky.gov' <Chad.Meredith@ky.gov>; 'Andrew Pinson' <APinson@LAW.GA.GOV>; 'jeff.chanay' <jeff.chanay@ag.ks.gov>; 'St. John, Joseph' <StJohnJ@ag.louisiana.gov>; 'Kristi.Johnson@ago.ms.gov' <Kristi.Johnson@ago.ms.gov>; 'ABurton@mt.gov' <ABurton@mt.gov>; 'MSchlichting@mt.gov' <MSchlichting@mt.gov>; 'Lindsay S. See' <Lindsay.S.See@wvago.gov>; 'jonbennion@mt.gov' <jonbennion@mt.gov>; 'wstenehjem@nd.gov' <wstenehjem@nd.gov>; 'Benjamin.flowers@ohioattorneygeneral.gov' <Benjamin.flowers@ohioattorneygeneral.gov>; 'ESmith@scag.gov' <ESmith@scag.gov>; 'BCook@scag.gov' <BCook@scag.gov>; 'steven.blair@state.sd.us' <steven.blair@state.sd.us>; 'Sherri.Wald@state.sd.us' <Sherri.Wald@state.sd.us>; 'Sarah.Campbell@ag.tn.gov' <Sarah.Campbell@ag.tn.gov>;

'tom.fisher@atg.in.gov' <tom.fisher@atg.in.gov>; 'Andree.Blumstein@ag.tn.gov' <Andree.Blumstein@ag.tn.gov>; 'matthew.frederick@texasattorneygeneral.gov' <matthew.frederick@texasattorneygeneral.gov>; 'Kyle.Hawkins@oag.texas.gov' <Kyle.Hawkins@oag.texas.gov>; 'Ric Cantrell' <rcantrell@agutah.gov>; 'james.kaste@wyo.gov' <james.kaste@wyo.gov>; 'Jim.Campbell@nebraska.gov' <Jim.Campbell@nebraska.gov>; 'Thomas T. Lampman' <Thomas.T.Lampman@wvago.gov>; 'Jessica A. Lee' <Jessica.A.Lee@wvago.gov>; 'Lindsay S. See' <Lindsay.S.See@wvago.gov>; 'Roysden, Beau' <Beau.Roysden@azag.gov>; 'Bash, Zina' <Zina.Bash@oag.texas.gov>; 'masagsve@nd.gov'; 'Harley Kirkland' <HKirkland@scag.gov>; 'Eddie Lacour' <elacour@ago.state.al.us>; 'Hudson, Kian' <Kian.Hudson@atg.in.gov>; 'Kuhn, Matt F (KYOAG)' <Matt.Kuhn@ky.gov>; 'Michelle Williams' <Michelle.Williams@ago.ms.gov>; 'krissy.nobile@ago.ms.gov' <krissy.nobile@ago.ms.gov>
Subject: RE: Texas v. Pennsylvania, et al. - Amicus Brief of Missouri, at al. - Joins requested by 1:00 p.m. Central Tomorrow, 12/9

Just a final reminder regarding this amicus brief, with the deadline to join in a half hour. So far, nine States have joined, with several others expressing interest: **Missouri, Alabama, Arkansas, Kansas, Louisiana, Mississippi, Montana, Nebraska, and West Virginia.** Please let us know as soon as possible if you would like to join too! Thanks, John

From: Sauer, John
Sent: Wednesday, December 9, 2020 11:21 AM
To: 'Mithun Mansinghani' <mithun.mansinghani@oag.ok.gov>; 'Murrill, Elizabeth' <MurrillE@ag.louisiana.gov>; 'Melissa Holyoak' <melissaholyoak@agutah.gov>; 'nicholas.bronni@arkansasag.gov' <nicholas.bronni@arkansasag.gov>; 'Vincent Wagner' <vincent.wagner@arkansasag.gov>; 'ed.sniffen@alaska.gov' <ed.sniffen@alaska.gov>; Smith, Justin <justin.smith@ago.mo.gov>; 'Amit.Agarwal@myfloridalegal.com' <Amit.Agarwal@myfloridalegal.com>; 'Kane, Brian' <brian.kane@ag.idaho.gov>; 'tom.fisher@atg.in.gov' <tom.fisher@atg.in.gov>; 'julia.payne@atg.in.gov' <julia.payne@atg.in.gov>; 'toby.crouse@ag.ks.gov' <toby.crouse@ag.ks.gov>; 'Chad.Meredith@ky.gov' <Chad.Meredith@ky.gov>; 'Andrew Pinson' <APinson@LAW.GA.GOV>; 'jeff.chanay' <jeff.chanay@ag.ks.gov>; 'St. John, Joseph' <StJohnJ@ag.louisiana.gov>; 'Kristi.Johnson@ago.ms.gov' <Kristi.Johnson@ago.ms.gov>; 'ABurton@mt.gov' <ABurton@mt.gov>; 'MSchlichting@mt.gov' <MSchlichting@mt.gov>; 'Lindsay S. See' <Lindsay.S.See@wvago.gov>; 'jonbennion@mt.gov' <jonbennion@mt.gov>; 'wstenehjem@nd.gov' <wstenehjem@nd.gov>; 'Benjamin.flowers@ohioattorneygeneral.gov' <Benjamin.flowers@ohioattorneygeneral.gov>; 'ESmith@scag.gov' <ESmith@scag.gov>; 'BCook@scag.gov' <BCook@scag.gov>; 'steven.blair@state.sd.us' <steven.blair@state.sd.us>; 'Sherri.Wald@state.sd.us' <Sherri.Wald@state.sd.us>; 'Sarah.Campbell@ag.tn.gov' <Sarah.Campbell@ag.tn.gov>; 'tom.fisher@atg.in.gov' <tom.fisher@atg.in.gov>; 'Andree.Blumstein@ag.tn.gov' <Andree.Blumstein@ag.tn.gov>; 'matthew.frederick@texasattorneygeneral.gov' <matthew.frederick@texasattorneygeneral.gov>; 'Kyle.Hawkins@oag.texas.gov' <Kyle.Hawkins@oag.texas.gov>; 'Ric Cantrell' <rcantrell@agutah.gov>; 'james.kaste@wyo.gov' <james.kaste@wyo.gov>; 'Jim.Campbell@nebraska.gov' <Jim.Campbell@nebraska.gov>; 'Thomas T. Lampman' <Thomas.T.Lampman@wvago.gov>; 'Jessica A. Lee' <Jessica.A.Lee@wvago.gov>; 'Lindsay S. See' <Lindsay.S.See@wvago.gov>; 'Roysden, Beau' <Beau.Roysden@azag.gov>; 'Bash, Zina' <Zina.Bash@oag.texas.gov>; 'masagsve@nd.gov'; 'Harley Kirkland' <HKirkland@scag.gov>; 'Eddie Lacour' <elacour@ago.state.al.us>; 'Hudson, Kian' <Kian.Hudson@atg.in.gov>; 'Kuhn, Matt F (KYOAG)' <Matt.Kuhn@ky.gov>; 'Michelle Williams' <Michelle.Williams@ago.ms.gov>; 'krissy.nobile@ago.ms.gov' <krissy.nobile@ago.ms.gov>
Subject: RE: Texas v. Pennsylvania, et al. - Amicus Brief of Missouri, at al. - Joins requested by 1:00 p.m. Central Tomorrow, 12/9

All-

Attached please find a redline with minor changes to this brief to address issues raised by several States. Thank you to Nebraska and West Virginia for proposing these changes. Arkansas, Louisiana, and Mississippi have joined, with many others expressing interest. Our printer has given a hard deadline of 1:00 pm, so please do let us know by then if you would like to join!

Thanks a lot, John Sauer

From: Sauer, John
Sent: Wednesday, December 9, 2020 9:04 AM
To: 'Mithun Mansinghani' <mithun.mansinghani@oag.ok.gov>; 'Murrill, Elizabeth' <MurrillE@ag.louisiana.gov>; 'Melissa Holyoak' <melissaholyoak@agutah.gov>; 'nicholas.bronni@arkansasag.gov' <nicholas.bronni@arkansasag.gov>; 'Vincent Wagner' <vincent.wagner@arkansasag.gov>; 'ed.sniffen@alaska.gov' <ed.sniffen@alaska.gov>; Smith, Justin <justin.smith@ago.mo.gov>; 'Amit.Agarwal@myfloridalegal.com' <Amit.Agarwal@myfloridalegal.com>; 'Kane, Brian' <brian.kane@ag.idaho.gov>; 'tom.fisher@atg.in.gov' <tom.fisher@atg.in.gov>; 'julia.payne@atg.in.gov' <julia.payne@atg.in.gov>; 'toby.crouse@ag.ks.gov' <toby.crouse@ag.ks.gov>; 'Chad.Meredith@ky.gov' <Chad.Meredith@ky.gov>; 'Andrew Pinson' <APinson@LAW.GA.GOV>; 'jeff.chanay' <jeff.chanay@ag.ks.gov>; 'St. John, Joseph' <StJohnJ@ag.louisiana.gov>; 'Kristi.Johnson@ago.ms.gov' <Kristi.Johnson@ago.ms.gov>; 'ABurton@mt.gov' <ABurton@mt.gov>; 'MSchlichting@mt.gov' <MSchlichting@mt.gov>; 'Lindsay S. See' <Lindsay.S.See@wvago.gov>; 'jonbennion@mt.gov' <jonbennion@mt.gov>; 'wstenehjem@nd.gov' <wstenehjem@nd.gov>; 'Benjamin.flowers@ohioattorneygeneral.gov' <Benjamin.flowers@ohioattorneygeneral.gov>; 'ESmith@scag.gov' <ESmith@scag.gov>; 'BCook@scag.gov' <BCook@scag.gov>; 'steven.blair@state.sd.us' <steven.blair@state.sd.us>; 'Sherri.Wald@state.sd.us' <Sherri.Wald@state.sd.us>; 'Sarah.Campbell@ag.tn.gov' <Sarah.Campbell@ag.tn.gov>; 'tom.fisher@atg.in.gov' <tom.fisher@atg.in.gov>; 'Andree.Blumstein@ag.tn.gov' <Andree.Blumstein@ag.tn.gov>; 'matthew.frederick@texasattorneygeneral.gov' <matthew.frederick@texasattorneygeneral.gov>; 'Kyle.Hawkins@oag.texas.gov' <Kyle.Hawkins@oag.texas.gov>; 'Ric Cantrell' <rcantrell@agutah.gov>; 'james.kaste@wyo.gov' <james.kaste@wyo.gov>; 'Jim.Campbell@nebraska.gov' <Jim.Campbell@nebraska.gov>; 'Thomas T. Lampman' <Thomas.T.Lampman@wvago.gov>; 'Jessica A. Lee' <Jessica.A.Lee@wvago.gov>; 'Lindsay S. See' <Lindsay.S.See@wvago.gov>; 'Roysden, Beau' <Beau.Roysden@azag.gov>; 'Bash, Zina' <Zina.Bash@oag.texas.gov>; 'masagsve@nd.gov'; 'Harley Kirkland' <HKirkland@scag.gov>; 'Eddie Lacour' <elacour@ago.state.al.us>; 'Hudson, Kian' <Kian.Hudson@atg.in.gov>; 'Kuhn, Matt F (KYOAG)' <Matt.Kuhn@ky.gov>; 'Michelle Williams' <Michelle.Williams@ago.ms.gov>; 'krissy.nobile@ago.ms.gov' <krissy.nobile@ago.ms.gov>
Subject: RE: Texas v. Pennsylvania, et al. - Amicus Brief of Missouri, at al. - Joins requested by 1:00 p.m. Central Tomorrow, 12/9

All-

Thank you for considering this amicus brief on such short notice. So far, Louisiana and Arkansas have joined, with several others expressing interest. I have attached an updated draft that includes minor, non-substantive edits, and which adjusts the language of the concluding paragraphs in response to comments from an interested state. The Supreme Court issued an order last night ordering the Defendant States (MI, PA, WS, GA) to file a response for the Motion for Leave to File Bill of Complaint and request for interim injunctive relief by 3:00 pm tomorrow. Given this highly accelerated briefing schedule, we would like to file this brief as soon as possible this afternoon to give the Court the most time possible to read it. Accordingly, we would prefer not to extend the deadline past 1:00 p.m. Central today, so please let us know by then if you are interested. Thanks a lot!

Best, John Sauer

From: Sauer, John
Sent: Tuesday, December 8, 2020 6:11 PM
To: 'Mithun Mansinghani' <mithun.mansinghani@oag.ok.gov>; 'Murrill, Elizabeth' <MurrillE@ag.louisiana.gov>; 'Melissa Holyoak' <melissaholyoak@agutah.gov>; 'nicholas.bronni@arkansasag.gov' <nicholas.bronni@arkansasag.gov>; 'Vincent Wagner' <vincent.wagner@arkansasag.gov>; 'ed.sniffen@alaska.gov' <ed.sniffen@alaska.gov>; Smith, Justin <justin.smith@ago.mo.gov>; 'Amit.Agarwal@myfloridalegal.com' <Amit.Agarwal@myfloridalegal.com>; 'Kane, Brian' <brian.kane@ag.idaho.gov>; 'tom.fisher@atg.in.gov' <tom.fisher@atg.in.gov>; 'julia.payne@atg.in.gov' <julia.payne@atg.in.gov>; 'toby.crouse@ag.ks.gov' <toby.crouse@ag.ks.gov>; 'Chad.Meredith@ky.gov' <Chad.Meredith@ky.gov>; 'Andrew Pinson' <APinson@LAW.GA.GOV>; 'jeff.chanay' <jeff.chanay@ag.ks.gov>; 'St. John, Joseph' <StJohnJ@ag.louisiana.gov>; 'Kristi.Johnson@ago.ms.gov' <Kristi.Johnson@ago.ms.gov>; 'ABurton@mt.gov' <ABurton@mt.gov>; 'MSchlichting@mt.gov' <MSchlichting@mt.gov>; 'Lindsay S. See' <Lindsay.S.See@wvago.gov>; 'jonbennion@mt.gov' <jonbennion@mt.gov>; 'wstenehjem@nd.gov' <wstenehjem@nd.gov>;

'Benjamin.flowers@ohioattorneygeneral.gov' <Benjamin.flowers@ohioattorneygeneral.gov>; 'ESmith@scag.gov' <ESmith@scag.gov>; 'BCook@scag.gov' <BCook@scag.gov>; 'steven.blair@state.sd.us' <steven.blair@state.sd.us>; 'Sherri.Wald@state.sd.us' <Sherri.Wald@state.sd.us>; 'Sarah.Campbell@ag.tn.gov' <Sarah.Campbell@ag.tn.gov>; 'tom.fisher@atg.in.gov' <tom.fisher@atg.in.gov>; 'Andree.Blumstein@ag.tn.gov' <Andree.Blumstein@ag.tn.gov>; 'matthew.frederick@texasattorneygeneral.gov' <matthew.frederick@texasattorneygeneral.gov>; 'Kyle.Hawkins@oag.texas.gov' <Kyle.Hawkins@oag.texas.gov>; 'Ric Cantrell' <rcantrell@agutah.gov>; 'james.kaste@wyo.gov' <james.kaste@wyo.gov>; 'Jim.Campbell@nebraska.gov' <Jim.Campbell@nebraska.gov>; 'Thomas T. Lampman' <Thomas.T.Lampman@wvago.gov>; 'Jessica A. Lee' <Jessica.A.Lee@wvago.gov>; 'Lindsay S. See' <Lindsay.S.See@wvago.gov>; 'Roysden, Beau' <Beau.Roysden@azag.gov>; 'Bash, Zina' <Zina.Bash@oag.texas.gov>; 'masagsve@nd.gov'; 'Harley Kirkland' <HKirkland@scag.gov>; 'Eddie Lacour' <elacour@ago.state.al.us>; 'Hudson, Kian' <Kian.Hudson@atg.in.gov>; 'Kuhn, Matt F (KYOAG)' <Matt.Kuhn@ky.gov>
Subject: Texas v. Pennsylvania, et al. - Amicus Brief of Missouri, at al. - Joins requested by 1:00 p.m. Central Tomorrow, 12/9

All-

Attached please find a draft multistate amicus brief in support of Texas's motion for leave to file a bill of complaint in the U.S. Supreme Court challenging the administration of the recent Presidential election in Pennsylvania, Michigan, Wisconsin, and Georgia. The brief argues that (1) the separation-of-powers provision of the Electors Clause of Article II, Section 1 is an important structural check on government that safeguards individual liberty; (2) voting by mail presents real concerns for fraud and abuse that require statutory safeguards to protect against such fraud and abuse; and (3) the abrogation of statutory safeguards against fraud in voting by mail by non-legislative actors violates the Electors Clause and undermines public confidence in elections. For your reference, I have also attached Texas's Motion for Leave to File Bill of Complaint and related documents.

With apologies for the short deadline, given the time-sensitivity of this case, we are requesting joins by **1:00 p.m. Central TOMORROW**, 12/9. We are planning to file tomorrow afternoon.

Thanks a lot,

John Sauer

Jeffrey DeSousa

From: Sauer, John <John.Sauer@ago.mo.gov>
Sent: Wednesday, December 9, 2020 1:56 PM
To: 'Mithun Mansinghani'; 'Murrill, Elizabeth'; 'Melissa Holyoak'; 'nicholas.bronni@arkansasag.gov'; 'Vincent Wagner'; 'ed.sniffen@alaska.gov'; Smith, Justin; Amit Agarwal; 'Kane, Brian'; 'tom.fisher@atg.in.gov'; 'julia.payne@atg.in.gov'; 'toby.crouse@ag.ks.gov'; 'Chad.Meredith@ky.gov'; 'Andrew Pinson'; 'jeff.chanay'; 'St. John, Joseph'; 'Kristi.Johnson@ago.ms.gov'; 'ABurton@mt.gov'; 'MSchlichting@mt.gov'; 'Lindsay S. See'; 'jonbennion@mt.gov'; 'wstenehjem@nd.gov'; 'Benjamin.flowers@ohioattorneygeneral.gov'; 'ESmith@scag.gov'; 'BCook@scag.gov'; 'steven.blair@state.sd.us'; 'Sherri.Wald@state.sd.us'; 'Sarah.Campbell@ag.tn.gov'; 'tom.fisher@atg.in.gov'; 'Andree.Blumstein@ag.tn.gov'; 'matthew.frederick@texasattorneygeneral.gov'; 'Kyle.Hawkins@oag.texas.gov'; 'Ric Cantrell'; 'james.kaste@wyo.gov'; 'Jim.Campbell@nebraska.gov'; 'Thomas T. Lampman'; 'Jessica A. Lee'; 'Lindsay S. See'; 'Roysden, Beau'; 'Bash, Zina'; 'masagsve@nd.gov'; 'Harley Kirkland'; 'Eddie Lacour'; 'Hudson, Kian'; 'Kuhn, Matt F (KYOAG)'; 'Michelle Williams'; 'krissy.nobile@ago.ms.gov'
Subject: RE: Texas v. Pennsylvania, et al. - Amicus Brief of Missouri, at al. - Joins requested by 1:00 p.m. Central Tomorrow, 12/9

Indiana has joined

From: Sauer, John
Sent: Wednesday, December 9, 2020 12:49 PM
To: 'Mithun Mansinghani' <mithun.mansinghani@oag.ok.gov>; 'Murrill, Elizabeth' <MurrillE@ag.louisiana.gov>; 'Melissa Holyoak' <melissaholyoak@agutah.gov>; 'nicholas.bronni@arkansasag.gov' <nicholas.bronni@arkansasag.gov>; 'Vincent Wagner' <vincent.wagner@arkansasag.gov>; 'ed.sniffen@alaska.gov' <ed.sniffen@alaska.gov>; Smith, Justin <justin.smith@ago.mo.gov>; 'Amit.Agarwal@myfloridalegal.com' <Amit.Agarwal@myfloridalegal.com>; 'Kane, Brian' <brian.kane@ag.idaho.gov>; 'tom.fisher@atg.in.gov' <tom.fisher@atg.in.gov>; 'julia.payne@atg.in.gov' <julia.payne@atg.in.gov>; 'toby.crouse@ag.ks.gov' <toby.crouse@ag.ks.gov>; 'Chad.Meredith@ky.gov' <Chad.Meredith@ky.gov>; 'Andrew Pinson' <APinson@LAW.GA.GOV>; 'jeff.chanay' <jeff.chanay@ag.ks.gov>; 'St. John, Joseph' <StJohnJ@ag.louisiana.gov>; 'Kristi.Johnson@ago.ms.gov' <Kristi.Johnson@ago.ms.gov>; 'ABurton@mt.gov' <ABurton@mt.gov>; 'MSchlichting@mt.gov' <MSchlichting@mt.gov>; 'Lindsay S. See' <Lindsay.S.See@wvago.gov>; 'jonbennion@mt.gov' <jonbennion@mt.gov>; 'wstenehjem@nd.gov' <wstenehjem@nd.gov>; 'Benjamin.flowers@ohioattorneygeneral.gov' <Benjamin.flowers@ohioattorneygeneral.gov>; 'ESmith@scag.gov' <ESmith@scag.gov>; 'BCook@scag.gov' <BCook@scag.gov>; 'steven.blair@state.sd.us' <steven.blair@state.sd.us>; 'Sherri.Wald@state.sd.us' <Sherri.Wald@state.sd.us>; 'Sarah.Campbell@ag.tn.gov' <Sarah.Campbell@ag.tn.gov>; 'tom.fisher@atg.in.gov' <tom.fisher@atg.in.gov>; 'Andree.Blumstein@ag.tn.gov' <Andree.Blumstein@ag.tn.gov>; 'matthew.frederick@texasattorneygeneral.gov' <matthew.frederick@texasattorneygeneral.gov>; 'Kyle.Hawkins@oag.texas.gov' <Kyle.Hawkins@oag.texas.gov>; 'Ric Cantrell' <rcantrell@agutah.gov>; 'james.kaste@wyo.gov' <james.kaste@wyo.gov>; 'Jim.Campbell@nebraska.gov' <Jim.Campbell@nebraska.gov>; 'Thomas T. Lampman' <Thomas.T.Lampman@wvago.gov>; 'Jessica A. Lee' <Jessica.A.Lee@wvago.gov>; 'Lindsay S. See' <Lindsay.S.See@wvago.gov>; 'Roysden, Beau' <Beau.Roysden@azag.gov>; 'Bash, Zina' <Zina.Bash@oag.texas.gov>; 'masagsve@nd.gov'; 'Harley Kirkland' <HKirkland@scag.gov>; 'Eddie Lacour' <elacour@ago.state.al.us>; 'Hudson, Kian' <Kian.Hudson@atg.in.gov>; 'Kuhn, Matt F (KYOAG)' <Matt.Kuhn@ky.gov>; 'Michelle Williams' <Michelle.Williams@ago.ms.gov>; 'krissy.nobile@ago.ms.gov' <krissy.nobile@ago.ms.gov>
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Utah and Tennessee have joined as well

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To: 'Mithun Mansinghani' <mithun.mansinghani@oag.ok.gov>; 'Murrill, Elizabeth' <MurrillE@ag.louisiana.gov>; 'Melissa Holyoak' <melissaholyoak@agutah.gov>; 'nicholas.bronni@arkansasag.gov' <nicholas.bronni@arkansasag.gov>; 'Vincent Wagner' <vincent.wagner@arkansasag.gov>; 'ed.sniffen@alaska.gov' <ed.sniffen@alaska.gov>; Smith, Justin <justin.smith@ago.mo.gov>; 'Amit.Agarwal@myfloridalegal.com' <Amit.Agarwal@myfloridalegal.com>; 'Kane, Brian' <brian.kane@ag.idaho.gov>; 'tom.fisher@atg.in.gov' <tom.fisher@atg.in.gov>; 'julia.payne@atg.in.gov' <julia.payne@atg.in.gov>; 'toby.crouse@ag.ks.gov' <toby.crouse@ag.ks.gov>; 'Chad.Meredith@ky.gov' <Chad.Meredith@ky.gov>; 'Andrew Pinson' <APinson@LAW.GA.GOV>; 'jeff.chanay' <jeff.chanay@ag.ks.gov>; 'St. John, Joseph' <StJohnJ@ag.louisiana.gov>; 'Kristi.Johnson@ago.ms.gov' <Kristi.Johnson@ago.ms.gov>; 'ABurton@mt.gov' <ABurton@mt.gov>; 'MSchlichting@mt.gov' <MSchlichting@mt.gov>; 'Lindsay S. See' <Lindsay.S.See@wvago.gov>; 'jonbennion@mt.gov' <jonbennion@mt.gov>; 'wstenehjem@nd.gov' <wstenehjem@nd.gov>; 'Benjamin.flowers@ohioattorneygeneral.gov' <Benjamin.flowers@ohioattorneygeneral.gov>; 'ESmith@scag.gov' <ESmith@scag.gov>; 'BCook@scag.gov' <BCook@scag.gov>; 'steven.blair@state.sd.us' <steven.blair@state.sd.us>; 'Sherri.Wald@state.sd.us' <Sherri.Wald@state.sd.us>; 'Sarah.Campbell@ag.tn.gov' <Sarah.Campbell@ag.tn.gov>; 'tom.fisher@atg.in.gov' <tom.fisher@atg.in.gov>; 'Andree.Blumstein@ag.tn.gov' <Andree.Blumstein@ag.tn.gov>; 'matthew.frederick@texasattorneygeneral.gov' <matthew.frederick@texasattorneygeneral.gov>; 'Kyle.Hawkins@oag.texas.gov' <Kyle.Hawkins@oag.texas.gov>; 'Ric Cantrell' <rcantrell@agutah.gov>; 'james.kaste@wyo.gov' <james.kaste@wyo.gov>; 'Jim.Campbell@nebraska.gov' <Jim.Campbell@nebraska.gov>; 'Thomas T. Lampman' <Thomas.T.Lampman@wvago.gov>; 'Jessica A. Lee' <Jessica.A.Lee@wvago.gov>; 'Lindsay S. See' <Lindsay.S.See@wvago.gov>; 'Roysden, Beau' <Beau.Roysden@azag.gov>; 'Bash, Zina' <Zina.Bash@oag.texas.gov>; 'masagsve@nd.gov'; 'Harley Kirkland' <HKirkland@scag.gov>; 'Eddie Lacour' <elacour@ago.state.al.us>; 'Hudson, Kian' <Kian.Hudson@atg.in.gov>; 'Kuhn, Matt F (KYOAG)' <Matt.Kuhn@ky.gov>; 'Michelle Williams' <Michelle.Williams@ago.ms.gov>; 'krissy.nobile@ago.ms.gov' <krissy.nobile@ago.ms.gov>
Subject: RE: Texas v. Pennsylvania, et al. - Amicus Brief of Missouri, at al. - Joins requested by 1:00 p.m. Central Tomorrow, 12/9

Florida and North Dakota have joined as well

From: Sauer, John
Sent: Wednesday, December 9, 2020 12:33 PM
To: 'Mithun Mansinghani' <mithun.mansinghani@oag.ok.gov>; 'Murrill, Elizabeth' <MurrillE@ag.louisiana.gov>; 'Melissa Holyoak' <melissaholyoak@agutah.gov>; 'nicholas.bronni@arkansasag.gov' <nicholas.bronni@arkansasag.gov>; 'Vincent Wagner' <vincent.wagner@arkansasag.gov>; 'ed.sniffen@alaska.gov' <ed.sniffen@alaska.gov>; Smith, Justin <justin.smith@ago.mo.gov>; 'Amit.Agarwal@myfloridalegal.com' <Amit.Agarwal@myfloridalegal.com>; 'Kane, Brian' <brian.kane@ag.idaho.gov>; 'tom.fisher@atg.in.gov' <tom.fisher@atg.in.gov>; 'julia.payne@atg.in.gov' <julia.payne@atg.in.gov>; 'toby.crouse@ag.ks.gov' <toby.crouse@ag.ks.gov>; 'Chad.Meredith@ky.gov' <Chad.Meredith@ky.gov>; 'Andrew Pinson' <APinson@LAW.GA.GOV>; 'jeff.chanay' <jeff.chanay@ag.ks.gov>; 'St. John, Joseph' <StJohnJ@ag.louisiana.gov>; 'Kristi.Johnson@ago.ms.gov' <Kristi.Johnson@ago.ms.gov>; 'ABurton@mt.gov' <ABurton@mt.gov>; 'MSchlichting@mt.gov' <MSchlichting@mt.gov>; 'Lindsay S. See' <Lindsay.S.See@wvago.gov>; 'jonbennion@mt.gov' <jonbennion@mt.gov>; 'wstenehjem@nd.gov' <wstenehjem@nd.gov>; 'Benjamin.flowers@ohioattorneygeneral.gov' <Benjamin.flowers@ohioattorneygeneral.gov>; 'ESmith@scag.gov' <ESmith@scag.gov>; 'BCook@scag.gov' <BCook@scag.gov>; 'steven.blair@state.sd.us' <steven.blair@state.sd.us>; 'Sherri.Wald@state.sd.us' <Sherri.Wald@state.sd.us>; 'Sarah.Campbell@ag.tn.gov' <Sarah.Campbell@ag.tn.gov>; 'tom.fisher@atg.in.gov' <tom.fisher@atg.in.gov>; 'Andree.Blumstein@ag.tn.gov' <Andree.Blumstein@ag.tn.gov>; 'matthew.frederick@texasattorneygeneral.gov' <matthew.frederick@texasattorneygeneral.gov>; 'Kyle.Hawkins@oag.texas.gov' <Kyle.Hawkins@oag.texas.gov>; 'Ric Cantrell' <rcantrell@agutah.gov>; 'james.kaste@wyo.gov' <james.kaste@wyo.gov>; 'Jim.Campbell@nebraska.gov' <Jim.Campbell@nebraska.gov>; 'Thomas T. Lampman' <Thomas.T.Lampman@wvago.gov>; 'Jessica A. Lee' <Jessica.A.Lee@wvago.gov>; 'Lindsay S. See' <Lindsay.S.See@wvago.gov>; 'Roysden, Beau' <Beau.Roysden@azag.gov>; 'Bash, Zina' <Zina.Bash@oag.texas.gov>;

'masagsve@nd.gov'; 'Harley Kirkland' <HKirkland@scag.gov>; 'Eddie Lacour' <elacour@ago.state.al.us>; 'Hudson, Kian' <Kian.Hudson@atg.in.gov>; 'Kuhn, Matt F (KYOAG)' <Matt.Kuhn@ky.gov>; 'Michelle Williams' <Michelle.Williams@ago.ms.gov>; 'krissy.nobile@ago.ms.gov' <krissy.nobile@ago.ms.gov>
Subject: RE: Texas v. Pennsylvania, et al. - Amicus Brief of Missouri, at al. - Joins requested by 1:00 p.m. Central Tomorrow, 12/9

P.S. South Carolina just joined too. Thanks, John

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Subject: RE: Texas v. Pennsylvania, et al. - Amicus Brief of Missouri, at al. - Joins requested by 1:00 p.m. Central Tomorrow, 12/9

Just a final reminder regarding this amicus brief, with the deadline to join in a half hour. So far, nine States have joined, with several others expressing interest: **Missouri, Alabama, Arkansas, Kansas, Louisiana, Mississippi, Montana, Nebraska, and West Virginia.** Please let us know as soon as possible if you would like to join too! Thanks, John

From: Sauer, John
Sent: Wednesday, December 9, 2020 11:21 AM
To: 'Mithun Mansinghani' <mithun.mansinghani@oag.ok.gov>; 'Murrill, Elizabeth' <MurrillE@ag.louisiana.gov>; 'Melissa Holyoak' <melissaholyoak@agutah.gov>; 'nicholas.bronni@arkansasag.gov' <nicholas.bronni@arkansasag.gov>; 'Vincent Wagner' <vincent.wagner@arkansasag.gov>; 'ed.sniffen@alaska.gov' <ed.sniffen@alaska.gov>; Smith, Justin <justin.smith@ago.mo.gov>; 'Amit.Agarwal@myfloridalegal.com' <Amit.Agarwal@myfloridalegal.com>; 'Kane, Brian' <brian.kane@ag.idaho.gov>; 'tom.fisher@atg.in.gov' <tom.fisher@atg.in.gov>; 'julia.payne@atg.in.gov' <julia.payne@atg.in.gov>; 'toby.crouse@ag.ks.gov' <toby.crouse@ag.ks.gov>; 'Chad.Meredith@ky.gov' <Chad.Meredith@ky.gov>; 'Andrew Pinson' <APinson@LAW.GA.GOV>; 'jeff.chanay' <jeff.chanay@ag.ks.gov>; 'St. John, Joseph' <StJohnJ@ag.louisiana.gov>; 'Kristi.Johnson@ago.ms.gov' <Kristi.Johnson@ago.ms.gov>; 'ABurton@mt.gov' <ABurton@mt.gov>; 'MSchlichting@mt.gov' <MSchlichting@mt.gov>; 'Lindsay S. See' <Lindsay.S.See@wvago.gov>; 'jonbennion@mt.gov' <jonbennion@mt.gov>; 'wstenehjem@nd.gov' <wstenehjem@nd.gov>; 'Benjamin.flowers@ohioattorneygeneral.gov' <Benjamin.flowers@ohioattorneygeneral.gov>; 'ESmith@scag.gov'

<ESmith@scag.gov>; 'BCook@scag.gov' <BCook@scag.gov>; 'steven.blair@state.sd.us' <steven.blair@state.sd.us>; 'Sherri.Wald@state.sd.us' <Sherri.Wald@state.sd.us>; 'Sarah.Campbell@ag.tn.gov' <Sarah.Campbell@ag.tn.gov>; 'tom.fisher@atg.in.gov' <tom.fisher@atg.in.gov>; 'Andree.Blumstein@ag.tn.gov' <Andree.Blumstein@ag.tn.gov>; 'matthew.frederick@texasattorneygeneral.gov' <matthew.frederick@texasattorneygeneral.gov>; 'Kyle.Hawkins@oag.texas.gov' <Kyle.Hawkins@oag.texas.gov>; 'Ric Cantrell' <rcantrell@agutah.gov>; 'james.kaste@wyo.gov' <james.kaste@wyo.gov>; 'Jim.Campbell@nebraska.gov' <Jim.Campbell@nebraska.gov>; 'Thomas T. Lampman' <Thomas.T.Lampman@wvago.gov>; 'Jessica A. Lee' <Jessica.A.Lee@wvago.gov>; 'Lindsay S. See' <Lindsay.S.See@wvago.gov>; 'Roysden, Beau' <Beau.Roysden@azag.gov>; 'Bash, Zina' <Zina.Bash@oag.texas.gov>; 'masagsve@nd.gov'; 'Harley Kirkland' <HKirkland@scag.gov>; 'Eddie Lacour' <elacour@ago.state.al.us>; 'Hudson, Kian' <Kian.Hudson@atg.in.gov>; 'Kuhn, Matt F (KYOAG)' <Matt.Kuhn@ky.gov>; 'Michelle Williams' <Michelle.Williams@ago.ms.gov>; 'krissy.nobile@ago.ms.gov' <krissy.nobile@ago.ms.gov>
Subject: RE: Texas v. Pennsylvania, et al. - Amicus Brief of Missouri, at al. - Joins requested by 1:00 p.m. Central Tomorrow, 12/9

All-

Attached please find a redline with minor changes to this brief to address issues raised by several States. Thank you to Nebraska and West Virginia for proposing these changes. Arkansas, Louisiana, and Mississippi have joined, with many others expressing interest. Our printer has given a hard deadline of 1:00 pm, so please do let us know by then if you would like to join!

Thanks a lot, John Sauer

From: Sauer, John
Sent: Wednesday, December 9, 2020 9:04 AM
To: 'Mithun Mansinghani' <mithun.mansinghani@oag.ok.gov>; 'Murrill, Elizabeth' <MurrillE@ag.louisiana.gov>; 'Melissa Holyoak' <melissaholyoak@agutah.gov>; 'nicholas.bronni@arkansasag.gov' <nicholas.bronni@arkansasag.gov>; 'Vincent Wagner' <vincent.wagner@arkansasag.gov>; 'ed.sniffen@alaska.gov' <ed.sniffen@alaska.gov>; Smith, Justin <justin.smith@ago.mo.gov>; 'Amit.Agarwal@myfloridalegal.com' <Amit.Agarwal@myfloridalegal.com>; 'Kane, Brian' <brian.kane@ag.idaho.gov>; 'tom.fisher@atg.in.gov' <tom.fisher@atg.in.gov>; 'julia.payne@atg.in.gov' <julia.payne@atg.in.gov>; 'toby.crouse@ag.ks.gov' <toby.crouse@ag.ks.gov>; 'Chad.Meredith@ky.gov' <Chad.Meredith@ky.gov>; 'Andrew Pinson' <APinson@LAW.GA.GOV>; 'jeff.chanay' <jeff.chanay@ag.ks.gov>; 'St. John, Joseph' <StJohnJ@ag.louisiana.gov>; 'Kristi.Johnson@ago.ms.gov' <Kristi.Johnson@ago.ms.gov>; 'ABurton@mt.gov' <ABurton@mt.gov>; 'MSchlichting@mt.gov' <MSchlichting@mt.gov>; 'Lindsay S. See' <Lindsay.S.See@wvago.gov>; 'jonbennion@mt.gov' <jonbennion@mt.gov>; 'wstenehjem@nd.gov' <wstenehjem@nd.gov>; 'Benjamin.flowers@ohioattorneygeneral.gov' <Benjamin.flowers@ohioattorneygeneral.gov>; 'ESmith@scag.gov' <ESmith@scag.gov>; 'BCook@scag.gov' <BCook@scag.gov>; 'steven.blair@state.sd.us' <steven.blair@state.sd.us>; 'Sherri.Wald@state.sd.us' <Sherri.Wald@state.sd.us>; 'Sarah.Campbell@ag.tn.gov' <Sarah.Campbell@ag.tn.gov>; 'tom.fisher@atg.in.gov' <tom.fisher@atg.in.gov>; 'Andree.Blumstein@ag.tn.gov' <Andree.Blumstein@ag.tn.gov>; 'matthew.frederick@texasattorneygeneral.gov' <matthew.frederick@texasattorneygeneral.gov>; 'Kyle.Hawkins@oag.texas.gov' <Kyle.Hawkins@oag.texas.gov>; 'Ric Cantrell' <rcantrell@agutah.gov>; 'james.kaste@wyo.gov' <james.kaste@wyo.gov>; 'Jim.Campbell@nebraska.gov' <Jim.Campbell@nebraska.gov>; 'Thomas T. Lampman' <Thomas.T.Lampman@wvago.gov>; 'Jessica A. Lee' <Jessica.A.Lee@wvago.gov>; 'Lindsay S. See' <Lindsay.S.See@wvago.gov>; 'Roysden, Beau' <Beau.Roysden@azag.gov>; 'Bash, Zina' <Zina.Bash@oag.texas.gov>; 'masagsve@nd.gov'; 'Harley Kirkland' <HKirkland@scag.gov>; 'Eddie Lacour' <elacour@ago.state.al.us>; 'Hudson, Kian' <Kian.Hudson@atg.in.gov>; 'Kuhn, Matt F (KYOAG)' <Matt.Kuhn@ky.gov>; 'Michelle Williams' <Michelle.Williams@ago.ms.gov>; 'krissy.nobile@ago.ms.gov' <krissy.nobile@ago.ms.gov>
Subject: RE: Texas v. Pennsylvania, et al. - Amicus Brief of Missouri, at al. - Joins requested by 1:00 p.m. Central Tomorrow, 12/9

All-

Thank you for considering this amicus brief on such short notice. So far, Louisiana and Arkansas have joined, with several others expressing interest. I have attached an updated draft that includes minor, non-substantive edits, and which adjusts the language of the concluding paragraphs in response to comments from an interested state. The Supreme Court issued an order last night ordering the Defendant States (MI, PA, WS, GA) to file a response for the Motion for Leave to File Bill of Complaint and request for interim injunctive relief by 3:00 pm tomorrow. Given this highly accelerated briefing schedule, we would like to file this brief as soon as possible this afternoon to give the Court the most time possible to read it. Accordingly, we would prefer not to extend the deadline past 1:00 p.m. Central today, so please let us know by then if you are interested. Thanks a lot!

Best, John Sauer

From: Sauer, John
Sent: Tuesday, December 8, 2020 6:11 PM
To: 'Mithun Mansinghani' <mithun.mansinghani@oag.ok.gov>; 'Murrill, Elizabeth' <MurrillE@ag.louisiana.gov>; 'Melissa Holyoak' <melissaholyoak@agutah.gov>; 'nicholas.bronni@arkansasag.gov' <nicholas.bronni@arkansasag.gov>; 'Vincent Wagner' <vincent.wagner@arkansasag.gov>; 'ed.sniffen@alaska.gov' <ed.sniffen@alaska.gov>; Smith, Justin <justin.smith@ago.mo.gov>; 'Amit.Agarwal@myfloridalegal.com' <Amit.Agarwal@myfloridalegal.com>; 'Kane, Brian' <brian.kane@ag.idaho.gov>; 'tom.fisher@atg.in.gov' <tom.fisher@atg.in.gov>; 'julia.payne@atg.in.gov' <julia.payne@atg.in.gov>; 'toby.crouse@ag.ks.gov' <toby.crouse@ag.ks.gov>; 'Chad.Meredith@ky.gov' <Chad.Meredith@ky.gov>; 'Andrew Pinson' <APinson@LAW.GA.GOV>; 'jeff.chanay' <jeff.chanay@ag.ks.gov>; 'St. John, Joseph' <StJohnJ@ag.louisiana.gov>; 'Kristi.Johnson@ago.ms.gov' <Kristi.Johnson@ago.ms.gov>; 'ABurton@mt.gov' <ABurton@mt.gov>; 'MSchlichting@mt.gov' <MSchlichting@mt.gov>; 'Lindsay S. See' <Lindsay.S.See@wvago.gov>; 'jonbennion@mt.gov' <jonbennion@mt.gov>; 'wstenehjem@nd.gov' <wstenehjem@nd.gov>; 'Benjamin.flowers@ohioattorneygeneral.gov' <Benjamin.flowers@ohioattorneygeneral.gov>; 'ESmith@scag.gov' <ESmith@scag.gov>; 'BCook@scag.gov' <BCook@scag.gov>; 'steven.blair@state.sd.us' <steven.blair@state.sd.us>; 'Sherri.Wald@state.sd.us' <Sherri.Wald@state.sd.us>; 'Sarah.Campbell@ag.tn.gov' <Sarah.Campbell@ag.tn.gov>; 'tom.fisher@atg.in.gov' <tom.fisher@atg.in.gov>; 'Andree.Blumstein@ag.tn.gov' <Andree.Blumstein@ag.tn.gov>; 'matthew.frederick@texasattorneygeneral.gov' <matthew.frederick@texasattorneygeneral.gov>; 'Kyle.Hawkins@oag.texas.gov' <Kyle.Hawkins@oag.texas.gov>; 'Ric Cantrell' <rcantrell@agutah.gov>; 'james.kaste@wyo.gov' <james.kaste@wyo.gov>; 'Jim.Campbell@nebraska.gov' <Jim.Campbell@nebraska.gov>; 'Thomas T. Lampman' <Thomas.T.Lampman@wvago.gov>; 'Jessica A. Lee' <Jessica.A.Lee@wvago.gov>; 'Lindsay S. See' <Lindsay.S.See@wvago.gov>; 'Roysden, Beau' <Beau.Roysden@azag.gov>; 'Bash, Zina' <Zina.Bash@oag.texas.gov>; 'masagsve@nd.gov'; 'Harley Kirkland' <HKirkland@scag.gov>; 'Eddie Lacour' <elacour@ago.state.al.us>; 'Hudson, Kian' <Kian.Hudson@atg.in.gov>; 'Kuhn, Matt F (KYOAG)' <Matt.Kuhn@ky.gov>
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All-

Attached please find a draft multistate amicus brief in support of Texas's motion for leave to file a bill of complaint in the U.S. Supreme Court challenging the administration of the recent Presidential election in Pennsylvania, Michigan, Wisconsin, and Georgia. The brief argues that (1) the separation-of-powers provision of the Electors Clause of Article II, Section 1 is an important structural check on government that safeguards individual liberty; (2) voting by mail presents real concerns for fraud and abuse that require statutory safeguards to protect against such fraud and abuse; and (3) the abrogation of statutory safeguards against fraud in voting by mail by non-legislative actors violates the Electors Clause and undermines public confidence in elections. For your reference, I have also attached Texas's Motion for Leave to File Bill of Complaint and related documents.

With apologies for the short deadline, given the time-sensitivity of this case, we are requesting joins by **1:00 p.m. Central TOMORROW**, 12/9. We are planning to file tomorrow afternoon.

Thanks a lot,

John Sauer

Jeffrey DeSousa

From: Sauer, John <John.Sauer@ago.mo.gov>
Sent: Wednesday, December 9, 2020 1:49 PM
To: 'Mithun Mansinghani'; 'Murrill, Elizabeth'; 'Melissa Holyoak'; 'nicholas.bronni@arkansasag.gov'; 'Vincent Wagner'; 'ed.sniffen@alaska.gov'; Smith, Justin; Amit Agarwal; 'Kane, Brian'; 'tom.fisher@atg.in.gov'; 'julia.payne@atg.in.gov'; 'toby.crouse@ag.ks.gov'; 'Chad.Meredith@ky.gov'; 'Andrew Pinson'; 'jeff.chanay'; 'St. John, Joseph'; 'Kristi.Johnson@ago.ms.gov'; 'ABurton@mt.gov'; 'MSchlichting@mt.gov'; 'Lindsay S. See'; 'jonbennion@mt.gov'; 'wstenehjem@nd.gov'; 'Benjamin.flowers@ohioattorneygeneral.gov'; 'ESmith@scag.gov'; 'BCook@scag.gov'; 'steven.blair@state.sd.us'; 'Sherri.Wald@state.sd.us'; 'Sarah.Campbell@ag.tn.gov'; 'tom.fisher@atg.in.gov'; 'Andree.Blumstein@ag.tn.gov'; 'matthew.frederick@texasattorneygeneral.gov'; 'Kyle.Hawkins@oag.texas.gov'; 'Ric Cantrell'; 'james.kaste@wyo.gov'; 'Jim.Campbell@nebraska.gov'; 'Thomas T. Lampman'; 'Jessica A. Lee'; 'Lindsay S. See'; 'Roysden, Beau'; 'Bash, Zina'; 'masagsve@nd.gov'; 'Harley Kirkland'; 'Eddie Lacour'; 'Hudson, Kian'; 'Kuhn, Matt F (KYOAG)'; 'Michelle Williams'; 'krissy.nobile@ago.ms.gov'
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Utah and Tennessee have joined as well

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Florida and North Dakota have joined as well

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To: 'Mithun Mansinghani' <mithun.mansinghani@oag.ok.gov>; 'Murrill, Elizabeth' <MurrillE@ag.louisiana.gov>; 'Melissa Holyoak' <melissaholyoak@agutah.gov>; 'nicholas.bronni@arkansasag.gov' <nicholas.bronni@arkansasag.gov>; 'Vincent Wagner' <vincent.wagner@arkansasag.gov>; 'ed.sniffen@alaska.gov' <ed.sniffen@alaska.gov>; Smith, Justin <justin.smith@ago.mo.gov>; 'Amit.Agarwal@myfloridalegal.com' <Amit.Agarwal@myfloridalegal.com>; 'Kane, Brian' <brian.kane@ag.idaho.gov>; 'tom.fisher@atg.in.gov' <tom.fisher@atg.in.gov>; 'julia.payne@atg.in.gov' <julia.payne@atg.in.gov>; 'toby.crouse@ag.ks.gov' <toby.crouse@ag.ks.gov>; 'Chad.Meredith@ky.gov' <Chad.Meredith@ky.gov>; 'Andrew Pinson' <APinson@LAW.GA.GOV>; 'jeff.chanay' <jeff.chanay@ag.ks.gov>; 'St. John, Joseph' <StJohnJ@ag.louisiana.gov>; 'Kristi.Johnson@ago.ms.gov' <Kristi.Johnson@ago.ms.gov>; 'ABurton@mt.gov' <ABurton@mt.gov>; 'MSchlichting@mt.gov' <MSchlichting@mt.gov>; 'Lindsay S. See' <Lindsay.S.See@wvago.gov>; 'jonbennion@mt.gov' <jonbennion@mt.gov>; 'wstenehjem@nd.gov' <wstenehjem@nd.gov>; 'Benjamin.flowers@ohioattorneygeneral.gov' <Benjamin.flowers@ohioattorneygeneral.gov>; 'ESmith@scag.gov' <ESmith@scag.gov>; 'BCook@scag.gov' <BCook@scag.gov>; 'steven.blair@state.sd.us' <steven.blair@state.sd.us>; 'Sherri.Wald@state.sd.us' <Sherri.Wald@state.sd.us>; 'Sarah.Campbell@ag.tn.gov' <Sarah.Campbell@ag.tn.gov>; 'tom.fisher@atg.in.gov' <tom.fisher@atg.in.gov>; 'Andree.Blumstein@ag.tn.gov' <Andree.Blumstein@ag.tn.gov>; 'matthew.frederick@texasattorneygeneral.gov' <matthew.frederick@texasattorneygeneral.gov>; 'Kyle.Hawkins@oag.texas.gov' <Kyle.Hawkins@oag.texas.gov>; 'Ric Cantrell' <rcantrell@agutah.gov>; 'james.kaste@wyo.gov' <james.kaste@wyo.gov>; 'Jim.Campbell@nebraska.gov' <Jim.Campbell@nebraska.gov>; 'Thomas T. Lampman' <Thomas.T.Lampman@wvago.gov>; 'Jessica A. Lee' <Jessica.A.Lee@wvago.gov>; 'Lindsay S. See' <Lindsay.S.See@wvago.gov>; 'Roysden, Beau' <Beau.Roysden@azag.gov>; 'Bash, Zina' <Zina.Bash@oag.texas.gov>; 'masagsve@nd.gov'; 'Harley Kirkland' <HKirkland@scag.gov>; 'Eddie Lacour' <elacour@ago.state.al.us>; 'Hudson, Kian' <Kian.Hudson@atg.in.gov>; 'Kuhn, Matt F (KYOAG)' <Matt.Kuhn@ky.gov>; 'Michelle Williams' <Michelle.Williams@ago.ms.gov>; 'krissy.nobile@ago.ms.gov' <krissy.nobile@ago.ms.gov>
Subject: RE: Texas v. Pennsylvania, et al. - Amicus Brief of Missouri, at al. - Joins requested by 1:00 p.m. Central Tomorrow, 12/9

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Just a final reminder regarding this amicus brief, with the deadline to join in a half hour. So far, nine States have joined, with several others expressing interest: **Missouri, Alabama, Arkansas, Kansas, Louisiana, Mississippi, Montana, Nebraska, and West Virginia.** Please let us know as soon as possible if you would like to join too! Thanks, John

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All-

Attached please find a redline with minor changes to this brief to address issues raised by several States. Thank you to Nebraska and West Virginia for proposing these changes. Arkansas, Louisiana, and Mississippi have joined, with many others expressing interest. Our printer has given a hard deadline of 1:00 pm, so please do let us know by then if you would like to join!

Thanks a lot, John Sauer

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To: 'Mithun Mansinghani' <mithun.mansinghani@oag.ok.gov>; 'Murrill, Elizabeth' <MurrillE@ag.louisiana.gov>; 'Melissa Holyoak' <melissaholyoak@agutah.gov>; 'nicholas.bronni@arkansasag.gov' <nicholas.bronni@arkansasag.gov>; 'Vincent Wagner' <vincent.wagner@arkansasag.gov>; 'ed.sniffen@alaska.gov' <ed.sniffen@alaska.gov>; Smith, Justin <justin.smith@ago.mo.gov>; 'Amit.Agarwal@myfloridalegal.com' <Amit.Agarwal@myfloridalegal.com>; 'Kane, Brian'

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All-

Thank you for considering this amicus brief on such short notice. So far, Louisiana and Arkansas have joined, with several others expressing interest. I have attached an updated draft that includes minor, non-substantive edits, and which adjusts the language of the concluding paragraphs in response to comments from an interested state. The Supreme Court issued an order last night ordering the Defendant States (MI, PA, WS, GA) to file a response for the Motion for Leave to File Bill of Complaint and request for interim injunctive relief by 3:00 pm tomorrow. Given this highly accelerated briefing schedule, we would like to file this brief as soon as possible this afternoon to give the Court the most time possible to read it. Accordingly, we would prefer not to extend the deadline past 1:00 p.m. Central today, so please let us know by then if you are interested. Thanks a lot!

Best, John Sauer

From: Sauer, John
Sent: Tuesday, December 8, 2020 6:11 PM
To: 'Mithun Mansinghani' <mithun.mansinghani@oag.ok.gov>; 'Murrill, Elizabeth' <MurrillE@ag.louisiana.gov>; 'Melissa Holyoak' <melissaholyoak@agutah.gov>; 'nicholas.bronni@arkansasag.gov' <nicholas.bronni@arkansasag.gov>; 'Vincent Wagner' <vincent.wagner@arkansasag.gov>; 'ed.sniffen@alaska.gov' <ed.sniffen@alaska.gov>; Smith, Justin <justin.smith@ago.mo.gov>; 'Amit.Agarwal@myfloridalegal.com' <Amit.Agarwal@myfloridalegal.com>; 'Kane, Brian' <brian.kane@ag.idaho.gov>; 'tom.fisher@atg.in.gov' <tom.fisher@atg.in.gov>; 'julia.payne@atg.in.gov' <julia.payne@atg.in.gov>; 'toby.crouse@ag.ks.gov' <toby.crouse@ag.ks.gov>; 'Chad.Meredith@ky.gov' <Chad.Meredith@ky.gov>; 'Andrew Pinson' <APinson@LAW.GA.GOV>; 'jeff.chanay' <jeff.chanay@ag.ks.gov>; 'St. John, Joseph' <StJohnJ@ag.louisiana.gov>; 'Kristi.Johnson@ago.ms.gov' <Kristi.Johnson@ago.ms.gov>; 'ABurton@mt.gov' <ABurton@mt.gov>; 'MSchlichting@mt.gov' <MSchlichting@mt.gov>; 'Lindsay S. See' <Lindsay.S.See@wvago.gov>; 'jonbennion@mt.gov' <jonbennion@mt.gov>; 'wstenehjem@nd.gov' <wstenehjem@nd.gov>; 'Benjamin.flowers@ohioattorneygeneral.gov' <Benjamin.flowers@ohioattorneygeneral.gov>; 'ESmith@scag.gov' <ESmith@scag.gov>; 'BCook@scag.gov' <BCook@scag.gov>; 'steven.blair@state.sd.us' <steven.blair@state.sd.us>; 'Sherri.Wald@state.sd.us' <Sherri.Wald@state.sd.us>; 'Sarah.Campbell@ag.tn.gov' <Sarah.Campbell@ag.tn.gov>; 'tom.fisher@atg.in.gov' <tom.fisher@atg.in.gov>; 'Andree.Blumstein@ag.tn.gov' <Andree.Blumstein@ag.tn.gov>; 'matthew.frederick@texasattorneygeneral.gov' <matthew.frederick@texasattorneygeneral.gov>; 'Kyle.Hawkins@oag.texas.gov' <Kyle.Hawkins@oag.texas.gov>; 'Ric Cantrell' <rcantrell@agutah.gov>;

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Attached please find a draft multistate amicus brief in support of Texas's motion for leave to file a bill of complaint in the U.S. Supreme Court challenging the administration of the recent Presidential election in Pennsylvania, Michigan, Wisconsin, and Georgia. The brief argues that (1) the separation-of-powers provision of the Electors Clause of Article II, Section 1 is an important structural check on government that safeguards individual liberty; (2) voting by mail presents real concerns for fraud and abuse that require statutory safeguards to protect against such fraud and abuse; and (3) the abrogation of statutory safeguards against fraud in voting by mail by non-legislative actors violates the Electors Clause and undermines public confidence in elections. For your reference, I have also attached Texas's Motion for Leave to File Bill of Complaint and related documents.

With apologies for the short deadline, given the time-sensitivity of this case, we are requesting joins by **1:00 p.m. Central TOMORROW**, 12/9. We are planning to file tomorrow afternoon.

Thanks a lot,

John Sauer

Jeffrey DeSousa

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Subject: RE: Texas v. Pennsylvania, et al. - Amicus Brief of Missouri, at al. - Joins requested by 1:00 p.m. Central Tomorrow, 12/9

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Attached please find a draft multistate amicus brief in support of Texas's motion for leave to file a bill of complaint in the U.S. Supreme Court challenging the administration of the recent Presidential election in Pennsylvania, Michigan, Wisconsin, and Georgia. The brief argues that (1) the separation-of-powers provision of the Electors Clause of Article II, Section 1 is an important structural check on government that safeguards individual liberty; (2) voting by mail presents real concerns for fraud and abuse that require statutory safeguards to protect against such fraud and abuse; and (3) the abrogation of statutory safeguards against fraud in voting by mail by non-legislative actors violates the Electors Clause and undermines public confidence in elections. For your reference, I have also attached Texas's Motion for Leave to File Bill of Complaint and related documents.

With apologies for the short deadline, given the time-sensitivity of this case, we are requesting joins by **1:00 p.m. Central TOMORROW**, 12/9. We are planning to file tomorrow afternoon.

Thanks a lot,

John Sauer

Jeffrey DeSousa

From: Sauer, John <John.Sauer@ago.mo.gov>
Sent: Wednesday, December 9, 2020 1:32 PM
To: 'Mithun Mansinghani'; 'Murrill, Elizabeth'; 'Melissa Holyoak'; 'nicholas.bronni@arkansasag.gov'; 'Vincent Wagner'; 'ed.sniffen@alaska.gov'; Smith, Justin; Amit Agarwal; 'Kane, Brian'; 'tom.fisher@atg.in.gov'; 'julia.payne@atg.in.gov'; 'toby.crouse@ag.ks.gov'; 'Chad.Meredith@ky.gov'; 'Andrew Pinson'; 'jeff.chanay'; 'St. John, Joseph'; 'Kristi.Johnson@ago.ms.gov'; 'ABurton@mt.gov'; 'MSchlichting@mt.gov'; 'Lindsay S. See'; 'jonbennion@mt.gov'; 'wstenehjem@nd.gov'; 'Benjamin.flowers@ohioattorneygeneral.gov'; 'ESmith@scag.gov'; 'BCook@scag.gov'; 'steven.blair@state.sd.us'; 'Sherri.Wald@state.sd.us'; 'Sarah.Campbell@ag.tn.gov'; 'tom.fisher@atg.in.gov'; 'Andree.Blumstein@ag.tn.gov'; 'matthew.frederick@texasattorneygeneral.gov'; 'Kyle.Hawkins@oag.texas.gov'; 'Ric Cantrell'; 'james.kaste@wyo.gov'; 'Jim.Campbell@nebraska.gov'; 'Thomas T. Lampman'; 'Jessica A. Lee'; 'Lindsay S. See'; 'Roysden, Beau'; 'Bash, Zina'; 'masagsve@nd.gov'; 'Harley Kirkland'; 'Eddie Lacour'; 'Hudson, Kian'; 'Kuhn, Matt F (KYOAG)'; 'Michelle Williams'; 'krissy.nobile@ago.ms.gov'
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Just a final reminder regarding this amicus brief, with the deadline to join in a half hour. So far, nine States have joined, with several others expressing interest: **Missouri, Alabama, Arkansas, Kansas, Louisiana, Mississippi, Montana, Nebraska, and West Virginia.** Please let us know as soon as possible if you would like to join too! Thanks, John

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Attached please find a draft multistate amicus brief in support of Texas's motion for leave to file a bill of complaint in the U.S. Supreme Court challenging the administration of the recent Presidential election in Pennsylvania, Michigan, Wisconsin, and Georgia. The brief argues that (1) the separation-of-powers provision of the Electors Clause of Article II, Section 1 is an important structural check on government that safeguards individual liberty; (2) voting by mail presents real concerns for fraud and abuse that require statutory safeguards to protect against such fraud and abuse; and (3) the abrogation of statutory safeguards against fraud in voting by mail by non-legislative actors violates the Electors Clause and undermines public confidence in elections. For your reference, I have also attached Texas's Motion for Leave to File Bill of Complaint and related documents.

With apologies for the short deadline, given the time-sensitivity of this case, we are requesting joins by **1:00 p.m. Central TOMORROW**, 12/9. We are planning to file tomorrow afternoon.

Thanks a lot,

John Sauer

Jeffrey DeSousa

From: Sauer, John <John.Sauer@ago.mo.gov>
Sent: Wednesday, December 9, 2020 12:21 PM
To: 'Mithun Mansinghani'; 'Murrill, Elizabeth'; 'Melissa Holyoak'; 'nicholas.bronni@arkansasag.gov'; 'Vincent Wagner'; 'ed.sniffen@alaska.gov'; Smith, Justin; Amit Agarwal; 'Kane, Brian'; 'tom.fisher@atg.in.gov'; 'julia.payne@atg.in.gov'; 'toby.crouse@ag.ks.gov'; 'Chad.Meredith@ky.gov'; 'Andrew Pinson'; 'jeff.chanay'; 'St. John, Joseph'; 'Kristi.Johnson@ago.ms.gov'; 'ABurton@mt.gov'; 'MSchlichting@mt.gov'; 'Lindsay S. See'; 'jonbennion@mt.gov'; 'wstenehjem@nd.gov'; 'Benjamin.flowers@ohioattorneygeneral.gov'; 'ESmith@scag.gov'; 'BCook@scag.gov'; 'steven.blair@state.sd.us'; 'Sherri.Wald@state.sd.us'; 'Sarah.Campbell@ag.tn.gov'; 'tom.fisher@atg.in.gov'; 'Andree.Blumstein@ag.tn.gov'; 'matthew.frederick@texasattorneygeneral.gov'; 'Kyle.Hawkins@oag.texas.gov'; 'Ric Cantrell'; 'james.kaste@wyo.gov'; 'Jim.Campbell@nebraska.gov'; 'Thomas T. Lampman'; 'Jessica A. Lee'; 'Lindsay S. See'; 'Roysden, Beau'; 'Bash, Zina'; 'masagsve@nd.gov'; 'Harley Kirkland'; 'Eddie Lacour'; 'Hudson, Kian'; 'Kuhn, Matt F (KYOAG)'; 'Michelle Williams'; 'krissy.nobile@ago.ms.gov'
Subject: RE: Texas v. Pennsylvania, et al. - Amicus Brief of Missouri, at al. - Joins requested by 1:00 p.m. Central Tomorrow, 12/9
Attachments: 2020-12-09 - Texas v. Pennsylvania - Amicus Brief of Missouri et al. - Circulation Redline.docx

All-

Attached please find a redline with minor changes to this brief to address issues raised by several States. Thank you to Nebraska and West Virginia for proposing these changes. Arkansas, Louisiana, and Mississippi have joined, with many others expressing interest. Our printer has given a hard deadline of 1:00 pm, so please do let us know by then if you would like to join!

Thanks a lot, John Sauer

From: Sauer, John
Sent: Wednesday, December 9, 2020 9:04 AM
To: 'Mithun Mansinghani' <mithun.mansinghani@oag.ok.gov>; 'Murrill, Elizabeth' <MurrillE@ag.louisiana.gov>; 'Melissa Holyoak' <melissaholyoak@agutah.gov>; 'nicholas.bronni@arkansasag.gov' <nicholas.bronni@arkansasag.gov>; 'Vincent Wagner' <vincent.wagner@arkansasag.gov>; 'ed.sniffen@alaska.gov' <ed.sniffen@alaska.gov>; Smith, Justin <justin.smith@ago.mo.gov>; 'Amit.Agarwal@myfloridalegal.com' <Amit.Agarwal@myfloridalegal.com>; 'Kane, Brian' <brian.kane@ag.idaho.gov>; 'tom.fisher@atg.in.gov' <tom.fisher@atg.in.gov>; 'julia.payne@atg.in.gov' <julia.payne@atg.in.gov>; 'toby.crouse@ag.ks.gov' <toby.crouse@ag.ks.gov>; 'Chad.Meredith@ky.gov' <Chad.Meredith@ky.gov>; 'Andrew Pinson' <APinson@LAW.GA.GOV>; 'jeff.chanay' <jeff.chanay@ag.ks.gov>; 'St. John, Joseph' <StJohnJ@ag.louisiana.gov>; 'Kristi.Johnson@ago.ms.gov' <Kristi.Johnson@ago.ms.gov>; 'ABurton@mt.gov' <ABurton@mt.gov>; 'MSchlichting@mt.gov' <MSchlichting@mt.gov>; 'Lindsay S. See' <Lindsay.S.See@wvago.gov>; 'jonbennion@mt.gov' <jonbennion@mt.gov>; 'wstenehjem@nd.gov' <wstenehjem@nd.gov>; 'Benjamin.flowers@ohioattorneygeneral.gov' <Benjamin.flowers@ohioattorneygeneral.gov>; 'ESmith@scag.gov' <ESmith@scag.gov>; 'BCook@scag.gov' <BCook@scag.gov>; 'steven.blair@state.sd.us' <steven.blair@state.sd.us>; 'Sherri.Wald@state.sd.us' <Sherri.Wald@state.sd.us>; 'Sarah.Campbell@ag.tn.gov' <Sarah.Campbell@ag.tn.gov>; 'tom.fisher@atg.in.gov' <tom.fisher@atg.in.gov>; 'Andree.Blumstein@ag.tn.gov' <Andree.Blumstein@ag.tn.gov>; 'matthew.frederick@texasattorneygeneral.gov' <matthew.frederick@texasattorneygeneral.gov>; 'Kyle.Hawkins@oag.texas.gov' <Kyle.Hawkins@oag.texas.gov>; 'Ric Cantrell' <rcantrell@agutah.gov>;

'james.kaste@wyo.gov' <james.kaste@wyo.gov>; 'Jim.Campbell@nebraska.gov' <Jim.Campbell@nebraska.gov>; 'Thomas T. Lampman' <Thomas.T.Lampman@wvago.gov>; 'Jessica A. Lee' <Jessica.A.Lee@wvago.gov>; 'Lindsay S. See' <Lindsay.S.See@wvago.gov>; 'Roysden, Beau' <Beau.Roysden@azag.gov>; 'Bash, Zina' <Zina.Bash@oag.texas.gov>; 'masagsve@nd.gov'; 'Harley Kirkland' <HKirkland@scag.gov>; 'Eddie Lacour' <elacour@ago.state.al.us>; 'Hudson, Kian' <Kian.Hudson@atg.in.gov>; 'Kuhn, Matt F (KYOAG)' <Matt.Kuhn@ky.gov>; 'Michelle Williams' <Michelle.Williams@ago.ms.gov>; 'krissy.nobile@ago.ms.gov' <krissy.nobile@ago.ms.gov>
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All-

Thank you for considering this amicus brief on such short notice. So far, Louisiana and Arkansas have joined, with several others expressing interest. I have attached an updated draft that includes minor, non-substantive edits, and which adjusts the language of the concluding paragraphs in response to comments from an interested state. The Supreme Court issued an order last night ordering the Defendant States (MI, PA, WS, GA) to file a response for the Motion for Leave to File Bill of Complaint and request for interim injunctive relief by 3:00 pm tomorrow. Given this highly accelerated briefing schedule, we would like to file this brief as soon as possible this afternoon to give the Court the most time possible to read it. Accordingly, we would prefer not to extend the deadline past 1:00 p.m. Central today, so please let us know by then if you are interested. Thanks a lot!

Best, John Sauer

From: Sauer, John
Sent: Tuesday, December 8, 2020 6:11 PM
To: 'Mithun Mansinghani' <mithun.mansinghani@oag.ok.gov>; 'Murrill, Elizabeth' <MurrillE@ag.louisiana.gov>; 'Melissa Holyoak' <melissaholyoak@agutah.gov>; 'nicholas.bronni@arkansasag.gov' <nicholas.bronni@arkansasag.gov>; 'Vincent Wagner' <vincent.wagner@arkansasag.gov>; 'ed.sniffen@alaska.gov' <ed.sniffen@alaska.gov>; Smith, Justin <justin.smith@ago.mo.gov>; 'Amit.Agarwal@myfloridalegal.com' <Amit.Agarwal@myfloridalegal.com>; 'Kane, Brian' <brian.kane@ag.idaho.gov>; 'tom.fisher@atg.in.gov' <tom.fisher@atg.in.gov>; 'julia.payne@atg.in.gov' <julia.payne@atg.in.gov>; 'toby.crouse@ag.ks.gov' <toby.crouse@ag.ks.gov>; 'Chad.Meredith@ky.gov' <Chad.Meredith@ky.gov>; 'Andrew Pinson' <APinson@LAW.GA.GOV>; 'jeff.chanay' <jeff.chanay@ag.ks.gov>; 'St. John, Joseph' <StJohnJ@ag.louisiana.gov>; 'Kristi.Johnson@ago.ms.gov' <Kristi.Johnson@ago.ms.gov>; 'ABurton@mt.gov' <ABurton@mt.gov>; 'MSchlichting@mt.gov' <MSchlichting@mt.gov>; 'Lindsay S. See' <Lindsay.S.See@wvago.gov>; 'jonbennion@mt.gov' <jonbennion@mt.gov>; 'wstenehjem@nd.gov' <wstenehjem@nd.gov>; 'Benjamin.flowers@ohioattorneygeneral.gov' <Benjamin.flowers@ohioattorneygeneral.gov>; 'ESmith@scag.gov' <ESmith@scag.gov>; 'BCook@scag.gov' <BCook@scag.gov>; 'steven.blair@state.sd.us' <steven.blair@state.sd.us>; 'Sherri.Wald@state.sd.us' <Sherri.Wald@state.sd.us>; 'Sarah.Campbell@ag.tn.gov' <Sarah.Campbell@ag.tn.gov>; 'tom.fisher@atg.in.gov' <tom.fisher@atg.in.gov>; 'Andree.Blumstein@ag.tn.gov' <Andree.Blumstein@ag.tn.gov>; 'matthew.frederick@texasattorneygeneral.gov' <matthew.frederick@texasattorneygeneral.gov>; 'Kyle.Hawkins@oag.texas.gov' <Kyle.Hawkins@oag.texas.gov>; 'Ric Cantrell' <rcantrell@agutah.gov>; 'james.kaste@wyo.gov' <james.kaste@wyo.gov>; 'Jim.Campbell@nebraska.gov' <Jim.Campbell@nebraska.gov>; 'Thomas T. Lampman' <Thomas.T.Lampman@wvago.gov>; 'Jessica A. Lee' <Jessica.A.Lee@wvago.gov>; 'Lindsay S. See' <Lindsay.S.See@wvago.gov>; 'Roysden, Beau' <Beau.Roysden@azag.gov>; 'Bash, Zina' <Zina.Bash@oag.texas.gov>; 'masagsve@nd.gov'; 'Harley Kirkland' <HKirkland@scag.gov>; 'Eddie Lacour' <elacour@ago.state.al.us>; 'Hudson, Kian' <Kian.Hudson@atg.in.gov>; 'Kuhn, Matt F (KYOAG)' <Matt.Kuhn@ky.gov>
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Thanks a lot,

John Sauer

No. 22O155, Original

In the Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

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

Defendants.

On Motion for Leave to File Bill of Complaint

BRIEF OF STATES OF MISSOURI, ARKANSAS, LOUISIANA, ~~AND~~ MISSISSIPPI, AND **AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF'S MOTION FOR LEAVE TO FILE BILL OF COMPLAINT**

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STATEMENT OF INTEREST OF *AMICI*

"In the context of a Presidential election," state actions "implicate a uniquely important national interest," because "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, 794–95 (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." *Id.*

Amici curiae are the States of Missouri, Arkansas, Louisiana, ~~and~~ Mississippi, and _____.[1] *Amici* have several important interests in this case. *First*, the States have a strong interest in safeguarding the separation of powers among state actors in the regulation of Presidential elections. The Electors Clause of Article II, § 1 carefully separates power among state actors, and it assigns a specific function to the "Legislature thereof" in each State. U.S. CONST. art. II, § 1, cl. 4. Our system of federalism relies on separation of powers to preserve liberty at every level of government, and the separation of powers in the Electors Clause is no exception. The States have a strong interest in preserving the proper roles of state legislatures in the administration of federal elections, and thus safeguarding the individual liberty of their citizens.

Second, *amici* States have a strong interest in ensuring that the votes of their own citizens are not diluted by the unconstitutional administration of

[1] This brief is filed under Supreme Court Rule 37.4, and all counsel of record received timely notice of the intent to file this amicus brief under Rule 37.2.

elections in other States. When non-legislative actors in other States encroach on the authority of the "Legislature thereof" in that State to administer a Presidential election, they threaten the liberty, not just of their own citizens, but of every citizen of the United States who casts a lawful ballot in that election—including the citizens of *amici* States.

Third, for similar reasons, *amici* States have a strong interest in safeguarding against fraud in voting by mail during Presidential elections. "Every voter" in a federal election, "has a right under the Constitution to have his vote fairly counted, without its being distorted by fraudulently cast votes." *Anderson* v. *United States*, 417 U.S. 211, 227 (1974). Plaintiff's Bill of Complaint alleges that non-legislative actors in the Defendant States stripped away important safeguards against fraud in voting by mail that had been enacted by the Legislature in each State. *Amici* States share a vital interest in protecting the integrity of the truly national election for President and Vice President of the United States.

SUMMARY OF ARGUMENT

The Bill of Complaint raises constitutional questions of great public importance that warrant this Court's review. First, like every similar provision in the Constitution, the separation-of-powers provision of the Electors Clause provides an important structural check on government designed to protect individual liberty. By allocating authority over Presidential electors to the "Legislature thereof" in each State, the Clause separates powers both vertically and horizontally, and it confers authority on

the branch of state government most responsive to the democratic will. Encroachments on the authority of state Legislatures by other state actors violate the separation of powers and threaten individual liberty.

The unconstitutional encroachments on the authority of state Legislatures in this case raise particularly grave concerns. For decades, responsible observers have cautioned about the risks of fraud and abuse in voting by mail, and they have urged the adoption of statutory safeguards to prevent such fraud and abuse. In the numerous cases identified in the Bill of Complaint, non-legislative actors in each Defendant State repeatedly stripped away the statutory safeguards that the "Legislature thereof" had enacted to protect against fraud in voting by mail. These changes removed protections that responsible actors had recommended for decades to guard against fraud and abuse in voting by mail~~, and they did so in a manner that uniformly and predictably benefited one candidate in the recent Presidential election~~. The allegations in the Bill of Complaint raise important questions about election integrity and public confidence in the administration of Presidential elections. This Court should grant Plaintiff leave to file the Bill of Complaint.

ARGUMENT

The Electors Clause provides that each State "shall appoint" its Presidential electors "in such Manner as the *Legislature thereof* may direct." U.S. CONST. art. II, § 1, cl. 4 (emphasis added). Moreover, "[o]ur constitutional system of representative government only works when the worth of honest ballots is not diluted by invalid ballots procured by

corruption." U.S. Dep't of Justice, *Federal Prosecution of Election Offenses*, at 1 (8th ed. Dec. 2017). "When the election process is corrupted, democracy is jeopardized." *Id.* The proposed Bill of Complaint raises serious concerns about both the constitutionality and ballot security of election procedures in the Defendant States. Given the importance of public confidence in American elections, these allegations raise questions of great public importance that warrant this Court's expedited review.

I. The Separation-of-Powers Provision of the Electors Clause Is a Structural Check on Government That Safeguards Liberty.

Article II 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. 4 (emphasis added); *see also id.* art. I, § 4, cl. 2 (providing that, in each State, the "Legislature thereof' shall establish "[t]he Times, Places and Manner of holding Elections for Senators and Representatives").

Thus, "in the case of a law enacted by a state legislature applicable not only to elections to state offices, but also to the selection of Presidential electors, the legislature is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under Art. II, § 1, cl. 2, of the United States Constitution." *Bush* v. *Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70, 76 (2000). "[T]he state legislature's power to select the manner for appointing electors is plenary." *Bush* v. *Gore*, 531 U.S. 98, 104 (2000).

Here, as set forth in the Bill of Complaint, non-legislative actors in each Defendant State have purported to "alter[] an important statutory provision enacted by the [State's] Legislature pursuant to its authority under the Constitution of the United States to make rules governing the conduct of elections for federal office." *Republican Party of Pennsylvania* v. *Boockvar*, No. 20-542, 2020 WL 6304626, at *1 (U.S. Oct. 28, 2020) (Statement of Alito, J.). *See* Bill of Complaint, ¶¶ 41-127. In doing so, these non-legislative actors may have encroached upon the "plenary" authority of those States' respective legislatures over the conduct of the Presidential election in each State. *Bush* v. *Gore*, 531 U.S. at 104. This encroachment on the authority of each State's Legislature violated the separation of powers set forth in the Electors Clause. "[I]n the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest. For the President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation." *Anderson*, 460 U.S. at 794–795.

In every other context, this Court recognizes that the Constitution's separation-of-powers provisions are designed to preserve liberty. "It is the proud boast of our democracy that we have 'a government of laws, and not of men.'" *Morrison* v. *Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting). "The Framers of the Federal Constitution . . . viewed the principle of separation of powers as the absolutely central guarantee of a just Government." *Id.* "Without a secure structure of separated powers, our Bill of Rights would be worthless, as are the bills of rights of

many nations of the world that have adopted, or even improved upon, the mere words of ours." *Id.* "The purpose of the separation and equilibration of powers in general . . . was not merely to assure effective government but to preserve individual freedom." *Id.* at 727.

This principle of preserving liberty applies both to the horizontal separation of powers among the branches of government, and the vertical separation of powers between the federal government and the States. "The federal system rests on what might at first seem a counterintuitive insight, that 'freedom is enhanced by the creation of two governments, not one.'" *Bond* v. *United States*, 564 U.S. 211, 220–21 (2011) (quoting *Alden* v. *Maine*, 527 U.S. 706, 758 (1999)). "[F]ederalism secures to citizens the liberties that derive from the diffusion of sovereign power." *Bond*, 564 U.S. at 221 (2011) (quoting *New York* v. *United States*, 505 U.S. 144, 181 (1992)). "Federalism also protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions." *Id.* Moreover, "federalism enhances the opportunity of all citizens to participate in representative government." *FERC* v. *Mississippi*, 456 U.S. 742, 789 (1982) (O'Connor, J., concurring in part and dissenting in part). "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Gregory* v. *Ashcroft*, 501 U.S. 452, 458 (1991).

The explicit grant of authority to state *Legislatures* in the Electors Clause effects both a horizontal and a vertical separation of powers. The Clause allocates 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. 4.

It is no accident that the Constitution allocates such authority to state Legislatures, rather than executive officers such as Secretaries of State, or judicial officers such as state Supreme Courts. The Constitutional Convention's delegates frequently recognized that the Legislature is the branch most responsive to the People and most democratically accountable. *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 ratification documents expressing that state legislatures were most likely to be in sympathy with the interests of the people); Federal Farmer, No. 12 (1788), *reprinted in* 2 THE FOUNDERS' CONSTITUTION (Philip B. Kurland & Ralph Lerner eds., 1987) (arguing that electoral regulations "ought to be left to the state legislatures, they coming far nearest to the people themselves"); THE FEDERALIST NO. 57, at 350 (C. Rossiter, ed. 2003) (Madison, J.) (stating that the "House of Representatives is so constituted as to support in its members an habitual recollection of their dependence on the people"); *id.* (stating that the "vigilant and manly spirit that actuates the people of America" is greatest restraint on the House of Representatives).

Democratic accountability in the method of selecting the President of the United States is a powerful bulwark safeguarding individual liberty. By identifying the "Legislature thereof" in each State as the regulator of elections for federal officers, the Electors Clause of Article II, § 1 prohibits the very arrogation of power over Presidential elections by non-legislative officials that the Defendant States perpetrated in this case. By violating the Constitution's separation of powers, these non-legislative actors undermined the liberty of all Americans, including the voters in *amici* States.

II. Stripping Away Safeguards From Voting by Mail Exacerbates the Risks of Fraud.

By stripping away critical safeguards against ballot fraud in voting by mail, non-legislative actors in the Defendant States inflicted another grave injury on the conduct of the recent election: They enhanced the risks of fraudulent voting by mail without authority. An impressive body of public evidence demonstrates that voting by mail presents unique opportunities for fraud and abuse, and that statutory safeguards are critical to reduce such risks of fraud.

For decades prior to 2020, responsible observers emphasized the risks of fraud in voting by mail, and the importance of imposing safeguards on the process of voting by mail to allay such risks. For example, in *Crawford* v. *Marion County Election Board*, this Court held that fraudulent voting "perpetrated using absentee ballots" demonstrates "that not only is the risk of voter fraud real but that *it could affect the outcome of a close election.*" *Crawford* v. *Marion*

County Election Bd., 553 U.S. 181, 195-96 (2008) (opinion of Stevens, J.) (emphasis added).

As noted by Plaintiff, the Carter-Baker Commission on Federal Election Reform emphasized the same concern. The bipartisan Commission—co-chaired by former President Jimmy Carter and former Secretary of State James A. Baker—determined that "[a]bsentee ballots remain 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) ("Carter-Baker Report").[2] According to the Carter-Baker Commission, "[a]bsentee balloting is vulnerable to abuse in several ways." *Id.* "Blank ballots mailed to the wrong address or to large residential buildings might be intercepted." *Id.* "Citizens who vote at home, at nursing homes, at the workplace, or in church are more susceptible to pressure, overt and subtle, or to intimidation." *Id.* "Vote buying schemes are far more difficult to detect when citizens vote by mail." *Id.*

Thus, the Commission noted that "absentee balloting in other states has been a major source of fraud." *Id.* at 35. It emphasized that voting by mail "increases the risk of fraud." *Id.* And the Commission recommended that "States ... need to do more to prevent ... absentee ballot fraud." *Id.* at v.

The Commission specifically recommended that States should implement and reinforce safeguards to prevent fraud in voting by mail. The Commission recommended that "States should make sure that absentee ballots received by election officials before

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[2] *Available at* https://www.legislationline.org/download/id/1472/file/-3b50795b2d0374cbef5c29766256.pdf.

Election Day are kept secure until they are opened and counted." *Id.* at 46. It also recommended that States "prohibit[] 'third-party' organizations, candidates, and political party activists from handling absentee ballots." *Id.* And the Commission highlighted that a particular state "appear[ed] to have avoided significant fraud in its vote-by-mail elections by introducing *safeguards to protect ballot integrity, including signature verification.*" *Id.* at 35 (emphasis added). The Commission concluded that "[v]ote by mail is ... likely to increase the risks of fraud and contested elections ... where the safeguards for ballot integrity are weaker." *Id.*

The most recent edition of the U.S. Department of Justice's Manual on *Federal Prosecution of Election Offenses*, published by its Public Integrity Section, highlights the very same concerns about fraud in voting by mail. U.S. Dep't of Justice, *Federal Prosecution of Election Offenses* (8th ed. Dec. 2017), at 28-29 ("DOJ Manual").[3] The Manual states: "Absentee ballots are particularly susceptible to fraudulent abuse because, by definition, they are marked and cast outside the presence of election officials and the structured environment of a polling place." *Id.* The Manual reports that "the more common ways" that election-fraud "crimes are committed include ... [o]btaining and marking absentee ballots without the active input of the voters involved." *Id.* at 28. And the Manual notes that "[a]bsentee ballot frauds" committed both with and without the voter's participation are "common." *Id.* at 29.

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[3] *Available at* https://www.justice.gov/criminal/file/1029066/download.

Similarly, the U.S. Government Accountability Office concluded that many crimes of election fraud likely go undetected. In 2014, discussing election fraud, the GAO reported that "crimes of fraud, in particular, are difficult to detect, as those involved are engaged in intentional deception." GAO-14-634, *Elections: Issues Related to State Voter Identification Laws* 62-63 (U.S. Gov't Accountability Office Sept. 2014).[4]

Despite the difficulties of detecting fraud schemes, recent experience contains many well-documented examples of absentee ballot fraud. For example, the News21 database, which was compiled to *refute* arguments that voter fraud is prevalent, identified 491 cases of absentee ballot over the 12-year period from 2000 to 2012—approximately 41 cases per year. *See* News21, *Election Fraud in America*.[5] This database reports that "Absentee Ballot Fraud" was "[t]he most prevalent fraud" in America, comprising "24 percent (491 cases)" of all cases reported in the public records surveyed. *Id.* Moreover, the database indicates that this number undercounts the total incidence of reported cases of absentee ballot fraud, because it was based on public-record requests to state and local government entities, many of which did not respond. *Id.*

Likewise, the Heritage Foundation's online database of election-fraud cases—which includes only a "sampling" of cases that resulted in an *adjudication*

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[4] *Available at* https://www.gao.gov/assets/670/665966.pdf.

[5] *Available at* https://votingrights.news21.com/interactive/election-fraud-database/&xid=17259,15700023,15700124,15700149,15700186,15700191,15700201,15700237,15700242

of fraud, such as a criminal conviction or civil penalty—identified 207 cases of proven "fraudulent use of absentee ballots" in the United States. The Heritage Foundation, *Election Fraud Cases*.[6] Again, this database undercounts the incidence of cases of election fraud: "The Heritage Foundation's Election Fraud Database presents a sampling of recent proven instances of election fraud from across the country. This database is not an exhaustive or comprehensive list." *Id.*

The public record abounds with recent examples of such fraudulent absentee-ballot schemes. For example, in November 2019, the mayor of Berkeley, Missouri was indicted on five felony counts of absentee ballot fraud for changing votes on absentee ballots to help him and his political allies to get elected. Brian Heffernan, *Berkeley Mayor Hoskins Charged with 5 Felony Counts of Election Fraud*, ST. LOUIS PUBLIC RADIO (Nov. 21, 2019).[7] Mayor Hoskins' scheme included "going to the home of elderly ... residents" to harvest absentee ballots, "filling out absentee ballot applications for voters and having his campaign workers do the same," and "altering absentee ballots" after he had procured them from voters. *Id.* Again, in 2016, a state House race in Missouri was overturned amid allegations of widespread absentee-ballot fraud that had occurred across multiple election cycles in the same community. Sarah Fenske, *FBI, Secretary of State*

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[6] *Available at* https://www.heritage.org/voterfraud/search?combine=&state=All&year=&case_type=All&fraud_type=24489&page=12.

[7] *Available at* https://news.stlpublicradio.org/post/berkeley-mayor-hoskins-charged-5-felony-counts-election-fraud#stream/0

Asking Questions About St. Louis Statehouse Race, RIVERFRONT TIMES (Aug. 16, 2016).[8] One candidate stated that it was widely known in the community that the incumbent ran an "absentee game" that resulted in the absentee vote tipping the outcome in her favor in multiple close elections. *Id.*

Other States have similar experiences. In 2018, a federal Congressional race was overturned in North Carolina, and eight political operatives were indicted for fraud, in an absentee-ballot scheme that sufficed to change the outcome of the election. Richard Gonzales, *North Carolina GOP Operative Faces New Felony Charges That Allege Ballot Fraud*, NPR.ORG, (July 30, 2019).[9] The indicted operatives "had improperly collected and possibly tampered with ballots," and were charged with "improperly mailing in absentee ballots for someone who had not mailed it themselves." *Id.*

In the North Carolina case, the lead investigator testified that the investigation was "a continuous case" over two election cycles, and that the scheme involved collecting absentee ballots from voters, altering the absentee ballots, and forging witness signatures on the ballots. *See In re: Investigation of Irregularities Affecting Counties Within the 9th Congressional District*, North Carolina Board of

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[8] *Available at* https://www.riverfronttimes.com/newsblog/2016/08/16/fbi-secretary-of-state-asking-questions-about-st-louis-statehouse-race.

[9] *Available at* https://www.npr.org/2019/07/30/746800630/north-carolina-gop-operative-faces-new-felony-charges-that-allege-ballot-fraud.

Elections, Evidentiary Hearing, at 2-3.[10] The investigators described it as a "coordinated, unlawful, and substantially resourced absentee ballots scheme." *Id.* at 2. According to the investigators' trial presentation, the investigation involved 142 voter interviews, 30 subject and witness interviews, and subpoenas of documents, financial records, and phone records. *Id.* at 3. The perpetrators collected absentee ballots and falsified ballot witness certifications outside the presence of the voters. *Id.* at 10, 13. The congressional election at issue was decided by margin of less than 1,000 votes. *Id.* at 4. The scheme involved the submission of well over 1,000 fraudulent absentee ballots and request forms. *Id.* at 11. The perpetrators took extensive steps to conceal the fraudulent scheme, which lasted over multiple election cycles before it was detected. *Id.* at 14.

Similarly, in 2016, a politician in the Bronx was indicted and pled guilty to 242 counts of election fraud based on an absentee ballot fraud scheme. Ben Kochman, *Bronx politician pleads guilty in absentee ballot scheme for Assembly election,* NEW YORK DAILY NEWS (Nov. 22, 2016).[11] Despite pleading guilty to 242 felonies involving absentee ballot fraud in an election that was decided by two votes, the defendant received no jail time and vowed to run for office again after a short disqualification period. *Id.*

The increases in mail-in voting due to the COVID-19 pandemic likewise increased opportunities for

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[10] *Available at* https://images.radio.com/wbt/Voter%20ID_%20Website.pdf.

[11] *Available at* http://www.nydailynews.com/new-york/nyc-crime/bronx-pol-pleads-guilty-absentee-ballot-scheme-article-1.2884009.

fraud. For instance, in May 2020, the leader of the New Jersey NAACP called for an election in Paterson, New Jersey to be overturned due to widespread mail-in ballot fraud. *See* Jonathan Dienst et al., *NJ NAACP Leader Calls for Paterson Mail-In Vote to Be Canceled Amid Corruption Claims*, NBC NEW YORK (May 27, 2020).[12] "'Invalidate the election. Let's do it again,' [the NAACP leader] said amid reports more that 20 percent of all ballots were disqualified, some in connection with voter fraud allegations." *Id.*

Hundreds of other reported cases highlight the same concerns about the vulnerability of voting by mail to fraud and abuse. Recently, a Missouri court considered extensive expert testimony reviewing absentee-ballot fraud cases like these. *Findings of Fact, Conclusions of Law, and Final Judgment in Mo. State Conference of the NAACP* v. *State*, No. 20AC-CC00169-01 (Circuit Court of Cole County, Missouri Sept. 24, 2020), *aff'd*, 607 S.W.3d 728 (Mo. banc Oct. 9, 2020) ("*Mo. NAACP*"). The court held that cases of absentee-ballot fraud "have several common features that persist across multiple recent cases: (1) close elections; (2) perpetrators who are candidates, campaign workers, or political consultants, not ordinary voters; (3) common techniques of ballot harvesting; (4) common techniques of signature forging; (5) fraud that persisted across multiple elections before it was detected; (6) massive resources required to investigate and prosecute the fraud; and (7) lenient criminal penalties." *Id.* at 17. Thus, the

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[12] *Available at* https://www.nbcnewyork.com/news/politics/nj-naacp-leader-calls-for-paterson-mail-in-vote-to-be-canceled-amid-fraud-claims/2435162/.

court concluded "that fraud in voting by mail is a recurrent problem, that it is hard to detect and prosecute, that there are strong incentives and weak penalties for doing so, and that it has the capacity to affect the outcome of close elections." *Id.* The court held that "the threat of mail-in ballot fraud is real." *Id.* at 2.

III. The Bill of Complaint Alleges that the Defendant States Unconstitutionally Abolished Critical Safeguards Against Fraud in Voting by Mail.

The Bill of Complaint alleges that non-legislative actors in each Defendant State unconstitutionally abolished or diluted statutory safeguards against fraud enacted by their state Legislatures, in violation of the Presidential Electors Clause. U.S. CONST. art. II, § 1, cl. 4. All the unconstitutional changes to election procedures identified in the Bill of Complaint have two common features: (1) They abrogated statutory safeguards against fraud that responsible observers have long recommended for voting by mail, and (2) they did so in a way that predictably conferred partisan advantage on one candidate in the Presidential election. Such allegations are serious, and they warrant this Court's review.

Abolishing signature verification. First, the proposed Bill of Complaint alleges that non-legislative actors in Pennsylvania, Michigan, and Georgia unilaterally abolished or weakened signature-verification requirements for mailed ballots. It alleges that Pennsylvania's Secretary of State abrogated Pennsylvania's statutory signature-verification requirement for mail-in ballots in a

"friendly" settlement of a lawsuit brought by activists. Bill of Complaint, ¶¶ 44-46. It alleges that Michigan's Secretary of State permitted absentee ballot applications online, with no signature at all, in violation of Michigan statutes, *id.* ¶¶ 85-89; and that election officials in Wayne County, Michigan simply disregarded statutory signature verification requirements, *id.* ¶¶ 92-95. And it alleges that Georgia's Secretary of State unilaterally abrogated Georgia's statute authorizing county registrars to engage in signature verification for absentee ballots in another lawsuit settlement. *Id.* ¶¶ 66-72.

In addition to violating the Electors Clause, these actions, as alleged, contradicted fundamental principles of ballot security. As noted above, the Carter-Baker Report highlighted the importance of "*signature verification*" as a critical "safeguard[] to protect ballot integrity" for ballots cast by mail. Carter-Baker Report, *supra*, at 35 (emphasis added). Without safeguards such as signature verification, the Report stated that "[v]ote by mail is ... likely to increase the risks of fraud and contested elections ... where the safeguards for ballot integrity are weaker." *Id.* The importance of signature verification is hard to overstate, because absentee-ballot fraud schemes commonly involve "common techniques of signature forging," typically by nefarious actors who are unfamiliar with the voter's signature. *Mo. NAACP*, *supra*, at 17. Verifying the voter's signature thus provides a fundamental safeguard against fraud.

Insecure ballot handling. The Bill of Complaint alleges that non-legislative actors changed or abolished statutory rules for the secure handling of absentee and mail-in ballots in Pennsylvania,

Michigan, and Wisconsin. It alleges that election officials in Democratic areas of Pennsylvania violated state statutes by opening and reviewing mail-in ballots that were required to be kept locked and secure until Election Day. Bill of Complaint, ¶¶ 50-51. It alleges that Michigan's Secretary of State, acting in violation of state law, sent 7.7 million unsolicited absentee-ballot applications to Michigan voters, thus "flooding Michigan with millions of absentee ballot applications prior to the 2020 general election." *Id.* ¶¶ 80-84. And it alleges that the Wisconsin Election Commission violated state law by placing hundreds of unmonitored boxes for the submission of absentee and mail-in ballots around the State, concentrated in heavily Democratic areas. *Id.* ¶¶ 107-114.

In addition to violating the Electors Clause, these actions, as alleged, contradicted commonsense ballot-security recommendations. The Department of Justice's Manual on *Federal Prosecution of Election Offenses* notes that vulnerability to mishandling is what makes absentee ballots "particularly susceptible to fraudulent abuse" because "they are marked and cast outside the presence of election officials and the structured environment of a polling place." DOJ Manual, at 28-29. According to the Manual, "[o]btaining and marking absentee ballots without the active input of the voters involved" is one of "the more common ways" that election fraud "crimes are committed." *Id.* at 28. For this reason, the Carter-Baker Commission made recommendations in favor of preventing such insecurity in the handling of ballots. For example, the Commission recommended that "States should make sure that absentee ballots received by election officials before Election Day are

kept secure until they are opened and counted." *Id.* at 46. It also recommended that States "prohibit[] 'third-party' organizations, candidates, and political party activists from handling absentee ballots." *Id.*

Inconsistent Statewide Standards. The Bill of Complaint alleges that the Defendant States provided different standards and treatment for mail-in ballots submitted in different areas of each State, and that this differential treatment uniformly provided a partisan advantage to one side in the Presidential election. It alleges that election officials in Philadelphia and Allegheny County, Pennsylvania, applied different standards to voters in those Democratic strongholds than applied to other voters in Pennsylvania, in violation of state law. Bill of Complaint, ¶¶ 52-54. Similarly, it alleges that Milwaukee, Wisconsin violated state law by authorizing election officials to "correct" disqualifying omissions on ballot envelopes by entering information that the voter should have entered with a red pen, while no similar "correction" process was granted to other voters in that State. *Id.* ¶¶ 123-127. And it alleges that Wayne County, Michigan provided differential treatment of its voters, in violation of state statutes, by simply ignoring statutorily required signature-verification requirements. *Id.* ¶¶ 92-95.

Such differential treatment, as alleged under circumstances raising concerns of partisan bias, contradicts universal recommendations for integrity and public confidence in elections. As this Court stated in *Bush* v. *Gore*, "[t]he idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government." 531 U.S. at 107 (quoting

Moore v. *Ogilvie*, 394 US 814 (1969)). The Carter-Baker Report noted that "inconsistent or incorrect application of electoral procedures may have the effect of discouraging voter participation and may, on occasion, raise questions about bias in the way elections are conducted." Carter-Baker Report, at 49. "Such problems raise public suspicions or may provide grounds for the losing candidate to contest the result in a close election." *Id.*

Excluding Bipartisan Observers. The Bill of Complaint alleges that certain counties in Defendant States excluded bipartisan observers from the ballot-opening and ballot-counting processes. For example, it alleges that election officials in Philadelphia and Allegheny County, Pennsylvania, violated state law by excluding Republican observers from the opening, counting, and recording of absentee ballots in those counties. Bill of Complaint, ¶ 49. And it alleges that election officials in Wayne County, Michigan violated state statutes by systematically excluding poll watchers from the counting and recording of absentee ballots. *Id.* ¶¶ 90-91.

Such actions, as alleged, raise concerns about the integrity of the vote count in those counties. As the Carter-Baker Report emphasized, States should "provide observers with meaningful opportunities to monitor the conduct of the election." Carter-Baker Report, at 47. "To build confidence in the electoral process, it is important that elections be administered in a neutral and professional manner," without the appearance of partisan bias." *Id.* at 49. When observers of one political party are illegally and systematically excluded from observing the vote count, "the appearance of partisan bias" is inevitable.

Id. For counties in Defendant States to exclude Republican observers weakens public confidence in the electoral process and raises grave concerns about the integrity of ballot counting in those counties.

Extending the Deadline to Receive Ballots. The Bill of Complaint alleges that a non-legislative actor in Pennsylvania—its Supreme Court—extended the statutory deadline to receive absentee and mail-in ballots without authorization from the "Legislature thereof," and that it directed that ballots with illegible postmarks or no postmarks at all would be deemed timely if received within the extended deadline. Bill of Complaint, ¶¶ 48, 55. Again, these non-legislative changes raise concerns about election integrity in Pennsylvania. They created a post-election window of time during which nefarious actors could wait and see whether the Presidential election would be close, and whether perpetrating fraud in Pennsylvania would be worthwhile. And they enhanced the opportunities for fraud by mandating that late ballots must be counted even when they are not postmarked or have no legible postmark, and thus there is no evidence they were mailed by Election Day.

These changes created needless vulnerability to actual fraud and undermined public confidence in the election. As the Department of Justice's Manual of *Federal Prosecution of Election Offenses* states, "the conditions most conducive to election fraud are close factional competition within an electoral jurisdiction for an elected position that matters." DOJ Manual, at 2-3. "[E]lection fraud is most likely to occur in electoral jurisdictions where there is close factional competition for an elected position that matters." *Id.* at 27. That statement exactly describes the conditions

in each of the Defendant States in the recent Presidential election.

CONCLUSION

The allegations in the Bill of Complaint raise important constitutional issues under the Electors Clause of Article II, § 1. They also raise serious concerns relating to election integrity and public confidence in elections. These are questions of great public importance that warrant this Court's attention. The Court should grant the Plaintiff's Motion for Leave to File Bill of Complaint.

December 9, 2020

Respectfully submitted,

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Sent: Wednesday, December 9, 2020 11:57 AM
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Subject: Ohio Amicus

https://www.supremecourt.gov/DocketPDF/20/20-542/160085/20201109120433581_Ohio%20Amicus%20-%20PA%20GOP%20v.%20Boockvar.pdf

Jeffrey DeSousa

From: Jeffrey DeSousa
Sent: Wednesday, December 9, 2020 11:50 AM
To: Christopher Baum; James Percival; David Costello; Evan Ezray; Kevin Golembiewski; Amit Agarwal
Subject: Election docs
Attachments: 2020-12-07 - Texas v. Pennsylvania, et al. - Bill of Complaint.pdf; 2020-12-08 - Texas v. Pennsylvania - Amicus Brief of Missouri et al.docx

Bill of complaint and draft *Missouri* amicus are attached, and here is the *Boockvar* amicus:

https://www.scotusblog.com/wp-content/uploads/2020/11/20201109134744257_2020-11-09-Republican-Party-of-Pa.-v.-Boockvar-Amicus-Brief-of-Missouri-et-al.-Final-With-Tables.pdf

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No. _____, Original

In the Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

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

Defendants.

MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

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In the Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

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

Defendants.

MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

Pursuant to 28 U.S.C. § 1251(a) and this Court's Rule 17, the State of Texas respectfully seeks leave to file the accompanying Bill of Complaint against the States of Georgia, Michigan, and Wisconsin and the Commonwealth of Pennsylvania (collectively, the "Defendant States") challenging their administration of the 2020 presidential election.

As set forth in 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.

- Intrastate differences in the treatment of voters, with more favorable allotted to voters – whether lawful or unlawful – in areas administered by local government under Democrat control and with populations with higher ratios of Democrat voters than other areas of Defendant States.
- 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.

All these flaws – even the violations of *state* election law – violate one or more of the federal requirements for elections (*i.e.*, equal protection, due process, and the Electors Clause) and thus arise under federal law. *See 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). Plaintiff State respectfully submits that the foregoing types of electoral irregularities exceed the hanging-chad saga of the 2000 election in their degree of departure from both state and federal law. Moreover, these flaws cumulatively preclude knowing who legitimately won the 2020 election and threaten to cloud all future elections.

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.

December 7, 2020 Respectfully submitted,

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No. _____, Original

In the Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

COMMONWEALTH OF PENNSYLVANIA, STATE OF STATE OF GEORGIA, STATE OF MICHIGAN, 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 democracy. The public, and indeed the candidates themselves, have a compelling interest in ensuring that the selection of a President—any President—is legitimate. If that trust is lost, the American Experiment will founder. A dark cloud hangs over the 2020 Presidential election.

Here is what we know. Using the COVID-19 pandemic as a justification, government officials in the defendant states of Georgia, Michigan, and Wisconsin, and the Commonwealth of Pennsylvania (collectively, "Defendant States"), usurped their legislatures' authority and unconstitutionally revised their state's election statutes. They accomplished these statutory revisions through executive fiat or friendly lawsuits, thereby weakening ballot integrity. Finally, these same government officials flooded the Defendant States with millions of ballots to be sent through the mails, or placed in drop boxes, with little

or no chain of custody[1] and, at the same time, weakened the strongest security measures protecting the integrity of the vote—signature verification and witness requirements.

Presently, evidence of material illegality in the 2020 general elections held in Defendant States grows daily. And, to be sure, the two presidential candidates who have garnered the most votes have an interest in assuming the duties of the Office of President without a taint of impropriety threatening the perceived legitimacy of their election. However, 3 U.S.C. § 7 requires that presidential electors be appointed on December 14, 2020. That deadline, however, should not cement a potentially illegitimate election result in the middle of this storm—a storm that is of the Defendant States' own making by virtue of their own unconstitutional actions.

This Court is the only forum that can delay the deadline for the appointment of presidential electors under 3 U.S.C. §§ 5, 7. To safeguard public legitimacy at this unprecedented moment and restore public trust in the presidential election, this Court should extend the December 14, 2020 deadline for Defendant States' certification of presidential electors to allow these investigations to be completed. Should one of the two leading candidates receive an absolute majority of the presidential electors' votes to be cast on December 14, this would finalize the selection of our President. The only date that is mandated under

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[1] *See* https://georgiastarnews.com/2020/12/05/dekalb-county-cannot-find-chain-of-custody-records-for-absentee-ballots-deposited-in-drop-boxes-it-has-not-been-determined-if-responsive-records-to-your-request-exist/

the Constitution, however, is January 20, 2021. U.S. CONST. amend. XX.

Against that background, the State of Texas ("Plaintiff State") brings this action against Defendant States based on the following allegations:

NATURE OF THE ACTION

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

2. This case presents a question of law: Did Defendant States violate the Electors Clause (or, in the alternative, the Fourteenth Amendment) by taking—or allowing—non-legislative actions to change the election rules that would govern the appointment of presidential electors?

3. Those unconstitutional changes opened the door to election irregularities in various forms. Plaintiff State alleges 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 and to restore public trust in this election.

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 Defendant States acted in a common pattern. State officials, sometimes through pending litigation (*e.g.*, settling "friendly" suits) and sometimes unilaterally by executive fiat, announced new rules for the conduct of the 2020 election that were inconsistent with existing state statutes defining what constitutes a lawful vote.

6. Defendant States also failed to segregate ballots in a manner that would permit 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 the Defendant States' presidential electors.

7. The rampant lawlessness arising out of Defendant States' unconstitutional acts is described in a number of currently pending lawsuits in Defendant States or in public view including:

- *Dozens of witnesses testifying under oath about*: the physical blocking and kicking out of Republican poll challengers; thousands of the same ballots run multiple times through tabulators; mysterious late night dumps of thousands of ballots at tabulation centers; illegally backdating thousands of ballots; signature verification procedures ignored; more

than 173,000 ballots in the Wayne County, MI center that cannot be tied to a registered voter;[2]

- *Videos of*: poll workers erupting in cheers as poll challengers are removed from vote counting centers; poll watchers being blocked from entering vote counting centers—despite even having a court order to enter; suitcases full of ballots being pulled out from underneath tables after poll watchers were told to leave.
- *Facts for which no independently verified reasonable explanation yet exists*: On October 1, 2020, in Pennsylvania 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, and potentially could be used to alter vote tallies; In Michigan, which also employed the same Dominion voting system, on November 4, 2020, Michigan election officials have admitted that a purported "glitch" caused 6,000 votes for President Trump to be wrongly switched to Democrat Candidate Biden. A flash drive containing tens of thousands of votes was left unattended in the Milwaukee tabulations center in the early morning hours of Nov. 4, 2020, without anyone aware it was not in a proper chain of custody.

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[2] All exhibits cited in this Complaint are in the Appendix to the Plaintiff State's forthcoming motion to expedite ("App. 1a-151a"). *See* Complaint (Doc. No. 1), *Donald J. Trump for President, Inc. v. Benson*, 1:20-cv-1083 (W.D. Mich. Nov. 11, 2020) at ¶¶ 26-55 & Doc. Nos. 1-2, 1-4.

8. Nor was this Court immune from the blatant disregard for the rule of law. Pennsylvania itself played fast and loose with its promise to this Court. 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).

9. Expert analysis using a commonly accepted statistical test further raises serious questions as to the integrity of this election.

10. The probability of former Vice President Biden winning the popular vote in the four Defendant States—Georgia, Michigan, Pennsylvania, and Wisconsin—independently given President Trump's early lead in those States as of 3 a.m. on November 4, 2020, is less than one in a quadrillion, or 1 in 1,000,000,000,000,000. For former Vice President Biden to win these four States collectively, the odds of

that event happening decrease to less than one in a quadrillion to the fourth power (*i.e.*, 1 in 1,000,000,000,000,000[4]). *See* Decl. of Charles J. Cicchetti, Ph.D. ("Cicchetti Decl.") at ¶¶ 14-21, 30-31. *See* App. 4a-7a, 9a.

11. The same less than one in a quadrillion statistical improbability of Mr. Biden winning the popular vote in the four Defendant States—Georgia, Michigan, Pennsylvania, and Wisconsin—independently exists when Mr. Biden's performance in each of those Defendant States is compared to former Secretary of State Hilary Clinton's performance in the 2016 general election and President Trump's performance in the 2016 and 2020 general elections. Again, the statistical improbability of Mr. Biden winning the popular vote in these **four** States collectively is 1 in 1,000,000,000,000,000[5]. *Id.* 10-13, 17-21, 30-31.

12. Put simply, there is substantial reason to doubt the voting results in the Defendant States.

13. 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 textually applies to the Article II process of selecting presidential electors).

14. Plaintiff States and their voters 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.

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

16. 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 constitutional democracy requires that states conduct presidential elections in accordance with the rule of law and federal constitutional guarantees.

JURISDICTION AND VENUE

17. 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).

18. 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 v. Gore*, 531 U.S. 98, 105 (2000) (quoting *Reynolds v. Sims*, 377 U. S. 533, 555 (1964)) (*Bush II*). In other words, Plaintiff State is acting to protect the interests of its respective citizens in the fair and constitutional conduct of elections used to appoint presidential electors.

19. 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 states "special solicitude in standing analysis"). Moreover, redressability likely would undermine a suit against a single state officer or State because no one State's electoral votes will make a difference in the election outcome. This action against multiple State defendants is the only adequate remedy for Plaintiff States, and this Court is the only court that can accommodate such a suit.

20. 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.

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

PARTIES

22. Plaintiff is the State of Texas, which is a sovereign State of the United States.

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

LEGAL BACKGROUND

24. 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.

25. "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).

26. 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)).

27. 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).

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

29. 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.

30. 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.").

31. 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.

32. 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.).

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

FACTS

34. 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 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.

35. 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).

36. 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),[3] 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.

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

37. 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 Defendant States' unconstitutional modification of statutory protections designed to ensure ballot integrity, Defendant States created a massive opportunity for fraud. In addition, the Defendant States have made it difficult or impossible to separate the constitutionally tainted mail-in ballots from all mail-in ballots.

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

39. Significantly, in 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.

40. The outcome of the Electoral College vote is directly affected by the constitutional violations committed by Defendant States. Plaintiff State complied 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 by unlawfully abrogating state election laws designed to

protect the integrity of the ballots and the electoral process, and those violations proximately caused the appointment of presidential electors for former Vice President Biden. Plaintiff State will therefore be injured if Defendant States' unlawfully certify these presidential electors.

Commonwealth of Pennsylvania

41. 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.

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

43. 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.

44. 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).

45. 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."

46. 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).

47. 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.

48. 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.

49. Pennsylvania's election law also requires that poll-watchers 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.

50. 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.

51. 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 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.

52. Statewide election officials and local election officials in Philadelphia and Allegheny Counties, aware of the historical Democrat advantage in those counties, 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. *See* Verified Complaint (Doc. No. 1), *Donald J. Trump for President, Inc. v. Boockvar*, 4:20-cv-02078-MWB (M.D. Pa. Nov. 18, 2020) at ¶¶ 3-6, 9, 11, 100-143.

53. 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.

54. The changed process allowing the curing of absentee and mail-in ballots in Allegheny and Philadelphia counties is a separate basis resulting in an unknown number of ballots being treated in an unconstitutional manner inconsistent with Pennsylvania statute. *Id.*

55. In addition, a great number of ballots were received after the statutory deadline and yet

were counted by virtue of the fact that Pennsylvania did not segregate all ballots received after 8:00 pm on November 3, 2020. Boockvar's claim that only about 10,000 ballots were received after this deadline has no way of being proven since Pennsylvania broke its promise to the Court to segregate ballots and co-mingled perhaps tens, or even hundreds of thousands, of illegal late ballots.

56. On December 4, 2020, fifteen members of the Pennsylvania House of Representatives led by Rep. Francis X. Ryan issued a report to Congressman Scott Perry (the "Ryan Report," App. 139a-144a) stating that "[t]he general election of 2020 in Pennsylvania was fraught with inconsistencies, documented irregularities and improprieties associated with mail-in balloting, pre-canvassing, and canvassing that the reliability of the mail-in votes in the Commonwealth of Pennsylvania is impossible to rely upon."

57. The Ryan Report's findings are startling, including:

- Ballots with NO MAILED date. That total is 9,005.
- Ballots Returned on or BEFORE the Mailed Date. That total is 58,221.
- Ballots Returned one day after Mailed Date. That total is 51,200.

Id. 143a.

58. These nonsensical numbers alone total 118,426 ballots and exceed Mr. Biden's margin of 81,660 votes over President Trump. But these discrepancies pale in comparison to the discrepancies in Pennsylvania's reported data concerning the

number of mail-in ballots distributed to the populace—now with no longer subject to legislated mandated signature verification requirements.

59. The Ryan Report also states as follows:

> [I]n a data file received on November 4, 2020, the Commonwealth's PA Open Data sites reported over 3.1 million mail in ballots sent out. The CSV file from the state on November 4 depicts 3.1 million mail in ballots sent out but on November 2, the information was provided that only 2.7 million ballots had been sent out. ***This discrepancy of approximately 400,000 ballots from November 2 to November 4 has not been explained.***

Id. at 143a-44a. (Emphasis added).

60. These stunning figures illustrate the out-of-control nature of Pennsylvania's mail-in balloting scheme. Democrats submitted mail-in ballots at more than two times the rate of Republicans. This number of constitutionally tainted ballots far exceeds the approximately 81,660 votes separating the candidates.

61. This blatant disregard of statutory law renders all mail-in ballots constitutionally tainted and cannot form the basis for appointing or certifying Pennsylvania's presidential electors to the Electoral College.

62. 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.

63. 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

64. 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.

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

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

67. 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.

68. 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).

69. 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).

70. 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).

71. 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.

72. 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.

73. This unconstitutional change in Georgia law materially benefitted former Vice President Biden. According to the Georgia Secretary of State's office, former Vice President Biden had almost double the number of absentee votes (65.32%) as President Trump (34.68%). *See* Cicchetti Decl. at ¶ 25, App. 7a-8a.

74. 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.

75. 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* Cicchetti Decl. at ¶ 24, App. 7a.

76. If the rejection rate of mailed-in absentee ballots remained the same in 2020 as it was in 2016, there would be 83,517 less tabulated ballots in 2020. The statewide split of absentee ballots was 34.68% for Trump and 65.2% for Biden. Rejecting at the higher 2016 rate with the 2020 split between Trump and Biden would decrease Trump votes by 28,965 and Biden votes by 54,552, which would be a net gain for Trump of 25,587 votes. This would be more than needed to overcome the Biden advantage of 12,670 votes, and Trump would win by 12,917 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

77. 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.

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

79. 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.

80. 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.

81. 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.

82. 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).

83. 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.*

84. 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 chose to flood across Michigan.

85. 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.

86. 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."

87. 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.

88. 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.

89. 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 materially benefited from these unconstitutional changes to Michigan's election law.

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

91. 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.

92. 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).

93. 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 materially benefited from these unconstitutional changes to Michigan's election law.

94. 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.[4] 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 instructed not to compare the signature on the absentee ballot with the signature on file.[5]

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[4] *Johnson v. Benson*, Petition for Extraordinary Writs & Declaratory Relief filed Nov. 26, 2020 (Mich. Sup. Ct.) at ¶¶ 71, 138-39, App. 25a-51a.

[5] *Id.*, Affidavit of Jessy Jacob, Appendix 14 at ¶15, attached at App. 34a-36a.

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

96. 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.

97. 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 174,384 absentee ballots out of 566,694 absentee ballots tabulated (about 30.8%) as counted without a registration number for precincts in the City of Detroit. *See* Cicchetti Decl. at ¶ 27, App. 8a. 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 28,377 votes.

98. The extra ballots cast most likely resulted from the phenomenon of Wayne County election workers running the same ballots through a tabulator multiple times, with Republican poll watchers obstructed or denied access, and election officials ignoring poll watchers' challenges, as documented by numerous declarations. App. 25a-51a.

99. 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. *Id.* at ¶ 29.

100. 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.

101. 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. *See* Cicchetti Decl. at ¶ 29, App. 8a.

102. 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 Wisconsin

103. 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.

104. In the 2016 general election some 146,932 mail-in ballots were returned in Wisconsin out of more than 3 million votes cast.[6] In stark contrast, 1,275,019 mail-in ballots, nearly a 900

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

percent increase over 2016, were returned in the November 3, 2020 election.[7]

105. 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).

106. 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.

107. For example, the WEC undertook a campaign to position hundreds of drop boxes to collect absentee ballots—including the use of unmanned drop boxes.[8]

108. 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

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

[8] 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.

of absentee ballots." Wisconsin Safe Voting Plan 2020, at 4 (June 15, 2020).[9]

109. 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.[10]

110. 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 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).

111. 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.

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[9] 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.

[10] *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.

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."

112. 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).

113. 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).

114. 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).

115. 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.

116. 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).

117. 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).

118. 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.

119. 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)."

120. 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."

121. 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."

122. 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.

123. 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).

124. 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.

125. 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. These acts violated WISC. STAT. § 6.87(6d) ("If a certificate is missing the address of a witness, the ballot may not 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.").

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

127. In addition, Ethan J. Pease, a box truck delivery driver subcontracted to the U.S. Postal Service ("USPS") to deliver truckloads of mail-in ballots to the sorting center in Madison, WI, testified

that USPS employees were backdating ballots received after November 3, 2020. Decl. of Ethan J. Pease at ¶¶ 3-13. Further, Pease testified how a senior USPS employee told him on November 4, 2020 that "[a]n order came down from the Wisconsin/Illinois Chapter of the Postal Service that 100,000 ballots were missing" and how the USPS dispatched employees to "find[] . . . the ballots." *Id.* ¶¶ 8-10. One hundred thousand ballots supposedly "found" after election day would far exceed former Vice President Biden margin of 20,565 votes over President Trump.

COUNT I: ELECTORS CLAUSE

128. Plaintiff State repeats and re-alleges the allegations above, as if fully set forth herein.

129. 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.

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

131. 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.

132. The actions set out in Paragraphs 41-128 constitute non-legislative changes to State election law by executive-branch State election officials, or by judicial officials, in Defendant States Pennsylvania, Georgia, Michigan, and Wisconsin, in violation of the Electors Clause.

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

COUNT II: EQUAL PROTECTION

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

135. 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.

136. The one-person, one-vote principle requires counting valid votes and not counting 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").

137. The actions set out in Paragraphs 66-73 (Georgia), 80-93 (Michigan), 44-55 (Pennsylvania), and 106-24 (Wisconsin) created differential voting standards in Defendant States Pennsylvania, Georgia, Michigan, and Wisconsin in violation of the Equal Protection Clause.

138. The actions set out in Paragraphs 66-73 (Georgia), 80-93 (Michigan), 44-55 (Pennsylvania), and 106-24 (Wisconsin) violated the one-person, one-

vote principle in Defendant States Pennsylvania, Georgia, Michigan, and Wisconsin.

139. By the shared enterprise of the entire nation electing the President and Vice President, equal protection violations in one State can and do adversely affect and diminish the weight of votes cast in States that lawfully abide by the election structure set forth in the Constitution. Plaintiff State is therefore harmed by this unconstitutional conduct in violation of the Equal Protection or Due Process Clauses.

COUNT III: DUE PROCESS

140. Plaintiff State repeats and re-alleges the allegations above, as if fully set forth herein.

141. When election practices reach "the point of patent and fundamental unfairness," the integrity of the election itself violates substantive due process. *Griffin v. Burns*, 570 F.2d 1065, 1077 (1st Cir. 1978); *Duncan v. Poythress*, 657 F.2d 691, 702 (5th Cir. 1981); *Florida State Conference of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1183-84 (11th Cir. 2008); *Roe v. State of Ala. By & Through Evans*, 43 F.3d 574, 580-82 (11th Cir. 1995); *Roe v. State of Ala.*, 68 F.3d 404, 407 (11th Cir. 1995); *Marks v. Stinson*, 19 F. 3d 873, 878 (3rd Cir. 1994).

142. Under this Court's precedents on procedural due process, not only intentional failure to follow election law as enacted by a State's legislature but also random and unauthorized acts by state election officials and their designees in local government can violate the Due Process Clause. *Parratt v. Taylor*, 451 U.S. 527, 537-41 (1981), *overruled in part on other grounds by Daniels v. Williams*, 474 U.S. 327, 330-31 (1986); *Hudson v. Palmer*, 468 U.S. 517, 532 (1984).

The difference between intentional acts and random and unauthorized acts is the degree of pre-deprivation review.

143. Defendant States acted unconstitutionally to lower their election standards—including to allow invalid ballots to be counted and valid ballots to not be counted—with the express intent to favor their candidate for President and to alter the outcome of the 2020 election. In many instances these actions occurred in areas having a history of election fraud.

144. The actions set out in Paragraphs 66-73 (Georgia), 80-93 (Michigan), 44-55 (Pennsylvania), and 106-24 (Wisconsin) constitute intentional violations of State election law by State election officials and their designees in Defendant States Pennsylvania, Georgia, Michigan, and Wisconsin, in violation of the Due Process Clause.

PRAYER FOR RELIEF

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

A. Declare that Defendant States Pennsylvania, Georgia, Michigan, and Wisconsin administered the 2020 presidential election in violation of the Electors Clause and the Fourteenth Amendment of the U.S. Constitution.

B. Declare that any electoral college votes cast by such presidential electors appointed in Defendant States Pennsylvania, Georgia, Michigan, and Wisconsin are in violation of the Electors Clause and the Fourteenth Amendment of the U.S. Constitution and cannot be counted.

C. Enjoin Defendant States' use of the 2020 election results for the Office of President to appoint presidential electors to the Electoral College.

D. Enjoin Defendant States' use of the 2020 election results for the Office of President to appoint presidential electors to the Electoral College and authorize, pursuant to the Court's remedial authority, the Defendant States to conduct a special election to appoint presidential electors.

E. If any of Defendant States have already appointed presidential 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 presidential electors in a manner that does not violate the Electors Clause and the Fourteenth Amendment, or to appoint no presidential electors at all.

F. Enjoin the Defendant States from certifying presidential electors or otherwise meeting for purposes of the electoral college pursuant to 3 U.S.C. § 5, 3 U.S.C. § 7, or applicable law pending further order of this Court.

G. Award costs to Plaintiff State.

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

December 7, 2020

Respectfully submitted,

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No. _____, Original

In the Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

COMMONWEALTH OF PENNSYLVANIA, STATE OF 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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STATE OF TEXAS,

Plaintiff,

v.

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

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 State of Texas ("Plaintiff State") respectfully submits this brief in support of its Motion for Leave to File a Bill of Complaint against the Commonwealth of Pennsylvania and the States of Georgia, Michigan, and Wisconsin (collectively, "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 Defendant States presented the pandemic as the justification for ignoring state laws regarding absentee and mail-in voting. 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 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 question of law: Did Defendant States violate the Electors Clause by taking non-legislative actions to change the election rules that would govern the appointment of presidential electors? 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, Defendant States have not only tainted the integrity of their own citizens' votes, but their actions have also debased the votes of citizens in the States that remained loyal to the Constitution.

Elections for federal office must comport with federal constitutional standards, *see 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]

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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.

Constitutional Background

The right to vote is protected by the by the Equal Protection Clause and the Due Process Clause. U.S. CONST. amend. XIV, § 1, cl. 3-4. Because "the right to vote is personal," *Reynolds*, 377 U.S. at 561-62 (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.* Though *Bush II* did not involve an action between States, the concern that illegal votes can cancel out lawful votes does not stop at a State's boundary in the context of a Presidential election.

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, § 4, cl. 1 (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 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 Defendant States. *See* Compl. at ¶¶ 66-73 (Georgia), 80-93 (Michigan), 44-55 (Pennsylvania), 106-24 (Wisconsin). 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 62 electoral votes, President Trump presumably has 232 electoral votes, and former Vice President Biden presumably has 244. Thus, Defendant States' presidential electors will determine the outcome of the election. Alternatively, if Defendant States are unable to certify 37 or more presidential 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.

Defendant States experienced serious voting irregularities. *See* Compl. at ¶¶ 75-76 (Georgia), 97-101 (Michigan), 55-60 (Pennsylvania), 122-28 (Wisconsin). At the time of this filing, Plaintiff State continues to investigate allegations of not only unlawful votes being counted but also fraud. Plaintiff State reserves the right to seek leave to amend the complaint as those investigations resolve. *See* S.Ct. Rule 17.2; FED. R. CIV. P. 15(a)(1)(A)-(B), (a)(2). But even the *appearance* of fraud in a close election is poisonous to democratic principles: "Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006); *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 189 (2008) (States have an interest in preventing voter fraud and ensuring voter confidence).

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).

ARGUMENT

I. THIS COURT HAS JURISDICTION OVER PLAINTIFF STATE'S 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. Plaintiff State's fundamental rights and interests are at stake. This Court is the *only* venue that can protect Plaintiff State's electoral college votes from being cancelled by the unlawful and constitutionally tainted votes cast by electors appointed and certified by 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 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. Plaintiff States' Electoral Clause claims arise under the Constitution and so are *federal*, even if the only claim is that Defendant States violated their own state election statutes. Moreover, as is explained below, Defendant States' actions injure the interests of Plaintiff State in the appointment of electors to the electoral college in a manner that is inconsistent 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 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 State's claims therefore fall within this Court's 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

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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).

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 State has standing under those rules.[3]

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 Defendant States affect the votes in Plaintiff State, as set forth in more detail below.

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

1. **Plaintiff State suffers an injury in fact.**

The citizens of Plaintiff State 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*, 376 U.S. at 10; *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. at 227; *Baker*, 369 U.S. at 208. 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, Plaintiff State presses its own form of voting-rights injury *as States*. As with the one-person, 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 Defendant States' unconstitutionally appointed electors vote for a presidential candidate opposed by the Plaintiff State's electors, that operates to defeat Plaintiff State's interests.[5] Indeed, even without an electoral college majority, presidential electors suffer the same voting-debasement injury as voters generally: "It must be remembered that 'the

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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 Plaintiff State appointed its electors consistent with the Constitution, they suffer injury if its electors are defeated by Defendant States' unconstitutionally appointed electors. This injury is all the more acute because Plaintiff State has taken steps to prevent fraud. For example, Texas does not allow no excuse vote by mail (Texas Election Code Sections 82.001-82.004); has strict signature verification procedures (Tex. Election Code §87.027(j); Early voting ballot boxes have two locks and different keys and other strict security measures (Tex. Election Code §§85.032(d) & 87.063); requires voter ID (House Comm. on Elections, Bill Analysis, Tex. H.B. 148, 83d R.S. (2013)); has witness requirements for assisting those in need (Tex. Election Code §§ 86.0052 & 86.0105), and does not allow ballot harvesting Tex. Election Code 86.006(f)(1-6). Unlike Defendant States, Plaintiff State neither weakened nor allowed the weakening of its ballot-integrity statutes by non-legislative means.

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)) ("*Bush II*"). Finally, once Plaintiff State has standing to challenge Defendant States' unlawful actions, Plaintiff State may do so on any legal theory that undermines those actions. *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 78-81 (1978); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 & n.5 (2006). Injuries to Plaintiff State's electors serve as an Article III basis for a *parens patriae* action.

2. Defendant States caused the injuries.

Non-legislative officials in 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 Plaintiff's injuries.

3. The requested relief would redress the injuries.

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

First, while 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 II, 531 U.S. at 104; *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"). Plaintiff State does 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 Plaintiff State requests—namely, remand to the State legislatures to allocate electors in a manner consistent with the Constitution—does not violate Defendant States' rights or exceed this Court's power. The power to select electors is a plenary power of the State 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 I*, 531 U.S. at 76-77; *Bush II*, 531 U.S at 104.

Third, uncertainty of how 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). Defendant States' legislatures would remain free to exercise their plenary authority under the Electors Clause in any *constitutional* manner they wish. 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 the constitutionally tainted November 3 election, remand the appointment of electors to Defendant States, and order 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 presidential electors' votes. 3 U.S.C. § 15.

D. 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 presidential 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. Moreover, 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.

E. This matter is ripe for review.

Plaintiff State's 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). Prior to the election, there was no reason to know who would win the vote in any given State.

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 Defendant States.

Before the election, 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). Plaintiff State could not have brought this action before the election results. The extent of the county-level deviations from election statutes in Defendant States became evident well after the election. Neither ripeness nor laches presents a timing problem here.

F. 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) 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.

G. 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 State 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).[6] Defendant States' legislature

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[6] Indeed, the Constitution also includes another backstop: "if no person have such majority [of electoral votes], then from the

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 Plaintiff State that Defendant States' appointment of presidential 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:

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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.

> 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). Defendant States would suffer no cognizable injury from this Court's enjoining their reliance on an unconstitutional vote.

II. THIS CASE PRESENTS CONSTITUTIONAL QUESTIONS OF IMMENSE NATIONAL CONSEQUENCE THAT WARRANT 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 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 State disputes that exercising this Court's original jurisdiction is discretionary, *see* Section III, *infra*, the clear unlawful abrogation of 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,[7] the closeness of the presidential election results, combined with the unconstitutional setting-aside of state election laws by non-legislative actors call both the result and the process into question.

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[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*, 570 F.2d at 1077-79)).

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

Defendant States' administration of the 2020 election violated several constitutional requirements and, thus, violated the rights that Plaintiff State seeks to protect. "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 104.[8] Even a State legislature vested with authority to regulate election procedures lacks authority to "abridg[e ...] fundamental rights, such as the right to vote." *Tashjian v. Republican Party*, 479 U.S. 208, 217 (1986). As demonstrated in this section, 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

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[8] The right to vote is "a fundamental political right, because preservative of all rights." *Reynolds*, 377 U.S. at 561-62 (internal quotations omitted).

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) (J. Madison) ("House of Representatives is so constituted as to support in its members a 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.

"[T]here 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, 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.

3. Defendant States' administration of the 2020 election violated the Fourteenth Amendment.

In each of Defendant States, important rules governing the sending, receipt, validity, 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

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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).

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 104. The Equal Protection Clause demands uniform "statewide standards for determining what is a legal vote." *Id.* at 110.

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 obstruction of poll-watcher requirements that occurred in Michigan's Wayne County may have contributed to the unusually high number of more than 173,000 votes which are not tied to a registered voter and that 71 percent of the precincts are out of balance with no explanation. Compl. ¶ 97.

Regardless of whether the modification of legal standards in some counties in 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 unconstitutional election.

The Fourteenth Amendment's due process clause protects the fundamental right to vote against "[t]he

disenfranchisement of a state electorate." *Duncan v. Poythress*, 657 F.2d 691, 702 (5th Cir. 1981). Weakening or eliminating signature-validating requirements, then restricting poll watchers also undermines the 2020 election's integrity—especially as practiced in urban centers with histories of electoral fraud—also violates substantive due process. *Griffin v. Burns*, 570 F.2d 1065, 1077 (1st Cir. 1978) ("violation of the due process clause may be indicated" if "election process itself reaches the point of patent and fundamental unfairness"); *see also Florida State Conference of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1183-84 (11th Cir. 2008); *Roe v. State of Ala. By & Through Evans*, 43 F.3d 574, 580-82 (11th Cir. 1995); *Roe v. State of Ala.*, 68 F.3d 404, 407 (11th Cir. 1995); *Marks v. Stinson*, 19 F. 3d 873, 878 (3rd Cir. 1994). Defendant States made concerted efforts to weaken or nullify their legislatures' ballot-integrity measures for the unprecedented deluge of mail-in ballots, citing the COVID-19 pandemic as a rationale. But "Government is not free to disregard the [the Constitution] in times of crisis." *Roman Catholic Diocese of Brooklyn*, 592 U.S. at ___ (Gorsuch, J., concurring).

Similarly, failing to follow procedural requirements for amending election standards violates procedural due process. *Brown v. O'Brien*, 469 F.2d 563, 567 (D.C. Cir.), *vacated as moot*, 409 U.S. 816 (1972). Under this Court's precedents on procedural due process, not only intentional failure to follow election law as enacted by a State's legislature but also random and unauthorized acts by state election officials and their designees in local government can violate the Due Process Clause. *Parratt v. Taylor*, 451

U.S. 527, 537-41 (1981), *overruled in part on other grounds by Daniels v. Williams*, 474 U.S. 327, 330-31 (1986); *Hudson v. Palmer*, 468 U.S. 517, 532 (1984). Here, the violations all were intentional, even if done for the reason of addressing the COVID-19 pandemic.

While Plaintiff State disputes that exercising this Court's original jurisdiction is discretionary, *see* Section III, *infra*, the clear unlawful abrogation of Defendant States' election laws designed to ensure election integrity by a few officials, and examples of material irregularities in the 2020 election cumulatively warrant exercising jurisdiction. Although isolated irregularities could be "garden-variety" election disputes that do not raise a federal question,[10] the closeness of election results in swing states combines with unprecedented expansion in the use of fraud-prone mail-in ballots—millions of which were also mailed out—and received and counted—without verification—often in violation of express state laws by non-legislative actors, *see* Sections II.A.1-II.A.2, *supra*, call both the result and the process into question. For an office as important as the presidency, these clear violations of the Constitution, coupled with a reasonable inference of unconstitutional ballots being cast in numbers that far exceed the margin of former Vice President Biden's vote tally over President Trump demands the attention of this Court.

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[10] "To be sure, 'garden variety election irregularities' may not present facts sufficient to offend the Constitution's guarantee of due process[.]" *Hunter*, 635 F.3d at 232 (quoting *Griffin*, 570 F.2d at 1077-79)).

While investigations into allegations of unlawful votes being counted and fraud continue, even the appearance of fraud in a close election would justify exercising the Court's discretion to grant the motion for leave to file. Regardless, Defendant States' violations of the Constitution would warrant this Court's review, even if no election fraud had resulted.

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 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 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 State respectfully submits 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.G, *supra*, and *some* court must have jurisdiction for these weighty issues. *See Mostyn v. Fabrigas*, 98 Eng. Rep. 1021, 1028 (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 State respectfully submits 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 State 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 and straightforward question of law that requires neither finding additional facts nor briefing beyond the threshold issues presented here.

CONCLUSION

Leave to file the Bill of Complaint should be granted.

December 7, 2020

Respectfully submitted,

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No. 20A , Original

In the Supreme Court of the United States

STATE OF TEXAS,
Plaintiff,

v.

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

MOTION FOR EXPEDITED CONSIDERATION OF THE MOTION FOR LEAVE TO FILE A BILL OF COMPLAINT AND FOR EXPEDITION OF ANY PLENARY CONSIDERATION OF THE MATTER ON THE PLEADINGS IF PLAINTIFFS' FORTHCOMING MOTION FOR INTERIM RELIEF IS NOT GRANTED

The State of Texas ("Plaintiff State") hereby moves, pursuant to Supreme Court Rule 21, for expedited consideration of the motion for leave to file a bill of complaint, filed today, in an original action on the administration of the 2020 presidential election by defendants Commonwealth of Pennsylvania, *et al.* (collectively, "Defendant States"). The relevant statutory deadlines for the defendants' action based on unconstitutional election results are imminent: (a) December 8 is the safe harbor for certifying presidential electors, 3 U.S.C. § 5; (b) the electoral college votes on December 14, 3 U.S.C. § 7; and (c) the House of Representatives counts votes on January 6, 3 U.S.C. § 15. Absent some form of relief, the defendants will appoint electors based on unconstitutional and deeply uncertain election results, and the House will count those votes on January 6, tainting the election and the future of free elections.

Expedited consideration of the motion for leave to file the bill of complaint is needed to enable the Court to resolve this original action before the applicable statutory deadlines, as well as the constitutional deadline of January 20, 2021, for the next presidential term to commence. U.S. CONST. amend. XX, § 1, cl. 1. Texas respectfully requests that the Court order Defendant States to respond to the motion for leave to file by December 9. Texas waives the waiting period for reply briefs under this Court's Rule 17.5, so that the Court could consider the case on an expedited basis at its December 11 conference.

Working in tandem with the merits briefing schedule proposed here, Texas also will move for interim relief in the form of a temporary restraining order, preliminary injunction, stay, and administrative stay to enjoin Defendant States from certifying their presidential electors or having them vote in the electoral college. *See* S.Ct. Rule 17.2 ("The form of pleadings and motions prescribed by the Federal Rules of Civil Procedure is followed."); *cf.* S.Ct. Rule 23 (stays in this Court). Texas also asked in their motion for leave to file that the Court summarily resolve this matter at that threshold stage. Any relief that the Court grants under those two alternate motions would inform the expedited briefing needed on the merits.

Enjoining or staying Defendant States' appointment of electors would be an especially appropriate and efficient way to ensure that the eventual appointment and vote of such electors reflects a constitutional and accurate tally of lawful votes and otherwise complies with the applicable constitutional and statutory requirements in time for the House to act on January 6. Accordingly, Texas respectfully requests

expedition of this original action on one or more of these related motions. The degree of expedition required depends, in part, on whether Congress reschedules the day set for presidential electors to vote and the day set for the House to count the votes. *See* 3 U.S.C. §§ 7, 15; U.S. Const. art. II, §1m cl. 4.

STATEMENT

Like much else in 2020, the 2020 election was compromised by the COVID-19 pandemic. Even without Defendant States' challenged actions here, the election nationwide saw a massive increase in fraud-prone voting by mail. *See* BUILDING CONFIDENCE IN U.S. ELECTIONS: REPORT OF THE COMMISSION ON FEDERAL ELECTION REFORM, at 46 (Sept. 2005) (absentee ballots are "the largest source of potential voter fraud"). Combined with that increase, the election in Defendant States was also compromised by numerous changes to the State legislatures' duly enacted election statutes by non-legislative actors—including both "friendly" suits settled in courts and executive fiats via guidance to election officials—in ways that undermined state statutory ballot-integrity protections such as signature and witness requirements for casting ballots and poll-watcher requirements for counting them. State legislatures have plenary authority to set the method for selecting presidential electors, *Bush v. Gore*, 531 U.S. 98, 104 (2000) ("*Bush II*"), and "significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question." *Id.* at 113 (Rehnquist, C.J., concurring); *accord Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70, 76 (2000) ("*Bush I*").

Plaintiff State has not had the benefit of formal discovery prior to submitting this original action. Nonetheless, Plaintiff State has uncovered substantial evidence

discussed below that raises serious doubts as to the integrity of the election processes in Defendant States. Although new information continues to come to light on a daily basis, as documented in the accompanying Appendix ("App."), the voting irregularities that resulted from Defendant States' unconstitutional actions include the following:

- Jesse Jacob, a decades-long City of Detroit employee assigned to work in the Elections Department for the 2020 election testified (App. 34a-36a) that she was "instructed not to look at any of the signatures on the absentee ballots, and I was instructed not to compare the signature on the absentee ballot with the signature on file" in direct contravention of MCL § 168.765a(6), which requires all signatures on ballots be verified.
- Ethan J. Pease, a box truck delivery driver subcontracted to the U.S. Postal Service ("USPS") to deliver truckloads of mail-in ballots to the sorting center in Madison, WI, testified that USPS employees were backdating ballots received after November 3, 2020. Decl. of Ethan J. Pease at ¶¶ 3-13. (App. 149a-51a). Further, Pease testified how a senior USPA employee told him on November 4, 2020 that "An order came down from the Wisconsin/Illinois Chapter of the Postal Service that 100,000 ballots" and how the USPSA dispatched employees to "find[] ... the ballots." ¶¶ 8-10. One hundred thousand ballots "found" after election day far exceeds former Vice President Biden margin of 20,565 votes over President Trump.

- 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), which the Pennsylvania defendants quickly settled resulting in guidance (App. 109a-114a)[1] issued 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." App. 113a.
- 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 the statutory deadline for mail-in ballots from Election Day to three days after Election Day and adopted a presumption that even *non-postmarked ballots* were presumptively timely. In addition, a great number of ballots were received after the statutory deadline. Because Pennsylvania misled this Court

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[1] Although the materials cited here are a complaint, that complaint is verified (*i.e.*, declared under penalty of perjury), App. 75a, which is evidence for purposes of a motion for summary judgment. *Neal v. Kelly*, 963 F.2d 453, 457 (D.C. Cir. 1992) ("allegations in [the] verified complaint should have been considered on the motion for summary judgment as if in a new affidavit").

about segregating the late-arriving ballots and instead commingled those ballots, it is now impossible to verify Pennsylvania's claim about the number of ballots affected.

- Contrary to Pennsylvania election law on providing poll-watchers access to the opening, counting, and recording of absentee ballots, local election officials in Philadelphia and Allegheny Counties decided not to follow 25 PA. STAT. § 3146.8(b). App. 127a-28a.
- 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. App. 122a-24a. 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 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. App. 122a-24a.
- On December 4, 2020, fifteen members of the Pennsylvania House of Representatives issued a report (App. 139a-45a) to Congressman Scott Perry stating that "[t]he general election of 2020 in Pennsylvania was fraught with ... documented irregularities and improprieties associated with mail-in balloting ... [and] that the reliability of the mail-in votes in the Commonwealth

of Pennsylvania is impossible to rely upon." The report detailed, *inter alia*, that more than 118,426 mail-in votes either had no mail date, were returned *before* they were mailed, or returned one day after the mail date. The Report also stated that, based on government reported data, the number of mail-in ballots *sent* by November 2, 2020 (2.7 million) somehow ballooned by 400,000, to 3.1 million on November 4, 2020, without explanation.

- 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 (App. 19a-24a) 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), which is particularly disturbing because the legislature allowed persons *other than the voter* to apply for an absentee ballot, GA. CODE § 21-2-381(a)(1)(C), which means that the legislature likely was relying heavily on the signature-verification on ballots under GA. CODE § 21-2-386.
- 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. App. 25a-51a.

- The probability of former Vice President Biden winning the popular vote in the four Defendant States—Georgia, Michigan, Pennsylvania, and Wisconsin—independently given President Trump's early lead in those States as of 3 a.m. on November 4, 2020, is less than one in a quadrillion, or 1 in 1,000,000,000,000,000. For former Vice President Biden to win these four States collectively, the odds of that event happening decrease to less than one in a quadrillion to the fourth power (*i.e.*, 1 in 1,000,000,000,000,000[4]). *See* Decl. of Charles J. Cicchetti, Ph.D. ("Cicchetti Decl.") at ¶¶ 14-21, 30-31 (App. 4a-7a, 9a).
- The same less than one in a quadrillion statistical improbability of Mr. Biden winning the popular vote in the four Defendant States—Georgia, Michigan, Pennsylvania, and Wisconsin—independently exists when Mr. Biden's performance in each of those Defendant States is compared to former Secretary of State Hilary Clinton's performance in the 2016 general election and President Trump's performance in the 2016 and 2020 general elections. Again, the statistical improbability of Mr. Biden winning the popular vote in these **four** States collectively is 1 in 1,000,000,000,000,000[5]. *Id.* 10-13, 17-21, 30-31 (App. 3a-7a, 9a).
- Georgia's unconstitutional abrogation of the express mandatory procedures for challenging defective signatures on ballots set forth at GA. CODE § 21-2-386(a)(1)(B) resulted in far more ballots with unmatching signatures being counted in the 2020 election than if the statute had been properly applied. The

2016 rejection rate was more than *seventeen times greater* than in 2020. *See* Cicchetti Decl. at ¶ 24 (App. 7a). As a consequence, applying the rejection rate in 2016, which applied the mandatory procedures, to the ballots received in 2020 would result in a net gain for President Trump of 25,587 votes. This would be more than needed to overcome the Biden advantage of 12,670 votes, and Trump would win by 12,917 votes. *See* App. 8a.

- The two Republican members of the Board *rescinded their votes* to certify the vote in Wayne County, 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. *See* Cicchetti Decl. at ¶ 29 (App. 8a).
- The Wayne County Statement of Votes Report lists 174,384 absentee ballots out of 566,694 absentee ballots tabulated (about 30.8%) as counted without a registration number for precincts in the City of Detroit. *See* Cicchetti Decl. at ¶ 27 (App. 8a). 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 28,377 votes. The extra ballots cast most likely resulted from the phenomenon of Wayne County election workers running the same ballots through a tabulator multiple times, with Republican poll watchers obstructed or denied access, and election officials ignoring poll watchers' challenges, as documented by numerous declarations. App. 25a-51a.

As a net result of these challenges, the close election result in Defendant States—on

which the presidential election turns—is indeterminate. Put another way, Defendant States' unconstitutional actions affect outcome-determinative numbers of popular votes, that in turn affect outcome-determinative numbers of electoral votes.

To remedy Texas's claims and remove the cloud over the results of the 2020 election, expedited review and interim relief are required. December 8, 2020 is a statutory safe harbor for States to appoint presidential electors, and by statute the electoral college votes on December 14. *See* 3 U.S.C. §§ 7, 15. In a contemporaneous filing, Texas asks this Court to vacate or enjoin—either permanently, preliminarily, or administratively—Defendant States from certifying their electors and participating in the electoral college vote. As permanent relief, Texas asks this Court to remand the allocation of electors to the legislatures of Defendant States pursuant to the statutory and constitutional backstop for this scenario: "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 (emphasis added); U.S. CONST. art. II, § 1, cl. 2.

Significantly, State legislatures retain the authority to appoint electors under the federal Electors Clause, even if state laws or constitutions provide otherwise. *McPherson v. Blacker*, 146 U.S. 1, 35 (1892); *accord Bush I*, 531 U.S. at 76-77; *Bush II*, 531 U.S at 104. For its part, Congress could move the December 14 date set for the electoral college's vote, as it has done before when faced with contested elections. Ch. 37, 19 Stat. 227 (1877). Alternatively, the electoral college could vote on December 14

without Defendant States' electors, with the presidential election going to the House of Representatives under the Twelfth Amendment if no candidate wins the required 270-vote majority.

What cannot happen, constitutionally, is what Defendant States appear to want (namely, the electoral college to proceed based on the unconstitutional election in Defendant States):

> 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 104. Proceeding under the unconstitutional election is not an option.

Pursuant to 28 U.S.C. 1251(a), Plaintiff State has filed a motion for leave to file a bill of complaint today. As set forth in the complaint and outlined above, all Defendant States ran their 2020 election process in noncompliance with the ballot-integrity requirements of their State legislature's election statutes, generally using the COVID-19 pandemic as a pretext or rationale for doing so. In so doing, Defendant States disenfranchised not only their own voters, but also the voters of all other States: "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).

ARGUMENT

The Constitution vests plenary authority over the appointing of presidential electors with State legislatures. *McPherson*, 146 U.S. at 35; *Bush I*, 531 U.S. at 76-77; *Bush II*, 531 U.S at 104. While State legislatures need not proceed by popular

vote, the Constitution requires protecting the fundamental right to vote when State legislatures decide to proceed via elections. *Bush II*, 531 U.S. at 104. On the issue of the constitutionality of an election, moreover, the Judiciary has the final say: "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); *Bush II*, 531 U.S. at 104. For its part, Congress has the ability to set the time for the electoral college to vote. U.S. CONST. art. II, § 1, cl. 3. To proceed constitutionally with the 2020 election, all three actors potentially have a role, given the complications posed by Defendant States' unconstitutional actions.

With this year's election on November 3, and the electoral college's vote set by statute for December 14, 3 U.S.C. § 7, Congress has not allowed much time to investigate irregularities like those in Defendant States before the electoral college is statutorily set to act. But the time constraints are not constitutional in nature—the Constitution's only time-related provision is that the President's term ends on January 20, U.S. CONST. amend. XX, § 1, cl. 1—and Congress has both the obvious authority and even a history of moving the date of the electoral college's vote when election irregularities require it.

Expedited consideration of this matter is warranted by the seriousness of the issues raised here, not only for the results of the 2020 presidential election but also for the implications for our constitutional democracy going forward. If this Court does not halt the Defendant States' participation in the electoral college's vote on December 14, a grave cloud will hang over not only the presidency but also the

Republic.

With ordinary briefing, Defendant States would not need to respond for 60 days, S.Ct. Rule 17.5, which is after the next presidential term commences on January 20, 2021. Accordingly, this Court should adopt an expedited briefing schedule on the motion for leave to file the bill of complaint, as well as the contemporaneously filed motion for interim relief, including an administrative stay or temporary restraining order pending further order of the Court. If this Court declines to resolve this original action summarily, the Court should adopt an expedited briefing schedule for plenary consideration, allowing the Court to resolve this matter before the relevant deadline passes. The contours of that schedule depend on whether the Court grants interim relief. Texas respectfully proposes two alternate schedules.

If the Court has not yet granted administrative relief, Texas proposes that the Court order Defendant States to respond to the motion for leave to file a bill of complaint and motion for interim relief by December 9. *See* S.Ct. Rule 17.2 (adopting Federal Rules of Civil Procedure); FED. R. CIV. P. 65; *cf.* S.Ct. Rule 23 (stays). Texas waives the waiting period for reply briefs under this Court's Rule 17.5 and would reply by December 10, which would allow the Court to consider this case on an expedited basis at its December 11 Conference.

With respect to the merits if the Court neither grants the requested interim relief nor summarily resolves this matter in response to the motion for leave to file the bill of complaint, thus requiring briefing of the merits, Texas respectfully proposes

the following schedule for briefing and argument:

December 8, 2020	Plaintiffs' opening brief
December 8, 2020	*Amicus* briefs in support of plaintiffs or of neither party
December 9, 2020	Defendants' response brief(s)
December 9, 2020	*Amicus* briefs in support of defendants
December 10, 2020	Plaintiffs' reply brief(s) to each response brief
December 11, 2020	Oral argument, if needed

If the Court grants an administrative stay or other interim relief, but does not summarily resolve this matter in response to the motion for leave to file the bill of complaint, Texas respectfully proposes the following schedule for briefing and argument on the merits:

December 11, 2020	Plaintiffs' opening brief
December 11, 2020	*Amicus* briefs in support of plaintiffs or of neither party
December 17, 2020	Defendants' response brief(s)
December 17, 2020	*Amicus* briefs in support of defendants
December 22, 2020	Plaintiffs' reply brief(s) to each response brief
December 2020	Oral argument, if needed

In the event that Congress moves the date for the electoral college and the House to vote or count votes, then the parties could propose an alternate schedule. If any motions to intervene are granted by the applicable deadline, intervenors would file by the applicable deadline as plaintiffs-intervenors or defendants-intervenors, with any still-pending intervenor filings considered as *amicus* briefs unless such

prospective intervenors file or seek leave to file an *amicus* brief in lieu of their still-pending intervenor filings.

CONCLUSION

Texas respectfully requests that the Court expedite consideration of its motion for leave to file a bill of complaint based on the proposed schedule and, if the Court neither stays nor summarily resolves the matter and thus sets the case for plenary consideration, that the Court expedite briefing and oral argument based on the proposed schedule.

Dated: December 7, 2020

Respectfully submitted,

/s/ Ken Paxton

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CERTIFICATE AS TO FORM

Pursuant to Sup. Ct. Rules 22 and 33, I certify that the foregoing motion are proportionately spaced, has a typeface of Century Schoolbook, 12 points, and contains 15 pages (and 3,550 words), excluding this Certificate as to Form, the Table of Contents, and the Certificate of Service.

Dated: December 7, 2020

Respectfully submitted,

/s/ Ken Paxton

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CERTIFICATE OF SERVICE

The undersigned certifies that, on this 7th day of December 2020, in addition to filing the foregoing document via the Court's electronic filing system, one true and correct copy of the foregoing document was served by Federal Express, with a PDF courtesy copy served via electronic mail on the following counsel and parties:

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Executed December 7, 2020, at Washington, DC,

/s/ Lawrence J. Joseph
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No. _____, Original

In the Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

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

Defendants.

MOTION FOR PRELIMINARY INJUNCTION AND TEMPORARY RESTRAINING ORDER OR, ALTERNATIVELY, FOR STAY AND ADMINISTRATIVE STAY

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In the Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

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

Defendants.

MOTION FOR PRELIMINARY INJUNCTION AND TEMPORARY RESTRAINING ORDER OR, ALTERNATIVELY, FOR STAY AND ADMINISTRATIVE STAY

Pursuant to S.Ct. Rules 21, 23, and 17.2 and pursuant to FED. R. CIV. P. 65, the State of Texas ("Plaintiff State") respectfully moves this Court to enter an administrative stay and temporary restraining order ("TRO") to enjoin the States of Georgia, Michigan, and Wisconsin and the Commonwealth of Pennsylvania (collectively, the "Defendant States") and all of their agents, officers, presidential electors, and others acting in concert from taking action to certify presidential electors or to have such electors take any official action—including without limitation participating in the electoral college or voting for a presidential candidate—until further order of this Court, and to preliminarily enjoin

and to stay such actions pending the final resolution of this action on the merits.

STATEMENT OF THE CASE

Lawful elections are 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 in derogation of statutory controls as to how they are lawfully received, evaluated, and counted. Whether well intentioned or not, these unconstitutional acts had the same *uniform effect*—they made the 2020 election less secure in the Defendant States. Those changes are inconsistent with relevant state laws and were made by non-legislative entities, without any consent by the state legislatures. The acts of these officials thus directly violated the Constitution. U.S. CONST. art. I, § 4; *id.* art. II, § 1, cl. 2.

This case presents a 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? These non-legislative changes to the Defendant States' election laws facilitated the casting and counting of ballots in violation of state law, which, in turn, violated the Electors Clause of Article II, Section 1, Clause 2 of the U.S. 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 Plaintiff State and other States that remained loyal to the Constitution.

Elections for federal office must comport with federal constitutional standards, s*ee Bush II*, 531 U.S. at 103-05, 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, § 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).

Defendant States' Violations of Electors Clause

As set forth in the Complaint, executive and judicial officials made significant changes to the legislatively defined election laws 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.

Factual Background

Without Defendant States' combined 72 electoral votes, President Trump presumably has 232 electoral votes, and former Vice President Biden presumably has 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 U.S. House of Representatives under the Twelfth Amendment to the U.S. Constitution.

STANDARD OF REVIEW

Original actions follow the motions practice of the Federal Rules of Civil Procedure. S.Ct. 17.2. Plaintiffs can obtain preliminary injunctions in original actions. *See California v. Texas*, 459 U.S. 1067 (1982) ("[m]otion of plaintiff for issuance of a preliminary injunction granted"); *United States v. Louisiana*, 351 U.S. 978 (1956) (enjoining named state officers "and others acting with them ... from prosecuting any other case or cases involving the controversy before this Court until further order of the Court"). Similarly, a moving party can seek a stay pending appeal under this Court's Rule 23.[2]

Plaintiffs who seek interim relief under Federal Rule 65 must establish that they likely will succeed on the merits and likely will suffer irreparable harm without interim relief, that the balance of equities between their harm in the absence of interim relief and the defendants' harm from interim relief favors the movants, and that the public interest favors interim relief. *Winter v. Natural Resources Def. Council, Inc.*, 555 U.S. 7, 20 (2008). To obtain a stay pending appeal under this Court's Rule 23, the applicant must meet a similar test:

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[2] *See, e.g., Frank v. Walker*, 135 S.Ct. 7 (2014); *Husted v. Ohio State Conf. of the NAACP*, 135 S.Ct. 42 (2014); *North Carolina v. League of Women Voters*, 135 S.Ct. 6 (2014); *Arizona Sect'y of State's Office v. Feldman*, 137 S.Ct. 446 (2016); *North Carolina v. Covington*, 138 S.Ct. 974 (2018); *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S.Ct. 1205 (2020).

> (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay. In close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent.

Hollingsworth v. Perry, 558 U.S. 183, 190 (2010).

ARGUMENT

I. THIS COURT IS LIKELY TO EXERCISE ITS DISCRETION TO HEAR THIS CASE.

Although Plaintiff State disputes that this Court has discretion to decide not to hear this case instituted by a sovereign State, *see* 28 U.S.C. § 1251(a) (this Court's jurisdiction is exclusive for actions between States); *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), this Court is nonetheless likely to exercise its discretion to hear this case for two reasons, which is analogous to the first *Hollingsworth* factor for a stay.

First, in the analogous case of *Republican Party v. Boockvar*, No. 20A54, 2020 U.S. LEXIS 5181 (Oct. 19, 2020), four justices voted to stay a decision by the Pennsylvania Supreme Court that worked an example of the type of non-legislative revision to State election law that the Plaintiff State challenges here. In addition, since then, a new Associate Justice joined the Court, and the Chief Justice indicated a rationale

for voting against a stay in *Democratic Nat'l Comm. v. Wisconsin State Legis.*, No. 20A66, 2020 U.S. LEXIS 5187, at *1 (Oct. 26, 2020) (Roberts, C.J., concurring in denial of application to vacate stay) that either does not apply to original actions or that was wrong for the reasons set forth in Section II.A.2, *supra* (non-legislative amendment of State election statutes poses a question that arises under the federal Constitution, see *Bush II*, 531 U.S. at 113 (Rehnquist, C.J., concurring).

Second, this Court has repeatedly acknowledged the "uniquely important national interest" in elections for president and the rules for them. *Bush II*, 531 U.S. at 112 (interior quotations omitted); *see also Oregon v. Mitchell*, 400 U.S. 112 (1970) (original jurisdiction in voting-rights cases). Few cases on this Court's docket will be as important to our future as this case.

Third, no other remedy or forum exists for a State to challenge multiple States' maladministration of a presidential election, *see* Section II.A.8, *infra*, and *some* court must have jurisdiction for these fundamental issues about the viability of our democracy: "if there is no other mode of trial, that alone will give the King's courts a jurisdiction." *Mostyn v. Fabrigas*, 98 Eng. Rep. 1021, 1028 (K.B. 1774) (Lord Mansfield).

II. THE PLAINTIFF STATE IS LIKELY TO PREVAIL.

Under the *Winter-Hollingsworth* test, the plaintiff's likelihood of prevailing is the primary factor to assess the need for interim relief. Here, the Plaintiff State will prevail because this Court has jurisdiction and the Plaintiff State's merit case is likely to prevail.

A. This Court has jurisdiction over Plaintiff State's 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 State's fundamental rights and interests are at stake. This Court is the *only* venue that can protect the Plaintiff State's Electoral College votes from being cancelled by the unlawful and constitutionally tainted votes cast by Electors appointed by the Defendant States.

1. 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 and certification of the Defendant States' presidential electors before their legislatures pursuant to 3 U.S.C. §§ 2, 5, and 7 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.

2. 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,[3] and—indeed—we did not even have federal-question jurisdiction until 1875. *Merrell Dow Pharm.*, 478 U.S. at 807. The

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[3] 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).

Plaintiff State's 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 State in the appointment and certification of presidential electors to the Electoral College.

Given this federal-law basis against these state actions, the state actions are not "independent" of the federal 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 State's 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.

3. 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 State has standing under those rules.[4]

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 State, as set forth in more detail below.

a. <u>Plaintiff State suffers an injury in fact.</u>

The citizens of Plaintiff State 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,

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

even the most basic, are illusory if the right to vote is undermined." *Wesberry*, 376 U.S. at 10; *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); *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 cognizable under Article III.

Significantly, Plaintiff State presses its own form of voting-rights injury *as a State*. As with the one-person, 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, Plaintiff State suffers 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, Plaintiff State has standing where its 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.[5] Like

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[5] "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)).

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 Plaintiff State's presidential electors, that operates to defeat the Plaintiff State's interests.[6] 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 II*, 531 U.S. at 105 (quoting *Reynold*, 377 U.S. at 555). Those injuries to electors serve as an Article III basis for a *parens patriae* action by their States.

b. <u>The Defendant States caused the injuries.</u>

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 Plaintiff's injuries.

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[6] Because Plaintiff State appointed its presidential electors fully consistent with the Constitution, it suffers injury if its presidential electors are defeated by the Defendant States' unconstitutionally appointed presidential electors. This injury is all the more acute because Plaintiff State has taken steps to prevent fraud. Unlike the Defendant States, the Plaintiff State neither weakened nor allowed the weakening of its ballot-integrity statutes by non-legislative means.

c. The requested relief would redress the injuries.

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

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 II, 531 U.S. at 104; *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 State does 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 State requests—namely, remand to the State legislatures to allocate presidential 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 presidential 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 I*, 531 U.S. at 76-77; *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 the 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 the House to count the presidential electors' votes. 3 U.S.C. § 15.

4. Plaintiff State has 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-person, 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 presidential 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.

5. 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 or certification of presidential 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 presidential 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.

6. This matter is ripe for review.

The Plaintiff State's 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).[7] Prior to the election, there was no reason to know who would win the vote in any given State.

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 State 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 Plaintiff State 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

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[7] 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.

States become evident until days after the election. Moreover, a State may reasonably assess the status of litigation commenced by candidates to the presidential election prior to commencing its own litigation. Neither ripeness nor laches presents a timing problem here.

7. <u>This action does not raise a non-justiciable political question.</u>

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 appointing presidential electors involves political rights, this 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.

8. <u>No adequate alternate remedy or forum exists.</u>

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 State 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).[8] 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 State that the Defendant States' appointment of presidential electors under the recently conducted elections would be unconstitutional, then the statutorily created safe harbor cannot be used as a

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[8] 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.

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 U.S. 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.

B. The Plaintiff State is likely to prevail on the merits.

For interim relief, the most important factor is the likelihood of movants' prevailing. *Winter*, 555 U.S. at 20. The Defendant States' administration of the 2020 election violated the Electors Clause, which renders invalid any appointment of presidential electors based upon those election results. 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 law 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.B.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.[9]

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[9] To advance the principles enunciated in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (concerning state police power to enforce compulsory vaccination laws), as authority for non-legislative state actors re-writing state election statutes—in direct conflict with the Electors Clause—is a nonstarter. Clearly, "the Constitution does not conflict with itself by conferring, upon the one hand, a ... power, and taking the same power away, on the other, by the limitations of the due process clause."

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.B.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[10]). 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.

III. THE OTHER *WINTER-HOLLINGSWORTH* FACTORS WARRANT INTERIM RELIEF.

Although Plaintiff State's likelihood of prevailing would alone justify granting interim relief, relief is also warranted by the other *Winter-Hollingsworth* factors.

Brushaber v. Union Pac. R. Co., 240 U.S. 1, 24 (1916). In other words, the States' reserved police power does not abrogate the Constitution's express Electors Clause. *See also Cook v. Gralike*, 531 U.S. at 522 (election authority is delegated to States, not reserved by them); *accord* Story, 1 COMMENTARIES § 627.

[10] 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).

A. Plaintiff State will suffer irreparable harm if the Defendant States' unconstitutional presidential electors vote in the Electoral College.

Allowing the unconstitutional election results in Defendant States to proceed would irreparably harm Plaintiff State and the Republic both by denying representation in the presidency and in the Senate in the near term and by permanently sowing distrust in federal elections. This Court has found such threats to constitute irreparable harm on numerous occasions. *See* note 2, *supra* (collecting cases). The stakes in this case are too high to ignore.

B. The balance of equities tips to the Plaintiff State.

All State parties represent citizens who voted in the 2020 presidential election. Because of their unconstitutional actions, Defendant States represent some citizens who cast ballots not in compliance with the Electors Clause. It does not disenfranchise anyone to require the State legislatures to attempt to resolve this matter as 3 U.S.C. § 2, the Electors Clause, and even the Twelfth Amendment provide. By contrast, it would irreparably harm Plaintiff State if the Court denied interim relief.

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.

C. The public interest favors interim relief.

The last *Winter* factor is the public interest. When parties dispute the lawfulness of government action, the public interest collapses into the merits. *ACLU v. Ashcroft*, 322 F.3d 240, 247 (3d Cir. 2003); *Washington v. Reno*, 35 F.3d 1093, 1103 (6th Cir. 1994); *League of Women Voters of the United States v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016). If the Court agrees with Plaintiff State that non-legislative actors lack authority to amend state statutes for selecting presidential electors, the public interest requires interim relief. Withholding relief would leave a taint over the election, disenfranchise voters, and lead to still more electoral legerdemain in future elections.

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 extraordinary case arising from a presidential election. 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 presidential electors, the resulting vote of the Electoral College not only lacks constitutional legitimacy, but the Constitution itself will be forever sullied.

The nation needs this Court's clarity: "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). While isolated irregularities could be "garden-variety" election irregularities that do not raise a federal question,[11] the unconstitutional setting-aside of state election statutes by non-legislative actors calls both the result and the process into question, requiring 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. The public interest requires this Court's action.

IV. ALTERNATIVELY, THIS CASE WARRANTS SUMMARY DISPOSITION.

In lieu of granting interim relief, this Court could simply reach the merits summarily. *Cf.* FED. R. CIV. P. 65(a)(2); S.Ct. Rule 17.5. Two things are clear from the evidence presented at this initial phase: (1) non-legislative actors modified the Defendant States' election statutes; and (2) the resulting uncertainty casts doubt on the lawful winner. Those two facts are enough to decide the merits of the Electors Clause claim. The Court should thus vacate the Defendant States' appointment and impending certifications of presidential electors and remand to their State legislatures to allocate presidential electors via any constitutional means that does not rely on 2020

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[11] "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 (1st Cir. 1978)).

election results that includes votes cast in violation of State election statutes in place on Election Day.

CONCLUSION

This Court should first administratively stay or temporarily restrain the Defendant States from voting in the electoral college until further order of this Court and then issue a preliminary injunction or stay against their doing so until the conclusion of this case on the merits. Alternatively, the Court should reach the merits, vacate the Defendant States' elector certifications from the unconstitutional 2020 election results, and remand to the Defendant States' legislatures pursuant to 3 U.S.C. § 2 to appoint electors.

December 7, 2020

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No. 22O155, Original

In the Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

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

Defendants.

On Motion for Leave to File Bill of Complaint

BRIEF OF STATES OF MISSOURI, ___ AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF'S MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

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STATEMENT OF INTEREST OF *AMICI*

"In the context of a Presidential election," state actions "implicate a uniquely important national interest," because "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, 794–95 (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." *Id.* "Every voter" in a federal election "has a right under the Constitution to have his vote fairly counted, without its being distorted by fraudulently cast votes." *Anderson* v. *United States*, 417 U.S. 211, 227 (1974).

Amici curiae are the States of Missouri, _____.[1] *Amici* have several important interests in this case. *First*, the States have a strong interest in safeguarding the separation of powers among state actors in the regulation of Presidential elections. The Electors Clause of Article II, § 1 carefully balances power among state actors, and it assigns a specific function to the "Legislature thereof" in each State. U.S. CONST. art. II, § 1, cl. 4. Our system of federalism relies on separation of powers to preserve liberty at every level of government, and the separation of powers in the Electors Clause is no exception. The States have a strong interest in preserving the proper roles of state legislatures in the administration of federal elections, and thus safeguarding the individual liberty of their citizens.

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[1] This brief is filed under Supreme Court Rule 37.4, and all counsel of record received timely notice of the intent to file this amicus brief under Rule 37.2.

Second, *amici* States have a strong interest in ensuring that the votes of their own citizens are not diluted by the unconstitutional administration of elections in other States. When non-legislative actors in other States encroach on the authority of the "Legislature thereof" in that State to administer a Presidential election, they threaten the liberty, not just of their own citizens, but of every citizen of the United States who casts a lawful ballot in that election—including the citizens of *amici* States.

Third, for similar reasons, *amici* States have a strong interest in safeguarding against fraud in voting by mail during Presidential elections. "Every voter" in a federal election, "has a right under the Constitution to have his vote fairly counted, without its being distorted by fraudulently cast votes." *Anderson*, 417 U.S. at 227. Plaintiff's Bill of Complaint alleges that non-legislative actors in the Defendant States stripped away important safeguards against fraud in voting by mail that had been enacted by the Legislature in each State. *Amici* States share a vital interest in protecting the integrity of the truly national election for President and Vice President of the United States.

SUMMARY OF ARGUMENT

The Bill of Complaint raises constitutional questions of great public importance that warrant this Court's review. First, like every similar provision in the Constitution, the separation-of-powers provision of the Electors Clause provides an important structural check on government designed to protect individual liberty. By allocating authority over Presidential electors to the "Legislature thereof" in

each State, the Clause separates powers both vertically and horizontally, and it confers authority on the branch of state government most responsive to the democratic will. Encroachments on the authority of state Legislatures by other state actors violate the separation of powers and threaten individual liberty.

The unconstitutional encroachments on the authority of state Legislatures in this case raise particularly grave concerns. For decades, responsible observers have cautioned about the risks of fraud and abuse in voting by mail, and they have urged the adoption of statutory safeguards to prevent such fraud and abuse. In the numerous cases identified in the Bill of Complaint, non-legislative actors in each Defendant State repeatedly stripped away statutory safeguards that the "Legislature thereof" had enacted to protect against fraud in voting by mail. These changes removed protections that responsible actors had recommended for decades to guard against fraud and abuse in voting by mail, and they did so in a manner that uniformly and predictably benefited one candidate in the recent Presidential election. The allegations in the Bill of Complaint raise grave questions about election integrity and public confidence in the administration of Presidential elections. This Court should grant Plaintiff leave to file the Bill of Complaint.

ARGUMENT

The Electors Clause provides that each State "shall appoint" its Presidential electors "in such Manner as the *Legislature thereof* may direct." U.S. CONST. art. II, § 1, cl. 4 (emphasis added). Moreover, "[o]ur constitutional system of representative government only works when the worth of honest

ballots is not diluted by invalid ballots procured by corruption." U.S. Dep't of Justice, *Federal Prosecution of Election Offenses*, at 1 (8th ed. Dec. 2017). "When the election process is corrupted, democracy is jeopardized." *Id.* The proposed Bill of Complaint raises serious concerns about constitutionality and ballot security of election procedures in the Defendant States. Given the importance of public confidence in American elections, these allegations raise questions of great public importance that warrant this Court's expedited review.

I. The Separation-of-Powers Provision of the Electors Clause Is a Structural Check on Government That Safeguards Liberty.

Article II 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. 4 (emphasis added); *see also id.* art. I, § 4, cl. 2 (providing that, in each State, the "Legislature thereof" shall establish "[t]he Times, Places and Manner of holding Elections for Senators and Representatives").

Thus, "in the case of a law enacted by a state legislature applicable not only to elections to state offices, but also to the selection of Presidential electors, the legislature is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under Art. II, § 1, cl. 2, of the United States Constitution." *Bush* v. *Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70, 76 (2000). "[T]he state legislature's power to select the manner for appointing electors is plenary." *Bush* v. *Gore*, 531 U.S. 98, 104 (2000).

Here, as set forth in the Bill of Complaint, non-legislative actors in each Defendant State have purported to "alter[] an important statutory provision enacted by the [State's] Legislature pursuant to its authority under the Constitution of the United States to make rules governing the conduct of elections for federal office." *Republican Party of Pennsylvania* v. *Boockvar*, No. 20-542, 2020 WL 6304626, at *1 (U.S. Oct. 28, 2020) (Statement of Alito, J.). *See* Bill of Complaint, ¶¶ 41-127. In doing so, these non-legislative actors encroached upon the "plenary" authority of those States' respective legislatures over the conduct of the Presidential election in each State. *Bush* v. *Gore*, 531 U.S. at 104. This encroachment on the authority of each State's Legislature violated the separation of powers set forth in the Electors Clause. "[I]n the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest. For the President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation." *Anderson*, 460 U.S. at 794–795.

In every other context, this Court recognizes that the Constitution's separation-of-powers provisions, which allocate authority to specific governmental actors to the exclusion of others, are designed to preserve liberty. "It is the proud boast of our democracy that we have 'a government of laws, and not of men.'" *Morrison* v. *Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting). "The Framers of the Federal Constitution . . . viewed the principle of separation of powers as the absolutely central guarantee of a just Government." *Id.* "Without a secure structure of separated powers, our Bill of Rights would be worthless, as are the bills of rights of

many nations of the world that have adopted, or even improved upon, the mere words of ours." *Id.* "The purpose of the separation and equilibration of powers in general . . . was not merely to assure effective government but to preserve individual freedom." *Id.* at 727.

This principle of preserving liberty applies both to the horizontal separation of powers among the branches of government, and the vertical separation of powers between the federal government and the States. "The federal system rests on what might at first seem a counterintuitive insight, that 'freedom is enhanced by the creation of two governments, not one.'" *Bond* v. *United States*, 564 U.S. 211, 220–21 (2011) (quoting *Alden* v. *Maine*, 527 U.S. 706, 758 (1999)). "[F]ederalism secures to citizens the liberties that derive from the diffusion of sovereign power." *Bond*, 564 U.S. at 221 (2011) (quoting *New York* v. *United States*, 505 U.S. 144, 181 (1992)). "Federalism also protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions." *Id.* Moreover, "federalism enhances the opportunity of all citizens to participate in representative government." *FERC* v. *Mississippi*, 456 U.S. 742, 789 (1982) (O'Connor, J., concurring in part and dissenting in part). "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Gregory* v. *Ashcroft*, 501 U.S. 452, 458 (1991).

The explicit grant of authority to state *Legislatures* in the Electors Clause of Article II, §1 effects both a horizontal and a vertical separation of powers. The Clause allocates 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. 4.

It is no accident that the Constitution allocates such authority to state Legislatures, rather than executive officers such as Secretaries of State, or judicial officers such as state Supreme Courts. The Constitutional Convention's delegates frequently recognized that the Legislature is the branch most responsive to the People and most democratically accountable. *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 ratification documents expressing that state legislatures were most likely to be in sympathy with the interests of the people); Federal Farmer, No. 12 (1788), *reprinted in* 2 THE FOUNDERS' CONSTITUTION (Philip B. Kurland & Ralph Lerner eds., 1987) (arguing that electoral regulations "ought to be left to the state legislatures, they coming far nearest to the people themselves"); THE FEDERALIST NO. 57, at 350 (C. Rossiter, ed. 2003) (Madison, J.) (stating that the "House of Representatives is so constituted as to support in its members an habitual recollection of their dependence on the people"); *id.* (stating that the "vigilant and manly spirit that actuates the people of America" is greatest restraint on the House of Representatives).

Democratic accountability in the method of selecting the President of the United States is a powerful bulwark safeguarding individual liberty. By identifying the "Legislature thereof" in each State as the regulator of elections for federal officers, the Electors Clause of Article II, § 1 prohibits the very arrogation of power over Presidential elections by non-legislative officials that the Defendant States perpetrated in this case. By violating the Constitution's separation of powers, these non-legislative actors undermined the liberty of all Americans, including the voters in *amici* States.

II. Stripping Away Safeguards From Voting by Mail Exacerbates the Risks of Fraud.

By stripping away critical safeguards against ballot fraud in voting by mail, non-legislative actors in the Defendant States inflicted another grave injury on the conduct of the recent election: They enhanced the risks of fraudulent voting by mail without authority. An impressive body of public evidence demonstrates that voting by mail presents unique opportunities for fraud and abuse, and that statutory safeguards are critical to reduce such risks of fraud.

For decades prior to 2020, responsible observers emphasized the risks of fraud in voting by mail, and the importance of imposing safeguards on the process of voting by mail to allay such risks. For example, in *Crawford* v. *Marion County Election Board*, this Court held that fraudulent voting "perpetrated using absentee ballots" demonstrates "that not only is the risk of voter fraud real but that *it could affect the outcome of a close election.*" *Crawford* v. *Marion County Election Bd.*, 553 U.S. 181, 195-96 (2008) (opinion of Stevens, J.) (emphasis added).

As noted by Plaintiff, the Carter-Baker Commission on Federal Election Reform emphasized the same concern. The bipartisan Commission—co-chaired by former President Jimmy Carter and former Secretary of State James A. Baker—determined that "[a]bsentee ballots remain 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) ("Carter-Baker Report").[2] According to the Carter-Baker Commission, "[a]bsentee balloting is vulnerable to abuse in several ways." *Id.* "Blank ballots mailed to the wrong address or to large residential buildings might bet intercepted." *Id.* "Citizens who vote at home, at nursing homes, at the workplace, or in church are more susceptible to pressure, overt and subtle, or to intimidation." *Id.* "Vote buying schemes are far more difficult to detect when citizens vote by mail." *Id.*

Thus, the Commission noted that "absentee balloting in other states has been a major source of fraud." *Id.* at 35. It emphasized that voting by mail "increases the risk of fraud." *Id.* And the Commission recommended that "States ... need to do more to prevent ... absentee ballot fraud." *Id.* at v.

The Commission specifically recommended that States should implement and reinforce safeguards to prevent fraud in voting by mail. The Commission recommended that "States should make sure that absentee ballots received by election officials before Election Day are kept secure until they are opened and counted." *Id.* at 46. It also recommended that States "prohibit[] 'third-party' organizations,

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[2] *Available at* https://www.legislationline.org/download/id/1472/file/-3b50795b2d0374cbef5c29766256.pdf.

candidates, and political party activists from handling absentee ballots." *Id.* And the Commission highlighted that a particular state "appear[ed] to have avoided significant fraud in its vote-by-mail elections by introducing safeguards to protect ballot integrity, *including signature verification*." *Id.* at 35 (emphasis added). The Commission concluded that "[v]ote by mail is ... likely to increase the risks of fraud and contested elections ... where the safeguards for ballot integrity are weaker." *Id.*

The most recent edition of the U.S. Department of Justice's Manual on *Federal Prosecution of Election Offenses*, published by its Public Integrity Section, highlights the very same concerns about fraud in voting by mail. U.S. Dep't of Justice, *Federal Prosecution of Election Offenses* (8th ed. Dec. 2017), at 28-29 ("DOJ Manual").[3] The Manual states: "Absentee ballots are particularly susceptible to fraudulent abuse because, by definition, they are marked and cast outside the presence of election officials and the structured environment of a polling place." *Id.* The Manual reports that "the more common ways" that election-fraud "crimes are committed include ... [o]btaining and marking absentee ballots without the active input of the voters involved." *Id.* at 28. And the Manual notes that "[a]bsentee ballot frauds" committed both with and without the voter's participation are "common." *Id.* at 29.

Similarly, the U.S. Government Accountability Office concluded that many crimes of election fraud likely go undetected. In 2014, discussing election fraud, the GAO reported that "crimes of fraud, in

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[3] *Available at* https://www.justice.gov/criminal/file/1029066/download.

particular, are difficult to detect, as those involved are engaged in intentional deception." GAO-14-634, *Elections: Issues Related to State Voter Identification Laws* 62-63 (U.S. Gov't Accountability Office Sept. 2014).[4]

Despite the difficulties of detecting fraud schemes, recent experience contains many well-documented examples of absentee ballot fraud. For example, the News21 database, which was compiled to *refute* arguments that voter fraud is prevalent, identified 491 cases of absentee ballot over the 12-year period from 2000 to 2012—approximately 41 cases per year. *See* News21, *Election Fraud in America*.[5] This database reports that "Absentee Ballot Fraud" was "[t]he most prevalent fraud" in America, comprising "24 percent (491 cases)" of all cases reported in the public records surveyed. *Id.* Moreover, the database indicates that this number undercounts the total incidence of reported cases of absentee ballot fraud, because it was based on public-record requests to state and local government entities, many of which did not respond. *Id.*

Likewise, the Heritage Foundation's online database of election-fraud cases—which includes only a "sampling" of cases that resulted in an *adjudication* of fraud, such as a criminal conviction or civil penalty—identified 207 cases of proven "fraudulent use of absentee ballots" in the United States. The

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[4] *Available at* https://www.gao.gov/assets/670/665966.pdf.

[5] *Available at* https://votingrights.news21.com/interactive/election-fraud-database/&xid=17259,15700023,15700124,15700149,15700186,15700191,15700201,15700237,15700242

Heritage Foundation, *Election Fraud Cases*.[6] Again, this database undercounts the incidence of cases of election fraud: "The Heritage Foundation's Election Fraud Database presents a sampling of recent proven instances of election fraud from across the country. This database is not an exhaustive or comprehensive list." *Id.*

The public record abounds with recent examples of such fraudulent absentee-ballot schemes. For example, in November 2019, the mayor of Berkeley, Missouri was indicted on five felony counts of absentee ballot fraud for changing votes on absentee ballots to help him and his political allies to get elected. Brian Heffernan, *Berkeley Mayor Hoskins Charged with 5 Felony Counts of Election Fraud*, ST. LOUIS PUBLIC RADIO (Nov. 21, 2019).[7] Mayor Hoskins' scheme included "going to the home of elderly ... residents" to harvest absentee ballots, "filling out absentee ballot applications for voters and having his campaign workers do the same," and "altering absentee ballots" after he had procured them from voters. *Id.* Again, in 2016, a state House race in Missouri was overturned amid allegations of widespread absentee-ballot fraud that had occurred across multiple election cycles in the same community. Sarah Fenske, *FBI, Secretary of State Asking Questions About St. Louis Statehouse Race*,

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[6] *Available at* https://www.heritage.org/voterfraud/search?combine=&state=All&year=&case_type=All&fraud_type=24489&page=12.

[7] *Available at* https://news.stlpublicradio.org/post/berkeley-mayor-hoskins-charged-5-felony-counts-election-fraud#stream/0

RIVERFRONT TIMES (Aug. 16, 2016).[8] One candidate stated that it was widely known in the community that the incumbent ran an "absentee game" that resulted in the mail-in vote tipping the outcome in her favor in multiple close elections. *Id.*

Other States have similar experiences. In 2018, a federal Congressional race was overturned in North Carolina, and eight political operatives were indicted for fraud, in an absentee-ballot fraud scheme that sufficed to change the outcome of the election. Richard Gonzales, *North Carolina GOP Operative Faces New Felony Charges That Allege Ballot Fraud*, NPR.ORG, (July 30, 2019).[9] The indicted operatives "had improperly collected and possibly tampered with ballots," and were charged with "improperly mailing in absentee ballots for someone who had not mailed it themselves." *Id.*

In the North Carolina case, the lead investigator testified that the investigation was "a continuous case" over two election cycles, and that the scheme involved collecting absentee ballots from voters, altering the absentee ballots, and forging witness signatures on the ballots. *See In re: Investigation of Irregularities Affecting Counties Within the 9th Congressional District*, North Carolina Board of Elections, Evidentiary Hearing, at 2-3.[10] The investigators described it as a "coordinated, unlawful,

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[8] *Available at* https://www.riverfronttimes.com/newsblog/2016/08/16/fbi-secretary-of-state-asking-questions-about-st-louis-statehouse-race.

[9] *Available at* https://www.npr.org/2019/07/30/746800630/north-carolina-gop-operative-faces-new-felony-charges-that-allege-ballot-fraud.

[10] *Available at* https://images.radio.com/wbt/Voter%20ID_%20Website.pdf.

and substantially resourced absentee ballots scheme." *Id.* at 2. According to the investigators' trial presentation, the investigation involved 142 voter interviews, 30 subject and witness interviews, and subpoenas of documents, financial records, and phone records. *Id.* at 3. The perpetrators collected absentee ballots and falsified ballot witness certifications outside the presence of the voters. *Id.* at 10, 13. The congressional election at issue was decided by margin of less than 1,000 votes. *Id.* at 4. The scheme involved the submission of well over 1,000 fraudulent absentee ballots and request forms. *Id.* at 11. The perpetrators took extensive steps to conceal the fraudulent scheme, which lasted over multiple election cycles before it was detected. *Id.* at 14.

Similarly, in 2016, a politician in the Bronx was indicted and pled guilty to 242 counts of election fraud based on an absentee ballot fraud scheme. Ben Kochman, *Bronx politician pleads guilty in absentee ballot scheme for Assembly election,* NEW YORK DAILY NEWS (Nov. 22, 2016).[11] Despite pleading guilty to 242 felonies involving absentee ballot fraud in an election that was decided by two votes, the defendant received no jail time and vowed to run for office again after a short disqualification period. *Id.*

The increases in mail-in voting due to the COVID-19 pandemic likewise increased opportunities for fraud. For instance, in May 2020, the leader of the New Jersey NAACP called for an election in Paterson, New Jersey to be overturned due to widespread mail-in ballot fraud. *See* Jonathan Dienst et al., *NJ NAACP*

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[11] *Available at* http://www.nydailynews.com/new-york/nyc-crime/bronx-pol-pleads-guilty-absentee-ballot-scheme-article-1.2884009.

Leader Calls for Paterson Mail-In Vote to Be Canceled Amid Corruption Claims, NBC NEW YORK (May 27, 2020).[12] "'Invalidate the election. Let's do it again,' [the NAACP leader] said amid reports more that 20 percent of all ballots were disqualified, some in connection with voter fraud allegations." *Id.*

Hundreds of other reported cases highlight the same concerns about the vulnerability of voting by mail to fraud and abuse. Recently, a Missouri court considered extensive expert testimony reviewing absentee-ballot fraud cases like these. *Findings of Fact, Conclusions of Law, and Final Judgment in Mo. State Conference of the NAACP* v. *State*, No. 20AC-CC00169-01 (Circuit Court of Cole County, Missouri Sept. 24, 2020), *aff'd*, 607 S.W.3d 728 (Mo. banc Oct. 9, 2020) ("*Mo. NAACP*"). The court held that cases of absentee-ballot fraud "have several common features that persist across multiple recent cases: (1) close elections; (2) perpetrators who are candidates, campaign workers, or political consultants, not ordinary voters; (3) common techniques of ballot harvesting, (4) common techniques of signature forging, (5) fraud that persisted across multiple elections before it was detected, (6) massive resources required to investigate and prosecute the fraud, and (7) lenient criminal penalties." *Id.* at 17. Thus, "fraud in voting by mail is a recurrent problem, that it is hard to detect and prosecute, that there are strong incentives and weak penalties for doing so, and that it has the capacity to affect the outcome of close

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[12] *Available at* https://www.nbcnewyork.com/news/politics/nj-naacp-leader-calls-for-paterson-mail-in-vote-to-be-canceled-amid-fraud-claims/2435162/.

elections." *Id.* The court concluded that "the threat of mail-in ballot fraud is real." *Id.* at 2.

III. The Bill of Complaint Alleges that the Defendant States Abolished Critical Safeguards Against Fraud in Voting by Mail.

The Bill of Complaint alleges that non-legislative actors in each Defendant State unconstitutionally abolished or diluted statutory safeguards against fraud enacted by the state legislature, in violation of the Presidential Electors Clause. U.S. CONST. art. II, § 1, cl. 4. All the unconstitutional changes to election procedures identified in the Bill of Complaint have two common features: (1) They abrogated statutory safeguards against fraud that responsible observers have long recommended for voting by mail, and (2) they did so in a way that predictably conferred partisan advantage on one candidate in the Presidential election. Such allegations are serious, and they warrant this Court's review.

Abolishing signature verification. First, the proposed Bill of Complaint alleges that non-legislative actors in Pennsylvania, Georgia, and Michigan unilaterally abolished or undermined signature-verification requirements for mailed ballots. It alleges that Pennsylvania's Secretary of State abrogated Pennsylvania's statutory signature-verification requirement for mail-in ballots in a "friendly" settlement of a lawsuit brought by activists. Bill of Complaint, ¶¶ 44-46. It alleges that Georgia's Secretary of State unilaterally abrogated Georgia's statute authorizing county registrars to engage in signature verification for absentee ballots in a similar settlement. *Id.* ¶¶ 66-72. It alleges that Michigan's Secretary of State permitted absentee ballot

applications online, with no signature at all, in violation of Michigan statutes, *id.* ¶¶ 85-89; and that election officials in Wayne County, Michigan simply disregarded statutory signature verification requirements, *id.* ¶¶ 92-95.

In addition to violating the Electors Clause, these actions contradicted fundamental principles of ballot security. As noted above, the Carter-Baker Report highlighted the importance of "*signature verification*" as a critical "safeguard[] to protect ballot integrity" for ballots cast by mail. Carter-Baker Report, *supra*, at 35 (emphasis added). Without safeguards such as signature verification, the Report stated that "[v]ote by mail is ... likely to increase the risks of fraud and contested elections ... where the safeguards for ballot integrity are weaker." *Id.* The importance of signature verification is hard to overstate, because absentee-ballot fraud schemes commonly involve "common techniques of signature forging," typically by nefarious actors who are unfamiliar with the voter's signature. *Mo. NAACP*, *supra*, at 17. Verifying the voter's signature by comparison to the signature on the voter rolls thus provides the most critical safeguard against fraud.

Insecure ballot handling. The Bill of Complaint alleges that non-legislative actors changed or abolished statutory rules for the secure handling of absentee and mail-in ballots in Pennsylvania, Michigan, and Wisconsin. It alleges that election officials in Democratic areas of Pennsylvania violated state statutes by opening and reviewing mail-in ballots that were required to be kept locked and secure until Election Day. Bill of Complaint, ¶¶ 50-51. It alleges that Michigan's Secretary of State, acting in violation of state law, sent 7.7 million unsolicited

absentee-ballot applications to Michigan voters, thus "flooding Michigan with millions of absentee ballot applications prior to the 2020 general election." *Id.* ¶¶ 80-84. And it alleges that the Wisconsin Election Commission violated state law by placing hundreds of unmonitored boxes for the submission of absentee and mail-in ballots around the State, concentrated in heavily Democratic areas. *Id.* ¶¶ 107-114.

In addition to violating the Electors Clause, these actions contradicted commonsense ballot-security recommendations. The Department of Justice's Manual on *Federal Prosecution of Election Offenses* notes that vulnerability to mishandling is what makes absentee ballots "particularly susceptible to fraudulent abuse" because "they are marked and cast outside the presence of election officials and the structured environment of a polling place." DOJ Manual, at 28-29. According to the Manual, "[o]btaining and marking absentee ballots without the active input of the voters involved" is one of "the more common ways" that election fraud "crimes are committed." *Id.* at 28. For this reason, the Carter-Baker Commission made a series of recommendations in favor of preventing such insecurity in the handling of ballots. For example, the Commission recommended that "States should make sure that absentee ballots received by election officials before Election Day are kept secure until they are opened and counted." *Id.* at 46. It also recommended that States "prohibit[] 'third-party' organizations, candidates, and political party activists from handling absentee ballots." *Id.*

Inconsistent Statewide Standards. The Bill of Complaint alleges that the Defendant States provided different standards and treatment for mail-

in ballots submitted in different areas of each State, and that this differential treatment uniformly provided a partisan advantage to one side in the Presidential election. It alleges that election officials in Philadelphia and Allegheny County, Pennsylvania, applied different standards to voters in those Democratic strongholds than applied to other voters in Pennsylvania, in violation of state law. Bill of Complaint, ¶¶ 52-54. Similarly, it alleges that Milwaukee, Wisconsin violated state law by authorizing election officials to "correct" disqualifying omissions on ballot envelopes by entering information that the voter should have entered with a red pen, while no similar "correction" process was granted to other voters in that State. *Id.* ¶¶ 123-127. And it alleges that Wayne County, Michigan provided favorable treatment to its voters, in violation of state statutes, by simply ignoring statutorily required signature-verification requirements. *Id.* ¶¶ 92-95.

Again, such differential treatment, under circumstances raising concerns of partisan bias, contradicts universal recommendations for integrity and public confidence in elections. As this Court stated in *Bush* v. *Gore*, "[t]he idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government." 531 U.S. at 107 (quoting *Moore* v. *Ogilvie*, 394 US 814 (1969)). The Carter-Baker Report noted that "inconsistent or incorrect application of electoral procedures may have the effect of discouraging voter participation and may, on occasion, raise questions about bias in the way elections are conducted." Carter-Baker Report, at 49. "Such problems raise public suspicions or may provide

grounds for the losing candidate to contest the result in a close election." *Id.*

Excluding Bipartisan Observers. The Bill of Complaint alleges that certain counties in Defendant States excluded bipartisan observers from the ballot-opening and ballot-counting processes. For example, it alleges that election officials in Philadelphia and Allegheny County, Pennsylvania, violated state law by excluding Republican observers from the opening, counting, and recording of absentee ballots in those counties. Bill of Complaint, ¶ 49. And it alleges that election officials in Wayne County, Michigan violated state statutes by systematically excluding poll watchers from the counting and recording of absentee ballots. *Id.* ¶¶ 90-91.

Such actions, as alleged, raise grave concerns about the integrity of the vote count in those counties. As the Carter-Baker Report emphasized, States should "provide observers with meaningful opportunities to monitor the conduct of the election." Carter-Baker Report, at 47. "To build confidence in the electoral process, it is important that elections be administered in a neutral and professional manner," without the appearance of partisan bias." *Id.* at 49. When observers of one political party are illegally and systematically excluded from observing the vote count, "the appearance of partisan bias" is inevitable. *Id.* For counties in Defendant States to exclude Republican observers weakens public confidence in the electoral process and raises grave concerns about the integrity of ballot counting in those counties.

Extending the deadline to receive ballots. The Bill of Complaint alleges that a non-legislative actor in Pennsylvania—its Supreme Court—extended the statutory deadline to receive absentee and mail-in

ballots without authorization of the "Legislature thereof," and directed that ballots with illegible postmarks or no postmarks at all would be deemed timely if received within the extended deadline. Bill of Complaint, ¶¶ 48, 55. Again, these non-legislative changes raise grave concerns about election integrity in Pennsylvania. First, they created a post-election window of time during which nefarious actors could wait and see whether the Presidential election would be close, and whether perpetrating fraud in Pennsylvania would be worthwhile. Second, they enhanced the opportunities for fraud by mandating that late ballots must be counted even when they are not postmarked or have no legible postmark, and thus there is no evidence they were mailed by Election Day.

These changes created needless vulnerability to actual fraud and undermined public confidence in a Presidential election. As the Department of Justice's Manual of *Federal Prosecution of Election Offenses* states, "the conditions most conducive to election fraud are close factional competition within an electoral jurisdiction for an elected position that matters." DOJ Manual, at 2-3. "[E]lection fraud is most likely to occur in electoral jurisdictions where there is close factional competition for an elected position that matters." *Id.* at 27. That statement exactly describes the conditions in each of the Defendant States in the recent Presidential election.

CONCLUSION

"Fraud in any degree and in any circumstance is subversive to the electoral process." Carter-Baker Report, at 45. The allegations in the Bill of Complaint raise serious constitutional issues under the Electors

Clause of Article II, § 1. In addition, the long series allegations of unconstitutional actions that stripped away safeguards against fraud in voting by mail raise concerns about the integrity of the recent election and the public confidence in its outcome. These are questions of great public importance that warrant this Court's attention. The Court should grant the Plaintiff's Motion for Leave to File Bill of Complaint.

December 9, 2020

Respectfully submitted,

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Subject: RE: Texas v. Pennsylvania, et al. - Amicus Brief of Missouri, at al. - Joins requested by 1:00 p.m. Central Tomorrow, 12/9
Attachments: 2020-12-09 - Texas v. Pennsylvania - Amicus Brief of Missouri et al.docx

All-

Thank you for considering this amicus brief on such short notice. So far, Louisiana and Arkansas have joined, with several others expressing interest. I have attached an updated draft that includes minor, non-substantive edits, and which adjusts the language of the concluding paragraphs in response to comments from an interested state. The Supreme Court issued an order last night ordering the Defendant States (MI, PA, WS, GA) to file a response for the Motion for Leave to File Bill of Complaint and request for interim injunctive relief by 3:00 pm tomorrow. Given this highly accelerated briefing schedule, we would like to file this brief as soon as possible this afternoon to give the Court the most time possible to read it. Accordingly, we would prefer not to extend the deadline past 1:00 p.m. Central today, so please let us know by then if you are interested. Thanks a lot!

Best, John Sauer

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All-

Attached please find a draft multistate amicus brief in support of Texas's motion for leave to file a bill of complaint in the U.S. Supreme Court challenging the administration of the recent Presidential election in Pennsylvania, Michigan, Wisconsin, and Georgia. The brief argues that (1) the separation-of-powers provision of the Electors Clause of Article II, Section 1 is an important structural check on government that safeguards individual liberty; (2) voting by mail presents real concerns for fraud and abuse that require statutory safeguards to protect against such fraud and abuse; and (3) the abrogation of statutory safeguards against fraud in voting by mail by non-legislative actors violates the Electors Clause and undermines public confidence in elections. For your reference, I have also attached Texas's Motion for Leave to File Bill of Complaint and related documents.

With apologies for the short deadline, given the time-sensitivity of this case, we are requesting joins by **1:00 p.m. Central TOMORROW**, 12/9. We are planning to file tomorrow afternoon.

Thanks a lot,

John Sauer

No. 22O155, Original

In the Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

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

Defendants.

On Motion for Leave to File Bill of Complaint

BRIEF OF STATES OF MISSOURI, ___ AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF'S MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

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STATEMENT OF INTEREST OF *AMICI*

"In the context of a Presidential election," state actions "implicate a uniquely important national interest," because "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, 794–95 (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." *Id.*

Amici curiae are the States of Missouri, _____.[1] *Amici* have several important interests in this case. *First*, the States have a strong interest in safeguarding the separation of powers among state actors in the regulation of Presidential elections. The Electors Clause of Article II, § 1 carefully separates power among state actors, and it assigns a specific function to the "Legislature thereof" in each State. U.S. CONST. art. II, § 1, cl. 4. Our system of federalism relies on separation of powers to preserve liberty at every level of government, and the separation of powers in the Electors Clause is no exception. The States have a strong interest in preserving the proper roles of state legislatures in the administration of federal elections, and thus safeguarding the individual liberty of their citizens.

Second, *amici* States have a strong interest in ensuring that the votes of their own citizens are not diluted by the unconstitutional administration of elections in other States. When non-legislative actors in other States encroach on the authority of the

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[1] This brief is filed under Supreme Court Rule 37.4, and all counsel of record received timely notice of the intent to file this amicus brief under Rule 37.2.

"Legislature thereof" in that State to administer a Presidential election, they threaten the liberty, not just of their own citizens, but of every citizen of the United States who casts a lawful ballot in that election—including the citizens of *amici* States.

Third, for similar reasons, *amici* States have a strong interest in safeguarding against fraud in voting by mail during Presidential elections. "Every voter" in a federal election, "has a right under the Constitution to have his vote fairly counted, without its being distorted by fraudulently cast votes." *Anderson* v. *United States*, 417 U.S. 211, 227 (1974). Plaintiff's Bill of Complaint alleges that non-legislative actors in the Defendant States stripped away important safeguards against fraud in voting by mail that had been enacted by the Legislature in each State. *Amici* States share a vital interest in protecting the integrity of the truly national election for President and Vice President of the United States.

SUMMARY OF ARGUMENT

The Bill of Complaint raises constitutional questions of great public importance that warrant this Court's review. First, like every similar provision in the Constitution, the separation-of-powers provision of the Electors Clause provides an important structural check on government designed to protect individual liberty. By allocating authority over Presidential electors to the "Legislature thereof" in each State, the Clause separates powers both vertically and horizontally, and it confers authority on the branch of state government most responsive to the democratic will. Encroachments on the authority of

state Legislatures by other state actors violate the separation of powers and threaten individual liberty.

The unconstitutional encroachments on the authority of state Legislatures in this case raise particularly grave concerns. For decades, responsible observers have cautioned about the risks of fraud and abuse in voting by mail, and they have urged the adoption of statutory safeguards to prevent such fraud and abuse. In the numerous cases identified in the Bill of Complaint, non-legislative actors in each Defendant State repeatedly stripped away the statutory safeguards that the "Legislature thereof" had enacted to protect against fraud in voting by mail. These changes removed protections that responsible actors had recommended for decades to guard against fraud and abuse in voting by mail, and they did so in a manner that uniformly and predictably benefited one candidate in the recent Presidential election. The allegations in the Bill of Complaint raise important questions about election integrity and public confidence in the administration of Presidential elections. This Court should grant Plaintiff leave to file the Bill of Complaint.

ARGUMENT

The Electors Clause provides that each State "shall appoint" its Presidential electors "in such Manner as the *Legislature thereof* may direct." U.S. CONST. art. II, § 1, cl. 4 (emphasis added). Moreover, "[o]ur constitutional system of representative government only works when the worth of honest ballots is not diluted by invalid ballots procured by corruption." U.S. Dep't of Justice, *Federal Prosecution of Election Offenses*, at 1 (8th ed. Dec. 2017). "When the election process is corrupted, democracy is

jeopardized." *Id.* The proposed Bill of Complaint raises serious concerns about both constitutionality and ballot security of election procedures in the Defendant States. Given the importance of public confidence in American elections, these allegations raise questions of great public importance that warrant this Court's expedited review.

I. The Separation-of-Powers Provision of the Electors Clause Is a Structural Check on Government That Safeguards Liberty.

Article II 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. 4 (emphasis added); *see also id.* art. I, § 4, cl. 2 (providing that, in each State, the "Legislature thereof" shall establish "[t]he Times, Places and Manner of holding Elections for Senators and Representatives").

Thus, "in the case of a law enacted by a state legislature applicable not only to elections to state offices, but also to the selection of Presidential electors, the legislature is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under Art. II, § 1, cl. 2, of the United States Constitution." *Bush* v. *Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70, 76 (2000). "[T]he state legislature's power to select the manner for appointing electors is plenary." *Bush* v. *Gore*, 531 U.S. 98, 104 (2000).

Here, as set forth in the Bill of Complaint, non-legislative actors in each Defendant State have purported to "alter[] an important statutory provision enacted by the [State's] Legislature pursuant to its authority under the Constitution of the United States

to make rules governing the conduct of elections for federal office." *Republican Party of Pennsylvania* v. *Boockvar*, No. 20-542, 2020 WL 6304626, at *1 (U.S. Oct. 28, 2020) (Statement of Alito, J.). *See* Bill of Complaint, ¶¶ 41-127. In doing so, these non-legislative actors encroached upon the "plenary" authority of those States' respective legislatures over the conduct of the Presidential election in each State. *Bush* v. *Gore*, 531 U.S. at 104. This encroachment on the authority of each State's Legislature violated the separation of powers set forth in the Electors Clause. "[I]n the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest. For the President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation." *Anderson*, 460 U.S. at 794–795.

In every other context, this Court recognizes that the Constitution's separation-of-powers provisions are designed to preserve liberty. "It is the proud boast of our democracy that we have 'a government of laws, and not of men.'" *Morrison* v. *Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting). "The Framers of the Federal Constitution . . . viewed the principle of separation of powers as the absolutely central guarantee of a just Government." *Id.* "Without a secure structure of separated powers, our Bill of Rights would be worthless, as are the bills of rights of many nations of the world that have adopted, or even improved upon, the mere words of ours." *Id.* "The purpose of the separation and equilibration of powers in general . . . was not merely to assure effective government but to preserve individual freedom." *Id.* at 727.

This principle of preserving liberty applies both to the horizontal separation of powers among the branches of government, and the vertical separation of powers between the federal government and the States. "The federal system rests on what might at first seem a counterintuitive insight, that 'freedom is enhanced by the creation of two governments, not one.'" *Bond* v. *United States*, 564 U.S. 211, 220–21 (2011) (quoting *Alden* v. *Maine*, 527 U.S. 706, 758 (1999)). "[F]ederalism secures to citizens the liberties that derive from the diffusion of sovereign power." *Bond*, 564 U.S. at 221 (2011) (quoting *New York* v. *United States*, 505 U.S. 144, 181 (1992)). "Federalism also protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions." *Id.* Moreover, "federalism enhances the opportunity of all citizens to participate in representative government." *FERC* v. *Mississippi*, 456 U.S. 742, 789 (1982) (O'Connor, J., concurring in part and dissenting in part). "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Gregory* v. *Ashcroft*, 501 U.S. 452, 458 (1991).

The explicit grant of authority to state *Legislatures* in the Electors Clause effects both a horizontal and a vertical separation of powers. The Clause allocates 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. 4.

It is no accident that the Constitution allocates such authority to state Legislatures, rather than executive officers such as Secretaries of State, or judicial officers such as state Supreme Courts. The Constitutional Convention's delegates frequently recognized that the Legislature is the branch most responsive to the People and most democratically accountable. *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 ratification documents expressing that state legislatures were most likely to be in sympathy with the interests of the people); Federal Farmer, No. 12 (1788), *reprinted in* 2 THE FOUNDERS' CONSTITUTION (Philip B. Kurland & Ralph Lerner eds., 1987) (arguing that electoral regulations "ought to be left to the state legislatures, they coming far nearest to the people themselves"); THE FEDERALIST NO. 57, at 350 (C. Rossiter, ed. 2003) (Madison, J.) (stating that the "House of Representatives is so constituted as to support in its members an habitual recollection of their dependence on the people"); *id.* (stating that the "vigilant and manly spirit that actuates the people of America" is greatest restraint on the House of Representatives).

Democratic accountability in the method of selecting the President of the United States is a powerful bulwark safeguarding individual liberty. By identifying the "Legislature thereof" in each State as the regulator of elections for federal officers, the Electors Clause of Article II, § 1 prohibits the very arrogation of power over Presidential elections by non-legislative officials that the Defendant States

perpetrated in this case. By violating the Constitution's separation of powers, these non-legislative actors undermined the liberty of all Americans, including the voters in *amici* States.

II. Stripping Away Safeguards From Voting by Mail Exacerbates the Risks of Fraud.

By stripping away critical safeguards against ballot fraud in voting by mail, non-legislative actors in the Defendant States inflicted another grave injury on the conduct of the recent election: They enhanced the risks of fraudulent voting by mail without authority. An impressive body of public evidence demonstrates that voting by mail presents unique opportunities for fraud and abuse, and that statutory safeguards are critical to reduce such risks of fraud.

For decades prior to 2020, responsible observers emphasized the risks of fraud in voting by mail, and the importance of imposing safeguards on the process of voting by mail to allay such risks. For example, in *Crawford* v. *Marion County Election Board*, this Court held that fraudulent voting "perpetrated using absentee ballots" demonstrates "that not only is the risk of voter fraud real but that *it could affect the outcome of a close election.*" *Crawford* v. *Marion County Election Bd.*, 553 U.S. 181, 195-96 (2008) (opinion of Stevens, J.) (emphasis added).

As noted by Plaintiff, the Carter-Baker Commission on Federal Election Reform emphasized the same concern. The bipartisan Commission—co-chaired by former President Jimmy Carter and former Secretary of State James A. Baker—determined that "[a]bsentee ballots remain 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) ("Carter-Baker Report").[2] According to the Carter-Baker Commission, "[a]bsentee balloting is vulnerable to abuse in several ways." *Id.* "Blank ballots mailed to the wrong address or to large residential buildings might be intercepted." *Id.* "Citizens who vote at home, at nursing homes, at the workplace, or in church are more susceptible to pressure, overt and subtle, or to intimidation." *Id.* "Vote buying schemes are far more difficult to detect when citizens vote by mail." *Id.*

Thus, the Commission noted that "absentee balloting in other states has been a major source of fraud." *Id.* at 35. It emphasized that voting by mail "increases the risk of fraud." *Id.* And the Commission recommended that "States ... need to do more to prevent ... absentee ballot fraud." *Id.* at v.

The Commission specifically recommended that States should implement and reinforce safeguards to prevent fraud in voting by mail. The Commission recommended that "States should make sure that absentee ballots received by election officials before Election Day are kept secure until they are opened and counted." *Id.* at 46. It also recommended that States "prohibit[] 'third-party' organizations, candidates, and political party activists from handling absentee ballots." *Id.* And the Commission highlighted that a particular state "appear[ed] to have avoided significant fraud in its vote-by-mail elections by introducing *safeguards to protect ballot integrity, including signature verification.*" *Id.* at 35 (emphasis added). The Commission concluded that "[v]ote by mail is ... likely to increase the risks of fraud and

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[2] *Available at* https://www.legislationline.org/download/id/1472/file/-3b50795b2d0374cbef5c29766256.pdf.

contested elections ... where the safeguards for ballot integrity are weaker." *Id.*

The most recent edition of the U.S. Department of Justice's Manual on *Federal Prosecution of Election Offenses*, published by its Public Integrity Section, highlights the very same concerns about fraud in voting by mail. U.S. Dep't of Justice, *Federal Prosecution of Election Offenses* (8th ed. Dec. 2017), at 28-29 ("DOJ Manual").[3] The Manual states: "Absentee ballots are particularly susceptible to fraudulent abuse because, by definition, they are marked and cast outside the presence of election officials and the structured environment of a polling place." *Id.* The Manual reports that "the more common ways" that election-fraud "crimes are committed include ... [o]btaining and marking absentee ballots without the active input of the voters involved." *Id.* at 28. And the Manual notes that "[a]bsentee ballot frauds" committed both with and without the voter's participation are "common." *Id.* at 29.

Similarly, the U.S. Government Accountability Office concluded that many crimes of election fraud likely go undetected. In 2014, discussing election fraud, the GAO reported that "crimes of fraud, in particular, are difficult to detect, as those involved are engaged in intentional deception." GAO-14-634, *Elections: Issues Related to State Voter Identification Laws* 62-63 (U.S. Gov't Accountability Office Sept. 2014).[4]

Despite the difficulties of detecting fraud schemes, recent experience contains many well-

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[3] *Available at* https://www.justice.gov/criminal/file/1029066/download.

[4] *Available at* https://www.gao.gov/assets/670/665966.pdf.

documented examples of absentee ballot fraud. For example, the News21 database, which was compiled to *refute* arguments that voter fraud is prevalent, identified 491 cases of absentee ballot over the 12-year period from 2000 to 2012—approximately 41 cases per year. *See* News21, *Election Fraud in America.*[5] This database reports that "Absentee Ballot Fraud" was "[t]he most prevalent fraud" in America, comprising "24 percent (491 cases)" of all cases reported in the public records surveyed. *Id.* Moreover, the database indicates that this number undercounts the total incidence of reported cases of absentee ballot fraud, because it was based on public-record requests to state and local government entities, many of which did not respond. *Id.*

Likewise, the Heritage Foundation's online database of election-fraud cases—which includes only a "sampling" of cases that resulted in an *adjudication* of fraud, such as a criminal conviction or civil penalty—identified 207 cases of proven "fraudulent use of absentee ballots" in the United States. The Heritage Foundation, *Election Fraud Cases.*[6] Again, this database undercounts the incidence of cases of election fraud: "The Heritage Foundation's Election Fraud Database presents a sampling of recent proven instances of election fraud from across the country. This database is not an exhaustive or comprehensive list." *Id.*

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[5] *Available at* https://votingrights.news21.com/interactive/election-fraud-database/&xid=17259,15700023,15700124,15700149,15700186,15700191,15700201,15700237,15700242

[6] *Available at* https://www.heritage.org/voterfraud/search?combine=&state=All&year=&case_type=All&fraud_type=24489&page=12.

The public record abounds with recent examples of such fraudulent absentee-ballot schemes. For example, in November 2019, the mayor of Berkeley, Missouri was indicted on five felony counts of absentee ballot fraud for changing votes on absentee ballots to help him and his political allies to get elected. Brian Heffernan, *Berkeley Mayor Hoskins Charged with 5 Felony Counts of Election Fraud*, ST. LOUIS PUBLIC RADIO (Nov. 21, 2019).[7] Mayor Hoskins' scheme included "going to the home of elderly ... residents" to harvest absentee ballots, "filling out absentee ballot applications for voters and having his campaign workers do the same," and "altering absentee ballots" after he had procured them from voters. *Id.* Again, in 2016, a state House race in Missouri was overturned amid allegations of widespread absentee-ballot fraud that had occurred across multiple election cycles in the same community. Sarah Fenske, *FBI, Secretary of State Asking Questions About St. Louis Statehouse Race*, RIVERFRONT TIMES (Aug. 16, 2016).[8] One candidate stated that it was widely known in the community that the incumbent ran an "absentee game" that resulted in the absentee vote tipping the outcome in her favor in multiple close elections. *Id.*

Other States have similar experiences. In 2018, a federal Congressional race was overturned in North Carolina, and eight political operatives were indicted for fraud, in an absentee-ballot scheme that sufficed to change the outcome of the election. Richard

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[7] *Available at* https://news.stlpublicradio.org/post/berkeley-mayor-hoskins-charged-5-felony-counts-election-fraud#stream/0

[8] *Available at* https://www.riverfronttimes.com/newsblog/2016/08/16/fbi-secretary-of-state-asking-questions-about-st-louis-statehouse-race.

Gonzales, *North Carolina GOP Operative Faces New Felony Charges That Allege Ballot Fraud*, NPR.ORG, (July 30, 2019).[9] The indicted operatives "had improperly collected and possibly tampered with ballots," and were charged with "improperly mailing in absentee ballots for someone who had not mailed it themselves." *Id.*

In the North Carolina case, the lead investigator testified that the investigation was "a continuous case" over two election cycles, and that the scheme involved collecting absentee ballots from voters, altering the absentee ballots, and forging witness signatures on the ballots. *See In re: Investigation of Irregularities Affecting Counties Within the 9th Congressional District*, North Carolina Board of Elections, Evidentiary Hearing, at 2-3.[10] The investigators described it as a "coordinated, unlawful, and substantially resourced absentee ballots scheme." *Id.* at 2. According to the investigators' trial presentation, the investigation involved 142 voter interviews, 30 subject and witness interviews, and subpoenas of documents, financial records, and phone records. *Id.* at 3. The perpetrators collected absentee ballots and falsified ballot witness certifications outside the presence of the voters. *Id.* at 10, 13. The congressional election at issue was decided by margin of less than 1,000 votes. *Id.* at 4. The scheme involved the submission of well over 1,000 fraudulent absentee ballots and request forms. *Id.* at 11. The perpetrators took extensive steps to conceal the fraudulent scheme,

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[9] *Available at* https://www.npr.org/2019/07/30/746800630/north-carolina-gop-operative-faces-new-felony-charges-that-allege-ballot-fraud.

[10] *Available at* https://images.radio.com/wbt/Voter%20ID_%20Website.pdf.

which lasted over multiple election cycles before it was detected. *Id.* at 14.

Similarly, in 2016, a politician in the Bronx was indicted and pled guilty to 242 counts of election fraud based on an absentee ballot fraud scheme. Ben Kochman, *Bronx politician pleads guilty in absentee ballot scheme for Assembly election,* NEW YORK DAILY NEWS (Nov. 22, 2016).[11] Despite pleading guilty to 242 felonies involving absentee ballot fraud in an election that was decided by two votes, the defendant received no jail time and vowed to run for office again after a short disqualification period. *Id.*

The increases in mail-in voting due to the COVID-19 pandemic likewise increased opportunities for fraud. For instance, in May 2020, the leader of the New Jersey NAACP called for an election in Paterson, New Jersey to be overturned due to widespread mail-in ballot fraud. *See* Jonathan Dienst et al., *NJ NAACP Leader Calls for Paterson Mail-In Vote to Be Canceled Amid Corruption Claims*, NBC NEW YORK (May 27, 2020).[12] "'Invalidate the election. Let's do it again,' [the NAACP leader] said amid reports more that 20 percent of all ballots were disqualified, some in connection with voter fraud allegations." *Id.*

Hundreds of other reported cases highlight the same concerns about the vulnerability of voting by mail to fraud and abuse. Recently, a Missouri court considered extensive expert testimony reviewing absentee-ballot fraud cases like these. *Findings of*

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[11] *Available at* http://www.nydailynews.com/new-york/nyc-crime/bronx-pol-pleads-guilty-absentee-ballot-scheme-article-1.2884009.

[12] *Available at* https://www.nbcnewyork.com/news/politics/nj-naacp-leader-calls-for-paterson-mail-in-vote-to-be-canceled-amid-fraud-claims/2435162/.

Fact, Conclusions of Law, and Final Judgment in Mo. State Conference of the NAACP v. *State*, No. 20AC-CC00169-01 (Circuit Court of Cole County, Missouri Sept. 24, 2020), *aff'd*, 607 S.W.3d 728 (Mo. banc Oct. 9, 2020) ("*Mo. NAACP*"). The court held that cases of absentee-ballot fraud "have several common features that persist across multiple recent cases: (1) close elections; (2) perpetrators who are candidates, campaign workers, or political consultants, not ordinary voters; (3) common techniques of ballot harvesting; (4) common techniques of signature forging; (5) fraud that persisted across multiple elections before it was detected; (6) massive resources required to investigate and prosecute the fraud; and (7) lenient criminal penalties." *Id.* at 17. Thus, the court concluded "that fraud in voting by mail is a recurrent problem, that it is hard to detect and prosecute, that there are strong incentives and weak penalties for doing so, and that it has the capacity to affect the outcome of close elections." *Id.* The court held that "the threat of mail-in ballot fraud is real." *Id.* at 2.

III. The Bill of Complaint Alleges that the Defendant States Unconstitutionally Abolished Critical Safeguards Against Fraud in Voting by Mail.

The Bill of Complaint alleges that non-legislative actors in each Defendant State unconstitutionally abolished or diluted statutory safeguards against fraud enacted by their state Legislatures, in violation of the Presidential Electors Clause. U.S. CONST. art. II, § 1, cl. 4. All the unconstitutional changes to election procedures identified in the Bill of Complaint have two common features: (1) They abrogated

statutory safeguards against fraud that responsible observers have long recommended for voting by mail, and (2) they did so in a way that predictably conferred partisan advantage on one candidate in the Presidential election. Such allegations are serious, and they warrant this Court's review.

Abolishing signature verification. First, the proposed Bill of Complaint alleges that non-legislative actors in Pennsylvania, Michigan, and Georgia unilaterally abolished or weakened signature-verification requirements for mailed ballots. It alleges that Pennsylvania's Secretary of State abrogated Pennsylvania's statutory signature-verification requirement for mail-in ballots in a "friendly" settlement of a lawsuit brought by activists. Bill of Complaint, ¶¶ 44-46. It alleges that Michigan's Secretary of State permitted absentee ballot applications online, with no signature at all, in violation of Michigan statutes, *id.* ¶¶ 85-89; and that election officials in Wayne County, Michigan simply disregarded statutory signature verification requirements, *id.* ¶¶ 92-95. And it alleges that Georgia's Secretary of State unilaterally abrogated Georgia's statute authorizing county registrars to engage in signature verification for absentee ballots in another lawsuit settlement. *Id.* ¶¶ 66-72.

In addition to violating the Electors Clause, these actions contradicted fundamental principles of ballot security. As noted above, the Carter-Baker Report highlighted the importance of "*signature verification*" as a critical "safeguard[] to protect ballot integrity" for ballots cast by mail. Carter-Baker Report, *supra*, at 35 (emphasis added). Without safeguards such as signature verification, the Report stated that "[v]ote by mail is ... likely to increase the risks of fraud and

contested elections ... where the safeguards for ballot integrity are weaker." *Id.* The importance of signature verification is hard to overstate, because absentee-ballot fraud schemes commonly involve "common techniques of signature forging," typically by nefarious actors who are unfamiliar with the voter's signature. *Mo. NAACP*, *supra*, at 17. Verifying the voter's signature thus provides a fundamental safeguard against fraud.

Insecure ballot handling. The Bill of Complaint alleges that non-legislative actors changed or abolished statutory rules for the secure handling of absentee and mail-in ballots in Pennsylvania, Michigan, and Wisconsin. It alleges that election officials in Democratic areas of Pennsylvania violated state statutes by opening and reviewing mail-in ballots that were required to be kept locked and secure until Election Day. Bill of Complaint, ¶¶ 50-51. It alleges that Michigan's Secretary of State, acting in violation of state law, sent 7.7 million unsolicited absentee-ballot applications to Michigan voters, thus "flooding Michigan with millions of absentee ballot applications prior to the 2020 general election." *Id.* ¶¶ 80-84. And it alleges that the Wisconsin Election Commission violated state law by placing hundreds of unmonitored boxes for the submission of absentee and mail-in ballots around the State, concentrated in heavily Democratic areas. *Id.* ¶¶ 107-114.

In addition to violating the Electors Clause, these actions contradicted commonsense ballot-security recommendations. The Department of Justice's Manual on *Federal Prosecution of Election Offenses* notes that vulnerability to mishandling is what makes absentee ballots "particularly susceptible to fraudulent abuse" because "they are marked and

cast outside the presence of election officials and the structured environment of a polling place." DOJ Manual, at 28-29. According to the Manual, "[o]btaining and marking absentee ballots without the active input of the voters involved" is one of "the more common ways" that election fraud "crimes are committed." *Id.* at 28. For this reason, the Carter-Baker Commission made recommendations in favor of preventing such insecurity in the handling of ballots. For example, the Commission recommended that "States should make sure that absentee ballots received by election officials before Election Day are kept secure until they are opened and counted." *Id.* at 46. It also recommended that States "prohibit[] 'third-party' organizations, candidates, and political party activists from handling absentee ballots." *Id.*

Inconsistent Statewide Standards. The Bill of Complaint alleges that the Defendant States provided different standards and treatment for mail-in ballots submitted in different areas of each State, and that this differential treatment uniformly provided a partisan advantage to one side in the Presidential election. It alleges that election officials in Philadelphia and Allegheny County, Pennsylvania, applied different standards to voters in those Democratic strongholds than applied to other voters in Pennsylvania, in violation of state law. Bill of Complaint, ¶¶ 52-54. Similarly, it alleges that Milwaukee, Wisconsin violated state law by authorizing election officials to "correct" disqualifying omissions on ballot envelopes by entering information that the voter should have entered with a red pen, while no similar "correction" process was granted to other voters in that State. *Id.* ¶¶ 123-127. And it alleges that Wayne County, Michigan provided

differential treatment of its voters, in violation of state statutes, by simply ignoring statutorily required signature-verification requirements. *Id.* ¶¶ 92-95.

Such differential treatment, under circumstances raising concerns of partisan bias, contradicts universal recommendations for integrity and public confidence in elections. As this Court stated in *Bush* v. *Gore*, "[t]he idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government." 531 U.S. at 107 (quoting *Moore* v. *Ogilvie*, 394 US 814 (1969)). The Carter-Baker Report noted that "inconsistent or incorrect application of electoral procedures may have the effect of discouraging voter participation and may, on occasion, raise questions about bias in the way elections are conducted." Carter-Baker Report, at 49. "Such problems raise public suspicions or may provide grounds for the losing candidate to contest the result in a close election." *Id.*

Excluding Bipartisan Observers. The Bill of Complaint alleges that certain counties in Defendant States excluded bipartisan observers from the ballot-opening and ballot-counting processes. For example, it alleges that election officials in Philadelphia and Allegheny County, Pennsylvania, violated state law by excluding Republican observers from the opening, counting, and recording of absentee ballots in those counties. Bill of Complaint, ¶ 49. And it alleges that election officials in Wayne County, Michigan violated state statutes by systematically excluding poll watchers from the counting and recording of absentee ballots. *Id.* ¶¶ 90-91.

Such actions, as alleged, raise concerns about the integrity of the vote count in those counties. As

the Carter-Baker Report emphasized, States should "provide observers with meaningful opportunities to monitor the conduct of the election." Carter-Baker Report, at 47. "To build confidence in the electoral process, it is important that elections be administered in a neutral and professional manner," without the appearance of partisan bias." *Id.* at 49. When observers of one political party are illegally and systematically excluded from observing the vote count, "the appearance of partisan bias" is inevitable. *Id.* For counties in Defendant States to exclude Republican observers weakens public confidence in the electoral process and raises grave concerns about the integrity of ballot counting in those counties.

Extending the Deadline to Receive Ballots. The Bill of Complaint alleges that a non-legislative actor in Pennsylvania—its Supreme Court—extended the statutory deadline to receive absentee and mail-in ballots without authorization from the "Legislature thereof," and that it directed that ballots with illegible postmarks or no postmarks at all would be deemed timely if received within the extended deadline. Bill of Complaint, ¶¶ 48, 55. Again, these non-legislative changes raise concerns about election integrity in Pennsylvania. They created a post-election window of time during which nefarious actors could wait and see whether the Presidential election would be close, and whether perpetrating fraud in Pennsylvania would be worthwhile. And they enhanced the opportunities for fraud by mandating that late ballots must be counted even when they are not postmarked or have no legible postmark, and thus there is no evidence they were mailed by Election Day.

These changes created needless vulnerability to actual fraud and undermined public confidence in the

election. As the Department of Justice's Manual of *Federal Prosecution of Election Offenses* states, "the conditions most conducive to election fraud are close factional competition within an electoral jurisdiction for an elected position that matters." DOJ Manual, at 2-3. "[E]lection fraud is most likely to occur in electoral jurisdictions where there is close factional competition for an elected position that matters." *Id.* at 27. That statement exactly describes the conditions in each of the Defendant States in the recent Presidential election.

CONCLUSION

The allegations in the Bill of Complaint raise important constitutional issues under the Electors Clause of Article II, § 1. They also raise serious concerns relating to election integrity and public confidence in elections. These are questions of great public importance that warrant this Court's attention. The Court should grant the Plaintiff's Motion for Leave to File Bill of Complaint.

December 9, 2020

Respectfully submitted,

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[To be inserted]

Jeffrey DeSousa

From: James Percival
Sent: Wednesday, December 9, 2020 9:54 AM
To: Kevin Golembiewski; Christopher Baum; Jeffrey DeSousa; Evan Ezray; David Costello
Cc: Amit Agarwal
Subject: Time Sensitive Team Meeting

For those who can join, we are having a meeting on a time sensitive issue at 10:10. I'll follow back with an invite.

This is a higher priority than other office tasks so please join if you can.

Jeffrey DeSousa

From: Evan Ezray
Sent: Wednesday, December 9, 2020 9:51 AM
To: Amit Agarwal
Cc: James Percival; Jeffrey DeSousa
Subject: RE:

Amit,

The safe harbor deadline provides that if a state has a pre-election procedure for appointing electors and, consistent with that pre-election law, makes a determination of the appointment of electors "at least six days before the time fixed for the meeting of the electors," then that determination "shall govern in the counting of the electoral votes." 3 U.S.C. § 5. This year, the meeting of electors will take place on December 14 (which is the first Monday after the second Wednesday in December). 3 U.S.C. § 7. That made the safe harbor day December 8.

The upshot is that if a state meets the safe harbor deadline and then its electors meet, those electors "shall govern" in the counting of electoral votes.

As far as I can tell every state save Wisconsin met the safe harbor. *See* https://www.jsonline.com/story/news/politics/elections/2020/12/08/wisconsin-only-state-miss-election-safe-harbor-deadline/6496378002/.

Last, I would note that the safe harbor provision played a key role in *Bush v. Gore*. To summarize, the majority thought that Florida had a legislatively-expressed desire to meet the safe harbor, and therefore, was unwilling to allow a recount to extend beyond the deadline. The dissent gave the safe harbor a much smaller role.

I have included the full text of the safe harbor and some key quotes from the *Bush v. Gore* debate below.

Happy to answer any additional questions,
Evan

- Safe harbor text. "If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned." 3 U.S.C. § 5.
    - Meeting of electors is the first Monday after the second Wednesday in December. 3 U.S. 7. That is December 14, so the safe harbor is December 8.
- *Bush v. Gore* debate on safe harbor
    - PC: "Seven Justices of the Court agree that there are constitutional problems with the recount ordered by the Florida Supreme Court that demand a remedy. The only disagreement is as to the remedy. Because the Florida Supreme Court has said that the Florida Legislature intended to obtain the safe-harbor benefits of 3 U.S.C. § 5, Justice BREYER's proposed

remedy—remanding to the Florida Supreme Court for its ordering of a constitutionally proper contest until December 18–contemplates action in violation of the Florida Election Code, and hence could not be part of an "appropriate" order authorized by Fla. Stat. Ann. § 102.168(8) (Supp.2001)."

- Rehnquist concurrence:
  - "If we are to respect the legislature's Article II powers, therefore, we must ensure that postelection state-court actions do not frustrate the legislative desire to attain the 'safe harbor' provided by § 5."
  - "in light of the legislative intent identified by the Florida Supreme Court to bring Florida within the "safe harbor" provision of 3 U.S.C. § 5, the remedy prescribed by the Supreme Court of Florida cannot be deemed an "appropriate" one as of December 8. It significantly departed from the statutory framework in place on November 7, and authorized open-ended further proceedings which could not be completed by December 12, thereby preventing a final determination by that date."
- Stevens dissent:
  - "It hardly needs stating that Congress, pursuant to 3 U.S.C. § 5, did not impose any affirmative duties upon the States that their governmental branches could "violate." Rather, § 5 provides a safe harbor for States to select electors in contested elections "by judicial or other methods" established by laws prior to the election day. Section 5, like Article II, assumes the involvement of the state judiciary in interpreting state election laws and resolving election disputes under those laws. Neither § 5 nor Article II grants federal judges any special authority to substitute their views for those of the state judiciary on matters of state law."
- Souter dissent:
  - "The 3 U.S.C. § 5 issue is not serious. That provision sets certain conditions for treating a State's certification of Presidential electors as conclusive in the event that a dispute over recognizing those electors must be resolved in the Congress under 3 U.S.C. § 15. Conclusiveness requires selection under a legal scheme in place before the election, with results determined at least six days before the date set for casting electoral votes. But no State is required to conform to § 5 if it cannot do that (for whatever reason); the sanction for failing to satisfy the conditions of § 5 is simply loss of what has been called its "safe harbor." And even that determination is to be made, if made anywhere, in the Congress."
- Ginsburg dissent:
  - "the December 12 "deadline" for bringing Florida's electoral votes into 3 U.S.C. § 5's safe harbor lacks the significance the Court assigns it. Were that date to pass, Florida would still be entitled to deliver electoral votes Congress must count unless both Houses find that the votes "ha [d] not been ... regularly given." 3 U.S.C. § 15. The statute identifies other significant dates. See, e.g., § 7 (specifying *144 December 18 as the date electors "shall meet and give their votes"); § 12 (specifying "the fourth Wednesday in December"—this year, December 27—as the date on which Congress, if it has not received a State's electoral votes, shall request the state secretary of state to send a certified return immediately). But none of these dates has ultimate significance in light of Congress' detailed provisions for determining, on "the sixth day of January," the validity of electoral votes."
- Breyer dissent:
  - "However, § 5 is part of the rules that govern Congress' recognition of slates of electors. Nowhere in Bush I did we *149 establish that this Court had the authority to enforce § 5. Nor did we suggest that the permissive "counsel against" could be transformed into the mandatory "must ensure." And nowhere did we intimate, as the concurrence

does here, that a state-court decision that threatens the safe harbor provision of § 5 does so in violation of Article II."

- "The parties before us agree that whatever else may be the effect of this section, it creates a "safe harbor" for a State insofar as congressional consideration of its electoral votes is concerned. If the state legislature has provided for final determination of contests or controversies by a law made prior to election day, that determination shall be conclusive if made at least six days prior to said time of meeting *78 of the electors. The Florida Supreme Court cited 3 U.S.C. §§ 1-10 in a footnote of its opinion, 772 So.2d, at 1238, n. 55, but did not discuss § 5. Since § 5 contains a principle of federal law that would assure finality of the State's determination if made pursuant to a state law in effect before the election, a legislative wish to take advantage of the "safe harbor" would counsel against any construction of the Election Code that Congress might deem to be a change in the law." *Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70, 77–78 (2000).

From: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Sent: Wednesday, December 9, 2020 12:19 AM
To: Evan Ezray <Evan.Ezray@myfloridalegal.com>
Subject: Fw:

Can you please take a look at this tomorrow morning?

From: John Guard <John.Guard@myfloridalegal.com>
Sent: Wednesday, December 9, 2020 12:15 AM
To: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Subject:

Can you have someone look at the safe harbor and its effect here?

Get Outlook for iOS

Jeffrey DeSousa

From: John Guard
Sent: Wednesday, December 9, 2020 12:16 AM
To: Amit Agarwal

Can you have someone look at the safe harbor and its effect here?

Get Outlook for iOS

Jeffrey DeSousa

From:	Jeffrey DeSousa
Sent:	Tuesday, December 8, 2020 9:50 PM
To:	Amit Agarwal
Cc:	Evan Ezray
Subject:	Preliminary questions about amicus brief

Considerations

Amit, here is a very preliminary set of questions that might guide our deliberations in this case:

1. Is joining inconsistent with a broad application of *Purcell*
    a. E.g., The *amicus* brief argues that "[the Bill of Complaint] alleges that Michigan's Secretary of State permitted absentee ballot applications online, with no signature at all, in violation of Michigan statutes." Is this the sort of challenge that a litigant should bring *before* voters cast their ballots? Otherwise, is there a risk that voters may be induced into believing they have a safe harbor to request a VBM ballot online without a signature only to have their reliance in the State or local government's rule undermined by subsequent litigation? In other words, would changing the rules in a post-election lawsuit disenfranchise voters who relied on regulations set by local and state officials in their states?
2. Does argument 2 in the Bill of Complaint (alleging that changes made by Executive and Judicial officials favored Democrat voters in the defendant states) embrace the sort of theory the Supreme Court recently rejected in *Rucho*, where it held that partisan gerrymandering presents a political question?
3. Would a strict reading of the Electors Clause and the Elections Clause implicate Florida election regulations contained in the Florida Constitution?
    a. Florida has constitutionalized certain voting regulations in Art. VI of the Florida Constitution. These include the requirements that felons are disqualified from voting unless they have completed "all terms of sentence," Art. VI, s. 4(a); elections shall be decided by a "plurality" of votes cast, Art. VI, s. 1; setting the date of elections and providing that "If all candidates for an office have the same party affiliation and the winner will have no opposition in the general election, all qualified electors, regardless of party affiliation, may vote in the primary elections for that office." Art. VI, s. 5(a)-(b).
    b. Because the Florida Legislature does not enact the Florida Constitution, would these regulations be subject to challenge on the theory that only the State Legislature can regulate the time, place, and manner of elections?
4. Will Florida executive officials wish to enter into settlements in the future that might be implicated by this litigation?
5. Does this lawsuit embrace a broad view of standing that would open Florida to future suit; e.g., could California sue us to enforce voting rights in the future? Would this raise the specter of one state suing another to complain that one state's anti-fraud measures are inadequate?
6. Would this litigation impede the ability of State and local government to respond to emergencies, including emergencies that may be unique to Florida?
    a. E.g., what if a hurricane struck Florida during the election cycle and the Secretary and Governor sought to make changes to loosen voting restrictions to accommodate voters who otherwise would be disenfranchised? What if a hurricane struck on election day and the Governor extended in-person voting by three days to accommodate voters in the affected region?
7. Would this litigation impede the ability of local SOEs to regulate elections as they see fit?
    a. *Amicus* notes that Texas may have colorable challenges to "inconsistent statewide standards"; does Florida law create or allow similar discrepancies? For instance, could another state challenge the fact that some large counties prepay the postage on VBM ballots (making it easier for their voters to

vote), while others do not? Could they challenge our election administration on the ground that some counties use a larger number of VBM drop boxes than others, which might conceivably affect the accessibility of voting in those counties?

8. Was it improper for the Governor/Secretary to expend the voter registration deadline after website crashed?
9. Was it improper for the Governor to allow County Canvassing Boards to begin canvassing vote-by-mail ballots "upon completion of the public Logic & Accuracy of tabulation machines/equipment," a point we noted in our *Nielsen* PI opposition brief?
10. The AG and Secretary explained in *Nielsen* that the Governor has broad emergency powers, including the regulate election administration: "The Governor's management of the COVID-19 pandemic is an exercise of his constitutional authority as the official with "supreme executive power" to respond to matters of Statewide concern. See Fla. Const. Art. IV, § 1(a). It is also an exercise of his statutory responsibility for "meeting the dangers presented to this state and its people by emergencies," like the ongoing COVID-19 crisis. See Fla. Stat. § 252.36(1)(a). To meet these hazards, the Governor may, among other things, "issue executive orders, proclamations, and rules" that "have the force and effect of law," id. § 252.36(1)(b), and "[s]uspend the provisions of any regulatory statute . . . if strict compliance with the provisions of any such statute, order, or rule would in any way prevent, hinder, or delay necessary action in coping with the emergency," id. § 252.36(5)(a)." Would this litigation call into question these delegations of authority to the Governor?

Amicus brief summary

Here's a summary of the arguments presented in the *amicus* brief:

- SOP provision of Electors Clause is a structural check that guarantees liberty
- Reducing VBM fraud safeguards exacerbates risk of fraud
    - Critique of VBM generally as susceptible to fraud
    - Discussion of infinitesimal numbers of VBM fraud
- Bill of complaint alleges that non-legislative state actors abolished "critical safeguards against fraud"
    - Abolishing signature verification
    - Insecure ballot handling
    - Inconsistent statewide standards
    - Excluding bipartisan observers
    - Extending deadline to receive ballot

PA _amicus_ in _Boockvar_ summary

- The Election Clauses' Separation-of-Powers Provisions Safeguard Liberty
- Voting by Mail Creates Unique Risks of Fraud, Including in Pennsylvania
- The Pennsylvania Supreme Court's Decision Exacerbated the Risks of Ballot Fraud.

Best,

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From: Jeffrey DeSousa
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Cc: Evan Ezray
Subject: Boockvar amicus brief joined by Florida

https://www.scotusblog.com/wp-content/uploads/2020/11/20201109134744257_2020-11-09-Republican-Party-of-Pa.-v.-Boockvar-Amicus-Brief-of-Missouri-et-al.-Final-With-Tables.pdf

In the Supreme Court of the United States - SCOTUSblog

Nos. 20-542, 20-574 In the Supreme Court of the United States REPUBLICAN PARTY OF PENNSYLVANIA, Petitioner, v. KATHY BOOCKVAR, IN HER OFFICIAL CAPACITY AS PENNSYLVANIA SECRETARY OF STATE, ET AL., Respondents. JOSEPH B. SCARNATI, III, ET AL. Petitioners, v. KATHY BOOCKVAR, IN HER OFFICIAL CAPACITY AS PENNSYLVANIA SECRETARY OF STATE, ET AL., On Petitions for Writs of Certiorari to the

www.scotusblog.com

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Sent: Tuesday, December 8, 2020 7:11 PM
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Subject: Texas v. Pennsylvania, et al. - Amicus Brief of Missouri, at al. - Joins requested by 1:00 p.m. Central Tomorrow, 12/9
Attachments: 2020-12-07 - Texas v. Pennsylvania, et al. - Bill of Complaint.pdf; 2020-12-08 - Texas v. Pennsylvania - Amicus Brief of Missouri et al.docx

All-

Attached please find a draft multistate amicus brief in support of Texas's motion for leave to file a bill of complaint in the U.S. Supreme Court challenging the administration of the recent Presidential election in Pennsylvania, Michigan, Wisconsin, and Georgia. The brief argues that (1) the separation-of-powers provision of the Electors Clause of Article II, Section 1 is an important structural check on government that safeguards individual liberty; (2) voting by mail presents real concerns for fraud and abuse that require statutory safeguards to protect against such fraud and abuse; and (3) the abrogation of statutory safeguards against fraud in voting by mail by non-legislative actors violates the Electors Clause and undermines public confidence in elections. For your reference, I have also attached Texas's Motion for Leave to File Bill of Complaint and related documents.

With apologies for the short deadline, given the time-sensitivity of this case, we are requesting joins by **1:00 p.m. Central TOMORROW**, 12/9. We are planning to file tomorrow afternoon.

Thanks a lot,

John Sauer

No. _____, Original

In the Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

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

Defendants.

MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

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In the Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

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

Defendants.

MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

Pursuant to 28 U.S.C. § 1251(a) and this Court's Rule 17, the State of Texas respectfully seeks leave to file the accompanying Bill of Complaint against the States of Georgia, Michigan, and Wisconsin and the Commonwealth of Pennsylvania (collectively, the "Defendant States") challenging their administration of the 2020 presidential election.

As set forth in 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.

- Intrastate differences in the treatment of voters, with more favorable allotted to voters – whether lawful or unlawful – in areas administered by local government under Democrat control and with populations with higher ratios of Democrat voters than other areas of Defendant States.
- 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.

All these flaws – even the violations of *state* election law – violate one or more of the federal requirements for elections (*i.e.*, equal protection, due process, and the Electors Clause) and thus arise under federal law. *See 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). Plaintiff State respectfully submits that the foregoing types of electoral irregularities exceed the hanging-chad saga of the 2000 election in their degree of departure from both state and federal law. Moreover, these flaws cumulatively preclude knowing who legitimately won the 2020 election and threaten to cloud all future elections.

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.

December 7, 2020

Respectfully submitted,

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No. _____, Original

In the Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

COMMONWEALTH OF PENNSYLVANIA, STATE OF STATE OF GEORGIA, STATE OF MICHIGAN, 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 democracy. The public, and indeed the candidates themselves, have a compelling interest in ensuring that the selection of a President—any President—is legitimate. If that trust is lost, the American Experiment will founder. A dark cloud hangs over the 2020 Presidential election.

Here is what we know. Using the COVID-19 pandemic as a justification, government officials in the defendant states of Georgia, Michigan, and Wisconsin, and the Commonwealth of Pennsylvania (collectively, "Defendant States"), usurped their legislatures' authority and unconstitutionally revised their state's election statutes. They accomplished these statutory revisions through executive fiat or friendly lawsuits, thereby weakening ballot integrity. Finally, these same government officials flooded the Defendant States with millions of ballots to be sent through the mails, or placed in drop boxes, with little

or no chain of custody[1] and, at the same time, weakened the strongest security measures protecting the integrity of the vote—signature verification and witness requirements.

Presently, evidence of material illegality in the 2020 general elections held in Defendant States grows daily. And, to be sure, the two presidential candidates who have garnered the most votes have an interest in assuming the duties of the Office of President without a taint of impropriety threatening the perceived legitimacy of their election. However, 3 U.S.C. § 7 requires that presidential electors be appointed on December 14, 2020. That deadline, however, should not cement a potentially illegitimate election result in the middle of this storm—a storm that is of the Defendant States' own making by virtue of their own unconstitutional actions.

This Court is the only forum that can delay the deadline for the appointment of presidential electors under 3 U.S.C. §§ 5, 7. To safeguard public legitimacy at this unprecedented moment and restore public trust in the presidential election, this Court should extend the December 14, 2020 deadline for Defendant States' certification of presidential electors to allow these investigations to be completed. Should one of the two leading candidates receive an absolute majority of the presidential electors' votes to be cast on December 14, this would finalize the selection of our President. The only date that is mandated under

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[1] *See* https://georgiastarnews.com/2020/12/05/dekalb-county-cannot-find-chain-of-custody-records-for-absentee-ballots-deposited-in-drop-boxes-it-has-not-been-determined-if-responsive-records-to-your-request-exist/

the Constitution, however, is January 20, 2021. U.S. CONST. amend. XX.

Against that background, the State of Texas ("Plaintiff State") brings this action against Defendant States based on the following allegations:

NATURE OF THE ACTION

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

2. This case presents a question of law: Did Defendant States violate the Electors Clause (or, in the alternative, the Fourteenth Amendment) by taking—or allowing—non-legislative actions to change the election rules that would govern the appointment of presidential electors?

3. Those unconstitutional changes opened the door to election irregularities in various forms. Plaintiff State alleges 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 and to restore public trust in this election.

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 Defendant States acted in a common pattern. State officials, sometimes through pending litigation (*e.g.*, settling "friendly" suits) and sometimes unilaterally by executive fiat, announced new rules for the conduct of the 2020 election that were inconsistent with existing state statutes defining what constitutes a lawful vote.

6. Defendant States also failed to segregate ballots in a manner that would permit 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 the Defendant States' presidential electors.

7. The rampant lawlessness arising out of Defendant States' unconstitutional acts is described in a number of currently pending lawsuits in Defendant States or in public view including:

- *Dozens of witnesses testifying under oath about*: the physical blocking and kicking out of Republican poll challengers; thousands of the same ballots run multiple times through tabulators; mysterious late night dumps of thousands of ballots at tabulation centers; illegally backdating thousands of ballots; signature verification procedures ignored; more

than 173,000 ballots in the Wayne County, MI center that cannot be tied to a registered voter;[2]

- *Videos of*: poll workers erupting in cheers as poll challengers are removed from vote counting centers; poll watchers being blocked from entering vote counting centers—despite even having a court order to enter; suitcases full of ballots being pulled out from underneath tables after poll watchers were told to leave.
- *Facts for which no independently verified reasonable explanation yet exists*: On October 1, 2020, in Pennsylvania 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, and potentially could be used to alter vote tallies; In Michigan, which also employed the same Dominion voting system, on November 4, 2020, Michigan election officials have admitted that a purported "glitch" caused 6,000 votes for President Trump to be wrongly switched to Democrat Candidate Biden. A flash drive containing tens of thousands of votes was left unattended in the Milwaukee tabulations center in the early morning hours of Nov. 4, 2020, without anyone aware it was not in a proper chain of custody.

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[2] All exhibits cited in this Complaint are in the Appendix to the Plaintiff State's forthcoming motion to expedite ("App. 1a-151a"). *See* Complaint (Doc. No. 1), *Donald J. Trump for President, Inc. v. Benson*, 1:20-cv-1083 (W.D. Mich. Nov. 11, 2020) at ¶¶ 26-55 & Doc. Nos. 1-2, 1-4.

8. Nor was this Court immune from the blatant disregard for the rule of law. Pennsylvania itself played fast and loose with its promise to this Court. 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).

9. Expert analysis using a commonly accepted statistical test further raises serious questions as to the integrity of this election.

10. The probability of former Vice President Biden winning the popular vote in the four Defendant States—Georgia, Michigan, Pennsylvania, and Wisconsin—independently given President Trump's early lead in those States as of 3 a.m. on November 4, 2020, is less than one in a quadrillion, or 1 in 1,000,000,000,000,000. For former Vice President Biden to win these four States collectively, the odds of

that event happening decrease to less than one in a quadrillion to the fourth power (*i.e.*, 1 in 1,000,000,000,000,000[4]). *See* Decl. of Charles J. Cicchetti, Ph.D. ("Cicchetti Decl.") at ¶¶ 14-21, 30-31. *See* App. 4a-7a, 9a.

11. The same less than one in a quadrillion statistical improbability of Mr. Biden winning the popular vote in the four Defendant States—Georgia, Michigan, Pennsylvania, and Wisconsin—independently exists when Mr. Biden's performance in each of those Defendant States is compared to former Secretary of State Hilary Clinton's performance in the 2016 general election and President Trump's performance in the 2016 and 2020 general elections. Again, the statistical improbability of Mr. Biden winning the popular vote in these **four** States collectively is 1 in 1,000,000,000,000,000[5]. *Id.* 10-13, 17-21, 30-31.

12. Put simply, there is substantial reason to doubt the voting results in the Defendant States.

13. 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 textually applies to the Article II process of selecting presidential electors).

14. Plaintiff States and their voters 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.

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

16. 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 constitutional democracy requires that states conduct presidential elections in accordance with the rule of law and federal constitutional guarantees.

JURISDICTION AND VENUE

17. 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).

18. 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 v. Gore*, 531 U.S. 98, 105 (2000) (quoting *Reynolds v. Sims*, 377 U. S. 533, 555 (1964)) (*Bush II*). In other words, Plaintiff State is acting to protect the interests of its respective citizens in the fair and constitutional conduct of elections used to appoint presidential electors.

19. 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 states "special solicitude in standing analysis"). Moreover, redressability likely would undermine a suit against a single state officer or State because no one State's electoral votes will make a difference in the election outcome. This action against multiple State defendants is the only adequate remedy for Plaintiff States, and this Court is the only court that can accommodate such a suit.

20. 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.

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

PARTIES

22. Plaintiff is the State of Texas, which is a sovereign State of the United States.

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

LEGAL BACKGROUND

24. 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.

25. "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).

26. 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)).

27. 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).

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

29. 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.

30. 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.").

31. 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.

32. 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.).

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

FACTS

34. 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 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.

35. 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).

36. 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),[3] 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.

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

37. 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 Defendant States' unconstitutional modification of statutory protections designed to ensure ballot integrity, Defendant States created a massive opportunity for fraud. In addition, the Defendant States have made it difficult or impossible to separate the constitutionally tainted mail-in ballots from all mail-in ballots.

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

39. Significantly, in 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.

40. The outcome of the Electoral College vote is directly affected by the constitutional violations committed by Defendant States. Plaintiff State complied 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 by unlawfully abrogating state election laws designed to

protect the integrity of the ballots and the electoral process, and those violations proximately caused the appointment of presidential electors for former Vice President Biden. Plaintiff State will therefore be injured if Defendant States' unlawfully certify these presidential electors.

Commonwealth of Pennsylvania

41. 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.

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

43. 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.

44. 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).

45. 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."

46. 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).

47. 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.

48. 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.

49. Pennsylvania's election law also requires that poll-watchers 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.

50. 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.

51. 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 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.

52. Statewide election officials and local election officials in Philadelphia and Allegheny Counties, aware of the historical Democrat advantage in those counties, 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. *See* Verified Complaint (Doc. No. 1), *Donald J. Trump for President, Inc. v. Boockvar*, 4:20-cv-02078-MWB (M.D. Pa. Nov. 18, 2020) at ¶¶ 3-6, 9, 11, 100-143.

53. 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.

54. The changed process allowing the curing of absentee and mail-in ballots in Allegheny and Philadelphia counties is a separate basis resulting in an unknown number of ballots being treated in an unconstitutional manner inconsistent with Pennsylvania statute. *Id.*

55. In addition, a great number of ballots were received after the statutory deadline and yet

were counted by virtue of the fact that Pennsylvania did not segregate all ballots received after 8:00 pm on November 3, 2020. Boockvar's claim that only about 10,000 ballots were received after this deadline has no way of being proven since Pennsylvania broke its promise to the Court to segregate ballots and co-mingled perhaps tens, or even hundreds of thousands, of illegal late ballots.

56. On December 4, 2020, fifteen members of the Pennsylvania House of Representatives led by Rep. Francis X. Ryan issued a report to Congressman Scott Perry (the "Ryan Report," App. 139a-144a) stating that "[t]he general election of 2020 in Pennsylvania was fraught with inconsistencies, documented irregularities and improprieties associated with mail-in balloting, pre-canvassing, and canvassing that the reliability of the mail-in votes in the Commonwealth of Pennsylvania is impossible to rely upon."

57. The Ryan Report's findings are startling, including:

- Ballots with NO MAILED date. That total is 9,005.
- Ballots Returned on or BEFORE the Mailed Date. That total is 58,221.
- Ballots Returned one day after Mailed Date. That total is 51,200.

Id. 143a.

58. These nonsensical numbers alone total 118,426 ballots and exceed Mr. Biden's margin of 81,660 votes over President Trump. But these discrepancies pale in comparison to the discrepancies in Pennsylvania's reported data concerning the

number of mail-in ballots distributed to the populace—now with no longer subject to legislated mandated signature verification requirements.

59. The Ryan Report also states as follows:

> [I]n a data file received on November 4, 2020, the Commonwealth's PA Open Data sites reported over 3.1 million mail in ballots sent out. The CSV file from the state on November 4 depicts 3.1 million mail in ballots sent out but on November 2, the information was provided that only 2.7 million ballots had been sent out. ***This discrepancy of approximately 400,000 ballots from November 2 to November 4 has not been explained.***

Id. at 143a-44a. (Emphasis added).

60. These stunning figures illustrate the out-of-control nature of Pennsylvania's mail-in balloting scheme. Democrats submitted mail-in ballots at more than two times the rate of Republicans. This number of constitutionally tainted ballots far exceeds the approximately 81,660 votes separating the candidates.

61. This blatant disregard of statutory law renders all mail-in ballots constitutionally tainted and cannot form the basis for appointing or certifying Pennsylvania's presidential electors to the Electoral College.

62. 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.

63. 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

64. 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.

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

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

67. 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.

68. 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).

69. 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).

70. 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).

71. 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.

72. 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.

73. This unconstitutional change in Georgia law materially benefitted former Vice President Biden. According to the Georgia Secretary of State's office, former Vice President Biden had almost double the number of absentee votes (65.32%) as President Trump (34.68%). *See* Cicchetti Decl. at ¶ 25, App. 7a-8a.

74. 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.

75. 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* Cicchetti Decl. at ¶ 24, App. 7a.

76. If the rejection rate of mailed-in absentee ballots remained the same in 2020 as it was in 2016, there would be 83,517 less tabulated ballots in 2020. The statewide split of absentee ballots was 34.68% for Trump and 65.2% for Biden. Rejecting at the higher 2016 rate with the 2020 split between Trump and Biden would decrease Trump votes by 28,965 and Biden votes by 54,552, which would be a net gain for Trump of 25,587 votes. This would be more than needed to overcome the Biden advantage of 12,670 votes, and Trump would win by 12,917 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

77. 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.

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

79. 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.

80. 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.

81. 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.

82. 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).

83. 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.*

84. 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 chose to flood across Michigan.

85. 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.

86. 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."

87. 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.

88. 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.

89. 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 materially benefited from these unconstitutional changes to Michigan's election law.

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

91. 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.

92. 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).

93. 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 materially benefited from these unconstitutional changes to Michigan's election law.

94. 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.[4] 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 instructed not to compare the signature on the absentee ballot with the signature on file.[5]

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[4] *Johnson v. Benson*, Petition for Extraordinary Writs & Declaratory Relief filed Nov. 26, 2020 (Mich. Sup. Ct.) at ¶¶ 71, 138-39, App. 25a-51a.

[5] *Id.*, Affidavit of Jessy Jacob, Appendix 14 at ¶15, attached at App. 34a-36a.

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

96. 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.

97. 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 174,384 absentee ballots out of 566,694 absentee ballots tabulated (about 30.8%) as counted without a registration number for precincts in the City of Detroit. *See* Cicchetti Decl. at ¶ 27, App. 8a. 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 28,377 votes.

98. The extra ballots cast most likely resulted from the phenomenon of Wayne County election workers running the same ballots through a tabulator multiple times, with Republican poll watchers obstructed or denied access, and election officials ignoring poll watchers' challenges, as documented by numerous declarations. App. 25a-51a.

99. 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. *Id.* at ¶ 29.

100. 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.

101. 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. *See* Cicchetti Decl. at ¶ 29, App. 8a.

102. 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 Wisconsin

103. 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.

104. In the 2016 general election some 146,932 mail-in ballots were returned in Wisconsin out of more than 3 million votes cast.[6] In stark contrast, 1,275,019 mail-in ballots, nearly a 900

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

percent increase over 2016, were returned in the November 3, 2020 election.[7]

105. 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).

106. 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.

107. For example, the WEC undertook a campaign to position hundreds of drop boxes to collect absentee ballots—including the use of unmanned drop boxes.[8]

108. 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

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

[8] 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.

of absentee ballots." Wisconsin Safe Voting Plan 2020, at 4 (June 15, 2020).[9]

109. 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.[10]

110. 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 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).

111. 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.

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[9] 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.

[10] *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.

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."

112. 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).

113. 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).

114. 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).

115. 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.

116. 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).

117. 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).

118. 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.

119. 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)."

120. 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."

121. 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."

122. 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.

123. 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).

124. 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.

125. 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. These acts violated WISC. STAT. § 6.87(6d) ("If a certificate is missing the address of a witness, the ballot may not 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.").

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

127. In addition, Ethan J. Pease, a box truck delivery driver subcontracted to the U.S. Postal Service ("USPS") to deliver truckloads of mail-in ballots to the sorting center in Madison, WI, testified

that USPS employees were backdating ballots received after November 3, 2020. Decl. of Ethan J. Pease at ¶¶ 3-13. Further, Pease testified how a senior USPS employee told him on November 4, 2020 that "[a]n order came down from the Wisconsin/Illinois Chapter of the Postal Service that 100,000 ballots were missing" and how the USPS dispatched employees to "find[] . . . the ballots." *Id.* ¶¶ 8-10. One hundred thousand ballots supposedly "found" after election day would far exceed former Vice President Biden margin of 20,565 votes over President Trump.

COUNT I: ELECTORS CLAUSE

128. Plaintiff State repeats and re-alleges the allegations above, as if fully set forth herein.

129. 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.

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

131. 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.

132. The actions set out in Paragraphs 41-128 constitute non-legislative changes to State election law by executive-branch State election officials, or by judicial officials, in Defendant States Pennsylvania, Georgia, Michigan, and Wisconsin, in violation of the Electors Clause.

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

COUNT II: EQUAL PROTECTION

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

135. 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.

136. The one-person, one-vote principle requires counting valid votes and not counting 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").

137. The actions set out in Paragraphs 66-73 (Georgia), 80-93 (Michigan), 44-55 (Pennsylvania), and 106-24 (Wisconsin) created differential voting standards in Defendant States Pennsylvania, Georgia, Michigan, and Wisconsin in violation of the Equal Protection Clause.

138. The actions set out in Paragraphs 66-73 (Georgia), 80-93 (Michigan), 44-55 (Pennsylvania), and 106-24 (Wisconsin) violated the one-person, one-

vote principle in Defendant States Pennsylvania, Georgia, Michigan, and Wisconsin.

139. By the shared enterprise of the entire nation electing the President and Vice President, equal protection violations in one State can and do adversely affect and diminish the weight of votes cast in States that lawfully abide by the election structure set forth in the Constitution. Plaintiff State is therefore harmed by this unconstitutional conduct in violation of the Equal Protection or Due Process Clauses.

COUNT III: DUE PROCESS

140. Plaintiff State repeats and re-alleges the allegations above, as if fully set forth herein.

141. When election practices reach "the point of patent and fundamental unfairness," the integrity of the election itself violates substantive due process. *Griffin v. Burns*, 570 F.2d 1065, 1077 (1st Cir. 1978); *Duncan v. Poythress*, 657 F.2d 691, 702 (5th Cir. 1981); *Florida State Conference of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1183-84 (11th Cir. 2008); *Roe v. State of Ala. By & Through Evans*, 43 F.3d 574, 580-82 (11th Cir. 1995); *Roe v. State of Ala.*, 68 F.3d 404, 407 (11th Cir. 1995); *Marks v. Stinson*, 19 F. 3d 873, 878 (3rd Cir. 1994).

142. Under this Court's precedents on procedural due process, not only intentional failure to follow election law as enacted by a State's legislature but also random and unauthorized acts by state election officials and their designees in local government can violate the Due Process Clause. *Parratt v. Taylor*, 451 U.S. 527, 537-41 (1981), *overruled in part on other grounds by Daniels v. Williams*, 474 U.S. 327, 330-31 (1986); *Hudson v. Palmer*, 468 U.S. 517, 532 (1984).

The difference between intentional acts and random and unauthorized acts is the degree of pre-deprivation review.

143. Defendant States acted unconstitutionally to lower their election standards—including to allow invalid ballots to be counted and valid ballots to not be counted—with the express intent to favor their candidate for President and to alter the outcome of the 2020 election. In many instances these actions occurred in areas having a history of election fraud.

144. The actions set out in Paragraphs 66-73 (Georgia), 80-93 (Michigan), 44-55 (Pennsylvania), and 106-24 (Wisconsin) constitute intentional violations of State election law by State election officials and their designees in Defendant States Pennsylvania, Georgia, Michigan, and Wisconsin, in violation of the Due Process Clause.

PRAYER FOR RELIEF

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

A. Declare that Defendant States Pennsylvania, Georgia, Michigan, and Wisconsin administered the 2020 presidential election in violation of the Electors Clause and the Fourteenth Amendment of the U.S. Constitution.

B. Declare that any electoral college votes cast by such presidential electors appointed in Defendant States Pennsylvania, Georgia, Michigan, and Wisconsin are in violation of the Electors Clause and the Fourteenth Amendment of the U.S. Constitution and cannot be counted.

C. Enjoin Defendant States' use of the 2020 election results for the Office of President to appoint presidential electors to the Electoral College.

D. Enjoin Defendant States' use of the 2020 election results for the Office of President to appoint presidential electors to the Electoral College and authorize, pursuant to the Court's remedial authority, the Defendant States to conduct a special election to appoint presidential electors.

E. If any of Defendant States have already appointed presidential 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 presidential electors in a manner that does not violate the Electors Clause and the Fourteenth Amendment, or to appoint no presidential electors at all.

F. Enjoin the Defendant States from certifying presidential electors or otherwise meeting for purposes of the electoral college pursuant to 3 U.S.C. § 5, 3 U.S.C. § 7, or applicable law pending further order of this Court.

G. Award costs to Plaintiff State.

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

December 7, 2020

Respectfully submitted,

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No. _____, Original

In the Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

COMMONWEALTH OF PENNSYLVANIA, STATE OF 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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STATE OF TEXAS,

Plaintiff,

v.

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

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 State of Texas ("Plaintiff State") respectfully submits this brief in support of its Motion for Leave to File a Bill of Complaint against the Commonwealth of Pennsylvania and the States of Georgia, Michigan, and Wisconsin (collectively, "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 Defendant States presented the pandemic as the justification for ignoring state laws regarding absentee and mail-in voting. 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 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 question of law: Did Defendant States violate the Electors Clause by taking non-legislative actions to change the election rules that would govern the appointment of presidential electors? 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, Defendant States have not only tainted the integrity of their own citizens' votes, but their actions have also debased the votes of citizens in the States that 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]

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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.

Constitutional Background

The right to vote is protected by the by the Equal Protection Clause and the Due Process Clause. U.S. CONST. amend. XIV, § 1, cl. 3-4. Because "the right to vote is personal," *Reynolds*, 377 U.S. at 561-62 (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.* Though *Bush II* did not involve an action between States, the concern that illegal votes can cancel out lawful votes does not stop at a State's boundary in the context of a Presidential election.

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, § 4, cl. 1 (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 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 Defendant States. *See* Compl. at ¶¶ 66-73 (Georgia), 80-93 (Michigan), 44-55 (Pennsylvania), 106-24 (Wisconsin). 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 62 electoral votes, President Trump presumably has 232 electoral votes, and former Vice President Biden presumably has 244. Thus, Defendant States' presidential electors will determine the outcome of the election. Alternatively, if Defendant States are unable to certify 37 or more presidential 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.

Defendant States experienced serious voting irregularities. *See* Compl. at ¶¶ 75-76 (Georgia), 97-101 (Michigan), 55-60 (Pennsylvania), 122-28 (Wisconsin). At the time of this filing, Plaintiff State continues to investigate allegations of not only unlawful votes being counted but also fraud. Plaintiff State reserves the right to seek leave to amend the complaint as those investigations resolve. *See* S.Ct. Rule 17.2; FED. R. CIV. P. 15(a)(1)(A)-(B), (a)(2). But even the *appearance* of fraud in a close election is poisonous to democratic principles: "Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised." *Purcell v. Gonzalez,* 549 U.S. 1, 4 (2006); *Crawford v. Marion County Election Bd.,* 553 U.S. 181, 189 (2008) (States have an interest in preventing voter fraud and ensuring voter confidence).

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).

ARGUMENT

I. THIS COURT HAS JURISDICTION OVER PLAINTIFF STATE'S 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. Plaintiff State's fundamental rights and interests are at stake. This Court is the *only* venue that can protect Plaintiff State's electoral college votes from being cancelled by the unlawful and constitutionally tainted votes cast by electors appointed and certified by 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 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. Plaintiff States' Electoral Clause claims arise under the Constitution and so are *federal*, even if the only claim is that Defendant States violated their own state election statutes. Moreover, as is explained below, Defendant States' actions injure the interests of Plaintiff State in the appointment of electors to the electoral college in a manner that is inconsistent 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 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 State's claims therefore fall within this Court's 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

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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).

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 State has standing under those rules.[3]

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 Defendant States affect the votes in Plaintiff State, as set forth in more detail below.

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

1. **Plaintiff State suffers an injury in fact.**

The citizens of Plaintiff State 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*, 376 U.S. at 10; *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. at 227; *Baker*, 369 U.S. at 208. 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, Plaintiff State presses its own form of voting-rights injury *as States*. As with the one-person, 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 Defendant States' unconstitutionally appointed electors vote for a presidential candidate opposed by the Plaintiff State's electors, that operates to defeat Plaintiff State's interests.[5] Indeed, even without an electoral college majority, presidential electors suffer the same voting-debasement injury as voters generally: "It must be remembered that 'the

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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 Plaintiff State appointed its electors consistent with the Constitution, they suffer injury if its electors are defeated by Defendant States' unconstitutionally appointed electors. This injury is all the more acute because Plaintiff State has taken steps to prevent fraud. For example, Texas does not allow no excuse vote by mail (Texas Election Code Sections 82.001-82.004); has strict signature verification procedures (Tex. Election Code §87.027(j); Early voting ballot boxes have two locks and different keys and other strict security measures (Tex. Election Code §§85.032(d) & 87.063); requires voter ID (House Comm. on Elections, Bill Analysis, Tex. H.B. 148, 83d R.S. (2013)); has witness requirements for assisting those in need (Tex. Election Code §§ 86.0052 & 86.0105), and does not allow ballot harvesting Tex. Election Code 86.006(f)(1-6). Unlike Defendant States, Plaintiff State neither weakened nor allowed the weakening of its ballot-integrity statutes by non-legislative means.

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)) ("*Bush II*"). Finally, once Plaintiff State has standing to challenge Defendant States' unlawful actions, Plaintiff State may do so on any legal theory that undermines those actions. *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 78-81 (1978); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 & n.5 (2006). Injuries to Plaintiff State's electors serve as an Article III basis for a *parens patriae* action.

2. Defendant States caused the injuries.

Non-legislative officials in 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 Plaintiff's injuries.

3. The requested relief would redress the injuries.

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

First, while 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 II, 531 U.S. at 104; *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"). Plaintiff State does 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 Plaintiff State requests—namely, remand to the State legislatures to allocate electors in a manner consistent with the Constitution—does not violate Defendant States' rights or exceed this Court's power. The power to select electors is a plenary power of the State 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 I*, 531 U.S. at 76-77; *Bush II*, 531 U.S at 104.

Third, uncertainty of how 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). Defendant States' legislatures would remain free to exercise their plenary authority under the Electors Clause in any *constitutional* manner they wish. 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 the constitutionally tainted November 3 election, remand the appointment of electors to Defendant States, and order 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 presidential electors' votes. 3 U.S.C. § 15.

D. 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 presidential 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. Moreover, 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.

E. This matter is ripe for review.

Plaintiff State's 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). Prior to the election, there was no reason to know who would win the vote in any given State.

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 Defendant States.

Before the election, 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). Plaintiff State could not have brought this action before the election results. The extent of the county-level deviations from election statutes in Defendant States became evident well after the election. Neither ripeness nor laches presents a timing problem here.

F. 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) 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.

G. 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 State 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).[6] Defendant States' legislature

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[6] Indeed, the Constitution also includes another backstop: "if no person have such majority [of electoral votes], then from the

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 Plaintiff State that Defendant States' appointment of presidential 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:

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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.

> 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). Defendant States would suffer no cognizable injury from this Court's enjoining their reliance on an unconstitutional vote.

II. THIS CASE PRESENTS CONSTITUTIONAL QUESTIONS OF IMMENSE NATIONAL CONSEQUENCE THAT WARRANT 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 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 State disputes that exercising this Court's original jurisdiction is discretionary, *see* Section III, *infra*, the clear unlawful abrogation of 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,[7] the closeness of the presidential election results, combined with the unconstitutional setting-aside of state election laws by non-legislative actors call both the result and the process into question.

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[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*, 570 F.2d at 1077-79)).

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

Defendant States' administration of the 2020 election violated several constitutional requirements and, thus, violated the rights that Plaintiff State seeks to protect. "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 104.[8] Even a State legislature vested with authority to regulate election procedures lacks authority to "abridg[e ...] fundamental rights, such as the right to vote." *Tashjian v. Republican Party*, 479 U.S. 208, 217 (1986). As demonstrated in this section, 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

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[8] The right to vote is "a fundamental political right, because preservative of all rights." *Reynolds*, 377 U.S. at 561-62 (internal quotations omitted).

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) (J. Madison) ("House of Representatives is so constituted as to support in its members a 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.

"[T]here 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, 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.

3. Defendant States' administration of the 2020 election violated the Fourteenth Amendment.

In each of Defendant States, important rules governing the sending, receipt, validity, 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

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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).

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 104. The Equal Protection Clause demands uniform "statewide standards for determining what is a legal vote." *Id.* at 110.

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 obstruction of poll-watcher requirements that occurred in Michigan's Wayne County may have contributed to the unusually high number of more than 173,000 votes which are not tied to a registered voter and that 71 percent of the precincts are out of balance with no explanation. Compl. ¶ 97.

Regardless of whether the modification of legal standards in some counties in 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 unconstitutional election.

The Fourteenth Amendment's due process clause protects the fundamental right to vote against "[t]he

disenfranchisement of a state electorate." *Duncan v. Poythress*, 657 F.2d 691, 702 (5th Cir. 1981). Weakening or eliminating signature-validating requirements, then restricting poll watchers also undermines the 2020 election's integrity—especially as practiced in urban centers with histories of electoral fraud—also violates substantive due process. *Griffin v. Burns*, 570 F.2d 1065, 1077 (1st Cir. 1978) ("violation of the due process clause may be indicated" if "election process itself reaches the point of patent and fundamental unfairness"); *see also Florida State Conference of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1183-84 (11th Cir. 2008); *Roe v. State of Ala. By & Through Evans*, 43 F.3d 574, 580-82 (11th Cir. 1995); *Roe v. State of Ala.*, 68 F.3d 404, 407 (11th Cir. 1995); *Marks v. Stinson*, 19 F. 3d 873, 878 (3rd Cir. 1994). Defendant States made concerted efforts to weaken or nullify their legislatures' ballot-integrity measures for the unprecedented deluge of mail-in ballots, citing the COVID-19 pandemic as a rationale. But "Government is not free to disregard the [the Constitution] in times of crisis." *Roman Catholic Diocese of Brooklyn*, 592 U.S. at ___ (Gorsuch, J., concurring).

Similarly, failing to follow procedural requirements for amending election standards violates procedural due process. *Brown v. O'Brien*, 469 F.2d 563, 567 (D.C. Cir.), *vacated as moot*, 409 U.S. 816 (1972). Under this Court's precedents on procedural due process, not only intentional failure to follow election law as enacted by a State's legislature but also random and unauthorized acts by state election officials and their designees in local government can violate the Due Process Clause. *Parratt v. Taylor*, 451

U.S. 527, 537-41 (1981), *overruled in part on other grounds by Daniels v. Williams*, 474 U.S. 327, 330-31 (1986); *Hudson v. Palmer*, 468 U.S. 517, 532 (1984). Here, the violations all were intentional, even if done for the reason of addressing the COVID-19 pandemic.

While Plaintiff State disputes that exercising this Court's original jurisdiction is discretionary, *see* Section III, *infra*, the clear unlawful abrogation of Defendant States' election laws designed to ensure election integrity by a few officials, and examples of material irregularities in the 2020 election cumulatively warrant exercising jurisdiction. Although isolated irregularities could be "garden-variety" election disputes that do not raise a federal question,[10] the closeness of election results in swing states combines with unprecedented expansion in the use of fraud-prone mail-in ballots—millions of which were also mailed out—and received and counted—without verification—often in violation of express state laws by non-legislative actors, *see* Sections II.A.1-II.A.2, *supra*, call both the result and the process into question. For an office as important as the presidency, these clear violations of the Constitution, coupled with a reasonable inference of unconstitutional ballots being cast in numbers that far exceed the margin of former Vice President Biden's vote tally over President Trump demands the attention of this Court.

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[10] "To be sure, 'garden variety election irregularities' may not present facts sufficient to offend the Constitution's guarantee of due process[.]" *Hunter*, 635 F.3d at 232 (quoting *Griffin*, 570 F.2d at 1077-79)).

While investigations into allegations of unlawful votes being counted and fraud continue, even the appearance of fraud in a close election would justify exercising the Court's discretion to grant the motion for leave to file. Regardless, Defendant States' violations of the Constitution would warrant this Court's review, even if no election fraud had resulted.

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 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 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 State respectfully submits 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.G, *supra*, and *some* court must have jurisdiction for these weighty issues. *See Mostyn v. Fabrigas*, 98 Eng. Rep. 1021, 1028 (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 State respectfully submits 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 State 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 and straightforward question of law that requires neither finding additional facts nor briefing beyond the threshold issues presented here.

CONCLUSION

Leave to file the Bill of Complaint should be granted.

December 7, 2020

Respectfully submitted,

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No. 20A , Original

In the Supreme Court of the United States

STATE OF TEXAS,
Plaintiff,

v.

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

MOTION FOR EXPEDITED CONSIDERATION OF THE MOTION FOR LEAVE TO FILE A BILL OF COMPLAINT AND FOR EXPEDITION OF ANY PLENARY CONSIDERATION OF THE MATTER ON THE PLEADINGS IF PLAINTIFFS' FORTHCOMING MOTION FOR INTERIM RELIEF IS NOT GRANTED

The State of Texas ("Plaintiff State") hereby moves, pursuant to Supreme Court Rule 21, for expedited consideration of the motion for leave to file a bill of complaint, filed today, in an original action on the administration of the 2020 presidential election by defendants Commonwealth of Pennsylvania, *et al.* (collectively, "Defendant States"). The relevant statutory deadlines for the defendants' action based on unconstitutional election results are imminent: (a) December 8 is the safe harbor for certifying presidential electors, 3 U.S.C. § 5; (b) the electoral college votes on December 14, 3 U.S.C. § 7; and (c) the House of Representatives counts votes on January 6, 3 U.S.C. § 15. Absent some form of relief, the defendants will appoint electors based on unconstitutional and deeply uncertain election results, and the House will count those votes on January 6, tainting the election and the future of free elections.

Expedited consideration of the motion for leave to file the bill of complaint is needed to enable the Court to resolve this original action before the applicable statutory deadlines, as well as the constitutional deadline of January 20, 2021, for the next presidential term to commence. U.S. CONST. amend. XX, § 1, cl. 1. Texas respectfully requests that the Court order Defendant States to respond to the motion for leave to file by December 9. Texas waives the waiting period for reply briefs under this Court's Rule 17.5, so that the Court could consider the case on an expedited basis at its December 11 conference.

Working in tandem with the merits briefing schedule proposed here, Texas also will move for interim relief in the form of a temporary restraining order, preliminary injunction, stay, and administrative stay to enjoin Defendant States from certifying their presidential electors or having them vote in the electoral college. *See* S.Ct. Rule 17.2 ("The form of pleadings and motions prescribed by the Federal Rules of Civil Procedure is followed."); *cf.* S.Ct. Rule 23 (stays in this Court). Texas also asked in their motion for leave to file that the Court summarily resolve this matter at that threshold stage. Any relief that the Court grants under those two alternate motions would inform the expedited briefing needed on the merits.

Enjoining or staying Defendant States' appointment of electors would be an especially appropriate and efficient way to ensure that the eventual appointment and vote of such electors reflects a constitutional and accurate tally of lawful votes and otherwise complies with the applicable constitutional and statutory requirements in time for the House to act on January 6. Accordingly, Texas respectfully requests

expedition of this original action on one or more of these related motions. The degree of expedition required depends, in part, on whether Congress reschedules the day set for presidential electors to vote and the day set for the House to count the votes. *See* 3 U.S.C. §§ 7, 15; U.S. Const. art. II, §1m cl. 4.

STATEMENT

Like much else in 2020, the 2020 election was compromised by the COVID-19 pandemic. Even without Defendant States' challenged actions here, the election nationwide saw a massive increase in fraud-prone voting by mail. *See* BUILDING CONFIDENCE IN U.S. ELECTIONS: REPORT OF THE COMMISSION ON FEDERAL ELECTION REFORM, at 46 (Sept. 2005) (absentee ballots are "the largest source of potential voter fraud"). Combined with that increase, the election in Defendant States was also compromised by numerous changes to the State legislatures' duly enacted election statutes by non-legislative actors—including both "friendly" suits settled in courts and executive fiats via guidance to election officials—in ways that undermined state statutory ballot-integrity protections such as signature and witness requirements for casting ballots and poll-watcher requirements for counting them. State legislatures have plenary authority to set the method for selecting presidential electors, *Bush v. Gore*, 531 U.S. 98, 104 (2000) ("*Bush II*"), and "significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question." *Id.* at 113 (Rehnquist, C.J., concurring); *accord Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70, 76 (2000) ("*Bush I*").

Plaintiff State has not had the benefit of formal discovery prior to submitting this original action. Nonetheless, Plaintiff State has uncovered substantial evidence

discussed below that raises serious doubts as to the integrity of the election processes in Defendant States. Although new information continues to come to light on a daily basis, as documented in the accompanying Appendix ("App."), the voting irregularities that resulted from Defendant States' unconstitutional actions include the following:

- Jesse Jacob, a decades-long City of Detroit employee assigned to work in the Elections Department for the 2020 election testified (App. 34a-36a) that she was "instructed not to look at any of the signatures on the absentee ballots, and I was instructed not to compare the signature on the absentee ballot with the signature on file" in direct contravention of MCL § 168.765a(6), which requires all signatures on ballots be verified.
- Ethan J. Pease, a box truck delivery driver subcontracted to the U.S. Postal Service ("USPS") to deliver truckloads of mail-in ballots to the sorting center in Madison, WI, testified that USPS employees were backdating ballots received after November 3, 2020. Decl. of Ethan J. Pease at ¶¶ 3-13. (App. 149a-51a). Further, Pease testified how a senior USPA employee told him on November 4, 2020 that "An order came down from the Wisconsin/Illinois Chapter of the Postal Service that 100,000 ballots" and how the USPSA dispatched employees to "find[] ... the ballots." ¶¶ 8-10. One hundred thousand ballots "found" after election day far exceeds former Vice President Biden margin of 20,565 votes over President Trump.

- 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), which the Pennsylvania defendants quickly settled resulting in guidance (App. 109a-114a)[1] issued 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." App. 113a.
- 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 the statutory deadline for mail-in ballots from Election Day to three days after Election Day and adopted a presumption that even *non-postmarked ballots* were presumptively timely. In addition, a great number of ballots were received after the statutory deadline. Because Pennsylvania misled this Court

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[1] Although the materials cited here are a complaint, that complaint is verified (*i.e.*, declared under penalty of perjury), App. 75a, which is evidence for purposes of a motion for summary judgment. *Neal v. Kelly*, 963 F.2d 453, 457 (D.C. Cir. 1992) ("allegations in [the] verified complaint should have been considered on the motion for summary judgment as if in a new affidavit").

about segregating the late-arriving ballots and instead commingled those ballots, it is now impossible to verify Pennsylvania's claim about the number of ballots affected.

- Contrary to Pennsylvania election law on providing poll-watchers access to the opening, counting, and recording of absentee ballots, local election officials in Philadelphia and Allegheny Counties decided not to follow 25 PA. STAT. § 3146.8(b). App. 127a-28a.
- 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. App. 122a-24a. 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 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. App. 122a-24a.
- On December 4, 2020, fifteen members of the Pennsylvania House of Representatives issued a report (App. 139a-45a) to Congressman Scott Perry stating that "[t]he general election of 2020 in Pennsylvania was fraught with ... documented irregularities and improprieties associated with mail-in balloting ... [and] that the reliability of the mail-in votes in the Commonwealth

of Pennsylvania is impossible to rely upon." The report detailed, *inter alia*, that more than 118,426 mail-in votes either had no mail date, were returned *before* they were mailed, or returned one day after the mail date. The Report also stated that, based on government reported data, the number of mail-in ballots *sent* by November 2, 2020 (2.7 million) somehow ballooned by 400,000, to 3.1 million on November 4, 2020, without explanation.

- 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 (App. 19a-24a) 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), which is particularly disturbing because the legislature allowed persons *other than the voter* to apply for an absentee ballot, GA. CODE § 21-2-381(a)(1)(C), which means that the legislature likely was relying heavily on the signature-verification on ballots under GA. CODE § 21-2-386.
- 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. App. 25a-51a.

- The probability of former Vice President Biden winning the popular vote in the four Defendant States—Georgia, Michigan, Pennsylvania, and Wisconsin—independently given President Trump's early lead in those States as of 3 a.m. on November 4, 2020, is less than one in a quadrillion, or 1 in 1,000,000,000,000,000. For former Vice President Biden to win these four States collectively, the odds of that event happening decrease to less than one in a quadrillion to the fourth power (*i.e.*, 1 in 1,000,000,000,000,000[4]). *See* Decl. of Charles J. Cicchetti, Ph.D. ("Cicchetti Decl.") at ¶¶ 14-21, 30-31 (App. 4a-7a, 9a).
- The same less than one in a quadrillion statistical improbability of Mr. Biden winning the popular vote in the four Defendant States—Georgia, Michigan, Pennsylvania, and Wisconsin—independently exists when Mr. Biden's performance in each of those Defendant States is compared to former Secretary of State Hilary Clinton's performance in the 2016 general election and President Trump's performance in the 2016 and 2020 general elections. Again, the statistical improbability of Mr. Biden winning the popular vote in these **four** States collectively is 1 in 1,000,000,000,000,000[5]. *Id.* 10-13, 17-21, 30-31 (App. 3a-7a, 9a).
- Georgia's unconstitutional abrogation of the express mandatory procedures for challenging defective signatures on ballots set forth at GA. CODE § 21-2-386(a)(1)(B) resulted in far more ballots with unmatching signatures being counted in the 2020 election than if the statute had been properly applied. The

2016 rejection rate was more than *seventeen times greater* than in 2020. *See* Cicchetti Decl. at ¶ 24 (App. 7a). As a consequence, applying the rejection rate in 2016, which applied the mandatory procedures, to the ballots received in 2020 would result in a net gain for President Trump of 25,587 votes. This would be more than needed to overcome the Biden advantage of 12,670 votes, and Trump would win by 12,917 votes. *See* App. 8a.

- The two Republican members of the Board *rescinded their votes* to certify the vote in Wayne County, 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. *See* Cicchetti Decl. at ¶ 29 (App. 8a).
- The Wayne County Statement of Votes Report lists 174,384 absentee ballots out of 566,694 absentee ballots tabulated (about 30.8%) as counted without a registration number for precincts in the City of Detroit. *See* Cicchetti Decl. at ¶ 27 (App. 8a). 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 28,377 votes. The extra ballots cast most likely resulted from the phenomenon of Wayne County election workers running the same ballots through a tabulator multiple times, with Republican poll watchers obstructed or denied access, and election officials ignoring poll watchers' challenges, as documented by numerous declarations. App. 25a-51a.

As a net result of these challenges, the close election result in Defendant States—on

which the presidential election turns—is indeterminate. Put another way, Defendant States' unconstitutional actions affect outcome-determinative numbers of popular votes, that in turn affect outcome-determinative numbers of electoral votes.

To remedy Texas's claims and remove the cloud over the results of the 2020 election, expedited review and interim relief are required. December 8, 2020 is a statutory safe harbor for States to appoint presidential electors, and by statute the electoral college votes on December 14. *See* 3 U.S.C. §§ 7, 15. In a contemporaneous filing, Texas asks this Court to vacate or enjoin—either permanently, preliminarily, or administratively—Defendant States from certifying their electors and participating in the electoral college vote. As permanent relief, Texas asks this Court to remand the allocation of electors to the legislatures of Defendant States pursuant to the statutory and constitutional backstop for this scenario: "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 (emphasis added); U.S. CONST. art. II, § 1, cl. 2.

Significantly, State legislatures retain the authority to appoint electors under the federal Electors Clause, even if state laws or constitutions provide otherwise. *McPherson v. Blacker*, 146 U.S. 1, 35 (1892); *accord Bush I*, 531 U.S. at 76-77; *Bush II*, 531 U.S at 104. For its part, Congress could move the December 14 date set for the electoral college's vote, as it has done before when faced with contested elections. Ch. 37, 19 Stat. 227 (1877). Alternatively, the electoral college could vote on December 14

without Defendant States' electors, with the presidential election going to the House of Representatives under the Twelfth Amendment if no candidate wins the required 270-vote majority.

What cannot happen, constitutionally, is what Defendant States appear to want (namely, the electoral college to proceed based on the unconstitutional election in Defendant States):

> 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 104. Proceeding under the unconstitutional election is not an option.

Pursuant to 28 U.S.C. 1251(a), Plaintiff State has filed a motion for leave to file a bill of complaint today. As set forth in the complaint and outlined above, all Defendant States ran their 2020 election process in noncompliance with the ballot-integrity requirements of their State legislature's election statutes, generally using the COVID-19 pandemic as a pretext or rationale for doing so. In so doing, Defendant States disenfranchised not only their own voters, but also the voters of all other States: "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).

ARGUMENT

The Constitution vests plenary authority over the appointing of presidential electors with State legislatures. *McPherson*, 146 U.S. at 35; *Bush I*, 531 U.S. at 76-77; *Bush II*, 531 U.S at 104. While State legislatures need not proceed by popular

vote, the Constitution requires protecting the fundamental right to vote when State legislatures decide to proceed via elections. *Bush II*, 531 U.S. at 104. On the issue of the constitutionality of an election, moreover, the Judiciary has the final say: "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); *Bush II*, 531 U.S. at 104. For its part, Congress has the ability to set the time for the electoral college to vote. U.S. CONST. art. II, § 1, cl. 3. To proceed constitutionally with the 2020 election, all three actors potentially have a role, given the complications posed by Defendant States' unconstitutional actions.

With this year's election on November 3, and the electoral college's vote set by statute for December 14, 3 U.S.C. § 7, Congress has not allowed much time to investigate irregularities like those in Defendant States before the electoral college is statutorily set to act. But the time constraints are not constitutional in nature—the Constitution's only time-related provision is that the President's term ends on January 20, U.S. CONST. amend. XX, § 1, cl. 1—and Congress has both the obvious authority and even a history of moving the date of the electoral college's vote when election irregularities require it.

Expedited consideration of this matter is warranted by the seriousness of the issues raised here, not only for the results of the 2020 presidential election but also for the implications for our constitutional democracy going forward. If this Court does not halt the Defendant States' participation in the electoral college's vote on December 14, a grave cloud will hang over not only the presidency but also the

Republic.

With ordinary briefing, Defendant States would not need to respond for 60 days, S.Ct. Rule 17.5, which is after the next presidential term commences on January 20, 2021. Accordingly, this Court should adopt an expedited briefing schedule on the motion for leave to file the bill of complaint, as well as the contemporaneously filed motion for interim relief, including an administrative stay or temporary restraining order pending further order of the Court. If this Court declines to resolve this original action summarily, the Court should adopt an expedited briefing schedule for plenary consideration, allowing the Court to resolve this matter before the relevant deadline passes. The contours of that schedule depend on whether the Court grants interim relief. Texas respectfully proposes two alternate schedules.

If the Court has not yet granted administrative relief, Texas proposes that the Court order Defendant States to respond to the motion for leave to file a bill of complaint and motion for interim relief by December 9. *See* S.Ct. Rule 17.2 (adopting Federal Rules of Civil Procedure); FED. R. CIV. P. 65; *cf.* S.Ct. Rule 23 (stays). Texas waives the waiting period for reply briefs under this Court's Rule 17.5 and would reply by December 10, which would allow the Court to consider this case on an expedited basis at its December 11 Conference.

With respect to the merits if the Court neither grants the requested interim relief nor summarily resolves this matter in response to the motion for leave to file the bill of complaint, thus requiring briefing of the merits, Texas respectfully proposes

the following schedule for briefing and argument:

December 8, 2020	Plaintiffs' opening brief
December 8, 2020	*Amicus* briefs in support of plaintiffs or of neither party
December 9, 2020	Defendants' response brief(s)
December 9, 2020	*Amicus* briefs in support of defendants
December 10, 2020	Plaintiffs' reply brief(s) to each response brief
December 11, 2020	Oral argument, if needed

If the Court grants an administrative stay or other interim relief, but does not summarily resolve this matter in response to the motion for leave to file the bill of complaint, Texas respectfully proposes the following schedule for briefing and argument on the merits:

December 11, 2020	Plaintiffs' opening brief
December 11, 2020	*Amicus* briefs in support of plaintiffs or of neither party
December 17, 2020	Defendants' response brief(s)
December 17, 2020	*Amicus* briefs in support of defendants
December 22, 2020	Plaintiffs' reply brief(s) to each response brief
December 2020	Oral argument, if needed

In the event that Congress moves the date for the electoral college and the House to vote or count votes, then the parties could propose an alternate schedule. If any motions to intervene are granted by the applicable deadline, intervenors would file by the applicable deadline as plaintiffs-intervenors or defendants-intervenors, with any still-pending intervenor filings considered as *amicus* briefs unless such

prospective intervenors file or seek leave to file an *amicus* brief in lieu of their still-pending intervenor filings.

CONCLUSION

Texas respectfully requests that the Court expedite consideration of its motion for leave to file a bill of complaint based on the proposed schedule and, if the Court neither stays nor summarily resolves the matter and thus sets the case for plenary consideration, that the Court expedite briefing and oral argument based on the proposed schedule.

Dated: December 7, 2020

Respectfully submitted,

/s/ Ken Paxton

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CERTIFICATE AS TO FORM

Pursuant to Sup. Ct. Rules 22 and 33, I certify that the foregoing motion are proportionately spaced, has a typeface of Century Schoolbook, 12 points, and contains 15 pages (and 3,550 words), excluding this Certificate as to Form, the Table of Contents, and the Certificate of Service.

Dated: December 7, 2020

Respectfully submitted,

/s/ Ken Paxton

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CERTIFICATE OF SERVICE

The undersigned certifies that, on this 7th day of December 2020, in addition to filing the foregoing document via the Court's electronic filing system, one true and correct copy of the foregoing document was served by Federal Express, with a PDF courtesy copy served via electronic mail on the following counsel and parties:

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Executed December 7, 2020, at Washington, DC,

/s/ Lawrence J. Joseph
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No. _____, Original

In the Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

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

Defendants.

MOTION FOR PRELIMINARY INJUNCTION AND TEMPORARY RESTRAINING ORDER OR, ALTERNATIVELY, FOR STAY AND ADMINISTRATIVE STAY

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In the Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

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

Defendants.

MOTION FOR PRELIMINARY INJUNCTION AND TEMPORARY RESTRAINING ORDER OR, ALTERNATIVELY, FOR STAY AND ADMINISTRATIVE STAY

Pursuant to S.Ct. Rules 21, 23, and 17.2 and pursuant to FED. R. CIV. P. 65, the State of Texas ("Plaintiff State") respectfully moves this Court to enter an administrative stay and temporary restraining order ("TRO") to enjoin the States of Georgia, Michigan, and Wisconsin and the Commonwealth of Pennsylvania (collectively, the "Defendant States") and all of their agents, officers, presidential electors, and others acting in concert from taking action to certify presidential electors or to have such electors take any official action—including without limitation participating in the electoral college or voting for a presidential candidate—until further order of this Court, and to preliminarily enjoin

and to stay such actions pending the final resolution of this action on the merits.

STATEMENT OF THE CASE

Lawful elections are 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 in derogation of statutory controls as to how they are lawfully received, evaluated, and counted. Whether well intentioned or not, these unconstitutional acts had the same *uniform effect*—they made the 2020 election less secure in the Defendant States. Those changes are inconsistent with relevant state laws and were made by non-legislative entities, without any consent by the state legislatures. The acts of these officials thus directly violated the Constitution. U.S. CONST. art. I, § 4; *id.* art. II, § 1, cl. 2.

This case presents a 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? These non-legislative changes to the Defendant States' election laws facilitated the casting and counting of ballots in violation of state law, which, in turn, violated the Electors Clause of Article II, Section 1, Clause 2 of the U.S. 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 Plaintiff State and other States that remained loyal to the Constitution.

Elections for federal office must comport with federal constitutional standards, s*ee Bush II*, 531 U.S. at 103-05, 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, § 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).

Defendant States' Violations of Electors Clause

As set forth in the Complaint, executive and judicial officials made significant changes to the legislatively defined election laws 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.

Factual Background

Without Defendant States' combined 72 electoral votes, President Trump presumably has 232 electoral votes, and former Vice President Biden presumably has 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 U.S. House of Representatives under the Twelfth Amendment to the U.S. Constitution.

STANDARD OF REVIEW

Original actions follow the motions practice of the Federal Rules of Civil Procedure. S.Ct. 17.2. Plaintiffs can obtain preliminary injunctions in original actions. *See California v. Texas*, 459 U.S. 1067 (1982) ("[m]otion of plaintiff for issuance of a preliminary injunction granted"); *United States v. Louisiana*, 351 U.S. 978 (1956) (enjoining named state officers "and others acting with them ... from prosecuting any other case or cases involving the controversy before this Court until further order of the Court"). Similarly, a moving party can seek a stay pending appeal under this Court's Rule 23.[2]

Plaintiffs who seek interim relief under Federal Rule 65 must establish that they likely will succeed on the merits and likely will suffer irreparable harm without interim relief, that the balance of equities between their harm in the absence of interim relief and the defendants' harm from interim relief favors the movants, and that the public interest favors interim relief. *Winter v. Natural Resources Def. Council, Inc.*, 555 U.S. 7, 20 (2008). To obtain a stay pending appeal under this Court's Rule 23, the applicant must meet a similar test:

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[2] *See, e.g., Frank v. Walker*, 135 S.Ct. 7 (2014); *Husted v. Ohio State Conf. of the NAACP*, 135 S.Ct. 42 (2014); *North Carolina v. League of Women Voters*, 135 S.Ct. 6 (2014); *Arizona Sect'y of State's Office v. Feldman*, 137 S.Ct. 446 (2016); *North Carolina v. Covington*, 138 S.Ct. 974 (2018); *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S.Ct. 1205 (2020).

> (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay. In close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent.

Hollingsworth v. Perry, 558 U.S. 183, 190 (2010).

ARGUMENT

I. THIS COURT IS LIKELY TO EXERCISE ITS DISCRETION TO HEAR THIS CASE.

Although Plaintiff State disputes that this Court has discretion to decide not to hear this case instituted by a sovereign State, *see* 28 U.S.C. § 1251(a) (this Court's jurisdiction is exclusive for actions between States); *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), this Court is nonetheless likely to exercise its discretion to hear this case for two reasons, which is analogous to the first *Hollingsworth* factor for a stay.

First, in the analogous case of *Republican Party v. Boockvar*, No. 20A54, 2020 U.S. LEXIS 5181 (Oct. 19, 2020), four justices voted to stay a decision by the Pennsylvania Supreme Court that worked an example of the type of non-legislative revision to State election law that the Plaintiff State challenges here. In addition, since then, a new Associate Justice joined the Court, and the Chief Justice indicated a rationale

for voting against a stay in *Democratic Nat'l Comm. v. Wisconsin State Legis.*, No. 20A66, 2020 U.S. LEXIS 5187, at *1 (Oct. 26, 2020) (Roberts, C.J., concurring in denial of application to vacate stay) that either does not apply to original actions or that was wrong for the reasons set forth in Section II.A.2, *supra* (non-legislative amendment of State election statutes poses a question that arises under the federal Constitution, see *Bush II*, 531 U.S. at 113 (Rehnquist, C.J., concurring).

Second, this Court has repeatedly acknowledged the "uniquely important national interest" in elections for president and the rules for them. *Bush II*, 531 U.S. at 112 (interior quotations omitted); *see also Oregon v. Mitchell*, 400 U.S. 112 (1970) (original jurisdiction in voting-rights cases). Few cases on this Court's docket will be as important to our future as this case.

Third, no other remedy or forum exists for a State to challenge multiple States' maladministration of a presidential election, *see* Section II.A.8, *infra*, and *some* court must have jurisdiction for these fundamental issues about the viability of our democracy: "if there is no other mode of trial, that alone will give the King's courts a jurisdiction." *Mostyn v. Fabrigas*, 98 Eng. Rep. 1021, 1028 (K.B. 1774) (Lord Mansfield).

II. THE PLAINTIFF STATE IS LIKELY TO PREVAIL.

Under the *Winter-Hollingsworth* test, the plaintiff's likelihood of prevailing is the primary factor to assess the need for interim relief. Here, the Plaintiff State will prevail because this Court has jurisdiction and the Plaintiff State's merit case is likely to prevail.

A. This Court has jurisdiction over Plaintiff State's 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 State's fundamental rights and interests are at stake. This Court is the *only* venue that can protect the Plaintiff State's Electoral College votes from being cancelled by the unlawful and constitutionally tainted votes cast by Electors appointed by the Defendant States.

1. 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 and certification of the Defendant States' presidential electors before their legislatures pursuant to 3 U.S.C. §§ 2, 5, and 7 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.

2. 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,[3] and—indeed—we did not even have federal-question jurisdiction until 1875. *Merrell Dow Pharm.*, 478 U.S. at 807. The

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[3] 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).

Plaintiff State's 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 State in the appointment and certification of presidential electors to the Electoral College.

Given this federal-law basis against these state actions, the state actions are not "independent" of the federal 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 State's 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.

3. 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 State has standing under those rules.[1]

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 State, as set forth in more detail below.

a. <u>Plaintiff State suffers an injury in fact.</u>

The citizens of Plaintiff State 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,

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

even the most basic, are illusory if the right to vote is undermined." *Wesberry*, 376 U.S. at 10; *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); *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 cognizable under Article III.

Significantly, Plaintiff State presses its own form of voting-rights injury *as a State*. As with the one-person, 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, Plaintiff State suffers 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, Plaintiff State has standing where its 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.[5] Like

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[5] "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)).

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 Plaintiff State's presidential electors, that operates to defeat the Plaintiff State's interests.[6] 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 II*, 531 U.S. at 105 (quoting *Reynold*, 377 U.S. at 555). Those injuries to electors serve as an Article III basis for a *parens patriae* action by their States.

b. <u>The Defendant States caused the injuries.</u>

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 Plaintiff's injuries.

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[6] Because Plaintiff State appointed its presidential electors fully consistent with the Constitution, it suffers injury if its presidential electors are defeated by the Defendant States' unconstitutionally appointed presidential electors. This injury is all the more acute because Plaintiff State has taken steps to prevent fraud. Unlike the Defendant States, the Plaintiff State neither weakened nor allowed the weakening of its ballot-integrity statutes by non-legislative means.

c. <u>The requested relief would redress the injuries.</u>

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

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 II, 531 U.S. at 104; *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 State does 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 State requests—namely, remand to the State legislatures to allocate presidential 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 presidential 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 I*, 531 U.S. at 76-77; *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 the 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 the House to count the presidential electors' votes. 3 U.S.C. § 15.

4. Plaintiff State has 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-person, 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 presidential 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.

5. 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 or certification of presidential 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 presidential 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.

6. This matter is ripe for review.

The Plaintiff State's 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).[7] Prior to the election, there was no reason to know who would win the vote in any given State.

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 State 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 Plaintiff State 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

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[7] 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.

States become evident until days after the election. Moreover, a State may reasonably assess the status of litigation commenced by candidates to the presidential election prior to commencing its own litigation. Neither ripeness nor laches presents a timing problem here.

7. 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 appointing presidential electors involves political rights, this 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.

8. 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 State 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).[8] 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 State that the Defendant States' appointment of presidential electors under the recently conducted elections would be unconstitutional, then the statutorily created safe harbor cannot be used as a

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[8] 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.

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 U.S. 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.

B. The Plaintiff State is likely to prevail on the merits.

For interim relief, the most important factor is the likelihood of movants' prevailing. *Winter*, 555 U.S. at 20. The Defendant States' administration of the 2020 election violated the Electors Clause, which renders invalid any appointment of presidential electors based upon those election results. 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 law 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.B.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.[9]

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[9] To advance the principles enunciated in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (concerning state police power to enforce compulsory vaccination laws), as authority for non-legislative state actors re-writing state election statutes—in direct conflict with the Electors Clause—is a nonstarter. Clearly, "the Constitution does not conflict with itself by conferring, upon the one hand, a ... power, and taking the same power away, on the other, by the limitations of the due process clause."

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.B.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[10]). 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.

III. THE OTHER *WINTER-HOLLINGSWORTH* FACTORS WARRANT INTERIM RELIEF.

Although Plaintiff State's likelihood of prevailing would alone justify granting interim relief, relief is also warranted by the other *Winter-Hollingsworth* factors.

Brushaber v. Union Pac. R. Co., 240 U.S. 1, 24 (1916). In other words, the States' reserved police power does not abrogate the Constitution's express Electors Clause. *See also Cook v. Gralike*, 531 U.S. at 522 (election authority is delegated to States, not reserved by them); *accord* Story, 1 COMMENTARIES § 627.

[10] 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).

A. Plaintiff State will suffer irreparable harm if the Defendant States' unconstitutional presidential electors vote in the Electoral College.

Allowing the unconstitutional election results in Defendant States to proceed would irreparably harm Plaintiff State and the Republic both by denying representation in the presidency and in the Senate in the near term and by permanently sowing distrust in federal elections. This Court has found such threats to constitute irreparable harm on numerous occasions. *See* note 2, *supra* (collecting cases). The stakes in this case are too high to ignore.

B. The balance of equities tips to the Plaintiff State.

All State parties represent citizens who voted in the 2020 presidential election. Because of their unconstitutional actions, Defendant States represent some citizens who cast ballots not in compliance with the Electors Clause. It does not disenfranchise anyone to require the State legislatures to attempt to resolve this matter as 3 U.S.C. § 2, the Electors Clause, and even the Twelfth Amendment provide. By contrast, it would irreparably harm Plaintiff State if the Court denied interim relief.

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.

C. The public interest favors interim relief.

The last *Winter* factor is the public interest. When parties dispute the lawfulness of government action, the public interest collapses into the merits. *ACLU v. Ashcroft*, 322 F.3d 240, 247 (3d Cir. 2003); *Washington v. Reno*, 35 F.3d 1093, 1103 (6th Cir. 1994); *League of Women Voters of the United States v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016). If the Court agrees with Plaintiff State that non-legislative actors lack authority to amend state statutes for selecting presidential electors, the public interest requires interim relief. Withholding relief would leave a taint over the election, disenfranchise voters, and lead to still more electoral legerdemain in future elections.

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 extraordinary case arising from a presidential election. 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 presidential electors, the resulting vote of the Electoral College not only lacks constitutional legitimacy, but the Constitution itself will be forever sullied.

The nation needs this Court's clarity: "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). While isolated irregularities could be "garden-variety" election irregularities that do not raise a federal question,[11] the unconstitutional setting-aside of state election statutes by non-legislative actors calls both the result and the process into question, requiring 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. The public interest requires this Court's action.

IV. ALTERNATIVELY, THIS CASE WARRANTS SUMMARY DISPOSITION.

In lieu of granting interim relief, this Court could simply reach the merits summarily. *Cf.* FED. R. CIV. P. 65(a)(2); S.Ct. Rule 17.5. Two things are clear from the evidence presented at this initial phase: (1) non-legislative actors modified the Defendant States' election statutes; and (2) the resulting uncertainty casts doubt on the lawful winner. Those two facts are enough to decide the merits of the Electors Clause claim. The Court should thus vacate the Defendant States' appointment and impending certifications of presidential electors and remand to their State legislatures to allocate presidential electors via any constitutional means that does not rely on 2020

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[11] "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 (1st Cir. 1978)).

election results that includes votes cast in violation of State election statutes in place on Election Day.

CONCLUSION

This Court should first administratively stay or temporarily restrain the Defendant States from voting in the electoral college until further order of this Court and then issue a preliminary injunction or stay against their doing so until the conclusion of this case on the merits. Alternatively, the Court should reach the merits, vacate the Defendant States' elector certifications from the unconstitutional 2020 election results, and remand to the Defendant States' legislatures pursuant to 3 U.S.C. § 2 to appoint electors.

December 7, 2020

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No. 22O155, Original

In the Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

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

Defendants.

On Motion for Leave to File Bill of Complaint

BRIEF OF STATES OF MISSOURI, ____ AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF'S MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

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STATEMENT OF INTEREST OF *AMICI*

"In the context of a Presidential election," state actions "implicate a uniquely important national interest," because "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, 794–95 (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." *Id.* "Every voter" in a federal election "has a right under the Constitution to have his vote fairly counted, without its being distorted by fraudulently cast votes." *Anderson* v. *United States*, 417 U.S. 211, 227 (1974).

Amici curiae are the States of Missouri, _____.[1] *Amici* have several important interests in this case. *First*, the States have a strong interest in safeguarding the separation of powers among state actors in the regulation of Presidential elections. The Electors Clause of Article II, § 1 carefully balances power among state actors, and it assigns a specific function to the "Legislature thereof" in each State. U.S. CONST. art. II, § 1, cl. 4. Our system of federalism relies on separation of powers to preserve liberty at every level of government, and the separation of powers in the Electors Clause is no exception. The States have a strong interest in preserving the proper roles of state legislatures in the administration of federal elections, and thus safeguarding the individual liberty of their citizens.

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[1] This brief is filed under Supreme Court Rule 37.4, and all counsel of record received timely notice of the intent to file this amicus brief under Rule 37.2.

Second, *amici* States have a strong interest in ensuring that the votes of their own citizens are not diluted by the unconstitutional administration of elections in other States. When non-legislative actors in other States encroach on the authority of the "Legislature thereof" in that State to administer a Presidential election, they threaten the liberty, not just of their own citizens, but of every citizen of the United States who casts a lawful ballot in that election—including the citizens of *amici* States.

Third, for similar reasons, *amici* States have a strong interest in safeguarding against fraud in voting by mail during Presidential elections. "Every voter" in a federal election, "has a right under the Constitution to have his vote fairly counted, without its being distorted by fraudulently cast votes." *Anderson*, 417 U.S. at 227. Plaintiff's Bill of Complaint alleges that non-legislative actors in the Defendant States stripped away important safeguards against fraud in voting by mail that had been enacted by the Legislature in each State. *Amici* States share a vital interest in protecting the integrity of the truly national election for President and Vice President of the United States.

SUMMARY OF ARGUMENT

The Bill of Complaint raises constitutional questions of great public importance that warrant this Court's review. First, like every similar provision in the Constitution, the separation-of-powers provision of the Electors Clause provides an important structural check on government designed to protect individual liberty. By allocating authority over Presidential electors to the "Legislature thereof" in

each State, the Clause separates powers both vertically and horizontally, and it confers authority on the branch of state government most responsive to the democratic will. Encroachments on the authority of state Legislatures by other state actors violate the separation of powers and threaten individual liberty.

The unconstitutional encroachments on the authority of state Legislatures in this case raise particularly grave concerns. For decades, responsible observers have cautioned about the risks of fraud and abuse in voting by mail, and they have urged the adoption of statutory safeguards to prevent such fraud and abuse. In the numerous cases identified in the Bill of Complaint, non-legislative actors in each Defendant State repeatedly stripped away statutory safeguards that the "Legislature thereof" had enacted to protect against fraud in voting by mail. These changes removed protections that responsible actors had recommended for decades to guard against fraud and abuse in voting by mail, and they did so in a manner that uniformly and predictably benefited one candidate in the recent Presidential election. The allegations in the Bill of Complaint raise grave questions about election integrity and public confidence in the administration of Presidential elections. This Court should grant Plaintiff leave to file the Bill of Complaint.

ARGUMENT

The Electors Clause provides that each State "shall appoint" its Presidential electors "in such Manner as the *Legislature thereof* may direct." U.S. CONST. art. II, § 1, cl. 4 (emphasis added). Moreover, "[o]ur constitutional system of representative government only works when the worth of honest

ballots is not diluted by invalid ballots procured by corruption." U.S. Dep't of Justice, *Federal Prosecution of Election Offenses*, at 1 (8th ed. Dec. 2017). "When the election process is corrupted, democracy is jeopardized." *Id.* The proposed Bill of Complaint raises serious concerns about constitutionality and ballot security of election procedures in the Defendant States. Given the importance of public confidence in American elections, these allegations raise questions of great public importance that warrant this Court's expedited review.

I. The Separation-of-Powers Provision of the Electors Clause Is a Structural Check on Government That Safeguards Liberty.

Article II 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. 4 (emphasis added); *see also id.* art. I, § 4, cl. 2 (providing that, in each State, the "Legislature thereof" shall establish "[t]he Times, Places and Manner of holding Elections for Senators and Representatives").

Thus, "in the case of a law enacted by a state legislature applicable not only to elections to state offices, but also to the selection of Presidential electors, the legislature is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under Art. II, § 1, cl. 2, of the United States Constitution." *Bush* v. *Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70, 76 (2000). "[T]he state legislature's power to select the manner for appointing electors is plenary." *Bush* v. *Gore*, 531 U.S. 98, 104 (2000).

Here, as set forth in the Bill of Complaint, non-legislative actors in each Defendant State have purported to "alter[] an important statutory provision enacted by the [State's] Legislature pursuant to its authority under the Constitution of the United States to make rules governing the conduct of elections for federal office." *Republican Party of Pennsylvania* v. *Boockvar*, No. 20-542, 2020 WL 6304626, at *1 (U.S. Oct. 28, 2020) (Statement of Alito, J.). *See* Bill of Complaint, ¶¶ 41-127. In doing so, these non-legislative actors encroached upon the "plenary" authority of those States' respective legislatures over the conduct of the Presidential election in each State. *Bush* v. *Gore*, 531 U.S. at 104. This encroachment on the authority of each State's Legislature violated the separation of powers set forth in the Electors Clause. "[I]n the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest. For the President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation." *Anderson*, 460 U.S. at 794–795.

In every other context, this Court recognizes that the Constitution's separation-of-powers provisions, which allocate authority to specific governmental actors to the exclusion of others, are designed to preserve liberty. "It is the proud boast of our democracy that we have 'a government of laws, and not of men.'" *Morrison* v. *Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting). "The Framers of the Federal Constitution . . . viewed the principle of separation of powers as the absolutely central guarantee of a just Government." *Id.* "Without a secure structure of separated powers, our Bill of Rights would be worthless, as are the bills of rights of

many nations of the world that have adopted, or even improved upon, the mere words of ours." *Id.* "The purpose of the separation and equilibration of powers in general . . . was not merely to assure effective government but to preserve individual freedom." *Id.* at 727.

This principle of preserving liberty applies both to the horizontal separation of powers among the branches of government, and the vertical separation of powers between the federal government and the States. "The federal system rests on what might at first seem a counterintuitive insight, that 'freedom is enhanced by the creation of two governments, not one.'" *Bond* v. *United States*, 564 U.S. 211, 220–21 (2011) (quoting *Alden* v. *Maine*, 527 U.S. 706, 758 (1999)). "[F]ederalism secures to citizens the liberties that derive from the diffusion of sovereign power." *Bond*, 564 U.S. at 221 (2011) (quoting *New York* v. *United States*, 505 U.S. 144, 181 (1992)). "Federalism also protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions." *Id.* Moreover, "federalism enhances the opportunity of all citizens to participate in representative government." *FERC* v. *Mississippi*, 456 U.S. 742, 789 (1982) (O'Connor, J., concurring in part and dissenting in part). "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Gregory* v. *Ashcroft*, 501 U.S. 452, 458 (1991).

The explicit grant of authority to state *Legislatures* in the Electors Clause of Article II, §1 effects both a horizontal and a vertical separation of powers. The Clause allocates 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. 4.

It is no accident that the Constitution allocates such authority to state Legislatures, rather than executive officers such as Secretaries of State, or judicial officers such as state Supreme Courts. The Constitutional Convention's delegates frequently recognized that the Legislature is the branch most responsive to the People and most democratically accountable. *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 ratification documents expressing that state legislatures were most likely to be in sympathy with the interests of the people); Federal Farmer, No. 12 (1788), *reprinted in* 2 THE FOUNDERS' CONSTITUTION (Philip B. Kurland & Ralph Lerner eds., 1987) (arguing that electoral regulations "ought to be left to the state legislatures, they coming far nearest to the people themselves"); THE FEDERALIST NO. 57, at 350 (C. Rossiter, ed. 2003) (Madison, J.) (stating that the "House of Representatives is so constituted as to support in its members an habitual recollection of their dependence on the people"); *id.* (stating that the "vigilant and manly spirit that actuates the people of America" is greatest restraint on the House of Representatives).

Democratic accountability in the method of selecting the President of the United States is a powerful bulwark safeguarding individual liberty. By identifying the "Legislature thereof" in each State as the regulator of elections for federal officers, the Electors Clause of Article II, § 1 prohibits the very arrogation of power over Presidential elections by non-legislative officials that the Defendant States perpetrated in this case. By violating the Constitution's separation of powers, these non-legislative actors undermined the liberty of all Americans, including the voters in *amici* States.

II. Stripping Away Safeguards From Voting by Mail Exacerbates the Risks of Fraud.

By stripping away critical safeguards against ballot fraud in voting by mail, non-legislative actors in the Defendant States inflicted another grave injury on the conduct of the recent election: They enhanced the risks of fraudulent voting by mail without authority. An impressive body of public evidence demonstrates that voting by mail presents unique opportunities for fraud and abuse, and that statutory safeguards are critical to reduce such risks of fraud.

For decades prior to 2020, responsible observers emphasized the risks of fraud in voting by mail, and the importance of imposing safeguards on the process of voting by mail to allay such risks. For example, in *Crawford* v. *Marion County Election Board*, this Court held that fraudulent voting "perpetrated using absentee ballots" demonstrates "that not only is the risk of voter fraud real but that *it could affect the outcome of a close election*." *Crawford* v. *Marion County Election Bd.*, 553 U.S. 181, 195-96 (2008) (opinion of Stevens, J.) (emphasis added).

As noted by Plaintiff, the Carter-Baker Commission on Federal Election Reform emphasized the same concern. The bipartisan Commission—co-chaired by former President Jimmy Carter and former Secretary of State James A. Baker—determined that "[a]bsentee ballots remain 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) ("Carter-Baker Report").[2] According to the Carter-Baker Commission, "[a]bsentee balloting is vulnerable to abuse in several ways." *Id.* "Blank ballots mailed to the wrong address or to large residential buildings might bet intercepted." *Id.* "Citizens who vote at home, at nursing homes, at the workplace, or in church are more susceptible to pressure, overt and subtle, or to intimidation." *Id.* "Vote buying schemes are far more difficult to detect when citizens vote by mail." *Id.*

Thus, the Commission noted that "absentee balloting in other states has been a major source of fraud." *Id.* at 35. It emphasized that voting by mail "increases the risk of fraud." *Id.* And the Commission recommended that "States ... need to do more to prevent ... absentee ballot fraud." *Id.* at v.

The Commission specifically recommended that States should implement and reinforce safeguards to prevent fraud in voting by mail. The Commission recommended that "States should make sure that absentee ballots received by election officials before Election Day are kept secure until they are opened and counted." *Id.* at 46. It also recommended that States "prohibit[] 'third-party' organizations,

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[2] *Available at* https://www.legislationline.org/download/id/1472/file/-3b50795b2d0374cbef5c29766256.pdf.

candidates, and political party activists from handling absentee ballots." *Id.* And the Commission highlighted that a particular state "appear[ed] to have avoided significant fraud in its vote-by-mail elections by introducing safeguards to protect ballot integrity, *including signature verification*." *Id.* at 35 (emphasis added). The Commission concluded that "[v]ote by mail is ... likely to increase the risks of fraud and contested elections ... where the safeguards for ballot integrity are weaker." *Id.*

The most recent edition of the U.S. Department of Justice's Manual on *Federal Prosecution of Election Offenses*, published by its Public Integrity Section, highlights the very same concerns about fraud in voting by mail. U.S. Dep't of Justice, *Federal Prosecution of Election Offenses* (8th ed. Dec. 2017), at 28-29 ("DOJ Manual").[3] The Manual states: "Absentee ballots are particularly susceptible to fraudulent abuse because, by definition, they are marked and cast outside the presence of election officials and the structured environment of a polling place." *Id.* The Manual reports that "the more common ways" that election-fraud "crimes are committed include ... [o]btaining and marking absentee ballots without the active input of the voters involved." *Id.* at 28. And the Manual notes that "[a]bsentee ballot frauds" committed both with and without the voter's participation are "common." *Id.* at 29.

Similarly, the U.S. Government Accountability Office concluded that many crimes of election fraud likely go undetected. In 2014, discussing election fraud, the GAO reported that "crimes of fraud, in

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[3] *Available at* https://www.justice.gov/criminal/file/1029066/download.

particular, are difficult to detect, as those involved are engaged in intentional deception." GAO-14-634, *Elections: Issues Related to State Voter Identification Laws* 62-63 (U.S. Gov't Accountability Office Sept. 2014).[4]

Despite the difficulties of detecting fraud schemes, recent experience contains many well-documented examples of absentee ballot fraud. For example, the News21 database, which was compiled to *refute* arguments that voter fraud is prevalent, identified 491 cases of absentee ballot over the 12-year period from 2000 to 2012—approximately 41 cases per year. *See* News21, *Election Fraud in America*.[5] This database reports that "Absentee Ballot Fraud" was "[t]he most prevalent fraud" in America, comprising "24 percent (491 cases)" of all cases reported in the public records surveyed. *Id.* Moreover, the database indicates that this number undercounts the total incidence of reported cases of absentee ballot fraud, because it was based on public-record requests to state and local government entities, many of which did not respond. *Id.*

Likewise, the Heritage Foundation's online database of election-fraud cases—which includes only a "sampling" of cases that resulted in an *adjudication* of fraud, such as a criminal conviction or civil penalty—identified 207 cases of proven "fraudulent use of absentee ballots" in the United States. The

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[4] *Available at* https://www.gao.gov/assets/670/665966.pdf.

[5] *Available at* https://votingrights.news21.com/interactive/election-fraud-database/&xid=17259,15700023,15700124,15700149,15700186,15700191,15700201,15700237,15700242

Heritage Foundation, *Election Fraud Cases*.[6] Again, this database undercounts the incidence of cases of election fraud: "The Heritage Foundation's Election Fraud Database presents a sampling of recent proven instances of election fraud from across the country. This database is not an exhaustive or comprehensive list." *Id.*

The public record abounds with recent examples of such fraudulent absentee-ballot schemes. For example, in November 2019, the mayor of Berkeley, Missouri was indicted on five felony counts of absentee ballot fraud for changing votes on absentee ballots to help him and his political allies to get elected. Brian Heffernan, *Berkeley Mayor Hoskins Charged with 5 Felony Counts of Election Fraud*, ST. LOUIS PUBLIC RADIO (Nov. 21, 2019).[7] Mayor Hoskins' scheme included "going to the home of elderly ... residents" to harvest absentee ballots, "filling out absentee ballot applications for voters and having his campaign workers do the same," and "altering absentee ballots" after he had procured them from voters. *Id.* Again, in 2016, a state House race in Missouri was overturned amid allegations of widespread absentee-ballot fraud that had occurred across multiple election cycles in the same community. Sarah Fenske, *FBI, Secretary of State Asking Questions About St. Louis Statehouse Race*,

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[6] *Available at* https://www.heritage.org/voterfraud/search?combine=&state=All&year=&case_type=All&fraud_type=24489&page=12.

[7] *Available at* https://news.stlpublicradio.org/post/berkeley-mayor-hoskins-charged-5-felony-counts-election-fraud#stream/0

RIVERFRONT TIMES (Aug. 16, 2016).[8] One candidate stated that it was widely known in the community that the incumbent ran an "absentee game" that resulted in the mail-in vote tipping the outcome in her favor in multiple close elections. *Id.*

Other States have similar experiences. In 2018, a federal Congressional race was overturned in North Carolina, and eight political operatives were indicted for fraud, in an absentee-ballot fraud scheme that sufficed to change the outcome of the election. Richard Gonzales, *North Carolina GOP Operative Faces New Felony Charges That Allege Ballot Fraud*, NPR.ORG, (July 30, 2019).[9] The indicted operatives "had improperly collected and possibly tampered with ballots," and were charged with "improperly mailing in absentee ballots for someone who had not mailed it themselves." *Id.*

In the North Carolina case, the lead investigator testified that the investigation was "a continuous case" over two election cycles, and that the scheme involved collecting absentee ballots from voters, altering the absentee ballots, and forging witness signatures on the ballots. *See In re: Investigation of Irregularities Affecting Counties Within the 9th Congressional District*, North Carolina Board of Elections, Evidentiary Hearing, at 2-3.[10] The investigators described it as a "coordinated, unlawful,

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[8] *Available at* https://www.riverfronttimes.com/newsblog/2016/08/16/fbi-secretary-of-state-asking-questions-about-st-louis-statehouse-race.

[9] *Available at* https://www.npr.org/2019/07/30/746800630/north-carolina-gop-operative-faces-new-felony-charges-that-allege-ballot-fraud.

[10] *Available at* https://images.radio.com/wbt/Voter%20ID_%20Website.pdf.

and substantially resourced absentee ballots scheme." *Id.* at 2. According to the investigators' trial presentation, the investigation involved 142 voter interviews, 30 subject and witness interviews, and subpoenas of documents, financial records, and phone records. *Id.* at 3. The perpetrators collected absentee ballots and falsified ballot witness certifications outside the presence of the voters. *Id.* at 10, 13. The congressional election at issue was decided by margin of less than 1,000 votes. *Id.* at 4. The scheme involved the submission of well over 1,000 fraudulent absentee ballots and request forms. *Id.* at 11. The perpetrators took extensive steps to conceal the fraudulent scheme, which lasted over multiple election cycles before it was detected. *Id.* at 14.

Similarly, in 2016, a politician in the Bronx was indicted and pled guilty to 242 counts of election fraud based on an absentee ballot fraud scheme. Ben Kochman, *Bronx politician pleads guilty in absentee ballot scheme for Assembly election,* NEW YORK DAILY NEWS (Nov. 22, 2016).[11] Despite pleading guilty to 242 felonies involving absentee ballot fraud in an election that was decided by two votes, the defendant received no jail time and vowed to run for office again after a short disqualification period. *Id.*

The increases in mail-in voting due to the COVID-19 pandemic likewise increased opportunities for fraud. For instance, in May 2020, the leader of the New Jersey NAACP called for an election in Paterson, New Jersey to be overturned due to widespread mail-in ballot fraud. *See* Jonathan Dienst et al., *NJ NAACP*

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[11] *Available at* http://www.nydailynews.com/new-york/nyc-crime/bronx-pol-pleads-guilty-absentee-ballot-scheme-article-1.2884009.

Leader Calls for Paterson Mail-In Vote to Be Canceled Amid Corruption Claims, NBC NEW YORK (May 27, 2020).[12] "'Invalidate the election. Let's do it again,' [the NAACP leader] said amid reports more that 20 percent of all ballots were disqualified, some in connection with voter fraud allegations." *Id.*

Hundreds of other reported cases highlight the same concerns about the vulnerability of voting by mail to fraud and abuse. Recently, a Missouri court considered extensive expert testimony reviewing absentee-ballot fraud cases like these. *Findings of Fact, Conclusions of Law, and Final Judgment in Mo. State Conference of the NAACP* v. *State*, No. 20AC-CC00169-01 (Circuit Court of Cole County, Missouri Sept. 24, 2020), *aff'd*, 607 S.W.3d 728 (Mo. banc Oct. 9, 2020) ("*Mo. NAACP*"). The court held that cases of absentee-ballot fraud "have several common features that persist across multiple recent cases: (1) close elections; (2) perpetrators who are candidates, campaign workers, or political consultants, not ordinary voters; (3) common techniques of ballot harvesting, (4) common techniques of signature forging, (5) fraud that persisted across multiple elections before it was detected, (6) massive resources required to investigate and prosecute the fraud, and (7) lenient criminal penalties." *Id.* at 17. Thus, "fraud in voting by mail is a recurrent problem, that it is hard to detect and prosecute, that there are strong incentives and weak penalties for doing so, and that it has the capacity to affect the outcome of close

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[12] *Available at* https://www.nbcnewyork.com/news/politics/nj-naacp-leader-calls-for-paterson-mail-in-vote-to-be-canceled-amid-fraud-claims/2435162/.

elections." *Id.* The court concluded that "the threat of mail-in ballot fraud is real." *Id.* at 2.

III. The Bill of Complaint Alleges that the Defendant States Abolished Critical Safeguards Against Fraud in Voting by Mail.

The Bill of Complaint alleges that non-legislative actors in each Defendant State unconstitutionally abolished or diluted statutory safeguards against fraud enacted by the state legislature, in violation of the Presidential Electors Clause. U.S. CONST. art. II, § 1, cl. 4. All the unconstitutional changes to election procedures identified in the Bill of Complaint have two common features: (1) They abrogated statutory safeguards against fraud that responsible observers have long recommended for voting by mail, and (2) they did so in a way that predictably conferred partisan advantage on one candidate in the Presidential election. Such allegations are serious, and they warrant this Court's review.

Abolishing signature verification. First, the proposed Bill of Complaint alleges that non-legislative actors in Pennsylvania, Georgia, and Michigan unilaterally abolished or undermined signature-verification requirements for mailed ballots. It alleges that Pennsylvania's Secretary of State abrogated Pennsylvania's statutory signature-verification requirement for mail-in ballots in a "friendly" settlement of a lawsuit brought by activists. Bill of Complaint, ¶¶ 44-46. It alleges that Georgia's Secretary of State unilaterally abrogated Georgia's statute authorizing county registrars to engage in signature verification for absentee ballots in a similar settlement. *Id.* ¶¶ 66-72. It alleges that Michigan's Secretary of State permitted absentee ballot

applications online, with no signature at all, in violation of Michigan statutes, *id.* ¶¶ 85-89; and that election officials in Wayne County, Michigan simply disregarded statutory signature verification requirements, *id.* ¶¶ 92-95.

In addition to violating the Electors Clause, these actions contradicted fundamental principles of ballot security. As noted above, the Carter-Baker Report highlighted the importance of "*signature verification*" as a critical "safeguard[] to protect ballot integrity" for ballots cast by mail. Carter-Baker Report, *supra*, at 35 (emphasis added). Without safeguards such as signature verification, the Report stated that "[v]ote by mail is ... likely to increase the risks of fraud and contested elections ... where the safeguards for ballot integrity are weaker." *Id.* The importance of signature verification is hard to overstate, because absentee-ballot fraud schemes commonly involve "common techniques of signature forging," typically by nefarious actors who are unfamiliar with the voter's signature. *Mo. NAACP*, *supra*, at 17. Verifying the voter's signature by comparison to the signature on the voter rolls thus provides the most critical safeguard against fraud.

Insecure ballot handling. The Bill of Complaint alleges that non-legislative actors changed or abolished statutory rules for the secure handling of absentee and mail-in ballots in Pennsylvania, Michigan, and Wisconsin. It alleges that election officials in Democratic areas of Pennsylvania violated state statutes by opening and reviewing mail-in ballots that were required to be kept locked and secure until Election Day. Bill of Complaint, ¶¶ 50-51. It alleges that Michigan's Secretary of State, acting in violation of state law, sent 7.7 million unsolicited

absentee-ballot applications to Michigan voters, thus "flooding Michigan with millions of absentee ballot applications prior to the 2020 general election." *Id.* ¶¶ 80-84. And it alleges that the Wisconsin Election Commission violated state law by placing hundreds of unmonitored boxes for the submission of absentee and mail-in ballots around the State, concentrated in heavily Democratic areas. *Id.* ¶¶ 107-114.

In addition to violating the Electors Clause, these actions contradicted commonsense ballot-security recommendations. The Department of Justice's Manual on *Federal Prosecution of Election Offenses* notes that vulnerability to mishandling is what makes absentee ballots "particularly susceptible to fraudulent abuse" because "they are marked and cast outside the presence of election officials and the structured environment of a polling place." DOJ Manual, at 28-29. According to the Manual, "[o]btaining and marking absentee ballots without the active input of the voters involved" is one of "the more common ways" that election fraud "crimes are committed." *Id.* at 28. For this reason, the Carter-Baker Commission made a series of recommendations in favor of preventing such insecurity in the handling of ballots. For example, the Commission recommended that "States should make sure that absentee ballots received by election officials before Election Day are kept secure until they are opened and counted." *Id.* at 46. It also recommended that States "prohibit[] 'third-party' organizations, candidates, and political party activists from handling absentee ballots." *Id.*

Inconsistent Statewide Standards. The Bill of Complaint alleges that the Defendant States provided different standards and treatment for mail-

in ballots submitted in different areas of each State, and that this differential treatment uniformly provided a partisan advantage to one side in the Presidential election. It alleges that election officials in Philadelphia and Allegheny County, Pennsylvania, applied different standards to voters in those Democratic strongholds than applied to other voters in Pennsylvania, in violation of state law. Bill of Complaint, ¶¶ 52-54. Similarly, it alleges that Milwaukee, Wisconsin violated state law by authorizing election officials to "correct" disqualifying omissions on ballot envelopes by entering information that the voter should have entered with a red pen, while no similar "correction" process was granted to other voters in that State. *Id.* ¶¶ 123-127. And it alleges that Wayne County, Michigan provided favorable treatment to its voters, in violation of state statutes, by simply ignoring statutorily required signature-verification requirements. *Id.* ¶¶ 92-95.

Again, such differential treatment, under circumstances raising concerns of partisan bias, contradicts universal recommendations for integrity and public confidence in elections. As this Court stated in *Bush* v. *Gore*, "[t]he idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government." 531 U.S. at 107 (quoting *Moore* v. *Ogilvie*, 394 US 814 (1969)). The Carter-Baker Report noted that "inconsistent or incorrect application of electoral procedures may have the effect of discouraging voter participation and may, on occasion, raise questions about bias in the way elections are conducted." Carter-Baker Report, at 49. "Such problems raise public suspicions or may provide

grounds for the losing candidate to contest the result in a close election." *Id.*

Excluding Bipartisan Observers. The Bill of Complaint alleges that certain counties in Defendant States excluded bipartisan observers from the ballot-opening and ballot-counting processes. For example, it alleges that election officials in Philadelphia and Allegheny County, Pennsylvania, violated state law by excluding Republican observers from the opening, counting, and recording of absentee ballots in those counties. Bill of Complaint, ¶ 49. And it alleges that election officials in Wayne County, Michigan violated state statutes by systematically excluding poll watchers from the counting and recording of absentee ballots. *Id.* ¶¶ 90-91.

Such actions, as alleged, raise grave concerns about the integrity of the vote count in those counties. As the Carter-Baker Report emphasized, States should "provide observers with meaningful opportunities to monitor the conduct of the election." Carter-Baker Report, at 47. "To build confidence in the electoral process, it is important that elections be administered in a neutral and professional manner," without the appearance of partisan bias." *Id.* at 49. When observers of one political party are illegally and systematically excluded from observing the vote count, "the appearance of partisan bias" is inevitable. *Id.* For counties in Defendant States to exclude Republican observers weakens public confidence in the electoral process and raises grave concerns about the integrity of ballot counting in those counties.

Extending the deadline to receive ballots. The Bill of Complaint alleges that a non-legislative actor in Pennsylvania—its Supreme Court—extended the statutory deadline to receive absentee and mail-in

ballots without authorization of the "Legislature thereof," and directed that ballots with illegible postmarks or no postmarks at all would be deemed timely if received within the extended deadline. Bill of Complaint, ¶¶ 48, 55. Again, these non-legislative changes raise grave concerns about election integrity in Pennsylvania. First, they created a post-election window of time during which nefarious actors could wait and see whether the Presidential election would be close, and whether perpetrating fraud in Pennsylvania would be worthwhile. Second, they enhanced the opportunities for fraud by mandating that late ballots must be counted even when they are not postmarked or have no legible postmark, and thus there is no evidence they were mailed by Election Day.

These changes created needless vulnerability to actual fraud and undermined public confidence in a Presidential election. As the Department of Justice's Manual of *Federal Prosecution of Election Offenses* states, "the conditions most conducive to election fraud are close factional competition within an electoral jurisdiction for an elected position that matters." DOJ Manual, at 2-3. "[E]lection fraud is most likely to occur in electoral jurisdictions where there is close factional competition for an elected position that matters." *Id.* at 27. That statement exactly describes the conditions in each of the Defendant States in the recent Presidential election.

CONCLUSION

"Fraud in any degree and in any circumstance is subversive to the electoral process." Carter-Baker Report, at 45. The allegations in the Bill of Complaint raise serious constitutional issues under the Electors

Clause of Article II, § 1. In addition, the long series allegations of unconstitutional actions that stripped away safeguards against fraud in voting by mail raise concerns about the integrity of the recent election and the public confidence in its outcome. These are questions of great public importance that warrant this Court's attention. The Court should grant the Plaintiff's Motion for Leave to File Bill of Complaint.

December 9, 2020

Respectfully submitted,

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[To be inserted]

Jeffrey DeSousa

From: Andrew Pinson <APinson@LAW.GA.GOV>
Sent: Tuesday, December 8, 2020 3:02 PM
To: Amit Agarwal
Subject: FW: Follow Up Docs
Attachments: Doc 56 Ex A Settlement Agreement.pdf; US_DIS_GAND_1_20cv4809_RESPONSE_in_Opposition_re_6_MOTION_for_Temporary_....pdf

Importance: High

Amit,

Our chief of staff asked me to pass this along. Let me know if you need anything else.

Thanks,
Andrew

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Georgia Department of Law
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From: Travis Johnson
Sent: Tuesday, December 8, 2020 3:00 PM
To: Andrew Pinson <APinson@LAW.GA.GOV>
Cc: Wright Banks <wbanks@law.ga.gov>
Subject: Follow Up Docs

Can you get these over to FL's SG per General Moody's request to Chris?

Travis Johnson
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Attachment A

COMPROMISE SETTLEMENT AGREEMENT AND RELEASE

This **Compromise Settlement Agreement and Release** ("Agreement") is made and entered into by and between the Democratic Party of Georgia, Inc. ("DPG"), the DSCC, and the DCCC (collectively, the "Political Party Committees"), on one side, and Brad Raffensperger, Rebecca N. Sullivan, David J. Worley, Seth Harp, and Anh Le (collectively, "State Defendants"), on the other side. The parties to this Agreement may be referred to individually as a "Party" or collectively as the "Parties." The Agreement will take effect when each and every Party has signed it, as of the date of the last signature (the "Effective Date").

WHEREAS, in the lawsuit styled as *Democratic Party of Georgia, et al. v. Raffensperger, et al.*, Civil Action File No. 1:19-cv-5028-WMR (the "Lawsuit"), the Political Party Committees have asserted claims in their Amended Complaint [Doc. 30] that the State Defendants' (i) absentee ballot signature matching procedure, (ii) notification process when an absentee ballot is rejected for any reason, and (iii) procedure for curing a rejected absentee ballot, violate the First and Fourteenth Amendments to the United States Constitution by unduly burdening the right to vote, subjecting similarly situated voters to disparate treatment, and failing to afford Georgia voters due process (the "Claims"), which the State Defendants deny;

WHEREAS, the State Defendants, in their capacity as members of the State Election Board, adopted on February 28, 2020 Rule 183-1-14-.13, which sets forth specific and standard notification procedures that all counties must follow after rejection of a timely mail-in absentee ballot;

WHEREAS, the State Defendants have a Motion to Dismiss [Doc. 45] pending before the Court, which sets forth various grounds for dismissal of the Amended Complaint, including mootness in light of the State Election Board's promulgation subsequent to adoption on February 28, 2020 of Rule 183-1-14-.13, which Motion the Political Party Committees deny is meritorious;

WHEREAS, all Parties desire to compromise and settle all disputed issues and claims arising from the Lawsuit, finally and fully, without admission of liability, having agreed on the procedures and guidance set forth below with respect to the signature matching and absentee ballot rejection notification and cure procedures; and

WHEREAS, by entering into this Agreement, the Political Party Committees do not concede that the challenged laws and procedures are constitutional, and

similarly, the State Defendants do not concede that the challenged laws and procedures are unconstitutional.

NOW THEREFORE, for and in consideration of the promises and covenants contained herein, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties do hereby agree as follows:

1. **Dismissal.** Within five (5) business days of March 22, 2020, the effective date of the Prompt Notification of Absentee Ballot Rejection rule specified in paragraph 2(a), the Political Party Committees shall dismiss the Lawsuit with prejudice as to the State Defendants.

2. **Prompt Notification of Absentee Ballot Rejection.**

(a) The State Defendants, in their capacity as members of the State Election Board, agree to promulgate and enforce, in accordance with the Georgia Administrative Procedures Act and State Election Board policy, the following State Election Board Rule 183-1-14-.13 of the Georgia Rules and Regulations:

> When a timely submitted absentee ballot is rejected, the board of registrars or absentee ballot clerk shall send the elector notice of such rejection and opportunity to cure, as provided by O.C.G.A. § 21-2-386, by mailing written notice, and attempt to notify the elector by telephone and email if a telephone number or email is on the elector's voter registration record, no later than the close of business on the third business day after receiving the absentee ballot. However, for any timely submitted absentee ballot that is rejected on or after the second Friday prior to Election Day, the board of registrars or absentee ballot clerk shall send the elector notice of such rejection and opportunity to cure, as provided by O.C.G.A. § 21-2-386, by mailing written notice, and attempt to notify the elector by telephone and email if a telephone number or email is on the elector's voter registration record, no later than close of business on the next business day.
>
> Ga. R. & Reg. § 183-1-14-.13 Prompt Notification of Absentee Ballot Rejection

(b) Unless otherwise required by law, State Defendants agree that any amendments to Rule 183-1-14-.13 will be made in good faith in the spirit of ensuring that voters are notified of rejection of their absentee ballots with ample time to cure

their ballots. The Political Party Committees agree that the State Election Board's proposed amendment to Rule 183-1-14-.13 to use contact information on absentee ballot applications to notify the voter fits within that spirit.

3. **Signature Match.**

(a) Secretary of State Raffensperger, in his official capacity as Secretary of State, agrees to issue an Official Election Bulletin containing the following procedure applicable to the review of signatures on absentee ballot envelopes by county elections officials and to incorporate the procedure below in training materials regarding the review of absentee ballot signatures for county registrars:

> County registrars and absentee ballot clerks are required, upon receipt of each mail-in absentee ballot, to compare the signature or mark of the elector on the mail-in absentee ballot envelope with the signatures or marks in eNet and on the application for the mail-in absentee ballot. If the signature does not appear to be valid, registrars and clerks are required to follow the procedure set forth in O.C.G.A. § 21-2-386(a)(1)(C). When reviewing an elector's signature on the mail-in absentee ballot envelope, the registrar or clerk must compare the signature on the mail-in absentee ballot envelope to each signature contained in such elector's voter registration record in eNet and the elector's signature on the application for the mail-in absentee ballot. If the registrar or absentee ballot clerk determines that the voter's signature on the mail-in absentee ballot envelope does not match any of the voter's signatures on file in eNet or on the absentee ballot application, the registrar or absentee ballot clerk must seek review from two other registrars, deputy registrars, or absentee ballot clerks. A mail-in absentee ballot shall not be rejected unless a majority of the registrars, deputy registrars, or absentee ballot clerks reviewing the signature agree that the signature does not match any of the voter's signatures on file in eNet or on the absentee ballot application. If a determination is made that the elector's signature on the mail-in absentee ballot envelope does not match any of the voter's signatures on file in eNet or on the absentee ballot application, the registrar or absentee ballot clerk shall write the names of the three elections officials who conducted the signature review across the face of the absentee ballot envelope, which shall be in addition to writing "Rejected" and the reason for the rejection as required under OCGA 21-2-386(a)(1)(C). Then, the registrar or absentee ballot clerk shall

commence the notification procedure set forth in O.C.G.A. § 21-2-386(a)(1)(C) and State Election Board Rule 183-1-14-.13.

(b) The Parties agree that the guidance in paragraph 3(a) shall be issued in advance of all statewide elections in 2020, including the March 24, 2020 Presidential Primary Elections and the November 3, 2020 General Election.

4. Consideration of Additional Guidance for Signature Matching. The State Defendants agree to consider in good faith providing county registrars and absentee ballot clerks with additional guidance and training materials to follow when comparing voters' signatures that will be drafted by the Political Party Committees' handwriting and signature review expert.

5. Attorneys' Fees and Expenses. The Parties to this Agreement shall bear their own attorney's fees and costs incurred in bringing or defending this action, and no party shall be considered to be a prevailing party for the purpose of any law, statute, or regulation providing for the award or recovery of attorney's fees and/or costs.

6. Release by The Political Party Committees. The Political Party Committees, on behalf of themselves and their successors, affiliates, and representatives, release and forever discharge the State Defendants, and each of their successors and representatives, from the prompt notification of absentee ballot rejection and signature match claims and causes of action, whether legal or equitable, in the Lawsuit.

7. No Admission of Liability. It is understood and agreed by the Parties that this Agreement is a compromise and is being executed to settle a dispute. Nothing contained herein may be construed as an admission of liability on the part of any of the Parties.

8. Authority to Bind; No Prior Assignment of Released Claims. The Parties represent and warrant that they have full authority to enter into this Agreement and bind themselves to its terms.

9. No Presumptions. The Parties acknowledge that they have had input into the drafting of this Agreement or, alternatively, have had an opportunity to have input into the drafting of this Agreement. The Parties agree that this Agreement is and shall be deemed jointly drafted and written by all Parties to it, and it shall be interpreted fairly, reasonably, and not more strongly against one Party than the other.

Accordingly, if a dispute arises about the meaning, construction, or interpretation of this Agreement, no presumption will apply to construe the language of this Agreement for or against any Party.

10. Knowing and Voluntary Agreement. Each Party to this Agreement acknowledges that it is entering into this Agreement voluntarily and of its own free will and accord, and seeks to be bound hereunder. The Parties further acknowledge that they have retained their own legal counsel in this matter or have had the opportunity to retain legal counsel to review this Agreement.

11. Choice of Law, Jurisdiction and Venue. This Agreement will be construed in accordance with the laws of the State of Georgia. In the event of any dispute arising out of or in any way related to this Agreement, the Parties consent to the sole and exclusive jurisdiction of the state courts located in Fulton County, Georgia. The Parties waive any objection to jurisdiction and venue of those courts.

12. Entire Agreement; Modification. This Agreement sets forth the entire agreement between the Parties hereto, and fully supersedes any prior agreements or understandings between the Parties. The Parties acknowledge that they have not relied on any representations, promises, or agreements of any kind made to them in connection with their decision to accept this Agreement, except for those set forth in this Agreement.

13. Counterparts. This Agreement may be executed in counterparts which, taken together, will constitute one and the same Agreement and will be effective as of the date last set forth below, and signatures by facsimile and electronic mail will have the same effect as the originals.

IN WITNESS WHEREOF, the Parties have set their hands and seals to this instrument on the date set forth below.

Dated: March 6, 2020

/s/ Bruce V. Spiva

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Bruce V. Spiva*
John Devaney*
Amanda R. Callais*
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CORECO JA'QAN PEARSON, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	CIVIL ACTION NO.
v.	)	1:20-cv-4809-TCB
	)	
BRIAN KEMP, *et al.*,	)	
	)	
Defendants.	)	

DEFENDANTS' CONSOLIDATED BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS AND RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR INJUNCTIVE RELIEF

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INTRODUCTION

Plaintiffs, a group of disappointed Republican presidential electors, filed a Complaint alleging widespread fraud in the November general election in Georgia, weaving an unsupported tale of "ballot stuffing," the switching of votes by an "algorithm" uploaded to the state's electronic voting equipment that switched votes from President Trump to Joe Biden, hacking by foreign actors from Iran and China, and other nefarious acts by unnamed actors. Plaintiffs did not bring this election challenge in state court as provided by Georgia's Election Code. Instead, they ask this Court to change the election outcome by judicial fiat and order the Governor, the Secretary, and the State Election Board to "de-certify" the results of the election and replace the presidential electors for Joe Biden (who were selected by a majority of Georgia voters by popular vote as provided by state law) with presidential electors for President Trump. Their claims would be extraordinary if true, but they are not. Much like the mythological "kraken" monster[1] after which Plaintiffs have named this lawsuit, their claims of election fraud and malfeasance belong more to the kraken's realm of mythos than they do to reality.

[1] A "kraken" is a mythical sea monster appearing in Scandinavian folklore, being "closely linked to sailors' ability to tell tall tales." *See* https://en.wikipedia.org/wiki/Kraken.

The truth is that the 2020 general election was, according to the federal agency tasked with overseeing election security, "the most secure in history." (*See* **Exhibit B**.)[2] Cybersecurity experts have determined that there is "***no evidence that any voting system deleted or lost votes, changed votes, or was in any way compromised.***" (*Id.*) The accuracy of the presidential election results has been confirmed through at least (1) the statewide risk-limiting audit; (2) a hand recount; and (3) independent testing, which has confirmed that the security of the state's electronic voting equipment was not compromised.

As a threshold matter, the Eleventh Circuit issued an opinion today that mandates dismissal of this action for lack of standing and mootness in the related case of *Wood v. Raffensperger*, No. 20-14418, which raised many of the same claims as this case and sought similar relief. (*See* slip opinion attached as **Exhibit A**). In affirming the district court's decision denying Wood's motion to enjoin certification of the election results, the panel held:

> We agree with the district court that Wood lacks standing to sue because he fails to allege a particularized injury. And because Georgia has already certified its election results and its slate of presidential electors, Wood's requests for emergency relief are moot to the extent they concern the 2020 election. The Constitution makes clear that

[2] *See* Cybersecurity & Infrastructure Security Agency's Joint Statement From Elections Infrastructure Government Coordinating Council & the Election Infrastructure Selector Coordinating Committees, November 12, 2020. A true and correct copy of this statement is attached as **Exhibit B**.

> federal courts are courts of limited jurisdiction, U.S. Const. art. III; we may not entertain post-election contests about garden-variety issues of vote counting and misconduct that may properly be filed in state courts.

(slip op. at 1). This decision squarely controls, and the Court should dismiss the action because Plaintiffs lack an injury in fact sufficient to establish Article III standing. Certification of the election results also moots Plaintiffs' claims, as the Court has no authority under federal law to undo what has already been done.

Other threshold issues bar the relief Plaintiffs seek. Even if they were not moot, Plaintiffs' claims are barred by laches because of their inexcusable delay in raising their challenge to the State's electronic voting system and absentee ballot procedures until after their preferred candidate lost. Plaintiffs' claims are also barred by the Eleventh Amendment to the U.S. Constitution, which bars suits for retrospective relief against state officials acting in their official capacity absent a waiver by the State. Similarly, despite their attempts to raise constitutional claims, Plaintiffs' lawsuit is really an election contest challenging the Presidential election, which can and should be brought in a Georgia court as some of Plaintiffs' allies have recently done.

But most importantly, there is no credible evidence to support the drastic and unprecedented remedy of substituting certified presidential election results with the Plaintiffs' preferred candidate. Without this, Plaintiffs cannot clearly establish the

required elements for injunctive relief. Like every state, Georgia has a compelling interest in preserving the integrity of its election process. "Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). Public confidence in the electoral process would certainly be undermined by a court invalidating the certified results of a presidential election in which nearly 5 million Georgians cast ballots. This Court should decline Plaintiffs' unsupportable efforts to overturn the expressed will of the voters, and should deny their request for relief and dismiss this action.

FACTUAL BACKGROUND

I. Georgia's Electronic Voting System is Secure and Has Not Been Compromised.

Plaintiffs allege wide-ranging conspiracy theories that Georgia's electronic voting system has been compromised by Hugo Chavez and the Venezuelan government (or China and Iran, depending on which "expert" is asked), is infected with a vaguely described "weighted" algorithm that switches votes between candidates, and otherwise produces fraudulent results. In support of their argument, Plaintiffs cite to the un-signed declaration of Dr. Shiva Ayyadurai,[3] other redacted

[3] Dr. Ayyadurai claims he is "an engineer with vast experience in engineering systems, pattern recognition, mathematical and computational modeling and analysis." [Doc. 6-1, ¶ 2]. Elsewhere, Dr. Ayyadurai claims to be the inventor of

declarations, hearsay in the form of various news articles, and contested evidentiary filings in the case *Curling v. Raffensperger*, No. 1:17-cv-2989 (N.D. Ga.).[4]

The Plaintiffs—blinded by either willful ignorance or a lack of basic knowledge of Georgia elections—are incorrect. Georgia's electronic voting system was adopted in compliance with state and federal law, is certified by the Election Assistance Commission following inspection and testing conducted by independent Voting System Test Laboratories ("VSTLs"), and has not been compromised. A review of the *facts*, as opposed to Plaintiffs' conspiracies, confirms the inaccuracy of Plaintiffs' allegations.

A. Adoption and selection of Georgia's electronic voting system.

In 2019, the Georgia General Assembly enacted House Bill 316 ("HB 316"), a sweeping and comprehensive reform of Georgia's election laws, which also modernized and further secured Georgia's voting system. Specifically, the General Assembly chose to require a new unified system of voting throughout the State—

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electronic mail. *See* Sam Biddle, *The Crazy Story of the Man Who Pretended to Invent Email*, Business Insider (Mar. 6, 2012), https://www.businessinsider.com/the-crazy-story-of-the-man-who-pretended-to-invent-email-2012-3. State Defendants object to any consideration of Dr. Ayyadurai's report as he is not qualified to offer the opinions proffered and utilizes unreliable methodology.

[4] The *Curling* matter is now subject to two appeals pending in the Eleventh Circuit Court of Appeals, docket numbers 20-13730 and 20-14067.

moving the State away from the secure, but older, direct-recording electronic ("DRE") voting system to a voting system utilizing Ballot-Marking Devices ("BMDs") and optical scanners. The General Assembly determined this replacement of DREs with BMDs should occur "as soon as possible." O.C.G.A. § 21-2-300(a)(2). The legislation placed the responsibility of selecting the equipment for the new voting system on the Secretary of State. O.C.G.A. § 21-2-300(a). However, contrary to Plaintiffs' assertions that Governor Kemp and Secretary Raffensperger "rushed through the purchase of Dominion voting machines and software," (Doc. 6, p. 15), the procurement of Georgia's new voting system was completed through an open and competitive bidding process as required by Georgia's State Purchasing Act, O.C.G.A. § 50-5-50. Secretary Raffensperger did not make the purchasing decision alone, but established a Selection Committee comprised of seven individuals who were tasked with reviewing bid proposals.[5] Selection Committee members evaluated those proposals using criteria and processes set forth on a Master Technical Evaluation spreadsheet.[6] Of the three requests for proposals evaluated by the Selection Committee, Dominion Voting Systems ("Dominion") received the highest overall score. *Id.*

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[5] *See* https://sos.ga.gov/admin/uploads/Selection%20Committee%20Bios.pdf

[6] *See* https://sos.ga.gov/admin/uploads/MasterTechnicalEvaluation_redacted.xls

On July 29, 2019, Secretary Raffensperger posted a Notice of Intent to Award the contract for the statewide voting system to Dominion. No bid protests were received by the State, and Secretary Raffensperger issued a final Notice of Intent to Award on August 9, 2019. *Id.* The voting system consists of BMDs that print ballots by way of a connected printer and optical scanners connected to a locked ballot box. The Dominion BMD allows the voter to make selections on a screen and then prints those selections onto a paper ballot. The voter has an opportunity to review the paper ballot for accuracy before placing it into the scanner. After scanning, the paper ballot drops into a locked ballot box connected to the scanner. BMDs thus create an auditable, verifiable ballot, as required by statute. O.C.G.A. § 21-2-300(a)(2) ("electronic ballot markers shall produce paper ballots which are marked with the elector's choices **in a format readable by the elector**") (emphasis added).

B. Testing and certification of Georgia's voting system.

Georgia's voting system is subject to two different certification requirements. First, the voting system must have been certified by the United States Election Assistance Commission ("EAC") at the time of procurement. O.C.G.A. § 21-2-300(a)(3). Second, the voting system must also be certified by the Secretary of State as safe and practicable for use. Georgia's BMD system meets both requirements.

The Help America Vote Act ("HAVA") created the EAC, which set up a rigorous process for voting-equipment certification, working with committees of experts and coordinating with the National Institute of Standards and Technology. 52 U.S.C. § 20962; *see also* 52 U.S.C. §§ 20962, 20971 (test lab standards). The EAC certifies voting systems as in compliance with the Voluntary Voting System Guidelines ("VVSG"), version 1.0, and does so by utilizing approved, independent Voting System Test Laboratories ("VSTL"). In the case of the voting system utilized in Georgia, SLI Compliance served as the VSTL tasked with testing the system for EAC purposes. The system utilized by Georgia, Democracy Suite 5.5-A, was certified by the EAC on January 30, 2019.[7]

Separately, the Secretary of State utilized another independent EAC-certified VSTL, Pro V&V, to conduct testing for *state* certification of the voting system. Following the VSTL's testing, the Secretary issued a Certification of the Dominion Voting Systems as meeting all applicable provisions of the Georgia Election Code and Rules of the Secretary of State on August 9, 2019.[8] That certification has been

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[7] *See* United States Election Assistance Commission, Agency Decision — Grant of Certification, https://www.eac.gov/sites/default/files/voting_system/files/Decision.Authority.Grant.of.Cert.D-Suite5.5-A.pdf

[8] Plaintiffs erroneously claim that both the Certificate and a test report signed by Michael Walker were "undated" and have attached altered documents that have been cropped to remove the dates of the documents. *See* Compl., ¶12 and Exhibits 5 and 6 thereto. A correct copy of the Certificate showing the date of August 9,

updated due to de minimis changes in system components on two different occasions since, on February 19, 2020, and again on October 5, 2020.

C. Georgia's electronic voting system has not been compromised and Plaintiffs' assertions to the contrary are disproven by the Risk-Limiting Audit.

Plaintiffs' conjecture and speculation does not rebut the reality that Georgia's voting system has not been compromised. Not only have two separate EAC-Certified independent VSTLs confirmed that the system operates as intended, but Georgia's risk-limiting audit ("RLA") further confirms that no "weighted" vote switching occurred.

Shockingly, the basis for Plaintiffs' outlandish claims of system compromise are rooted in suspect statistical—not software—analyses that they suggest irrefutably proves vote switching occurred. For example, in Dr. Ayyadurai's unsigned declaration, the author references (without citation) vote totals in certain precincts for the proposition that a "weighted race" algorithm must be responsible. (*See generally* Doc. 6-1.) The author, however, makes no attempt to evaluate any other reasons voters may have chosen not to vote for President Trump. Indeed, the

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2019 may be viewed at https://sos.ga.gov/admin/uploads/Dominion_Certification.pdf. A copy of the test report showing a date of August 7, 2019 may be found at https://sos.ga.gov/admin/uploads/Dominion_Test_Cert_Report.pdf.

author of that declaration speculates that 48,000 of 373,000 votes cast in Dekalb County were switched in this manner from Trump to Biden, (Doc. 6-1, p. 28), meaning that (under the author's theory) the results in Dekalb County would be 106,373 for Trump to 260,227 for Biden (or approximately 28.6% to 70%). Of course, this would be extraordinarily unusual for heavily democratic Dekalb County, in which President Trump received 51,468 votes (16.47%) in 2016, when the State was using an entirely different voting system.[9]

Moreover, the existence of such a "weighted" algorithm would have been detected in the RLA conducted this year. Following the counties' tabulation of the November election results, but prior to certification, Secretary Raffensperger was required by law to conduct a risk-limiting audit in accordance with O.C.G.A. § 21-2-498. State Election Board Rule 183-1-15-.04 provides that the Secretary of State shall choose the particular election contest to audit. Recognizing the importance of clear and reliable results for such an important contest, Secretary Raffensperger selected the presidential race for the audit.[10] *See* **Exhibit C**.

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[9] *See* Dekalb County Election Results, 2016, *available at* https://results.enr.clarityelections.com/GA/DeKalb/64036/183321/en/summary.html.

[10] *See* Statement of Secretary Raffensperger, "Historic First Statewide Audit of Paper Ballots Upholds Results of Presidential Race, attached as Exhibit C hereto and available at

County election officials were then required to count by hand all absentee ballots and paper ballots printed by the Dominion BMDs. *See id.* The audit confirmed the same outcome of the presidential race as the original tabulation using the Dominion voting systems equipment. *Id.* While there was a slight differential between the audit results and the original machine counts, the differential was well within the expected margin of error that occurs when hand-counting ballots. *Id.* A 2012 study by Rice University and Clemson University found that hand counting ballots in post-election audit or recount procedures can result in error rates of up to 2 percent. *Id.* In Georgia's audit, the highest error rate reported in any county recount was 0.73%, and most counties found no change in their final tally. *Id.*

The audit results refute Plaintiffs' speculation that Dominion machines or software might have somehow flipped, switched, or "stuffed" ballots in the 2020 presidential election. *Id.* Because Georgia voters can verify that their paper ballots (whether hand-marked absentee ballots or ballots marked by BMDs) accurately reflect their intended votes, any actual manipulation of the initial electronic vote count would have been revealed when the hand count of paper ballots presented a different result. The fact that this did not happen forecloses the possibility that

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https://sos.ga.gov/index.php/elections/historic_first_statewide_audit_of_paper_ballots_upholds_result_of_presidential_race

Dominion equipment or software had been manipulated to somehow record false votes for one candidate or to eliminate votes from another.

In sum, the components of Georgia's voting system have been evaluated, tested, and certified by two different independent laboratories as compliant with both state and federal requirements and safe for use in elections. Neither of those two VSTLs identified any "weighted" vote counting algorithm, nor any other impropriety. And, in Georgia's 2020 general election, the correct operation of the voting system was again confirmed by the state's risk-limiting audit.

II. Absentee Ballots Were Validly Processed According to Law

Plaintiffs' claim that the rules under which county elections officials verified absentee ballots are contrary to Georgia law is also without merit. Absentee ballots for the 2020 general election were processed by county election officials according to the procedures established by the Georgia legislature. These procedures were part of HB 316, bipartisan legislation passed in 2019 to reform the state's election code and implement a new electronic voting system. The reforms kept in place Georgia's policy of "no excuse" absentee voting, but modified the technical requirements for absentee ballots. HB 316 modified the language of the oath on the outer absentee ballot envelope to leave the signature requirement but remove the elector's address and date of birth. *See* O.C.G.A. § 21-2-384. Further, HB 316 added a "cure"

provision, which requires election officials to give a voter until three days after the date of the election to cure an issue with the voter's signature before rejecting an absentee ballot for a missing or mismatched signature on the outer envelope. *See* O.C.G.A. § 21-2-386(a)(1)(C). The "cure" provision was added to the statute's requirement that election officials "promptly notify" the voter of a rejected absentee ballot due to a missing or mismatched signature.

On November 6, 2019, the Democratic Party of Georgia, DSCC, and DCCC (collectively, "Political Party Organizations") sued the State Defendants, alleging that the "promptly notify" language of O.C.G.A. § 21-2-386(a)(1)(C) was vague and ill-defined and left counties without standards for verifying signatures on absentee ballots. (App'x Vol. I at 144-49).

While that action was pending, the State Election Board ("SEB") approved a rule that established a uniform standard for counties to follow to "promptly notify" voters when their absentee ballot is rejected as required by O.C.G.A. § 21-2-386(a)(1)(C). The rule provides that when a timely submitted absentee ballot is rejected, the board of registrars or absentee ballot clerk must send the voter notice of the rejection and opportunity to cure within three business days, or by the next business day if within ten days of Election Day. Ga. Comp. R. & Regs. r. 183-1-14-.13 (the "Prompt Notification Rule").

The Prompt Notification Rule was adopted pursuant to the SEB's rule-making authority under O.C.G.A. § 21-2-31(2). It provides a uniform three-day standard for "prompt" notification required by O.C.G.A. § 21-2-386(a)(1)(C) when an absentee ballot is rejected, so that all counties give notice in a uniform manner. The Prompt Notification Rule was promulgated pursuant to the Georgia Administrative Procedure Act, published for public comment, and discussed at multiple public hearings before it became effective on March 22, 2020.

Because the Prompt Notification Rule resolved the issues in the pending lawsuit, the parties resolved the matter in a settlement agreement that included, among other terms, an agreement that (1) the State Election Board would promulgate and enforce the Prompt Notification Rule; and (2) the Secretary of State would issue guidance to county election officials regarding the signature matching process.

On May 1, 2020, the Secretary of State distributed an Official Election Bulletin ("OEB"), advising county election officials of the Prompt Notification Rule and providing guidance for reviewing signatures on absentee-ballot envelopes. (Declaration of Chris Harvey ¶ 5).[11] The OEB instructed that after an election official makes an initial determination that the signature on the absentee ballot envelope does

[11] The Harvey Declaration was submitted in the related case of *Wood v. Raffensperger*, Civil Action No. 1:20-CV-4651-SDG and is attached as **Exhibit D**.

not match the signature on file for the voter pursuant to O.C.G.A. § 21-2-386(a)(1)(B) and (C), two additional registrars, deputy registrars, or absentee ballot clerks should also review the signature, and the ballot should be rejected if at least two of the three officials agree that the signature does not match. (*Id.*) The OEB expressly instructs county officials to comply with state law. (*Id.*)

Contrary to Plaintiff's claim that the Prompt Notification Rule and the OEB have significantly disrupted the signature verification process, these measures have had no detectable effect on the absentee ballot rejection rate since the last general election in 2018. (Harvey Dec. ¶¶ 6, 7). An analysis of the number of absentee-ballot rejections for signature issues for 2020 as compared to 2018 found that the rejection rate for absentee ballots with missing or non-matching signatures in the 2020 general election was 0.15%; the same rejection rate for signature issues as in 2018 before the new measures were implemented. (*Id.*)

ARGUMENT AND CITATION OF AUTHORITIES

I. The Court Lacks Subject Matter Jurisdiction because Plaintiffs Cannot Establish Article III Standing.

Plaintiffs raise three constitutional counts in their Complaint: (1) that the State Defendants violated the Electors and Elections Clauses of Articles I and II ("Count I"); that the State Defendants violated the equal protection clause of the U.S. Constitution ("Count II"); that the State Defendants denied Plaintiffs Due Process

related to "alleged disparate treatment of absentee/mail-in voters among different counties" ("Count III"); and that the State Defendants denied Plaintiffs Due Process "on the right to vote" ("Count IV"). Plaintiffs also bring a state law election contest claim against Defendants pursuant to O.C.G.A. § 21-5-522, invoking the Court's supplemental jurisdiction under 28 U.S.C. § 1367. However, because Plaintiffs cannot establish standing as to any of these causes of action, the Court lacks jurisdiction to consider the merits of Plaintiffs' claims and the case should be dismissed.

Federal courts have an independent obligation to ensure that subject-matter jurisdiction exists before reaching the merits of a dispute. *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1245 (11th Cir. 2020) (vacating and ordering dismissal of voting rights case due to lack of standing). "For a court to pronounce upon . . . the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires." *Id.* (citation omitted). "If at any point a federal court discovers a lack of jurisdiction, it must dismiss the action." *Id.*

Article III of the Constitution limits the subject-matter jurisdiction of federal courts to "Cases" and "Controversies." U.S. Const. art. III, § 2. A party invoking federal jurisdiction bears the burden of establishing standing at the commencement of the lawsuit. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). As an

irreducible constitutional minimum, Plaintiffs must show they have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision. *Lujan*, 504 U.S. at 561. As the party invoking federal jurisdiction, Plaintiffs bear the burden at the pleadings phase of "clearly alleg[ing] facts demonstrating each element." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016).

A. Plaintiffs have not Alleged an Injury in Fact Sufficient to Form a Basis for Standing.

Injury in fact is the "first and foremost" of the standing elements. *Spokeo*, 136 S. Ct. at 1547. An injury in fact is "an invasion of a legally protected interest that is both concrete and particularized and actual or imminent, not conjectural or hypothetical." *Trichell v. Midland Credit Mgmt., Inc.*, 964 F.3d 990, 996 (11th Cir. 2020); *see also Bognet v. Sec'y Commonwealth of Pa.*, No. 20-3214, 2020 U.S. App. LEXIS 35639 at *16 (3d Cir. Nov. 13, 2020) ("To bring suit, you—and you personally—must be injured, and you must be injured in a way that concretely impacts your own protected legal interests.").

The alleged injury must be "distinct from a generally available grievance about government." *Gill v. Whitford*, 138 S. Ct. 1916, 1923 (2018). This requires more than a mere "keen interest in the issue." *Trump v. Hawaii*, 138 S. Ct. 2392, 2416 (2018); *see also Lance v. Coffman*, 549 U.S. 437, 440–41 (2007) ("Our refusal

to serve as a forum for generalized grievances has a lengthy pedigree. . . . [A] generalized grievance that is plainly undifferentiated and common to all members of the public" is not sufficient for standing).

It is for this reason that the Eleventh Circuit found lack of standing in the *Wood* case. The plaintiff in that case could not "explain how his interest in compliance with state election laws is different from that of any other person. Indeed, he admits that any Georgia voter could bring an identical suit. But the logic of his argument sweeps past even that boundary. All Americans, whether they voted in this election or whether they reside in Georgia, could be said to share [plaintiff's] interest in "ensur[ing] that [a presidential election] is properly administered." (slip op., **Ex. A**, at 11).

Plaintiffs have fared no better at articulating a particularized grievance that is somehow different than that of the general voting public. In fact, throughout their Complaint, Plaintiffs allege that their interests are one and the same as any Georgia voter. *See, e.g.* Compl. at ¶ 156 ("Defendants…diluted the lawful ballots of Plaintiffs and of other Georgia voters and electors…"); ¶ 163 ("Defendants further violated Georgia voters' rights…"), ¶ 199 ("all candidates, political parties, and voters, including without limitation Plaintiffs, have a vested interest in being present and having meaningful access to observe and monitor the electoral process"). Having

confirmed that their interests are no different than the interests of all Georgia voters, Plaintiffs have articulated only generalized grievances insufficient to confer standing upon them to pursue their claims.

B. Plaintiffs do not have Standing as Presidential Electors.

Plaintiffs assert that by virtue of their status as Republican presidential electors, they are "candidates" that have standing to raise whatever variety of election complaints that they may choose. For this proposition, they cite to only a single case: *Carson v. Simon*, 978 F.3d 1051 (8th Cir. 2020). However, *Carson* was predicated on Minnesota election laws that differ from Georgia's and upon facts that are distinguishable from the Plaintiffs' case. Further, the Third Circuit in *Bognet* recently rejected Plaintiff's broad reading of *Carson*. In that case, the court found that a congressional candidate lacked standing to pursue claims under the Elections and Elector clauses based on a generalized "right to run." It specifically noted its disagreement with *Carson*, saying "The Carson court appears to have cited language from [*Bond v. United States*, 564 U.S. 211 (2011)] without considering the context—specifically, the Tenth Amendment and the reserved police powers—in which the U.S. Supreme Court employed that language. There is no precedent for expanding Bond beyond this context, and the *Carson* court cited none." 2020 U.S. App. LEXIS 35639 at *24, fn. 6; *see also Hotze v. Hollins*, No. 4:20-CV-03709, 2020 WL

6437668 at *2 (S.D. Tex. Nov. 2, 2020) (holding candidate lacked standing under Elections Clause); *Looper v. Boman*, 958 F.Supp. 341, 344 (M.D. Tn. 1997) (candidate lacked standing to claim that violations of state election laws had disenfranchised voters as "[h]ow other people vote…does not in any way relate to plaintiff's own exercise of the franchise and further does not constitute concrete and specific judicially cognizable injury."); *Moncier v. Haslam*, 1 F.Supp.3d 854 (E.D. Tn. 2014) (plaintiff denied opportunity to be placed on ballot as candidate for judicial office shared the same generalized grievance as a large class of citizens and failed to demonstrate concrete and particularized injury).

In finding that presidential elector did have standing to challenge purported violations of state election laws, *Carson* relies heavily on specific provisions of Minnesota elections law that treated presidential electors the same as other candidates for office. However, in Georgia, unlike in Minnesota, all persons possessing the qualifications for voting and who have registered in accordance with the law are considered "Electors." O.C.G.A. § 21-2-2(7). Presidential electors in Georgia are not elected to public office, but perform only a limited ministerial role in which they appear at the Capitol on the designated date and time to carry out the expressed will of Georgia's electors by casting their votes for President and Vice President in the Electoral College. O.C.G.A. § 21-2-11. Presidential electors need

not file notices of candidacy otherwise required of political candidates. O.C.G.A. § 21-2-132. Their names do not appear on the ballot; instead, the names of the candidates for President and Vice President appear on the ballot. O.C.G.A. § 21-2-325. Georgia electors do not elect any presidential electors individually; instead, "that slate of candidates shall be elected to such office which receives the highest number of votes cast." O.C.G.A. § 21-2-501(f).

The Eleventh Circuit has held that voters do not suffer a "concrete and particularized injury" simply because their preferred candidate loses an election (*see Jacobson,* 974 F.3d at 1252), and that such a harm would be based on "generalized partisan preferences" which are insufficient to establish standing. *Id.*; *see also Gill v. Whitford,* 138 S.Ct. 1916, 1933 (2018) (rejecting standing based on "group political interests, not individual legal rights"). Plaintiffs have failed to articulate how they, as presidential electors, have suffered any injury not common to their partisan group political interests, or that would not have also been suffered by all Georgia electors generally.

C. Plaintiffs' Alleged Injuries are not Traceable to the State Defendants.

Not only have Plaintiffs failed to demonstrate an injury in fact, they cannot satisfy the causation requirement of standing, which requires that "a plaintiff's injury must be 'fairly traceable to the challenged action of the defendant, and not the result

of the independent action of some third party not before the court.'" *Jacobson*, 974 F.3d at 1253 (citation omitted); *see also Hollywood Mobile Estates Ltd. v. Seminole Tribe of Fla.*, 641 F.3d 1259, 1265 (11th Cir. 2011) (holding that an injury sufficient to establish standing cannot "result [from] the independent action of some third party not before the court.").

Plaintiffs have introduced declarations and affidavits from witnesses that raise disparate complaints about a variety of events that occurring at various times and places during the November election and subsequent audit. These complaints focus on actions allegedly taken by local elections officials and other third parties that are not named as defendants in this case.[12] Whatever one might conclude from these varied allegations, they all have one thing in common: none of the actions complained of are attributable in any way to any of the State Defendants. Instead, they were taken by local elections officials not named as parties to this case, and any

[12] Examples of these complaints include allegations that Dekalb County elections workers were "more hostile" to Republican observers than Democratic observers (Silva Aff. 06-9 Ex. 18, ¶14), that a Cobb County volunteer audit monitor witnessed "already separated paper machine receipt ballots with barcodes in the Trump tray, placing them in to the Biden tray" (Johnson Aff., Compl., Ex. 17, ¶¶4-5), and that an audit observer at the Lithonia location was too far away from ballots to see how they had been voted and that some auditors were validating ballots without reading them aloud to another auditor. (O'Neal Aff., 6-10, Exhibit J, ¶5-8).

injuries that might have resulted from those actions are not traceable to and cannot be redressed by the State Defendants.

With regard to Plaintiffs' conspiratorial claims related to Dominion equipment and software, there has been no allegation whatsoever that any of the State Defendants participated in any conspiracy or collusion with Dominion or any other third party malicious actor to cause any harm to Plaintiffs or any Georgia voters. The only allegation made against any of the State Defendants is that Governor Kemp and Secretary Raffensperger somehow "rushed" through the equipment selection process. However, this process was an open, competitive bidding process, conducted pursuant to Georgia procurement law, and during *Curling* hearings, and no allegation has been made as to how *any* action or inaction taken by any of the State Defendants during that bidding process might have caused any of Plaintiffs' alleged injuries.

Finally, to the extent that Plaintiffs claim injury as a result of any improprieties in the mailing, processing, validation or tabulation of absentee ballots, these injuries again would not be traceable to any of the State Defendants. Absentee ballots are mailed, processed, validated, and tabulated by local elections officials. *See* O.C.G.A. § 21-2-386. Having failed to establish that any of their purported injuries are traceable to or redressable by the State Defendants, Plaintiffs lack standing and their

claims should be dismissed. *See Jacobson*, 974 F.3d at 1253. *See also Anderson v. Raffensperger*, 1:20-CV-03263, 2020 WL 6048048, at *22 (N.D. Ga. Oct. 13, 2020) (applying *Jacobson* to dismiss election related claims against State Defendants).

II. Plaintiffs' Claims are Moot.

The Eleventh Circuit held in the *Wood* decision today that federal challenges to the certification of the presidential election results in Georgia are now moot. "'We cannot turn back the clock and create a world in which' the 2020 election results are not certified." *Wood v. Raffensperger*, slip op. at 17 (quoting *Fleming v. Gutierrez*, 785 F.3d 442, 445 (10th Cir. 2015)). Accordingly, the case "no longer presents a live controversy with respect to which the court can give meaningful relief." *Troiano v. Supervisor of Elections in Palm Beach Cty., Fla.*, 382 F.3d 1276, 1282 (11th Cir. 2004). Mootness is jurisdictional—because a federal court may only adjudicate cases and controversies, and a ruling that cannot provide meaningful relief is an impermissible advisory opinion. *Id.*

The Court "cannot prevent what has already occurred." *De La Fuente v. Kemp*, 679 F. App'x 932, 933 (11th Cir. 2017); *Yates v. GMAC Mortg. LLC*, No. 1:10-CV-02546-RWS, 2010 WL 5316550, at *2 (N.D. Ga. Dec. 17, 2010) ("The Court is powerless to enjoin what has already occurred."). While Plaintiffs purportedly seek "decertification" of the certifications that Secretary Raffensperger

and Governor Kemp have already executed, they cite no authority whatsoever to support the notion that a court could order such relief. If the Plaintiffs believed that the results certified by Secretary Raffensperger and Governor Kemp were invalid for fraud or other grounds specified in O.C.G.A. § 21-2-522, Georgia provides an adequate remedy at law by setting forth the procedures for a state law election contest to be initiated in the Superior Court of Fulton County. O.C.G.A. §§ 21-2-520, *et seq*. However, there is simply no precedent for a federal court to issue an injunction requiring either Governor Kemp or Secretary Raffensperger to "decertify" their already-issued certifications or to certify results in direct contravention of the actual election result.

III. Plaintiffs' Claims are Barred by the Eleventh Amendment.

Plaintiffs' federal claims are asserted against the individually named State Defendants in their official capacities. (Doc. 1 at ¶¶ 31-33). These claims are barred by the Eleventh Amendment. The Eleventh Amendment bars suit against a State or one of its agencies, departments or officials, absent a waiver by the State or a valid congressional override, when the State is the real party in interest. *Kentucky v. Graham*, 473 U.S. 159, 169 (1985). Because claims against public officials in their official capacities are merely another way of pleading an action against the entity of which the officer is an agent, "official capacity" claims against a state officer are

included in the Eleventh Amendment's bar. *Kentucky*, 473 U.S. at 165. While an exception to Eleventh Amendment immunity exists under *Ex parte Young*, 209 U.S. 123 (1908), it is limited to suits against state officers for **prospective** injunctive relief. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 69 n. 24 (1997). "A federal court cannot award retrospective relief, designed to remedy past violations of federal law." *Id.*

Plaintiffs' claims for injunctive and declaratory relief, premised on the conduct of the November 3, 2020 General Election and the certification of results that have already taken place, are barred because they are retrospective in nature. "Retrospective relief is backward-looking, and seeks to remedy harm 'resulting from a past breach of a legal duty on the part of the defendant state officials.'" *Seminole Tribe of Fla. v. Fla. Dep't of Revenue*, 750 F.3d 1238, 1249 (11th Cir. 2014) (quoting *Edelman v. Jordan,* 415 U.S. 651, 668 (1974)). "Simply because the remedy will occur in the future, does not transform it into 'prospective' relief. The term, 'prospective relief,' refers to the ongoing or future threat of harm, not relief." *Fedorov v. Bd. of Regents*, 194 F. Supp. 2d 1378, 1387 (S.D. Ga. 2002). Plaintiffs' claims for any relief related to the rules and regulations governing the conduct of the November 3, 2020, election or any alleged past security lapses, miscounting of votes,

or election irregularities are entirely retrospective and barred by the Eleventh Amendment.

IV. Laches Bars Plaintiffs' Claims for Post-Election Relief.

In *Wood v. Raffensperger*, 2020 U.S.Dist. LEXIS 218058 (Nov. 20. 2020), this Court found that claims raised by Plaintiffs' counsel Lin Wood were barred by the doctrine of laches. While Plaintiffs' claims overlap significantly with Wood's claims, the facts here are even more compelling when it comes to a finding of laches. Plaintiffs waited even longer than Wood did to file this action. As in *Wood,* virtually all of the complaints that Plaintiffs allege regarding the security of Georgia's voting system or the propriety of State Election Board rules or regulations could have been raised prior to the election.

To establish laches, State Defendants must show "(1) there was a delay in asserting a right or a claim, (2) the delay was not excusable, and (3) the delay caused [them] undue prejudice." *United States v. Barfield*, 396 F.3d 1144, 1150 (11th Cir. 2005); *see also Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1326 (11th Cir. 2019) ("To succeed on a laches claim, [defendant] must demonstrate that [p]laintiffs inexcusably delayed bringing their claim and that the delay caused it undue prejudice.").

Where, as here, a challenge to an election procedure is not filed until *after* an election has already been conducted, the prejudice to the state and to the voters that have cast their votes in the election becomes particularly severe. Once the election has been conducted, any harm that might arise from a purported constitutional violation must be weighed against "such countervailing equitable factors as the extremely disruptive effect of election invalidation and the havoc it wreaks upon local political continuity." *Soules v. Kauaians for Nukolii Campaign Committee*, 849 F.2d 1176, 1177 (9th Cir. 1988). For this reason, "if aggrieved parties, without adequate explanation, do not come forward before the election, they will be barred from the equitable relief of overturning the results of the election." *Id.* at 1180-81 (*citing Hendon v. North Carolina State Bd. of Elections*, 710 F.2d 177, 182-83 (4th Cir. 1983); *see also Curtin v. Va. State Bd. of Elections*, No. 1:20-cv-0546, 2020 U.S. Dist. LEXIS 98627, *16-17 (E.D. Va. May 29, 2020) (rejecting a similar challenge to state official guidance as barred by laches due to plaintiffs' failure to raise the challenge prior to the election). To hold otherwise "permit[s], if not encourage[s], parties who could raise a claim to lay by and gamble upon receiving a favorable decision of the electorate and then, upon losing, seek to undo the ballot results in a court action." *Toney v. White*, 488 F.2d 310, 314 (5th Cir. 1973).

Plaintiffs delayed considerably in asserting their claims. To the extent that they had any concerns regarding the vulnerability of Dominion's voting systems, they could have raised those claims long before the election. Each of the absentee ballot regulations and procedures that Plaintiffs now complain of were adopted well before the November 3, 2020 election, and any claims related to the application of those rules during that election are subject to dismissal here for the same reasons that they were dismissed in *Wood*. And, with regard to the purported "irregularities" reported by Plaintiffs' voter and observer declarants, Plaintiffs offer no explanation why they did not attempt to address those issues with the relevant local election officials at the time, but instead waited until after the election officials completed the initial count and audit and certified those results.

As the *Wood* court recognized, Defendants and the public at large would be significantly injured if Plaintiffs were permitted to raise these challenges after the election has already taken place. 2020 U.S.Dist. LEXIS 218058 at *23 ("Wood's requested relief could disenfranchise a substantial portion of the electorate and erode the public's confidence in the electoral process."); *see also Arkansas United v. Thurston*, No. 5:20-cv-5193, 2020 WL 6472651, at *5 (W.D. Ark. Nov. 3, 2020) ("[T]he equities do not favor intervention where the election is already in progress and the requested relief would change the rules of the game mid-play.").

V. The Court should Abstain from Granting Relief.

The relief Plaintiffs seek is nothing short of overturning the November election. The ad damnum clause asks this Court to (1) order the Defendants to de-certify the election results; (2) enjoin the Governor from transmitting the certified results to the Electoral College; and instead (3) require the Governor to transmit a certification that President Trump received the majority of votes in Georgia. (Doc. 1 ¶ 211(1-3); Doc. 101 at 100.) There are numerous problems with this proposed relief. First, it violates the principles of federalism. Second, the *Pullman* doctrine warrants dismissal. Finally, and at the very least, this lawsuit should be stayed pending the outcome of state election challenges pursuant to the *Colorado River* doctrine.

On federalism, the Eleventh Circuit recently held that it is "doubtful" that a federal court could compel a state to promulgate a regulation. *Jacobson*, 974 F.3d at 1257. First, federal courts are only able to order state defendants from "refrain[ing] from violating federal law." *Id.* (citing *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 255 (2011)). Much of Plaintiffs' proposed relief cannot be reconciled with this binding precedent. Specifically, Plaintiffs do not seek to just refrain the Governor and the Secretary, they seek to compel them to certify a different candidate than the election laws demand, which is wholly inconsistent with Georgia's Election

Code and the thrice-audited results. The relief sought is particularly offensive to federalism principles in the light of the election challenges pending in state court that significantly mirror the claims brought in this lawsuit. As the Plaintiffs themselves now recognize, "Georgia law makes clear that post-election litigation may proceed in state Court." *Wood v. Raffensperger*, slip op. at 9. Indeed, Plaintiffs' Complaint repeatedly claims that they are bringing their lawsuit pursuant to Georgia statutes that provide the very basis to challenge elections. (Doc. No. 1 ¶¶ 150 (O.C.G.A. § 21-2-522), 183-207 (O.C.G.A. §§ 21-2-521, 21-2-522). It is hard to imagine a more significant challenge to federalism than for a party to come to federal court asking that court to reverse certified election results without giving the State an opportunity to act pursuant to its own statutory scheme.

These concerns are recognized by the *Pullman* doctrine, which is "appropriate 'in cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law.'" *3637 Corp., Inc. v. City of Miami*, 314 F. Supp. 3d 1320, 1334 (S.D. Fla. 2018) (citing *Moheb, Inc. v. City of Miami*, 756 F.Supp.2d 1370, 1372 (S.D. Fla. 2010) (quoting *Abell v. Frank*, 625 F.2d 653, 656–57 (5th Cir. 1980)). Here, the constitutional issue presented—whether the legislature's delegation of rulemaking authority to the SEB is valid, and whether the SEB exceeded that authority when

promulgating various emergency rules—violates the federal constitution. In other words, the Court cannot answer the constitutional question without first deciding that the state agency exceeded its authority *under State law*. This is a classic *Pullman* situation, which examines and requires that "(1) there must be an unsettled issue of state law; and (2) there must be a possibility that the state law determination will moot or present in a different posture the federal constitutional questions raised." *Id.* at 1372–73 (citing *Abell*, 625 F.2d at 657). Judge Jones reached the same conclusion last December in another election-related lawsuit, *Fair Fight, Inc. v. Raffensperger*.[13] This Court should do the same and dismiss the lawsuit.

For a similar reason, Plaintiffs' requested relief violates the *Colorado River Doctrine.* There are numerous pending challenges to the November election that have properly been filed in Georgia's courts, including, according to press statements by Mr. Wood's counsel in the *Wood* litigation, one filed late on December 4, 2020, by President Trump. At least one seeks nearly identical relief as the Plaintiffs' lawsuit. Under similar circumstances, the Eleventh Circuit has indicated that a stay of federal proceedings is warranted under the *Colorado River* doctrine, which "authorizes a federal 'district court to dismiss or stay an action when there is an ongoing parallel action in state court.'" *Moorer v. Demopolis Waterworks &*

[13] A true and accurate copy of the December Order is attached as **Exhibit E**.

Sewer Bd., 374 F.3d 994, 997–98 (11th Cir. 2004) (citing *LaDuke v. Burlington Northern Railroad Co.*, 879 F.2d 1556, 1558 (7th Cir.1989)). Factors considered in the *Colorado River* analysis include: the desire to "avoid piecemeal litigation," whether state or federal law governs the issue, and whether the state court can protect all parties' rights. *Id.* at 987 (citation omitted).

Each of these factors warrants staying the litigation. The bulk of Plaintiffs' complaint addresses issues of state law: how absentee ballot requests and ballots are inspected, the authority of the General Assembly to delegate authority to the SEB and the Secretary, and the criteria for certifying elections. Moreover, the state court election challenges are to move swiftly. Thus, the possibility of piecemeal litigation is real and concrete. Finally, the relief that the parties in the state court challenges can obtain would protect all parties' rights. The remedies available to Georgia courts when ruling on election challenges are spelled out in state law. *See* O.C.G.A. § 21-2-527(d). Under these circumstances, *Colorado River* factors are satisfied, and the election challenge should proceed in state court under the same state laws that the Plaintiffs raised in their Complaint.

VI. Plaintiffs' Motion for Injunctive Relief Should be Denied.

Even if Plaintiffs could overcome the jurisdictional defects that are fatal to their claims, they still fail to satisfy the requirements for the extraordinary injunctive relief they seek.

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 24 (2008). To prevail on their motion, Plaintiffs are required to show: (1) a substantial likelihood of prevailing on the merits; (2) that the plaintiff will suffer irreparable injury unless the injunction issues; (3) that the threatened injury to the movant outweighs whatever damages the proposed injunction may cause the opposing party; and (4) the injunction would not be adverse to the public interest. *Duke v. Cleland*, 954 F.2d 1526, 1529 (11th Cir. 1992). The Court "should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Winter*, 555 U.S. at 24.

A. Plaintiffs are not likely to succeed on the merits of their claims.

1. Plaintiffs' equal protection claims fail because they cannot show arbitrary and disparate treatment among different classes of voters.

Plaintiffs' equal protection claims fail for the same reason their counsel's equal protections claims failed in *Wood*. In the voting rights context, equal protection means that "[h]aving once granted the right to vote on equal terms, the state may

not, by later arbitrary and disparate treatment, value one person's vote over that of another." *Bush v. Gore,* 531 U.S. 98, 104 (2000) (citation omitted). Typically, when deciding a constitutional challenge to state election laws, federal courts apply the *Anderson-Burdick* framework that balances the burden on the voter with the state's interest in the voting regulation. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 190 (2008); *Democratic Exec. Comm. of Fla. v. Lee,* 915 F.3d 1312, 1318-19 (11th Cir. 2019).

But, as the *Wood* court recognized, Plaintiffs' claims do not fit within this framework. 2020 U.S. Dist. LEXIS 218058 at *25. Plaintiffs have not articulated a cognizable harm that invokes the Equal Protection Clause. Any actions taken by the State Defendants were taken "in a wholly uniform manner across the entire state." *Id.* at 26. No voters – including the Plaintiffs – were treated differently than any other voter. *Id.* (*citing Wise v. Circosta*, 978 F.3d 93, 100 (4th Cir. 2020).

Nor have Plaintiffs set forth a "vote dilution" claim. None of the Plaintiffs have alleged that any action of Defendants have burdened their ability to cast their own votes. Instead, their claims, like Wood's, appear to be that because some votes were improperly counted or illegally cast, these illegal or improperly counted votes somehow caused the weight of ballots cast lawfully by Georgia voters to be somehow weighted differently than others. *Id.* at 27. Both the district court in *Wood*

court and the Third Circuit Court of Appeals in *Bognet* "squarely rejected" this theory. *Bognet*, 2020 WL 6686120, at *31-2 ("if dilution of lawfully cast ballots by the 'unlawful' counting of invalidly cast ballots were a true equal-protection problem, then it would transform every violation of state election law…into a potential federal equal-protection claim"); *see also Jacobson*, 974 F.3d at 1247 (rejecting partisan vote dilution claim).

The Supreme Court's decision in *Bush v. Gore* does not support Plaintiff's case (*see* Doc. 6 at 16-17), as that case found a violation of equal protection where certain counties were utilizing varying standards for what constituted a legal vote in the 2000 Florida recount. 531 U.S. at 105 ("The question before us … is whether the recount procedures … are consistent with its obligation to avoid arbitrary and disparate treatment of the members of its electorate"). Here, any actions taken by the State Defendants were undertaken state-wide. The isolated "irregularities" complained of by Plaintiff's various declarants, if true, would have taken place at the county level under the supervision of elections officials that are not parties to this case. All actions of the State Defendants have been uniform and applicable to all Georgia counties and voters, in order to avoid the kind of ad hoc standards that varied from county to county as found unconstitutional in *Bush*. They are the exact opposite of arbitrary and disparate treatment.

2. *Plaintiffs' claim under the Electors and Elections Clauses fails.*

The electors clause of the United States Constitution provides that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, "who, in turn, cast the State's votes for president. U.S. Const. art. II, § 1, cl. 2. The General Assembly established the manner for the appointment of presidential electors in O.C.G.A. § 21-2-10, which provides that electors are *selected by popular vote* in a general election. Plaintiffs fail to show how any act of the State Defendants has altered this process.

Similarly, Plaintiffs fail to show how State Defendants have violated the elections clause, which provides that "[t]he Times, Places, and Manner of holding elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof." U.S. Const. art. I, § 4, cl. 1. Plaintiffs complain about a variety of regulations or procedures related to absentee ballot processing, without articulating precisely how those regulations or procedures run afoul of the elections clause. In any event, the State Election Board has the authority, delegated by the legislature, "[t]o formulate, adopt, and promulgate such rules and regulations … as will be conducive to the fair, legal, and orderly conduct of primaries and elections" so long as those rules are "consistent with law." O.C.G.A. 21-2-31(2). Thus, while no one disagrees that State Defendants are not members of the Georgia legislature,

Plaintiff's claim depends on the assumption that the rules and procedures used to process absentee ballots during the November 3, 2020, election were somehow inconsistent with Georgia's election code.

But this simply is not so. The SEB Rule is consistent with State law, and a Georgia court would likely say the same. Under Georgia precedent, when an agency empowered with rulemaking authority (like the SEB is), the test applied to regulation challenges is quite deferential. Georgia courts ask whether the regulation is authorized by statute and reasonable. *Albany Surgical, P.C. v. Dep't of Cmty. Health*, 257 Ga. App. 636, 637 (2002). The answer to both questions is an unqualified "yes."

As shown, the SEB is empowered to promulgate regulations. O.C.G.A. § 21-2-31(1). As recognized by Judge Grimberg in *Wood*, it is normal and constitutional for state legislatures to delegate their authority in such a manner. 2020 U.S.Dist. LEXIS 218058 at *10. The regulations are also reasonable. There is no conflict between the signature verification regulation and statutes cited by the Plaintiffs, O.C.G.A. §§ 21-2-386(a)(1)(C). (Doc. No. 1 at 23.) The statute requires an absentee ballot where a signature "does not appear to be valid" to be rejected and notice provided to the voter. *Id.* The challenged SEB Rule, which merely requires "an additional safeguard to ensure election security by having more than one individual review an absentee ballot's information and signature for accuracy before the ballot

is rejected," is consistent with this approach. *Wood*, 2020 U.S.Dist. LEXIS 218058 at *10. No statute cited by the Plaintiffs mandates that only one county official examine the absentee ballot, and that the review process involves several officials does not make it any less rigorous or inconsistent with the statutory law. (*See* Harvey Decl. ¶¶ 3, 5). A Georgia court would likely hold the same, because state courts have said that a "regulation must be upheld if the agency presents *any evidence* to support the regulation." *Albany Surgical, P.C. v. Dep't of Cmty. Health*, 257 Ga. App. 636, 640 (2002). Mr. Harvey's declaration certainly satisfies that standard, and it should be obvious that having a verification process in place designed to ensure uniform statewide application of the laws for determining consideration of an absentee ballot does not lead to invalid votes.

Any remaining doubt must be resolved in the State's favor, as the Plaintiffs have not identified any conflict in the language. This is what Judge Grimberg rightly concluded when he held that: "The record in this case demonstrate that, if anything, Defendants' actions in entering into the Settlement Agreement sought to achieve consistency among county election officials in Georgia, which ***furthers*** Wood's stated goals of conducting "[f]ree, fair, and transparent elections." *Wood* at * 10 (emphasis and brackets in original). This ends the inquiry and is fatal to Plaintiffs' claims in Counts I, III, IV, and V.

3. Plaintiffs' due process claims fail.

Plaintiffs' motion fails to articulate a discernable claim under the due process clause. It is unclear what process Plaintiffs claim that they were due or how any of the State Defendants failed to provide that process. Count II of Plaintiffs' Complaint, while captioned "Denial of Due Process" vaguely describes an undefined "disparate treatment" with regard to cure processes and argues that the disparate treatment "violates Equal Protection guarantees." *See* Compl. at ¶172. Count IV of Plaintiffs' Complaint is captioned "Denial of Due Process on the Right to Vote", and appears to describe a claim of vote dilution or debasement – citing to various equal protection cases. *See* Compl. at ¶§176-80. Plaintiffs' Motion for Preliminary Injunction does not include any discussion of due process at all.

Plaintiffs have not articulated a cognizable procedural due process claim. A procedural due process claim raises two inquires: "(1) whether there exists a liberty or property interest which has been interfered with by the State and (2) whether the procedures attendant upon that deprivation were constitutionally sufficient." *Richardson v. Texas Sec'y of State*, 978 F.3d 220, 229 (5th Cir. 2020) (citing *Kentucky Dep't of Corr. v. Thompson*, 490 U.S. 454, 460 (1989)). The party invoking the Due Process Clause's procedural protections bears the "burden . . . of establishing a cognizable liberty or property interest." *Richardson*, 978 F.3d at 229

(citing *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005)). Plaintiffs have not clearly articulated what liberty or property interest has been interfered with by the State Defendants, or how any procedures attendant to the purported deprivation were constitutionally sufficient. As the *Wood* court noted:

> …the Eleventh Circuit does "assume that the right to vote is a liberty interest protected by the Due Process Clause." *Jones v. Governor of Fla.*, 975 F.3d 1016, 1048 (11th Cir. 2020). But the circuit court has expressly declined to extend the strictures of procedural due process to "a State's election procedures." *New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1282 (11th Cir. 2020) ("The generalized due process argument that the plaintiffs argued for and the district court applied would stretch concepts of due process to their breaking point.").

2020 U.S. Dist. LEXIS 218058 at *33.

Nor have Plaintiffs articulated a cognizable substantive due process claim. The types of voting rights covered by the substantive due process clause are considered narrow. *Curry v. Baker*, 802 F.2d 1302, 1314 (11th Cir. 1986). This does not extend to examining the validity of individual ballots or supervising the administrative details of an election. *Id.* In only "extraordinary circumstances will a challenge to a state election rise to the level of a constitutional deprivation." *Id.*

As the *Wood* court recognized:

> Although Wood generally claims fundamental unfairness, and the declarations and testimony submitted in support of his motion speculate as to wide-spread impropriety, the actual harm alleged by Wood concerns merely a "garden variety" election dispute.

2020 U.S. Dist. LEXIS 218058 at *35. Further, "[p]recedent militates against a finding of a due process violation regarding such an ordinary dispute over the counting and marking of ballots." *Id.* (*citing Gamza v. Aguirre*, 619 F.2d 449, 453 (5th Cir. 1980) for the proposition that "If every state election irregularity were considered a federal constitutional deprivation, federal courts would adjudicate every state election dispute.").

The same is true here. Plaintiffs have introduced only speculative, conclusory and contradictory testimony from "experts" that would do no more than establish a possibility of irregularities if their analysis were correct, along with a hodge-podge of disparate claims by third-party voters and observers claiming that they observed a variety of different purported irregularities in a handful of different counties (none of which are parties to this action). Plaintiffs have failed to demonstrate the "extraordinary circumstances" rising to the level of a constitutional deprivation that are necessary to support a substantive due process claim. Plaintiffs have therefore failed to demonstrate a substantial likelihood of success on the merits of any claim for violation of the 14th Amendment's guarantee of either procedural or substantive Due Process.

4. Plaintiffs' Election Contest Claims Fail.

As shown, the Plaintiffs have effectively filed an election challenge under Georgia law. Seeking to stop certification does not save the Plaintiffs' Complaint for at least two additional reasons. First, it has long been the rule that electors are state and not federal officials. *See Walker v. United States*, 93 F.2d 383, 388 (8th Cir. 1937). Consequently, it is state law that determines how challenges to electors are made, and Georgia law sets forth that process as explained above. This also demonstrates why abstention is appropriate. Second, to the extent that the Plaintiffs argue that county election officials did not properly count mail-in and absentee ballots, there are state remedies available to challenge the acts of those county officials. Indeed, Georgia's laws governing election challenges provide for just that.

Finally, and as addressed elsewhere in this brief, the *Jacobson* decision makes clear that challenges to acts of county officials must be brought against those county officials. 974 F.3d at 1254. It is insufficient to rely on the Secretary's general powers "to establish traceability." *Anderson*, 2020 WL 6048048 at *23. Similarly, reliance on the phrase "chief election official" or statements about the uniformity in the administration of election laws have been deemed insufficient by the *Anderson* court when it applied *Jacobson*. *Id.*

In sum, because Plaintiffs are not likely to succeed on the merits of any of their claims, injunctive relief must be denied.

B. The loss of Plaintiffs' preferred candidate is not irreparable harm.

Plaintiffs fail to articulate any specific harm that he faces if his requested relief is not granted, other than the vague claim that an infringement on the right to vote constitutes irreparable harm. However, Plaintiffs do not allege that their right to vote was denied or infringed in any way—only that their preferred candidate lost. It is not irreparable harm if they are not able to "cast their votes in the Electoral College for President Trump," because "[v]oters have no judicially enforceable interest in the outcome of an election." *Jacobson*, 974 F.3d at 1246 ("Voters have no judicially enforceable interest in the outcome of an election.").

Irreparable harm goes to the availability of a remedy—not a particular outcome. Certifying the expressed will of the electorate is not irreparable harm, but rather inevitable and legally required within our constitutional framework. There is a remedy available to extent that the losing candidate—rather than a dissatisfied voter, supporter, or presidential elector—seeks post-certification remedies, and such election contests have been filed in state court and remain pending.

C. The balance of equities and public interest weigh heavily against an injunction.

These remaining injunction factors—balancing the equities and public interest—are frequently considered "in tandem" by courts, "as the real question posed in this context is how injunctive relief at this eleventh-hour would impact the public interest in an orderly and fair election, with the fullest voter participation possible." *Curling v. Kemp*, 334 F. Supp. 3d 1303, 1326 (N.D. Ga. 2018), *aff'd in part, appeal dismissed in part*, 761 F. App'x 927 (11th Cir. 2019); *see also Purcell*, 549 U.S. at 4. The Court must "balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief," paying "particular regard as well for the public consequences in employing the extraordinary remedy of injunction." *Winter*, 555 U.S. at 24.

Here, "the threatened injury to Defendants as state officials and the public at large far outweigh any minimal burden on [Plaintiffs]. *Wood*, 2020 U.S. Dist. LEXIS 218058 at *38. "Confidence in the integrity of our electoral process is essential to the functioning of our participatory democracy," and court orders affecting elections "can themselves result in voter confusion and consequent incentive to remain away from the polls." *Purcell*, 549 U. S. at 4-5. For this reason, the Supreme Court "has repeatedly emphasized that lower federal courts should ordinarily not alter the

election rules on the eve of an election." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S.Ct. 1205, 1207 (April 6, 2020) (per curiam).

The Eleventh Circuit recently held that the *Purcell* principle applies with even greater force when voting has already occurred. *See New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1283 (11th Cir. 2020) ("[W]e are not on the eve of the election—we are in the middle of it, with absentee ballots already printed and mailed. An injunction here would thus violate *Purcell*'s well-known caution against federal courts mandating new election rules—especially at the last minute."); *see also Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 919 (9th Cir. 2003) ("Interference with impending elections is extraordinary, and interference with an election after voting has begun is unprecedented.").

Here, the election *has already been conducted*, and the slate of presidential electors has been certified. Granting Plaintiffs' extraordinary relief would only serve to "disenfranchise [] voters or sidestep the expressed will of the people." *Donald J. Trump for President,* 2020 U.S. App. LEXIS 37346 at *28. As the district court in *Wood* correctly recognized, "To interfere with the result of an election that has already concluded would be unprecedented and harm the public in countless ways." 2020 U.S. Dist. LEXIS 218058 at *37-38. Plaintiffs seek even broader relief than that sought in *Wood.* If granted, Plaintiffs' requested relief would disenfranchise not

only Georgia's absentee voters but would invalidate **all** votes cast by Georgia electors.

CONCLUSION

For the foregoing reasons, Plaintiffs' emergency motion for injunctive relief must be denied and the Court should dismiss the action with prejudice. Furthermore, the current TRO entered by the Court should be immediately dissolved to prevent ongoing harm to the ability of county elections officials to begin early voting for the January run-off, for the reasons shown in State Defendants' motion to modify the TRO.

Respectfully submitted, this 5th day of December, 2020.

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Robbins Ross Alloy Belinfante Littlefield LLC
500 14th Street NW
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Telephone: (678) 701-9381
Facsimile: (404) 856-3250

Attorneys for State Defendants

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing has been formatted using Times New Roman font in 14-point type in compliance with Local Rule 7.1(D).

/s/ Charlene S. McGowan
Charlene S. McGowan
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that I have this day electronically filed the foregoing **STATE DEFENDANTS' CONSOLIDATED BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS AND RESPONSE TO PLAINTIFF'S EMERGENCY MOTION FOR INJUNCTIVE RELIEF** with the Clerk of Court using the CM/ECF system, which will send notification of such filing to counsel for all parties of record via electronic notification.

Dated: December 5, 2020.

/s/ Charlene S. McGowan
Charlene S. McGowan
Assistant Attorney General

Jeffrey DeSousa

From: Catherine McNeill
Sent: Tuesday, December 8, 2020 2:16 PM
To: Amit Agarwal
Subject: RE: amicus meeting

Added for 4 today. AG is expecting the call. Thanks

From: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Sent: Tuesday, December 8, 2020 1:13 PM
To: Catherine McNeill <cate.mcneill@myfloridalegal.com>
Cc: John Guard <John.Guard@myfloridalegal.com>; Charles Trippe <Charles.Trippe@myfloridalegal.com>; Richard Martin <Richard.Martin@myfloridalegal.com>
Subject: Re: amicus meeting

I am not available from 4:30 to 5:30 or 3:00 to 4:00.

In light of a recent update, this could wait till tomorrow morning if that's more convenient for the group.

From: Catherine McNeill <cate.mcneill@myfloridalegal.com>
Sent: Tuesday, December 8, 2020 1:10 PM
To: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Cc: John Guard <John.Guard@myfloridalegal.com>; Charles Trippe <Charles.Trippe@myfloridalegal.com>; Richard Martin <Richard.Martin@myfloridalegal.com>
Subject: RE: amicus meeting

Maybe have Charlie join at 4:30?

From: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Sent: Tuesday, December 8, 2020 12:45 PM
To: Catherine McNeill <cate.mcneill@myfloridalegal.com>
Cc: John Guard <John.Guard@myfloridalegal.com>; Charles Trippe <Charles.Trippe@myfloridalegal.com>; Richard Martin <Richard.Martin@myfloridalegal.com>
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Catherine,

Can we please schedule a short meeting this afternoon to discuss some amicus briefs that have come in with impending deadlines (one of which has a join deadline of today at COB)? I can arrange to be free any time **other than** from 3:00 to 4:00 and 4:30 to 5:30. 4:00 would be ideal if that works for the group.

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Amit Agarwal
Office of the Attorney General
Solicitor General

PL-01, The Capitol
Tallahassee, FL 32399-1050
Amit.Agarwal@myfloridalegal.com
Office: (850) 414-3688

Jeffrey DeSousa

From: Evan Ezray
Sent: Tuesday, December 8, 2020 2:14 PM
To: Amit Agarwal
Cc: James Percival
Subject: RE: Texas law suit

All,

The Supreme Court docket is up. The case number is 22O155. There is no action that we haven't seen yet, but the docket does break the documents up, so it a little easier to read.

https://www.supremecourt.gov/Search.aspx?FileName=/docket/docketfiles/html/public\22o155.html

From: Evan Ezray
Sent: Tuesday, December 8, 2020 1:21 PM
To: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Cc: James Percival <James.Percival@myfloridalegal.com>
Subject: RE: Texas law suit

Amit,

In terms of procedure, Supreme Court Rule 17 governs original actions.

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From: Evan Ezray
Sent: Tuesday, December 8, 2020 1:06 PM
To: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Subject: Texas law suit

https://www.texasattorneygeneral.gov/sites/default/files/images/admin/2020/Press/SCOTUSFiling.pdf?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=

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James Percival

From: Amit Agarwal
Sent: Tuesday, December 8, 2020 7:14 PM
To: John Guard; Richard Martin; Charles Trippe
Cc: Christopher Baum; Evan Ezray; James Percival; Jeffrey DeSousa
Subject: Fw: Texas v. Pennsylvania, et al. - Amicus Brief of Missouri, at al. - Joins requested by 1:00 p.m. Central Tomorrow, 12/9
Attachments: 2020-12-07 - Texas v. Pennsylvania, et al. - Bill of Complaint.pdf; 2020-12-08 - Texas v. Pennsylvania - Amicus Brief of Missouri et al.docx

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From: Sauer, John <John.Sauer@ago.mo.gov>
Sent: Tuesday, December 8, 2020 7:10 PM
To: 'Mithun Mansinghani' <mithun.mansinghani@oag.ok.gov>; 'Murrill, Elizabeth' <MurrillE@ag.louisiana.gov>; 'Melissa Holyoak' <melissaholyoak@agutah.gov>; 'nicholas.bronni@arkansasag.gov' <nicholas.bronni@arkansasag.gov>; 'Vincent Wagner' <vincent.wagner@arkansasag.gov>; 'ed.sniffen@alaska.gov' <ed.sniffen@alaska.gov>; Smith, Justin <Justin.Smith@ago.mo.gov>; Amit Agarwal <Amit.Agarwal@myfloridalegal.com>; 'Kane, Brian' <brian.kane@ag.idaho.gov>; 'tom.fisher@atg.in.gov' <tom.fisher@atg.in.gov>; 'julia.payne@atg.in.gov' <julia.payne@atg.in.gov>; 'toby.crouse@ag.ks.gov' <toby.crouse@ag.ks.gov>; 'Chad.Meredith@ky.gov' <Chad.Meredith@ky.gov>; 'Andrew Pinson' <APinson@LAW.GA.GOV>; 'jeff.chanay' <jeff.chanay@ag.ks.gov>; 'St. John, Joseph' <StJohnJ@ag.louisiana.gov>; 'Kristi.Johnson@ago.ms.gov' <Kristi.Johnson@ago.ms.gov>; 'ABurton@mt.gov' <ABurton@mt.gov>; 'MSchlichting@mt.gov' <MSchlichting@mt.gov>; 'Lindsay S. See' <Lindsay.S.See@wvago.gov>; 'jonbennion@mt.gov' <jonbennion@mt.gov>; 'wstenehjem@nd.gov' <wstenehjem@nd.gov>; 'Benjamin.flowers@ohioattorneygeneral.gov' <Benjamin.flowers@ohioattorneygeneral.gov>; 'ESmith@scag.gov' <ESmith@scag.gov>; 'BCook@scag.gov' <BCook@scag.gov>; 'steven.blair@state.sd.us' <steven.blair@state.sd.us>; 'Sherri.Wald@state.sd.us' <Sherri.Wald@state.sd.us>; 'Sarah.Campbell@ag.tn.gov' <Sarah.Campbell@ag.tn.gov>; 'tom.fisher@atg.in.gov' <tom.fisher@atg.in.gov>; 'Andree.Blumstein@ag.tn.gov' <Andree.Blumstein@ag.tn.gov>; 'matthew.frederick@texasattorneygeneral.gov' <matthew.frederick@texasattorneygeneral.gov>; 'Kyle.Hawkins@oag.texas.gov' <Kyle.Hawkins@oag.texas.gov>; 'Ric Cantrell' <rcantrell@agutah.gov>; 'james.kaste@wyo.gov' <james.kaste@wyo.gov>; 'Jim.Campbell@nebraska.gov' <Jim.Campbell@nebraska.gov>; 'Thomas T. Lampman' <Thomas.T.Lampman@wvago.gov>; 'Jessica A. Lee' <Jessica.A.Lee@wvago.gov>; 'Lindsay S. See' <Lindsay.S.See@wvago.gov>; 'Roysden, Beau' <Beau.Roysden@azag.gov>; 'Bash, Zina' <Zina.Bash@oag.texas.gov>; 'masagsve@nd.gov' <'masagsve@nd.gov'>; 'Harley Kirkland' <HKirkland@scag.gov>; 'Eddie Lacour' <elacour@ago.state.al.us>; 'Hudson, Kian' <Kian.Hudson@atg.in.gov>; 'Kuhn, Matt F (KYOAG)' <Matt.Kuhn@ky.gov>
Subject: Texas v. Pennsylvania, et al. - Amicus Brief of Missouri, at al. - Joins requested by 1:00 p.m. Central Tomorrow, 12/9

All-

Attached please find a draft multistate amicus brief in support of Texas's motion for leave to file a bill of complaint in the U.S. Supreme Court challenging the administration of the recent Presidential election in Pennsylvania, Michigan, Wisconsin, and Georgia. The brief argues that (1) the separation-of-powers provision of the Electors Clause of Article II, Section 1 is an important structural check on government that safeguards individual liberty; (2) voting by mail presents real concerns for fraud and abuse that require statutory safeguards to protect against such fraud and abuse; and (3) the abrogation of statutory safeguards against fraud in voting by mail by non-legislative actors violates the Electors Clause and undermines public confidence in elections. For your reference, I have also attached Texas's Motion for Leave to File Bill of Complaint and related documents.

With apologies for the short deadline, given the time-sensitivity of this case, we are requesting joins by **1:00 p.m. Central TOMORROW**, 12/9. We are planning to file tomorrow afternoon.

Thanks a lot,

John Sauer

No. 22O155, Original

In the Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

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

Defendants.

On Motion for Leave to File Bill of Complaint

BRIEF OF STATES OF MISSOURI, ____ AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF'S MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

OFFICE OF THE MISSOURI ATTORNEY GENERAL
Supreme Court Building
P.O. Box 899
Jefferson City, MO 65102
John.Sauer@ago.mo.gov

ERIC S. SCHMITT
Attorney General

D. John Sauer
Solicitor General
Counsel of Record

Counsel for Amici Curiae
(additional counsel listed on signature page)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF INTEREST OF *AMICI*

"In the context of a Presidential election," state actions "implicate a uniquely important national interest," because "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, 794–95 (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." *Id.* "Every voter" in a federal election "has a right under the Constitution to have his vote fairly counted, without its being distorted by fraudulently cast votes." *Anderson* v. *United States*, 417 U.S. 211, 227 (1974).

Amici curiae are the States of Missouri, _____.[1] *Amici* have several important interests in this case. *First*, the States have a strong interest in safeguarding the separation of powers among state actors in the regulation of Presidential elections. The Electors Clause of Article II, § 1 carefully balances power among state actors, and it assigns a specific function to the "Legislature thereof" in each State. U.S. CONST. art. II, § 1, cl. 4. Our system of federalism relies on separation of powers to preserve liberty at every level of government, and the separation of powers in the Electors Clause is no exception. The States have a strong interest in preserving the proper roles of state legislatures in the administration of federal elections, and thus safeguarding the individual liberty of their citizens.

---

[1] This brief is filed under Supreme Court Rule 37.4, and all counsel of record received timely notice of the intent to file this amicus brief under Rule 37.2.

Second, *amici* States have a strong interest in ensuring that the votes of their own citizens are not diluted by the unconstitutional administration of elections in other States. When non-legislative actors in other States encroach on the authority of the "Legislature thereof" in that State to administer a Presidential election, they threaten the liberty, not just of their own citizens, but of every citizen of the United States who casts a lawful ballot in that election—including the citizens of *amici* States.

Third, for similar reasons, *amici* States have a strong interest in safeguarding against fraud in voting by mail during Presidential elections. "Every voter" in a federal election, "has a right under the Constitution to have his vote fairly counted, without its being distorted by fraudulently cast votes." *Anderson*, 417 U.S. at 227. Plaintiff's Bill of Complaint alleges that non-legislative actors in the Defendant States stripped away important safeguards against fraud in voting by mail that had been enacted by the Legislature in each State. *Amici* States share a vital interest in protecting the integrity of the truly national election for President and Vice President of the United States.

SUMMARY OF ARGUMENT

The Bill of Complaint raises constitutional questions of great public importance that warrant this Court's review. First, like every similar provision in the Constitution, the separation-of-powers provision of the Electors Clause provides an important structural check on government designed to protect individual liberty. By allocating authority over Presidential electors to the "Legislature thereof" in

each State, the Clause separates powers both vertically and horizontally, and it confers authority on the branch of state government most responsive to the democratic will. Encroachments on the authority of state Legislatures by other state actors violate the separation of powers and threaten individual liberty.

The unconstitutional encroachments on the authority of state Legislatures in this case raise particularly grave concerns. For decades, responsible observers have cautioned about the risks of fraud and abuse in voting by mail, and they have urged the adoption of statutory safeguards to prevent such fraud and abuse. In the numerous cases identified in the Bill of Complaint, non-legislative actors in each Defendant State repeatedly stripped away statutory safeguards that the "Legislature thereof" had enacted to protect against fraud in voting by mail. These changes removed protections that responsible actors had recommended for decades to guard against fraud and abuse in voting by mail, and they did so in a manner that uniformly and predictably benefited one candidate in the recent Presidential election. The allegations in the Bill of Complaint raise grave questions about election integrity and public confidence in the administration of Presidential elections. This Court should grant Plaintiff leave to file the Bill of Complaint.

ARGUMENT

The Electors Clause provides that each State "shall appoint" its Presidential electors "in such Manner as the *Legislature thereof* may direct." U.S. CONST. art. II, § 1, cl. 4 (emphasis added). Moreover, "[o]ur constitutional system of representative government only works when the worth of honest

ballots is not diluted by invalid ballots procured by corruption." U.S. Dep't of Justice, *Federal Prosecution of Election Offenses*, at 1 (8th ed. Dec. 2017). "When the election process is corrupted, democracy is jeopardized." *Id.* The proposed Bill of Complaint raises serious concerns about constitutionality and ballot security of election procedures in the Defendant States. Given the importance of public confidence in American elections, these allegations raise questions of great public importance that warrant this Court's expedited review.

I. The Separation-of-Powers Provision of the Electors Clause Is a Structural Check on Government That Safeguards Liberty.

Article II 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. 4 (emphasis added); *see also id.* art. I, § 4, cl. 2 (providing that, in each State, the "Legislature thereof" shall establish "[t]he Times, Places and Manner of holding Elections for Senators and Representatives").

Thus, "in the case of a law enacted by a state legislature applicable not only to elections to state offices, but also to the selection of Presidential electors, the legislature is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under Art. II, § 1, cl. 2, of the United States Constitution." *Bush* v. *Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70, 76 (2000). "[T]he state legislature's power to select the manner for appointing electors is plenary." *Bush* v. *Gore*, 531 U.S. 98, 104 (2000).

Here, as set forth in the Bill of Complaint, non-legislative actors in each Defendant State have purported to "alter[] an important statutory provision enacted by the [State's] Legislature pursuant to its authority under the Constitution of the United States to make rules governing the conduct of elections for federal office." *Republican Party of Pennsylvania* v. *Boockvar*, No. 20-542, 2020 WL 6304626, at *1 (U.S. Oct. 28, 2020) (Statement of Alito, J.). *See* Bill of Complaint, ¶¶ 41-127. In doing so, these non-legislative actors encroached upon the "plenary" authority of those States' respective legislatures over the conduct of the Presidential election in each State. *Bush* v. *Gore*, 531 U.S. at 104. This encroachment on the authority of each State's Legislature violated the separation of powers set forth in the Electors Clause. "[I]n the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest. For the President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation." *Anderson*, 460 U.S. at 794–795.

In every other context, this Court recognizes that the Constitution's separation-of-powers provisions, which allocate authority to specific governmental actors to the exclusion of others, are designed to preserve liberty. "It is the proud boast of our democracy that we have 'a government of laws, and not of men.'" *Morrison* v. *Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting). "The Framers of the Federal Constitution . . . viewed the principle of separation of powers as the absolutely central guarantee of a just Government." *Id.* "Without a secure structure of separated powers, our Bill of Rights would be worthless, as are the bills of rights of

many nations of the world that have adopted, or even improved upon, the mere words of ours." *Id.* "The purpose of the separation and equilibration of powers in general . . . was not merely to assure effective government but to preserve individual freedom." *Id.* at 727.

This principle of preserving liberty applies both to the horizontal separation of powers among the branches of government, and the vertical separation of powers between the federal government and the States. "The federal system rests on what might at first seem a counterintuitive insight, that 'freedom is enhanced by the creation of two governments, not one.'" *Bond* v. *United States*, 564 U.S. 211, 220–21 (2011) (quoting *Alden* v. *Maine*, 527 U.S. 706, 758 (1999)). "[F]ederalism secures to citizens the liberties that derive from the diffusion of sovereign power." *Bond*, 564 U.S. at 221 (2011) (quoting *New York* v. *United States*, 505 U.S. 144, 181 (1992)). "Federalism also protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions." *Id.* Moreover, "federalism enhances the opportunity of all citizens to participate in representative government." *FERC* v. *Mississippi*, 456 U.S. 742, 789 (1982) (O'Connor, J., concurring in part and dissenting in part). "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Gregory* v. *Ashcroft*, 501 U.S. 452, 458 (1991).

The explicit grant of authority to state *Legislatures* in the Electors Clause of Article II, §1 effects both a horizontal and a vertical separation of powers. The Clause allocates 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. 4.

It is no accident that the Constitution allocates such authority to state Legislatures, rather than executive officers such as Secretaries of State, or judicial officers such as state Supreme Courts. The Constitutional Convention's delegates frequently recognized that the Legislature is the branch most responsive to the People and most democratically accountable. *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 ratification documents expressing that state legislatures were most likely to be in sympathy with the interests of the people); Federal Farmer, No. 12 (1788), *reprinted in* 2 THE FOUNDERS' CONSTITUTION (Philip B. Kurland & Ralph Lerner eds., 1987) (arguing that electoral regulations "ought to be left to the state legislatures, they coming far nearest to the people themselves"); THE FEDERALIST NO. 57, at 350 (C. Rossiter, ed. 2003) (Madison, J.) (stating that the "House of Representatives is so constituted as to support in its members an habitual recollection of their dependence on the people"); *id.* (stating that the "vigilant and manly spirit that actuates the people of America" is greatest restraint on the House of Representatives).

Democratic accountability in the method of selecting the President of the United States is a powerful bulwark safeguarding individual liberty. By identifying the "Legislature thereof" in each State as the regulator of elections for federal officers, the Electors Clause of Article II, § 1 prohibits the very arrogation of power over Presidential elections by non-legislative officials that the Defendant States perpetrated in this case. By violating the Constitution's separation of powers, these non-legislative actors undermined the liberty of all Americans, including the voters in *amici* States.

II. Stripping Away Safeguards From Voting by Mail Exacerbates the Risks of Fraud.

By stripping away critical safeguards against ballot fraud in voting by mail, non-legislative actors in the Defendant States inflicted another grave injury on the conduct of the recent election: They enhanced the risks of fraudulent voting by mail without authority. An impressive body of public evidence demonstrates that voting by mail presents unique opportunities for fraud and abuse, and that statutory safeguards are critical to reduce such risks of fraud.

For decades prior to 2020, responsible observers emphasized the risks of fraud in voting by mail, and the importance of imposing safeguards on the process of voting by mail to allay such risks. For example, in *Crawford* v. *Marion County Election Board*, this Court held that fraudulent voting "perpetrated using absentee ballots" demonstrates "that not only is the risk of voter fraud real but that *it could affect the outcome of a close election.*" *Crawford* v. *Marion County Election Bd.*, 553 U.S. 181, 195-96 (2008) (opinion of Stevens, J.) (emphasis added).

As noted by Plaintiff, the Carter-Baker Commission on Federal Election Reform emphasized the same concern. The bipartisan Commission—co-chaired by former President Jimmy Carter and former Secretary of State James A. Baker—determined that "[a]bsentee ballots remain 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) ("Carter-Baker Report").[2] According to the Carter-Baker Commission, "[a]bsentee balloting is vulnerable to abuse in several ways." *Id.* "Blank ballots mailed to the wrong address or to large residential buildings might bet intercepted." *Id.* "Citizens who vote at home, at nursing homes, at the workplace, or in church are more susceptible to pressure, overt and subtle, or to intimidation." *Id.* "Vote buying schemes are far more difficult to detect when citizens vote by mail." *Id.*

Thus, the Commission noted that "absentee balloting in other states has been a major source of fraud." *Id.* at 35. It emphasized that voting by mail "increases the risk of fraud." *Id.* And the Commission recommended that "States ... need to do more to prevent ... absentee ballot fraud." *Id.* at v.

The Commission specifically recommended that States should implement and reinforce safeguards to prevent fraud in voting by mail. The Commission recommended that "States should make sure that absentee ballots received by election officials before Election Day are kept secure until they are opened and counted." *Id.* at 46. It also recommended that States "prohibit[] 'third-party' organizations,

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[2] *Available at* https://www.legislationline.org/download/id/1472/file/-3b50795b2d0374cbef5c29766256.pdf.

candidates, and political party activists from handling absentee ballots." *Id.* And the Commission highlighted that a particular state "appear[ed] to have avoided significant fraud in its vote-by-mail elections by introducing safeguards to protect ballot integrity, *including signature verification*." *Id.* at 35 (emphasis added). The Commission concluded that "[v]ote by mail is ... likely to increase the risks of fraud and contested elections ... where the safeguards for ballot integrity are weaker." *Id.*

The most recent edition of the U.S. Department of Justice's Manual on *Federal Prosecution of Election Offenses*, published by its Public Integrity Section, highlights the very same concerns about fraud in voting by mail. U.S. Dep't of Justice, *Federal Prosecution of Election Offenses* (8th ed. Dec. 2017), at 28-29 ("DOJ Manual").[3] The Manual states: "Absentee ballots are particularly susceptible to fraudulent abuse because, by definition, they are marked and cast outside the presence of election officials and the structured environment of a polling place." *Id.* The Manual reports that "the more common ways" that election-fraud "crimes are committed include ... [o]btaining and marking absentee ballots without the active input of the voters involved." *Id.* at 28. And the Manual notes that "[a]bsentee ballot frauds" committed both with and without the voter's participation are "common." *Id.* at 29.

Similarly, the U.S. Government Accountability Office concluded that many crimes of election fraud likely go undetected. In 2014, discussing election fraud, the GAO reported that "crimes of fraud, in

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[3] *Available at* https://www.justice.gov/criminal/file/1029066/download.

particular, are difficult to detect, as those involved are engaged in intentional deception." GAO-14-634, *Elections: Issues Related to State Voter Identification Laws* 62-63 (U.S. Gov't Accountability Office Sept. 2014).[4]

Despite the difficulties of detecting fraud schemes, recent experience contains many well-documented examples of absentee ballot fraud. For example, the News21 database, which was compiled to *refute* arguments that voter fraud is prevalent, identified 491 cases of absentee ballot over the 12-year period from 2000 to 2012—approximately 41 cases per year. *See* News21, *Election Fraud in America*.[5] This database reports that "Absentee Ballot Fraud" was "[t]he most prevalent fraud" in America, comprising "24 percent (491 cases)" of all cases reported in the public records surveyed. *Id.* Moreover, the database indicates that this number undercounts the total incidence of reported cases of absentee ballot fraud, because it was based on public-record requests to state and local government entities, many of which did not respond. *Id.*

Likewise, the Heritage Foundation's online database of election-fraud cases—which includes only a "sampling" of cases that resulted in an *adjudication* of fraud, such as a criminal conviction or civil penalty—identified 207 cases of proven "fraudulent use of absentee ballots" in the United States. The

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[4] *Available at* https://www.gao.gov/assets/670/665966.pdf.

[5] *Available at* https://votingrights.news21.com/interactive/election-fraud-database/&xid=17259,15700023,15700124,15700149,15700186,15700191,15700201,15700237,15700242

Heritage Foundation, *Election Fraud Cases*.[6] Again, this database undercounts the incidence of cases of election fraud: "The Heritage Foundation's Election Fraud Database presents a sampling of recent proven instances of election fraud from across the country. This database is not an exhaustive or comprehensive list." *Id.*

The public record abounds with recent examples of such fraudulent absentee-ballot schemes. For example, in November 2019, the mayor of Berkeley, Missouri was indicted on five felony counts of absentee ballot fraud for changing votes on absentee ballots to help him and his political allies to get elected. Brian Heffernan, *Berkeley Mayor Hoskins Charged with 5 Felony Counts of Election Fraud*, ST. LOUIS PUBLIC RADIO (Nov. 21, 2019).[7] Mayor Hoskins' scheme included "going to the home of elderly ... residents" to harvest absentee ballots, "filling out absentee ballot applications for voters and having his campaign workers do the same," and "altering absentee ballots" after he had procured them from voters. *Id.* Again, in 2016, a state House race in Missouri was overturned amid allegations of widespread absentee-ballot fraud that had occurred across multiple election cycles in the same community. Sarah Fenske, *FBI, Secretary of State Asking Questions About St. Louis Statehouse Race*,

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[6] *Available at* https://www.heritage.org/voterfraud/search?combine=&state=All&year=&case_type=All&fraud_type=24489&page=12.

[7] *Available at* https://news.stlpublicradio.org/post/berkeley-mayor-hoskins-charged-5-felony-counts-election-fraud#stream/0

RIVERFRONT TIMES (Aug. 16, 2016).[8] One candidate stated that it was widely known in the community that the incumbent ran an "absentee game" that resulted in the mail-in vote tipping the outcome in her favor in multiple close elections. *Id.*

Other States have similar experiences. In 2018, a federal Congressional race was overturned in North Carolina, and eight political operatives were indicted for fraud, in an absentee-ballot fraud scheme that sufficed to change the outcome of the election. Richard Gonzales, *North Carolina GOP Operative Faces New Felony Charges That Allege Ballot Fraud*, NPR.ORG, (July 30, 2019).[9] The indicted operatives "had improperly collected and possibly tampered with ballots," and were charged with "improperly mailing in absentee ballots for someone who had not mailed it themselves." *Id.*

In the North Carolina case, the lead investigator testified that the investigation was "a continuous case" over two election cycles, and that the scheme involved collecting absentee ballots from voters, altering the absentee ballots, and forging witness signatures on the ballots. *See In re: Investigation of Irregularities Affecting Counties Within the 9th Congressional District*, North Carolina Board of Elections, Evidentiary Hearing, at 2-3.[10] The investigators described it as a "coordinated, unlawful,

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[8] *Available at* https://www.riverfronttimes.com/newsblog/2016/08/16/fbi-secretary-of-state-asking-questions-about-st-louis-statehouse-race.

[9] *Available at* https://www.npr.org/2019/07/30/746800630/north-carolina-gop-operative-faces-new-felony-charges-that-allege-ballot-fraud.

[10] *Available at* https://images.radio.com/wbt/Voter%20ID_%20Website.pdf.

and substantially resourced absentee ballots scheme." *Id.* at 2. According to the investigators' trial presentation, the investigation involved 142 voter interviews, 30 subject and witness interviews, and subpoenas of documents, financial records, and phone records. *Id.* at 3. The perpetrators collected absentee ballots and falsified ballot witness certifications outside the presence of the voters. *Id.* at 10, 13. The congressional election at issue was decided by margin of less than 1,000 votes. *Id.* at 4. The scheme involved the submission of well over 1,000 fraudulent absentee ballots and request forms. *Id.* at 11. The perpetrators took extensive steps to conceal the fraudulent scheme, which lasted over multiple election cycles before it was detected. *Id.* at 14.

Similarly, in 2016, a politician in the Bronx was indicted and pled guilty to 242 counts of election fraud based on an absentee ballot fraud scheme. Ben Kochman, *Bronx politician pleads guilty in absentee ballot scheme for Assembly election,* NEW YORK DAILY NEWS (Nov. 22, 2016).[11] Despite pleading guilty to 242 felonies involving absentee ballot fraud in an election that was decided by two votes, the defendant received no jail time and vowed to run for office again after a short disqualification period. *Id.*

The increases in mail-in voting due to the COVID-19 pandemic likewise increased opportunities for fraud. For instance, in May 2020, the leader of the New Jersey NAACP called for an election in Paterson, New Jersey to be overturned due to widespread mail-in ballot fraud. *See* Jonathan Dienst et al., *NJ NAACP*

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[11] *Available at* http://www.nydailynews.com/new-york/nyc-crime/bronx-pol-pleads-guilty-absentee-ballot-scheme-article-1.2884009.

Leader Calls for Paterson Mail-In Vote to Be Canceled Amid Corruption Claims, NBC NEW YORK (May 27, 2020).[12] "'Invalidate the election. Let's do it again,' [the NAACP leader] said amid reports more that 20 percent of all ballots were disqualified, some in connection with voter fraud allegations." *Id.*

Hundreds of other reported cases highlight the same concerns about the vulnerability of voting by mail to fraud and abuse. Recently, a Missouri court considered extensive expert testimony reviewing absentee-ballot fraud cases like these. *Findings of Fact, Conclusions of Law, and Final Judgment in Mo. State Conference of the NAACP* v. *State*, No. 20AC-CC00169-01 (Circuit Court of Cole County, Missouri Sept. 24, 2020), *aff'd*, 607 S.W.3d 728 (Mo. banc Oct. 9, 2020) ("*Mo. NAACP*"). The court held that cases of absentee-ballot fraud "have several common features that persist across multiple recent cases: (1) close elections; (2) perpetrators who are candidates, campaign workers, or political consultants, not ordinary voters; (3) common techniques of ballot harvesting, (4) common techniques of signature forging, (5) fraud that persisted across multiple elections before it was detected, (6) massive resources required to investigate and prosecute the fraud, and (7) lenient criminal penalties." *Id.* at 17. Thus, "fraud in voting by mail is a recurrent problem, that it is hard to detect and prosecute, that there are strong incentives and weak penalties for doing so, and that it has the capacity to affect the outcome of close

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[12] *Available at* https://www.nbcnewyork.com/news/politics/nj-naacp-leader-calls-for-paterson-mail-in-vote-to-be-canceled-amid-fraud-claims/2435162/.

elections." *Id.* The court concluded that "the threat of mail-in ballot fraud is real." *Id.* at 2.

III. The Bill of Complaint Alleges that the Defendant States Abolished Critical Safeguards Against Fraud in Voting by Mail.

The Bill of Complaint alleges that non-legislative actors in each Defendant State unconstitutionally abolished or diluted statutory safeguards against fraud enacted by the state legislature, in violation of the Presidential Electors Clause. U.S. CONST. art. II, § 1, cl. 4. All the unconstitutional changes to election procedures identified in the Bill of Complaint have two common features: (1) They abrogated statutory safeguards against fraud that responsible observers have long recommended for voting by mail, and (2) they did so in a way that predictably conferred partisan advantage on one candidate in the Presidential election. Such allegations are serious, and they warrant this Court's review.

Abolishing signature verification. First, the proposed Bill of Complaint alleges that non-legislative actors in Pennsylvania, Georgia, and Michigan unilaterally abolished or undermined signature-verification requirements for mailed ballots. It alleges that Pennsylvania's Secretary of State abrogated Pennsylvania's statutory signature-verification requirement for mail-in ballots in a "friendly" settlement of a lawsuit brought by activists. Bill of Complaint, ¶¶ 44-46. It alleges that Georgia's Secretary of State unilaterally abrogated Georgia's statute authorizing county registrars to engage in signature verification for absentee ballots in a similar settlement. *Id.* ¶¶ 66-72. It alleges that Michigan's Secretary of State permitted absentee ballot

applications online, with no signature at all, in violation of Michigan statutes, *id.* ¶¶ 85-89; and that election officials in Wayne County, Michigan simply disregarded statutory signature verification requirements, *id.* ¶¶ 92-95.

In addition to violating the Electors Clause, these actions contradicted fundamental principles of ballot security. As noted above, the Carter-Baker Report highlighted the importance of "*signature verification*" as a critical "safeguard[] to protect ballot integrity" for ballots cast by mail. Carter-Baker Report, *supra*, at 35 (emphasis added). Without safeguards such as signature verification, the Report stated that "[v]ote by mail is ... likely to increase the risks of fraud and contested elections ... where the safeguards for ballot integrity are weaker." *Id.* The importance of signature verification is hard to overstate, because absentee-ballot fraud schemes commonly involve "common techniques of signature forging," typically by nefarious actors who are unfamiliar with the voter's signature. *Mo. NAACP*, *supra*, at 17. Verifying the voter's signature by comparison to the signature on the voter rolls thus provides the most critical safeguard against fraud.

Insecure ballot handling. The Bill of Complaint alleges that non-legislative actors changed or abolished statutory rules for the secure handling of absentee and mail-in ballots in Pennsylvania, Michigan, and Wisconsin. It alleges that election officials in Democratic areas of Pennsylvania violated state statutes by opening and reviewing mail-in ballots that were required to be kept locked and secure until Election Day. Bill of Complaint, ¶¶ 50-51. It alleges that Michigan's Secretary of State, acting in violation of state law, sent 7.7 million unsolicited

absentee-ballot applications to Michigan voters, thus "flooding Michigan with millions of absentee ballot applications prior to the 2020 general election." *Id.* ¶¶ 80-84. And it alleges that the Wisconsin Election Commission violated state law by placing hundreds of unmonitored boxes for the submission of absentee and mail-in ballots around the State, concentrated in heavily Democratic areas. *Id.* ¶¶ 107-114.

In addition to violating the Electors Clause, these actions contradicted commonsense ballot-security recommendations. The Department of Justice's Manual on *Federal Prosecution of Election Offenses* notes that vulnerability to mishandling is what makes absentee ballots "particularly susceptible to fraudulent abuse" because "they are marked and cast outside the presence of election officials and the structured environment of a polling place." DOJ Manual, at 28-29. According to the Manual, "[o]btaining and marking absentee ballots without the active input of the voters involved" is one of "the more common ways" that election fraud "crimes are committed." *Id.* at 28. For this reason, the Carter-Baker Commission made a series of recommendations in favor of preventing such insecurity in the handling of ballots. For example, the Commission recommended that "States should make sure that absentee ballots received by election officials before Election Day are kept secure until they are opened and counted." *Id.* at 46. It also recommended that States "prohibit[] 'third-party' organizations, candidates, and political party activists from handling absentee ballots." *Id.*

Inconsistent Statewide Standards. The Bill of Complaint alleges that the Defendant States provided different standards and treatment for mail-

in ballots submitted in different areas of each State, and that this differential treatment uniformly provided a partisan advantage to one side in the Presidential election. It alleges that election officials in Philadelphia and Allegheny County, Pennsylvania, applied different standards to voters in those Democratic strongholds than applied to other voters in Pennsylvania, in violation of state law. Bill of Complaint, ¶¶ 52-54. Similarly, it alleges that Milwaukee, Wisconsin violated state law by authorizing election officials to "correct" disqualifying omissions on ballot envelopes by entering information that the voter should have entered with a red pen, while no similar "correction" process was granted to other voters in that State. *Id.* ¶¶ 123-127. And it alleges that Wayne County, Michigan provided favorable treatment to its voters, in violation of state statutes, by simply ignoring statutorily required signature-verification requirements. *Id.* ¶¶ 92-95.

Again, such differential treatment, under circumstances raising concerns of partisan bias, contradicts universal recommendations for integrity and public confidence in elections. As this Court stated in *Bush* v. *Gore*, "[t]he idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government." 531 U.S. at 107 (quoting *Moore* v. *Ogilvie*, 394 US 814 (1969)). The Carter-Baker Report noted that "inconsistent or incorrect application of electoral procedures may have the effect of discouraging voter participation and may, on occasion, raise questions about bias in the way elections are conducted." Carter-Baker Report, at 49. "Such problems raise public suspicions or may provide

grounds for the losing candidate to contest the result in a close election." *Id.*

Excluding Bipartisan Observers. The Bill of Complaint alleges that certain counties in Defendant States excluded bipartisan observers from the ballot-opening and ballot-counting processes. For example, it alleges that election officials in Philadelphia and Allegheny County, Pennsylvania, violated state law by excluding Republican observers from the opening, counting, and recording of absentee ballots in those counties. Bill of Complaint, ¶ 49. And it alleges that election officials in Wayne County, Michigan violated state statutes by systematically excluding poll watchers from the counting and recording of absentee ballots. *Id.* ¶¶ 90-91.

Such actions, as alleged, raise grave concerns about the integrity of the vote count in those counties. As the Carter-Baker Report emphasized, States should "provide observers with meaningful opportunities to monitor the conduct of the election." Carter-Baker Report, at 47. "To build confidence in the electoral process, it is important that elections be administered in a neutral and professional manner," without the appearance of partisan bias." *Id.* at 49. When observers of one political party are illegally and systematically excluded from observing the vote count, "the appearance of partisan bias" is inevitable. *Id.* For counties in Defendant States to exclude Republican observers weakens public confidence in the electoral process and raises grave concerns about the integrity of ballot counting in those counties.

Extending the deadline to receive ballots. The Bill of Complaint alleges that a non-legislative actor in Pennsylvania—its Supreme Court—extended the statutory deadline to receive absentee and mail-in

ballots without authorization of the "Legislature thereof," and directed that ballots with illegible postmarks or no postmarks at all would be deemed timely if received within the extended deadline. Bill of Complaint, ¶¶ 48, 55. Again, these non-legislative changes raise grave concerns about election integrity in Pennsylvania. First, they created a post-election window of time during which nefarious actors could wait and see whether the Presidential election would be close, and whether perpetrating fraud in Pennsylvania would be worthwhile. Second, they enhanced the opportunities for fraud by mandating that late ballots must be counted even when they are not postmarked or have no legible postmark, and thus there is no evidence they were mailed by Election Day.

These changes created needless vulnerability to actual fraud and undermined public confidence in a Presidential election. As the Department of Justice's Manual of *Federal Prosecution of Election Offenses* states, "the conditions most conducive to election fraud are close factional competition within an electoral jurisdiction for an elected position that matters." DOJ Manual, at 2-3. "[E]lection fraud is most likely to occur in electoral jurisdictions where there is close factional competition for an elected position that matters." *Id.* at 27. That statement exactly describes the conditions in each of the Defendant States in the recent Presidential election.

CONCLUSION

"Fraud in any degree and in any circumstance is subversive to the electoral process." Carter-Baker Report, at 45. The allegations in the Bill of Complaint raise serious constitutional issues under the Electors

Clause of Article II, § 1. In addition, the long series allegations of unconstitutional actions that stripped away safeguards against fraud in voting by mail raise concerns about the integrity of the recent election and the public confidence in its outcome. These are questions of great public importance that warrant this Court's attention. The Court should grant the Plaintiff's Motion for Leave to File Bill of Complaint.

December 9, 2020

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No. _____, Original

In the Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

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

Defendants.

MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

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STATE OF TEXAS,

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

Defendants.

MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

Pursuant to 28 U.S.C. § 1251(a) and this Court's Rule 17, the State of Texas respectfully seeks leave to file the accompanying Bill of Complaint against the States of Georgia, Michigan, and Wisconsin and the Commonwealth of Pennsylvania (collectively, the "Defendant States") challenging their administration of the 2020 presidential election.

As set forth in 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.

- Intrastate differences in the treatment of voters, with more favorable allotted to voters – whether lawful or unlawful – in areas administered by local government under Democrat control and with populations with higher ratios of Democrat voters than other areas of Defendant States.
- 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.

All these flaws – even the violations of *state* election law – violate one or more of the federal requirements for elections (*i.e.*, equal protection, due process, and the Electors Clause) and thus arise under federal law. *See 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). Plaintiff State respectfully submits that the foregoing types of electoral irregularities exceed the hanging-chad saga of the 2000 election in their degree of departure from both state and federal law. Moreover, these flaws cumulatively preclude knowing who legitimately won the 2020 election and threaten to cloud all future elections.

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.

December 7, 2020 Respectfully submitted,

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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 democracy. The public, and indeed the candidates themselves, have a compelling interest in ensuring that the selection of a President—any President—is legitimate. If that trust is lost, the American Experiment will founder. A dark cloud hangs over the 2020 Presidential election.

Here is what we know. Using the COVID-19 pandemic as a justification, government officials in the defendant states of Georgia, Michigan, and Wisconsin, and the Commonwealth of Pennsylvania (collectively, "Defendant States"), usurped their legislatures' authority and unconstitutionally revised their state's election statutes. They accomplished these statutory revisions through executive fiat or friendly lawsuits, thereby weakening ballot integrity. Finally, these same government officials flooded the Defendant States with millions of ballots to be sent through the mails, or placed in drop boxes, with little

or no chain of custody[1] and, at the same time, weakened the strongest security measures protecting the integrity of the vote—signature verification and witness requirements.

Presently, evidence of material illegality in the 2020 general elections held in Defendant States grows daily. And, to be sure, the two presidential candidates who have garnered the most votes have an interest in assuming the duties of the Office of President without a taint of impropriety threatening the perceived legitimacy of their election. However, 3 U.S.C. § 7 requires that presidential electors be appointed on December 14, 2020. That deadline, however, should not cement a potentially illegitimate election result in the middle of this storm—a storm that is of the Defendant States' own making by virtue of their own unconstitutional actions.

This Court is the only forum that can delay the deadline for the appointment of presidential electors under 3 U.S.C. §§ 5, 7. To safeguard public legitimacy at this unprecedented moment and restore public trust in the presidential election, this Court should extend the December 14, 2020 deadline for Defendant States' certification of presidential electors to allow these investigations to be completed. Should one of the two leading candidates receive an absolute majority of the presidential electors' votes to be cast on December 14, this would finalize the selection of our President. The only date that is mandated under

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[1] *See* https://georgiastarnews.com/2020/12/05/dekalb-county-cannot-find-chain-of-custody-records-for-absentee-ballots-deposited-in-drop-boxes-it-has-not-been-determined-if-responsive-records-to-your-request-exist/

the Constitution, however, is January 20, 2021. U.S. CONST. amend. XX.

Against that background, the State of Texas ("Plaintiff State") brings this action against Defendant States based on the following allegations:

NATURE OF THE ACTION

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

2. This case presents a question of law: Did Defendant States violate the Electors Clause (or, in the alternative, the Fourteenth Amendment) by taking—or allowing—non-legislative actions to change the election rules that would govern the appointment of presidential electors?

3. Those unconstitutional changes opened the door to election irregularities in various forms. Plaintiff State alleges 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 and to restore public trust in this election.

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 Defendant States acted in a common pattern. State officials, sometimes through pending litigation (*e.g.*, settling "friendly" suits) and sometimes unilaterally by executive fiat, announced new rules for the conduct of the 2020 election that were inconsistent with existing state statutes defining what constitutes a lawful vote.

6. Defendant States also failed to segregate ballots in a manner that would permit 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 the Defendant States' presidential electors.

7. The rampant lawlessness arising out of Defendant States' unconstitutional acts is described in a number of currently pending lawsuits in Defendant States or in public view including:

- *Dozens of witnesses testifying under oath about*: the physical blocking and kicking out of Republican poll challengers; thousands of the same ballots run multiple times through tabulators; mysterious late night dumps of thousands of ballots at tabulation centers; illegally backdating thousands of ballots; signature verification procedures ignored; more

than 173,000 ballots in the Wayne County, MI center that cannot be tied to a registered voter;[2]

- *Videos of*: poll workers erupting in cheers as poll challengers are removed from vote counting centers; poll watchers being blocked from entering vote counting centers—despite even having a court order to enter; suitcases full of ballots being pulled out from underneath tables after poll watchers were told to leave.
- *Facts for which no independently verified reasonable explanation yet exists*: On October 1, 2020, in Pennsylvania 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, and potentially could be used to alter vote tallies; In Michigan, which also employed the same Dominion voting system, on November 4, 2020, Michigan election officials have admitted that a purported "glitch" caused 6,000 votes for President Trump to be wrongly switched to Democrat Candidate Biden. A flash drive containing tens of thousands of votes was left unattended in the Milwaukee tabulations center in the early morning hours of Nov. 4, 2020, without anyone aware it was not in a proper chain of custody.

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[2] All exhibits cited in this Complaint are in the Appendix to the Plaintiff State's forthcoming motion to expedite ("App. 1a-151a"). *See* Complaint (Doc. No. 1), *Donald J. Trump for President, Inc. v. Benson*, 1:20-cv-1083 (W.D. Mich. Nov. 11, 2020) at ¶¶ 26-55 & Doc. Nos. 1-2, 1-4.

8. Nor was this Court immune from the blatant disregard for the rule of law. Pennsylvania itself played fast and loose with its promise to this Court. 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).

9. Expert analysis using a commonly accepted statistical test further raises serious questions as to the integrity of this election.

10. The probability of former Vice President Biden winning the popular vote in the four Defendant States—Georgia, Michigan, Pennsylvania, and Wisconsin—independently given President Trump's early lead in those States as of 3 a.m. on November 4, 2020, is less than one in a quadrillion, or 1 in 1,000,000,000,000,000. For former Vice President Biden to win these four States collectively, the odds of

that event happening decrease to less than one in a quadrillion to the fourth power (*i.e.*, 1 in 1,000,000,000,000,000[4]). *See* Decl. of Charles J. Cicchetti, Ph.D. ("Cicchetti Decl.") at ¶¶ 14-21, 30-31. *See* App. 4a-7a, 9a.

11. The same less than one in a quadrillion statistical improbability of Mr. Biden winning the popular vote in the four Defendant States—Georgia, Michigan, Pennsylvania, and Wisconsin—independently exists when Mr. Biden's performance in each of those Defendant States is compared to former Secretary of State Hilary Clinton's performance in the 2016 general election and President Trump's performance in the 2016 and 2020 general elections. Again, the statistical improbability of Mr. Biden winning the popular vote in these **four** States collectively is 1 in 1,000,000,000,000,000[5]. *Id.* 10-13, 17-21, 30-31.

12. Put simply, there is substantial reason to doubt the voting results in the Defendant States.

13. 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 textually applies to the Article II process of selecting presidential electors).

14. Plaintiff States and their voters 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.

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

16. 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 constitutional democracy requires that states conduct presidential elections in accordance with the rule of law and federal constitutional guarantees.

JURISDICTION AND VENUE

17. 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).

18. 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 v. Gore*, 531 U.S. 98, 105 (2000) (quoting *Reynolds v. Sims*, 377 U. S. 533, 555 (1964)) (*Bush II*). In other words, Plaintiff State is acting to protect the interests of its respective citizens in the fair and constitutional conduct of elections used to appoint presidential electors.

19. 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 states "special solicitude in standing analysis"). Moreover, redressability likely would undermine a suit against a single state officer or State because no one State's electoral votes will make a difference in the election outcome. This action against multiple State defendants is the only adequate remedy for Plaintiff States, and this Court is the only court that can accommodate such a suit.

20. 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.

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

PARTIES

22. Plaintiff is the State of Texas, which is a sovereign State of the United States.

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

LEGAL BACKGROUND

24. 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.

25. "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).

26. 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)).

27. 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).

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

29. 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.

30. 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.").

31. 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.

32. 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.).

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

FACTS

34. 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 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.

35. 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).

36. 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),[3] 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.

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

37. 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 Defendant States' unconstitutional modification of statutory protections designed to ensure ballot integrity, Defendant States created a massive opportunity for fraud. In addition, the Defendant States have made it difficult or impossible to separate the constitutionally tainted mail-in ballots from all mail-in ballots.

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

39. Significantly, in 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.

40. The outcome of the Electoral College vote is directly affected by the constitutional violations committed by Defendant States. Plaintiff State complied 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 by unlawfully abrogating state election laws designed to

protect the integrity of the ballots and the electoral process, and those violations proximately caused the appointment of presidential electors for former Vice President Biden. Plaintiff State will therefore be injured if Defendant States' unlawfully certify these presidential electors.

Commonwealth of Pennsylvania

41. 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.

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

43. 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.

44. 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).

45. 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."

46. 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).

47. 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.

48. 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.

49. Pennsylvania's election law also requires that poll-watchers 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.

50. 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.

51. 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 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.

52. Statewide election officials and local election officials in Philadelphia and Allegheny Counties, aware of the historical Democrat advantage in those counties, 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. *See* Verified Complaint (Doc. No. 1), *Donald J. Trump for President, Inc. v. Boockvar*, 4:20-cv-02078-MWB (M.D. Pa. Nov. 18, 2020) at ¶¶ 3-6, 9, 11, 100-143.

53. 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.

54. The changed process allowing the curing of absentee and mail-in ballots in Allegheny and Philadelphia counties is a separate basis resulting in an unknown number of ballots being treated in an unconstitutional manner inconsistent with Pennsylvania statute. *Id.*

55. In addition, a great number of ballots were received after the statutory deadline and yet

were counted by virtue of the fact that Pennsylvania did not segregate all ballots received after 8:00 pm on November 3, 2020. Boockvar's claim that only about 10,000 ballots were received after this deadline has no way of being proven since Pennsylvania broke its promise to the Court to segregate ballots and co-mingled perhaps tens, or even hundreds of thousands, of illegal late ballots.

56. On December 4, 2020, fifteen members of the Pennsylvania House of Representatives led by Rep. Francis X. Ryan issued a report to Congressman Scott Perry (the "Ryan Report," App. 139a-144a) stating that "[t]he general election of 2020 in Pennsylvania was fraught with inconsistencies, documented irregularities and improprieties associated with mail-in balloting, pre-canvassing, and canvassing that the reliability of the mail-in votes in the Commonwealth of Pennsylvania is impossible to rely upon."

57. The Ryan Report's findings are startling, including:

- Ballots with NO MAILED date. That total is 9,005.
- Ballots Returned on or BEFORE the Mailed Date. That total is 58,221.
- Ballots Returned one day after Mailed Date. That total is 51,200.

Id. 143a.

58. These nonsensical numbers alone total 118,426 ballots and exceed Mr. Biden's margin of 81,660 votes over President Trump. But these discrepancies pale in comparison to the discrepancies in Pennsylvania's reported data concerning the

number of mail-in ballots distributed to the populace—now with no longer subject to legislated mandated signature verification requirements.

59. The Ryan Report also states as follows:

> [I]n a data file received on November 4, 2020, the Commonwealth's PA Open Data sites reported over 3.1 million mail in ballots sent out. The CSV file from the state on November 4 depicts 3.1 million mail in ballots sent out but on November 2, the information was provided that only 2.7 million ballots had been sent out. ***This discrepancy of approximately 400,000 ballots from November 2 to November 4 has not been explained.***

Id. at 143a-44a. (Emphasis added).

60. These stunning figures illustrate the out-of-control nature of Pennsylvania's mail-in balloting scheme. Democrats submitted mail-in ballots at more than two times the rate of Republicans. This number of constitutionally tainted ballots far exceeds the approximately 81,660 votes separating the candidates.

61. This blatant disregard of statutory law renders all mail-in ballots constitutionally tainted and cannot form the basis for appointing or certifying Pennsylvania's presidential electors to the Electoral College.

62. 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.

63. 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

64. 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.

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

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

67. 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.

68. 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).

69. 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).

70. 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).

71. 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.

72. 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.

73. This unconstitutional change in Georgia law materially benefitted former Vice President Biden. According to the Georgia Secretary of State's office, former Vice President Biden had almost double the number of absentee votes (65.32%) as President Trump (34.68%). *See* Cicchetti Decl. at ¶ 25, App. 7a-8a.

74. 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.

75. 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* Cicchetti Decl. at ¶ 24, App. 7a.

76. If the rejection rate of mailed-in absentee ballots remained the same in 2020 as it was in 2016, there would be 83,517 less tabulated ballots in 2020. The statewide split of absentee ballots was 34.68% for Trump and 65.2% for Biden. Rejecting at the higher 2016 rate with the 2020 split between Trump and Biden would decrease Trump votes by 28,965 and Biden votes by 54,552, which would be a net gain for Trump of 25,587 votes. This would be more than needed to overcome the Biden advantage of 12,670 votes, and Trump would win by 12,917 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

77. 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.

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

79. 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.

80. 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.

81. 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.

82. 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).

83. 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.*

84. 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 chose to flood across Michigan.

85. 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.

86. 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."

87. 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.

88. 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.

89. 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 materially benefited from these unconstitutional changes to Michigan's election law.

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

91. 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.

92. 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).

93. 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 materially benefited from these unconstitutional changes to Michigan's election law.

94. 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.[4] 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 instructed not to compare the signature on the absentee ballot with the signature on file.[5]

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[4] *Johnson v. Benson*, Petition for Extraordinary Writs & Declaratory Relief filed Nov. 26, 2020 (Mich. Sup. Ct.) at ¶¶ 71, 138-39, App. 25a-51a.

[5] *Id.*, Affidavit of Jessy Jacob, Appendix 14 at ¶15, attached at App. 34a-36a.

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

96. 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.

97. 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 174,384 absentee ballots out of 566,694 absentee ballots tabulated (about 30.8%) as counted without a registration number for precincts in the City of Detroit. *See* Cicchetti Decl. at ¶ 27, App. 8a. 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 28,377 votes.

98. The extra ballots cast most likely resulted from the phenomenon of Wayne County election workers running the same ballots through a tabulator multiple times, with Republican poll watchers obstructed or denied access, and election officials ignoring poll watchers' challenges, as documented by numerous declarations. App. 25a-51a.

99. 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. *Id.* at ¶ 29.

100. 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.

101. 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. *See* Cicchetti Decl. at ¶ 29, App. 8a.

102. 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 Wisconsin

103. 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.

104. In the 2016 general election some 146,932 mail-in ballots were returned in Wisconsin out of more than 3 million votes cast.[6] In stark contrast, 1,275,019 mail-in ballots, nearly a 900

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

percent increase over 2016, were returned in the November 3, 2020 election.[7]

105. 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).

106. 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.

107. For example, the WEC undertook a campaign to position hundreds of drop boxes to collect absentee ballots—including the use of unmanned drop boxes.[8]

108. 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

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

[8] 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.

of absentee ballots." Wisconsin Safe Voting Plan 2020, at 4 (June 15, 2020).[9]

109. 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.[10]

110. 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 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).

111. 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.

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[9] 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.

[10] *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.

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."

112. 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).

113. 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).

114. 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).

115. 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.

116. 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).

117. 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).

118. 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.

119. 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)."

120. 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."

121. 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."

122. 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.

123. 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).

124. 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.

125. 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. These acts violated WISC. STAT. § 6.87(6d) ("If a certificate is missing the address of a witness, the ballot may not 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.").

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

127. In addition, Ethan J. Pease, a box truck delivery driver subcontracted to the U.S. Postal Service ("USPS") to deliver truckloads of mail-in ballots to the sorting center in Madison, WI, testified

that USPS employees were backdating ballots received after November 3, 2020. Decl. of Ethan J. Pease at ¶¶ 3-13. Further, Pease testified how a senior USPS employee told him on November 4, 2020 that "[a]n order came down from the Wisconsin/Illinois Chapter of the Postal Service that 100,000 ballots were missing" and how the USPS dispatched employees to "find[] . . . the ballots." *Id.* ¶¶ 8-10. One hundred thousand ballots supposedly "found" after election day would far exceed former Vice President Biden margin of 20,565 votes over President Trump.

COUNT I: ELECTORS CLAUSE

128. Plaintiff State repeats and re-alleges the allegations above, as if fully set forth herein.

129. 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.

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

131. 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.

132. The actions set out in Paragraphs 41-128 constitute non-legislative changes to State election law by executive-branch State election officials, or by judicial officials, in Defendant States Pennsylvania, Georgia, Michigan, and Wisconsin, in violation of the Electors Clause.

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

COUNT II: EQUAL PROTECTION

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

135. 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.

136. The one-person, one-vote principle requires counting valid votes and not counting 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").

137. The actions set out in Paragraphs 66-73 (Georgia), 80-93 (Michigan), 44-55 (Pennsylvania), and 106-24 (Wisconsin) created differential voting standards in Defendant States Pennsylvania, Georgia, Michigan, and Wisconsin in violation of the Equal Protection Clause.

138. The actions set out in Paragraphs 66-73 (Georgia), 80-93 (Michigan), 44-55 (Pennsylvania), and 106-24 (Wisconsin) violated the one-person, one-

vote principle in Defendant States Pennsylvania, Georgia, Michigan, and Wisconsin.

139. By the shared enterprise of the entire nation electing the President and Vice President, equal protection violations in one State can and do adversely affect and diminish the weight of votes cast in States that lawfully abide by the election structure set forth in the Constitution. Plaintiff State is therefore harmed by this unconstitutional conduct in violation of the Equal Protection or Due Process Clauses.

COUNT III: DUE PROCESS

140. Plaintiff State repeats and re-alleges the allegations above, as if fully set forth herein.

141. When election practices reach "the point of patent and fundamental unfairness," the integrity of the election itself violates substantive due process. *Griffin v. Burns*, 570 F.2d 1065, 1077 (1st Cir. 1978); *Duncan v. Poythress*, 657 F.2d 691, 702 (5th Cir. 1981); *Florida State Conference of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1183-84 (11th Cir. 2008); *Roe v. State of Ala. By & Through Evans*, 43 F.3d 574, 580-82 (11th Cir. 1995); *Roe v. State of Ala.*, 68 F.3d 404, 407 (11th Cir. 1995); *Marks v. Stinson*, 19 F. 3d 873, 878 (3rd Cir. 1994).

142. Under this Court's precedents on procedural due process, not only intentional failure to follow election law as enacted by a State's legislature but also random and unauthorized acts by state election officials and their designees in local government can violate the Due Process Clause. *Parratt v. Taylor*, 451 U.S. 527, 537-41 (1981), *overruled in part on other grounds by Daniels v. Williams*, 474 U.S. 327, 330-31 (1986); *Hudson v. Palmer*, 468 U.S. 517, 532 (1984).

The difference between intentional acts and random and unauthorized acts is the degree of pre-deprivation review.

143. Defendant States acted unconstitutionally to lower their election standards—including to allow invalid ballots to be counted and valid ballots to not be counted—with the express intent to favor their candidate for President and to alter the outcome of the 2020 election. In many instances these actions occurred in areas having a history of election fraud.

144. The actions set out in Paragraphs 66-73 (Georgia), 80-93 (Michigan), 44-55 (Pennsylvania), and 106-24 (Wisconsin) constitute intentional violations of State election law by State election officials and their designees in Defendant States Pennsylvania, Georgia, Michigan, and Wisconsin, in violation of the Due Process Clause.

PRAYER FOR RELIEF

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

A. Declare that Defendant States Pennsylvania, Georgia, Michigan, and Wisconsin administered the 2020 presidential election in violation of the Electors Clause and the Fourteenth Amendment of the U.S. Constitution.

B. Declare that any electoral college votes cast by such presidential electors appointed in Defendant States Pennsylvania, Georgia, Michigan, and Wisconsin are in violation of the Electors Clause and the Fourteenth Amendment of the U.S. Constitution and cannot be counted.

C. Enjoin Defendant States' use of the 2020 election results for the Office of President to appoint presidential electors to the Electoral College.

D. Enjoin Defendant States' use of the 2020 election results for the Office of President to appoint presidential electors to the Electoral College and authorize, pursuant to the Court's remedial authority, the Defendant States to conduct a special election to appoint presidential electors.

E. If any of Defendant States have already appointed presidential 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 presidential electors in a manner that does not violate the Electors Clause and the Fourteenth Amendment, or to appoint no presidential electors at all.

F. Enjoin the Defendant States from certifying presidential electors or otherwise meeting for purposes of the electoral college pursuant to 3 U.S.C. § 5, 3 U.S.C. § 7, or applicable law pending further order of this Court.

G. Award costs to Plaintiff State.

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

December 7, 2020

Respectfully submitted,

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No. _____, Original

In the Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

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

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 State of Texas ("Plaintiff State") respectfully submits this brief in support of its Motion for Leave to File a Bill of Complaint against the Commonwealth of Pennsylvania and the States of Georgia, Michigan, and Wisconsin (collectively, "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 Defendant States presented the pandemic as the justification for ignoring state laws regarding absentee and mail-in voting. 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 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 question of law: Did Defendant States violate the Electors Clause by taking non-legislative actions to change the election rules that would govern the appointment of presidential electors? 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, Defendant States have not only tainted the integrity of their own citizens' votes, but their actions have also debased the votes of citizens in the States that 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]

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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.

Constitutional Background

The right to vote is protected by the by the Equal Protection Clause and the Due Process Clause. U.S. CONST. amend. XIV, § 1, cl. 3-4. Because "the right to vote is personal," *Reynolds*, 377 U.S. at 561-62 (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.* Though *Bush II* did not involve an action between States, the concern that illegal votes can cancel out lawful votes does not stop at a State's boundary in the context of a Presidential election.

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, § 4, cl. 1 (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 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 Defendant States. *See* Compl. at ¶¶ 66-73 (Georgia), 80-93 (Michigan), 44-55 (Pennsylvania), 106-24 (Wisconsin). 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 62 electoral votes, President Trump presumably has 232 electoral votes, and former Vice President Biden presumably has 244. Thus, Defendant States' presidential electors will determine the outcome of the election. Alternatively, if Defendant States are unable to certify 37 or more presidential 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.

Defendant States experienced serious voting irregularities. *See* Compl. at ¶¶ 75-76 (Georgia), 97-101 (Michigan), 55-60 (Pennsylvania), 122-28 (Wisconsin). At the time of this filing, Plaintiff State continues to investigate allegations of not only unlawful votes being counted but also fraud. Plaintiff State reserves the right to seek leave to amend the complaint as those investigations resolve. *See* S.Ct. Rule 17.2; FED. R. CIV. P. 15(a)(1)(A)-(B), (a)(2). But even the *appearance* of fraud in a close election is poisonous to democratic principles: "Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised." *Purcell v. Gonzalez,* 549 U.S. 1, 4 (2006); *Crawford v. Marion County Election Bd.,* 553 U.S. 181, 189 (2008) (States have an interest in preventing voter fraud and ensuring voter confidence).

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).

ARGUMENT

I. THIS COURT HAS JURISDICTION OVER PLAINTIFF STATE'S 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. Plaintiff State's fundamental rights and interests are at stake. This Court is the *only* venue that can protect Plaintiff State's electoral college votes from being cancelled by the unlawful and constitutionally tainted votes cast by electors appointed and certified by 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 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. Plaintiff States' Electoral Clause claims arise under the Constitution and so are *federal*, even if the only claim is that Defendant States violated their own state election statutes. Moreover, as is explained below, Defendant States' actions injure the interests of Plaintiff State in the appointment of electors to the electoral college in a manner that is inconsistent 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 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 State's claims therefore fall within this Court's 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

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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).

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 State has standing under those rules.[3]

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 Defendant States affect the votes in Plaintiff State, as set forth in more detail below.

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

1. **Plaintiff State suffers an injury in fact.**

The citizens of Plaintiff State 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*, 376 U.S. at 10; *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. at 227; *Baker*, 369 U.S. at 208. 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, Plaintiff State presses its own form of voting-rights injury *as States*. As with the one-person, 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 Defendant States' unconstitutionally appointed electors vote for a presidential candidate opposed by the Plaintiff State's electors, that operates to defeat Plaintiff State's interests.[5] Indeed, even without an electoral college majority, presidential electors suffer the same voting-debasement injury as voters generally: "It must be remembered that 'the

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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 Plaintiff State appointed its electors consistent with the Constitution, they suffer injury if its electors are defeated by Defendant States' unconstitutionally appointed electors. This injury is all the more acute because Plaintiff State has taken steps to prevent fraud. For example, Texas does not allow no excuse vote by mail (Texas Election Code Sections 82.001-82.004); has strict signature verification procedures (Tex. Election Code §87.027(j); Early voting ballot boxes have two locks and different keys and other strict security measures (Tex. Election Code §§85.032(d) & 87.063); requires voter ID (House Comm. on Elections, Bill Analysis, Tex. H.B. 148, 83d R.S. (2013)); has witness requirements for assisting those in need (Tex. Election Code §§ 86.0052 & 86.0105), and does not allow ballot harvesting Tex. Election Code 86.006(f)(1-6). Unlike Defendant States, Plaintiff State neither weakened nor allowed the weakening of its ballot-integrity statutes by non-legislative means.

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)) ("*Bush II*"). Finally, once Plaintiff State has standing to challenge Defendant States' unlawful actions, Plaintiff State may do so on any legal theory that undermines those actions. *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 78-81 (1978); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 & n.5 (2006). Injuries to Plaintiff State's electors serve as an Article III basis for a *parens patriae* action.

2. Defendant States caused the injuries.

Non-legislative officials in 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 Plaintiff's injuries.

3. The requested relief would redress the injuries.

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

First, while 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 II, 531 U.S. at 104; *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"). Plaintiff State does 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 Plaintiff State requests—namely, remand to the State legislatures to allocate electors in a manner consistent with the Constitution—does not violate Defendant States' rights or exceed this Court's power. The power to select electors is a plenary power of the State 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 I*, 531 U.S. at 76-77; *Bush II*, 531 U.S at 104.

Third, uncertainty of how 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). Defendant States' legislatures would remain free to exercise their plenary authority under the Electors Clause in any *constitutional* manner they wish. 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 the constitutionally tainted November 3 election, remand the appointment of electors to Defendant States, and order 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 presidential electors' votes. 3 U.S.C. § 15.

D. 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 presidential 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. Moreover, 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.

E. This matter is ripe for review.

Plaintiff State's 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). Prior to the election, there was no reason to know who would win the vote in any given State.

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 Defendant States.

Before the election, 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). Plaintiff State could not have brought this action before the election results. The extent of the county-level deviations from election statutes in Defendant States became evident well after the election. Neither ripeness nor laches presents a timing problem here.

F. 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) 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.

G. 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 State 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).[6] Defendant States' legislature

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[6] Indeed, the Constitution also includes another backstop: "if no person have such majority [of electoral votes], then from the

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 Plaintiff State that Defendant States' appointment of presidential 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:

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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.

> 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). Defendant States would suffer no cognizable injury from this Court's enjoining their reliance on an unconstitutional vote.

II. THIS CASE PRESENTS CONSTITUTIONAL QUESTIONS OF IMMENSE NATIONAL CONSEQUENCE THAT WARRANT 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 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 State disputes that exercising this Court's original jurisdiction is discretionary, *see* Section III, *infra*, the clear unlawful abrogation of 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,[7] the closeness of the presidential election results, combined with the unconstitutional setting-aside of state election laws by non-legislative actors call both the result and the process into question.

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[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*, 570 F.2d at 1077-79)).

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

Defendant States' administration of the 2020 election violated several constitutional requirements and, thus, violated the rights that Plaintiff State seeks to protect. "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 104.[8] Even a State legislature vested with authority to regulate election procedures lacks authority to "abridg[e ...] fundamental rights, such as the right to vote." *Tashjian v. Republican Party*, 479 U.S. 208, 217 (1986). As demonstrated in this section, 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

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[8] The right to vote is "a fundamental political right, because preservative of all rights." *Reynolds*, 377 U.S. at 561-62 (internal quotations omitted).

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) (J. Madison) ("House of Representatives is so constituted as to support in its members a 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.

"[T]here 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, 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.

3. Defendant States' administration of the 2020 election violated the Fourteenth Amendment.

In each of Defendant States, important rules governing the sending, receipt, validity, 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

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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).

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 104. The Equal Protection Clause demands uniform "statewide standards for determining what is a legal vote." *Id.* at 110.

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 obstruction of poll-watcher requirements that occurred in Michigan's Wayne County may have contributed to the unusually high number of more than 173,000 votes which are not tied to a registered voter and that 71 percent of the precincts are out of balance with no explanation. Compl. ¶ 97.

Regardless of whether the modification of legal standards in some counties in 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 unconstitutional election.

The Fourteenth Amendment's due process clause protects the fundamental right to vote against "[t]he

disenfranchisement of a state electorate." *Duncan v. Poythress*, 657 F.2d 691, 702 (5th Cir. 1981). Weakening or eliminating signature-validating requirements, then restricting poll watchers also undermines the 2020 election's integrity—especially as practiced in urban centers with histories of electoral fraud—also violates substantive due process. *Griffin v. Burns*, 570 F.2d 1065, 1077 (1st Cir. 1978) ("violation of the due process clause may be indicated" if "election process itself reaches the point of patent and fundamental unfairness"); *see also Florida State Conference of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1183-84 (11th Cir. 2008); *Roe v. State of Ala. By & Through Evans*, 43 F.3d 574, 580-82 (11th Cir. 1995); *Roe v. State of Ala.*, 68 F.3d 404, 407 (11th Cir. 1995); *Marks v. Stinson*, 19 F. 3d 873, 878 (3rd Cir. 1994). Defendant States made concerted efforts to weaken or nullify their legislatures' ballot-integrity measures for the unprecedented deluge of mail-in ballots, citing the COVID-19 pandemic as a rationale. But "Government is not free to disregard the [the Constitution] in times of crisis." *Roman Catholic Diocese of Brooklyn*, 592 U.S. at ___ (Gorsuch, J., concurring).

Similarly, failing to follow procedural requirements for amending election standards violates procedural due process. *Brown v. O'Brien*, 469 F.2d 563, 567 (D.C. Cir.), *vacated as moot*, 409 U.S. 816 (1972). Under this Court's precedents on procedural due process, not only intentional failure to follow election law as enacted by a State's legislature but also random and unauthorized acts by state election officials and their designees in local government can violate the Due Process Clause. *Parratt v. Taylor*, 451

U.S. 527, 537-41 (1981), *overruled in part on other grounds by Daniels v. Williams*, 474 U.S. 327, 330-31 (1986); *Hudson v. Palmer*, 468 U.S. 517, 532 (1984). Here, the violations all were intentional, even if done for the reason of addressing the COVID-19 pandemic.

While Plaintiff State disputes that exercising this Court's original jurisdiction is discretionary, *see* Section III, *infra*, the clear unlawful abrogation of Defendant States' election laws designed to ensure election integrity by a few officials, and examples of material irregularities in the 2020 election cumulatively warrant exercising jurisdiction. Although isolated irregularities could be "garden-variety" election disputes that do not raise a federal question,[10] the closeness of election results in swing states combines with unprecedented expansion in the use of fraud-prone mail-in ballots—millions of which were also mailed out—and received and counted—without verification—often in violation of express state laws by non-legislative actors, *see* Sections II.A.1-II.A.2, *supra*, call both the result and the process into question. For an office as important as the presidency, these clear violations of the Constitution, coupled with a reasonable inference of unconstitutional ballots being cast in numbers that far exceed the margin of former Vice President Biden's vote tally over President Trump demands the attention of this Court.

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[10] "To be sure, 'garden variety election irregularities' may not present facts sufficient to offend the Constitution's guarantee of due process[.]" *Hunter*, 635 F.3d at 232 (quoting *Griffin*, 570 F.2d at 1077-79)).

While investigations into allegations of unlawful votes being counted and fraud continue, even the appearance of fraud in a close election would justify exercising the Court's discretion to grant the motion for leave to file. Regardless, Defendant States' violations of the Constitution would warrant this Court's review, even if no election fraud had resulted.

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 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 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 State respectfully submits 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.G, *supra*, and *some* court must have jurisdiction for these weighty issues. *See Mostyn v. Fabrigas*, 98 Eng. Rep. 1021, 1028 (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 State respectfully submits 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 State 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 and straightforward question of law that requires neither finding additional facts nor briefing beyond the threshold issues presented here.

CONCLUSION

Leave to file the Bill of Complaint should be granted.

December 7, 2020

Respectfully submitted,

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No. 20A , Original

In the Supreme Court of the United States

STATE OF TEXAS,
Plaintiff,

v.

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

MOTION FOR EXPEDITED CONSIDERATION OF THE MOTION FOR LEAVE TO FILE A BILL OF COMPLAINT AND FOR EXPEDITION OF ANY PLENARY CONSIDERATION OF THE MATTER ON THE PLEADINGS IF PLAINTIFFS' FORTHCOMING MOTION FOR INTERIM RELIEF IS NOT GRANTED

The State of Texas ("Plaintiff State") hereby moves, pursuant to Supreme Court Rule 21, for expedited consideration of the motion for leave to file a bill of complaint, filed today, in an original action on the administration of the 2020 presidential election by defendants Commonwealth of Pennsylvania, *et al.* (collectively, "Defendant States"). The relevant statutory deadlines for the defendants' action based on unconstitutional election results are imminent: (a) December 8 is the safe harbor for certifying presidential electors, 3 U.S.C. § 5; (b) the electoral college votes on December 14, 3 U.S.C. § 7; and (c) the House of Representatives counts votes on January 6, 3 U.S.C. § 15. Absent some form of relief, the defendants will appoint electors based on unconstitutional and deeply uncertain election results, and the House will count those votes on January 6, tainting the election and the future of free elections.

Expedited consideration of the motion for leave to file the bill of complaint is needed to enable the Court to resolve this original action before the applicable statutory deadlines, as well as the constitutional deadline of January 20, 2021, for the next presidential term to commence. U.S. CONST. amend. XX, § 1, cl. 1. Texas respectfully requests that the Court order Defendant States to respond to the motion for leave to file by December 9. Texas waives the waiting period for reply briefs under this Court's Rule 17.5, so that the Court could consider the case on an expedited basis at its December 11 conference.

Working in tandem with the merits briefing schedule proposed here, Texas also will move for interim relief in the form of a temporary restraining order, preliminary injunction, stay, and administrative stay to enjoin Defendant States from certifying their presidential electors or having them vote in the electoral college. *See* S.Ct. Rule 17.2 ("The form of pleadings and motions prescribed by the Federal Rules of Civil Procedure is followed."); *cf.* S.Ct. Rule 23 (stays in this Court). Texas also asked in their motion for leave to file that the Court summarily resolve this matter at that threshold stage. Any relief that the Court grants under those two alternate motions would inform the expedited briefing needed on the merits.

Enjoining or staying Defendant States' appointment of electors would be an especially appropriate and efficient way to ensure that the eventual appointment and vote of such electors reflects a constitutional and accurate tally of lawful votes and otherwise complies with the applicable constitutional and statutory requirements in time for the House to act on January 6. Accordingly, Texas respectfully requests

expedition of this original action on one or more of these related motions. The degree of expedition required depends, in part, on whether Congress reschedules the day set for presidential electors to vote and the day set for the House to count the votes. *See* 3 U.S.C. §§ 7, 15; U.S. Const. art. II, §1m cl. 4.

STATEMENT

Like much else in 2020, the 2020 election was compromised by the COVID-19 pandemic. Even without Defendant States' challenged actions here, the election nationwide saw a massive increase in fraud-prone voting by mail. *See* BUILDING CONFIDENCE IN U.S. ELECTIONS: REPORT OF THE COMMISSION ON FEDERAL ELECTION REFORM, at 46 (Sept. 2005) (absentee ballots are "the largest source of potential voter fraud"). Combined with that increase, the election in Defendant States was also compromised by numerous changes to the State legislatures' duly enacted election statutes by non-legislative actors—including both "friendly" suits settled in courts and executive fiats via guidance to election officials—in ways that undermined state statutory ballot-integrity protections such as signature and witness requirements for casting ballots and poll-watcher requirements for counting them. State legislatures have plenary authority to set the method for selecting presidential electors, *Bush v. Gore*, 531 U.S. 98, 104 (2000) ("*Bush II*"), and "significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question." *Id.* at 113 (Rehnquist, C.J., concurring); *accord Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70, 76 (2000) ("*Bush I*").

Plaintiff State has not had the benefit of formal discovery prior to submitting this original action. Nonetheless, Plaintiff State has uncovered substantial evidence

discussed below that raises serious doubts as to the integrity of the election processes in Defendant States. Although new information continues to come to light on a daily basis, as documented in the accompanying Appendix ("App."), the voting irregularities that resulted from Defendant States' unconstitutional actions include the following:

- Jesse Jacob, a decades-long City of Detroit employee assigned to work in the Elections Department for the 2020 election testified (App. 34a-36a) that she was "instructed not to look at any of the signatures on the absentee ballots, and I was instructed not to compare the signature on the absentee ballot with the signature on file" in direct contravention of MCL § 168.765a(6), which requires all signatures on ballots be verified.
- Ethan J. Pease, a box truck delivery driver subcontracted to the U.S. Postal Service ("USPS") to deliver truckloads of mail-in ballots to the sorting center in Madison, WI, testified that USPS employees were backdating ballots received after November 3, 2020. Decl. of Ethan J. Pease at ¶¶ 3-13. (App. 149a-51a). Further, Pease testified how a senior USPA employee told him on November 4, 2020 that "An order came down from the Wisconsin/Illinois Chapter of the Postal Service that 100,000 ballots" and how the USPSA dispatched employees to "find[] ... the ballots." ¶¶ 8-10. One hundred thousand ballots "found" after election day far exceeds former Vice President Biden margin of 20,565 votes over President Trump.

- 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), which the Pennsylvania defendants quickly settled resulting in guidance (App. 109a-114a)[1] issued 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." App. 113a.
- 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 the statutory deadline for mail-in ballots from Election Day to three days after Election Day and adopted a presumption that even *non-postmarked ballots* were presumptively timely. In addition, a great number of ballots were received after the statutory deadline. Because Pennsylvania misled this Court

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[1] Although the materials cited here are a complaint, that complaint is verified (*i.e.*, declared under penalty of perjury), App. 75a, which is evidence for purposes of a motion for summary judgment. *Neal v. Kelly*, 963 F.2d 453, 457 (D.C. Cir. 1992) ("allegations in [the] verified complaint should have been considered on the motion for summary judgment as if in a new affidavit").

about segregating the late-arriving ballots and instead commingled those ballots, it is now impossible to verify Pennsylvania's claim about the number of ballots affected.

- Contrary to Pennsylvania election law on providing poll-watchers access to the opening, counting, and recording of absentee ballots, local election officials in Philadelphia and Allegheny Counties decided not to follow 25 PA. STAT. § 3146.8(b). App. 127a-28a.
- 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. App. 122a-24a. 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 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. App. 122a-24a.
- On December 4, 2020, fifteen members of the Pennsylvania House of Representatives issued a report (App. 139a-45a) to Congressman Scott Perry stating that "[t]he general election of 2020 in Pennsylvania was fraught with ... documented irregularities and improprieties associated with mail-in balloting ... [and] that the reliability of the mail-in votes in the Commonwealth

of Pennsylvania is impossible to rely upon." The report detailed, *inter alia*, that more than 118,426 mail-in votes either had no mail date, were returned *before* they were mailed, or returned one day after the mail date. The Report also stated that, based on government reported data, the number of mail-in ballots *sent* by November 2, 2020 (2.7 million) somehow ballooned by 400,000, to 3.1 million on November 4, 2020, without explanation.

- 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 (App. 19a-24a) 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), which is particularly disturbing because the legislature allowed persons *other than the voter* to apply for an absentee ballot, GA. CODE § 21-2-381(a)(1)(C), which means that the legislature likely was relying heavily on the signature-verification on ballots under GA. CODE § 21-2-386.
- 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. App. 25a-51a.

- The probability of former Vice President Biden winning the popular vote in the four Defendant States—Georgia, Michigan, Pennsylvania, and Wisconsin—independently given President Trump's early lead in those States as of 3 a.m. on November 4, 2020, is less than one in a quadrillion, or 1 in 1,000,000,000,000,000. For former Vice President Biden to win these four States collectively, the odds of that event happening decrease to less than one in a quadrillion to the fourth power (*i.e.*, 1 in 1,000,000,000,000,000[4]). *See* Decl. of Charles J. Cicchetti, Ph.D. ("Cicchetti Decl.") at ¶¶ 14-21, 30-31 (App. 4a-7a, 9a).
- The same less than one in a quadrillion statistical improbability of Mr. Biden winning the popular vote in the four Defendant States—Georgia, Michigan, Pennsylvania, and Wisconsin—independently exists when Mr. Biden's performance in each of those Defendant States is compared to former Secretary of State Hilary Clinton's performance in the 2016 general election and President Trump's performance in the 2016 and 2020 general elections. Again, the statistical improbability of Mr. Biden winning the popular vote in these **four** States collectively is 1 in 1,000,000,000,000,000[5]. *Id.* 10-13, 17-21, 30-31 (App. 3a-7a, 9a).
- Georgia's unconstitutional abrogation of the express mandatory procedures for challenging defective signatures on ballots set forth at GA. CODE § 21-2-386(a)(1)(B) resulted in far more ballots with unmatching signatures being counted in the 2020 election than if the statute had been properly applied. The

2016 rejection rate was more than *seventeen times greater* than in 2020. *See* Cicchetti Decl. at ¶ 24 (App. 7a). As a consequence, applying the rejection rate in 2016, which applied the mandatory procedures, to the ballots received in 2020 would result in a net gain for President Trump of 25,587 votes. This would be more than needed to overcome the Biden advantage of 12,670 votes, and Trump would win by 12,917 votes. *See* App. 8a.

- The two Republican members of the Board *rescinded their votes* to certify the vote in Wayne County, 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. *See* Cicchetti Decl. at ¶ 29 (App. 8a).
- The Wayne County Statement of Votes Report lists 174,384 absentee ballots out of 566,694 absentee ballots tabulated (about 30.8%) as counted without a registration number for precincts in the City of Detroit. *See* Cicchetti Decl. at ¶ 27 (App. 8a). 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 28,377 votes. The extra ballots cast most likely resulted from the phenomenon of Wayne County election workers running the same ballots through a tabulator multiple times, with Republican poll watchers obstructed or denied access, and election officials ignoring poll watchers' challenges, as documented by numerous declarations. App. 25a-51a.

As a net result of these challenges, the close election result in Defendant States—on

which the presidential election turns—is indeterminate. Put another way, Defendant States' unconstitutional actions affect outcome-determinative numbers of popular votes, that in turn affect outcome-determinative numbers of electoral votes.

To remedy Texas's claims and remove the cloud over the results of the 2020 election, expedited review and interim relief are required. December 8, 2020 is a statutory safe harbor for States to appoint presidential electors, and by statute the electoral college votes on December 14. *See* 3 U.S.C. §§ 7, 15. In a contemporaneous filing, Texas asks this Court to vacate or enjoin—either permanently, preliminarily, or administratively—Defendant States from certifying their electors and participating in the electoral college vote. As permanent relief, Texas asks this Court to remand the allocation of electors to the legislatures of Defendant States pursuant to the statutory and constitutional backstop for this scenario: "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 (emphasis added); U.S. CONST. art. II, § 1, cl. 2.

Significantly, State legislatures retain the authority to appoint electors under the federal Electors Clause, even if state laws or constitutions provide otherwise. *McPherson v. Blacker*, 146 U.S. 1, 35 (1892); *accord Bush I*, 531 U.S. at 76-77; *Bush II*, 531 U.S at 104. For its part, Congress could move the December 14 date set for the electoral college's vote, as it has done before when faced with contested elections. Ch. 37, 19 Stat. 227 (1877). Alternatively, the electoral college could vote on December 14

without Defendant States' electors, with the presidential election going to the House of Representatives under the Twelfth Amendment if no candidate wins the required 270-vote majority.

What cannot happen, constitutionally, is what Defendant States appear to want (namely, the electoral college to proceed based on the unconstitutional election in Defendant States):

> 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 104. Proceeding under the unconstitutional election is not an option.

Pursuant to 28 U.S.C. 1251(a), Plaintiff State has filed a motion for leave to file a bill of complaint today. As set forth in the complaint and outlined above, all Defendant States ran their 2020 election process in noncompliance with the ballot-integrity requirements of their State legislature's election statutes, generally using the COVID-19 pandemic as a pretext or rationale for doing so. In so doing, Defendant States disenfranchised not only their own voters, but also the voters of all other States: "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).

ARGUMENT

The Constitution vests plenary authority over the appointing of presidential electors with State legislatures. *McPherson*, 146 U.S. at 35; *Bush I*, 531 U.S. at 76-77; *Bush II*, 531 U.S at 104. While State legislatures need not proceed by popular

vote, the Constitution requires protecting the fundamental right to vote when State legislatures decide to proceed via elections. *Bush II*, 531 U.S. at 104. On the issue of the constitutionality of an election, moreover, the Judiciary has the final say: "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); *Bush II*, 531 U.S. at 104. For its part, Congress has the ability to set the time for the electoral college to vote. U.S. CONST. art. II, § 1, cl. 3. To proceed constitutionally with the 2020 election, all three actors potentially have a role, given the complications posed by Defendant States' unconstitutional actions.

With this year's election on November 3, and the electoral college's vote set by statute for December 14, 3 U.S.C. § 7, Congress has not allowed much time to investigate irregularities like those in Defendant States before the electoral college is statutorily set to act. But the time constraints are not constitutional in nature—the Constitution's only time-related provision is that the President's term ends on January 20, U.S. CONST. amend. XX, § 1, cl. 1—and Congress has both the obvious authority and even a history of moving the date of the electoral college's vote when election irregularities require it.

Expedited consideration of this matter is warranted by the seriousness of the issues raised here, not only for the results of the 2020 presidential election but also for the implications for our constitutional democracy going forward. If this Court does not halt the Defendant States' participation in the electoral college's vote on December 14, a grave cloud will hang over not only the presidency but also the

Republic.

With ordinary briefing, Defendant States would not need to respond for 60 days, S.Ct. Rule 17.5, which is after the next presidential term commences on January 20, 2021. Accordingly, this Court should adopt an expedited briefing schedule on the motion for leave to file the bill of complaint, as well as the contemporaneously filed motion for interim relief, including an administrative stay or temporary restraining order pending further order of the Court. If this Court declines to resolve this original action summarily, the Court should adopt an expedited briefing schedule for plenary consideration, allowing the Court to resolve this matter before the relevant deadline passes. The contours of that schedule depend on whether the Court grants interim relief. Texas respectfully proposes two alternate schedules.

If the Court has not yet granted administrative relief, Texas proposes that the Court order Defendant States to respond to the motion for leave to file a bill of complaint and motion for interim relief by December 9. *See* S.Ct. Rule 17.2 (adopting Federal Rules of Civil Procedure); FED. R. CIV. P. 65; *cf.* S.Ct. Rule 23 (stays). Texas waives the waiting period for reply briefs under this Court's Rule 17.5 and would reply by December 10, which would allow the Court to consider this case on an expedited basis at its December 11 Conference.

With respect to the merits if the Court neither grants the requested interim relief nor summarily resolves this matter in response to the motion for leave to file the bill of complaint, thus requiring briefing of the merits, Texas respectfully proposes

the following schedule for briefing and argument:

December 8, 2020	Plaintiffs' opening brief
December 8, 2020	*Amicus* briefs in support of plaintiffs or of neither party
December 9, 2020	Defendants' response brief(s)
December 9, 2020	*Amicus* briefs in support of defendants
December 10, 2020	Plaintiffs' reply brief(s) to each response brief
December 11, 2020	Oral argument, if needed

If the Court grants an administrative stay or other interim relief, but does not summarily resolve this matter in response to the motion for leave to file the bill of complaint, Texas respectfully proposes the following schedule for briefing and argument on the merits:

December 11, 2020	Plaintiffs' opening brief
December 11, 2020	*Amicus* briefs in support of plaintiffs or of neither party
December 17, 2020	Defendants' response brief(s)
December 17, 2020	*Amicus* briefs in support of defendants
December 22, 2020	Plaintiffs' reply brief(s) to each response brief
December 2020	Oral argument, if needed

In the event that Congress moves the date for the electoral college and the House to vote or count votes, then the parties could propose an alternate schedule. If any motions to intervene are granted by the applicable deadline, intervenors would file by the applicable deadline as plaintiffs-intervenors or defendants-intervenors, with any still-pending intervenor filings considered as *amicus* briefs unless such

prospective intervenors file or seek leave to file an *amicus* brief in lieu of their still-pending intervenor filings.

CONCLUSION

Texas respectfully requests that the Court expedite consideration of its motion for leave to file a bill of complaint based on the proposed schedule and, if the Court neither stays nor summarily resolves the matter and thus sets the case for plenary consideration, that the Court expedite briefing and oral argument based on the proposed schedule.

Dated: December 7, 2020

Respectfully submitted,

/s/ Ken Paxton

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CERTIFICATE AS TO FORM

Pursuant to Sup. Ct. Rules 22 and 33, I certify that the foregoing motion are proportionately spaced, has a typeface of Century Schoolbook, 12 points, and contains 15 pages (and 3,550 words), excluding this Certificate as to Form, the Table of Contents, and the Certificate of Service.

Dated: December 7, 2020

Respectfully submitted,

/s/ Ken Paxton

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CERTIFICATE OF SERVICE

The undersigned certifies that, on this 7th day of December 2020, in addition to filing the foregoing document via the Court's electronic filing system, one true and correct copy of the foregoing document was served by Federal Express, with a PDF courtesy copy served via electronic mail on the following counsel and parties:

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/s/ Lawrence J. Joseph
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No. _____, Original

In the Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

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

Defendants.

MOTION FOR PRELIMINARY INJUNCTION AND TEMPORARY RESTRAINING ORDER OR, ALTERNATIVELY, FOR STAY AND ADMINISTRATIVE STAY

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Pursuant to S.Ct. Rules 21, 23, and 17.2 and pursuant to FED. R. CIV. P. 65, the State of Texas ("Plaintiff State") respectfully moves this Court to enter an administrative stay and temporary restraining order ("TRO") to enjoin the States of Georgia, Michigan, and Wisconsin and the Commonwealth of Pennsylvania (collectively, the "Defendant States") and all of their agents, officers, presidential electors, and others acting in concert from taking action to certify presidential electors or to have such electors take any official action—including without limitation participating in the electoral college or voting for a presidential candidate—until further order of this Court, and to preliminarily enjoin

and to stay such actions pending the final resolution of this action on the merits.

STATEMENT OF THE CASE

Lawful elections are 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 in derogation of statutory controls as to how they are lawfully received, evaluated, and counted. Whether well intentioned or not, these unconstitutional acts had the same *uniform effect*—they made the 2020 election less secure in the Defendant States. Those changes are inconsistent with relevant state laws and were made by non-legislative entities, without any consent by the state legislatures. The acts of these officials thus directly violated the Constitution. U.S. CONST. art. I, § 4; *id.* art. II, § 1, cl. 2.

This case presents a 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? These non-legislative changes to the Defendant States' election laws facilitated the casting and counting of ballots in violation of state law, which, in turn, violated the Electors Clause of Article II, Section 1, Clause 2 of the U.S. 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 Plaintiff State and other States that remained loyal to the Constitution.

Elections for federal office must comport with federal constitutional standards, *see Bush II*, 531 U.S. at 103-05, 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, § 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).

Defendant States' Violations of Electors Clause

As set forth in the Complaint, executive and judicial officials made significant changes to the legislatively defined election laws 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.

Factual Background

Without Defendant States' combined 72 electoral votes, President Trump presumably has 232 electoral votes, and former Vice President Biden presumably has 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 U.S. House of Representatives under the Twelfth Amendment to the U.S. Constitution.

STANDARD OF REVIEW

Original actions follow the motions practice of the Federal Rules of Civil Procedure. S.Ct. 17.2. Plaintiffs can obtain preliminary injunctions in original actions. *See California v. Texas*, 459 U.S. 1067 (1982) ("[m]otion of plaintiff for issuance of a preliminary injunction granted"); *United States v. Louisiana*, 351 U.S. 978 (1956) (enjoining named state officers "and others acting with them ... from prosecuting any other case or cases involving the controversy before this Court until further order of the Court"). Similarly, a moving party can seek a stay pending appeal under this Court's Rule 23.[2]

Plaintiffs who seek interim relief under Federal Rule 65 must establish that they likely will succeed on the merits and likely will suffer irreparable harm without interim relief, that the balance of equities between their harm in the absence of interim relief and the defendants' harm from interim relief favors the movants, and that the public interest favors interim relief. *Winter v. Natural Resources Def. Council, Inc.*, 555 U.S. 7, 20 (2008). To obtain a stay pending appeal under this Court's Rule 23, the applicant must meet a similar test:

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[2] *See, e.g., Frank v. Walker*, 135 S.Ct. 7 (2014); *Husted v. Ohio State Conf. of the NAACP*, 135 S.Ct. 42 (2014); *North Carolina v. League of Women Voters*, 135 S.Ct. 6 (2014); *Arizona Sec't'y of State's Office v. Feldman*, 137 S.Ct. 446 (2016); *North Carolina v. Covington*, 138 S.Ct. 974 (2018); *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S.Ct. 1205 (2020).

> (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay. In close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent.

Hollingsworth v. Perry, 558 U.S. 183, 190 (2010).

ARGUMENT

I. THIS COURT IS LIKELY TO EXERCISE ITS DISCRETION TO HEAR THIS CASE.

Although Plaintiff State disputes that this Court has discretion to decide not to hear this case instituted by a sovereign State, *see* 28 U.S.C. § 1251(a) (this Court's jurisdiction is exclusive for actions between States); *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), this Court is nonetheless likely to exercise its discretion to hear this case for two reasons, which is analogous to the first *Hollingsworth* factor for a stay.

First, in the analogous case of *Republican Party v. Boockvar*, No. 20A54, 2020 U.S. LEXIS 5181 (Oct. 19, 2020), four justices voted to stay a decision by the Pennsylvania Supreme Court that worked an example of the type of non-legislative revision to State election law that the Plaintiff State challenges here. In addition, since then, a new Associate Justice joined the Court, and the Chief Justice indicated a rationale

for voting against a stay in *Democratic Nat'l Comm. v. Wisconsin State Legis.*, No. 20A66, 2020 U.S. LEXIS 5187, at *1 (Oct. 26, 2020) (Roberts, C.J., concurring in denial of application to vacate stay) that either does not apply to original actions or that was wrong for the reasons set forth in Section II.A.2, *supra* (non-legislative amendment of State election statutes poses a question that arises under the federal Constitution, see *Bush II*, 531 U.S. at 113 (Rehnquist, C.J., concurring).

Second, this Court has repeatedly acknowledged the "uniquely important national interest" in elections for president and the rules for them. *Bush II*, 531 U.S. at 112 (interior quotations omitted); *see also Oregon v. Mitchell*, 400 U.S. 112 (1970) (original jurisdiction in voting-rights cases). Few cases on this Court's docket will be as important to our future as this case.

Third, no other remedy or forum exists for a State to challenge multiple States' maladministration of a presidential election, *see* Section II.A.8, *infra*, and *some* court must have jurisdiction for these fundamental issues about the viability of our democracy: "if there is no other mode of trial, that alone will give the King's courts a jurisdiction." *Mostyn v. Fabrigas*, 98 Eng. Rep. 1021, 1028 (K.B. 1774) (Lord Mansfield).

II. THE PLAINTIFF STATE IS LIKELY TO PREVAIL.

Under the *Winter-Hollingsworth* test, the plaintiff's likelihood of prevailing is the primary factor to assess the need for interim relief. Here, the Plaintiff State will prevail because this Court has jurisdiction and the Plaintiff State's merit case is likely to prevail.

A. This Court has jurisdiction over Plaintiff State's 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 State's fundamental rights and interests are at stake. This Court is the *only* venue that can protect the Plaintiff State's Electoral College votes from being cancelled by the unlawful and constitutionally tainted votes cast by Electors appointed by the Defendant States.

1. 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 and certification of the Defendant States' presidential electors before their legislatures pursuant to 3 U.S.C. §§ 2, 5, and 7 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.

2. 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,[3] and—indeed—we did not even have federal-question jurisdiction until 1875. *Merrell Dow Pharm.*, 478 U.S. at 807. The

[3] 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).

Plaintiff State's 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 State in the appointment and certification of presidential electors to the Electoral College.

Given this federal-law basis against these state actions, the state actions are not "independent" of the federal 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 State's 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.

3. 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 State has standing under those rules.[1]

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 State, as set forth in more detail below.

a. <u>Plaintiff State suffers an injury in fact.</u>

The citizens of Plaintiff State 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,

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

even the most basic, are illusory if the right to vote is undermined." *Wesberry*, 376 U.S. at 10; *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); *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 cognizable under Article III.

Significantly, Plaintiff State presses its own form of voting-rights injury *as a State*. As with the one-person, 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, Plaintiff State suffers 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, Plaintiff State has standing where its 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.[5] Like

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[5] "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)).

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 Plaintiff State's presidential electors, that operates to defeat the Plaintiff State's interests.[6] 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 II*, 531 U.S. at 105 (quoting *Reynold*, 377 U.S. at 555). Those injuries to electors serve as an Article III basis for a *parens patriae* action by their States.

b. <u>The Defendant States caused the injuries.</u>

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 Plaintiff's injuries.

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[6] Because Plaintiff State appointed its presidential electors fully consistent with the Constitution, it suffers injury if its presidential electors are defeated by the Defendant States' unconstitutionally appointed presidential electors. This injury is all the more acute because Plaintiff State has taken steps to prevent fraud. Unlike the Defendant States, the Plaintiff State neither weakened nor allowed the weakening of its ballot-integrity statutes by non-legislative means.

c. The requested relief would redress the injuries.

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

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 II, 531 U.S. at 104; *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 State does 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 State requests—namely, remand to the State legislatures to allocate presidential 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 presidential 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 I*, 531 U.S. at 76-77; *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 the 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 the House to count the presidential electors' votes. 3 U.S.C. § 15.

4. Plaintiff State has 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-person, 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 presidential 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.

5. 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 or certification of presidential 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 presidential 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.

6. This matter is ripe for review.

The Plaintiff State's 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).[7] Prior to the election, there was no reason to know who would win the vote in any given State.

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 State 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 Plaintiff State 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

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[7] 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.

States become evident until days after the election. Moreover, a State may reasonably assess the status of litigation commenced by candidates to the presidential election prior to commencing its own litigation. Neither ripeness nor laches presents a timing problem here.

7. <u>This action does not raise a non-justiciable political question.</u>

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 appointing presidential electors involves political rights, this 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.

8. <u>No adequate alternate remedy or forum exists.</u>

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 State 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).[8] 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 State that the Defendant States' appointment of presidential electors under the recently conducted elections would be unconstitutional, then the statutorily created safe harbor cannot be used as a

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[8] 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.

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 U.S. 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.

B. The Plaintiff State is likely to prevail on the merits.

For interim relief, the most important factor is the likelihood of movants' prevailing. *Winter*, 555 U.S. at 20. The Defendant States' administration of the 2020 election violated the Electors Clause, which renders invalid any appointment of presidential electors based upon those election results. 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 law 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.B.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.[9]

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[9] To advance the principles enunciated in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (concerning state police power to enforce compulsory vaccination laws), as authority for non-legislative state actors re-writing state election statutes—in direct conflict with the Electors Clause—is a nonstarter. Clearly, "the Constitution does not conflict with itself by conferring, upon the one hand, a ... power, and taking the same power away, on the other, by the limitations of the due process clause."

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.B.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[10]). 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.

III. THE OTHER *WINTER-HOLLINGSWORTH* FACTORS WARRANT INTERIM RELIEF.

Although Plaintiff State's likelihood of prevailing would alone justify granting interim relief, relief is also warranted by the other *Winter-Hollingsworth* factors.

Brushaber v. Union Pac. R. Co., 240 U.S. 1, 24 (1916). In other words, the States' reserved police power does not abrogate the Constitution's express Electors Clause. *See also Cook v. Gralike*, 531 U.S. at 522 (election authority is delegated to States, not reserved by them); *accord* Story, 1 COMMENTARIES § 627.

[10] 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).

A. Plaintiff State will suffer irreparable harm if the Defendant States' unconstitutional presidential electors vote in the Electoral College.

Allowing the unconstitutional election results in Defendant States to proceed would irreparably harm Plaintiff State and the Republic both by denying representation in the presidency and in the Senate in the near term and by permanently sowing distrust in federal elections. This Court has found such threats to constitute irreparable harm on numerous occasions. *See* note 2, *supra* (collecting cases). The stakes in this case are too high to ignore.

B. The balance of equities tips to the Plaintiff State.

All State parties represent citizens who voted in the 2020 presidential election. Because of their unconstitutional actions, Defendant States represent some citizens who cast ballots not in compliance with the Electors Clause. It does not disenfranchise anyone to require the State legislatures to attempt to resolve this matter as 3 U.S.C. § 2, the Electors Clause, and even the Twelfth Amendment provide. By contrast, it would irreparably harm Plaintiff State if the Court denied interim relief.

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.

C. The public interest favors interim relief.

The last *Winter* factor is the public interest. When parties dispute the lawfulness of government action, the public interest collapses into the merits. *ACLU v. Ashcroft*, 322 F.3d 240, 247 (3d Cir. 2003); *Washington v. Reno*, 35 F.3d 1093, 1103 (6th Cir. 1994); *League of Women Voters of the United States v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016). If the Court agrees with Plaintiff State that non-legislative actors lack authority to amend state statutes for selecting presidential electors, the public interest requires interim relief. Withholding relief would leave a taint over the election, disenfranchise voters, and lead to still more electoral legerdemain in future elections.

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 extraordinary case arising from a presidential election. 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 presidential electors, the resulting vote of the Electoral College not only lacks constitutional legitimacy, but the Constitution itself will be forever sullied.

The nation needs this Court's clarity: "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). While isolated irregularities could be "garden-variety" election irregularities that do not raise a federal question,[11] the unconstitutional setting-aside of state election statutes by non-legislative actors calls both the result and the process into question, requiring 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. The public interest requires this Court's action.

IV. ALTERNATIVELY, THIS CASE WARRANTS SUMMARY DISPOSITION.

In lieu of granting interim relief, this Court could simply reach the merits summarily. *Cf.* FED. R. CIV. P. 65(a)(2); S.Ct. Rule 17.5. Two things are clear from the evidence presented at this initial phase: (1) non-legislative actors modified the Defendant States' election statutes; and (2) the resulting uncertainty casts doubt on the lawful winner. Those two facts are enough to decide the merits of the Electors Clause claim. The Court should thus vacate the Defendant States' appointment and impending certifications of presidential electors and remand to their State legislatures to allocate presidential electors via any constitutional means that does not rely on 2020

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[11] "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 (1st Cir. 1978)).

election results that includes votes cast in violation of State election statutes in place on Election Day.

CONCLUSION

This Court should first administratively stay or temporarily restrain the Defendant States from voting in the electoral college until further order of this Court and then issue a preliminary injunction or stay against their doing so until the conclusion of this case on the merits. Alternatively, the Court should reach the merits, vacate the Defendant States' elector certifications from the unconstitutional 2020 election results, and remand to the Defendant States' legislatures pursuant to 3 U.S.C. § 2 to appoint electors.

December 7, 2020

Respectfully submitted,

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James Percival

From: James Percival
Sent: Wednesday, December 9, 2020 9:54 AM
To: Kevin Golembiewski; Christopher Baum; Jeffrey DeSousa; Evan Ezray; David Costello
Cc: Amit Agarwal
Subject: Time Sensitive Team Meeting

For those who can join, we are having a meeting on a time sensitive issue at 10:10. I'll follow back with an invite.

This is a higher priority than other office tasks so please join if you can.

James Percival

Subject:	OSG Meeting
Start:	Wed 12/9/2020 10:10 AM
End:	Wed 12/9/2020 10:40 AM
Recurrence:	(none)
Meeting Status:	Accepted
Organizer:	Jeffrey DeSousa
Required Attendees:	Amit Agarwal; Kevin Golembiewski; Evan Ezray; David Costello; Christopher Baum; James Percival

https://us02web.zoom.us/j/[redacted]

James Percival

From:	Jeffrey DeSousa
Sent:	Wednesday, December 9, 2020 11:50 AM
To:	Christopher Baum; James Percival; David Costello; Evan Ezray; Kevin Golembiewski; Amit Agarwal
Subject:	Election docs
Attachments:	2020-12-07 - Texas v. Pennsylvania, et al. - Bill of Complaint.pdf; 2020-12-08 - Texas v. Pennsylvania - Amicus Brief of Missouri et al.docx

Bill of complaint and draft *Missouri* amicus are attached, and here is the *Boockvar* amicus:

https://www.scotusblog.com/wp-content/uploads/2020/11/20201109134744257_2020-11-09-Republican-Party-of-Pa.-v.-Boockvar-Amicus-Brief-of-Missouri-et-al.-Final-With-Tables.pdf

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No. 22O155, Original

In the Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

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

Defendants.

On Motion for Leave to File Bill of Complaint

BRIEF OF STATES OF MISSOURI, ____ AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF'S MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

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STATEMENT OF INTEREST OF *AMICI*

"In the context of a Presidential election," state actions "implicate a uniquely important national interest," because "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, 794–95 (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." *Id.* "Every voter" in a federal election "has a right under the Constitution to have his vote fairly counted, without its being distorted by fraudulently cast votes." *Anderson* v. *United States*, 417 U.S. 211, 227 (1974).

Amici curiae are the States of Missouri, _____.[1] *Amici* have several important interests in this case. *First*, the States have a strong interest in safeguarding the separation of powers among state actors in the regulation of Presidential elections. The Electors Clause of Article II, § 1 carefully balances power among state actors, and it assigns a specific function to the "Legislature thereof" in each State. U.S. CONST. art. II, § 1, cl. 4. Our system of federalism relies on separation of powers to preserve liberty at every level of government, and the separation of powers in the Electors Clause is no exception. The States have a strong interest in preserving the proper roles of state legislatures in the administration of federal elections, and thus safeguarding the individual liberty of their citizens.

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[1] This brief is filed under Supreme Court Rule 37.4, and all counsel of record received timely notice of the intent to file this amicus brief under Rule 37.2.

Second, *amici* States have a strong interest in ensuring that the votes of their own citizens are not diluted by the unconstitutional administration of elections in other States. When non-legislative actors in other States encroach on the authority of the "Legislature thereof" in that State to administer a Presidential election, they threaten the liberty, not just of their own citizens, but of every citizen of the United States who casts a lawful ballot in that election—including the citizens of *amici* States.

Third, for similar reasons, *amici* States have a strong interest in safeguarding against fraud in voting by mail during Presidential elections. "Every voter" in a federal election, "has a right under the Constitution to have his vote fairly counted, without its being distorted by fraudulently cast votes." *Anderson*, 417 U.S. at 227. Plaintiff's Bill of Complaint alleges that non-legislative actors in the Defendant States stripped away important safeguards against fraud in voting by mail that had been enacted by the Legislature in each State. *Amici* States share a vital interest in protecting the integrity of the truly national election for President and Vice President of the United States.

SUMMARY OF ARGUMENT

The Bill of Complaint raises constitutional questions of great public importance that warrant this Court's review. First, like every similar provision in the Constitution, the separation-of-powers provision of the Electors Clause provides an important structural check on government designed to protect individual liberty. By allocating authority over Presidential electors to the "Legislature thereof" in

each State, the Clause separates powers both vertically and horizontally, and it confers authority on the branch of state government most responsive to the democratic will. Encroachments on the authority of state Legislatures by other state actors violate the separation of powers and threaten individual liberty.

The unconstitutional encroachments on the authority of state Legislatures in this case raise particularly grave concerns. For decades, responsible observers have cautioned about the risks of fraud and abuse in voting by mail, and they have urged the adoption of statutory safeguards to prevent such fraud and abuse. In the numerous cases identified in the Bill of Complaint, non-legislative actors in each Defendant State repeatedly stripped away statutory safeguards that the "Legislature thereof" had enacted to protect against fraud in voting by mail. These changes removed protections that responsible actors had recommended for decades to guard against fraud and abuse in voting by mail, and they did so in a manner that uniformly and predictably benefited one candidate in the recent Presidential election. The allegations in the Bill of Complaint raise grave questions about election integrity and public confidence in the administration of Presidential elections. This Court should grant Plaintiff leave to file the Bill of Complaint.

ARGUMENT

The Electors Clause provides that each State "shall appoint" its Presidential electors "in such Manner as the *Legislature thereof* may direct." U.S. CONST. art. II, § 1, cl. 4 (emphasis added). Moreover, "[o]ur constitutional system of representative government only works when the worth of honest

ballots is not diluted by invalid ballots procured by corruption." U.S. Dep't of Justice, *Federal Prosecution of Election Offenses*, at 1 (8th ed. Dec. 2017). "When the election process is corrupted, democracy is jeopardized." *Id.* The proposed Bill of Complaint raises serious concerns about constitutionality and ballot security of election procedures in the Defendant States. Given the importance of public confidence in American elections, these allegations raise questions of great public importance that warrant this Court's expedited review.

I. The Separation-of-Powers Provision of the Electors Clause Is a Structural Check on Government That Safeguards Liberty.

Article II 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. 4 (emphasis added); *see also id.* art. I, § 4, cl. 2 (providing that, in each State, the "Legislature thereof" shall establish "[t]he Times, Places and Manner of holding Elections for Senators and Representatives").

Thus, "in the case of a law enacted by a state legislature applicable not only to elections to state offices, but also to the selection of Presidential electors, the legislature is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under Art. II, § 1, cl. 2, of the United States Constitution." *Bush* v. *Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70, 76 (2000). "[T]he state legislature's power to select the manner for appointing electors is plenary." *Bush* v. *Gore*, 531 U.S. 98, 104 (2000).

Here, as set forth in the Bill of Complaint, non-legislative actors in each Defendant State have purported to "alter[] an important statutory provision enacted by the [State's] Legislature pursuant to its authority under the Constitution of the United States to make rules governing the conduct of elections for federal office." *Republican Party of Pennsylvania* v. *Boockvar*, No. 20-542, 2020 WL 6304626, at *1 (U.S. Oct. 28, 2020) (Statement of Alito, J.). *See* Bill of Complaint, ¶¶ 41-127. In doing so, these non-legislative actors encroached upon the "plenary" authority of those States' respective legislatures over the conduct of the Presidential election in each State. *Bush* v. *Gore*, 531 U.S. at 104. This encroachment on the authority of each State's Legislature violated the separation of powers set forth in the Electors Clause. "[I]n the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest. For the President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation." *Anderson*, 460 U.S. at 794–795.

In every other context, this Court recognizes that the Constitution's separation-of-powers provisions, which allocate authority to specific governmental actors to the exclusion of others, are designed to preserve liberty. "It is the proud boast of our democracy that we have 'a government of laws, and not of men.'" *Morrison* v. *Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting). "The Framers of the Federal Constitution . . . viewed the principle of separation of powers as the absolutely central guarantee of a just Government." *Id.* "Without a secure structure of separated powers, our Bill of Rights would be worthless, as are the bills of rights of

many nations of the world that have adopted, or even improved upon, the mere words of ours." *Id.* "The purpose of the separation and equilibration of powers in general . . . was not merely to assure effective government but to preserve individual freedom." *Id.* at 727.

This principle of preserving liberty applies both to the horizontal separation of powers among the branches of government, and the vertical separation of powers between the federal government and the States. "The federal system rests on what might at first seem a counterintuitive insight, that 'freedom is enhanced by the creation of two governments, not one.'" *Bond* v. *United States*, 564 U.S. 211, 220–21 (2011) (quoting *Alden* v. *Maine*, 527 U.S. 706, 758 (1999)). "[F]ederalism secures to citizens the liberties that derive from the diffusion of sovereign power." *Bond*, 564 U.S. at 221 (2011) (quoting *New York* v. *United States*, 505 U.S. 144, 181 (1992)). "Federalism also protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions." *Id.* Moreover, "federalism enhances the opportunity of all citizens to participate in representative government." *FERC* v. *Mississippi*, 456 U.S. 742, 789 (1982) (O'Connor, J., concurring in part and dissenting in part). "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Gregory* v. *Ashcroft*, 501 U.S. 452, 458 (1991).

The explicit grant of authority to state *Legislatures* in the Electors Clause of Article II, §1 effects both a horizontal and a vertical separation of powers. The Clause allocates 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. 4.

It is no accident that the Constitution allocates such authority to state Legislatures, rather than executive officers such as Secretaries of State, or judicial officers such as state Supreme Courts. The Constitutional Convention's delegates frequently recognized that the Legislature is the branch most responsive to the People and most democratically accountable. *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 ratification documents expressing that state legislatures were most likely to be in sympathy with the interests of the people); Federal Farmer, No. 12 (1788), *reprinted in* 2 THE FOUNDERS' CONSTITUTION (Philip B. Kurland & Ralph Lerner eds., 1987) (arguing that electoral regulations "ought to be left to the state legislatures, they coming far nearest to the people themselves"); THE FEDERALIST NO. 57, at 350 (C. Rossiter, ed. 2003) (Madison, J.) (stating that the "House of Representatives is so constituted as to support in its members an habitual recollection of their dependence on the people"); *id.* (stating that the "vigilant and manly spirit that actuates the people of America" is greatest restraint on the House of Representatives).

Democratic accountability in the method of selecting the President of the United States is a powerful bulwark safeguarding individual liberty. By identifying the "Legislature thereof" in each State as the regulator of elections for federal officers, the Electors Clause of Article II, § 1 prohibits the very arrogation of power over Presidential elections by non-legislative officials that the Defendant States perpetrated in this case. By violating the Constitution's separation of powers, these non-legislative actors undermined the liberty of all Americans, including the voters in *amici* States.

II. Stripping Away Safeguards From Voting by Mail Exacerbates the Risks of Fraud.

By stripping away critical safeguards against ballot fraud in voting by mail, non-legislative actors in the Defendant States inflicted another grave injury on the conduct of the recent election: They enhanced the risks of fraudulent voting by mail without authority. An impressive body of public evidence demonstrates that voting by mail presents unique opportunities for fraud and abuse, and that statutory safeguards are critical to reduce such risks of fraud.

For decades prior to 2020, responsible observers emphasized the risks of fraud in voting by mail, and the importance of imposing safeguards on the process of voting by mail to allay such risks. For example, in *Crawford* v. *Marion County Election Board*, this Court held that fraudulent voting "perpetrated using absentee ballots" demonstrates "that not only is the risk of voter fraud real but that *it could affect the outcome of a close election*." *Crawford* v. *Marion County Election Bd.*, 553 U.S. 181, 195-96 (2008) (opinion of Stevens, J.) (emphasis added).

As noted by Plaintiff, the Carter-Baker Commission on Federal Election Reform emphasized the same concern. The bipartisan Commission—co-chaired by former President Jimmy Carter and former Secretary of State James A. Baker—determined that "[a]bsentee ballots remain 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) ("Carter-Baker Report").[2] According to the Carter-Baker Commission, "[a]bsentee balloting is vulnerable to abuse in several ways." *Id.* "Blank ballots mailed to the wrong address or to large residential buildings might bet intercepted." *Id.* "Citizens who vote at home, at nursing homes, at the workplace, or in church are more susceptible to pressure, overt and subtle, or to intimidation." *Id.* "Vote buying schemes are far more difficult to detect when citizens vote by mail." *Id.*

Thus, the Commission noted that "absentee balloting in other states has been a major source of fraud." *Id.* at 35. It emphasized that voting by mail "increases the risk of fraud." *Id.* And the Commission recommended that "States ... need to do more to prevent ... absentee ballot fraud." *Id.* at v.

The Commission specifically recommended that States should implement and reinforce safeguards to prevent fraud in voting by mail. The Commission recommended that "States should make sure that absentee ballots received by election officials before Election Day are kept secure until they are opened and counted." *Id.* at 46. It also recommended that States "prohibit[] 'third-party' organizations,

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[2] *Available at* https://www.legislationline.org/download/id/1472/file/-3b50795b2d0374cbef5c29766256.pdf.

candidates, and political party activists from handling absentee ballots." *Id.* And the Commission highlighted that a particular state "appear[ed] to have avoided significant fraud in its vote-by-mail elections by introducing safeguards to protect ballot integrity, *including signature verification*." *Id.* at 35 (emphasis added). The Commission concluded that "[v]ote by mail is ... likely to increase the risks of fraud and contested elections ... where the safeguards for ballot integrity are weaker." *Id.*

The most recent edition of the U.S. Department of Justice's Manual on *Federal Prosecution of Election Offenses*, published by its Public Integrity Section, highlights the very same concerns about fraud in voting by mail. U.S. Dep't of Justice, *Federal Prosecution of Election Offenses* (8th ed. Dec. 2017), at 28-29 ("DOJ Manual").[3] The Manual states: "Absentee ballots are particularly susceptible to fraudulent abuse because, by definition, they are marked and cast outside the presence of election officials and the structured environment of a polling place." *Id.* The Manual reports that "the more common ways" that election-fraud "crimes are committed include ... [o]btaining and marking absentee ballots without the active input of the voters involved." *Id.* at 28. And the Manual notes that "[a]bsentee ballot frauds" committed both with and without the voter's participation are "common." *Id.* at 29.

Similarly, the U.S. Government Accountability Office concluded that many crimes of election fraud likely go undetected. In 2014, discussing election fraud, the GAO reported that "crimes of fraud, in

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[3] *Available at* https://www.justice.gov/criminal/file/1029066/download.

particular, are difficult to detect, as those involved are engaged in intentional deception." GAO-14-634, *Elections: Issues Related to State Voter Identification Laws* 62-63 (U.S. Gov't Accountability Office Sept. 2014).[4]

Despite the difficulties of detecting fraud schemes, recent experience contains many well-documented examples of absentee ballot fraud. For example, the News21 database, which was compiled to *refute* arguments that voter fraud is prevalent, identified 491 cases of absentee ballot over the 12-year period from 2000 to 2012—approximately 41 cases per year. *See* News21, *Election Fraud in America*.[5] This database reports that "Absentee Ballot Fraud" was "[t]he most prevalent fraud" in America, comprising "24 percent (491 cases)" of all cases reported in the public records surveyed. *Id.* Moreover, the database indicates that this number undercounts the total incidence of reported cases of absentee ballot fraud, because it was based on public-record requests to state and local government entities, many of which did not respond. *Id.*

Likewise, the Heritage Foundation's online database of election-fraud cases—which includes only a "sampling" of cases that resulted in an *adjudication* of fraud, such as a criminal conviction or civil penalty—identified 207 cases of proven "fraudulent use of absentee ballots" in the United States. The

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[4] *Available at* https://www.gao.gov/assets/670/665966.pdf.

[5] *Available at* https://votingrights.news21.com/interactive/election-fraud-database/&xid=17259,15700023,15700124,15700149,15700186,15700191,15700201,15700237,15700242

Heritage Foundation, *Election Fraud Cases.*[6] Again, this database undercounts the incidence of cases of election fraud: "The Heritage Foundation's Election Fraud Database presents a sampling of recent proven instances of election fraud from across the country. This database is not an exhaustive or comprehensive list." *Id.*

The public record abounds with recent examples of such fraudulent absentee-ballot schemes. For example, in November 2019, the mayor of Berkeley, Missouri was indicted on five felony counts of absentee ballot fraud for changing votes on absentee ballots to help him and his political allies to get elected. Brian Heffernan, *Berkeley Mayor Hoskins Charged with 5 Felony Counts of Election Fraud*, ST. LOUIS PUBLIC RADIO (Nov. 21, 2019).[7] Mayor Hoskins' scheme included "going to the home of elderly ... residents" to harvest absentee ballots, "filling out absentee ballot applications for voters and having his campaign workers do the same," and "altering absentee ballots" after he had procured them from voters. *Id.* Again, in 2016, a state House race in Missouri was overturned amid allegations of widespread absentee-ballot fraud that had occurred across multiple election cycles in the same community. Sarah Fenske, *FBI, Secretary of State Asking Questions About St. Louis Statehouse Race,*

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[6] *Available at* https://www.heritage.org/voterfraud/search?combine=&state=All&year=&case_type=All&fraud_type=24489&page=12.

[7] *Available at* https://news.stlpublicradio.org/post/berkeley-mayor-hoskins-charged-5-felony-counts-election-fraud#stream/0

RIVERFRONT TIMES (Aug. 16, 2016).[8] One candidate stated that it was widely known in the community that the incumbent ran an "absentee game" that resulted in the mail-in vote tipping the outcome in her favor in multiple close elections. *Id.*

Other States have similar experiences. In 2018, a federal Congressional race was overturned in North Carolina, and eight political operatives were indicted for fraud, in an absentee-ballot fraud scheme that sufficed to change the outcome of the election. Richard Gonzales, *North Carolina GOP Operative Faces New Felony Charges That Allege Ballot Fraud*, NPR.ORG, (July 30, 2019).[9] The indicted operatives "had improperly collected and possibly tampered with ballots," and were charged with "improperly mailing in absentee ballots for someone who had not mailed it themselves." *Id.*

In the North Carolina case, the lead investigator testified that the investigation was "a continuous case" over two election cycles, and that the scheme involved collecting absentee ballots from voters, altering the absentee ballots, and forging witness signatures on the ballots. *See In re: Investigation of Irregularities Affecting Counties Within the 9th Congressional District*, North Carolina Board of Elections, Evidentiary Hearing, at 2-3.[10] The investigators described it as a "coordinated, unlawful,

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[8] *Available at* https://www.riverfronttimes.com/newsblog/2016/08/16/fbi-secretary-of-state-asking-questions-about-st-louis-statehouse-race.

[9] *Available at* https://www.npr.org/2019/07/30/746800630/north-carolina-gop-operative-faces-new-felony-charges-that-allege-ballot-fraud.

[10] *Available at* https://images.radio.com/wbt/Voter%20ID_%20Website.pdf.

and substantially resourced absentee ballots scheme." *Id.* at 2. According to the investigators' trial presentation, the investigation involved 142 voter interviews, 30 subject and witness interviews, and subpoenas of documents, financial records, and phone records. *Id.* at 3. The perpetrators collected absentee ballots and falsified ballot witness certifications outside the presence of the voters. *Id.* at 10, 13. The congressional election at issue was decided by margin of less than 1,000 votes. *Id.* at 4. The scheme involved the submission of well over 1,000 fraudulent absentee ballots and request forms. *Id.* at 11. The perpetrators took extensive steps to conceal the fraudulent scheme, which lasted over multiple election cycles before it was detected. *Id.* at 14.

Similarly, in 2016, a politician in the Bronx was indicted and pled guilty to 242 counts of election fraud based on an absentee ballot fraud scheme. Ben Kochman, *Bronx politician pleads guilty in absentee ballot scheme for Assembly election,* NEW YORK DAILY NEWS (Nov. 22, 2016).[11] Despite pleading guilty to 242 felonies involving absentee ballot fraud in an election that was decided by two votes, the defendant received no jail time and vowed to run for office again after a short disqualification period. *Id.*

The increases in mail-in voting due to the COVID-19 pandemic likewise increased opportunities for fraud. For instance, in May 2020, the leader of the New Jersey NAACP called for an election in Paterson, New Jersey to be overturned due to widespread mail-in ballot fraud. *See* Jonathan Dienst et al., *NJ NAACP*

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[11] *Available at* http://www.nydailynews.com/new-york/nyc-crime/bronx-pol-pleads-guilty-absentee-ballot-scheme-article-1.2884009.

Leader Calls for Paterson Mail-In Vote to Be Canceled Amid Corruption Claims, NBC NEW YORK (May 27, 2020).[12] "'Invalidate the election. Let's do it again,' [the NAACP leader] said amid reports more that 20 percent of all ballots were disqualified, some in connection with voter fraud allegations." *Id.*

Hundreds of other reported cases highlight the same concerns about the vulnerability of voting by mail to fraud and abuse. Recently, a Missouri court considered extensive expert testimony reviewing absentee-ballot fraud cases like these. *Findings of Fact, Conclusions of Law, and Final Judgment in Mo. State Conference of the NAACP* v. *State*, No. 20AC-CC00169-01 (Circuit Court of Cole County, Missouri Sept. 24, 2020), *aff'd*, 607 S.W.3d 728 (Mo. banc Oct. 9, 2020) ("*Mo. NAACP*"). The court held that cases of absentee-ballot fraud "have several common features that persist across multiple recent cases: (1) close elections; (2) perpetrators who are candidates, campaign workers, or political consultants, not ordinary voters; (3) common techniques of ballot harvesting, (4) common techniques of signature forging, (5) fraud that persisted across multiple elections before it was detected, (6) massive resources required to investigate and prosecute the fraud, and (7) lenient criminal penalties." *Id.* at 17. Thus, "fraud in voting by mail is a recurrent problem, that it is hard to detect and prosecute, that there are strong incentives and weak penalties for doing so, and that it has the capacity to affect the outcome of close

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[12] *Available at* https://www.nbcnewyork.com/news/politics/nj-naacp-leader-calls-for-paterson-mail-in-vote-to-be-canceled-amid-fraud-claims/2435162/.

elections." *Id.* The court concluded that "the threat of mail-in ballot fraud is real." *Id.* at 2.

III. The Bill of Complaint Alleges that the Defendant States Abolished Critical Safeguards Against Fraud in Voting by Mail.

The Bill of Complaint alleges that non-legislative actors in each Defendant State unconstitutionally abolished or diluted statutory safeguards against fraud enacted by the state legislature, in violation of the Presidential Electors Clause. U.S. CONST. art. II, § 1, cl. 4. All the unconstitutional changes to election procedures identified in the Bill of Complaint have two common features: (1) They abrogated statutory safeguards against fraud that responsible observers have long recommended for voting by mail, and (2) they did so in a way that predictably conferred partisan advantage on one candidate in the Presidential election. Such allegations are serious, and they warrant this Court's review.

Abolishing signature verification. First, the proposed Bill of Complaint alleges that non-legislative actors in Pennsylvania, Georgia, and Michigan unilaterally abolished or undermined signature-verification requirements for mailed ballots. It alleges that Pennsylvania's Secretary of State abrogated Pennsylvania's statutory signature-verification requirement for mail-in ballots in a "friendly" settlement of a lawsuit brought by activists. Bill of Complaint, ¶¶ 44-46. It alleges that Georgia's Secretary of State unilaterally abrogated Georgia's statute authorizing county registrars to engage in signature verification for absentee ballots in a similar settlement. *Id.* ¶¶ 66-72. It alleges that Michigan's Secretary of State permitted absentee ballot

applications online, with no signature at all, in violation of Michigan statutes, *id.* ¶¶ 85-89; and that election officials in Wayne County, Michigan simply disregarded statutory signature verification requirements, *id.* ¶¶ 92-95.

In addition to violating the Electors Clause, these actions contradicted fundamental principles of ballot security. As noted above, the Carter-Baker Report highlighted the importance of "*signature verification*" as a critical "safeguard[] to protect ballot integrity" for ballots cast by mail. Carter-Baker Report, *supra*, at 35 (emphasis added). Without safeguards such as signature verification, the Report stated that "[v]ote by mail is ... likely to increase the risks of fraud and contested elections ... where the safeguards for ballot integrity are weaker." *Id.* The importance of signature verification is hard to overstate, because absentee-ballot fraud schemes commonly involve "common techniques of signature forging," typically by nefarious actors who are unfamiliar with the voter's signature. *Mo. NAACP*, *supra*, at 17. Verifying the voter's signature by comparison to the signature on the voter rolls thus provides the most critical safeguard against fraud.

Insecure ballot handling. The Bill of Complaint alleges that non-legislative actors changed or abolished statutory rules for the secure handling of absentee and mail-in ballots in Pennsylvania, Michigan, and Wisconsin. It alleges that election officials in Democratic areas of Pennsylvania violated state statutes by opening and reviewing mail-in ballots that were required to be kept locked and secure until Election Day. Bill of Complaint, ¶¶ 50-51. It alleges that Michigan's Secretary of State, acting in violation of state law, sent 7.7 million unsolicited

absentee-ballot applications to Michigan voters, thus "flooding Michigan with millions of absentee ballot applications prior to the 2020 general election." *Id.* ¶¶ 80-84. And it alleges that the Wisconsin Election Commission violated state law by placing hundreds of unmonitored boxes for the submission of absentee and mail-in ballots around the State, concentrated in heavily Democratic areas. *Id.* ¶¶ 107-114.

In addition to violating the Electors Clause, these actions contradicted commonsense ballot-security recommendations. The Department of Justice's Manual on *Federal Prosecution of Election Offenses* notes that vulnerability to mishandling is what makes absentee ballots "particularly susceptible to fraudulent abuse" because "they are marked and cast outside the presence of election officials and the structured environment of a polling place." DOJ Manual, at 28-29. According to the Manual, "[o]btaining and marking absentee ballots without the active input of the voters involved" is one of "the more common ways" that election fraud "crimes are committed." *Id.* at 28. For this reason, the Carter-Baker Commission made a series of recommendations in favor of preventing such insecurity in the handling of ballots. For example, the Commission recommended that "States should make sure that absentee ballots received by election officials before Election Day are kept secure until they are opened and counted." *Id.* at 46. It also recommended that States "prohibit[] 'third-party' organizations, candidates, and political party activists from handling absentee ballots." *Id.*

Inconsistent Statewide Standards. The Bill of Complaint alleges that the Defendant States provided different standards and treatment for mail-

in ballots submitted in different areas of each State, and that this differential treatment uniformly provided a partisan advantage to one side in the Presidential election. It alleges that election officials in Philadelphia and Allegheny County, Pennsylvania, applied different standards to voters in those Democratic strongholds than applied to other voters in Pennsylvania, in violation of state law. Bill of Complaint, ¶¶ 52-54. Similarly, it alleges that Milwaukee, Wisconsin violated state law by authorizing election officials to "correct" disqualifying omissions on ballot envelopes by entering information that the voter should have entered with a red pen, while no similar "correction" process was granted to other voters in that State. *Id.* ¶¶ 123-127. And it alleges that Wayne County, Michigan provided favorable treatment to its voters, in violation of state statutes, by simply ignoring statutorily required signature-verification requirements. *Id.* ¶¶ 92-95.

Again, such differential treatment, under circumstances raising concerns of partisan bias, contradicts universal recommendations for integrity and public confidence in elections. As this Court stated in *Bush* v. *Gore*, "[t]he idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government." 531 U.S. at 107 (quoting *Moore* v. *Ogilvie*, 394 US 814 (1969)). The Carter-Baker Report noted that "inconsistent or incorrect application of electoral procedures may have the effect of discouraging voter participation and may, on occasion, raise questions about bias in the way elections are conducted." Carter-Baker Report, at 49. "Such problems raise public suspicions or may provide

grounds for the losing candidate to contest the result in a close election." *Id.*

Excluding Bipartisan Observers. The Bill of Complaint alleges that certain counties in Defendant States excluded bipartisan observers from the ballot-opening and ballot-counting processes. For example, it alleges that election officials in Philadelphia and Allegheny County, Pennsylvania, violated state law by excluding Republican observers from the opening, counting, and recording of absentee ballots in those counties. Bill of Complaint, ¶ 49. And it alleges that election officials in Wayne County, Michigan violated state statutes by systematically excluding poll watchers from the counting and recording of absentee ballots. *Id.* ¶¶ 90-91.

Such actions, as alleged, raise grave concerns about the integrity of the vote count in those counties. As the Carter-Baker Report emphasized, States should "provide observers with meaningful opportunities to monitor the conduct of the election." Carter-Baker Report, at 47. "To build confidence in the electoral process, it is important that elections be administered in a neutral and professional manner," without the appearance of partisan bias." *Id.* at 49. When observers of one political party are illegally and systematically excluded from observing the vote count, "the appearance of partisan bias" is inevitable. *Id.* For counties in Defendant States to exclude Republican observers weakens public confidence in the electoral process and raises grave concerns about the integrity of ballot counting in those counties.

Extending the deadline to receive ballots. The Bill of Complaint alleges that a non-legislative actor in Pennsylvania—its Supreme Court—extended the statutory deadline to receive absentee and mail-in

ballots without authorization of the "Legislature thereof," and directed that ballots with illegible postmarks or no postmarks at all would be deemed timely if received within the extended deadline. Bill of Complaint, ¶¶ 48, 55. Again, these non-legislative changes raise grave concerns about election integrity in Pennsylvania. First, they created a post-election window of time during which nefarious actors could wait and see whether the Presidential election would be close, and whether perpetrating fraud in Pennsylvania would be worthwhile. Second, they enhanced the opportunities for fraud by mandating that late ballots must be counted even when they are not postmarked or have no legible postmark, and thus there is no evidence they were mailed by Election Day.

These changes created needless vulnerability to actual fraud and undermined public confidence in a Presidential election. As the Department of Justice's Manual of *Federal Prosecution of Election Offenses* states, "the conditions most conducive to election fraud are close factional competition within an electoral jurisdiction for an elected position that matters." DOJ Manual, at 2-3. "[E]lection fraud is most likely to occur in electoral jurisdictions where there is close factional competition for an elected position that matters." *Id.* at 27. That statement exactly describes the conditions in each of the Defendant States in the recent Presidential election.

CONCLUSION

"Fraud in any degree and in any circumstance is subversive to the electoral process." Carter-Baker Report, at 45. The allegations in the Bill of Complaint raise serious constitutional issues under the Electors

Clause of Article II, § 1. In addition, the long series allegations of unconstitutional actions that stripped away safeguards against fraud in voting by mail raise concerns about the integrity of the recent election and the public confidence in its outcome. These are questions of great public importance that warrant this Court's attention. The Court should grant the Plaintiff's Motion for Leave to File Bill of Complaint.

December 9, 2020

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No. _____, Original

In the Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

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

Defendants.

MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

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MOTION FOR PRELIMINARY INJUNCTION AND TEMPORARY RESTRAINING ORDER OR, ALTERNATIVELY, FOR STAY AND ADMINISTRATIVE STAY

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MOTION FOR PRELIMINARY INJUNCTION AND TEMPORARY RESTRAINING ORDER OR, ALTERNATIVELY, FOR STAY AND ADMINISTRATIVE STAY

Pursuant to S.Ct. Rules 21, 23, and 17.2 and pursuant to FED. R. CIV. P. 65, the State of Texas ("Plaintiff State") respectfully moves this Court to enter an administrative stay and temporary restraining order ("TRO") to enjoin the States of Georgia, Michigan, and Wisconsin and the Commonwealth of Pennsylvania (collectively, the "Defendant States") and all of their agents, officers, presidential electors, and others acting in concert from taking action to certify presidential electors or to have such electors take any official action—including without limitation participating in the electoral college or voting for a presidential candidate—until further order of this Court, and to preliminarily enjoin

and to stay such actions pending the final resolution of this action on the merits.

STATEMENT OF THE CASE

Lawful elections are 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 in derogation of statutory controls as to how they are lawfully received, evaluated, and counted. Whether well intentioned or not, these unconstitutional acts had the same *uniform effect*—they made the 2020 election less secure in the Defendant States. Those changes are inconsistent with relevant state laws and were made by non-legislative entities, without any consent by the state legislatures. The acts of these officials thus directly violated the Constitution. U.S. CONST. art. I, § 4; *id.* art. II, § 1, cl. 2.

This case presents a 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? These non-legislative changes to the Defendant States' election laws facilitated the casting and counting of ballots in violation of state law, which, in turn, violated the Electors Clause of Article II, Section 1, Clause 2 of the U.S. 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 Plaintiff State and other States that remained loyal to the Constitution.

Elections for federal office must comport with federal constitutional standards, s*ee Bush II*, 531 U.S. at 103-05, 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, § 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).

Defendant States' Violations of Electors Clause

As set forth in the Complaint, executive and judicial officials made significant changes to the legislatively defined election laws 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.

Factual Background

Without Defendant States' combined 72 electoral votes, President Trump presumably has 232 electoral votes, and former Vice President Biden presumably has 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 U.S. House of Representatives under the Twelfth Amendment to the U.S. Constitution.

STANDARD OF REVIEW

Original actions follow the motions practice of the Federal Rules of Civil Procedure. S.Ct. 17.2. Plaintiffs can obtain preliminary injunctions in original actions. *See California v. Texas*, 459 U.S. 1067 (1982) ("[m]otion of plaintiff for issuance of a preliminary injunction granted"); *United States v. Louisiana*, 351 U.S. 978 (1956) (enjoining named state officers "and others acting with them ... from prosecuting any other case or cases involving the controversy before this Court until further order of the Court"). Similarly, a moving party can seek a stay pending appeal under this Court's Rule 23.[2]

Plaintiffs who seek interim relief under Federal Rule 65 must establish that they likely will succeed on the merits and likely will suffer irreparable harm without interim relief, that the balance of equities between their harm in the absence of interim relief and the defendants' harm from interim relief favors the movants, and that the public interest favors interim relief. *Winter v. Natural Resources Def. Council, Inc.*, 555 U.S. 7, 20 (2008). To obtain a stay pending appeal under this Court's Rule 23, the applicant must meet a similar test:

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[2] *See, e.g., Frank v. Walker*, 135 S.Ct. 7 (2014); *Husted v. Ohio State Conf. of the NAACP*, 135 S.Ct. 42 (2014); *North Carolina v. League of Women Voters*, 135 S.Ct. 6 (2014); *Arizona Sect'y of State's Office v. Feldman*, 137 S.Ct. 446 (2016); *North Carolina v. Covington*, 138 S.Ct. 974 (2018); *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S.Ct. 1205 (2020).

> (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay. In close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent.

Hollingsworth v. Perry, 558 U.S. 183, 190 (2010).

ARGUMENT

I. THIS COURT IS LIKELY TO EXERCISE ITS DISCRETION TO HEAR THIS CASE.

Although Plaintiff State disputes that this Court has discretion to decide not to hear this case instituted by a sovereign State, *see* 28 U.S.C. § 1251(a) (this Court's jurisdiction is exclusive for actions between States); *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), this Court is nonetheless likely to exercise its discretion to hear this case for two reasons, which is analogous to the first *Hollingsworth* factor for a stay.

First, in the analogous case of *Republican Party v. Boockvar*, No. 20A54, 2020 U.S. LEXIS 5181 (Oct. 19, 2020), four justices voted to stay a decision by the Pennsylvania Supreme Court that worked an example of the type of non-legislative revision to State election law that the Plaintiff State challenges here. In addition, since then, a new Associate Justice joined the Court, and the Chief Justice indicated a rationale

for voting against a stay in *Democratic Nat'l Comm. v. Wisconsin State Legis.*, No. 20A66, 2020 U.S. LEXIS 5187, at *1 (Oct. 26, 2020) (Roberts, C.J., concurring in denial of application to vacate stay) that either does not apply to original actions or that was wrong for the reasons set forth in Section II.A.2, *supra* (non-legislative amendment of State election statutes poses a question that arises under the federal Constitution, see *Bush II*, 531 U.S. at 113 (Rehnquist, C.J., concurring).

Second, this Court has repeatedly acknowledged the "uniquely important national interest" in elections for president and the rules for them. *Bush II*, 531 U.S. at 112 (interior quotations omitted); *see also Oregon v. Mitchell*, 400 U.S. 112 (1970) (original jurisdiction in voting-rights cases). Few cases on this Court's docket will be as important to our future as this case.

Third, no other remedy or forum exists for a State to challenge multiple States' maladministration of a presidential election, *see* Section II.A.8, *infra*, and *some* court must have jurisdiction for these fundamental issues about the viability of our democracy: "if there is no other mode of trial, that alone will give the King's courts a jurisdiction." *Mostyn v. Fabrigas*, 98 Eng. Rep. 1021, 1028 (K.B. 1774) (Lord Mansfield).

II. THE PLAINTIFF STATE IS LIKELY TO PREVAIL.

Under the *Winter-Hollingsworth* test, the plaintiff's likelihood of prevailing is the primary factor to assess the need for interim relief. Here, the Plaintiff State will prevail because this Court has jurisdiction and the Plaintiff State's merit case is likely to prevail.

A. This Court has jurisdiction over Plaintiff State's 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 State's fundamental rights and interests are at stake. This Court is the *only* venue that can protect the Plaintiff State's Electoral College votes from being cancelled by the unlawful and constitutionally tainted votes cast by Electors appointed by the Defendant States.

1. 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 and certification of the Defendant States' presidential electors before their legislatures pursuant to 3 U.S.C. §§ 2, 5, and 7 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.

2. 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,[3] and—indeed—we did not even have federal-question jurisdiction until 1875. *Merrell Dow Pharm.*, 478 U.S. at 807. The

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[3] 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).

Plaintiff State's 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 State in the appointment and certification of presidential electors to the Electoral College.

Given this federal-law basis against these state actions, the state actions are not "independent" of the federal 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 State's 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.

3. 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 State has standing under those rules.[1]

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 State, as set forth in more detail below.

a. <u>Plaintiff State suffers an injury in fact.</u>

The citizens of Plaintiff State 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,

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

even the most basic, are illusory if the right to vote is undermined." *Wesberry*, 376 U.S. at 10; *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); *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 cognizable under Article III.

Significantly, Plaintiff State presses its own form of voting-rights injury *as a State*. As with the one-person, 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, Plaintiff State suffers 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, Plaintiff State has standing where its 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.[5] Like

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[5] "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)).

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 Plaintiff State's presidential electors, that operates to defeat the Plaintiff State's interests.[6] 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 II*, 531 U.S. at 105 (quoting *Reynold*, 377 U.S. at 555). Those injuries to electors serve as an Article III basis for a *parens patriae* action by their States.

b. <u>The Defendant States caused the injuries.</u>

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 Plaintiff's injuries.

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[6] Because Plaintiff State appointed its presidential electors fully consistent with the Constitution, it suffers injury if its presidential electors are defeated by the Defendant States' unconstitutionally appointed presidential electors. This injury is all the more acute because Plaintiff State has taken steps to prevent fraud. Unlike the Defendant States, the Plaintiff State neither weakened nor allowed the weakening of its ballot-integrity statutes by non-legislative means.

c. The requested relief would redress the injuries.

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

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 II, 531 U.S. at 104; *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 State does 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 State requests—namely, remand to the State legislatures to allocate presidential 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 presidential 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 I*, 531 U.S. at 76-77; *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 the 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 the House to count the presidential electors' votes. 3 U.S.C. § 15.

4. Plaintiff State has 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-person, 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 presidential 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.

5. 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 or certification of presidential 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 presidential 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.

6. This matter is ripe for review.

The Plaintiff State's 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).[7] Prior to the election, there was no reason to know who would win the vote in any given State.

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 State 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 Plaintiff State 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

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[7] 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.

States become evident until days after the election. Moreover, a State may reasonably assess the status of litigation commenced by candidates to the presidential election prior to commencing its own litigation. Neither ripeness nor laches presents a timing problem here.

7. <u>This action does not raise a non-justiciable political question.</u>

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 appointing presidential electors involves political rights, this 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.

8. <u>No adequate alternate remedy or forum exists.</u>

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 State 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).[8] 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 State that the Defendant States' appointment of presidential electors under the recently conducted elections would be unconstitutional, then the statutorily created safe harbor cannot be used as a

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[8] 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.

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 U.S. 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.

B. The Plaintiff State is likely to prevail on the merits.

For interim relief, the most important factor is the likelihood of movants' prevailing. *Winter*, 555 U.S. at 20. The Defendant States' administration of the 2020 election violated the Electors Clause, which renders invalid any appointment of presidential electors based upon those election results. 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 law 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.B.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.[9]

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[9] To advance the principles enunciated in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (concerning state police power to enforce compulsory vaccination laws), as authority for non-legislative state actors re-writing state election statutes—in direct conflict with the Electors Clause—is a nonstarter. Clearly, "the Constitution does not conflict with itself by conferring, upon the one hand, a ... power, and taking the same power away, on the other, by the limitations of the due process clause."

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.B.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[10]). 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.

III. THE OTHER *WINTER-HOLLINGSWORTH* FACTORS WARRANT INTERIM RELIEF.

Although Plaintiff State's likelihood of prevailing would alone justify granting interim relief, relief is also warranted by the other *Winter-Hollingsworth* factors.

Brushaber v. Union Pac. R. Co., 240 U.S. 1, 24 (1916). In other words, the States' reserved police power does not abrogate the Constitution's express Electors Clause. *See also Cook v. Gralike*, 531 U.S. at 522 (election authority is delegated to States, not reserved by them); *accord* Story, 1 COMMENTARIES § 627.

[10] 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).

A. Plaintiff State will suffer irreparable harm if the Defendant States' unconstitutional presidential electors vote in the Electoral College.

Allowing the unconstitutional election results in Defendant States to proceed would irreparably harm Plaintiff State and the Republic both by denying representation in the presidency and in the Senate in the near term and by permanently sowing distrust in federal elections. This Court has found such threats to constitute irreparable harm on numerous occasions. *See* note 2, *supra* (collecting cases). The stakes in this case are too high to ignore.

B. The balance of equities tips to the Plaintiff State.

All State parties represent citizens who voted in the 2020 presidential election. Because of their unconstitutional actions, Defendant States represent some citizens who cast ballots not in compliance with the Electors Clause. It does not disenfranchise anyone to require the State legislatures to attempt to resolve this matter as 3 U.S.C. § 2, the Electors Clause, and even the Twelfth Amendment provide. By contrast, it would irreparably harm Plaintiff State if the Court denied interim relief.

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.

C. The public interest favors interim relief.

The last *Winter* factor is the public interest. When parties dispute the lawfulness of government action, the public interest collapses into the merits. *ACLU v. Ashcroft*, 322 F.3d 240, 247 (3d Cir. 2003); *Washington v. Reno*, 35 F.3d 1093, 1103 (6th Cir. 1994); *League of Women Voters of the United States v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016). If the Court agrees with Plaintiff State that non-legislative actors lack authority to amend state statutes for selecting presidential electors, the public interest requires interim relief. Withholding relief would leave a taint over the election, disenfranchise voters, and lead to still more electoral legerdemain in future elections.

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 extraordinary case arising from a presidential election. 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 presidential electors, the resulting vote of the Electoral College not only lacks constitutional legitimacy, but the Constitution itself will be forever sullied.

The nation needs this Court's clarity: "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). While isolated irregularities could be "garden-variety" election irregularities that do not raise a federal question,[11] the unconstitutional setting-aside of state election statutes by non-legislative actors calls both the result and the process into question, requiring 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. The public interest requires this Court's action.

IV. ALTERNATIVELY, THIS CASE WARRANTS SUMMARY DISPOSITION.

In lieu of granting interim relief, this Court could simply reach the merits summarily. *Cf.* FED. R. CIV. P. 65(a)(2); S.Ct. Rule 17.5. Two things are clear from the evidence presented at this initial phase: (1) non-legislative actors modified the Defendant States' election statutes; and (2) the resulting uncertainty casts doubt on the lawful winner. Those two facts are enough to decide the merits of the Electors Clause claim. The Court should thus vacate the Defendant States' appointment and impending certifications of presidential electors and remand to their State legislatures to allocate presidential electors via any constitutional means that does not rely on 2020

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[11] "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 (1st Cir. 1978)).

election results that includes votes cast in violation of State election statutes in place on Election Day.

CONCLUSION

This Court should first administratively stay or temporarily restrain the Defendant States from voting in the electoral college until further order of this Court and then issue a preliminary injunction or stay against their doing so until the conclusion of this case on the merits. Alternatively, the Court should reach the merits, vacate the Defendant States' elector certifications from the unconstitutional 2020 election results, and remand to the Defendant States' legislatures pursuant to 3 U.S.C. § 2 to appoint electors.

December 7, 2020

Respectfully submitted,

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No. _____, Original

In the Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

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

Defendants.

MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

Pursuant to 28 U.S.C. § 1251(a) and this Court's Rule 17, the State of Texas respectfully seeks leave to file the accompanying Bill of Complaint against the States of Georgia, Michigan, and Wisconsin and the Commonwealth of Pennsylvania (collectively, the "Defendant States") challenging their administration of the 2020 presidential election.

As set forth in 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.

- Intrastate differences in the treatment of voters, with more favorable allotted to voters – whether lawful or unlawful – in areas administered by local government under Democrat control and with populations with higher ratios of Democrat voters than other areas of Defendant States.
- 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.

All these flaws – even the violations of *state* election law – violate one or more of the federal requirements for elections (*i.e.*, equal protection, due process, and the Electors Clause) and thus arise under federal law. *See 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). Plaintiff State respectfully submits that the foregoing types of electoral irregularities exceed the hanging-chad saga of the 2000 election in their degree of departure from both state and federal law. Moreover, these flaws cumulatively preclude knowing who legitimately won the 2020 election and threaten to cloud all future elections.

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.

December 7, 2020 Respectfully submitted,

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No. _____, Original

In the Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

COMMONWEALTH OF PENNSYLVANIA, STATE OF STATE OF GEORGIA, STATE OF MICHIGAN, 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 democracy. The public, and indeed the candidates themselves, have a compelling interest in ensuring that the selection of a President—any President—is legitimate. If that trust is lost, the American Experiment will founder. A dark cloud hangs over the 2020 Presidential election.

Here is what we know. Using the COVID-19 pandemic as a justification, government officials in the defendant states of Georgia, Michigan, and Wisconsin, and the Commonwealth of Pennsylvania (collectively, "Defendant States"), usurped their legislatures' authority and unconstitutionally revised their state's election statutes. They accomplished these statutory revisions through executive fiat or friendly lawsuits, thereby weakening ballot integrity. Finally, these same government officials flooded the Defendant States with millions of ballots to be sent through the mails, or placed in drop boxes, with little

or no chain of custody[1] and, at the same time, weakened the strongest security measures protecting the integrity of the vote—signature verification and witness requirements.

Presently, evidence of material illegality in the 2020 general elections held in Defendant States grows daily. And, to be sure, the two presidential candidates who have garnered the most votes have an interest in assuming the duties of the Office of President without a taint of impropriety threatening the perceived legitimacy of their election. However, 3 U.S.C. § 7 requires that presidential electors be appointed on December 14, 2020. That deadline, however, should not cement a potentially illegitimate election result in the middle of this storm—a storm that is of the Defendant States' own making by virtue of their own unconstitutional actions.

This Court is the only forum that can delay the deadline for the appointment of presidential electors under 3 U.S.C. §§ 5, 7. To safeguard public legitimacy at this unprecedented moment and restore public trust in the presidential election, this Court should extend the December 14, 2020 deadline for Defendant States' certification of presidential electors to allow these investigations to be completed. Should one of the two leading candidates receive an absolute majority of the presidential electors' votes to be cast on December 14, this would finalize the selection of our President. The only date that is mandated under

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[1] *See* https://georgiastarnews.com/2020/12/05/dekalb-county-cannot-find-chain-of-custody-records-for-absentee-ballots-deposited-in-drop-boxes-it-has-not-been-determined-if-responsive-records-to-your-request-exist/

the Constitution, however, is January 20, 2021. U.S. CONST. amend. XX.

Against that background, the State of Texas ("Plaintiff State") brings this action against Defendant States based on the following allegations:

NATURE OF THE ACTION

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

2. This case presents a question of law: Did Defendant States violate the Electors Clause (or, in the alternative, the Fourteenth Amendment) by taking—or allowing—non-legislative actions to change the election rules that would govern the appointment of presidential electors?

3. Those unconstitutional changes opened the door to election irregularities in various forms. Plaintiff State alleges 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 and to restore public trust in this election.

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 Defendant States acted in a common pattern. State officials, sometimes through pending litigation (*e.g.*, settling "friendly" suits) and sometimes unilaterally by executive fiat, announced new rules for the conduct of the 2020 election that were inconsistent with existing state statutes defining what constitutes a lawful vote.

6. Defendant States also failed to segregate ballots in a manner that would permit 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 the Defendant States' presidential electors.

7. The rampant lawlessness arising out of Defendant States' unconstitutional acts is described in a number of currently pending lawsuits in Defendant States or in public view including:

- *Dozens of witnesses testifying under oath about*: the physical blocking and kicking out of Republican poll challengers; thousands of the same ballots run multiple times through tabulators; mysterious late night dumps of thousands of ballots at tabulation centers; illegally backdating thousands of ballots; signature verification procedures ignored; more

than 173,000 ballots in the Wayne County, MI center that cannot be tied to a registered voter;[2]

- *Videos of*: poll workers erupting in cheers as poll challengers are removed from vote counting centers; poll watchers being blocked from entering vote counting centers—despite even having a court order to enter; suitcases full of ballots being pulled out from underneath tables after poll watchers were told to leave.
- *Facts for which no independently verified reasonable explanation yet exists*: On October 1, 2020, in Pennsylvania 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, and potentially could be used to alter vote tallies; In Michigan, which also employed the same Dominion voting system, on November 4, 2020, Michigan election officials have admitted that a purported "glitch" caused 6,000 votes for President Trump to be wrongly switched to Democrat Candidate Biden. A flash drive containing tens of thousands of votes was left unattended in the Milwaukee tabulations center in the early morning hours of Nov. 4, 2020, without anyone aware it was not in a proper chain of custody.

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[2] All exhibits cited in this Complaint are in the Appendix to the Plaintiff State's forthcoming motion to expedite ("App. 1a-151a"). *See* Complaint (Doc. No. 1), *Donald J. Trump for President, Inc. v. Benson*, 1:20-cv-1083 (W.D. Mich. Nov. 11, 2020) at ¶¶ 26-55 & Doc. Nos. 1-2, 1-4.

8. Nor was this Court immune from the blatant disregard for the rule of law. Pennsylvania itself played fast and loose with its promise to this Court. 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).

9. Expert analysis using a commonly accepted statistical test further raises serious questions as to the integrity of this election.

10. The probability of former Vice President Biden winning the popular vote in the four Defendant States—Georgia, Michigan, Pennsylvania, and Wisconsin—independently given President Trump's early lead in those States as of 3 a.m. on November 4, 2020, is less than one in a quadrillion, or 1 in 1,000,000,000,000,000. For former Vice President Biden to win these four States collectively, the odds of

that event happening decrease to less than one in a quadrillion to the fourth power (*i.e.*, 1 in 1,000,000,000,000,000[4]). *See* Decl. of Charles J. Cicchetti, Ph.D. ("Cicchetti Decl.") at ¶¶ 14-21, 30-31. *See* App. 4a-7a, 9a.

11. The same less than one in a quadrillion statistical improbability of Mr. Biden winning the popular vote in the four Defendant States—Georgia, Michigan, Pennsylvania, and Wisconsin—independently exists when Mr. Biden's performance in each of those Defendant States is compared to former Secretary of State Hilary Clinton's performance in the 2016 general election and President Trump's performance in the 2016 and 2020 general elections. Again, the statistical improbability of Mr. Biden winning the popular vote in these **four** States collectively is 1 in 1,000,000,000,000,000[5]. *Id.* 10-13, 17-21, 30-31.

12. Put simply, there is substantial reason to doubt the voting results in the Defendant States.

13. 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 textually applies to the Article II process of selecting presidential electors).

14. Plaintiff States and their voters 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.

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

16. 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 constitutional democracy requires that states conduct presidential elections in accordance with the rule of law and federal constitutional guarantees.

JURISDICTION AND VENUE

17. 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).

18. 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 v. Gore*, 531 U.S. 98, 105 (2000) (quoting *Reynolds v. Sims*, 377 U. S. 533, 555 (1964)) (*Bush II*). In other words, Plaintiff State is acting to protect the interests of its respective citizens in the fair and constitutional conduct of elections used to appoint presidential electors.

19. 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 states "special solicitude in standing analysis"). Moreover, redressability likely would undermine a suit against a single state officer or State because no one State's electoral votes will make a difference in the election outcome. This action against multiple State defendants is the only adequate remedy for Plaintiff States, and this Court is the only court that can accommodate such a suit.

20. 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.

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

PARTIES

22. Plaintiff is the State of Texas, which is a sovereign State of the United States.

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

LEGAL BACKGROUND

24. 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.

25. "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).

26. 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)).

27. 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).

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

29. 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.

30. 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.").

31. 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.

32. 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.).

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

FACTS

34. 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 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.

35. 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).

36. 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),[3] 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.

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

37. 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 Defendant States' unconstitutional modification of statutory protections designed to ensure ballot integrity, Defendant States created a massive opportunity for fraud. In addition, the Defendant States have made it difficult or impossible to separate the constitutionally tainted mail-in ballots from all mail-in ballots.

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

39. Significantly, in 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.

40. The outcome of the Electoral College vote is directly affected by the constitutional violations committed by Defendant States. Plaintiff State complied 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 by unlawfully abrogating state election laws designed to

protect the integrity of the ballots and the electoral process, and those violations proximately caused the appointment of presidential electors for former Vice President Biden. Plaintiff State will therefore be injured if Defendant States' unlawfully certify these presidential electors.

Commonwealth of Pennsylvania

41. 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.

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

43. 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.

44. 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).

45. 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."

46. 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).

47. 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.

48. 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.

49. Pennsylvania's election law also requires that poll-watchers 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.

50. 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.

51. 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 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.

52. Statewide election officials and local election officials in Philadelphia and Allegheny Counties, aware of the historical Democrat advantage in those counties, 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. *See* Verified Complaint (Doc. No. 1), *Donald J. Trump for President, Inc. v. Boockvar*, 4:20-cv-02078-MWB (M.D. Pa. Nov. 18, 2020) at ¶¶ 3-6, 9, 11, 100-143.

53. 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.

54. The changed process allowing the curing of absentee and mail-in ballots in Allegheny and Philadelphia counties is a separate basis resulting in an unknown number of ballots being treated in an unconstitutional manner inconsistent with Pennsylvania statute. *Id.*

55. In addition, a great number of ballots were received after the statutory deadline and yet

were counted by virtue of the fact that Pennsylvania did not segregate all ballots received after 8:00 pm on November 3, 2020. Boockvar's claim that only about 10,000 ballots were received after this deadline has no way of being proven since Pennsylvania broke its promise to the Court to segregate ballots and co-mingled perhaps tens, or even hundreds of thousands, of illegal late ballots.

56. On December 4, 2020, fifteen members of the Pennsylvania House of Representatives led by Rep. Francis X. Ryan issued a report to Congressman Scott Perry (the "Ryan Report," App. 139a-144a) stating that "[t]he general election of 2020 in Pennsylvania was fraught with inconsistencies, documented irregularities and improprieties associated with mail-in balloting, pre-canvassing, and canvassing that the reliability of the mail-in votes in the Commonwealth of Pennsylvania is impossible to rely upon."

57. The Ryan Report's findings are startling, including:

- Ballots with NO MAILED date. That total is 9,005.
- Ballots Returned on or BEFORE the Mailed Date. That total is 58,221.
- Ballots Returned one day after Mailed Date. That total is 51,200.

Id. 143a.

58. These nonsensical numbers alone total 118,426 ballots and exceed Mr. Biden's margin of 81,660 votes over President Trump. But these discrepancies pale in comparison to the discrepancies in Pennsylvania's reported data concerning the

number of mail-in ballots distributed to the populace—now with no longer subject to legislated mandated signature verification requirements.

59. The Ryan Report also states as follows:

> [I]n a data file received on November 4, 2020, the Commonwealth's PA Open Data sites reported over 3.1 million mail in ballots sent out. The CSV file from the state on November 4 depicts 3.1 million mail in ballots sent out but on November 2, the information was provided that only 2.7 million ballots had been sent out. ***This discrepancy of approximately 400,000 ballots from November 2 to November 4 has not been explained.***

Id. at 143a-44a. (Emphasis added).

60. These stunning figures illustrate the out-of-control nature of Pennsylvania's mail-in balloting scheme. Democrats submitted mail-in ballots at more than two times the rate of Republicans. This number of constitutionally tainted ballots far exceeds the approximately 81,660 votes separating the candidates.

61. This blatant disregard of statutory law renders all mail-in ballots constitutionally tainted and cannot form the basis for appointing or certifying Pennsylvania's presidential electors to the Electoral College.

62. 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.

63. 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

64. 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.

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

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

67. 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.

68. 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).

69. 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).

70. 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).

71. 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.

72. 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.

73. This unconstitutional change in Georgia law materially benefitted former Vice President Biden. According to the Georgia Secretary of State's office, former Vice President Biden had almost double the number of absentee votes (65.32%) as President Trump (34.68%). *See* Cicchetti Decl. at ¶ 25, App. 7a-8a.

74. 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.

75. 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* Cicchetti Decl. at ¶ 24, App. 7a.

76. If the rejection rate of mailed-in absentee ballots remained the same in 2020 as it was in 2016, there would be 83,517 less tabulated ballots in 2020. The statewide split of absentee ballots was 34.68% for Trump and 65.2% for Biden. Rejecting at the higher 2016 rate with the 2020 split between Trump and Biden would decrease Trump votes by 28,965 and Biden votes by 54,552, which would be a net gain for Trump of 25,587 votes. This would be more than needed to overcome the Biden advantage of 12,670 votes, and Trump would win by 12,917 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

77. 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.

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

79. 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.

80. 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.

81. 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.

82. 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).

83. 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.*

84. 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 chose to flood across Michigan.

85. 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.

86. 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."

87. 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.

88. 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.

89. 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 materially benefited from these unconstitutional changes to Michigan's election law.

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

91. 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.

92. 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).

93. 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 materially benefited from these unconstitutional changes to Michigan's election law.

94. 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.[4] 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 instructed not to compare the signature on the absentee ballot with the signature on file.[5]

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[4] *Johnson v. Benson*, Petition for Extraordinary Writs & Declaratory Relief filed Nov. 26, 2020 (Mich. Sup. Ct.) at ¶¶ 71, 138-39, App. 25a-51a.

[5] *Id.*, Affidavit of Jessy Jacob, Appendix 14 at ¶15, attached at App. 34a-36a.

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

96. 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.

97. 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 174,384 absentee ballots out of 566,694 absentee ballots tabulated (about 30.8%) as counted without a registration number for precincts in the City of Detroit. *See* Cicchetti Decl. at ¶ 27, App. 8a. 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 28,377 votes.

98. The extra ballots cast most likely resulted from the phenomenon of Wayne County election workers running the same ballots through a tabulator multiple times, with Republican poll watchers obstructed or denied access, and election officials ignoring poll watchers' challenges, as documented by numerous declarations. App. 25a-51a.

99. 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. *Id.* at ¶ 29.

100. 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.

101. 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. *See* Cicchetti Decl. at ¶ 29, App. 8a.

102. 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 Wisconsin

103. 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.

104. In the 2016 general election some 146,932 mail-in ballots were returned in Wisconsin out of more than 3 million votes cast.[6] In stark contrast, 1,275,019 mail-in ballots, nearly a 900

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

percent increase over 2016, were returned in the November 3, 2020 election.[7]

105. 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).

106. 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.

107. For example, the WEC undertook a campaign to position hundreds of drop boxes to collect absentee ballots—including the use of unmanned drop boxes.[8]

108. 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

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

[8] 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.

of absentee ballots." Wisconsin Safe Voting Plan 2020, at 4 (June 15, 2020).[9]

109. 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.[10]

110. 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 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).

111. 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.

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[9] 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.

[10] *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.

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."

112. 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).

113. 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).

114. 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).

115. 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.

116. 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).

117. 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).

118. 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.

119. 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)."

120. 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."

121. 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."

122. 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.

123. 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).

124. 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.

125. 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. These acts violated WISC. STAT. § 6.87(6d) ("If a certificate is missing the address of a witness, the ballot may not 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.").

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

127. In addition, Ethan J. Pease, a box truck delivery driver subcontracted to the U.S. Postal Service ("USPS") to deliver truckloads of mail-in ballots to the sorting center in Madison, WI, testified

that USPS employees were backdating ballots received after November 3, 2020. Decl. of Ethan J. Pease at ¶¶ 3-13. Further, Pease testified how a senior USPS employee told him on November 4, 2020 that "[a]n order came down from the Wisconsin/Illinois Chapter of the Postal Service that 100,000 ballots were missing" and how the USPS dispatched employees to "find[] . . . the ballots." *Id.* ¶¶ 8-10. One hundred thousand ballots supposedly "found" after election day would far exceed former Vice President Biden margin of 20,565 votes over President Trump.

COUNT I: ELECTORS CLAUSE

128. Plaintiff State repeats and re-alleges the allegations above, as if fully set forth herein.

129. 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.

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

131. 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.

132. The actions set out in Paragraphs 41-128 constitute non-legislative changes to State election law by executive-branch State election officials, or by judicial officials, in Defendant States Pennsylvania, Georgia, Michigan, and Wisconsin, in violation of the Electors Clause.

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

COUNT II: EQUAL PROTECTION

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

135. 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.

136. The one-person, one-vote principle requires counting valid votes and not counting 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").

137. The actions set out in Paragraphs 66-73 (Georgia), 80-93 (Michigan), 44-55 (Pennsylvania), and 106-24 (Wisconsin) created differential voting standards in Defendant States Pennsylvania, Georgia, Michigan, and Wisconsin in violation of the Equal Protection Clause.

138. The actions set out in Paragraphs 66-73 (Georgia), 80-93 (Michigan), 44-55 (Pennsylvania), and 106-24 (Wisconsin) violated the one-person, one-

vote principle in Defendant States Pennsylvania, Georgia, Michigan, and Wisconsin.

139. By the shared enterprise of the entire nation electing the President and Vice President, equal protection violations in one State can and do adversely affect and diminish the weight of votes cast in States that lawfully abide by the election structure set forth in the Constitution. Plaintiff State is therefore harmed by this unconstitutional conduct in violation of the Equal Protection or Due Process Clauses.

COUNT III: DUE PROCESS

140. Plaintiff State repeats and re-alleges the allegations above, as if fully set forth herein.

141. When election practices reach "the point of patent and fundamental unfairness," the integrity of the election itself violates substantive due process. *Griffin v. Burns*, 570 F.2d 1065, 1077 (1st Cir. 1978); *Duncan v. Poythress*, 657 F.2d 691, 702 (5th Cir. 1981); *Florida State Conference of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1183-84 (11th Cir. 2008); *Roe v. State of Ala. By & Through Evans*, 43 F.3d 574, 580-82 (11th Cir. 1995); *Roe v. State of Ala.*, 68 F.3d 404, 407 (11th Cir. 1995); *Marks v. Stinson*, 19 F. 3d 873, 878 (3rd Cir. 1994).

142. Under this Court's precedents on procedural due process, not only intentional failure to follow election law as enacted by a State's legislature but also random and unauthorized acts by state election officials and their designees in local government can violate the Due Process Clause. *Parratt v. Taylor*, 451 U.S. 527, 537-41 (1981), *overruled in part on other grounds by Daniels v. Williams*, 474 U.S. 327, 330-31 (1986); *Hudson v. Palmer*, 468 U.S. 517, 532 (1984).

The difference between intentional acts and random and unauthorized acts is the degree of pre-deprivation review.

143. Defendant States acted unconstitutionally to lower their election standards—including to allow invalid ballots to be counted and valid ballots to not be counted—with the express intent to favor their candidate for President and to alter the outcome of the 2020 election. In many instances these actions occurred in areas having a history of election fraud.

144. The actions set out in Paragraphs 66-73 (Georgia), 80-93 (Michigan), 44-55 (Pennsylvania), and 106-24 (Wisconsin) constitute intentional violations of State election law by State election officials and their designees in Defendant States Pennsylvania, Georgia, Michigan, and Wisconsin, in violation of the Due Process Clause.

PRAYER FOR RELIEF

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

A. Declare that Defendant States Pennsylvania, Georgia, Michigan, and Wisconsin administered the 2020 presidential election in violation of the Electors Clause and the Fourteenth Amendment of the U.S. Constitution.

B. Declare that any electoral college votes cast by such presidential electors appointed in Defendant States Pennsylvania, Georgia, Michigan, and Wisconsin are in violation of the Electors Clause and the Fourteenth Amendment of the U.S. Constitution and cannot be counted.

C. Enjoin Defendant States' use of the 2020 election results for the Office of President to appoint presidential electors to the Electoral College.

D. Enjoin Defendant States' use of the 2020 election results for the Office of President to appoint presidential electors to the Electoral College and authorize, pursuant to the Court's remedial authority, the Defendant States to conduct a special election to appoint presidential electors.

E. If any of Defendant States have already appointed presidential 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 presidential electors in a manner that does not violate the Electors Clause and the Fourteenth Amendment, or to appoint no presidential electors at all.

F. Enjoin the Defendant States from certifying presidential electors or otherwise meeting for purposes of the electoral college pursuant to 3 U.S.C. § 5, 3 U.S.C. § 7, or applicable law pending further order of this Court.

G. Award costs to Plaintiff State.

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

December 7, 2020

Respectfully submitted,

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No. _____, Original

In the Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

COMMONWEALTH OF PENNSYLVANIA, STATE OF 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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STATE OF TEXAS,

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v.

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

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 State of Texas ("Plaintiff State") respectfully submits this brief in support of its Motion for Leave to File a Bill of Complaint against the Commonwealth of Pennsylvania and the States of Georgia, Michigan, and Wisconsin (collectively, "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 Defendant States presented the pandemic as the justification for ignoring state laws regarding absentee and mail-in voting. 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 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 question of law: Did Defendant States violate the Electors Clause by taking non-legislative actions to change the election rules that would govern the appointment of presidential electors? 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, Defendant States have not only tainted the integrity of their own citizens' votes, but their actions have also debased the votes of citizens in the States that 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]

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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.

Constitutional Background

The right to vote is protected by the by the Equal Protection Clause and the Due Process Clause. U.S. CONST. amend. XIV, § 1, cl. 3-4. Because "the right to vote is personal," *Reynolds*, 377 U.S. at 561-62 (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.* Though *Bush II* did not involve an action between States, the concern that illegal votes can cancel out lawful votes does not stop at a State's boundary in the context of a Presidential election.

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, § 4, cl. 1 (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 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 Defendant States. *See* Compl. at ¶¶ 66-73 (Georgia), 80-93 (Michigan), 44-55 (Pennsylvania), 106-24 (Wisconsin). 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 62 electoral votes, President Trump presumably has 232 electoral votes, and former Vice President Biden presumably has 244. Thus, Defendant States' presidential electors will determine the outcome of the election. Alternatively, if Defendant States are unable to certify 37 or more presidential 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.

Defendant States experienced serious voting irregularities. *See* Compl. at ¶¶ 75-76 (Georgia), 97-101 (Michigan), 55-60 (Pennsylvania), 122-28 (Wisconsin). At the time of this filing, Plaintiff State continues to investigate allegations of not only unlawful votes being counted but also fraud. Plaintiff State reserves the right to seek leave to amend the complaint as those investigations resolve. *See* S.Ct. Rule 17.2; FED. R. CIV. P. 15(a)(1)(A)-(B), (a)(2). But even the *appearance* of fraud in a close election is poisonous to democratic principles: "Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised." *Purcell v. Gonzalez,* 549 U.S. 1, 4 (2006); *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 189 (2008) (States have an interest in preventing voter fraud and ensuring voter confidence).

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).

ARGUMENT

I. THIS COURT HAS JURISDICTION OVER PLAINTIFF STATE'S 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. Plaintiff State's fundamental rights and interests are at stake. This Court is the *only* venue that can protect Plaintiff State's electoral college votes from being cancelled by the unlawful and constitutionally tainted votes cast by electors appointed and certified by 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 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. Plaintiff States' Electoral Clause claims arise under the Constitution and so are *federal*, even if the only claim is that Defendant States violated their own state election statutes. Moreover, as is explained below, Defendant States' actions injure the interests of Plaintiff State in the appointment of electors to the electoral college in a manner that is inconsistent 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 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 State's claims therefore fall within this Court's 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

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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).

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 State has standing under those rules.[3]

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 Defendant States affect the votes in Plaintiff State, as set forth in more detail below.

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

1. Plaintiff State suffers an injury in fact.

The citizens of Plaintiff State 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*, 376 U.S. at 10; *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. at 227; *Baker*, 369 U.S. at 208. 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, Plaintiff State presses its own form of voting-rights injury *as States*. As with the one-person, 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 Defendant States' unconstitutionally appointed electors vote for a presidential candidate opposed by the Plaintiff State's electors, that operates to defeat Plaintiff State's interests.[5] Indeed, even without an electoral college majority, presidential electors suffer the same voting-debasement injury as voters generally: "It must be remembered that 'the

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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 Plaintiff State appointed its electors consistent with the Constitution, they suffer injury if its electors are defeated by Defendant States' unconstitutionally appointed electors. This injury is all the more acute because Plaintiff State has taken steps to prevent fraud. For example, Texas does not allow no excuse vote by mail (Texas Election Code Sections 82.001-82.004); has strict signature verification procedures (Tex. Election Code §87.027(j); Early voting ballot boxes have two locks and different keys and other strict security measures (Tex. Election Code §§85.032(d) & 87.063); requires voter ID (House Comm. on Elections, Bill Analysis, Tex. H.B. 148, 83d R.S. (2013)); has witness requirements for assisting those in need (Tex. Election Code §§ 86.0052 & 86.0105), and does not allow ballot harvesting Tex. Election Code 86.006(f)(1-6). Unlike Defendant States, Plaintiff State neither weakened nor allowed the weakening of its ballot-integrity statutes by non-legislative means.

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)) ("*Bush II*"). Finally, once Plaintiff State has standing to challenge Defendant States' unlawful actions, Plaintiff State may do so on any legal theory that undermines those actions. *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 78-81 (1978); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 & n.5 (2006). Injuries to Plaintiff State's electors serve as an Article III basis for a *parens patriae* action.

2. Defendant States caused the injuries.

Non-legislative officials in 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 Plaintiff's injuries.

3. The requested relief would redress the injuries.

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

First, while 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 II, 531 U.S. at 104; *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"). Plaintiff State does 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 Plaintiff State requests—namely, remand to the State legislatures to allocate electors in a manner consistent with the Constitution—does not violate Defendant States' rights or exceed this Court's power. The power to select electors is a plenary power of the State 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 I*, 531 U.S. at 76-77; *Bush II*, 531 U.S at 104.

Third, uncertainty of how 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). Defendant States' legislatures would remain free to exercise their plenary authority under the Electors Clause in any *constitutional* manner they wish. 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 the constitutionally tainted November 3 election, remand the appointment of electors to Defendant States, and order 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 presidential electors' votes. 3 U.S.C. § 15.

D. 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 presidential 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. Moreover, 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.

E. This matter is ripe for review.

Plaintiff State's 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). Prior to the election, there was no reason to know who would win the vote in any given State.

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 Defendant States.

Before the election, 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). Plaintiff State could not have brought this action before the election results. The extent of the county-level deviations from election statutes in Defendant States became evident well after the election. Neither ripeness nor laches presents a timing problem here.

F. 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) 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.

G. 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 State 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).[6] Defendant States' legislature

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[6] Indeed, the Constitution also includes another backstop: "if no person have such majority [of electoral votes], then from the

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 Plaintiff State that Defendant States' appointment of presidential 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:

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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.

> 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). Defendant States would suffer no cognizable injury from this Court's enjoining their reliance on an unconstitutional vote.

II. THIS CASE PRESENTS CONSTITUTIONAL QUESTIONS OF IMMENSE NATIONAL CONSEQUENCE THAT WARRANT 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 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 State disputes that exercising this Court's original jurisdiction is discretionary, *see* Section III, *infra*, the clear unlawful abrogation of 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,[7] the closeness of the presidential election results, combined with the unconstitutional setting-aside of state election laws by non-legislative actors call both the result and the process into question.

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[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*, 570 F.2d at 1077-79)).

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

Defendant States' administration of the 2020 election violated several constitutional requirements and, thus, violated the rights that Plaintiff State seeks to protect. "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 104.[8] Even a State legislature vested with authority to regulate election procedures lacks authority to "abridg[e ...] fundamental rights, such as the right to vote." *Tashjian v. Republican Party*, 479 U.S. 208, 217 (1986). As demonstrated in this section, 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

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[8] The right to vote is "a fundamental political right, because preservative of all rights." *Reynolds*, 377 U.S. at 561-62 (internal quotations omitted).

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) (J. Madison) ("House of Representatives is so constituted as to support in its members a 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.

"[T]here 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, 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.

3. Defendant States' administration of the 2020 election violated the Fourteenth Amendment.

In each of Defendant States, important rules governing the sending, receipt, validity, 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

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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).

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 104. The Equal Protection Clause demands uniform "statewide standards for determining what is a legal vote." *Id.* at 110.

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 obstruction of poll-watcher requirements that occurred in Michigan's Wayne County may have contributed to the unusually high number of more than 173,000 votes which are not tied to a registered voter and that 71 percent of the precincts are out of balance with no explanation. Compl. ¶ 97.

Regardless of whether the modification of legal standards in some counties in 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 unconstitutional election.

The Fourteenth Amendment's due process clause protects the fundamental right to vote against "[t]he

disenfranchisement of a state electorate." *Duncan v. Poythress*, 657 F.2d 691, 702 (5th Cir. 1981). Weakening or eliminating signature-validating requirements, then restricting poll watchers also undermines the 2020 election's integrity—especially as practiced in urban centers with histories of electoral fraud—also violates substantive due process. *Griffin v. Burns*, 570 F.2d 1065, 1077 (1st Cir. 1978) ("violation of the due process clause may be indicated" if "election process itself reaches the point of patent and fundamental unfairness"); *see also Florida State Conference of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1183-84 (11th Cir. 2008); *Roe v. State of Ala. By & Through Evans*, 43 F.3d 574, 580-82 (11th Cir. 1995); *Roe v. State of Ala.*, 68 F.3d 404, 407 (11th Cir. 1995); *Marks v. Stinson*, 19 F. 3d 873, 878 (3rd Cir. 1994). Defendant States made concerted efforts to weaken or nullify their legislatures' ballot-integrity measures for the unprecedented deluge of mail-in ballots, citing the COVID-19 pandemic as a rationale. But "Government is not free to disregard the [the Constitution] in times of crisis." *Roman Catholic Diocese of Brooklyn*, 592 U.S. at ___ (Gorsuch, J., concurring).

Similarly, failing to follow procedural requirements for amending election standards violates procedural due process. *Brown v. O'Brien*, 469 F.2d 563, 567 (D.C. Cir.), *vacated as moot*, 409 U.S. 816 (1972). Under this Court's precedents on procedural due process, not only intentional failure to follow election law as enacted by a State's legislature but also random and unauthorized acts by state election officials and their designees in local government can violate the Due Process Clause. *Parratt v. Taylor*, 451

U.S. 527, 537-41 (1981), *overruled in part on other grounds by Daniels v. Williams*, 474 U.S. 327, 330-31 (1986); *Hudson v. Palmer*, 468 U.S. 517, 532 (1984). Here, the violations all were intentional, even if done for the reason of addressing the COVID-19 pandemic.

While Plaintiff State disputes that exercising this Court's original jurisdiction is discretionary, *see* Section III, *infra*, the clear unlawful abrogation of Defendant States' election laws designed to ensure election integrity by a few officials, and examples of material irregularities in the 2020 election cumulatively warrant exercising jurisdiction. Although isolated irregularities could be "garden-variety" election disputes that do not raise a federal question,[10] the closeness of election results in swing states combines with unprecedented expansion in the use of fraud-prone mail-in ballots—millions of which were also mailed out—and received and counted—without verification—often in violation of express state laws by non-legislative actors, *see* Sections II.A.1-II.A.2, *supra*, call both the result and the process into question. For an office as important as the presidency, these clear violations of the Constitution, coupled with a reasonable inference of unconstitutional ballots being cast in numbers that far exceed the margin of former Vice President Biden's vote tally over President Trump demands the attention of this Court.

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[10] "To be sure, 'garden variety election irregularities' may not present facts sufficient to offend the Constitution's guarantee of due process[.]" *Hunter*, 635 F.3d at 232 (quoting *Griffin*, 570 F.2d at 1077-79)).

While investigations into allegations of unlawful votes being counted and fraud continue, even the appearance of fraud in a close election would justify exercising the Court's discretion to grant the motion for leave to file. Regardless, Defendant States' violations of the Constitution would warrant this Court's review, even if no election fraud had resulted.

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 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 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 State respectfully submits 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.G, *supra*, and *some* court must have jurisdiction for these weighty issues. *See Mostyn v. Fabrigas*, 98 Eng. Rep. 1021, 1028 (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 State respectfully submits 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 State 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 and straightforward question of law that requires neither finding additional facts nor briefing beyond the threshold issues presented here.

CONCLUSION

Leave to file the Bill of Complaint should be granted.

December 7, 2020

Respectfully submitted,

Ken Paxton*
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Brent Webster
First Assistant Attorney
General of Texas

Lawrence Joseph
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No. 20A , Original

In the Supreme Court of the United States

STATE OF TEXAS,
Plaintiff,

v.

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

MOTION FOR EXPEDITED CONSIDERATION OF THE MOTION FOR LEAVE TO FILE A BILL OF COMPLAINT AND FOR EXPEDITION OF ANY PLENARY CONSIDERATION OF THE MATTER ON THE PLEADINGS IF PLAINTIFFS' FORTHCOMING MOTION FOR INTERIM RELIEF IS NOT GRANTED

The State of Texas ("Plaintiff State") hereby moves, pursuant to Supreme Court Rule 21, for expedited consideration of the motion for leave to file a bill of complaint, filed today, in an original action on the administration of the 2020 presidential election by defendants Commonwealth of Pennsylvania, *et al.* (collectively, "Defendant States"). The relevant statutory deadlines for the defendants' action based on unconstitutional election results are imminent: (a) December 8 is the safe harbor for certifying presidential electors, 3 U.S.C. § 5; (b) the electoral college votes on December 14, 3 U.S.C. § 7; and (c) the House of Representatives counts votes on January 6, 3 U.S.C. § 15. Absent some form of relief, the defendants will appoint electors based on unconstitutional and deeply uncertain election results, and the House will count those votes on January 6, tainting the election and the future of free elections.

Expedited consideration of the motion for leave to file the bill of complaint is needed to enable the Court to resolve this original action before the applicable statutory deadlines, as well as the constitutional deadline of January 20, 2021, for the next presidential term to commence. U.S. CONST. amend. XX, § 1, cl. 1. Texas respectfully requests that the Court order Defendant States to respond to the motion for leave to file by December 9. Texas waives the waiting period for reply briefs under this Court's Rule 17.5, so that the Court could consider the case on an expedited basis at its December 11 conference.

Working in tandem with the merits briefing schedule proposed here, Texas also will move for interim relief in the form of a temporary restraining order, preliminary injunction, stay, and administrative stay to enjoin Defendant States from certifying their presidential electors or having them vote in the electoral college. *See* S.Ct. Rule 17.2 ("The form of pleadings and motions prescribed by the Federal Rules of Civil Procedure is followed."); *cf.* S.Ct. Rule 23 (stays in this Court). Texas also asked in their motion for leave to file that the Court summarily resolve this matter at that threshold stage. Any relief that the Court grants under those two alternate motions would inform the expedited briefing needed on the merits.

Enjoining or staying Defendant States' appointment of electors would be an especially appropriate and efficient way to ensure that the eventual appointment and vote of such electors reflects a constitutional and accurate tally of lawful votes and otherwise complies with the applicable constitutional and statutory requirements in time for the House to act on January 6. Accordingly, Texas respectfully requests

expedition of this original action on one or more of these related motions. The degree of expedition required depends, in part, on whether Congress reschedules the day set for presidential electors to vote and the day set for the House to count the votes. *See* 3 U.S.C. §§ 7, 15; U.S. Const. art. II, §1m cl. 4.

STATEMENT

Like much else in 2020, the 2020 election was compromised by the COVID-19 pandemic. Even without Defendant States' challenged actions here, the election nationwide saw a massive increase in fraud-prone voting by mail. *See* BUILDING CONFIDENCE IN U.S. ELECTIONS: REPORT OF THE COMMISSION ON FEDERAL ELECTION REFORM, at 46 (Sept. 2005) (absentee ballots are "the largest source of potential voter fraud"). Combined with that increase, the election in Defendant States was also compromised by numerous changes to the State legislatures' duly enacted election statutes by non-legislative actors—including both "friendly" suits settled in courts and executive fiats via guidance to election officials—in ways that undermined state statutory ballot-integrity protections such as signature and witness requirements for casting ballots and poll-watcher requirements for counting them. State legislatures have plenary authority to set the method for selecting presidential electors, *Bush v. Gore*, 531 U.S. 98, 104 (2000) ("*Bush II*"), and "significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question." *Id.* at 113 (Rehnquist, C.J., concurring); *accord Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70, 76 (2000) ("*Bush I*").

Plaintiff State has not had the benefit of formal discovery prior to submitting this original action. Nonetheless, Plaintiff State has uncovered substantial evidence

discussed below that raises serious doubts as to the integrity of the election processes in Defendant States. Although new information continues to come to light on a daily basis, as documented in the accompanying Appendix ("App."), the voting irregularities that resulted from Defendant States' unconstitutional actions include the following:

- Jesse Jacob, a decades-long City of Detroit employee assigned to work in the Elections Department for the 2020 election testified (App. 34a-36a) that she was "instructed not to look at any of the signatures on the absentee ballots, and I was instructed not to compare the signature on the absentee ballot with the signature on file" in direct contravention of MCL § 168.765a(6), which requires all signatures on ballots be verified.
- Ethan J. Pease, a box truck delivery driver subcontracted to the U.S. Postal Service ("USPS") to deliver truckloads of mail-in ballots to the sorting center in Madison, WI, testified that USPS employees were backdating ballots received after November 3, 2020. Decl. of Ethan J. Pease at ¶¶ 3-13. (App. 149a-51a). Further, Pease testified how a senior USPA employee told him on November 4, 2020 that "An order came down from the Wisconsin/Illinois Chapter of the Postal Service that 100,000 ballots" and how the USPSA dispatched employees to "find[] ... the ballots." ¶¶ 8-10. One hundred thousand ballots "found" after election day far exceeds former Vice President Biden margin of 20,565 votes over President Trump.

- 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), which the Pennsylvania defendants quickly settled resulting in guidance (App. 109a-114a)[1] issued 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." App. 113a.
- 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 the statutory deadline for mail-in ballots from Election Day to three days after Election Day and adopted a presumption that even *non-postmarked ballots* were presumptively timely. In addition, a great number of ballots were received after the statutory deadline. Because Pennsylvania misled this Court

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[1] Although the materials cited here are a complaint, that complaint is verified (*i.e.*, declared under penalty of perjury), App. 75a, which is evidence for purposes of a motion for summary judgment. *Neal v. Kelly*, 963 F.2d 453, 457 (D.C. Cir. 1992) ("allegations in [the] verified complaint should have been considered on the motion for summary judgment as if in a new affidavit").

about segregating the late-arriving ballots and instead commingled those ballots, it is now impossible to verify Pennsylvania's claim about the number of ballots affected.

- Contrary to Pennsylvania election law on providing poll-watchers access to the opening, counting, and recording of absentee ballots, local election officials in Philadelphia and Allegheny Counties decided not to follow 25 PA. STAT. § 3146.8(b). App. 127a-28a.
- 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. App. 122a-24a. 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 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. App. 122a-24a.
- On December 4, 2020, fifteen members of the Pennsylvania House of Representatives issued a report (App. 139a-45a) to Congressman Scott Perry stating that "[t]he general election of 2020 in Pennsylvania was fraught with ... documented irregularities and improprieties associated with mail-in balloting ... [and] that the reliability of the mail-in votes in the Commonwealth

of Pennsylvania is impossible to rely upon." The report detailed, *inter alia*, that more than 118,426 mail-in votes either had no mail date, were returned *before* they were mailed, or returned one day after the mail date. The Report also stated that, based on government reported data, the number of mail-in ballots *sent* by November 2, 2020 (2.7 million) somehow ballooned by 400,000, to 3.1 million on November 4, 2020, without explanation.

- 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 (App. 19a-24a) 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), which is particularly disturbing because the legislature allowed persons *other than the voter* to apply for an absentee ballot, GA. CODE § 21-2-381(a)(1)(C), which means that the legislature likely was relying heavily on the signature-verification on ballots under GA. CODE § 21-2-386.
- 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. App. 25a-51a.

- The probability of former Vice President Biden winning the popular vote in the four Defendant States—Georgia, Michigan, Pennsylvania, and Wisconsin—independently given President Trump's early lead in those States as of 3 a.m. on November 4, 2020, is less than one in a quadrillion, or 1 in 1,000,000,000,000,000. For former Vice President Biden to win these four States collectively, the odds of that event happening decrease to less than one in a quadrillion to the fourth power (*i.e.*, 1 in 1,000,000,000,000,000[4]). *See* Decl. of Charles J. Cicchetti, Ph.D. ("Cicchetti Decl.") at ¶¶ 14-21, 30-31 (App. 4a-7a, 9a).
- The same less than one in a quadrillion statistical improbability of Mr. Biden winning the popular vote in the four Defendant States—Georgia, Michigan, Pennsylvania, and Wisconsin—independently exists when Mr. Biden's performance in each of those Defendant States is compared to former Secretary of State Hilary Clinton's performance in the 2016 general election and President Trump's performance in the 2016 and 2020 general elections. Again, the statistical improbability of Mr. Biden winning the popular vote in these **four** States collectively is 1 in 1,000,000,000,000,000[5]. *Id.* 10-13, 17-21, 30-31 (App. 3a-7a, 9a).
- Georgia's unconstitutional abrogation of the express mandatory procedures for challenging defective signatures on ballots set forth at GA. CODE § 21-2-386(a)(1)(B) resulted in far more ballots with unmatching signatures being counted in the 2020 election than if the statute had been properly applied. The

2016 rejection rate was more than *seventeen times greater* than in 2020. *See* Cicchetti Decl. at ¶ 24 (App. 7a). As a consequence, applying the rejection rate in 2016, which applied the mandatory procedures, to the ballots received in 2020 would result in a net gain for President Trump of 25,587 votes. This would be more than needed to overcome the Biden advantage of 12,670 votes, and Trump would win by 12,917 votes. *See* App. 8a.

- The two Republican members of the Board *rescinded their votes* to certify the vote in Wayne County, 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. *See* Cicchetti Decl. at ¶ 29 (App. 8a).
- The Wayne County Statement of Votes Report lists 174,384 absentee ballots out of 566,694 absentee ballots tabulated (about 30.8%) as counted without a registration number for precincts in the City of Detroit. *See* Cicchetti Decl. at ¶ 27 (App. 8a). 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 28,377 votes. The extra ballots cast most likely resulted from the phenomenon of Wayne County election workers running the same ballots through a tabulator multiple times, with Republican poll watchers obstructed or denied access, and election officials ignoring poll watchers' challenges, as documented by numerous declarations. App. 25a-51a.

As a net result of these challenges, the close election result in Defendant States—on

which the presidential election turns—is indeterminate. Put another way, Defendant States' unconstitutional actions affect outcome-determinative numbers of popular votes, that in turn affect outcome-determinative numbers of electoral votes.

To remedy Texas's claims and remove the cloud over the results of the 2020 election, expedited review and interim relief are required. December 8, 2020 is a statutory safe harbor for States to appoint presidential electors, and by statute the electoral college votes on December 14. *See* 3 U.S.C. §§ 7, 15. In a contemporaneous filing, Texas asks this Court to vacate or enjoin—either permanently, preliminarily, or administratively—Defendant States from certifying their electors and participating in the electoral college vote. As permanent relief, Texas asks this Court to remand the allocation of electors to the legislatures of Defendant States pursuant to the statutory and constitutional backstop for this scenario: "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 (emphasis added); U.S. CONST. art. II, § 1, cl. 2.

Significantly, State legislatures retain the authority to appoint electors under the federal Electors Clause, even if state laws or constitutions provide otherwise. *McPherson v. Blacker*, 146 U.S. 1, 35 (1892); *accord Bush I*, 531 U.S. at 76-77; *Bush II*, 531 U.S at 104. For its part, Congress could move the December 14 date set for the electoral college's vote, as it has done before when faced with contested elections. Ch. 37, 19 Stat. 227 (1877). Alternatively, the electoral college could vote on December 14

without Defendant States' electors, with the presidential election going to the House of Representatives under the Twelfth Amendment if no candidate wins the required 270-vote majority.

What cannot happen, constitutionally, is what Defendant States appear to want (namely, the electoral college to proceed based on the unconstitutional election in Defendant States):

> 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 104. Proceeding under the unconstitutional election is not an option.

Pursuant to 28 U.S.C. 1251(a), Plaintiff State has filed a motion for leave to file a bill of complaint today. As set forth in the complaint and outlined above, all Defendant States ran their 2020 election process in noncompliance with the ballot-integrity requirements of their State legislature's election statutes, generally using the COVID-19 pandemic as a pretext or rationale for doing so. In so doing, Defendant States disenfranchised not only their own voters, but also the voters of all other States: "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).

ARGUMENT

The Constitution vests plenary authority over the appointing of presidential electors with State legislatures. *McPherson*, 146 U.S. at 35; *Bush I*, 531 U.S. at 76-77; *Bush II*, 531 U.S at 104. While State legislatures need not proceed by popular

vote, the Constitution requires protecting the fundamental right to vote when State legislatures decide to proceed via elections. *Bush II*, 531 U.S. at 104. On the issue of the constitutionality of an election, moreover, the Judiciary has the final say: "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); *Bush II*, 531 U.S. at 104. For its part, Congress has the ability to set the time for the electoral college to vote. U.S. CONST. art. II, § 1, cl. 3. To proceed constitutionally with the 2020 election, all three actors potentially have a role, given the complications posed by Defendant States' unconstitutional actions.

With this year's election on November 3, and the electoral college's vote set by statute for December 14, 3 U.S.C. § 7, Congress has not allowed much time to investigate irregularities like those in Defendant States before the electoral college is statutorily set to act. But the time constraints are not constitutional in nature—the Constitution's only time-related provision is that the President's term ends on January 20, U.S. CONST. amend. XX, § 1, cl. 1—and Congress has both the obvious authority and even a history of moving the date of the electoral college's vote when election irregularities require it.

Expedited consideration of this matter is warranted by the seriousness of the issues raised here, not only for the results of the 2020 presidential election but also for the implications for our constitutional democracy going forward. If this Court does not halt the Defendant States' participation in the electoral college's vote on December 14, a grave cloud will hang over not only the presidency but also the

Republic.

With ordinary briefing, Defendant States would not need to respond for 60 days, S.Ct. Rule 17.5, which is after the next presidential term commences on January 20, 2021. Accordingly, this Court should adopt an expedited briefing schedule on the motion for leave to file the bill of complaint, as well as the contemporaneously filed motion for interim relief, including an administrative stay or temporary restraining order pending further order of the Court. If this Court declines to resolve this original action summarily, the Court should adopt an expedited briefing schedule for plenary consideration, allowing the Court to resolve this matter before the relevant deadline passes. The contours of that schedule depend on whether the Court grants interim relief. Texas respectfully proposes two alternate schedules.

If the Court has not yet granted administrative relief, Texas proposes that the Court order Defendant States to respond to the motion for leave to file a bill of complaint and motion for interim relief by December 9. *See* S.Ct. Rule 17.2 (adopting Federal Rules of Civil Procedure); FED. R. CIV. P. 65; *cf.* S.Ct. Rule 23 (stays). Texas waives the waiting period for reply briefs under this Court's Rule 17.5 and would reply by December 10, which would allow the Court to consider this case on an expedited basis at its December 11 Conference.

With respect to the merits if the Court neither grants the requested interim relief nor summarily resolves this matter in response to the motion for leave to file the bill of complaint, thus requiring briefing of the merits, Texas respectfully proposes

the following schedule for briefing and argument:

December 8, 2020	Plaintiffs' opening brief
December 8, 2020	*Amicus* briefs in support of plaintiffs or of neither party
December 9, 2020	Defendants' response brief(s)
December 9, 2020	*Amicus* briefs in support of defendants
December 10, 2020	Plaintiffs' reply brief(s) to each response brief
December 11, 2020	Oral argument, if needed

If the Court grants an administrative stay or other interim relief, but does not summarily resolve this matter in response to the motion for leave to file the bill of complaint, Texas respectfully proposes the following schedule for briefing and argument on the merits:

December 11, 2020	Plaintiffs' opening brief
December 11, 2020	*Amicus* briefs in support of plaintiffs or of neither party
December 17, 2020	Defendants' response brief(s)
December 17, 2020	*Amicus* briefs in support of defendants
December 22, 2020	Plaintiffs' reply brief(s) to each response brief
December 2020	Oral argument, if needed

In the event that Congress moves the date for the electoral college and the House to vote or count votes, then the parties could propose an alternate schedule. If any motions to intervene are granted by the applicable deadline, intervenors would file by the applicable deadline as plaintiffs-intervenors or defendants-intervenors, with any still-pending intervenor filings considered as *amicus* briefs unless such

prospective intervenors file or seek leave to file an *amicus* brief in lieu of their still-pending intervenor filings.

CONCLUSION

Texas respectfully requests that the Court expedite consideration of its motion for leave to file a bill of complaint based on the proposed schedule and, if the Court neither stays nor summarily resolves the matter and thus sets the case for plenary consideration, that the Court expedite briefing and oral argument based on the proposed schedule.

Dated: December 7, 2020

Respectfully submitted,

/s/ Ken Paxton

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Brent Webster
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CERTIFICATE AS TO FORM

Pursuant to Sup. Ct. Rules 22 and 33, I certify that the foregoing motion are proportionately spaced, has a typeface of Century Schoolbook, 12 points, and contains 15 pages (and 3,550 words), excluding this Certificate as to Form, the Table of Contents, and the Certificate of Service.

Dated: December 7, 2020

Respectfully submitted,

/s/ Ken Paxton

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Counsel for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned certifies that, on this 7th day of December 2020, in addition to filing the foregoing document via the Court's electronic filing system, one true and correct copy of the foregoing document was served by Federal Express, with a PDF courtesy copy served via electronic mail on the following counsel and parties:

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Executed December 7, 2020, at Washington, DC,

/s/ Lawrence J. Joseph
Lawrence J. Joseph

James Percival

From: Amit Agarwal
Sent: Wednesday, December 9, 2020 2:37 PM
To: Evan Ezray
Cc: James Percival; Jeffrey DeSousa
Subject: Re: RE:

Evan,

Thanks for taking the time to do this, and for the quick and helpful analysis.

--Amit

From: Evan Ezray <Evan.Ezray@myfloridalegal.com>
Sent: Wednesday, December 9, 2020 9:51 AM
To: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Cc: James Percival <James.Percival@myfloridalegal.com>; Jeffrey DeSousa <Jeffrey.DeSousa@myfloridalegal.com>
Subject: RE:

Amit,

The safe harbor deadline provides that if a state has a pre-election procedure for appointing electors and, consistent with that pre-election law, makes a determination of the appointment of electors "at least six days before the time fixed for the meeting of the electors," then that determination "shall govern in the counting of the electoral votes." 3 U.S.C. § 5. This year, the meeting of electors will take place on December 14 (which is the first Monday after the second Wednesday in December). 3 U.S.C. § 7. That made the safe harbor day December 8.

The upshot is that if a state meets the safe harbor deadline and then its electors meet, those electors "shall govern" in the counting of electoral votes.

As far as I can tell every state save Wisconsin met the safe harbor. *See* https://www.jsonline.com/story/news/politics/elections/2020/12/08/wisconsin-only-state-miss-election-safe-harbor-deadline/6496378002/.

Last, I would note that the safe harbor provision played a key role in *Bush v. Gore*. To summarize, the majority thought that Florida had a legislatively-expressed desire to meet the safe harbor, and therefore, was unwilling to allow a recount to extend beyond the deadline. The dissent gave the safe harbor a much smaller role.

I have included the full text of the safe harbor and some key quotes from the *Bush v. Gore* debate below.

Happy to answer any additional questions,

Evan

- Safe harbor text. "If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned." 3 U.S.C. § 5.
    - Meeting of electors is the first Monday after the second Wednesday in December. 3 U.S. 7. That is December 14, so the safe harbor is December 8.
- *Bush v. Gore* debate on safe harbor
    - PC: "Seven Justices of the Court agree that there are constitutional problems with the recount ordered by the Florida Supreme Court that demand a remedy. The only disagreement is as to the remedy. Because the Florida Supreme Court has said that the Florida Legislature intended to obtain the safe-harbor benefits of 3 U.S.C. § 5, Justice BREYER's proposed remedy—remanding to the Florida Supreme Court for its ordering of a constitutionally proper contest until December 18–contemplates action in violation of the Florida Election Code, and hence could not be part of an "appropriate" order authorized by Fla. Stat. Ann. § 102.168(8) (Supp.2001)."
    - Rehnquist concurrence:
        - "If we are to respect the legislature's Article II powers, therefore, we must ensure that postelection state-court actions do not frustrate the legislative desire to attain the 'safe harbor' provided by § 5."
        - "in light of the legislative intent identified by the Florida Supreme Court to bring Florida within the "safe harbor" provision of 3 U.S.C. § 5, the remedy prescribed by the Supreme Court of Florida cannot be deemed an "appropriate" one as of December 8. It significantly departed from the statutory framework in place on November 7, and authorized open-ended further proceedings which could not be completed by December 12, thereby preventing a final determination by that date."
    - Stevens dissent:
        - "It hardly needs stating that Congress, pursuant to 3 U.S.C. § 5, did not impose any affirmative duties upon the States that their governmental branches could "violate." Rather, § 5 provides a safe harbor for States to select electors in contested elections "by judicial or other methods" established by laws prior to the election day. Section 5, like Article II, assumes the involvement of the state judiciary in interpreting state election laws and resolving election disputes under those laws. Neither § 5 nor Article II grants federal judges any special authority to substitute their views for those of the state judiciary on matters of state law."
    - Souter dissent:

- "The 3 U.S.C. § 5 issue is not serious. That provision sets certain conditions for treating a State's certification of Presidential electors as conclusive in the event that a dispute over recognizing those electors must be resolved in the Congress under 3 U.S.C. § 15. Conclusiveness requires selection under a legal scheme in place before the election, with results determined at least six days before the date set for casting electoral votes. But no State is required to conform to § 5 if it cannot do that (for whatever reason); the sanction for failing to satisfy the conditions of § 5 is simply loss of what has been called its "safe harbor." And even that determination is to be made, if made anywhere, in the Congress."

  - Ginsburg dissent:

    - "the December 12 "deadline" for bringing Florida's electoral votes into 3 U.S.C. § 5's safe harbor lacks the significance the Court assigns it. Were that date to pass, Florida would still be entitled to deliver electoral votes Congress must count unless both Houses find that the votes "ha [d] not been ... regularly given." 3 U.S.C. § 15. The statute identifies other significant dates. See, e.g., § 7 (specifying *144 December 18 as the date electors "shall meet and give their votes"); § 12 (specifying "the fourth Wednesday in December"—this year, December 27—as the date on which Congress, if it has not received a State's electoral votes, shall request the state secretary of state to send a certified return immediately). But none of these dates has ultimate significance in light of Congress' detailed provisions for determining, on "the sixth day of January," the validity of electoral votes."

  - Breyer dissent:

    - "However, § 5 is part of the rules that govern Congress' recognition of slates of electors. Nowhere in Bush I did we *149 establish that this Court had the authority to enforce § 5. Nor did we suggest that the permissive "counsel against" could be transformed into the mandatory "must ensure." And nowhere did we intimate, as the concurrence does here, that a state-court decision that threatens the safe harbor provision of § 5 does so in violation of Article II."

- "The parties before us agree that whatever else may be the effect of this section, it creates a "safe harbor" for a State insofar as congressional consideration of its electoral votes is concerned. If the state legislature has provided for final determination of contests or controversies by a law made prior to election day, that determination shall be conclusive if made at least six days prior to said time of meeting *78 of the electors. The Florida Supreme Court cited 3 U.S.C. §§ 1-10 in a footnote of its opinion, 772 So.2d, at 1238, n. 55, but did not discuss § 5. Since § 5 contains a principle of federal law that would assure finality of the State's determination if made pursuant to a state law in effect before the election, a legislative wish to take advantage of the "safe harbor" would counsel against any construction of the Election Code that Congress might deem to be a change in the law." *Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70, 77–78 (2000).

From: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Sent: Wednesday, December 9, 2020 12:19 AM
To: Evan Ezray <Evan.Ezray@myfloridalegal.com>
Subject: Fw:

Can you please take a look at this tomorrow morning?

From: John Guard <John.Guard@myfloridalegal.com>
Sent: Wednesday, December 9, 2020 12:15 AM
To: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Subject:

Can you have someone look at the safe harbor and its effect here?

Get Outlook for iOS

James Percival

From: Evan Ezray
Sent: Wednesday, December 9, 2020 2:46 PM
To: Amit Agarwal
Cc: James Percival; Jeffrey DeSousa
Subject: RE: RE:

Thanks Amit, glad it was helpful.

From: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Sent: Wednesday, December 9, 2020 2:37 PM
To: Evan Ezray <Evan.Ezray@myfloridalegal.com>
Cc: James Percival <James.Percival@myfloridalegal.com>; Jeffrey DeSousa <Jeffrey.DeSousa@myfloridalegal.com>
Subject: Re: RE:

Evan,

Thanks for taking the time to do this, and for the quick and helpful analysis.

--Amit

From: Evan Ezray <Evan.Ezray@myfloridalegal.com>
Sent: Wednesday, December 9, 2020 9:51 AM
To: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Cc: James Percival <James.Percival@myfloridalegal.com>; Jeffrey DeSousa <Jeffrey.DeSousa@myfloridalegal.com>
Subject: RE:

Amit,

The safe harbor deadline provides that if a state has a pre-election procedure for appointing electors and, consistent with that pre-election law, makes a determination of the appointment of electors "at least six days before the time fixed for the meeting of the electors," then that determination "shall govern in the counting of the electoral votes." 3 U.S.C. § 5. This year, the meeting of electors will take place on December 14 (which is the first Monday after the second Wednesday in December). 3 U.S.C. § 7. That made the safe harbor day December 8.

The upshot is that if a state meets the safe harbor deadline and then its electors meet, those electors "shall govern" in the counting of electoral votes.

As far as I can tell every state save Wisconsin met the safe harbor. *See* https://www.jsonline.com/story/news/politics/elections/2020/12/08/wisconsin-only-state-miss-election-safe-harbor-deadline/6496378002/.

Last, I would note that the safe harbor provision played a key role in *Bush v. Gore*. To summarize, the majority thought that Florida had a legislatively-expressed desire to meet the safe harbor, and therefore, was unwilling to allow a recount to extend beyond the deadline. The dissent gave the safe harbor a much smaller role.

I have included the full text of the safe harbor and some key quotes from the *Bush v. Gore* debate below.

Happy to answer any additional questions,

Evan

- Safe harbor text. "If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned." 3 U.S.C. § 5.
    - Meeting of electors is the first Monday after the second Wednesday in December. 3 U.S. 7. That is December 14, so the safe harbor is December 8.
- *Bush v. Gore* debate on safe harbor
    - PC: "Seven Justices of the Court agree that there are constitutional problems with the recount ordered by the Florida Supreme Court that demand a remedy. The only disagreement is as to the remedy. Because the Florida Supreme Court has said that the Florida Legislature intended to obtain the safe-harbor benefits of 3 U.S.C. § 5, Justice BREYER's proposed remedy—remanding to the Florida Supreme Court for its ordering of a constitutionally proper contest until December 18–contemplates action in violation of the Florida Election Code, and hence could not be part of an "appropriate" order authorized by Fla. Stat. Ann. § 102.168(8) (Supp.2001)."
    - Rehnquist concurrence:
        - "If we are to respect the legislature's Article II powers, therefore, we must ensure that postelection state-court actions do not frustrate the legislative desire to attain the 'safe harbor' provided by § 5."
        - "in light of the legislative intent identified by the Florida Supreme Court to bring Florida within the "safe harbor" provision of 3 U.S.C. § 5, the remedy prescribed by the Supreme Court of Florida cannot be deemed an "appropriate" one as of December 8. It significantly departed from the statutory framework in place on November 7, and authorized open-ended further proceedings which could not be completed by December 12, thereby preventing a final determination by that date."
    - Stevens dissent:
        - "It hardly needs stating that Congress, pursuant to 3 U.S.C. § 5, did not impose any affirmative duties upon the States that their governmental branches could "violate."

Rather, § 5 provides a safe harbor for States to select electors in contested elections "by judicial or other methods" established by laws prior to the election day. Section 5, like Article II, assumes the involvement of the state judiciary in interpreting state election laws and resolving election disputes under those laws. Neither § 5 nor Article II grants federal judges any special authority to substitute their views for those of the state judiciary on matters of state law."

- Souter dissent:
  - "The 3 U.S.C. § 5 issue is not serious. That provision sets certain conditions for treating a State's certification of Presidential electors as conclusive in the event that a dispute over recognizing those electors must be resolved in the Congress under 3 U.S.C. § 15. Conclusiveness requires selection under a legal scheme in place before the election, with results determined at least six days before the date set for casting electoral votes. But no State is required to conform to § 5 if it cannot do that (for whatever reason); the sanction for failing to satisfy the conditions of § 5 is simply loss of what has been called its "safe harbor." And even that determination is to be made, if made anywhere, in the Congress."
- Ginsburg dissent:
  - "the December 12 "deadline" for bringing Florida's electoral votes into 3 U.S.C. § 5's safe harbor lacks the significance the Court assigns it. Were that date to pass, Florida would still be entitled to deliver electoral votes Congress must count unless both Houses find that the votes "ha [d] not been ... regularly given." 3 U.S.C. § 15. The statute identifies other significant dates. See, e.g., § 7 (specifying *144 December 18 as the date electors "shall meet and give their votes"); § 12 (specifying "the fourth Wednesday in December"—this year, December 27—as the date on which Congress, if it has not received a State's electoral votes, shall request the state secretary of state to send a certified return immediately). But none of these dates has ultimate significance in light of Congress' detailed provisions for determining, on "the sixth day of January," the validity of electoral votes."
- Breyer dissent:
  - "However, § 5 is part of the rules that govern Congress' recognition of slates of electors. Nowhere in Bush I did we *149 establish that this Court had the authority to enforce § 5. Nor did we suggest that the permissive "counsel against" could be transformed into the mandatory "must ensure." And nowhere did we intimate, as the concurrence does here, that a state-court decision that threatens the safe harbor provision of § 5 does so in violation of Article II."

- "The parties before us agree that whatever else may be the effect of this section, it creates a "safe harbor" for a State insofar as congressional consideration of its electoral votes is concerned. If the state legislature has provided for final determination of contests or controversies by a law made prior to election day, that determination shall be conclusive if made at least six days prior to said time of meeting *78 of the electors. The Florida Supreme Court cited 3 U.S.C. §§ 1-10 in a footnote of its opinion, 772 So.2d, at 1238, n. 55, but did not discuss § 5. Since § 5 contains a principle of federal law that would assure finality of the State's determination if made pursuant to a state law in effect before the election, a legislative wish to take advantage of the "safe harbor" would counsel against any construction of the Election Code that Congress might deem to be a change in the law." *Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70, 77–78 (2000).

From: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Sent: Wednesday, December 9, 2020 12:19 AM
To: Evan Ezray <Evan.Ezray@myfloridalegal.com>
Subject: Fw:

Can you please take a look at this tomorrow morning?

From: John Guard <John.Guard@myfloridalegal.com>
Sent: Wednesday, December 9, 2020 12:15 AM
To: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Subject:

Can you have someone look at the safe harbor and its effect here?

Get Outlook for iOS

Jenna Hodges

From: Evan Ezray
Sent: Wednesday, December 9, 2020 2:56 AM
To: Amit Agarwal
Subject: Re:

Will do.

Get Outlook for iOS

From: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Sent: Wednesday, December 9, 2020 12:19:23 AM
To: Evan Ezray <Evan.Ezray@myfloridalegal.com>
Subject: Fw:

Can you please take a look at this tomorrow morning?

From: John Guard <John.Guard@myfloridalegal.com>
Sent: Wednesday, December 9, 2020 12:15 AM
To: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Subject:

Can you have someone look at the safe harbor and its effect here?

Get Outlook for iOS

Jenna Hodges

From: Evan Ezray
Sent: Wednesday, December 9, 2020 10:00 AM
To: Jeffrey DeSousa
Subject: Accepted: OSG Meeting

Jenna Hodges

Subject: OSG Meeting

Start: Wed 12/9/2020 10:00 AM
End: Wed 12/9/2020 10:30 AM
Show Time As: Tentative

Recurrence: (none)

Organizer: Jeffrey DeSousa
Required Attendees: Amit Agarwal; Kevin Golembiewski; Evan Ezray; David Costello; Christopher Baum; James Percival

https://us02web.zoom.us/j/[redacted]

Jeffrey DeSousa

From: Evan Ezray
Sent: Wednesday, December 9, 2020 5:38 PM
To: James Percival
Subject: AZ Amicus

https://www.supremecourt.gov/DocketPDF/22/22O155/163258/20201209171850333_TX%20v%20PA%20Motion%20for%20Leave%20FINAL.pdf

John Guard

Subject:	OSG Meeting
Start:	Wed 12/9/2020 10:10 AM
End:	Wed 12/9/2020 10:40 AM
Show Time As:	Tentative
Recurrence:	(none)
Meeting Status:	Not yet responded
Organizer:	Jeffrey DeSousa
Required Attendees:	Amit Agarwal; Kevin Golembiewski; Evan Ezray; David Costello; Christopher Baum; James Percival; John Guard

https://us02web.zoom.us/j/[redacted]

John Guard

From: Robertson, Katherine <Katherine.Robertson@AlabamaAG.gov>
Sent: Wednesday, December 9, 2020 1:02 PM
To: John Guard
Subject: Your call

Just tried you back. Call my desk again or my cell 205-535-0815.

Get Outlook for iOS

John Guard

From: Sauer, John <John.Sauer@ago.mo.gov>
Sent: Wednesday, December 9, 2020 1:06 PM
To: John Guard
Subject: FW: Texas v. Pennsylvania, et al. - Amicus Brief of Missouri, at al. - Joins requested by 1:00 p.m. Central Tomorrow, 12/9
Attachments: 2020-12-09 - Texas v. Pennsylvania - Amicus Brief of Missouri et al. - Circulation Redline.docx

Missouri
Arkansas
Louisiana
Missisippi
Nebraska
West Virginia

From: Sauer, John
Sent: Wednesday, December 9, 2020 11:21 AM
To: 'Mithun Mansinghani' <mithun.mansinghani@oag.ok.gov>; 'Murrill, Elizabeth' <MurrillE@ag.louisiana.gov>; 'Melissa Holyoak' <melissaholyoak@agutah.gov>; 'nicholas.bronni@arkansasag.gov' <nicholas.bronni@arkansasag.gov>; 'Vincent Wagner' <vincent.wagner@arkansasag.gov>; 'ed.sniffen@alaska.gov' <ed.sniffen@alaska.gov>; Smith, Justin <justin.smith@ago.mo.gov>; 'Amit.Agarwal@myfloridalegal.com' <Amit.Agarwal@myfloridalegal.com>; 'Kane, Brian' <brian.kane@ag.idaho.gov>; 'tom.fisher@atg.in.gov' <tom.fisher@atg.in.gov>; 'julia.payne@atg.in.gov' <julia.payne@atg.in.gov>; 'toby.crouse@ag.ks.gov' <toby.crouse@ag.ks.gov>; 'Chad.Meredith@ky.gov' <Chad.Meredith@ky.gov>; 'Andrew Pinson' <APinson@LAW.GA.GOV>; 'jeff.chanay' <jeff.chanay@ag.ks.gov>; 'St. John, Joseph' <StJohnJ@ag.louisiana.gov>; 'Kristi.Johnson@ago.ms.gov' <Kristi.Johnson@ago.ms.gov>; 'ABurton@mt.gov' <ABurton@mt.gov>; 'MSchlichting@mt.gov' <MSchlichting@mt.gov>; 'Lindsay S. See' <Lindsay.S.See@wvago.gov>; 'jonbennion@mt.gov' <jonbennion@mt.gov>; 'wstenehjem@nd.gov' <wstenehjem@nd.gov>; 'Benjamin.flowers@ohioattorneygeneral.gov' <Benjamin.flowers@ohioattorneygeneral.gov>; 'ESmith@scag.gov' <ESmith@scag.gov>; 'BCook@scag.gov' <BCook@scag.gov>; 'steven.blair@state.sd.us' <steven.blair@state.sd.us>; 'Sherri.Wald@state.sd.us' <Sherri.Wald@state.sd.us>; 'Sarah.Campbell@ag.tn.gov' <Sarah.Campbell@ag.tn.gov>; 'tom.fisher@atg.in.gov' <tom.fisher@atg.in.gov>; 'Andree.Blumstein@ag.tn.gov' <Andree.Blumstein@ag.tn.gov>; 'matthew.frederick@texasattorneygeneral.gov' <matthew.frederick@texasattorneygeneral.gov>; 'Kyle.Hawkins@oag.texas.gov' <Kyle.Hawkins@oag.texas.gov>; 'Ric Cantrell' <rcantrell@agutah.gov>; 'james.kaste@wyo.gov' <james.kaste@wyo.gov>; 'Jim.Campbell@nebraska.gov' <Jim.Campbell@nebraska.gov>; 'Thomas T. Lampman' <Thomas.T.Lampman@wvago.gov>; 'Jessica A. Lee' <Jessica.A.Lee@wvago.gov>; 'Lindsay S. See' <Lindsay.S.See@wvago.gov>; 'Roysden, Beau' <Beau.Roysden@azag.gov>; 'Bash, Zina' <Zina.Bash@oag.texas.gov>; 'masagsve@nd.gov'; 'Harley Kirkland' <HKirkland@scag.gov>; 'Eddie Lacour' <elacour@ago.state.al.us>; 'Hudson, Kian' <Kian.Hudson@atg.in.gov>; 'Kuhn, Matt F (KYOAG)' <Matt.Kuhn@ky.gov>; 'Michelle Williams' <Michelle.Williams@ago.ms.gov>; 'krissy.nobile@ago.ms.gov' <krissy.nobile@ago.ms.gov>
Subject: RE: Texas v. Pennsylvania, et al. - Amicus Brief of Missouri, at al. - Joins requested by 1:00 p.m. Central Tomorrow, 12/9

All-

Attached please find a redline with minor changes to this brief to address issues raised by several States. Thank you to Nebraska and West Virginia for proposing these changes. Arkansas, Louisiana, and Mississippi have joined, with many others expressing interest. Our printer has given a hard deadline of 1:00 pm, so please do let us know by then if you would like to join!

Thanks a lot, John Sauer

From: Sauer, John
Sent: Wednesday, December 9, 2020 9:04 AM
To: 'Mithun Mansinghani' <mithun.mansinghani@oag.ok.gov>; 'Murrill, Elizabeth' <MurrillE@ag.louisiana.gov>; 'Melissa Holyoak' <melissaholyoak@agutah.gov>; 'nicholas.bronni@arkansasag.gov' <nicholas.bronni@arkansasag.gov>; 'Vincent Wagner' <vincent.wagner@arkansasag.gov>; 'ed.sniffen@alaska.gov' <ed.sniffen@alaska.gov>; Smith, Justin <justin.smith@ago.mo.gov>; 'Amit.Agarwal@myfloridalegal.com' <Amit.Agarwal@myfloridalegal.com>; 'Kane, Brian' <brian.kane@ag.idaho.gov>; 'tom.fisher@atg.in.gov' <tom.fisher@atg.in.gov>; 'julia.payne@atg.in.gov' <julia.payne@atg.in.gov>; 'toby.crouse@ag.ks.gov' <toby.crouse@ag.ks.gov>; 'Chad.Meredith@ky.gov' <Chad.Meredith@ky.gov>; 'Andrew Pinson' <APinson@LAW.GA.GOV>; 'jeff.chanay' <jeff.chanay@ag.ks.gov>; 'St. John, Joseph' <StJohnJ@ag.louisiana.gov>; 'Kristi.Johnson@ago.ms.gov' <Kristi.Johnson@ago.ms.gov>; 'ABurton@mt.gov' <ABurton@mt.gov>; 'MSchlichting@mt.gov' <MSchlichting@mt.gov>; 'Lindsay S. See' <Lindsay.S.See@wvago.gov>; 'jonbennion@mt.gov' <jonbennion@mt.gov>; 'wstenehjem@nd.gov' <wstenehjem@nd.gov>; 'Benjamin.flowers@ohioattorneygeneral.gov' <Benjamin.flowers@ohioattorneygeneral.gov>; 'ESmith@scag.gov' <ESmith@scag.gov>; 'BCook@scag.gov' <BCook@scag.gov>; 'steven.blair@state.sd.us' <steven.blair@state.sd.us>; 'Sherri.Wald@state.sd.us' <Sherri.Wald@state.sd.us>; 'Sarah.Campbell@ag.tn.gov' <Sarah.Campbell@ag.tn.gov>; 'tom.fisher@atg.in.gov' <tom.fisher@atg.in.gov>; 'Andree.Blumstein@ag.tn.gov' <Andree.Blumstein@ag.tn.gov>; 'matthew.frederick@texasattorneygeneral.gov' <matthew.frederick@texasattorneygeneral.gov>; 'Kyle.Hawkins@oag.texas.gov' <Kyle.Hawkins@oag.texas.gov>; 'Ric Cantrell' <rcantrell@agutah.gov>; 'james.kaste@wyo.gov' <james.kaste@wyo.gov>; 'Jim.Campbell@nebraska.gov' <Jim.Campbell@nebraska.gov>; 'Thomas T. Lampman' <Thomas.T.Lampman@wvago.gov>; 'Jessica A. Lee' <Jessica.A.Lee@wvago.gov>; 'Lindsay S. See' <Lindsay.S.See@wvago.gov>; 'Roysden, Beau' <Beau.Roysden@azag.gov>; 'Bash, Zina' <Zina.Bash@oag.texas.gov>; 'masagsve@nd.gov'; 'Harley Kirkland' <HKirkland@scag.gov>; 'Eddie Lacour' <elacour@ago.state.al.us>; 'Hudson, Kian' <Kian.Hudson@atg.in.gov>; 'Kuhn, Matt F (KYOAG)' <Matt.Kuhn@ky.gov>; 'Michelle Williams' <Michelle.Williams@ago.ms.gov>; 'krissy.nobile@ago.ms.gov' <krissy.nobile@ago.ms.gov>
Subject: RE: Texas v. Pennsylvania, et al. - Amicus Brief of Missouri, at al. - Joins requested by 1:00 p.m. Central Tomorrow, 12/9

All-

Thank you for considering this amicus brief on such short notice. So far, Louisiana and Arkansas have joined, with several others expressing interest. I have attached an updated draft that includes minor, non-substantive edits, and which adjusts the language of the concluding paragraphs in response to comments from an interested state. The Supreme Court issued an order last night ordering the Defendant States (MI, PA, WS, GA) to file a response for the Motion for Leave to File Bill of Complaint and request for interim injunctive relief by 3:00 pm tomorrow. Given this highly accelerated briefing schedule, we would like to file this brief as soon as possible this afternoon to give the Court the most time possible to read it. Accordingly, we would prefer not to extend the deadline past 1:00 p.m. Central today, so please let us know by then if you are interested. Thanks a lot!

Best, John Sauer

From: Sauer, John
Sent: Tuesday, December 8, 2020 6:11 PM
To: 'Mithun Mansinghani' <mithun.mansinghani@oag.ok.gov>; 'Murrill, Elizabeth' <MurrillE@ag.louisiana.gov>; 'Melissa Holyoak' <melissaholyoak@agutah.gov>; 'nicholas.bronni@arkansasag.gov' <nicholas.bronni@arkansasag.gov>; 'Vincent Wagner' <vincent.wagner@arkansasag.gov>; 'ed.sniffen@alaska.gov' <ed.sniffen@alaska.gov>; Smith, Justin <justin.smith@ago.mo.gov>; 'Amit.Agarwal@myfloridalegal.com' <Amit.Agarwal@myfloridalegal.com>; 'Kane, Brian' <brian.kane@ag.idaho.gov>; 'tom.fisher@atg.in.gov' <tom.fisher@atg.in.gov>; 'julia.payne@atg.in.gov' <julia.payne@atg.in.gov>; 'toby.crouse@ag.ks.gov' <toby.crouse@ag.ks.gov>; 'Chad.Meredith@ky.gov' <Chad.Meredith@ky.gov>; 'Andrew Pinson' <APinson@LAW.GA.GOV>; 'jeff.chanay' <jeff.chanay@ag.ks.gov>; 'St. John,

Joseph' <StJohnJ@ag.louisiana.gov>; 'Kristi.Johnson@ago.ms.gov' <Kristi.Johnson@ago.ms.gov>; 'ABurton@mt.gov' <ABurton@mt.gov>; 'MSchlichting@mt.gov' <MSchlichting@mt.gov>; 'Lindsay S. See' <Lindsay.S.See@wvago.gov>; 'jonbennion@mt.gov' <jonbennion@mt.gov>; 'wstenehjem@nd.gov' <wstenehjem@nd.gov>; 'Benjamin.flowers@ohioattorneygeneral.gov' <Benjamin.flowers@ohioattorneygeneral.gov>; 'ESmith@scag.gov' <ESmith@scag.gov>; 'BCook@scag.gov' <BCook@scag.gov>; 'steven.blair@state.sd.us' <steven.blair@state.sd.us>; 'Sherri.Wald@state.sd.us' <Sherri.Wald@state.sd.us>; 'Sarah.Campbell@ag.tn.gov' <Sarah.Campbell@ag.tn.gov>; 'tom.fisher@atg.in.gov' <tom.fisher@atg.in.gov>; 'Andree.Blumstein@ag.tn.gov' <Andree.Blumstein@ag.tn.gov>; 'matthew.frederick@texasattorneygeneral.gov' <matthew.frederick@texasattorneygeneral.gov>; 'Kyle.Hawkins@oag.texas.gov' <Kyle.Hawkins@oag.texas.gov>; 'Ric Cantrell' <rcantrell@agutah.gov>; 'james.kaste@wyo.gov' <james.kaste@wyo.gov>; 'Jim.Campbell@nebraska.gov' <Jim.Campbell@nebraska.gov>; 'Thomas T. Lampman' <Thomas.T.Lampman@wvago.gov>; 'Jessica A. Lee' <Jessica.A.Lee@wvago.gov>; 'Lindsay S. See' <Lindsay.S.See@wvago.gov>; 'Roysden, Beau' <Beau.Roysden@azag.gov>; 'Bash, Zina' <Zina.Bash@oag.texas.gov>; 'masagsve@nd.gov'; 'Harley Kirkland' <HKirkland@scag.gov>; 'Eddie Lacour' <elacour@ago.state.al.us>; 'Hudson, Kian' <Kian.Hudson@atg.in.gov>; 'Kuhn, Matt F (KYOAG)' <Matt.Kuhn@ky.gov>
Subject: Texas v. Pennsylvania, et al. - Amicus Brief of Missouri, at al. - Joins requested by 1:00 p.m. Central Tomorrow, 12/9

All-

Attached please find a draft multistate amicus brief in support of Texas's motion for leave to file a bill of complaint in the U.S. Supreme Court challenging the administration of the recent Presidential election in Pennsylvania, Michigan, Wisconsin, and Georgia. The brief argues that (1) the separation-of-powers provision of the Electors Clause of Article II, Section 1 is an important structural check on government that safeguards individual liberty; (2) voting by mail presents real concerns for fraud and abuse that require statutory safeguards to protect against such fraud and abuse; and (3) the abrogation of statutory safeguards against fraud in voting by mail by non-legislative actors violates the Electors Clause and undermines public confidence in elections. For your reference, I have also attached Texas's Motion for Leave to File Bill of Complaint and related documents.

With apologies for the short deadline, given the time-sensitivity of this case, we are requesting joins by **1:00 p.m. Central TOMORROW**, 12/9. We are planning to file tomorrow afternoon.

Thanks a lot,

John Sauer

No. 22O155, Original

In the Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

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

Defendants.

On Motion for Leave to File Bill of Complaint

BRIEF OF STATES OF MISSOURI, ARKANSAS, LOUISIANA, ~~AND~~ MISSISSIPPI, AND AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF'S MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

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STATEMENT OF INTEREST OF *AMICI*

"In the context of a Presidential election," state actions "implicate a uniquely important national interest," because "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, 794–95 (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." *Id.*

Amici curiae are the States of Missouri, Arkansas, Louisiana, ~~and~~ Mississippi, and _____.[1] *Amici* have several important interests in this case. *First*, the States have a strong interest in safeguarding the separation of powers among state actors in the regulation of Presidential elections. The Electors Clause of Article II, § 1 carefully separates power among state actors, and it assigns a specific function to the "Legislature thereof" in each State. U.S. CONST. art. II, § 1, cl. 4. Our system of federalism relies on separation of powers to preserve liberty at every level of government, and the separation of powers in the Electors Clause is no exception. The States have a strong interest in preserving the proper roles of state legislatures in the administration of federal elections, and thus safeguarding the individual liberty of their citizens.

Second, *amici* States have a strong interest in ensuring that the votes of their own citizens are not diluted by the unconstitutional administration of

[1] This brief is filed under Supreme Court Rule 37.4, and all counsel of record received timely notice of the intent to file this amicus brief under Rule 37.2.

elections in other States. When non-legislative actors in other States encroach on the authority of the "Legislature thereof" in that State to administer a Presidential election, they threaten the liberty, not just of their own citizens, but of every citizen of the United States who casts a lawful ballot in that election—including the citizens of *amici* States.

Third, for similar reasons, *amici* States have a strong interest in safeguarding against fraud in voting by mail during Presidential elections. "Every voter" in a federal election, "has a right under the Constitution to have his vote fairly counted, without its being distorted by fraudulently cast votes." *Anderson* v. *United States*, 417 U.S. 211, 227 (1974). Plaintiff's Bill of Complaint alleges that non-legislative actors in the Defendant States stripped away important safeguards against fraud in voting by mail that had been enacted by the Legislature in each State. *Amici* States share a vital interest in protecting the integrity of the truly national election for President and Vice President of the United States.

SUMMARY OF ARGUMENT

The Bill of Complaint raises constitutional questions of great public importance that warrant this Court's review. First, like every similar provision in the Constitution, the separation-of-powers provision of the Electors Clause provides an important structural check on government designed to protect individual liberty. By allocating authority over Presidential electors to the "Legislature thereof" in each State, the Clause separates powers both vertically and horizontally, and it confers authority on

the branch of state government most responsive to the democratic will. Encroachments on the authority of state Legislatures by other state actors violate the separation of powers and threaten individual liberty.

The unconstitutional encroachments on the authority of state Legislatures in this case raise particularly grave concerns. For decades, responsible observers have cautioned about the risks of fraud and abuse in voting by mail, and they have urged the adoption of statutory safeguards to prevent such fraud and abuse. In the numerous cases identified in the Bill of Complaint, non-legislative actors in each Defendant State repeatedly stripped away the statutory safeguards that the "Legislature thereof" had enacted to protect against fraud in voting by mail. These changes removed protections that responsible actors had recommended for decades to guard against fraud and abuse in voting by mail~~, and they did so in a manner that uniformly and predictably benefited one candidate in the recent Presidential election~~. The allegations in the Bill of Complaint raise important questions about election integrity and public confidence in the administration of Presidential elections. This Court should grant Plaintiff leave to file the Bill of Complaint.

ARGUMENT

The Electors Clause provides that each State "shall appoint" its Presidential electors "in such Manner as the *Legislature thereof* may direct." U.S. CONST. art. II, § 1, cl. 4 (emphasis added). Moreover, "[o]ur constitutional system of representative government only works when the worth of honest ballots is not diluted by invalid ballots procured by

corruption." U.S. Dep't of Justice, *Federal Prosecution of Election Offenses*, at 1 (8th ed. Dec. 2017). "When the election process is corrupted, democracy is jeopardized." *Id.* The proposed Bill of Complaint raises serious concerns about both the constitutionality and ballot security of election procedures in the Defendant States. Given the importance of public confidence in American elections, these allegations raise questions of great public importance that warrant this Court's expedited review.

I. The Separation-of-Powers Provision of the Electors Clause Is a Structural Check on Government That Safeguards Liberty.

Article II 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. 4 (emphasis added); *see also id.* art. I, § 4, cl. 2 (providing that, in each State, the "Legislature thereof" shall establish "[t]he Times, Places and Manner of holding Elections for Senators and Representatives").

Thus, "in the case of a law enacted by a state legislature applicable not only to elections to state offices, but also to the selection of Presidential electors, the legislature is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under Art. II, § 1, cl. 2, of the United States Constitution." *Bush* v. *Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70, 76 (2000). "[T]he state legislature's power to select the manner for appointing electors is plenary." *Bush* v. *Gore*, 531 U.S. 98, 104 (2000).

Here, as set forth in the Bill of Complaint, non-legislative actors in each Defendant State have purported to "alter[] an important statutory provision enacted by the [State's] Legislature pursuant to its authority under the Constitution of the United States to make rules governing the conduct of elections for federal office." *Republican Party of Pennsylvania* v. *Boockvar*, No. 20-542, 2020 WL 6304626, at *1 (U.S. Oct. 28, 2020) (Statement of Alito, J.). *See* Bill of Complaint, ¶¶ 41-127. In doing so, these non-legislative actors may have encroached upon the "plenary" authority of those States' respective legislatures over the conduct of the Presidential election in each State. *Bush* v. *Gore*, 531 U.S. at 104. This encroachment on the authority of each State's Legislature violated the separation of powers set forth in the Electors Clause. "[I]n the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest. For the President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation." *Anderson*, 460 U.S. at 794–795.

In every other context, this Court recognizes that the Constitution's separation-of-powers provisions are designed to preserve liberty. "It is the proud boast of our democracy that we have 'a government of laws, and not of men.'" *Morrison* v. *Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting). "The Framers of the Federal Constitution . . . viewed the principle of separation of powers as the absolutely central guarantee of a just Government." *Id.* "Without a secure structure of separated powers, our Bill of Rights would be worthless, as are the bills of rights of

many nations of the world that have adopted, or even improved upon, the mere words of ours." *Id.* "The purpose of the separation and equilibration of powers in general . . . was not merely to assure effective government but to preserve individual freedom." *Id.* at 727.

This principle of preserving liberty applies both to the horizontal separation of powers among the branches of government, and the vertical separation of powers between the federal government and the States. "The federal system rests on what might at first seem a counterintuitive insight, that 'freedom is enhanced by the creation of two governments, not one.'" *Bond* v. *United States*, 564 U.S. 211, 220–21 (2011) (quoting *Alden* v. *Maine*, 527 U.S. 706, 758 (1999)). "[F]ederalism secures to citizens the liberties that derive from the diffusion of sovereign power." *Bond*, 564 U.S. at 221 (2011) (quoting *New York* v. *United States*, 505 U.S. 144, 181 (1992)). "Federalism also protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions." *Id.* Moreover, "federalism enhances the opportunity of all citizens to participate in representative government." *FERC* v. *Mississippi*, 456 U.S. 742, 789 (1982) (O'Connor, J., concurring in part and dissenting in part). "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Gregory* v. *Ashcroft*, 501 U.S. 452, 458 (1991).

The explicit grant of authority to state *Legislatures* in the Electors Clause effects both a horizontal and a vertical separation of powers. The Clause allocates 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. 4.

It is no accident that the Constitution allocates such authority to state Legislatures, rather than executive officers such as Secretaries of State, or judicial officers such as state Supreme Courts. The Constitutional Convention's delegates frequently recognized that the Legislature is the branch most responsive to the People and most democratically accountable. *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 ratification documents expressing that state legislatures were most likely to be in sympathy with the interests of the people); Federal Farmer, No. 12 (1788), *reprinted in* 2 THE FOUNDERS' CONSTITUTION (Philip B. Kurland & Ralph Lerner eds., 1987) (arguing that electoral regulations "ought to be left to the state legislatures, they coming far nearest to the people themselves"); THE FEDERALIST NO. 57, at 350 (C. Rossiter, ed. 2003) (Madison, J.) (stating that the "House of Representatives is so constituted as to support in its members an habitual recollection of their dependence on the people"); *id.* (stating that the "vigilant and manly spirit that actuates the people of America" is greatest restraint on the House of Representatives).

Democratic accountability in the method of selecting the President of the United States is a powerful bulwark safeguarding individual liberty. By identifying the "Legislature thereof" in each State as the regulator of elections for federal officers, the Electors Clause of Article II, § 1 prohibits the very arrogation of power over Presidential elections by non-legislative officials that the Defendant States perpetrated in this case. By violating the Constitution's separation of powers, these non-legislative actors undermined the liberty of all Americans, including the voters in *amici* States.

II. Stripping Away Safeguards From Voting by Mail Exacerbates the Risks of Fraud.

By stripping away critical safeguards against ballot fraud in voting by mail, non-legislative actors in the Defendant States inflicted another grave injury on the conduct of the recent election: They enhanced the risks of fraudulent voting by mail without authority. An impressive body of public evidence demonstrates that voting by mail presents unique opportunities for fraud and abuse, and that statutory safeguards are critical to reduce such risks of fraud.

For decades prior to 2020, responsible observers emphasized the risks of fraud in voting by mail, and the importance of imposing safeguards on the process of voting by mail to allay such risks. For example, in *Crawford* v. *Marion County Election Board*, this Court held that fraudulent voting "perpetrated using absentee ballots" demonstrates "that not only is the risk of voter fraud real but that *it could affect the outcome of a close election*." *Crawford* v. *Marion*

County Election Bd., 553 U.S. 181, 195-96 (2008) (opinion of Stevens, J.) (emphasis added).

As noted by Plaintiff, the Carter-Baker Commission on Federal Election Reform emphasized the same concern. The bipartisan Commission—co-chaired by former President Jimmy Carter and former Secretary of State James A. Baker—determined that "[a]bsentee ballots remain 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) ("Carter-Baker Report").[2] According to the Carter-Baker Commission, "[a]bsentee balloting is vulnerable to abuse in several ways." *Id.* "Blank ballots mailed to the wrong address or to large residential buildings might be intercepted." *Id.* "Citizens who vote at home, at nursing homes, at the workplace, or in church are more susceptible to pressure, overt and subtle, or to intimidation." *Id.* "Vote buying schemes are far more difficult to detect when citizens vote by mail." *Id.*

Thus, the Commission noted that "absentee balloting in other states has been a major source of fraud." *Id.* at 35. It emphasized that voting by mail "increases the risk of fraud." *Id.* And the Commission recommended that "States ... need to do more to prevent ... absentee ballot fraud." *Id.* at v.

The Commission specifically recommended that States should implement and reinforce safeguards to prevent fraud in voting by mail. The Commission recommended that "States should make sure that absentee ballots received by election officials before

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[2] *Available at* https://www.legislationline.org/download/id/1472/file/-3b50795b2d0374cbef5c29766256.pdf.

Election Day are kept secure until they are opened and counted." *Id.* at 46. It also recommended that States "prohibit[] 'third-party' organizations, candidates, and political party activists from handling absentee ballots." *Id.* And the Commission highlighted that a particular state "appear[ed] to have avoided significant fraud in its vote-by-mail elections by introducing *safeguards to protect ballot integrity, including signature verification.*" *Id.* at 35 (emphasis added). The Commission concluded that "[v]ote by mail is ... likely to increase the risks of fraud and contested elections ... where the safeguards for ballot integrity are weaker." *Id.*

The most recent edition of the U.S. Department of Justice's Manual on *Federal Prosecution of Election Offenses*, published by its Public Integrity Section, highlights the very same concerns about fraud in voting by mail. U.S. Dep't of Justice, *Federal Prosecution of Election Offenses* (8th ed. Dec. 2017), at 28-29 ("DOJ Manual").[3] The Manual states: "Absentee ballots are particularly susceptible to fraudulent abuse because, by definition, they are marked and cast outside the presence of election officials and the structured environment of a polling place." *Id.* The Manual reports that "the more common ways" that election-fraud "crimes are committed include ... [o]btaining and marking absentee ballots without the active input of the voters involved." *Id.* at 28. And the Manual notes that "[a]bsentee ballot frauds" committed both with and without the voter's participation are "common." *Id.* at 29.

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[3] *Available at* https://www.justice.gov/criminal/file/1029066/download.

Similarly, the U.S. Government Accountability Office concluded that many crimes of election fraud likely go undetected. In 2014, discussing election fraud, the GAO reported that "crimes of fraud, in particular, are difficult to detect, as those involved are engaged in intentional deception." GAO-14-634, *Elections: Issues Related to State Voter Identification Laws* 62-63 (U.S. Gov't Accountability Office Sept. 2014).[4]

Despite the difficulties of detecting fraud schemes, recent experience contains many well-documented examples of absentee ballot fraud. For example, the News21 database, which was compiled to *refute* arguments that voter fraud is prevalent, identified 491 cases of absentee ballot over the 12-year period from 2000 to 2012—approximately 41 cases per year. *See* News21, *Election Fraud in America*.[5] This database reports that "Absentee Ballot Fraud" was "[t]he most prevalent fraud" in America, comprising "24 percent (491 cases)" of all cases reported in the public records surveyed. *Id.* Moreover, the database indicates that this number undercounts the total incidence of reported cases of absentee ballot fraud, because it was based on public-record requests to state and local government entities, many of which did not respond. *Id.*

Likewise, the Heritage Foundation's online database of election-fraud cases—which includes only a "sampling" of cases that resulted in an *adjudication*

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[4] *Available at* https://www.gao.gov/assets/670/665966.pdf.

[5] *Available at* https://votingrights.news21.com/interactive/election-fraud-database/&xid=17259,15700023,15700124,15700149,15700186,15700191,15700201,15700237,15700242

of fraud, such as a criminal conviction or civil penalty—identified 207 cases of proven "fraudulent use of absentee ballots" in the United States. The Heritage Foundation, *Election Fraud Cases*.[6] Again, this database undercounts the incidence of cases of election fraud: "The Heritage Foundation's Election Fraud Database presents a sampling of recent proven instances of election fraud from across the country. This database is not an exhaustive or comprehensive list." *Id.*

The public record abounds with recent examples of such fraudulent absentee-ballot schemes. For example, in November 2019, the mayor of Berkeley, Missouri was indicted on five felony counts of absentee ballot fraud for changing votes on absentee ballots to help him and his political allies to get elected. Brian Heffernan, *Berkeley Mayor Hoskins Charged with 5 Felony Counts of Election Fraud*, ST. LOUIS PUBLIC RADIO (Nov. 21, 2019).[7] Mayor Hoskins' scheme included "going to the home of elderly ... residents" to harvest absentee ballots, "filling out absentee ballot applications for voters and having his campaign workers do the same," and "altering absentee ballots" after he had procured them from voters. *Id.* Again, in 2016, a state House race in Missouri was overturned amid allegations of widespread absentee-ballot fraud that had occurred across multiple election cycles in the same community. Sarah Fenske, *FBI, Secretary of State*

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[6] *Available at* https://www.heritage.org/voterfraud/search?combine=&state=All&year=&case_type=All&fraud_type=24489&page=12.

[7] *Available at* https://news.stlpublicradio.org/post/berkeley-mayor-hoskins-charged-5-felony-counts-election-fraud#stream/0

Asking Questions About St. Louis Statehouse Race, RIVERFRONT TIMES (Aug. 16, 2016).[8] One candidate stated that it was widely known in the community that the incumbent ran an "absentee game" that resulted in the absentee vote tipping the outcome in her favor in multiple close elections. *Id.*

Other States have similar experiences. In 2018, a federal Congressional race was overturned in North Carolina, and eight political operatives were indicted for fraud, in an absentee-ballot scheme that sufficed to change the outcome of the election. Richard Gonzales, *North Carolina GOP Operative Faces New Felony Charges That Allege Ballot Fraud*, NPR.ORG, (July 30, 2019).[9] The indicted operatives "had improperly collected and possibly tampered with ballots," and were charged with "improperly mailing in absentee ballots for someone who had not mailed it themselves." *Id.*

In the North Carolina case, the lead investigator testified that the investigation was "a continuous case" over two election cycles, and that the scheme involved collecting absentee ballots from voters, altering the absentee ballots, and forging witness signatures on the ballots. *See In re: Investigation of Irregularities Affecting Counties Within the 9th Congressional District*, North Carolina Board of

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[8] *Available at* https://www.riverfronttimes.com/newsblog/2016/08/16/fbi-secretary-of-state-asking-questions-about-st-louis-statehouse-race.

[9] *Available at* https://www.npr.org/2019/07/30/746800630/north-carolina-gop-operative-faces-new-felony-charges-that-allege-ballot-fraud.

Elections, Evidentiary Hearing, at 2-3.[10] The investigators described it as a "coordinated, unlawful, and substantially resourced absentee ballots scheme." *Id.* at 2. According to the investigators' trial presentation, the investigation involved 142 voter interviews, 30 subject and witness interviews, and subpoenas of documents, financial records, and phone records. *Id.* at 3. The perpetrators collected absentee ballots and falsified ballot witness certifications outside the presence of the voters. *Id.* at 10, 13. The congressional election at issue was decided by margin of less than 1,000 votes. *Id.* at 4. The scheme involved the submission of well over 1,000 fraudulent absentee ballots and request forms. *Id.* at 11. The perpetrators took extensive steps to conceal the fraudulent scheme, which lasted over multiple election cycles before it was detected. *Id.* at 14.

Similarly, in 2016, a politician in the Bronx was indicted and pled guilty to 242 counts of election fraud based on an absentee ballot fraud scheme. Ben Kochman, *Bronx politician pleads guilty in absentee ballot scheme for Assembly election,* NEW YORK DAILY NEWS (Nov. 22, 2016).[11] Despite pleading guilty to 242 felonies involving absentee ballot fraud in an election that was decided by two votes, the defendant received no jail time and vowed to run for office again after a short disqualification period. *Id.*

The increases in mail-in voting due to the COVID-19 pandemic likewise increased opportunities for

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[10] *Available at* https://images.radio.com/wbt/Voter%20ID_%20Website.pdf.

[11] *Available at* http://www.nydailynews.com/new-york/nyc-crime/bronx-pol-pleads-guilty-absentee-ballot-scheme-article-1.2884009.

fraud. For instance, in May 2020, the leader of the New Jersey NAACP called for an election in Paterson, New Jersey to be overturned due to widespread mail-in ballot fraud. *See* Jonathan Dienst et al., *NJ NAACP Leader Calls for Paterson Mail-In Vote to Be Canceled Amid Corruption Claims*, NBC NEW YORK (May 27, 2020).[12] "'Invalidate the election. Let's do it again,' [the NAACP leader] said amid reports more that 20 percent of all ballots were disqualified, some in connection with voter fraud allegations." *Id.*

Hundreds of other reported cases highlight the same concerns about the vulnerability of voting by mail to fraud and abuse. Recently, a Missouri court considered extensive expert testimony reviewing absentee-ballot fraud cases like these. *Findings of Fact, Conclusions of Law, and Final Judgment in Mo. State Conference of the NAACP* v. *State*, No. 20AC-CC00169-01 (Circuit Court of Cole County, Missouri Sept. 24, 2020), *aff'd*, 607 S.W.3d 728 (Mo. banc Oct. 9, 2020) ("*Mo. NAACP*"). The court held that cases of absentee-ballot fraud "have several common features that persist across multiple recent cases: (1) close elections; (2) perpetrators who are candidates, campaign workers, or political consultants, not ordinary voters; (3) common techniques of ballot harvesting; (4) common techniques of signature forging; (5) fraud that persisted across multiple elections before it was detected; (6) massive resources required to investigate and prosecute the fraud; and (7) lenient criminal penalties." *Id.* at 17. Thus, the

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[12] *Available at* https://www.nbcnewyork.com/news/politics/nj-naacp-leader-calls-for-paterson-mail-in-vote-to-be-canceled-amid-fraud-claims/2435162/.

court concluded "that fraud in voting by mail is a recurrent problem, that it is hard to detect and prosecute, that there are strong incentives and weak penalties for doing so, and that it has the capacity to affect the outcome of close elections." *Id.* The court held that "the threat of mail-in ballot fraud is real." *Id.* at 2.

III. The Bill of Complaint Alleges that the Defendant States Unconstitutionally Abolished Critical Safeguards Against Fraud in Voting by Mail.

The Bill of Complaint alleges that non-legislative actors in each Defendant State unconstitutionally abolished or diluted statutory safeguards against fraud enacted by their state Legislatures, in violation of the Presidential Electors Clause. U.S. CONST. art. II, § 1, cl. 4. All the unconstitutional changes to election procedures identified in the Bill of Complaint have two common features: (1) They abrogated statutory safeguards against fraud that responsible observers have long recommended for voting by mail, and (2) they did so in a way that predictably conferred partisan advantage on one candidate in the Presidential election. Such allegations are serious, and they warrant this Court's review.

Abolishing signature verification. First, the proposed Bill of Complaint alleges that non-legislative actors in Pennsylvania, Michigan, and Georgia unilaterally abolished or weakened signature-verification requirements for mailed ballots. It alleges that Pennsylvania's Secretary of State abrogated Pennsylvania's statutory signature-verification requirement for mail-in ballots in a

"friendly" settlement of a lawsuit brought by activists. Bill of Complaint, ¶¶ 44-46. It alleges that Michigan's Secretary of State permitted absentee ballot applications online, with no signature at all, in violation of Michigan statutes, *id.* ¶¶ 85-89; and that election officials in Wayne County, Michigan simply disregarded statutory signature verification requirements, *id.* ¶¶ 92-95. And it alleges that Georgia's Secretary of State unilaterally abrogated Georgia's statute authorizing county registrars to engage in signature verification for absentee ballots in another lawsuit settlement. *Id.* ¶¶ 66-72.

In addition to violating the Electors Clause, these actions, as alleged, contradicted fundamental principles of ballot security. As noted above, the Carter-Baker Report highlighted the importance of "*signature verification*" as a critical "safeguard[] to protect ballot integrity" for ballots cast by mail. Carter-Baker Report, *supra*, at 35 (emphasis added). Without safeguards such as signature verification, the Report stated that "[v]ote by mail is ... likely to increase the risks of fraud and contested elections ... where the safeguards for ballot integrity are weaker." *Id.* The importance of signature verification is hard to overstate, because absentee-ballot fraud schemes commonly involve "common techniques of signature forging," typically by nefarious actors who are unfamiliar with the voter's signature. *Mo. NAACP*, *supra*, at 17. Verifying the voter's signature thus provides a fundamental safeguard against fraud.

Insecure ballot handling. The Bill of Complaint alleges that non-legislative actors changed or abolished statutory rules for the secure handling of absentee and mail-in ballots in Pennsylvania,

Michigan, and Wisconsin. It alleges that election officials in Democratic areas of Pennsylvania violated state statutes by opening and reviewing mail-in ballots that were required to be kept locked and secure until Election Day. Bill of Complaint, ¶¶ 50-51. It alleges that Michigan's Secretary of State, acting in violation of state law, sent 7.7 million unsolicited absentee-ballot applications to Michigan voters, thus "flooding Michigan with millions of absentee ballot applications prior to the 2020 general election." *Id.* ¶¶ 80-84. And it alleges that the Wisconsin Election Commission violated state law by placing hundreds of unmonitored boxes for the submission of absentee and mail-in ballots around the State, concentrated in heavily Democratic areas. *Id.* ¶¶ 107-114.

In addition to violating the Electors Clause, these actions, as alleged, contradicted commonsense ballot-security recommendations. The Department of Justice's Manual on *Federal Prosecution of Election Offenses* notes that vulnerability to mishandling is what makes absentee ballots "particularly susceptible to fraudulent abuse" because "they are marked and cast outside the presence of election officials and the structured environment of a polling place." DOJ Manual, at 28-29. According to the Manual, "[o]btaining and marking absentee ballots without the active input of the voters involved" is one of "the more common ways" that election fraud "crimes are committed." *Id.* at 28. For this reason, the Carter-Baker Commission made recommendations in favor of preventing such insecurity in the handling of ballots. For example, the Commission recommended that "States should make sure that absentee ballots received by election officials before Election Day are

kept secure until they are opened and counted." *Id.* at 46. It also recommended that States "prohibit[] 'third-party' organizations, candidates, and political party activists from handling absentee ballots." *Id.*

Inconsistent Statewide Standards. The Bill of Complaint alleges that the Defendant States provided different standards and treatment for mail-in ballots submitted in different areas of each State, and that this differential treatment uniformly provided a partisan advantage to one side in the Presidential election. It alleges that election officials in Philadelphia and Allegheny County, Pennsylvania, applied different standards to voters in those Democratic strongholds than applied to other voters in Pennsylvania, in violation of state law. Bill of Complaint, ¶¶ 52-54. Similarly, it alleges that Milwaukee, Wisconsin violated state law by authorizing election officials to "correct" disqualifying omissions on ballot envelopes by entering information that the voter should have entered with a red pen, while no similar "correction" process was granted to other voters in that State. *Id.* ¶¶ 123-127. And it alleges that Wayne County, Michigan provided differential treatment of its voters, in violation of state statutes, by simply ignoring statutorily required signature-verification requirements. *Id.* ¶¶ 92-95.

Such differential treatment, as alleged under circumstances raising concerns of partisan bias, contradicts universal recommendations for integrity and public confidence in elections. As this Court stated in *Bush* v. *Gore*, "[t]he idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government." 531 U.S. at 107 (quoting

Moore v. *Ogilvie*, 394 US 814 (1969)). The Carter-Baker Report noted that "inconsistent or incorrect application of electoral procedures may have the effect of discouraging voter participation and may, on occasion, raise questions about bias in the way elections are conducted." Carter-Baker Report, at 49. "Such problems raise public suspicions or may provide grounds for the losing candidate to contest the result in a close election." *Id.*

Excluding Bipartisan Observers. The Bill of Complaint alleges that certain counties in Defendant States excluded bipartisan observers from the ballot-opening and ballot-counting processes. For example, it alleges that election officials in Philadelphia and Allegheny County, Pennsylvania, violated state law by excluding Republican observers from the opening, counting, and recording of absentee ballots in those counties. Bill of Complaint, ¶ 49. And it alleges that election officials in Wayne County, Michigan violated state statutes by systematically excluding poll watchers from the counting and recording of absentee ballots. *Id.* ¶¶ 90-91.

Such actions, as alleged, raise concerns about the integrity of the vote count in those counties. As the Carter-Baker Report emphasized, States should "provide observers with meaningful opportunities to monitor the conduct of the election." Carter-Baker Report, at 47. "To build confidence in the electoral process, it is important that elections be administered in a neutral and professional manner," without the appearance of partisan bias." *Id.* at 49. When observers of one political party are illegally and systematically excluded from observing the vote count, "the appearance of partisan bias" is inevitable.

Id. For counties in Defendant States to exclude Republican observers weakens public confidence in the electoral process and raises grave concerns about the integrity of ballot counting in those counties.

Extending the Deadline to Receive Ballots. The Bill of Complaint alleges that a non-legislative actor in Pennsylvania—its Supreme Court—extended the statutory deadline to receive absentee and mail-in ballots without authorization from the "Legislature thereof," and that it directed that ballots with illegible postmarks or no postmarks at all would be deemed timely if received within the extended deadline. Bill of Complaint, ¶¶ 48, 55. Again, these non-legislative changes raise concerns about election integrity in Pennsylvania. They created a post-election window of time during which nefarious actors could wait and see whether the Presidential election would be close, and whether perpetrating fraud in Pennsylvania would be worthwhile. And they enhanced the opportunities for fraud by mandating that late ballots must be counted even when they are not postmarked or have no legible postmark, and thus there is no evidence they were mailed by Election Day.

These changes created needless vulnerability to actual fraud and undermined public confidence in the election. As the Department of Justice's Manual of *Federal Prosecution of Election Offenses* states, "the conditions most conducive to election fraud are close factional competition within an electoral jurisdiction for an elected position that matters." DOJ Manual, at 2-3. "[E]lection fraud is most likely to occur in electoral jurisdictions where there is close factional competition for an elected position that matters." *Id.* at 27. That statement exactly describes the conditions

in each of the Defendant States in the recent Presidential election.

CONCLUSION

The allegations in the Bill of Complaint raise important constitutional issues under the Electors Clause of Article II, § 1. They also raise serious concerns relating to election integrity and public confidence in elections. These are questions of great public importance that warrant this Court's attention. The Court should grant the Plaintiff's Motion for Leave to File Bill of Complaint.

December 9, 2020

Respectfully submitted,

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P.O. Box 899
Jefferson City, MO 65102
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(573) 751-8870
Counsel for Amici Curiae

ADDITIONAL COUNSEL

~~[To be inserted]~~
Leslie Rutledge
Attorney General
STATE OF ARKANSAS

Jeff Landry
Attorney General
STATE OF LOUISIANA

Lynn Fitch
Attorney General
STATE OF MISSISSIPPI

John Guard

From: Amit Agarwal
Sent: Wednesday, December 9, 2020 9:24 AM
To: John Guard
Subject: sorry I missed your call ...

... was on phone with AG. Please call my cell when you have a minute.

Amit Agarwal
Office of the Attorney General
Solicitor General
PL-01, The Capitol
Tallahassee, FL 32399-1050
Amit.Agarwal@myfloridalegal.com
Office: (850) 414-3688

John Guard

From: Sauer, John <John.Sauer@ago.mo.gov>
Sent: Wednesday, December 9, 2020 1:40 PM
To: John Guard
Cc: Johnson, Jeff; Smith, Justin
Subject: RE:

Great, thanks a lot!!

From: John Guard <John.Guard@myfloridalegal.com>
Sent: Wednesday, December 9, 2020 12:40 PM
To: Sauer, John <John.Sauer@ago.mo.gov>
Subject:

Florida joins.

John Guard

From: Lauren Cassedy
Sent: Wednesday, December 9, 2020 8:17 AM
To: John Guard
Subject: Fwd: AG Moody on Fox today?

Get Outlook for iOS

From: Robbins, Christina Svolopoulos <Christina.Robbins@FOXNEWS.COM>
Sent: Wednesday, December 9, 2020 7:32:14 AM
To: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Subject: AG Moody on Fox today?

Hi!
I hope you are doing well!
Can you the Florida Attorney General join Harris Faulkner today for an interview in the 1p hour?
We want to talk about her support of TX's case before the Supreme Court regarding the election.
This is for the 1p ET hour today on Outnumbered Overtime on Fox News Channel.

We want to talk about this http://agjefflandry.com/Files/Article/10808/Documents/2020-11-09-RepublicanPartyofPa.v.Boockvar-AmicusBriefofMissourietal.-FinalWithTables.pdf#page23

Thanks for checking and letting me know!

Christina Svolopoulos Robbins
DC Booking Supervisor / Producer
Fox News Channel
Direct: 202 824 6321
Cell: 202 262 9493
Email: Christina.Robbins@FoxNews.com

John Guard

From: Kylie Mason
Sent: Wednesday, December 9, 2020 2:19 PM
To: Lauren Cassedy; Gerald Whitney Ray; John Guard
Subject: RE: DRAFT STATEMENT - NOT READY TO SEND YET
Attachments: Election Statement.png

Please see attached.

Kylie Mason
Press Secretary

Office of the Attorney General Ashley Moody
Kylie.Mason@MyFloridaLegal.com
(850) 245-0150

PL-01, The Capitol
Tallahassee, Florida 32399

From: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Sent: Wednesday, December 9, 2020 2:12 PM
To: Gerald Whitney Ray <Whitney.Ray@myfloridalegal.com>; Kylie Mason <Kylie.Mason@myfloridalegal.com>; John Guard <John.Guard@myfloridalegal.com>
Subject: Re: DRAFT STATEMENT - NOT READY TO SEND YET

Adding in John so he can see the graphic before it goes out and advise on if we are ready to send

---

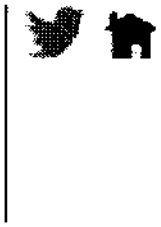
From: Gerald Whitney Ray <Whitney.Ray@myfloridalegal.com>
Sent: Wednesday, December 9, 2020 2:02 PM
To: Kylie Mason <Kylie.Mason@myfloridalegal.com>; Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Subject: RE: DRAFT STATEMENT - NOT READY TO SEND YET

I like it.

Whitney Ray
Director of Communications

Office of the Attorney General Ashley Moody
Whitney.Ray@MyFloridaLegal.com
(850) 245-0150

PL-01, The Capitol
Tallahassee, Florida 32399



From: Kylie Mason <Kylie.Mason@myfloridalegal.com>
Sent: Wednesday, December 9, 2020 2:01 PM
To: Gerald Whitney Ray <Whitney.Ray@myfloridalegal.com>; Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Subject: RE: DRAFT STATEMENT - NOT READY TO SEND YET

We usually bold important parts. Thoughts on the following bolded?

"The **integrity and resolution** of the 2020 election is of paramount importance. The United States Supreme Court should weigh the **legal arguments** of the Texas motion and all pending matters so that Americans can be assured the election was **fairly reviewed and decided**."

From: Gerald Whitney Ray <Whitney.Ray@myfloridalegal.com>
Sent: Wednesday, December 9, 2020 1:59 PM
To: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>; Kylie Mason <Kylie.Mason@myfloridalegal.com>
Subject: Re: DRAFT STATEMENT - NOT READY TO SEND YET

Looks good to me.

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From: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Sent: Wednesday, December 9, 2020 1:54:29 PM
To: Kylie Mason <Kylie.Mason@myfloridalegal.com>; Gerald Whitney Ray <Whitney.Ray@myfloridalegal.com>
Subject: DRAFT STATEMENT - NOT READY TO SEND YET

DRAFT TWEET: Statement on Florida joining amicus brief urging the Supreme Court to consider Texas's motion -

LANGUAGE FOR THE GRAPHIC - "The integrity and resolution of the 2020 election is of paramount importance. The United States Supreme Court should weigh the legal arguments of the Texas motion and all pending matters so that Americans can be assured the election was fairly reviewed and decided."

The INTEGRITY AND RESOLUTION of the 2020 election is of paramount importance.

The United States Supreme Court should weigh the legal arguments of the Texas motion and all pending matters so that Americans can be assured the election was FAIRLY REVIEWED AND DECIDED."

— Ashley Moody
Attorney General

John Guard

From: Gerald Whitney Ray
Sent: Wednesday, December 9, 2020 2:20 PM
To: Kylie Mason; Lauren Cassedy; John Guard
Subject: RE: DRAFT STATEMENT - NOT READY TO SEND YET

I like it.

Whitney Ray
Director of Communications

Office of the Attorney General Ashley Moody
Whitney.Ray@MyFloridaLegal.com
(850) 245-0150

PL-01, The Capitol
Tallahassee, Florida 32399

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John Guard

From: Lauren Cassedy
Sent: Wednesday, December 9, 2020 2:34 PM
To: Gerald Whitney Ray; Kylie Mason; John Guard
Subject: Re: DRAFT STATEMENT - NOT READY TO SEND YET

John is driving but has approved this to go immediately

Get Outlook for iOS

From: Gerald Whitney Ray <Whitney.Ray@myfloridalegal.com>
Sent: Wednesday, December 9, 2020 2:19:39 PM
To: Kylie Mason <Kylie.Mason@myfloridalegal.com>; Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>; John Guard <John.Guard@myfloridalegal.com>
Subject: RE: DRAFT STATEMENT - NOT READY TO SEND YET

I like it.

Whitney Ray
Director of Communications

Office of the Attorney General Ashley Moody
Whitney.Ray@MyFloridaLegal.com
(850) 245-0150

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Tallahassee, Florida 32399

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John Guard

From: Sauer, John <John.Sauer@ago.mo.gov>
Sent: Wednesday, December 9, 2020 3:03 PM
To: 'LaCour, Edmund'; 'nicholas.bronni@arkansasag.gov'; John Guard; 'Fisher, Tom'; 'Chanay, Jeff'; 'Murrill, Elizabeth'; 'Michelle Williams'; 'Schlichting, Melissa'; 'Campbell, Jim'; 'Seibel, Troy T.'; 'Mithun Mansinghani'; 'Emory Smith'; 'Ravnsborg, Jason'; 'Andree S. Blumstein'; 'Melissa Holyoak'; 'Lindsay S. See'
Subject: 22O155 - Texas v. Pennsylvania (U.S.) - Amicus Brief of Missouri and 16 Other States - Final
Attachments: 2020-12-09 - Texas v. Pennsylvania - Amicus Brief of Missouri et al. - Final with Tables.pdf; 2020.12.09 Certificate of Compliance.pdf; 2020.12.09 Certificate of Service.pdf

All-

Thank you all for joining this amicus brief on such short notice. Attached are the final PDFs of the Amicus Brief and Certificates. We ended up with a 17-State coalition, which is an extremely strong group for such a short turnaround. Our press officer has requested that this be embargoed until 3:30 pm Central. Thank you all for your support on this important project!

Thank you,

John Sauer

No. 22O155

In the Supreme Court of the United States

STATE OF TEXAS,
Plaintiff,

v.

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

On Motion for Leave to File Bill of Complaint

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the Brief of Missouri and 16 Other States as *Amici Curiae* in Support of Plaintiff's Motion for Leave to File Bill of Complaint in the above captioned case contains 5,166 words as determined by the word counting feature of Microsoft Word, excluding the parts of the brief that are exempted by Supreme Court Rule 33.1(d).

December 9, 2020

Respectfully submitted,

s/ D. John Sauer

ERIC S. SCHMITT
Attorney General

D. John Sauer
Solicitor General
Counsel of Record

OFFICE OF THE MISSOURI ATTORNEY GENERAL
Supreme Court Building
207 West High Street

P.O. Box 899
Jefferson City, MO 65102
John.Sauer@ago.mo.gov
(573) 751-8870
Counsel for Amici Curiae

No. 22O155, Original

In the Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

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

Defendants.

On Motion for Leave to File Bill of Complaint

BRIEF OF STATE OF MISSOURI AND 16 OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF'S MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

OFFICE OF THE MISSOURI ATTORNEY GENERAL
Supreme Court Building
P.O. Box 899
Jefferson City, MO 65102
John.Sauer@ago.mo.gov

ERIC S. SCHMITT
Attorney General

D. John Sauer
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Counsel of Record

Counsel for Amici Curiae
(additional counsel listed on signature page)

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TABLE OF AUTHORITIES

Cases

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Other Authorities

STATEMENT OF INTEREST OF *AMICI*

"In the context of a Presidential election," state actions "implicate a uniquely important national interest," because "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, 794–95 (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." *Id.*

Amici curiae are the States of Missouri, Alabama, Arkansas, Florida, Indiana, Kansas, Louisiana, Mississippi, Montana, Nebraska, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, and West Virginia.[1] *Amici* have several important interests in this case. *First*, the States have a strong interest in safeguarding the separation of powers among state actors in the regulation of Presidential elections. The Electors Clause of Article II, § 1 carefully separates power among state actors, and it assigns a specific function to the "Legislature thereof" in each State. U.S. CONST. art. II, § 1, cl. 4. Our system of federalism relies on separation of powers to preserve liberty at every level of government, and the separation of powers in the Electors Clause is no exception. The States have a strong interest in preserving the proper roles of state legislatures in the administration of federal elections, and thus safeguarding the individual liberty of their citizens.

---

[1] This brief is filed under Supreme Court Rule 37.4, and all counsel of record received timely notice of the intent to file this amicus brief under Rule 37.2.

Second, *amici* States have a strong interest in ensuring that the votes of their own citizens are not diluted by the unconstitutional administration of elections in other States. When non-legislative actors in other States encroach on the authority of the "Legislature thereof" in that State to administer a Presidential election, they threaten the liberty, not just of their own citizens, but of every citizen of the United States who casts a lawful ballot in that election—including the citizens of *amici* States.

Third, for similar reasons, *amici* States have a strong interest in safeguarding against fraud in voting by mail during Presidential elections. "Every voter" in a federal election, "has a right under the Constitution to have his vote fairly counted, without its being distorted by fraudulently cast votes." *Anderson* v. *United States*, 417 U.S. 211, 227 (1974). Plaintiff's Bill of Complaint alleges that non-legislative actors in the Defendant States stripped away important safeguards against fraud in voting by mail that had been enacted by the Legislature in each State. *Amici* States share a vital interest in protecting the integrity of the truly national election for President and Vice President of the United States.

SUMMARY OF ARGUMENT

The Bill of Complaint raises constitutional questions of great public importance that warrant this Court's review. First, like every similar provision in the Constitution, the separation-of-powers provision of the Electors Clause provides an important structural check on government designed to protect individual liberty. By allocating authority over

Presidential electors to the "Legislature thereof" in each State, the Clause separates powers both vertically and horizontally, and it confers authority on the branch of state government most responsive to the democratic will. Encroachments on the authority of state Legislatures by other state actors violate the separation of powers and threaten individual liberty.

The unconstitutional encroachments on the authority of state Legislatures in this case raise particularly grave concerns. For decades, responsible observers have cautioned about the risks of fraud and abuse in voting by mail, and they have urged the adoption of statutory safeguards to prevent such fraud and abuse. In the numerous cases identified in the Bill of Complaint, non-legislative actors in each Defendant State repeatedly stripped away the statutory safeguards that the "Legislature thereof" had enacted to protect against fraud in voting by mail. These changes removed protections that responsible actors had recommended for decades to guard against fraud and abuse in voting by mail. The allegations in the Bill of Complaint raise important questions about election integrity and public confidence in the administration of Presidential elections. This Court should grant Plaintiff leave to file the Bill of Complaint.

ARGUMENT

The Electors Clause provides that each State "shall appoint" its Presidential electors "in such Manner as the *Legislature thereof* may direct." U.S. CONST. art. II, § 1, cl. 4 (emphasis added). Moreover, "[o]ur constitutional system of representative government only works when the worth of honest

ballots is not diluted by invalid ballots procured by corruption." U.S. Dep't of Justice, *Federal Prosecution of Election Offenses*, at 1 (8th ed. Dec. 2017). "When the election process is corrupted, democracy is jeopardized." *Id.* The proposed Bill of Complaint raises serious concerns about both the constitutionality and ballot security of election procedures in the Defendant States. Given the importance of public confidence in American elections, these allegations raise questions of great public importance that warrant this Court's expedited review.

I. The Separation-of-Powers Provision of the Electors Clause Is a Structural Check on Government That Safeguards Liberty.

Article II 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. 4 (emphasis added); *see also id.* art. I, § 4, cl. 2 (providing that, in each State, the "Legislature thereof" shall establish "[t]he Times, Places and Manner of holding Elections for Senators and Representatives").

Thus, "in the case of a law enacted by a state legislature applicable not only to elections to state offices, but also to the selection of Presidential electors, the legislature is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under Art. II, § 1, cl. 2, of the United States Constitution." *Bush* v. *Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70, 76 (2000). "[T]he state legislature's power to select the

manner for appointing electors is plenary." *Bush* v. *Gore*, 531 U.S. 98, 104 (2000).

Here, as set forth in the Bill of Complaint, non-legislative actors in each Defendant State have purported to "alter[] an important statutory provision enacted by the [State's] Legislature pursuant to its authority under the Constitution of the United States to make rules governing the conduct of elections for federal office." *Republican Party of Pennsylvania* v. *Boockvar*, No. 20-542, 2020 WL 6304626, at *1 (U.S. Oct. 28, 2020) (Statement of Alito, J.). *See* Bill of Complaint, ¶¶ 41-127. In doing so, these non-legislative actors may have encroached upon the "plenary" authority of those States' respective legislatures over the conduct of the Presidential election in each State. *Bush* v. *Gore*, 531 U.S. at 104. This encroachment on the authority of each State's Legislature violated the separation of powers set forth in the Electors Clause. "[I]n the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest. For the President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation." *Anderson*, 460 U.S. at 794–795.

In every other context, this Court recognizes that the Constitution's separation-of-powers provisions are designed to preserve liberty. "It is the proud boast of our democracy that we have 'a government of laws, and not of men.'" *Morrison* v. *Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting). "The Framers of the Federal Constitution . . . viewed the principle of separation of powers as the absolutely central guarantee of a just Government." *Id.* "Without a

secure structure of separated powers, our Bill of Rights would be worthless, as are the bills of rights of many nations of the world that have adopted, or even improved upon, the mere words of ours." *Id.* "The purpose of the separation and equilibration of powers in general . . . was not merely to assure effective government but to preserve individual freedom." *Id.* at 727.

This principle of preserving liberty applies both to the horizontal separation of powers among the branches of government, and the vertical separation of powers between the federal government and the States. "The federal system rests on what might at first seem a counterintuitive insight, that 'freedom is enhanced by the creation of two governments, not one.'" *Bond* v. *United States*, 564 U.S. 211, 220–21 (2011) (quoting *Alden* v. *Maine*, 527 U.S. 706, 758 (1999)). "[F]ederalism secures to citizens the liberties that derive from the diffusion of sovereign power." *Bond*, 564 U.S. at 221 (2011) (quoting *New York* v. *United States*, 505 U.S. 144, 181 (1992)). "Federalism also protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions." *Id.* Moreover, "federalism enhances the opportunity of all citizens to participate in representative government." *FERC* v. *Mississippi*, 456 U.S. 742, 789 (1982) (O'Connor, J., concurring in part and dissenting in part). "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny

and abuse from either front." *Gregory* v. *Ashcroft*, 501 U.S. 452, 458 (1991).

The explicit grant of authority to state *Legislatures* in the Electors Clause effects both a horizontal and a vertical separation of powers. The Clause allocates 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. 4.

It is no accident that the Constitution allocates such authority to state Legislatures, rather than executive officers such as Secretaries of State, or judicial officers such as state Supreme Courts. The Constitutional Convention's delegates frequently recognized that the Legislature is the branch most responsive to the People and most democratically accountable. *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 ratification documents expressing that state legislatures were most likely to be in sympathy with the interests of the people); Federal Farmer, No. 12 (1788), *reprinted in* 2 THE FOUNDERS' CONSTITUTION (Philip B. Kurland & Ralph Lerner eds., 1987) (arguing that electoral regulations "ought to be left to the state legislatures, they coming far nearest to the people themselves"); THE FEDERALIST NO. 57, at 350 (C. Rossiter, ed. 2003) (Madison, J.) (stating that the "House of Representatives is so constituted as to support in its members an habitual recollection of their dependence on the people"); *id.* (stating that the "vigilant and manly spirit that actuates the people of

America" is greatest restraint on the House of Representatives).

Democratic accountability in the method of selecting the President of the United States is a powerful bulwark safeguarding individual liberty. By identifying the "Legislature thereof" in each State as the regulator of elections for federal officers, the Electors Clause of Article II, § 1 prohibits the very arrogation of power over Presidential elections by non-legislative officials that the Defendant States perpetrated in this case. By violating the Constitution's separation of powers, these non-legislative actors undermined the liberty of all Americans, including the voters in *amici* States.

II. Stripping Away Safeguards From Voting by Mail Exacerbates the Risks of Fraud.

By stripping away critical safeguards against ballot fraud in voting by mail, non-legislative actors in the Defendant States inflicted another grave injury on the conduct of the recent election: They enhanced the risks of fraudulent voting by mail without authority. An impressive body of public evidence demonstrates that voting by mail presents unique opportunities for fraud and abuse, and that statutory safeguards are critical to reduce such risks of fraud.

For decades prior to 2020, responsible observers emphasized the risks of fraud in voting by mail, and the importance of imposing safeguards on the process of voting by mail to allay such risks. For example, in *Crawford* v. *Marion County Election Board*, this Court held that fraudulent voting "perpetrated using absentee ballots" demonstrates "that not only is the risk of voter fraud real but that *it could affect the*

outcome of a close election." *Crawford* v. *Marion County Election Bd.*, 553 U.S. 181, 195-96 (2008) (opinion of Stevens, J.) (emphasis added).

As noted by Plaintiff, the Carter-Baker Commission on Federal Election Reform emphasized the same concern. The bipartisan Commission—co-chaired by former President Jimmy Carter and former Secretary of State James A. Baker—determined that "[a]bsentee ballots remain 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) ("Carter-Baker Report").[2] According to the Carter-Baker Commission, "[a]bsentee balloting is vulnerable to abuse in several ways." *Id.* "Blank ballots mailed to the wrong address or to large residential buildings might be intercepted." *Id.* "Citizens who vote at home, at nursing homes, at the workplace, or in church are more susceptible to pressure, overt and subtle, or to intimidation." *Id.* "Vote buying schemes are far more difficult to detect when citizens vote by mail." *Id.*

Thus, the Commission noted that "absentee balloting in other states has been a major source of fraud." *Id.* at 35. It emphasized that voting by mail "increases the risk of fraud." *Id.* And the Commission recommended that "States ... need to do more to prevent ... absentee ballot fraud." *Id.* at v.

The Commission specifically recommended that States should implement and reinforce safeguards to prevent fraud in voting by mail. The Commission recommended that "States should make sure that

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[2] *Available at* https://www.legislationline.org/download/id/1472/file/-3b50795b2d0374cbef5c29766256.pdf.

absentee ballots received by election officials before Election Day are kept secure until they are opened and counted." *Id.* at 46. It also recommended that States "prohibit[] 'third-party' organizations, candidates, and political party activists from handling absentee ballots." *Id.* And the Commission highlighted that a particular state "appear[ed] to have avoided significant fraud in its vote-by-mail elections by introducing *safeguards to protect ballot integrity, including signature verification.*" *Id.* at 35 (emphasis added). The Commission concluded that "[v]ote by mail is ... likely to increase the risks of fraud and contested elections ... where the safeguards for ballot integrity are weaker." *Id.*

The most recent edition of the U.S. Department of Justice's Manual on *Federal Prosecution of Election Offenses*, published by its Public Integrity Section, highlights the very same concerns about fraud in voting by mail. U.S. Dep't of Justice, *Federal Prosecution of Election Offenses* (8th ed. Dec. 2017), at 28-29 ("DOJ Manual").[3] The Manual states: "Absentee ballots are particularly susceptible to fraudulent abuse because, by definition, they are marked and cast outside the presence of election officials and the structured environment of a polling place." *Id.* The Manual reports that "the more common ways" that election-fraud "crimes are committed include ... [o]btaining and marking absentee ballots without the active input of the voters involved." *Id.* at 28. And the Manual notes that "[a]bsentee ballot

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[3] *Available at* https://www.justice.gov/criminal/file/1029066/download.

frauds" committed both with and without the voter's participation are "common." *Id.* at 29.

Similarly, the U.S. Government Accountability Office concluded that many crimes of election fraud likely go undetected. In 2014, discussing election fraud, the GAO reported that "crimes of fraud, in particular, are difficult to detect, as those involved are engaged in intentional deception." GAO-14-634, *Elections: Issues Related to State Voter Identification Laws* 62-63 (U.S. Gov't Accountability Office Sept. 2014).[4]

Despite the difficulties of detecting fraud schemes, recent experience contains many well-documented examples of absentee ballot fraud. For example, the News21 database, which was compiled to *refute* arguments that voter fraud is prevalent, identified 491 cases of absentee ballot over the 12-year period from 2000 to 2012—approximately 41 cases per year. *See* News21, *Election Fraud in America*.[5] This database reports that "Absentee Ballot Fraud" was "[t]he most prevalent fraud" in America, comprising "24 percent (491 cases)" of all cases reported in the public records surveyed. *Id.* Moreover, the database indicates that this number undercounts the total incidence of reported cases of absentee ballot fraud, because it was based on public-record requests to state and local government entities, many of which did not respond. *Id.*

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[4] *Available at* https://www.gao.gov/assets/670/665966.pdf.

[5] *Available at* https://votingrights.news21.com/interactive/election-fraud-database/&xid=17259,15700023,15700124,15700149,15700186,15700191,15700201,15700237,15700242

Likewise, the Heritage Foundation's online database of election-fraud cases—which includes only a "sampling" of cases that resulted in an *adjudication* of fraud, such as a criminal conviction or civil penalty—identified 207 cases of proven "fraudulent use of absentee ballots" in the United States. The Heritage Foundation, *Election Fraud Cases*.[6] Again, this database undercounts the incidence of cases of election fraud: "The Heritage Foundation's Election Fraud Database presents a sampling of recent proven instances of election fraud from across the country. This database is not an exhaustive or comprehensive list." *Id.*

The public record abounds with recent examples of such fraudulent absentee-ballot schemes. For example, in November 2019, the mayor of Berkeley, Missouri was indicted on five felony counts of absentee ballot fraud for changing votes on absentee ballots to help him and his political allies to get elected. Brian Heffernan, *Berkeley Mayor Hoskins Charged with 5 Felony Counts of Election Fraud*, ST. LOUIS PUBLIC RADIO (Nov. 21, 2019).[7] Mayor Hoskins' scheme included "going to the home of elderly ... residents" to harvest absentee ballots, "filling out absentee ballot applications for voters and having his campaign workers do the same," and "altering absentee ballots" after he had procured them from voters. *Id.* Again, in 2016, a state House race in Missouri was overturned amid allegations of

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[6] *Available at* https://www.heritage.org/voterfraud/search?combine=&state=All&year=&case_type=All&fraud_type=24489&page=12.

[7] *Available at* https://news.stlpublicradio.org/post/berkeley-mayor-hoskins-charged-5-felony-counts-election-fraud#stream/0

widespread absentee-ballot fraud that had occurred across multiple election cycles in the same community. Sarah Fenske, *FBI, Secretary of State Asking Questions About St. Louis Statehouse Race*, RIVERFRONT TIMES (Aug. 16, 2016).[8] One candidate stated that it was widely known in the community that the incumbent ran an "absentee game" that resulted in the absentee vote tipping the outcome in her favor in multiple close elections. *Id.*

Other States have similar experiences. In 2018, a federal Congressional race was overturned in North Carolina, and eight political operatives were indicted for fraud, in an absentee-ballot scheme that sufficed to change the outcome of the election. Richard Gonzales, *North Carolina GOP Operative Faces New Felony Charges That Allege Ballot Fraud*, NPR.ORG, (July 30, 2019).[9] The indicted operatives "had improperly collected and possibly tampered with ballots," and were charged with "improperly mailing in absentee ballots for someone who had not mailed it themselves." *Id.*

In the North Carolina case, the lead investigator testified that the investigation was "a continuous case" over two election cycles, and that the scheme involved collecting absentee ballots from voters, altering the absentee ballots, and forging witness signatures on the ballots. *See In re: Investigation of Irregularities Affecting Counties Within the 9th*

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[8] *Available at* https://www.riverfronttimes.com/newsblog/2016/08/16/fbi-secretary-of-state-asking-questions-about-st-louis-statehouse-race.

[9] *Available at* https://www.npr.org/2019/07/30/746800630/north-carolina-gop-operative-faces-new-felony-charges-that-allege-ballot-fraud.

Congressional District, North Carolina Board of Elections, Evidentiary Hearing, at 2-3.[10] The investigators described it as a "coordinated, unlawful, and substantially resourced absentee ballots scheme." *Id.* at 2. According to the investigators' trial presentation, the investigation involved 142 voter interviews, 30 subject and witness interviews, and subpoenas of documents, financial records, and phone records. *Id.* at 3. The perpetrators collected absentee ballots and falsified ballot witness certifications outside the presence of the voters. *Id.* at 10, 13. The congressional election at issue was decided by margin of less than 1,000 votes. *Id.* at 4. The scheme involved the submission of well over 1,000 fraudulent absentee ballots and request forms. *Id.* at 11. The perpetrators took extensive steps to conceal the fraudulent scheme, which lasted over multiple election cycles before it was detected. *Id.* at 14.

Similarly, in 2016, a politician in the Bronx was indicted and pled guilty to 242 counts of election fraud based on an absentee ballot fraud scheme. Ben Kochman, *Bronx politician pleads guilty in absentee ballot scheme for Assembly election*, NEW YORK DAILY NEWS (Nov. 22, 2016).[11] Despite pleading guilty to 242 felonies involving absentee ballot fraud in an election that was decided by two votes, the defendant received no jail time and vowed to run for office again after a short disqualification period. *Id.*

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[10] *Available at* https://images.radio.com/wbt/Voter%20ID_%20Website.pdf.

[11] *Available at* http://www.nydailynews.com/new-york/nyc-crime/bronx-pol-pleads-guilty-absentee-ballot-scheme-article-1.2884009.

The increases in mail-in voting due to the COVID-19 pandemic likewise increased opportunities for fraud. For instance, in May 2020, the leader of the New Jersey NAACP called for an election in Paterson, New Jersey to be overturned due to widespread mail-in ballot fraud. *See* Jonathan Dienst et al., *NJ NAACP Leader Calls for Paterson Mail-In Vote to Be Canceled Amid Corruption Claims*, NBC NEW YORK (May 27, 2020).[12] "'Invalidate the election. Let's do it again,' [the NAACP leader] said amid reports more that 20 percent of all ballots were disqualified, some in connection with voter fraud allegations." *Id.*

Hundreds of other reported cases highlight the same concerns about the vulnerability of voting by mail to fraud and abuse. Recently, a Missouri court considered extensive expert testimony reviewing absentee-ballot fraud cases like these. *Findings of Fact, Conclusions of Law, and Final Judgment in Mo. State Conference of the NAACP* v. *State*, No. 20AC-CC00169-01 (Circuit Court of Cole County, Missouri Sept. 24, 2020), *aff'd*, 607 S.W.3d 728 (Mo. banc Oct. 9, 2020) ("*Mo. NAACP*"). The court held that cases of absentee-ballot fraud "have several common features that persist across multiple recent cases: (1) close elections; (2) perpetrators who are candidates, campaign workers, or political consultants, not ordinary voters; (3) common techniques of ballot harvesting; (4) common techniques of signature forging; (5) fraud that persisted across multiple elections before it was detected; (6) massive resources

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[12] *Available at* https://www.nbcnewyork.com/news/politics/nj-naacp-leader-calls-for-paterson-mail-in-vote-to-be-canceled-amid-fraud-claims/2435162/.

required to investigate and prosecute the fraud; and (7) lenient criminal penalties." *Id.* at 17. Thus, the court concluded "that fraud in voting by mail is a recurrent problem, that it is hard to detect and prosecute, that there are strong incentives and weak penalties for doing so, and that it has the capacity to affect the outcome of close elections." *Id.* The court held that "the threat of mail-in ballot fraud is real." *Id.* at 2.

III. The Bill of Complaint Alleges that the Defendant States Unconstitutionally Abolished Critical Safeguards Against Fraud in Voting by Mail.

The Bill of Complaint alleges that non-legislative actors in each Defendant State unconstitutionally abolished or diluted statutory safeguards against fraud enacted by their state Legislatures, in violation of the Presidential Electors Clause. U.S. CONST. art. II, § 1, cl. 4. All the unconstitutional changes to election procedures identified in the Bill of Complaint have two common features: (1) They abrogated statutory safeguards against fraud that responsible observers have long recommended for voting by mail, and (2) they did so in a way that predictably conferred partisan advantage on one candidate in the Presidential election. Such allegations are serious, and they warrant this Court's review.

Abolishing signature verification. First, the proposed Bill of Complaint alleges that non-legislative actors in Pennsylvania, Michigan, and Georgia unilaterally abolished or weakened signature-verification requirements for mailed ballots. It alleges that Pennsylvania's Secretary of State

abrogated Pennsylvania's statutory signature-verification requirement for mail-in ballots in a "friendly" settlement of a lawsuit brought by activists. Bill of Complaint, ¶¶ 44-46. It alleges that Michigan's Secretary of State permitted absentee ballot applications online, with no signature at all, in violation of Michigan statutes, *id.* ¶¶ 85-89; and that election officials in Wayne County, Michigan simply disregarded statutory signature verification requirements, *id.* ¶¶ 92-95. And it alleges that Georgia's Secretary of State unilaterally abrogated Georgia's statute authorizing county registrars to engage in signature verification for absentee ballots in another lawsuit settlement. *Id.* ¶¶ 66-72.

In addition to violating the Electors Clause, these actions, as alleged, contradict fundamental principles of ballot security. As noted above, the Carter-Baker Report highlighted the importance of "*signature verification*" as a critical "safeguard[] to protect ballot integrity" for ballots cast by mail. Carter-Baker Report, *supra*, at 35 (emphasis added). Without safeguards such as signature verification, the Report stated that "[v]ote by mail is ... likely to increase the risks of fraud and contested elections ... where the safeguards for ballot integrity are weaker." *Id.* The importance of signature verification is hard to overstate, because absentee-ballot fraud schemes commonly involve "common techniques of signature forging," typically by nefarious actors who are unfamiliar with the voter's signature. *Mo. NAACP*, *supra*, at 17. Verifying the voter's signature thus provides a fundamental safeguard against fraud.

Insecure ballot handling. The Bill of Complaint alleges that non-legislative actors changed

or abolished statutory rules for the secure handling of absentee and mail-in ballots in Pennsylvania, Michigan, and Wisconsin. It alleges that election officials in Democratic areas of Pennsylvania violated state statutes by opening and reviewing mail-in ballots that were required to be kept locked and secure until Election Day. Bill of Complaint, ¶¶ 50-51. It alleges that Michigan's Secretary of State, acting in violation of state law, sent 7.7 million unsolicited absentee-ballot applications to Michigan voters, thus "flooding Michigan with millions of absentee ballot applications prior to the 2020 general election." *Id.* ¶¶ 80-84. And it alleges that the Wisconsin Election Commission violated state law by placing hundreds of unmonitored boxes for the submission of absentee and mail-in ballots around the State, concentrated in heavily Democratic areas. *Id.* ¶¶ 107-114.

In addition to violating the Electors Clause, these actions, as alleged, contradict commonsense ballot-security recommendations. The Department of Justice's Manual on *Federal Prosecution of Election Offenses* notes that vulnerability to mishandling is what makes absentee ballots "particularly susceptible to fraudulent abuse" because "they are marked and cast outside the presence of election officials and the structured environment of a polling place." DOJ Manual, at 28-29. According to the Manual, "[o]btaining and marking absentee ballots without the active input of the voters involved" is one of "the more common ways" that election fraud "crimes are committed." *Id.* at 28. For this reason, the Carter-Baker Commission made recommendations in favor of preventing such insecurity in the handling of ballots. For example, the Commission recommended that

"States should make sure that absentee ballots received by election officials before Election Day are kept secure until they are opened and counted." *Id.* at 46. It also recommended that States "prohibit[] 'third-party' organizations, candidates, and political party activists from handling absentee ballots." *Id.*

Inconsistent Statewide Standards. The Bill of Complaint alleges that the Defendant States provided different standards and treatment for mail-in ballots submitted in different areas of each State, and that this differential treatment uniformly provided a partisan advantage to one side in the Presidential election. It alleges that election officials in Philadelphia and Allegheny County, Pennsylvania, applied different standards to voters in those Democratic strongholds than applied to other voters in Pennsylvania, in violation of state law. Bill of Complaint, ¶¶ 52-54. Similarly, it alleges that Milwaukee, Wisconsin violated state law by authorizing election officials to "correct" disqualifying omissions on ballot envelopes by entering information that the voter should have entered with a red pen, while no similar "correction" process was granted to other voters in that State. *Id.* ¶¶ 123-127. And it alleges that Wayne County, Michigan provided differential treatment of its voters, in violation of state statutes, by simply ignoring statutorily required signature-verification requirements. *Id.* ¶¶ 92-95.

Such differential treatment, as alleged under circumstances raising concerns of partisan bias, contradicts universal recommendations for integrity and public confidence in elections. As this Court stated in *Bush* v. *Gore*, "[t]he idea that one group can be granted greater voting strength than another is

hostile to the one man, one vote basis of our representative government." 531 U.S. at 107 (quoting *Moore* v. *Ogilvie*, 394 US 814 (1969)). The Carter-Baker Report noted that "inconsistent or incorrect application of electoral procedures may have the effect of discouraging voter participation and may, on occasion, raise questions about bias in the way elections are conducted." Carter-Baker Report, at 49. "Such problems raise public suspicions or may provide grounds for the losing candidate to contest the result in a close election." *Id.*

Excluding Bipartisan Observers. The Bill of Complaint alleges that certain counties in Defendant States excluded bipartisan observers from the ballot-opening and ballot-counting processes. For example, it alleges that election officials in Philadelphia and Allegheny County, Pennsylvania, violated state law by excluding Republican observers from the opening, counting, and recording of absentee ballots in those counties. Bill of Complaint, ¶ 49. And it alleges that election officials in Wayne County, Michigan violated state statutes by systematically excluding poll watchers from the counting and recording of absentee ballots. *Id.* ¶¶ 90-91.

Such actions, as alleged, raise concerns about the integrity of the vote count in those counties. As the Carter-Baker Report emphasized, States should "provide observers with meaningful opportunities to monitor the conduct of the election." Carter-Baker Report, at 47. "To build confidence in the electoral process, it is important that elections be administered in a neutral and professional manner," without the appearance of partisan bias." *Id.* at 49. When observers of one political party are illegally and

systematically excluded from observing the vote count, "the appearance of partisan bias" is inevitable. *Id.* For counties in Defendant States to exclude Republican observers weakens public confidence in the electoral process and raises grave concerns about the integrity of ballot counting in those counties.

Extending the Deadline to Receive Ballots. The Bill of Complaint alleges that a non-legislative actor in Pennsylvania—its Supreme Court—extended the statutory deadline to receive absentee and mail-in ballots without authorization from the "Legislature thereof," and that it directed that ballots with illegible postmarks or no postmarks at all would be deemed timely if received within the extended deadline. Bill of Complaint, ¶¶ 48, 55. Again, these non-legislative changes raise concerns about election integrity in Pennsylvania. They created a post-election window of time during which nefarious actors could wait and see whether the Presidential election would be close, and whether perpetrating fraud in Pennsylvania would be worthwhile. And they enhanced the opportunities for fraud by mandating that late ballots must be counted even when they are not postmarked or have no legible postmark, and thus there is no evidence they were mailed by Election Day.

These changes created needless vulnerability to actual fraud and undermined public confidence in the election. As the Department of Justice's Manual of *Federal Prosecution of Election Offenses* states, "the conditions most conducive to election fraud are close factional competition within an electoral jurisdiction for an elected position that matters." DOJ Manual, at 2-3. "[E]lection fraud is most likely to occur in electoral jurisdictions where there is close factional

competition for an elected position that matters." *Id.* at 27. That statement exactly describes the conditions in each of the Defendant States in the recent Presidential election.

CONCLUSION

The allegations in the Bill of Complaint raise important constitutional issues under the Electors Clause of Article II, § 1. They also raise serious concerns relating to election integrity and public confidence in elections. These are questions of great public importance that warrant this Court's attention. The Court should grant the Plaintiff's Motion for Leave to File Bill of Complaint.

December 9, 2020

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No. 22O155

In the Supreme Court of the United States

STATE OF TEXAS,
Plaintiff,

v.

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

On Motion for Leave to File Bill of Complaint

CERTIFICATE OF SERVICE

In accordance with Rule 29.5(b) and the Court's April 15, 2020 Order, I certify that the required copies of the Brief of Missouri and 16 Other States as *Amici Curiae* in Support of Plaintiff's Motion for Leave to File a Bill of Complaint in the above captioned case have been sent to the U.S. Supreme Court by commercial overnight delivery, and electronic copies were served by electronic mail on the following parties listed below on December 9, 2020.

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Florida joins.

John Guard

From: John Guard
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Subject: FW: Texas v. Pennsylvania, et al. - Amicus Brief of Missouri, at al. - Joins requested by 1:00 p.m. Central Tomorrow, 12/9
Attachments: 2020-12-09 - Texas v. Pennsylvania - Amicus Brief of Missouri et al. - Circulation Redline.docx

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Missouri
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Missisippi
Nebraska
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Sent: Wednesday, December 9, 2020 11:21 AM
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Subject: RE: Texas v. Pennsylvania, et al. - Amicus Brief of Missouri, at al. - Joins requested by 1:00 p.m. Central Tomorrow, 12/9

All-

Attached please find a redline with minor changes to this brief to address issues raised by several States. Thank you to Nebraska and West Virginia for proposing these changes. Arkansas, Louisiana, and Mississippi have joined, with many others expressing interest. Our printer has given a hard deadline of 1:00 pm, so please do let us know by then if you would like to join!

Thanks a lot, John Sauer

From: Sauer, John
Sent: Wednesday, December 9, 2020 9:04 AM
To: 'Mithun Mansinghani' <mithun.mansinghani@oag.ok.gov>; 'Murrill, Elizabeth' <MurrillE@ag.louisiana.gov>; 'Melissa Holyoak' <melissaholyoak@agutah.gov>; 'nicholas.bronni@arkansasag.gov' <nicholas.bronni@arkansasag.gov>; 'Vincent Wagner' <vincent.wagner@arkansasag.gov>; 'ed.sniffen@alaska.gov' <ed.sniffen@alaska.gov>; Smith, Justin <justin.smith@ago.mo.gov>; 'Amit.Agarwal@myfloridalegal.com' <Amit.Agarwal@myfloridalegal.com>; 'Kane, Brian' <brian.kane@ag.idaho.gov>; 'tom.fisher@atg.in.gov' <tom.fisher@atg.in.gov>; 'julia.payne@atg.in.gov' <julia.payne@atg.in.gov>; 'toby.crouse@ag.ks.gov' <toby.crouse@ag.ks.gov>; 'Chad.Meredith@ky.gov' <Chad.Meredith@ky.gov>; 'Andrew Pinson' <APinson@LAW.GA.GOV>; 'jeff.chanay' <jeff.chanay@ag.ks.gov>; 'St. John, Joseph' <StJohnJ@ag.louisiana.gov>; 'Kristi.Johnson@ago.ms.gov' <Kristi.Johnson@ago.ms.gov>; 'ABurton@mt.gov' <ABurton@mt.gov>; 'MSchlichting@mt.gov' <MSchlichting@mt.gov>; 'Lindsay S. See' <Lindsay.S.See@wvago.gov>; 'jonbennion@mt.gov' <jonbennion@mt.gov>; 'wstenehjem@nd.gov' <wstenehjem@nd.gov>; 'Benjamin.flowers@ohioattorneygeneral.gov' <Benjamin.flowers@ohioattorneygeneral.gov>; 'ESmith@scag.gov' <ESmith@scag.gov>; 'BCook@scag.gov' <BCook@scag.gov>; 'steven.blair@state.sd.us' <steven.blair@state.sd.us>; 'Sherri.Wald@state.sd.us' <Sherri.Wald@state.sd.us>; 'Sarah.Campbell@ag.tn.gov' <Sarah.Campbell@ag.tn.gov>; 'tom.fisher@atg.in.gov' <tom.fisher@atg.in.gov>; 'Andree.Blumstein@ag.tn.gov' <Andree.Blumstein@ag.tn.gov>; 'matthew.frederick@texasattorneygeneral.gov' <matthew.frederick@texasattorneygeneral.gov>; 'Kyle.Hawkins@oag.texas.gov' <Kyle.Hawkins@oag.texas.gov>; 'Ric Cantrell' <rcantrell@agutah.gov>; 'james.kaste@wyo.gov' <james.kaste@wyo.gov>; 'Jim.Campbell@nebraska.gov' <Jim.Campbell@nebraska.gov>; 'Thomas T. Lampman' <Thomas.T.Lampman@wvago.gov>; 'Jessica A. Lee' <Jessica.A.Lee@wvago.gov>; 'Lindsay S. See' <Lindsay.S.See@wvago.gov>; 'Roysden, Beau' <Beau.Roysden@azag.gov>; 'Bash, Zina' <Zina.Bash@oag.texas.gov>; 'masagsve@nd.gov'; 'Harley Kirkland' <HKirkland@scag.gov>; 'Eddie Lacour' <elacour@ago.state.al.us>; 'Hudson, Kian' <Kian.Hudson@atg.in.gov>; 'Kuhn, Matt F (KYOAG)' <Matt.Kuhn@ky.gov>; 'Michelle Williams' <Michelle.Williams@ago.ms.gov>; 'krissy.nobile@ago.ms.gov' <krissy.nobile@ago.ms.gov>
Subject: RE: Texas v. Pennsylvania, et al. - Amicus Brief of Missouri, at al. - Joins requested by 1:00 p.m. Central Tomorrow, 12/9

All-

Thank you for considering this amicus brief on such short notice. So far, Louisiana and Arkansas have joined, with several others expressing interest. I have attached an updated draft that includes minor, non-substantive edits, and which adjusts the language of the concluding paragraphs in response to comments from an interested state. The Supreme Court issued an order last night ordering the Defendant States (MI, PA, WS, GA) to file a response for the Motion for Leave to File Bill of Complaint and request for interim injunctive relief by 3:00 pm tomorrow. Given this highly accelerated briefing schedule, we would like to file this brief as soon as possible this afternoon to give the Court the most time possible to read it. Accordingly, we would prefer not to extend the deadline past 1:00 p.m. Central today, so please let us know by then if you are interested. Thanks a lot!

Best, John Sauer

From: Sauer, John
Sent: Tuesday, December 8, 2020 6:11 PM
To: 'Mithun Mansinghani' <mithun.mansinghani@oag.ok.gov>; 'Murrill, Elizabeth' <MurrillE@ag.louisiana.gov>; 'Melissa Holyoak' <melissaholyoak@agutah.gov>; 'nicholas.bronni@arkansasag.gov' <nicholas.bronni@arkansasag.gov>; 'Vincent Wagner' <vincent.wagner@arkansasag.gov>; 'ed.sniffen@alaska.gov' <ed.sniffen@alaska.gov>; Smith, Justin <justin.smith@ago.mo.gov>; 'Amit.Agarwal@myfloridalegal.com' <Amit.Agarwal@myfloridalegal.com>; 'Kane, Brian' <brian.kane@ag.idaho.gov>; 'tom.fisher@atg.in.gov' <tom.fisher@atg.in.gov>; 'julia.payne@atg.in.gov' <julia.payne@atg.in.gov>; 'toby.crouse@ag.ks.gov' <toby.crouse@ag.ks.gov>; 'Chad.Meredith@ky.gov' <Chad.Meredith@ky.gov>; 'Andrew Pinson' <APinson@LAW.GA.GOV>; 'jeff.chanay' <jeff.chanay@ag.ks.gov>; 'St. John, Joseph' <StJohnJ@ag.louisiana.gov>; 'Kristi.Johnson@ago.ms.gov' <Kristi.Johnson@ago.ms.gov>; 'ABurton@mt.gov' <ABurton@mt.gov>; 'MSchlichting@mt.gov' <MSchlichting@mt.gov>; 'Lindsay S. See' <Lindsay.S.See@wvago.gov>; 'jonbennion@mt.gov' <jonbennion@mt.gov>; 'wstenehjem@nd.gov' <wstenehjem@nd.gov>; 'Benjamin.flowers@ohioattorneygeneral.gov' <Benjamin.flowers@ohioattorneygeneral.gov>; 'ESmith@scag.gov' <ESmith@scag.gov>; 'BCook@scag.gov' <BCook@scag.gov>; 'steven.blair@state.sd.us' <steven.blair@state.sd.us>; 'Sherri.Wald@state.sd.us' <Sherri.Wald@state.sd.us>; 'Sarah.Campbell@ag.tn.gov' <Sarah.Campbell@ag.tn.gov>; 'tom.fisher@atg.in.gov' <tom.fisher@atg.in.gov>; 'Andree.Blumstein@ag.tn.gov' <Andree.Blumstein@ag.tn.gov>; 'matthew.frederick@texasattorneygeneral.gov' <matthew.frederick@texasattorneygeneral.gov>; 'Kyle.Hawkins@oag.texas.gov' <Kyle.Hawkins@oag.texas.gov>; 'Ric Cantrell' <rcantrell@agutah.gov>; 'james.kaste@wyo.gov' <james.kaste@wyo.gov>; 'Jim.Campbell@nebraska.gov' <Jim.Campbell@nebraska.gov>; 'Thomas T. Lampman' <Thomas.T.Lampman@wvago.gov>; 'Jessica A. Lee' <Jessica.A.Lee@wvago.gov>; 'Lindsay S. See' <Lindsay.S.See@wvago.gov>; 'Roysden, Beau' <Beau.Roysden@azag.gov>; 'Bash, Zina' <Zina.Bash@oag.texas.gov>; 'masagsve@nd.gov'; 'Harley Kirkland' <HKirkland@scag.gov>; 'Eddie Lacour' <elacour@ago.state.al.us>; 'Hudson, Kian' <Kian.Hudson@atg.in.gov>; 'Kuhn, Matt F (KYOAG)' <Matt.Kuhn@ky.gov>
Subject: Texas v. Pennsylvania, et al. - Amicus Brief of Missouri, at al. - Joins requested by 1:00 p.m. Central Tomorrow, 12/9

All-

Attached please find a draft multistate amicus brief in support of Texas's motion for leave to file a bill of complaint in the U.S. Supreme Court challenging the administration of the recent Presidential election in Pennsylvania, Michigan, Wisconsin, and Georgia. The brief argues that (1) the separation-of-powers provision of the Electors Clause of Article II, Section 1 is an important structural check on government that safeguards individual liberty; (2) voting by mail presents real concerns for fraud and abuse that require statutory safeguards to protect against such fraud and abuse; and (3) the abrogation of statutory safeguards against fraud in voting by mail by non-legislative actors violates the Electors Clause and undermines public confidence in elections. For your reference, I have also attached Texas's Motion for Leave to File Bill of Complaint and related documents.

With apologies for the short deadline, given the time-sensitivity of this case, we are requesting joins by **1:00 p.m. Central TOMORROW**, 12/9. We are planning to file tomorrow afternoon.

Thanks a lot,

John Sauer

No. 22O155, Original

In the Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

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

Defendants.

On Motion for Leave to File Bill of Complaint

BRIEF OF STATES OF MISSOURI, ARKANSAS, LOUISIANA, ~~AND~~ MISSISSIPPI, AND AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF'S MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

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STATEMENT OF INTEREST OF *AMICI*

"In the context of a Presidential election," state actions "implicate a uniquely important national interest," because "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, 794–95 (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." *Id.*

Amici curiae are the States of Missouri, Arkansas, Louisiana, ~~and~~ Mississippi, and _____.[1] *Amici* have several important interests in this case. *First*, the States have a strong interest in safeguarding the separation of powers among state actors in the regulation of Presidential elections. The Electors Clause of Article II, § 1 carefully separates power among state actors, and it assigns a specific function to the "Legislature thereof" in each State. U.S. CONST. art. II, § 1, cl. 4. Our system of federalism relies on separation of powers to preserve liberty at every level of government, and the separation of powers in the Electors Clause is no exception. The States have a strong interest in preserving the proper roles of state legislatures in the administration of federal elections, and thus safeguarding the individual liberty of their citizens.

Second, *amici* States have a strong interest in ensuring that the votes of their own citizens are not diluted by the unconstitutional administration of

[1] This brief is filed under Supreme Court Rule 37.4, and all counsel of record received timely notice of the intent to file this amicus brief under Rule 37.2.

elections in other States. When non-legislative actors in other States encroach on the authority of the "Legislature thereof" in that State to administer a Presidential election, they threaten the liberty, not just of their own citizens, but of every citizen of the United States who casts a lawful ballot in that election—including the citizens of *amici* States.

Third, for similar reasons, *amici* States have a strong interest in safeguarding against fraud in voting by mail during Presidential elections. "Every voter" in a federal election, "has a right under the Constitution to have his vote fairly counted, without its being distorted by fraudulently cast votes." *Anderson* v. *United States*, 417 U.S. 211, 227 (1974). Plaintiff's Bill of Complaint alleges that non-legislative actors in the Defendant States stripped away important safeguards against fraud in voting by mail that had been enacted by the Legislature in each State. *Amici* States share a vital interest in protecting the integrity of the truly national election for President and Vice President of the United States.

SUMMARY OF ARGUMENT

The Bill of Complaint raises constitutional questions of great public importance that warrant this Court's review. First, like every similar provision in the Constitution, the separation-of-powers provision of the Electors Clause provides an important structural check on government designed to protect individual liberty. By allocating authority over Presidential electors to the "Legislature thereof" in each State, the Clause separates powers both vertically and horizontally, and it confers authority on

the branch of state government most responsive to the democratic will. Encroachments on the authority of state Legislatures by other state actors violate the separation of powers and threaten individual liberty.

The unconstitutional encroachments on the authority of state Legislatures in this case raise particularly grave concerns. For decades, responsible observers have cautioned about the risks of fraud and abuse in voting by mail, and they have urged the adoption of statutory safeguards to prevent such fraud and abuse. In the numerous cases identified in the Bill of Complaint, non-legislative actors in each Defendant State repeatedly stripped away the statutory safeguards that the "Legislature thereof" had enacted to protect against fraud in voting by mail. These changes removed protections that responsible actors had recommended for decades to guard against fraud and abuse in voting by mail~~, and they did so in a manner that uniformly and predictably benefited one candidate in the recent Presidential election~~. The allegations in the Bill of Complaint raise important questions about election integrity and public confidence in the administration of Presidential elections. This Court should grant Plaintiff leave to file the Bill of Complaint.

ARGUMENT

The Electors Clause provides that each State "shall appoint" its Presidential electors "in such Manner as the *Legislature thereof* may direct." U.S. CONST. art. II, § 1, cl. 4 (emphasis added). Moreover, "[o]ur constitutional system of representative government only works when the worth of honest ballots is not diluted by invalid ballots procured by

corruption." U.S. Dep't of Justice, *Federal Prosecution of Election Offenses*, at 1 (8th ed. Dec. 2017). "When the election process is corrupted, democracy is jeopardized." *Id.* The proposed Bill of Complaint raises serious concerns about both the constitutionality and ballot security of election procedures in the Defendant States. Given the importance of public confidence in American elections, these allegations raise questions of great public importance that warrant this Court's expedited review.

I. The Separation-of-Powers Provision of the Electors Clause Is a Structural Check on Government That Safeguards Liberty.

Article II 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. 4 (emphasis added); *see also id.* art. I, § 4, cl. 2 (providing that, in each State, the "Legislature thereof" shall establish "[t]he Times, Places and Manner of holding Elections for Senators and Representatives").

Thus, "in the case of a law enacted by a state legislature applicable not only to elections to state offices, but also to the selection of Presidential electors, the legislature is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under Art. II, § 1, cl. 2, of the United States Constitution." *Bush* v. *Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70, 76 (2000). "[T]he state legislature's power to select the manner for appointing electors is plenary." *Bush* v. *Gore*, 531 U.S. 98, 104 (2000).

Here, as set forth in the Bill of Complaint, non-legislative actors in each Defendant State have purported to "alter[] an important statutory provision enacted by the [State's] Legislature pursuant to its authority under the Constitution of the United States to make rules governing the conduct of elections for federal office." *Republican Party of Pennsylvania* v. *Boockvar*, No. 20-542, 2020 WL 6304626, at *1 (U.S. Oct. 28, 2020) (Statement of Alito, J.). *See* Bill of Complaint, ¶¶ 41-127. In doing so, these non-legislative actors may have encroached upon the "plenary" authority of those States' respective legislatures over the conduct of the Presidential election in each State. *Bush* v. *Gore*, 531 U.S. at 104. This encroachment on the authority of each State's Legislature violated the separation of powers set forth in the Electors Clause. "[I]n the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest. For the President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation." *Anderson*, 460 U.S. at 794–795.

In every other context, this Court recognizes that the Constitution's separation-of-powers provisions are designed to preserve liberty. "It is the proud boast of our democracy that we have 'a government of laws, and not of men.'" *Morrison* v. *Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting). "The Framers of the Federal Constitution . . . viewed the principle of separation of powers as the absolutely central guarantee of a just Government." *Id.* "Without a secure structure of separated powers, our Bill of Rights would be worthless, as are the bills of rights of

many nations of the world that have adopted, or even improved upon, the mere words of ours." *Id.* "The purpose of the separation and equilibration of powers in general . . . was not merely to assure effective government but to preserve individual freedom." *Id.* at 727.

This principle of preserving liberty applies both to the horizontal separation of powers among the branches of government, and the vertical separation of powers between the federal government and the States. "The federal system rests on what might at first seem a counterintuitive insight, that 'freedom is enhanced by the creation of two governments, not one.'" *Bond* v. *United States*, 564 U.S. 211, 220–21 (2011) (quoting *Alden* v. *Maine*, 527 U.S. 706, 758 (1999)). "[F]ederalism secures to citizens the liberties that derive from the diffusion of sovereign power." *Bond*, 564 U.S. at 221 (2011) (quoting *New York* v. *United States*, 505 U.S. 144, 181 (1992)). "Federalism also protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions." *Id.* Moreover, "federalism enhances the opportunity of all citizens to participate in representative government." *FERC* v. *Mississippi*, 456 U.S. 742, 789 (1982) (O'Connor, J., concurring in part and dissenting in part). "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Gregory* v. *Ashcroft*, 501 U.S. 452, 458 (1991).

The explicit grant of authority to state *Legislatures* in the Electors Clause effects both a horizontal and a vertical separation of powers. The Clause allocates 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. 4.

It is no accident that the Constitution allocates such authority to state Legislatures, rather than executive officers such as Secretaries of State, or judicial officers such as state Supreme Courts. The Constitutional Convention's delegates frequently recognized that the Legislature is the branch most responsive to the People and most democratically accountable. *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 ratification documents expressing that state legislatures were most likely to be in sympathy with the interests of the people); Federal Farmer, No. 12 (1788), *reprinted in* 2 THE FOUNDERS' CONSTITUTION (Philip B. Kurland & Ralph Lerner eds., 1987) (arguing that electoral regulations "ought to be left to the state legislatures, they coming far nearest to the people themselves"); THE FEDERALIST NO. 57, at 350 (C. Rossiter, ed. 2003) (Madison, J.) (stating that the "House of Representatives is so constituted as to support in its members an habitual recollection of their dependence on the people"); *id.* (stating that the "vigilant and manly spirit that actuates the people of America" is greatest restraint on the House of Representatives).

Democratic accountability in the method of selecting the President of the United States is a powerful bulwark safeguarding individual liberty. By identifying the "Legislature thereof" in each State as the regulator of elections for federal officers, the Electors Clause of Article II, § 1 prohibits the very arrogation of power over Presidential elections by non-legislative officials that the Defendant States perpetrated in this case. By violating the Constitution's separation of powers, these non-legislative actors undermined the liberty of all Americans, including the voters in *amici* States.

II. Stripping Away Safeguards From Voting by Mail Exacerbates the Risks of Fraud.

By stripping away critical safeguards against ballot fraud in voting by mail, non-legislative actors in the Defendant States inflicted another grave injury on the conduct of the recent election: They enhanced the risks of fraudulent voting by mail without authority. An impressive body of public evidence demonstrates that voting by mail presents unique opportunities for fraud and abuse, and that statutory safeguards are critical to reduce such risks of fraud.

For decades prior to 2020, responsible observers emphasized the risks of fraud in voting by mail, and the importance of imposing safeguards on the process of voting by mail to allay such risks. For example, in *Crawford* v. *Marion County Election Board*, this Court held that fraudulent voting "perpetrated using absentee ballots" demonstrates "that not only is the risk of voter fraud real but that *it could affect the outcome of a close election.*" *Crawford* v. *Marion*

County Election Bd., 553 U.S. 181, 195-96 (2008) (opinion of Stevens, J.) (emphasis added).

As noted by Plaintiff, the Carter-Baker Commission on Federal Election Reform emphasized the same concern. The bipartisan Commission—co-chaired by former President Jimmy Carter and former Secretary of State James A. Baker—determined that "[a]bsentee ballots remain 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) ("Carter-Baker Report").[2] According to the Carter-Baker Commission, "[a]bsentee balloting is vulnerable to abuse in several ways." *Id.* "Blank ballots mailed to the wrong address or to large residential buildings might be intercepted." *Id.* "Citizens who vote at home, at nursing homes, at the workplace, or in church are more susceptible to pressure, overt and subtle, or to intimidation." *Id.* "Vote buying schemes are far more difficult to detect when citizens vote by mail." *Id.*

Thus, the Commission noted that "absentee balloting in other states has been a major source of fraud." *Id.* at 35. It emphasized that voting by mail "increases the risk of fraud." *Id.* And the Commission recommended that "States ... need to do more to prevent ... absentee ballot fraud." *Id.* at v.

The Commission specifically recommended that States should implement and reinforce safeguards to prevent fraud in voting by mail. The Commission recommended that "States should make sure that absentee ballots received by election officials before

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[2] *Available at* https://www.legislationline.org/download/id/1472/file/-3b50795b2d0374cbef5c29766256.pdf.

Election Day are kept secure until they are opened and counted." *Id.* at 46. It also recommended that States "prohibit[] 'third-party' organizations, candidates, and political party activists from handling absentee ballots." *Id.* And the Commission highlighted that a particular state "appear[ed] to have avoided significant fraud in its vote-by-mail elections by introducing *safeguards to protect ballot integrity, including signature verification.*" *Id.* at 35 (emphasis added). The Commission concluded that "[v]ote by mail is ... likely to increase the risks of fraud and contested elections ... where the safeguards for ballot integrity are weaker." *Id.*

The most recent edition of the U.S. Department of Justice's Manual on *Federal Prosecution of Election Offenses*, published by its Public Integrity Section, highlights the very same concerns about fraud in voting by mail. U.S. Dep't of Justice, *Federal Prosecution of Election Offenses* (8th ed. Dec. 2017), at 28-29 ("DOJ Manual").[3] The Manual states: "Absentee ballots are particularly susceptible to fraudulent abuse because, by definition, they are marked and cast outside the presence of election officials and the structured environment of a polling place." *Id.* The Manual reports that "the more common ways" that election-fraud "crimes are committed include ... [o]btaining and marking absentee ballots without the active input of the voters involved." *Id.* at 28. And the Manual notes that "[a]bsentee ballot frauds" committed both with and without the voter's participation are "common." *Id.* at 29.

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[3] *Available at* https://www.justice.gov/criminal/file/1029066/download.

Similarly, the U.S. Government Accountability Office concluded that many crimes of election fraud likely go undetected. In 2014, discussing election fraud, the GAO reported that "crimes of fraud, in particular, are difficult to detect, as those involved are engaged in intentional deception." GAO-14-634, *Elections: Issues Related to State Voter Identification Laws* 62-63 (U.S. Gov't Accountability Office Sept. 2014).[4]

Despite the difficulties of detecting fraud schemes, recent experience contains many well-documented examples of absentee ballot fraud. For example, the News21 database, which was compiled to *refute* arguments that voter fraud is prevalent, identified 491 cases of absentee ballot over the 12-year period from 2000 to 2012—approximately 41 cases per year. *See* News21, *Election Fraud in America*.[5] This database reports that "Absentee Ballot Fraud" was "[t]he most prevalent fraud" in America, comprising "24 percent (491 cases)" of all cases reported in the public records surveyed. *Id.* Moreover, the database indicates that this number undercounts the total incidence of reported cases of absentee ballot fraud, because it was based on public-record requests to state and local government entities, many of which did not respond. *Id.*

Likewise, the Heritage Foundation's online database of election-fraud cases—which includes only a "sampling" of cases that resulted in an *adjudication*

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[4] *Available at* https://www.gao.gov/assets/670/665966.pdf.

[5] *Available at* https://votingrights.news21.com/interactive/election-fraud-database/&xid=17259,15700023,15700124,15700149,15700186,15700191,15700201,15700237,15700242

of fraud, such as a criminal conviction or civil penalty—identified 207 cases of proven "fraudulent use of absentee ballots" in the United States. The Heritage Foundation, *Election Fraud Cases*.[6] Again, this database undercounts the incidence of cases of election fraud: "The Heritage Foundation's Election Fraud Database presents a sampling of recent proven instances of election fraud from across the country. This database is not an exhaustive or comprehensive list." *Id.*

The public record abounds with recent examples of such fraudulent absentee-ballot schemes. For example, in November 2019, the mayor of Berkeley, Missouri was indicted on five felony counts of absentee ballot fraud for changing votes on absentee ballots to help him and his political allies to get elected. Brian Heffernan, *Berkeley Mayor Hoskins Charged with 5 Felony Counts of Election Fraud*, ST. LOUIS PUBLIC RADIO (Nov. 21, 2019).[7] Mayor Hoskins' scheme included "going to the home of elderly ... residents" to harvest absentee ballots, "filling out absentee ballot applications for voters and having his campaign workers do the same," and "altering absentee ballots" after he had procured them from voters. *Id.* Again, in 2016, a state House race in Missouri was overturned amid allegations of widespread absentee-ballot fraud that had occurred across multiple election cycles in the same community. Sarah Fenske, *FBI, Secretary of State*

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[6] *Available at* https://www.heritage.org/voterfraud/search?combine=&state=All&year=&case_type=All&fraud_type=24489&page=12.

[7] *Available at* https://news.stlpublicradio.org/post/berkeley-mayor-hoskins-charged-5-felony-counts-election-fraud#stream/0

Asking Questions About St. Louis Statehouse Race, RIVERFRONT TIMES (Aug. 16, 2016).[8] One candidate stated that it was widely known in the community that the incumbent ran an "absentee game" that resulted in the absentee vote tipping the outcome in her favor in multiple close elections. *Id.*

Other States have similar experiences. In 2018, a federal Congressional race was overturned in North Carolina, and eight political operatives were indicted for fraud, in an absentee-ballot scheme that sufficed to change the outcome of the election. Richard Gonzales, *North Carolina GOP Operative Faces New Felony Charges That Allege Ballot Fraud*, NPR.ORG, (July 30, 2019).[9] The indicted operatives "had improperly collected and possibly tampered with ballots," and were charged with "improperly mailing in absentee ballots for someone who had not mailed it themselves." *Id.*

In the North Carolina case, the lead investigator testified that the investigation was "a continuous case" over two election cycles, and that the scheme involved collecting absentee ballots from voters, altering the absentee ballots, and forging witness signatures on the ballots. *See In re: Investigation of Irregularities Affecting Counties Within the 9th Congressional District*, North Carolina Board of

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[8] *Available at* https://www.riverfronttimes.com/newsblog/2016/08/16/fbi-secretary-of-state-asking-questions-about-st-louis-statehouse-race.

[9] *Available at* https://www.npr.org/2019/07/30/746800630/north-carolina-gop-operative-faces-new-felony-charges-that-allege-ballot-fraud.

Elections, Evidentiary Hearing, at 2-3.[10] The investigators described it as a "coordinated, unlawful, and substantially resourced absentee ballots scheme." *Id.* at 2. According to the investigators' trial presentation, the investigation involved 142 voter interviews, 30 subject and witness interviews, and subpoenas of documents, financial records, and phone records. *Id.* at 3. The perpetrators collected absentee ballots and falsified ballot witness certifications outside the presence of the voters. *Id.* at 10, 13. The congressional election at issue was decided by margin of less than 1,000 votes. *Id.* at 4. The scheme involved the submission of well over 1,000 fraudulent absentee ballots and request forms. *Id.* at 11. The perpetrators took extensive steps to conceal the fraudulent scheme, which lasted over multiple election cycles before it was detected. *Id.* at 14.

Similarly, in 2016, a politician in the Bronx was indicted and pled guilty to 242 counts of election fraud based on an absentee ballot fraud scheme. Ben Kochman, *Bronx politician pleads guilty in absentee ballot scheme for Assembly election,* NEW YORK DAILY NEWS (Nov. 22, 2016).[11] Despite pleading guilty to 242 felonies involving absentee ballot fraud in an election that was decided by two votes, the defendant received no jail time and vowed to run for office again after a short disqualification period. *Id.*

The increases in mail-in voting due to the COVID-19 pandemic likewise increased opportunities for

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[10] *Available at* https://images.radio.com/wbt/Voter%20ID_%20Website.pdf.

[11] *Available at* http://www.nydailynews.com/new-york/nyc-crime/bronx-pol-pleads-guilty-absentee-ballot-scheme-article-1.2884009.

fraud. For instance, in May 2020, the leader of the New Jersey NAACP called for an election in Paterson, New Jersey to be overturned due to widespread mail-in ballot fraud. *See* Jonathan Dienst et al., *NJ NAACP Leader Calls for Paterson Mail-In Vote to Be Canceled Amid Corruption Claims*, NBC NEW YORK (May 27, 2020).[12] "'Invalidate the election. Let's do it again,' [the NAACP leader] said amid reports more that 20 percent of all ballots were disqualified, some in connection with voter fraud allegations." *Id.*

Hundreds of other reported cases highlight the same concerns about the vulnerability of voting by mail to fraud and abuse. Recently, a Missouri court considered extensive expert testimony reviewing absentee-ballot fraud cases like these. *Findings of Fact, Conclusions of Law, and Final Judgment in Mo. State Conference of the NAACP* v. *State*, No. 20AC-CC00169-01 (Circuit Court of Cole County, Missouri Sept. 24, 2020), *aff'd*, 607 S.W.3d 728 (Mo. banc Oct. 9, 2020) ("*Mo. NAACP*"). The court held that cases of absentee-ballot fraud "have several common features that persist across multiple recent cases: (1) close elections; (2) perpetrators who are candidates, campaign workers, or political consultants, not ordinary voters; (3) common techniques of ballot harvesting; (4) common techniques of signature forging; (5) fraud that persisted across multiple elections before it was detected; (6) massive resources required to investigate and prosecute the fraud; and (7) lenient criminal penalties." *Id.* at 17. Thus, the

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[12] *Available at* https://www.nbcnewyork.com/news/politics/nj-naacp-leader-calls-for-paterson-mail-in-vote-to-be-canceled-amid-fraud-claims/2435162/.

court concluded "that fraud in voting by mail is a recurrent problem, that it is hard to detect and prosecute, that there are strong incentives and weak penalties for doing so, and that it has the capacity to affect the outcome of close elections." *Id.* The court held that "the threat of mail-in ballot fraud is real." *Id.* at 2.

III. The Bill of Complaint Alleges that the Defendant States Unconstitutionally Abolished Critical Safeguards Against Fraud in Voting by Mail.

The Bill of Complaint alleges that non-legislative actors in each Defendant State unconstitutionally abolished or diluted statutory safeguards against fraud enacted by their state Legislatures, in violation of the Presidential Electors Clause. U.S. CONST. art. II, § 1, cl. 4. All the unconstitutional changes to election procedures identified in the Bill of Complaint have two common features: (1) They abrogated statutory safeguards against fraud that responsible observers have long recommended for voting by mail, and (2) they did so in a way that predictably conferred partisan advantage on one candidate in the Presidential election. Such allegations are serious, and they warrant this Court's review.

Abolishing signature verification. First, the proposed Bill of Complaint alleges that non-legislative actors in Pennsylvania, Michigan, and Georgia unilaterally abolished or weakened signature-verification requirements for mailed ballots. It alleges that Pennsylvania's Secretary of State abrogated Pennsylvania's statutory signature-verification requirement for mail-in ballots in a

"friendly" settlement of a lawsuit brought by activists. Bill of Complaint, ¶¶ 44-46. It alleges that Michigan's Secretary of State permitted absentee ballot applications online, with no signature at all, in violation of Michigan statutes, *id.* ¶¶ 85-89; and that election officials in Wayne County, Michigan simply disregarded statutory signature verification requirements, *id.* ¶¶ 92-95. And it alleges that Georgia's Secretary of State unilaterally abrogated Georgia's statute authorizing county registrars to engage in signature verification for absentee ballots in another lawsuit settlement. *Id.* ¶¶ 66-72.

In addition to violating the Electors Clause, these actions, as alleged, contradicted fundamental principles of ballot security. As noted above, the Carter-Baker Report highlighted the importance of "*signature verification*" as a critical "safeguard[] to protect ballot integrity" for ballots cast by mail. Carter-Baker Report, *supra*, at 35 (emphasis added). Without safeguards such as signature verification, the Report stated that "[v]ote by mail is ... likely to increase the risks of fraud and contested elections ... where the safeguards for ballot integrity are weaker." *Id.* The importance of signature verification is hard to overstate, because absentee-ballot fraud schemes commonly involve "common techniques of signature forging," typically by nefarious actors who are unfamiliar with the voter's signature. *Mo. NAACP*, *supra*, at 17. Verifying the voter's signature thus provides a fundamental safeguard against fraud.

Insecure ballot handling. The Bill of Complaint alleges that non-legislative actors changed or abolished statutory rules for the secure handling of absentee and mail-in ballots in Pennsylvania,

Michigan, and Wisconsin. It alleges that election officials in Democratic areas of Pennsylvania violated state statutes by opening and reviewing mail-in ballots that were required to be kept locked and secure until Election Day. Bill of Complaint, ¶¶ 50-51. It alleges that Michigan's Secretary of State, acting in violation of state law, sent 7.7 million unsolicited absentee-ballot applications to Michigan voters, thus "flooding Michigan with millions of absentee ballot applications prior to the 2020 general election." *Id.* ¶¶ 80-84. And it alleges that the Wisconsin Election Commission violated state law by placing hundreds of unmonitored boxes for the submission of absentee and mail-in ballots around the State, concentrated in heavily Democratic areas. *Id.* ¶¶ 107-114.

In addition to violating the Electors Clause, these actions, as alleged, contradicted commonsense ballot-security recommendations. The Department of Justice's Manual on *Federal Prosecution of Election Offenses* notes that vulnerability to mishandling is what makes absentee ballots "particularly susceptible to fraudulent abuse" because "they are marked and cast outside the presence of election officials and the structured environment of a polling place." DOJ Manual, at 28-29. According to the Manual, "[o]btaining and marking absentee ballots without the active input of the voters involved" is one of "the more common ways" that election fraud "crimes are committed." *Id.* at 28. For this reason, the Carter-Baker Commission made recommendations in favor of preventing such insecurity in the handling of ballots. For example, the Commission recommended that "States should make sure that absentee ballots received by election officials before Election Day are

kept secure until they are opened and counted." *Id.* at 46. It also recommended that States "prohibit[] 'third-party' organizations, candidates, and political party activists from handling absentee ballots." *Id.*

Inconsistent Statewide Standards. The Bill of Complaint alleges that the Defendant States provided different standards and treatment for mail-in ballots submitted in different areas of each State, and that this differential treatment uniformly provided a partisan advantage to one side in the Presidential election. It alleges that election officials in Philadelphia and Allegheny County, Pennsylvania, applied different standards to voters in those Democratic strongholds than applied to other voters in Pennsylvania, in violation of state law. Bill of Complaint, ¶¶ 52-54. Similarly, it alleges that Milwaukee, Wisconsin violated state law by authorizing election officials to "correct" disqualifying omissions on ballot envelopes by entering information that the voter should have entered with a red pen, while no similar "correction" process was granted to other voters in that State. *Id.* ¶¶ 123-127. And it alleges that Wayne County, Michigan provided differential treatment of its voters, in violation of state statutes, by simply ignoring statutorily required signature-verification requirements. *Id.* ¶¶ 92-95.

Such differential treatment, as alleged under circumstances raising concerns of partisan bias, contradicts universal recommendations for integrity and public confidence in elections. As this Court stated in *Bush* v. *Gore*, "[t]he idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government." 531 U.S. at 107 (quoting

Moore v. *Ogilvie*, 394 US 814 (1969)). The Carter-Baker Report noted that "inconsistent or incorrect application of electoral procedures may have the effect of discouraging voter participation and may, on occasion, raise questions about bias in the way elections are conducted." Carter-Baker Report, at 49. "Such problems raise public suspicions or may provide grounds for the losing candidate to contest the result in a close election." *Id.*

Excluding Bipartisan Observers. The Bill of Complaint alleges that certain counties in Defendant States excluded bipartisan observers from the ballot-opening and ballot-counting processes. For example, it alleges that election officials in Philadelphia and Allegheny County, Pennsylvania, violated state law by excluding Republican observers from the opening, counting, and recording of absentee ballots in those counties. Bill of Complaint, ¶ 49. And it alleges that election officials in Wayne County, Michigan violated state statutes by systematically excluding poll watchers from the counting and recording of absentee ballots. *Id.* ¶¶ 90-91.

Such actions, as alleged, raise concerns about the integrity of the vote count in those counties. As the Carter-Baker Report emphasized, States should "provide observers with meaningful opportunities to monitor the conduct of the election." Carter-Baker Report, at 47. "To build confidence in the electoral process, it is important that elections be administered in a neutral and professional manner," without the appearance of partisan bias." *Id.* at 49. When observers of one political party are illegally and systematically excluded from observing the vote count, "the appearance of partisan bias" is inevitable.

Id. For counties in Defendant States to exclude Republican observers weakens public confidence in the electoral process and raises grave concerns about the integrity of ballot counting in those counties.

Extending the Deadline to Receive Ballots. The Bill of Complaint alleges that a non-legislative actor in Pennsylvania—its Supreme Court—extended the statutory deadline to receive absentee and mail-in ballots without authorization from the "Legislature thereof," and that it directed that ballots with illegible postmarks or no postmarks at all would be deemed timely if received within the extended deadline. Bill of Complaint, ¶¶ 48, 55. Again, these non-legislative changes raise concerns about election integrity in Pennsylvania. They created a post-election window of time during which nefarious actors could wait and see whether the Presidential election would be close, and whether perpetrating fraud in Pennsylvania would be worthwhile. And they enhanced the opportunities for fraud by mandating that late ballots must be counted even when they are not postmarked or have no legible postmark, and thus there is no evidence they were mailed by Election Day.

These changes created needless vulnerability to actual fraud and undermined public confidence in the election. As the Department of Justice's Manual of *Federal Prosecution of Election Offenses* states, "the conditions most conducive to election fraud are close factional competition within an electoral jurisdiction for an elected position that matters." DOJ Manual, at 2-3. "[E]lection fraud is most likely to occur in electoral jurisdictions where there is close factional competition for an elected position that matters." *Id.* at 27. That statement exactly describes the conditions

in each of the Defendant States in the recent Presidential election.

CONCLUSION

The allegations in the Bill of Complaint raise important constitutional issues under the Electors Clause of Article II, § 1. They also raise serious concerns relating to election integrity and public confidence in elections. These are questions of great public importance that warrant this Court's attention. The Court should grant the Plaintiff's Motion for Leave to File Bill of Complaint.

December 9, 2020

Respectfully submitted,

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John Guard

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To: Erica Geiger
Subject: FW: Texas v. Pennsylvania, et al. - Amicus Brief of Missouri, at al. - Joins requested by 1:00 p.m. Central Tomorrow, 12/9
Attachments: 2020-12-08 - Texas v. Pennsylvania - Amicus Brief of Missouri et al.docx

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Subject: Texas v. Pennsylvania, et al. - Amicus Brief of Missouri, at al. - Joins requested by 1:00 p.m. Central Tomorrow, 12/9

All-

Attached please find a draft multistate amicus brief in support of Texas's motion for leave to file a bill of complaint in the U.S. Supreme Court challenging the administration of the recent Presidential election in Pennsylvania, Michigan, Wisconsin, and Georgia. The brief argues that (1) the separation-of-powers provision of the Electors Clause of Article II, Section 1 is an important structural check on government that safeguards individual liberty; (2) voting by mail presents real concerns for fraud and abuse that require statutory safeguards to protect against such fraud and abuse; and (3) the abrogation of statutory safeguards against fraud in voting by mail by non-legislative actors violates the Electors Clause and undermines public confidence in elections. For your reference, I have also attached Texas's Motion for Leave to File Bill of Complaint and related documents.

With apologies for the short deadline, given the time-sensitivity of this case, we are requesting joins by **1:00 p.m. Central TOMORROW**, 12/9. We are planning to file tomorrow afternoon.

Thanks a lot,

John Sauer

No. 22O155, Original

In the Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

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

Defendants.

On Motion for Leave to File Bill of Complaint

BRIEF OF STATES OF MISSOURI, ____ AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF'S MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

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STATEMENT OF INTEREST OF *AMICI*

"In the context of a Presidential election," state actions "implicate a uniquely important national interest," because "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, 794–95 (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." *Id.* "Every voter" in a federal election "has a right under the Constitution to have his vote fairly counted, without its being distorted by fraudulently cast votes." *Anderson* v. *United States*, 417 U.S. 211, 227 (1974).

Amici curiae are the States of Missouri, _____.[1] *Amici* have several important interests in this case. *First*, the States have a strong interest in safeguarding the separation of powers among state actors in the regulation of Presidential elections. The Electors Clause of Article II, § 1 carefully balances power among state actors, and it assigns a specific function to the "Legislature thereof" in each State. U.S. CONST. art. II, § 1, cl. 4. Our system of federalism relies on separation of powers to preserve liberty at every level of government, and the separation of powers in the Electors Clause is no exception. The States have a strong interest in preserving the proper roles of state legislatures in the administration of federal elections, and thus safeguarding the individual liberty of their citizens.

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[1] This brief is filed under Supreme Court Rule 37.4, and all counsel of record received timely notice of the intent to file this amicus brief under Rule 37.2.

Second, *amici* States have a strong interest in ensuring that the votes of their own citizens are not diluted by the unconstitutional administration of elections in other States. When non-legislative actors in other States encroach on the authority of the "Legislature thereof" in that State to administer a Presidential election, they threaten the liberty, not just of their own citizens, but of every citizen of the United States who casts a lawful ballot in that election—including the citizens of *amici* States.

Third, for similar reasons, *amici* States have a strong interest in safeguarding against fraud in voting by mail during Presidential elections. "Every voter" in a federal election, "has a right under the Constitution to have his vote fairly counted, without its being distorted by fraudulently cast votes." *Anderson*, 417 U.S. at 227. Plaintiff's Bill of Complaint alleges that non-legislative actors in the Defendant States stripped away important safeguards against fraud in voting by mail that had been enacted by the Legislature in each State. *Amici* States share a vital interest in protecting the integrity of the truly national election for President and Vice President of the United States.

SUMMARY OF ARGUMENT

The Bill of Complaint raises constitutional questions of great public importance that warrant this Court's review. First, like every similar provision in the Constitution, the separation-of-powers provision of the Electors Clause provides an important structural check on government designed to protect individual liberty. By allocating authority over Presidential electors to the "Legislature thereof" in

each State, the Clause separates powers both vertically and horizontally, and it confers authority on the branch of state government most responsive to the democratic will. Encroachments on the authority of state Legislatures by other state actors violate the separation of powers and threaten individual liberty.

The unconstitutional encroachments on the authority of state Legislatures in this case raise particularly grave concerns. For decades, responsible observers have cautioned about the risks of fraud and abuse in voting by mail, and they have urged the adoption of statutory safeguards to prevent such fraud and abuse. In the numerous cases identified in the Bill of Complaint, non-legislative actors in each Defendant State repeatedly stripped away statutory safeguards that the "Legislature thereof" had enacted to protect against fraud in voting by mail. These changes removed protections that responsible actors had recommended for decades to guard against fraud and abuse in voting by mail, and they did so in a manner that uniformly and predictably benefited one candidate in the recent Presidential election. The allegations in the Bill of Complaint raise grave questions about election integrity and public confidence in the administration of Presidential elections. This Court should grant Plaintiff leave to file the Bill of Complaint.

ARGUMENT

The Electors Clause provides that each State "shall appoint" its Presidential electors "in such Manner as the *Legislature thereof* may direct." U.S. CONST. art. II, § 1, cl. 4 (emphasis added). Moreover, "[o]ur constitutional system of representative government only works when the worth of honest

ballots is not diluted by invalid ballots procured by corruption." U.S. Dep't of Justice, *Federal Prosecution of Election Offenses*, at 1 (8th ed. Dec. 2017). "When the election process is corrupted, democracy is jeopardized." *Id.* The proposed Bill of Complaint raises serious concerns about constitutionality and ballot security of election procedures in the Defendant States. Given the importance of public confidence in American elections, these allegations raise questions of great public importance that warrant this Court's expedited review.

I. The Separation-of-Powers Provision of the Electors Clause Is a Structural Check on Government That Safeguards Liberty.

Article II 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. 4 (emphasis added); *see also id.* art. I, § 4, cl. 2 (providing that, in each State, the "Legislature thereof" shall establish "[t]he Times, Places and Manner of holding Elections for Senators and Representatives").

Thus, "in the case of a law enacted by a state legislature applicable not only to elections to state offices, but also to the selection of Presidential electors, the legislature is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under Art. II, § 1, cl. 2, of the United States Constitution." *Bush* v. *Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70, 76 (2000). "[T]he state legislature's power to select the manner for appointing electors is plenary." *Bush* v. *Gore*, 531 U.S. 98, 104 (2000).

Here, as set forth in the Bill of Complaint, non-legislative actors in each Defendant State have purported to "alter[] an important statutory provision enacted by the [State's] Legislature pursuant to its authority under the Constitution of the United States to make rules governing the conduct of elections for federal office." *Republican Party of Pennsylvania* v. *Boockvar*, No. 20-542, 2020 WL 6304626, at *1 (U.S. Oct. 28, 2020) (Statement of Alito, J.). *See* Bill of Complaint, ¶¶ 41-127. In doing so, these non-legislative actors encroached upon the "plenary" authority of those States' respective legislatures over the conduct of the Presidential election in each State. *Bush* v. *Gore*, 531 U.S. at 104. This encroachment on the authority of each State's Legislature violated the separation of powers set forth in the Electors Clause. "[I]n the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest. For the President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation." *Anderson*, 460 U.S. at 794–795.

In every other context, this Court recognizes that the Constitution's separation-of-powers provisions, which allocate authority to specific governmental actors to the exclusion of others, are designed to preserve liberty. "It is the proud boast of our democracy that we have 'a government of laws, and not of men.'" *Morrison* v. *Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting). "The Framers of the Federal Constitution . . . viewed the principle of separation of powers as the absolutely central guarantee of a just Government." *Id.* "Without a secure structure of separated powers, our Bill of Rights would be worthless, as are the bills of rights of

many nations of the world that have adopted, or even improved upon, the mere words of ours." *Id.* "The purpose of the separation and equilibration of powers in general . . . was not merely to assure effective government but to preserve individual freedom." *Id.* at 727.

This principle of preserving liberty applies both to the horizontal separation of powers among the branches of government, and the vertical separation of powers between the federal government and the States. "The federal system rests on what might at first seem a counterintuitive insight, that 'freedom is enhanced by the creation of two governments, not one.'" *Bond* v. *United States*, 564 U.S. 211, 220–21 (2011) (quoting *Alden* v. *Maine*, 527 U.S. 706, 758 (1999)). "[F]ederalism secures to citizens the liberties that derive from the diffusion of sovereign power." *Bond*, 564 U.S. at 221 (2011) (quoting *New York* v. *United States*, 505 U.S. 144, 181 (1992)). "Federalism also protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions." *Id.* Moreover, "federalism enhances the opportunity of all citizens to participate in representative government." *FERC* v. *Mississippi*, 456 U.S. 742, 789 (1982) (O'Connor, J., concurring in part and dissenting in part). "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Gregory* v. *Ashcroft*, 501 U.S. 452, 458 (1991).

The explicit grant of authority to state *Legislatures* in the Electors Clause of Article II, §1 effects both a horizontal and a vertical separation of powers. The Clause allocates 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. 4.

It is no accident that the Constitution allocates such authority to state Legislatures, rather than executive officers such as Secretaries of State, or judicial officers such as state Supreme Courts. The Constitutional Convention's delegates frequently recognized that the Legislature is the branch most responsive to the People and most democratically accountable. *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 ratification documents expressing that state legislatures were most likely to be in sympathy with the interests of the people); Federal Farmer, No. 12 (1788), *reprinted in* 2 THE FOUNDERS' CONSTITUTION (Philip B. Kurland & Ralph Lerner eds., 1987) (arguing that electoral regulations "ought to be left to the state legislatures, they coming far nearest to the people themselves"); THE FEDERALIST NO. 57, at 350 (C. Rossiter, ed. 2003) (Madison, J.) (stating that the "House of Representatives is so constituted as to support in its members an habitual recollection of their dependence on the people"); *id.* (stating that the "vigilant and manly spirit that actuates the people of America" is greatest restraint on the House of Representatives).

Democratic accountability in the method of selecting the President of the United States is a powerful bulwark safeguarding individual liberty. By identifying the "Legislature thereof" in each State as the regulator of elections for federal officers, the Electors Clause of Article II, § 1 prohibits the very arrogation of power over Presidential elections by non-legislative officials that the Defendant States perpetrated in this case. By violating the Constitution's separation of powers, these non-legislative actors undermined the liberty of all Americans, including the voters in *amici* States.

II. Stripping Away Safeguards From Voting by Mail Exacerbates the Risks of Fraud.

By stripping away critical safeguards against ballot fraud in voting by mail, non-legislative actors in the Defendant States inflicted another grave injury on the conduct of the recent election: They enhanced the risks of fraudulent voting by mail without authority. An impressive body of public evidence demonstrates that voting by mail presents unique opportunities for fraud and abuse, and that statutory safeguards are critical to reduce such risks of fraud.

For decades prior to 2020, responsible observers emphasized the risks of fraud in voting by mail, and the importance of imposing safeguards on the process of voting by mail to allay such risks. For example, in *Crawford* v. *Marion County Election Board*, this Court held that fraudulent voting "perpetrated using absentee ballots" demonstrates "that not only is the risk of voter fraud real but that *it could affect the outcome of a close election*." *Crawford* v. *Marion County Election Bd.*, 553 U.S. 181, 195-96 (2008) (opinion of Stevens, J.) (emphasis added).

As noted by Plaintiff, the Carter-Baker Commission on Federal Election Reform emphasized the same concern. The bipartisan Commission—co-chaired by former President Jimmy Carter and former Secretary of State James A. Baker—determined that "[a]bsentee ballots remain 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) ("Carter-Baker Report").[2] According to the Carter-Baker Commission, "[a]bsentee balloting is vulnerable to abuse in several ways." *Id.* "Blank ballots mailed to the wrong address or to large residential buildings might bet intercepted." *Id.* "Citizens who vote at home, at nursing homes, at the workplace, or in church are more susceptible to pressure, overt and subtle, or to intimidation." *Id.* "Vote buying schemes are far more difficult to detect when citizens vote by mail." *Id.*

Thus, the Commission noted that "absentee balloting in other states has been a major source of fraud." *Id.* at 35. It emphasized that voting by mail "increases the risk of fraud." *Id.* And the Commission recommended that "States ... need to do more to prevent ... absentee ballot fraud." *Id.* at v.

The Commission specifically recommended that States should implement and reinforce safeguards to prevent fraud in voting by mail. The Commission recommended that "States should make sure that absentee ballots received by election officials before Election Day are kept secure until they are opened and counted." *Id.* at 46. It also recommended that States "prohibit[] 'third-party' organizations,

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[2] *Available at* https://www.legislationline.org/download/id/1472/file/-3b50795b2d0374cbef5c29766256.pdf.

candidates, and political party activists from handling absentee ballots." *Id.* And the Commission highlighted that a particular state "appear[ed] to have avoided significant fraud in its vote-by-mail elections by introducing safeguards to protect ballot integrity, *including signature verification*." *Id.* at 35 (emphasis added). The Commission concluded that "[v]ote by mail is ... likely to increase the risks of fraud and contested elections ... where the safeguards for ballot integrity are weaker." *Id.*

The most recent edition of the U.S. Department of Justice's Manual on *Federal Prosecution of Election Offenses*, published by its Public Integrity Section, highlights the very same concerns about fraud in voting by mail. U.S. Dep't of Justice, *Federal Prosecution of Election Offenses* (8th ed. Dec. 2017), at 28-29 ("DOJ Manual").[3] The Manual states: "Absentee ballots are particularly susceptible to fraudulent abuse because, by definition, they are marked and cast outside the presence of election officials and the structured environment of a polling place." *Id.* The Manual reports that "the more common ways" that election-fraud "crimes are committed include ... [o]btaining and marking absentee ballots without the active input of the voters involved." *Id.* at 28. And the Manual notes that "[a]bsentee ballot frauds" committed both with and without the voter's participation are "common." *Id.* at 29.

Similarly, the U.S. Government Accountability Office concluded that many crimes of election fraud likely go undetected. In 2014, discussing election fraud, the GAO reported that "crimes of fraud, in

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[3] *Available at* https://www.justice.gov/criminal/file/1029066/download.

particular, are difficult to detect, as those involved are engaged in intentional deception." GAO-14-634, *Elections: Issues Related to State Voter Identification Laws* 62-63 (U.S. Gov't Accountability Office Sept. 2014).[4]

Despite the difficulties of detecting fraud schemes, recent experience contains many well-documented examples of absentee ballot fraud. For example, the News21 database, which was compiled to *refute* arguments that voter fraud is prevalent, identified 491 cases of absentee ballot over the 12-year period from 2000 to 2012—approximately 41 cases per year. *See* News21, *Election Fraud in America*.[5] This database reports that "Absentee Ballot Fraud" was "[t]he most prevalent fraud" in America, comprising "24 percent (491 cases)" of all cases reported in the public records surveyed. *Id.* Moreover, the database indicates that this number undercounts the total incidence of reported cases of absentee ballot fraud, because it was based on public-record requests to state and local government entities, many of which did not respond. *Id.*

Likewise, the Heritage Foundation's online database of election-fraud cases—which includes only a "sampling" of cases that resulted in an *adjudication* of fraud, such as a criminal conviction or civil penalty—identified 207 cases of proven "fraudulent use of absentee ballots" in the United States. The

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[4] *Available at* https://www.gao.gov/assets/670/665966.pdf.

[5] *Available at* https://votingrights.news21.com/interactive/election-fraud-database/&xid=17259,15700023,15700124,15700149,15700186,15700191,15700201,15700237,15700242

Heritage Foundation, *Election Fraud Cases*.[6] Again, this database undercounts the incidence of cases of election fraud: "The Heritage Foundation's Election Fraud Database presents a sampling of recent proven instances of election fraud from across the country. This database is not an exhaustive or comprehensive list." *Id.*

The public record abounds with recent examples of such fraudulent absentee-ballot schemes. For example, in November 2019, the mayor of Berkeley, Missouri was indicted on five felony counts of absentee ballot fraud for changing votes on absentee ballots to help him and his political allies to get elected. Brian Heffernan, *Berkeley Mayor Hoskins Charged with 5 Felony Counts of Election Fraud*, ST. LOUIS PUBLIC RADIO (Nov. 21, 2019).[7] Mayor Hoskins' scheme included "going to the home of elderly ... residents" to harvest absentee ballots, "filling out absentee ballot applications for voters and having his campaign workers do the same," and "altering absentee ballots" after he had procured them from voters. *Id.* Again, in 2016, a state House race in Missouri was overturned amid allegations of widespread absentee-ballot fraud that had occurred across multiple election cycles in the same community. Sarah Fenske, *FBI, Secretary of State Asking Questions About St. Louis Statehouse Race*,

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[6] *Available at* https://www.heritage.org/voterfraud/search?combine=&state=All&year=&case_type=All&fraud_type=24489&page=12.

[7] *Available at* https://news.stlpublicradio.org/post/berkeley-mayor-hoskins-charged-5-felony-counts-election-fraud#stream/0

RIVERFRONT TIMES (Aug. 16, 2016).[8] One candidate stated that it was widely known in the community that the incumbent ran an "absentee game" that resulted in the mail-in vote tipping the outcome in her favor in multiple close elections. *Id.*

Other States have similar experiences. In 2018, a federal Congressional race was overturned in North Carolina, and eight political operatives were indicted for fraud, in an absentee-ballot fraud scheme that sufficed to change the outcome of the election. Richard Gonzales, *North Carolina GOP Operative Faces New Felony Charges That Allege Ballot Fraud*, NPR.ORG, (July 30, 2019).[9] The indicted operatives "had improperly collected and possibly tampered with ballots," and were charged with "improperly mailing in absentee ballots for someone who had not mailed it themselves." *Id.*

In the North Carolina case, the lead investigator testified that the investigation was "a continuous case" over two election cycles, and that the scheme involved collecting absentee ballots from voters, altering the absentee ballots, and forging witness signatures on the ballots. *See In re: Investigation of Irregularities Affecting Counties Within the 9th Congressional District*, North Carolina Board of Elections, Evidentiary Hearing, at 2-3.[10] The investigators described it as a "coordinated, unlawful,

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[8] *Available at* https://www.riverfronttimes.com/newsblog/2016/08/16/fbi-secretary-of-state-asking-questions-about-st-louis-statehouse-race.

[9] *Available at* https://www.npr.org/2019/07/30/746800630/north-carolina-gop-operative-faces-new-felony-charges-that-allege-ballot-fraud.

[10] *Available at* https://images.radio.com/wbt/Voter%20ID_%20Website.pdf.

and substantially resourced absentee ballots scheme." *Id.* at 2. According to the investigators' trial presentation, the investigation involved 142 voter interviews, 30 subject and witness interviews, and subpoenas of documents, financial records, and phone records. *Id.* at 3. The perpetrators collected absentee ballots and falsified ballot witness certifications outside the presence of the voters. *Id.* at 10, 13. The congressional election at issue was decided by margin of less than 1,000 votes. *Id.* at 4. The scheme involved the submission of well over 1,000 fraudulent absentee ballots and request forms. *Id.* at 11. The perpetrators took extensive steps to conceal the fraudulent scheme, which lasted over multiple election cycles before it was detected. *Id.* at 14.

Similarly, in 2016, a politician in the Bronx was indicted and pled guilty to 242 counts of election fraud based on an absentee ballot fraud scheme. Ben Kochman, *Bronx politician pleads guilty in absentee ballot scheme for Assembly election,* NEW YORK DAILY NEWS (Nov. 22, 2016).[11] Despite pleading guilty to 242 felonies involving absentee ballot fraud in an election that was decided by two votes, the defendant received no jail time and vowed to run for office again after a short disqualification period. *Id.*

The increases in mail-in voting due to the COVID-19 pandemic likewise increased opportunities for fraud. For instance, in May 2020, the leader of the New Jersey NAACP called for an election in Paterson, New Jersey to be overturned due to widespread mail-in ballot fraud. *See* Jonathan Dienst et al., *NJ NAACP*

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[11] *Available at* http://www.nydailynews.com/new-york/nyc-crime/bronx-pol-pleads-guilty-absentee-ballot-scheme-article-1.2884009.

Leader Calls for Paterson Mail-In Vote to Be Canceled Amid Corruption Claims, NBC NEW YORK (May 27, 2020).[12] "'Invalidate the election. Let's do it again,' [the NAACP leader] said amid reports more that 20 percent of all ballots were disqualified, some in connection with voter fraud allegations." *Id.*

Hundreds of other reported cases highlight the same concerns about the vulnerability of voting by mail to fraud and abuse. Recently, a Missouri court considered extensive expert testimony reviewing absentee-ballot fraud cases like these. *Findings of Fact, Conclusions of Law, and Final Judgment in Mo. State Conference of the NAACP* v. *State*, No. 20AC-CC00169-01 (Circuit Court of Cole County, Missouri Sept. 24, 2020), *aff'd*, 607 S.W.3d 728 (Mo. banc Oct. 9, 2020) ("*Mo. NAACP*"). The court held that cases of absentee-ballot fraud "have several common features that persist across multiple recent cases: (1) close elections; (2) perpetrators who are candidates, campaign workers, or political consultants, not ordinary voters; (3) common techniques of ballot harvesting, (4) common techniques of signature forging, (5) fraud that persisted across multiple elections before it was detected, (6) massive resources required to investigate and prosecute the fraud, and (7) lenient criminal penalties." *Id.* at 17. Thus, "fraud in voting by mail is a recurrent problem, that it is hard to detect and prosecute, that there are strong incentives and weak penalties for doing so, and that it has the capacity to affect the outcome of close

[12] *Available at* https://www.nbcnewyork.com/news/politics/nj-naacp-leader-calls-for-paterson-mail-in-vote-to-be-canceled-amid-fraud-claims/2435162/.

elections." *Id.* The court concluded that "the threat of mail-in ballot fraud is real." *Id.* at 2.

III. The Bill of Complaint Alleges that the Defendant States Abolished Critical Safeguards Against Fraud in Voting by Mail.

The Bill of Complaint alleges that non-legislative actors in each Defendant State unconstitutionally abolished or diluted statutory safeguards against fraud enacted by the state legislature, in violation of the Presidential Electors Clause. U.S. CONST. art. II, § 1, cl. 4. All the unconstitutional changes to election procedures identified in the Bill of Complaint have two common features: (1) They abrogated statutory safeguards against fraud that responsible observers have long recommended for voting by mail, and (2) they did so in a way that predictably conferred partisan advantage on one candidate in the Presidential election. Such allegations are serious, and they warrant this Court's review.

Abolishing signature verification. First, the proposed Bill of Complaint alleges that non-legislative actors in Pennsylvania, Georgia, and Michigan unilaterally abolished or undermined signature-verification requirements for mailed ballots. It alleges that Pennsylvania's Secretary of State abrogated Pennsylvania's statutory signature-verification requirement for mail-in ballots in a "friendly" settlement of a lawsuit brought by activists. Bill of Complaint, ¶¶ 44-46. It alleges that Georgia's Secretary of State unilaterally abrogated Georgia's statute authorizing county registrars to engage in signature verification for absentee ballots in a similar settlement. *Id.* ¶¶ 66-72. It alleges that Michigan's Secretary of State permitted absentee ballot

applications online, with no signature at all, in violation of Michigan statutes, *id.* ¶¶ 85-89; and that election officials in Wayne County, Michigan simply disregarded statutory signature verification requirements, *id.* ¶¶ 92-95.

In addition to violating the Electors Clause, these actions contradicted fundamental principles of ballot security. As noted above, the Carter-Baker Report highlighted the importance of "*signature verification*" as a critical "safeguard[] to protect ballot integrity" for ballots cast by mail. Carter-Baker Report, *supra*, at 35 (emphasis added). Without safeguards such as signature verification, the Report stated that "[v]ote by mail is ... likely to increase the risks of fraud and contested elections ... where the safeguards for ballot integrity are weaker." *Id.* The importance of signature verification is hard to overstate, because absentee-ballot fraud schemes commonly involve "common techniques of signature forging," typically by nefarious actors who are unfamiliar with the voter's signature. *Mo. NAACP*, *supra*, at 17. Verifying the voter's signature by comparison to the signature on the voter rolls thus provides the most critical safeguard against fraud.

Insecure ballot handling. The Bill of Complaint alleges that non-legislative actors changed or abolished statutory rules for the secure handling of absentee and mail-in ballots in Pennsylvania, Michigan, and Wisconsin. It alleges that election officials in Democratic areas of Pennsylvania violated state statutes by opening and reviewing mail-in ballots that were required to be kept locked and secure until Election Day. Bill of Complaint, ¶¶ 50-51. It alleges that Michigan's Secretary of State, acting in violation of state law, sent 7.7 million unsolicited

absentee-ballot applications to Michigan voters, thus "flooding Michigan with millions of absentee ballot applications prior to the 2020 general election." *Id.* ¶¶ 80-84. And it alleges that the Wisconsin Election Commission violated state law by placing hundreds of unmonitored boxes for the submission of absentee and mail-in ballots around the State, concentrated in heavily Democratic areas. *Id.* ¶¶ 107-114.

In addition to violating the Electors Clause, these actions contradicted commonsense ballot-security recommendations. The Department of Justice's Manual on *Federal Prosecution of Election Offenses* notes that vulnerability to mishandling is what makes absentee ballots "particularly susceptible to fraudulent abuse" because "they are marked and cast outside the presence of election officials and the structured environment of a polling place." DOJ Manual, at 28-29. According to the Manual, "[o]btaining and marking absentee ballots without the active input of the voters involved" is one of "the more common ways" that election fraud "crimes are committed." *Id.* at 28. For this reason, the Carter-Baker Commission made a series of recommendations in favor of preventing such insecurity in the handling of ballots. For example, the Commission recommended that "States should make sure that absentee ballots received by election officials before Election Day are kept secure until they are opened and counted." *Id.* at 46. It also recommended that States "prohibit[] 'third-party' organizations, candidates, and political party activists from handling absentee ballots." *Id.*

Inconsistent Statewide Standards. The Bill of Complaint alleges that the Defendant States provided different standards and treatment for mail-

in ballots submitted in different areas of each State, and that this differential treatment uniformly provided a partisan advantage to one side in the Presidential election. It alleges that election officials in Philadelphia and Allegheny County, Pennsylvania, applied different standards to voters in those Democratic strongholds than applied to other voters in Pennsylvania, in violation of state law. Bill of Complaint, ¶¶ 52-54. Similarly, it alleges that Milwaukee, Wisconsin violated state law by authorizing election officials to "correct" disqualifying omissions on ballot envelopes by entering information that the voter should have entered with a red pen, while no similar "correction" process was granted to other voters in that State. *Id.* ¶¶ 123-127. And it alleges that Wayne County, Michigan provided favorable treatment to its voters, in violation of state statutes, by simply ignoring statutorily required signature-verification requirements. *Id.* ¶¶ 92-95.

Again, such differential treatment, under circumstances raising concerns of partisan bias, contradicts universal recommendations for integrity and public confidence in elections. As this Court stated in *Bush* v. *Gore*, "[t]he idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government." 531 U.S. at 107 (quoting *Moore* v. *Ogilvie*, 394 US 814 (1969)). The Carter-Baker Report noted that "inconsistent or incorrect application of electoral procedures may have the effect of discouraging voter participation and may, on occasion, raise questions about bias in the way elections are conducted." Carter-Baker Report, at 49. "Such problems raise public suspicions or may provide

grounds for the losing candidate to contest the result in a close election." *Id.*

Excluding Bipartisan Observers. The Bill of Complaint alleges that certain counties in Defendant States excluded bipartisan observers from the ballot-opening and ballot-counting processes. For example, it alleges that election officials in Philadelphia and Allegheny County, Pennsylvania, violated state law by excluding Republican observers from the opening, counting, and recording of absentee ballots in those counties. Bill of Complaint, ¶ 49. And it alleges that election officials in Wayne County, Michigan violated state statutes by systematically excluding poll watchers from the counting and recording of absentee ballots. *Id.* ¶¶ 90-91.

Such actions, as alleged, raise grave concerns about the integrity of the vote count in those counties. As the Carter-Baker Report emphasized, States should "provide observers with meaningful opportunities to monitor the conduct of the election." Carter-Baker Report, at 47. "To build confidence in the electoral process, it is important that elections be administered in a neutral and professional manner," without the appearance of partisan bias." *Id.* at 49. When observers of one political party are illegally and systematically excluded from observing the vote count, "the appearance of partisan bias" is inevitable. *Id.* For counties in Defendant States to exclude Republican observers weakens public confidence in the electoral process and raises grave concerns about the integrity of ballot counting in those counties.

Extending the deadline to receive ballots. The Bill of Complaint alleges that a non-legislative actor in Pennsylvania—its Supreme Court—extended the statutory deadline to receive absentee and mail-in

ballots without authorization of the "Legislature thereof," and directed that ballots with illegible postmarks or no postmarks at all would be deemed timely if received within the extended deadline. Bill of Complaint, ¶¶ 48, 55. Again, these non-legislative changes raise grave concerns about election integrity in Pennsylvania. First, they created a post-election window of time during which nefarious actors could wait and see whether the Presidential election would be close, and whether perpetrating fraud in Pennsylvania would be worthwhile. Second, they enhanced the opportunities for fraud by mandating that late ballots must be counted even when they are not postmarked or have no legible postmark, and thus there is no evidence they were mailed by Election Day.

These changes created needless vulnerability to actual fraud and undermined public confidence in a Presidential election. As the Department of Justice's Manual of *Federal Prosecution of Election Offenses* states, "the conditions most conducive to election fraud are close factional competition within an electoral jurisdiction for an elected position that matters." DOJ Manual, at 2-3. "[E]lection fraud is most likely to occur in electoral jurisdictions where there is close factional competition for an elected position that matters." *Id.* at 27. That statement exactly describes the conditions in each of the Defendant States in the recent Presidential election.

CONCLUSION

"Fraud in any degree and in any circumstance is subversive to the electoral process." Carter-Baker Report, at 45. The allegations in the Bill of Complaint raise serious constitutional issues under the Electors

Clause of Article II, § 1. In addition, the long series allegations of unconstitutional actions that stripped away safeguards against fraud in voting by mail raise concerns about the integrity of the recent election and the public confidence in its outcome. These are questions of great public importance that warrant this Court's attention. The Court should grant the Plaintiff's Motion for Leave to File Bill of Complaint.

December 9, 2020

Respectfully submitted,

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[To be inserted]

John Guard

From: John Guard
Sent: Wednesday, December 9, 2020 9:50 AM
To: Amit Agarwal
Subject: Re: sorry I missed your call ...

The call needs to happen ASAP

Get Outlook for iOS

From: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Sent: Wednesday, December 9, 2020 9:23:46 AM
To: John Guard <John.Guard@myfloridalegal.com>
Subject: sorry I missed your call ...

... was on phone with AG. Please call my cell when you have a minute.

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2000 WL 1818338 (U.S.) (Appellate Brief)
United States Supreme Court Amicus Brief.

George W. BUSH, et al., Petitioners,

v.

Albert GORE Jr., et al., Respondents.

No. 00-949.
December 10, 2000.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF OF AMICUS CURIAE BUTTERWORTH IN SUPPORT OF RESPONDENT GORE ET AL.

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*1 INTEREST OF THE AMICUS

The Florida Attorney General is the state's chief legal officer. Art. IV, sec. 4(c), Florida Constitution. The Attorney General has broad common law powers to act on the state's behalf. *State of Florida ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266 (5th Cir. 1976).

As the state's chief legal officer, the Attorney General has a fundamental interest in the constitutional operation of Florida government and in maintaining the proper relations between its branches, as established in the state constitution. This proceeding challenges, inter alia, the authority of the State's highest court to resolve disputes involving the selection of presidential electors. In so doing, the proceeding raises important issues of federalism and the authority of Florida to resolves state-law disputes in the manner the State deems appropriate. The Attorney General should be heard on these important issues.

SUMMARY OF THE ARGUMENT

When the Florida Legislature enacted a method for selecting presidential electors by general law applicable to all state elections, it understood that elections contests would be subject to judicial review. Had the Legislature wished to exempt presidential elections contests from judicial review it could have done so. But it did not.

Florida law provides constitutionally adequate procedures for determining voter intent.

*2 ARGUMENT

The constitutional sovereignty of the states to judge their own laws, and the interplay of state statutes and state constitutions, have been jeopardized by positions asserted by the petitioners solely to gain an advantage of the moment. But such transitory individual interests must give way to fundamental constitutional principles of federalism and the rights of states to govern themselves.

U.S. Const., Art. II, sec. 1, cl. 2 confers a right upon each "State" to appoint presidential electors in such manner as the Legislature thereof may direct." The petitioners assert that, because of U.S. Const., Art. II, sec. 1, cl 2, the state judiciary has no jurisdiction to resolve conflicts in state elections laws pertaining to the appointment of presidential electors. Petitioners' propose a dangerous precedent which is contrary to the Founders' intent, this Court's prior holdings and the constitutionally protected concept of state sovereignty.

I. THE FLORIDA LEGISLATURE INTENDED THAT THE STATE SUPREME COURT WOULD HAVE JURISDICTION TO REVIEW STATE STATUTES REGARDING THE MANNER OF APPOINTMENT OF PRESIDENTIAL ELECTORS. FLORIDA STATUTES AUTHORIZE THE FLORIDA SUPREME COURT TO INTERPRET AND APPLY FLORIDA ELECTIONS LAWS.

The majority opinion of the Florida Supreme Court took great care to respond to this Court's earlier admonishment to reveal the precise grounds for its holding. The challenged opinion contains a detailed analysis of the Florida statutory and Florida case law upon which it is based - all legal precedents in existence *prior* to November 7, 2000. Dec. 8 Florida ***3** Opinion, p. 6. The opinion demonstrates the existence of longstanding statutes and case law establishing the Florida Supreme Court's jurisdiction to review the matters at issue in this case and supporting the substance of that holding.

As noted by the Florida Supreme Court, "the [Florida] Legislature has prescribed a single election scheme for local, state and federal elections. The Legislature has not, beyond granting to Florida's voters the right to select presidential electors, indicated in any way that it intended that a different (and unstated) set of election rules should apply to the selection of presidential electors...." Dec. 8 Florida Opinion, p. 18, f.n. 11. The Legislature has, thus, chosen to prescribe the manner for appointment of its presidential electors *by general statute*, authorizing a popular election. Section 103.011, Fla. Stat.

Contrary to Petitioners' assertions here, the Legislature has itself incorporated the State Constitution into the statutory methods of dispute resolution. The Legislature has declared that "[t]he State Constitution contemplates the separation of powers among the legislative, executive, and judicial branches of the government" and *has delegated* to the judicial branch the responsibility for "adjudicating any conflicts arising from the interpretation or application of the laws." Section 20.02(1), Fla. Stat. This provision of statutory law thus enacts the constitutional authority of the courts as described in the Florida Constitution, including Article V, Section 3(b) which establishes the jurisdiction of the State Supreme Court.

The legislature has made no exception or express exclusion of the elections laws pertaining to appointment of presidential electors from that statutory grant of authority. The laws of Florida confirm that, if the Legislature had wanted to create such an exception, it knew how to do so. For example, Florida ***4** law imposes such a limitation on judicial review in the context of legislative elections.[1]

Florida law does vest initial jurisdiction in the Florida circuit courts to hear election contests pursuant to Florida Statutes 102.168. But the legislative design is that a circuit court's decision is subject to review by a higher court, and no exception is made for presidential electors. This statutory design does not violate Art. II, sec. 1.

As this Court noted in *Bush v. Palm Beach County Canvassing Board,* case no. 00-836 (December 4, 2000), "[a]s a general rule, this Court defers to a state court's interpretation of a state statute." *Bush*, p. 4. It is particularly imperative that this principle be scrupulously adhered to where, as here, the state court decision concerns a matter entrusted to the states by express federal constitutional grant. This Court should not intrude on the resolution of these state law matters by the state's highest court and should not disturb the judgment of the Florida Supreme Court regarding the adjudication of a conflict arising from the interpretation and application of Florida's elections laws - a matter statutorily conferred *by* the Florida legislature *on* the Florida courts.

We suggest further that petitioner's reliance on *McPherson v. Blacker,* 146 U.S. 1 (1892), and this Court's opinion in *Bush v. Palm Beach County Canvassing Bd.*, Petitioners' Exh. D, to exclude the judiciary from the state-authorized methods of resolving presidential election disputes is misplaced. Perhaps ***5** no precedent of this Court more plainly establishes the jurisdiction of the judiciary, both at the state and federal levels, to interpret laws concerning a state legislature's directions regarding the manner of appointing electors than does *McPherson v. Blacker.* The petitioner argues that this Court "reemphasized" in *Bush, supra*, that "the federal constitution 'operat [es] as a limitation upon the State in respect of any attempt to circumscribe the legislative

power' of the State. *Bush*, [Petitioners'] Exh. D. at 5 (quoting *McPherson v. Blacker,* 146 U.S. 1, 25 (1892))." Petitioners' Stay Petition, p. 24. However, neither *Bush* nor *McPherson* reaches such a conclusion.

As this Court noted in *Bush*, the question the petitioners raise here was not addressed in *McPherson v. Blacker, supra.* Slip Op. p. 4. Indeed, in direct contravention to the petitioners' premise here, the complete quotation from *McPherson v. Blacker,* 146 U.S. at 25 reads as follows:

The legislative power is the supreme authority, *except as limited by the constitution of the state*, and the sovereignty of the people is exercised through their representatives in the legislature, *unless by the fundamental law* power is elsewhere reposed. The constitution of the United States frequently refers to the state as a political community, and also in terms to the people of the several states and the citizens of each state. What is forbidden or required to be done by a state is forbidden or required of the legislative power *under state constitutions as they exist.* The clause under consideration does not read that the people or the citizens shall appoint, but that 'each state shall;' and if the words, 'in such manner as the legislature thereof may direct,' had been omitted, it would seem that the legislative power of appointment could ***6** not have been successfully questioned *in the absence of any provision in the state constitution* in that regard. Hence the insertion of those words, while operating as a limitation upon the state in respect of any attempt to circumscribe the legislative power, cannot be held to operate as a limitation on that power itself.

(Emphasis supplied).

The context of *McPherson* makes clear that it is an appropriate and expected role of the state judiciary to interpret and review even those laws enacted by state legislatures that concern the manner in which electors are appointed. The issue in *McPherson* was whether Art. II, sec. 1, cl. 2 authorized states to choose electors in district elections rather than statewide. The case came to the court *after* review and determination *by the Michigan Supreme Court* on the validity of the statute. The Michigan Supreme Court had determined it was within the power of a state legislature to direct district elections of presidential electors, but invalidated several provisions of the statute prescribing the times for doing certain things as violative of federal deadlines. This Court *affirmed* the holding of the Michigan Supreme Court - including that aspect of the holding invalidating the timing provisions.

Further, in *McPherson*, this Court looked *to the constitution of the state of Michigan* in analyzing one of the provisions of the statute rejected by *both* the supreme court of Michigan *and* this Court. *McPherson v. Blacker,* 146 U.S. at 41. Had this Court believed that neither the state constitution applied nor the state judiciary had jurisdiction to interpret and review the validity of a statute enacted in pursuit of a state legislature's authority under Art. II, sec. 1, cl. 2, this Court would have so stated in ruling on the challenge to the Michigan Supreme ***7** Court's holding. However, rather than holding that the state supreme court lacked jurisdiction over such matters, as now asserted by the petitioners, this Court *affirmed* the state supreme court's order - including the part invalidating portions of the state elections statute. *McPherson v. Blacker,* 146 U.S. at 41, 42.[2] See *Smiley v. Holm,* 285 U.S. 355 (1932), holding that the grant of authority to a state legislature in U.S. Const., Art. I, sec. 4 was conditioned by the authority given to the state legislature under its state constitution.[3] *See also,* ***8** *Davis v. Hildebrant*, 241 U.S. 565, 567 36 S. Ct. 708, 709 (1916) ("It was because of the authority of the state to determine what should constitute its legislative process that the validity of the requirement of the state Constitution of Ohio, in its application to congressional elections, was sustained.").

Unquestionably, state legislatures have great latitude under Art. II, sec. 1, cl. 2, in directing the manner of appointment of electors in the state.[4] Article II should not be interpreted as precluding a State from resolving disputes concerning the selection of electors pusuant to the State's constitutionally authorized structure. In the case at bar, there is no conflict between the election laws and the Constitution. The clear design of the Legislature is that the election laws and Constitution would work in tandem and provide meaning to each other.[5]

*9 Therefore, the Supreme Court of Florida had jurisdiction to enter its order and this Court should not disturb that court's interpretation of Florida law. This Court should affirm the jurisdiction of the Florida state courts and reject the petitioners' assault on the vitality of Florida's laws and constitutions under the guise of Art. II, sec. 1.[6]

We further note that the weakness of Petitioner's argument regarding the meaning of Article II is revealed by applying their analysis to overseas ballots which the State receives up to ten *10 days following an election so long as the vote is cast before the close of the polls on election day. This extended time for receipt of ballots has not been enacted by the Legislature. Florida law requires that absentee ballots be received by the close of the polls on election day. The extended period results from orders entered in *United States v. State of Florida*, Civ. No. TCA 80-1055 (N.D. Fla.). The litigation was brought pursuant to the Overseas Citizens Voting Rights Act of 1975, 42 U.S.C. 1973dd *et seq.*, and the Federal Voting Assistance Act of 1955, 42 U.S.C. 1973cc(b). Those laws provided that states must allow military personnel and civilians overseas to vote by absentee ballot in federal elections pursuant to regular state absentee provisions. The federal statutes did not provide for the extended period to return ballots. But like the issues presented to the Florida courts resulting in the controversy today, the inter-workings of the Florida election code did not allow sufficient time to get the ballots back by election day. Thus, to resolve the conflict among the laws, it was agreed by the executive branch of our government that the deadline for return of ballots would be extended.

There is no question that military and overseas ballots should be granted this extension even though the Legislature has not enacted a law so providing -- but Petitioner's analysis leads to a contrary conclusion. Petitioners have contended that the extension is authorized by federal law notwithstanding Article II. But the federal law does not provide the extension, and it is questionable whether Congress would have authority to grant such an extension in the face of the Article II delegation to the states.

II. FLORIDA LAW PROVIDES ADEQUATE PROCEDURES FOR DETERMINING VOTER INTENT.

*11 The petitioners attack the standards used during the review of ballots in the post-election contest, contending that they lack guidelines. The Florida Supreme Court followed state law governing election contest provisions by remanding the case back to the Circuit Judge to set guidelines during the ongoing "investigation and examination" phase of the election contest. In fact, circuit judge Lewis requested each county canvassing board to submit their standards for counting the ballots and determining "voter intent" as provided by Florida statutes. Unfortunately this process was interrupted by this Court's stay of the election contest.

Finally, the petitioners' argument raises the issue of what is a legal ballot, which is a matter of state and not federal law. The "legality" of a vote is not judged by whether it can be read by a machine or not, but by whether the intent of the voter can be ascertained by an examination of the ballot. The Florida Supreme Court properly held that, under Florida law in existence on November 7, 2000, "a legal vote is one in which there is a 'clear indication of the intent of the voter.' " Dec. 8 Opinion, p, 25. *See,* Section 101.5614(5), Fla. Stat. (2000) ("No vote shall be declared invalid or void if there is a clear indication of the intent of the voter as determined by the canvassing board."); Section 101.5614(6). Fla. Stat. (any vote in which the board cannot discern the intent of the voter must be discarded); Section 102.166(7)(b), Fla. Stat. ("If a counting team is unable to determine a voter's intent in casting a ballot, the ballot shall be presented to the county canvassing board for it to determine the voter's intent."). This Court should lift the stay and permit the lawful votes contained in the 45,000 "no registered vote" ballots, statewide, to be counted.

CONCLUSION

*12 For these reasons, the Court must affirm the decision below, and allow the manual count of presidential ballots to continue.

Footnotes

1 See e.g. Art. III, sec. 2, Fla. Const., which provides in relevant part that:
Section 2. Members; officers.- Each house shall be the sole judge of the qualifications, elections, and returns of its members …

2 "We entirely agree with the supreme court of Michigan … and are of the opinion that the date may be rejected, and the act held to remain otherwise complete and valid."

3 The Court specifically held that:
Whether the Governor of the state, through the veto power, shall have a part in the making of state laws, is a matter of state polity. Article 1, sec. 4, of the Federal Constitution, neither requires nor excludes such participation. And provision for it, as a check in the legislative process, cannot be regarded as repugnant to the grant of legislative authority…. That the state Legislature might be subject to such a limitation, either then or thereafter imposed as the several states might think wise, was no more incongruous with the grant of legislative authority to regulate congressional elections than the fact that the Congress in making its regulations under the same provision would be subject to the veto power of the President, as provided in article 1, s. 7. The latter consequence was not expressed, but there is no question that it was necessarily implied, as the Congress was to act by law …
Smiley v. Holm, 285 U.S.. at 368-369.

4 "This provision, one of the few in the constitution that grants an express plenary power to the States, conveys 'the broadest power of determination' and '[i]t recognizes that [in the election of a President] the people act through their representatives in the legislature, and *leaves it to the legislature exclusively to define the method of effecting the object.' McPherson v. Blacker,* 146 U.S. 1, 27, 13 S.Ct. 3, 7, 36 L.Ed. 869 (1892) (emphasis added [in original]).' *Anderson v. Celebrezze,* 460 U.S. at 806-807, 103 S.Ct. at 1579 (dissenting opinion).

5 Under *federal* law, a state's power to establish the manner of selecting electors is not absolute. For example, once a state confers a right to vote for presidential electors, that right cannot be abridged in a manner that violates federal constitutional or statutory provisions. *Williams v. Rhodes,* 393 U.S. 23 (1968); *Rodriguez v. Popular Democratic Party,* 457 U.S. 1, 11 (1982).
Two United States Supreme Court cases, *Williams v. Rhodes,* 393 U.S. 23 (1968), and *Anderson v. Celebrezzee,* 460 U.S. 780 (1983), speak to the limits imposed by federal constitutional provisions on the exercise of state legislatures' authority to direct the manner of choosing electors. Both cases make clear that the power of states to select electors to choose the President and Vice President cannot be exercised in such a way as to violate express *federal* constitutional commands. Both cases hold that, while Art. II, sec. 1 grants extensive powers to states to pass laws regulating the selection of electors, the provision does not give states power to impose burdens on the right to vote, where such burdens are expressly prohibited in other constitutional provisions. *Williams v. Rhodes,* 393 U.S. at 28-29; *Anderson v. Celebrezzee,* 460 U.S. at 794-795, 806.

6 The Attorney General addressed the impact of 3 U.S.C. 5 in his brief in *Bush v. Palm Beach County Canvassing Board, Case No. 00-836* (Dec. 4, 2000). We stand with that analysis and contend that Section 5 has little meaning here, other than to provide a safe harbor for electors if certain circumstances arise.

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2000 WL 1818366 (U.S.) (Appellate Brief)
United States Supreme Court Amicus Brief.

Goerge W. BUSH and Richard CHENEY, Petitioners,

v.

Albert GORE, Jr., et al., Respondents.

No. 00-949.
December 10, 2000.

On Writ of Certiorari to the Supreme Court of Florida

BRIEF FOR THE STATE OF ALABAMA, BY AND THROUGH ITS ATTORNEY GENERAL AND SECRETARY OF STATE, AS AMICUS CURIAE, SUPPORTING REVERSAL

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*i QUESTIONS PRESENTED

1. Whether the Florida Supreme Court erred in establishing new standards for resolving presidential election contests that conflict with legislative enactments and thereby violate Article II, Section 1, Clause 2 of the United States Constitution, which provides that electors shall be appointed by each State "in such Manner as the Legislature thereof may direct."

2. Whether the Florida Supreme Court erred in establishing post-election judicially created standards that threaten to overturn the certified results of the election for President in the State of Florida and that fail to comply with the requirements of 3 U.S.C. § 5, which gives conclusive effect to state court determinations only if those determinations are made "pursuant to" "laws enacted prior to" election day.

3. Whether the use of arbitrary, standardless and selective manual recounts to determine the results of a presidential election, including post-election judicially created selective and capricious recount procedures, that vary both across counties and within counties in the State of Florida violates the Equal Protection or Due Process Clauses of the Fourteenth Amendment.

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*1 INTEREST OF *AMICUS CURIAE*

The State of Alabama, by and through its Attorney General, Bill Pryor, and Secretary of State, Jim Bennett, respectfully submits this Brief as *amicus curiae* pursuant to Sup. Ct. R. 37.4. *Amicus* submits this Brief because of the striking similarities between this case and an Alabama case decided by the United States Court of Appeals for the Eleventh Circuit five years ago, *Roe v. Alabama*, involving the counting of unwitnessed absentee ballots in the 1994 election for Chief Justice of the Supreme Court of Alabama. That case resulted in a series of decisions from the Eleventh Circuit holding that a post-election change in the procedures for counting absentee ballots violated the First and Fourteenth Amendments, which require state election procedures to be fundamentally fair. *See Roe v. Alabama*, 43 F.3d 574 (11th Cir.) ("*Roe I*") (certifying question to Supreme Court of

Alabama), *remanded to district court for evidentiary hearing after certified question answered*, 52 F.3d 300 (11th Cir.) ("*Roe II*"), *cert. denied*, 516 U.S. 908, *appeal after remand to district court*, 68 F.3d 404 (11th Cir.) ("*Roe III*"), *stay denied sub nom. Hellums v. Alabama*, 516 U.S. 938 (1995). The Petitioner in this case expressly relied upon these decisions of the Eleventh Circuit in requesting review by this Court in both this case and the earlier decision of this Court. *See* Emergency App. for Stay at 38; Pet. Br. at 28, Pet. Reply Br. at 19, *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. ___ (2000) (No. 00-836). The State of Alabama, by and through its Attorney General, and the Secretary of State of Alabama were defendants in *Roe v. Alabama*. *See Roe I*, 43 F.3d at 574; *Roe II*, 52 F.3d at 300; *Roe III*, 68 F.3d at 404. The current Attorney General of Alabama, then a deputy attorney general, personally represented the State and the current Secretary of State in that litigation. *See Roe II*, 52 F.3d at 300; *Roe III*, 68 F.3d at 404; *see also* ***2** *Roe v. Mobile County Appointing Bd.*, 904 F. Supp 1316, 1317 (S.D. Ala.), *aff'd sub nom. Roe v. Alabama*, 68 F.3d 404 (11th Cir.), *stay denied*, 516 U.S. 938 (1995).

Relying on the constitutional principles applied in *Roe v. Alabama*, the State of Alabama reformed its election laws to ensure that Alabama courts cannot change the rules for counting absentee ballots after an election. *See* Ala. Code § 17-10-10 (Supp. 2000) ("No court or other election tribunal shall allow the counting of an absentee ballot with respect to which the voter's affidavit signature (or mark) is not witnessed by the signatures of two witnesses 18 years of age or older or a notary public (or other officer authorized to acknowledge oaths) ...."). The Attorney General and Secretary of State have relied on *Roe v. Alabama* in enforcing the election laws of Alabama, advising election officials, and ensuring that election procedures in Alabama are and remain fundamentally fair. *See, e.g.*, Opinion to the Hon. Leland Avery, Hale County Probate Judge, Ala. A.G. Op. No. 2000-180, at 4 (June 26, 2000) <http:// www.ago.state.al.us/pdfopinions/ 2000-180.pdf> ("[T]he United States Court of Appeals for the Eleventh Circuit has held that a systematic counting of unwitnessed and unnotarized absentee ballots violates the voting rights of those voters who complied with the statutory mandates."); Opinion to the Hon. Jim Bennett, Secretary of State, Ala. A.G. Op. No. 99-00227, at 3 (May 31, 1996) <http://www.ago.state.al.us/pdfopinions/99-00227.pdf> ("In this circumstance, under the *Roe* decision, the state election officials cannot count unwitnessed absentee ballots without violating the [F]ourteenth [A]mendment.").

Having now relied on the principles of due process and equal protection applied in *Roe v. Alabama* for several years, *amicus* has a profound interest in seeing those principles upheld and consistently enforced. This is especially true in the unique context of the election of the ***3** President and Vice President of the United States, in which all States have a profound interest. As this Court has acknowledged,

in the context of a presidential election, state-imposed restrictions implicate a uniquely important national interest. For the President and Vice President of the United States are the only elected officials who represent all the voters in the Nation. Moreover, the impact of the votes cast in each State is affected by the votes cast for the various candidates in other States. ... [T]he State has a less important interest in regulating Presidential elections than statewide or local elections, because the outcome of the former will be largely determined by votes beyond the State's boundaries.

Anderson v. Celebreeze, 460 U.S. 780, 794-95 (1983) (citations omitted).

The judgment of the Supreme Court of Florida must be reversed because that court changed the rules governing election protests and contests in Florida, in violation of Article II, § 1, cl. 2 of the U.S. Constitution, the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and 3 U.S.C. § 5 (1994). *Amicus* urges this Court to uphold the First and Fourteenth Amendment guarantees of fundamentally fair election procedures so that States may not, after a presidential election, employ arbitrary standards and retroactively change their canvassing, certification, and contest procedures to alter the outcome of an election.

SUMMARY OF ARGUMENT

Because the right to vote is a fundamental right, the constitutionality of state election procedures rests on ***4** whether those procedures are fundamentally fair. Fundamental fairness requires election officials to refrain from changing the rules for counting ballots after an election to alter the outcome. Fundamental fairness also requires each State to establish — before an

election — objective and meaningful standards for counting ballots and adhere to those standards after the election to protect the First and Fourteenth Amendment rights of both voters and candidates. Adherence to these guarantees of fundamental fairness requires special deference to the authority of legislatures to establish rules for counting votes before an election rather than allowing courts retroactively to create rules for resolving post-election disputes. Because the decision of the Supreme Court of Florida violates due process, equal protection, and the First Amendment in the election of the President and Vice President of the United States, this Court should reverse that decision and enjoin the use of the arbitrary manual recounts of ballots in Florida.

ARGUMENT

I. MATERIAL POST-ELECTION CHANGES IN STATE CANVASSING PROCEDURES VIOLATE DUE PROCESS.

This Court has long held that voting is "a fundamental political right, because preservative of all rights." *Yick Wo v. Hopkins,* 118 U.S. 356, 370 (1886). It is well established that "the right of qualified voters, regardless of their political persuasion, to cast their votes effectively … rank[s] among our most precious freedoms. … Other rights, even the most basic, are illusory if the right to vote is undermined." *Williams v. Rhodes,* 393 U.S. 23, 30-31 (1968). Because the right to vote is so fundamental, "any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Reynolds v. Sims,* 377 U.S. 533, 562 (1964). In this context, "the right ***5** 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." *Id.* at 554.

In 1995, the United States Court of Appeals for the Eleventh Circuit was called upon to apply these principles in *Roe v. Alabama,* a case involving a state circuit court's order to count absentee ballots that had not been properly witnessed or notarized in accordance with state law. The Eleventh Circuit correctly observed in *Roe I* that "federal courts do not involve themselves in garden variety election disputes. If, however, the election process itself reaches the point of fundamental unfairness, a violation of the due process clause may be indicated and relief under § 1983 therefore in order." 43 F.3d at 580 (citations and internal quotation marks omitted) (quoting *Curry v. Baker,* 802 F.2d 1302, 1315 (11th Cir.), *cert. denied,* 479 U.S. 1023 (1986), in turn quoting *Welch v. McKenzie,* 765 F.2d 1311, 1317 (5th Cir. 1985), and *Duncan v. Poythress,* 657 F.2d 691, 703 (5th Cir. Unit B Sept. 1981), *cert. denied,* 459 U.S. 1012 (1982)). Like the case now before this Court, *Roe* was no "garden variety" election dispute. As in this case, the post-election change in election procedures by the state courts in *Roe* raised serious questions about the fundamental fairness of the election process. Because the situation in *Roe v. Alabama* was so similar to the present case, *Roe* provides an excellent analytical framework for examining the due process principles at stake in this case.

A. *Roe v. Alabama*

Before the November 1994 general election, it was a uniform statewide practice in Alabama to disregard absentee ballots that had not been properly notarized or witnessed. *Roe I,* 43 F.3d at 578; *Roe III,* 68 F.3d at 406-07 (stating that the district court's findings, which were ***6** "supported overwhelmingly by the evidence," showed there had been no prior practice, in 66 of Alabama's 67 counties, of counting improperly executed absentee ballots). A state circuit court nonetheless ordered unwitnessed absentee ballots to be counted after the 1994 general election. Because the candidates for Chief Justice were separated by a mere 200 to 300 votes before the court entered its order, the order placed the outcome of the race for Chief Justice in doubt. *Roe I,* 43 F.3d at 578. As the Court is no doubt aware, the 200 to 300 vote spread in *Roe* is similar to the narrow margin separating presidential candidates George W. Bush and Albert Gore, Jr., in the election in Florida.

The Alabama court's order was challenged in a 42 U.S.C. § 1983 (1994) action brought in the United States District Court for the Southern District of Alabama. The district court promptly granted a preliminary injunction halting the counting of unwitnessed absentee ballots. In its order, the district court specifically found that it was an established practice in Alabama not to count unwitnessed absentee ballots. Moreover, the district court held that adhering to the state court order and changing the practice of not counting unwitnessed absentee ballots would violate the First and Fourteenth Amendments. *Roe I,* 43 F.3d at 579.

On appeal to the Eleventh Circuit, the *Roe* plaintiffs argued that enforcement of the state court order would constitute a retroactive validation of a potentially controlling number of votes in the elections for Chief Justice and Treasurer that would result in fundamental unfairness and would violate plaintiffs' right to due process of law in violation of the Fourteenth Amendment, and that this violation of the plaintiffs' rights to vote and ... have their votes properly and honestly counted *7 constitutes a violation of the First and Fourteenth Amendments.

Id. at 580 (internal quotation marks omitted). The *Roe* plaintiffs further argued "that the [state] circuit court's order requiring the state's election officials to perform the ministerial act of counting the contested absentee ballots, if permitted to stand, will constitute a retroactive change in the election laws that will effectively 'stuff the ballot box,' implicating fundamental fairness issues." *Id.* at 581 (footnotes omitted). The Eleventh Circuit agreed with the *Roe* plaintiffs and determined that departing from Alabama's longstanding policy of not counting unwitnessed absentee ballots would indeed violate the First and Fourteenth Amendments.

In deciding *Roe I*, the Eleventh Circuit held that departing from Alabama's previous practice of not counting unwitnessed absentee ballots "would have two effects that implicate fundamental fairness." *Id.* "First, counting ballots that were not previously counted would dilute the votes of those voters who met the [statutory] requirements .... Second, the change in the rules after the election would have the effect of disenfranchising those who would have voted but for the inconvenience imposed by the [statutory requirements]." *Id.* The court also stated that "had the candidates and citizens of Alabama known that something less than the signature of two witnesses or a notary attesting to the signature of absentee voters would suffice, campaign strategies would have taken this into account and [those] who did not vote would have voted absentee." *Id.* at 582 (distinguishing *Partido Nuevo Progresista v. Barreto Perez*, 639 F.2d 825 (1st Cir. 1980), *cert. denied*, 451 U.S. 985 (1981)). On these grounds — that retroactively counting improperly executed absentee ballots would disenfranchise or dilute the votes of others and that altering election rules *post hoc* would upset the legitimate expectations of the voters *8 and candidates — the Eleventh Circuit ruled that complying with the state court's *post hoc* change in election procedures would violate the First and Fourteenth Amendments.

The Eleventh Circuit refused to require the Roe plaintiffs to pursue their claims in state court. *Id.* at 582. The court noted that, under Ala. Code § 17-15-6 (1995), Alabama courts are jurisdictionally barred from deciding statewide election contests. The court concluded that the state legislature, which has exclusive authority to decide an election contest involving the office of Chief Justice, *see* Ala. Code § 17-15-52 (1995), was "not an adequate or proper forum for the resolution of the federal constitutional issues presented." *Roe I*, 43 F.3d at 582.

The Court of Appeals did, however, abstain from finally adjudicating the plaintiffs' claims to certify a question to the Alabama Supreme Court asking whether absentee ballots that were not properly notarized or witnessed could nonetheless be counted under Alabama law. *Id.* at 583. The Supreme Court of Alabama, in answering the certified question, affirmed the order of the state circuit court and held that unwitnessed absentee ballots in "substantial compliance" with state law should be counted. *Roe v. Mobile County Appointment Bd.*, 676 So. 2d 1206, 1221-22 (Ala. 1995).

Within a month of the Alabama Supreme Court's decision, the Eleventh Circuit remanded the case to the district court for trial. *Roe II*, 52 F.3d at 301. The Eleventh Circuit specifically directed the district court to address seventeen factual issues. Chief among these was the question of whether there was an established practice of including or excluding improperly executed absentee ballots in previous elections in Alabama. *Id.* at 302-03. Following *Roe II*, the defendant class of voters who sought to have their unwitnessed absentee ballots counted *9 petitioned this Court for a writ of certiorari. That petition was denied. *Davis v. Alabama*, 516 U.S. 908 (1995).

Following a three-day trial, the district court found that "the practice in Alabama prior to the November 8, 1994 election had been uniformly to exclude [improperly executed absentee] ballots." *Roe III*, 68 F.3d at 406-07. Accordingly, the district court concluded the *Roe* plaintiffs were entitled to relief and entered an order directing the Alabama Secretary of State to certify

the results of the Chief Justice and State Treasurer elections without counting unwitnessed absentee ballots. *Id.* at 407. The defendant class of voters that had cast improperly executed absentee ballots then appealed to the Eleventh Circuit. *Id.*

In *Roe III,* the Eleventh Circuit concluded that the district court's findings of fact were "supported overwhelmingly by the evidence." *Id.* The appeals court also reaffirmed its holdings in *Roe I* and *Roe II. Id.* at 408. The court again rejected the appellants' plea to abstain and allow the state courts to decide the contested elections for Chief Justice and State Treasurer. The appellants argued, in essence, that state courts should have been given the opportunity to apply the Alabama Supreme Court's opinion in *Roe v. Mobile County Appointment Board* and grant them relief by ordering their improperly executed absentee votes to be counted. The Eleventh Circuit rejected this argument, again noting that it was "highly doubtful" that the state courts had jurisdiction to grant such relief given the jurisdictional bar in Ala. Code § 17-15-6. *Id.* The court determined that the Roe plaintiffs had no adequate state forum for the vindication of their federal constitutional claims and promptly affirmed the district court's order. Because time was of the essence, the Court of Appeals directed its clerk to issue the court's mandate instanter.

***10** The defendant class of voters who wanted their improperly executed absentee ballots counted immediately applied for a stay from this Court. Justice Kennedy granted a temporary stay on October 14, 1995, while this Court considered the matter. The Court then denied the stay application on October 19, 1995. *Hellums v. Alabama,* 516 U.S. 938 (1995). Chief Justice Perry O. Hooper, Sr., was certified as the winner of the 1994 election and sworn into office the next day.

B. The Costs and Consequences of *Roe v. Alabama*

Roe v. Alabama ended with a reaffirmation of the guarantees of the First and Fourteenth Amendments, as interpreted by this Court, that state election procedures must be fundamentally fair. Complete justice was not done, however, because the harm caused by the state circuit court order could not be undone. Because of the state circuit court's order, Chief Justice Hooper was not certified as the winner of the November 1994 election until October 20, 1995. *See* Ala. Rptr., 656-659 So. 2d, at IX n.2. He was sworn in later the same day, more than nine months after he should have taken office on January 16, 1995. *Id.* at IX n.1. As a result of the circuit court's attempt to change the rules for counting ballots after the election, the people of Alabama were deprived of their choice for Chief Justice for more than nine months — one-eighth of his total term of office. The Eleventh Circuit's decision in *Roe v. Alabama* could not give those nine months back to the people of Alabama.

What is more, the incumbent Chief Justice, who lost the November 1994 election, "continued in office" during the nine months after his term expired until Chief Justice Hooper was sworn in. *Id.* The State then had to pay salaries to both men for that nine-month period. ***11** Moreover, the litigation itself cost the State of Alabama hundreds of thousands of dollars.

The process now unfolding in Florida as a result of the change in state law by the Supreme Court of Florida portends different, but more frightening ills. The process now under way in Florida is undermining public confidence in the presidency and the Republic itself as voters across the country watch judges and State officials stare at tiny pieces of cardboard to divine whether a voter's "dimpled chad" means the voter wanted to vote for a candidate or decided not to vote at the last minute. *Gore v. Harris,* No. SC00-2431, slip op. at 41 (Fla. Dec. 8, 2000) (Wells, C.J., dissenting) ("I have a deep and abiding concern that the prolonging of the judicial process in this counting contest propels this country and this state into an unprecedented and unnecessary constitutional crisis."). If post-election changes to election procedures in Florida are approved by this Court, other states will be flooded with similar post-election litigation. Any disgruntled candidate who loses by a narrow margin will have an incentive to file an election contest, argue for a new set of rules, and then keep counting and changing the rules until the requisite votes are "found." Such untoward results are avoided when federal courts uphold the due process requirement of fair rules for counting ballots that cannot be changed after the election to alter the outcome.

C. Other Cases Invalidating *Post Hoc* Changes in Election Procedures

Roe represents an extreme example of what can happen when election procedures are changed after an election. The situation in *Roe* was not unique, however. Other circuits have intervened in the name of due process to halt similar, fundamentally unfair *post hoc* changes in election procedures.

***12** In *Briscoe v. Kusper,* 435 F.2d 1046 (7th Cir. 1970), for example, the Seventh Circuit addressed a change in the petition requirements for candidates for alderman in the City of Chicago. The City Board of Election Commissioners applied a new "anti-duplication" rule to disallow voters' signatures on more than one candidate's petition to run for alderman; the Board also disallowed any signatures without a middle initial. *Id.* at 1055. The Seventh Circuit held that the Board's failure to forewarn candidates of these new, rigorous requirements violated due process. *Id.*

In *Griffin v. Burns,* 570 F.2d 1065 (1st Cir. 1978), the First Circuit ordered a new election after state election officials handed out absentee ballots that were later voided by the state supreme court after the election. *Id.* at 1078-80. The court observed that federal courts have intervened in state elections where

the attack was, broadly, upon the fairness of the official terms and procedures under which the election was conducted. The federal courts were not asked to count and validate ballots and enter into the details of the administration of the election. Rather they were confronted with an officially-sponsored election procedure which, in its basic aspect, was flawed.

Id. at 1078.

In *Brown v. O'Brien,* 469 F.2d 563 (D.C. Cir.), *stay granted,* 409 U.S. 1 (*per curiam*), *vacated as moot,* 409 U.S. 816 (1972), the District of Columbia Circuit concluded that a political party's retroactive application of a new and unannounced ban on winner-take-all presidential primaries violated due process. *Id.* at 570. The court noted that, if the party had announced its rule change prior to the primaries, candidates might have campaigned differently, voters might have voted ***13** differently, and the State of California might have altered its delegate selection scheme. *Id.* at 569-70. The court observed that "there can be no dispute that the very integrity of the process rests on the assumption that clear rules will be established and that, once established, they will be enforced fairly, consistently, and without discrimination so long as they remain in force." *Id.*

Finally, in *Duncan v. Poythress,* 657 F.2d 691 (5th Cir. Unit B. Sept. 1981), *cert. dismissed,* 459 U.S. 1012 (1982), the former Fifth Circuit held that state officials' refusal to hold a special election to fill a vacancy on the state supreme court in accordance with state law violated due process. *Id.* at 708. The court observed that it could "imagine no claim more deserving of constitutional protection than the allegation that state officials have purposely abrogated the right to vote, a right that is fundamental to our society and preservative of all individual rights." *Id.* at 704.

These cases underscore that the right to vote, at bottom, is a *federal* right. *See Griffin v. Burns,* 570 F.2d at 1077. If a state election procedure is so flawed as to be fundamentally unfair, that process violates due process. Where, as in *Roe* and in this case, a state supreme court materially changes state election, canvassing, and contest procedures after an election has occurred and requires the use of arbitrary recounts, that change is fundamentally unfair and violates the due process rights of the voters and the candidates.

***14 II. THE JUDGMENT OF THE SUPREME COURT OF FLORIDA VIOLATES ARTICLE II OF THE CONSTITUTION, 3 U.S.C. § 5, AND THE FIRST AND FOURTEENTH AMENDMENTS.**

As was the case in *Roe v. Alabama,* the judgment of the Supreme Court of Florida in this case substantially changed Florida election procedures after the election and applied those changes retroactively — *again.* The Supreme Court of Florida also required the use of arbitrary manual recounts that violate due process and equal protection. The dissenting opinion of Chief Justice Wells amply demonstrates the nature of the changes in election procedures made by the Supreme Court of Florida. *Gore v. Harris,* slip op. at 40-60 (Wells, C.J., dissenting). As Chief Justice Wells feared, by changing Florida law after the election, the Supreme Court of Florida violated the Constitution and 3 U.S.C. § 5. *See id.* at 41, 54-60 (Wells, C.J., dissenting).

A. The Judgment of the Supreme Court of Florida Retroactively Changed Florida Election Procedures — *Again.*

In *Palm Beach County Canvassing Board v. Harris,* Nos. SC00-2346, SC00-2348, and SC00-2349 (Fla. Nov. 21, 2000), the Supreme Court of Florida materially and retroactively changed Florida election procedures in violation of due process. *See* Br. for the State of Alabama, et al., as *Amici Curiae*, Supp. Reversal at 13-24, *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. ___ (2000) (No. 00-836). Less than a week ago, this Court unanimously vacated that judgment because there was " 'considerable uncertainty as to the precise grounds for the decision.' " *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. ___, ___ (2000) (slip op. at 6) (quoting *Minnesota v. National Tea Co.* 309 U.S. 551, 555 (1940)). Four days later, in an appeal from Vice President Gore's ***15** unsuccessful election contest in State court, the Supreme Court of Florida materially changed Florida law *again*, ordering the trial court to embark on a statewide manual recount of so-called "undervotes" in the presidential election.[1]

The first and perhaps most important change effected by the Florida Supreme Court's decision in this case was the acceptance of so-called "dimpled" chads as votes. Prior to the decision in this case, there was no statewide policy requiring "dimpled" chads to be counted as votes. By accepting the returns from Broward and Palm Beach Counties, where "dimpled" chads were counted as votes, the court altered state practice. After the election, the Palm Beach County Canvassing Board changed its ten-year-old policy not to count "dimpled" ballots. The board's November 1990 guidelines made clear that "a chad that is fully attached, bearing only an indentation, should not be counted as a vote ... an indentation is not evidence of intent to cast a valid vote." Ex. J to Emer. App. for Stay. The court's inclusion of Palm Beach County's amended returns validated this post-election change in canvassing procedure in violation of due process and 3 U.S.C. § 5.

A second major change to state law was the alteration of the standard of review applied by the circuit court. Prior to the decision in this case, the Florida courts gave great deference to the decisions made by the executive officials who implemented Florida's election laws. As noted by Chief Justice Wells, in ***16** *Krivanek v. Take Back Tampa Political Committee,* 625 So. 2d 840 (Fla. 1993), the court stated that

the judgment of officials duly charged with carrying out the election process should be presumed correct if reasonable and not in derogation of the law. *Boardman v. Esteva,* 323 So. 2d 259 (Fla. 1975), cert. denied, 425 U.S. 967, 96 S. Ct. 2162, 48 L. Ed. 2d 791 (1976). As noted in *Boardman*:

The election process is subject to legislative prescription and constitutional command and is committed to the executive branch of government through duly designated officials all charged with specific duties.... [The] judgments [of those officials] are entitled to be regarded by the courts as presumptively correct and if rational and not clearly outside legal requirements should be upheld rather than substituted by the impression a particular judge or panel of judges might deem more appropriate. It is certainly the intent of the constitution and the legislature that the results of elections are to be efficiently, honestly and promptly ascertained by election officials to whom some latitude of judgment is accorded, and that courts are to overturn such determinations only for compelling reasons when there are clear, substantial departures from essential requirements of law.

Gore v. Harris, slip op. at 43 (Wells, C.J., dissenting) (quoting *Krivanek*, 625 So. 2d at 844-45). In this case, however, the Supreme Court of Florida ruled that executive officials were entitled to no such deference. ***17** *Id.* at 13-14 (holding that circuit court erred in applying abuse of discretion standard). This change in the standard of review fundamentally altered the relationship between the judicial and executive branches in the election process in Florida, arrogating power to the judiciary that had not been expressly granted by the Legislature.

A third major change wrought by the Supreme Court of Florida's decision was to authorize manual recounts of only so-called "undervotes" as part of an election contest. Florida's election contest statute, Fla. Stat. § 102.168, does not mention manual recounts; "the only procedures for manual recounts are in the protest statute," Fla. Stat. § 102.166. *Gore v. Harris,* slip op. at 45 (Wells, C.J., dissenting). The majority concluded that the contest statute's broad grant of authority "to provide any relief appropriate under such circumstances," Fla. Stat. § 102.168(8), included the ability to order manual recounts. *See id.* at 37-38.

Even assuming, *arguendo*, that this conclusion was a proper interpretation of legislative intent, the Supreme Court of Florida rewrote the manual recount provisions by authorizing a manual recount of only *certain* ballots.

The manual recount provisions in Florida law state that, if a test recount indicates "an error in the vote tabulation which could affect the outcome of the election," the canvassing board can "[m]anually recount *all* ballots." Fla. Stat. § 102.166(5)(c) (emphasis added); *see Gore v. Harris,* slip op. at 45-46 (Wells, C.J., dissenting) (citing Fla. Stat. § 102.166(5)(c)). In other words, "Section 102.166(5)(c) *requires that, if there is a manual recount, all of the ballots have to be recounted." Id.* at 53 (Wells, C.J., dissenting). The majority below, however, altered the manual recount provision to fit the perceived needs of ***18** this election contest, changing the statute to allow for a partial recount of only *certain* ballots. *Id.* at 16.[2]

These changes run afoul of the grant of "plenary" power to the State Legislature in Article II, § 1, cl. 2 of the United States Constitution. *See McPherson v. Blacker,* 146 U.S. 1, 7 (1892). These changes further violate 3 U.S.C. § 5 because all of them were adopted *after* the November 7, 2000, election and applied retroactively. Finally, these changes unleashed an arbitrary, standardless, and fundamentally unfair process of counting ballots in violation of due process and equal protection.

B. Counting Partially Punched Ballots Without Clear, Uniform Standards Attributes Political Speech to Voters Without Their Consent and Dilutes Proper Votes by "Stuffing the Ballot Box."

In *Baker v. Carr,* this Court noted that "[a] citizen's right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution, when such impairment resulted from dilution by ... a stuffing of the ballot box." 369 U.S. 186, 208 (1962) (citing *Ex parte Siebold,* 100 U.S. 371 (1879), and *United States v. Saylor,* 322 U.S. 385 (1944)). The effect of the judgment of the Supreme Court of Florida was to order the circuit court and election officials in Florida to divine the intent of individual voters based on either a discretionary majority vote of local officials or the individual subjective views of the persons handling the ballots. By requiring the circuit court to accept the untimely manual recounts and include them in the ***19** certified election results, the Florida Supreme Court adopted a standardless procedure and "stuffed the ballot box" in violation of voters' First Amendment right to freedom of expression and Fourteenth Amendment rights to due process and equal protection.

It is well established that "the right of qualified voters, regardless of their political persuasion, to cast their votes effectively ... rank[s] among our most precious freedoms. ... Other rights, even the most basic, are illusory if the right to vote is undermined." *Williams v. Rhodes,* 393 U.S. 23, 30-31 (1968). The First Amendment protects the right of our nation's citizens not only to entertain their individual political beliefs, but also to express them. *Id.* at 30; *see also Wooley v. Maynard,* 430 U.S. 705, 714 (1977) ("The right to speak and the right to refrain from speaking are complementary components of the broader concept of individual freedom of mind."); *Pacific Gas & Elec. Co. v. Public Util. Comm'n,* 475 U.S. 1, 2 (1986)("[T]he choice to speak includes within it the choice of what not to say."). When a citizen casts a vote, it is the ultimate expression of individual political speech and constitutes the culmination of the individual right to choose the representative governing body.

During this election, the overwhelming majority of Floridians who cast their votes using punch-card ballots did so in accordance with the instructions for properly casting ballots, and those votes were accurately tabulated in keeping with the principles of due process. As noted by the Secretary of State:

In the weeks before the November 7, 2000, general election, each registered voter in Florida was provided with a sample ballot and detailed instructions on how to vote according to the method used in his or her precinct. Additionally, a copy of the instructions was placed prominently in ***20** each voting booth. *See* Fla. Stat. § 101.46. In those districts using punch cards, the instructions explained how a voter was to select and punch out the appropriate chad on the ballot. App. at 14a. The instructions included this specific direction:

AFTER VOTING, CHECK YOUR BALLOT CARD TO BE SURE YOUR VOTING SELECTIONS ARE CLEARLY AND CLEANLY PUNCHED AND THERE ARE NO CHIPS LEFT HANGING ON THE BACK OF THE CARD.

Id. When voters followed the instructions, including the removal of any loose chips left attached to their ballots, the automatic tabulation accurately tabulated the ballots. There is no contention otherwise. Only the ballots of those voters who, by their own actions, failed to clearly indicate their elective choices, as directed, would be affected by the manual recount at issue.

Harris Resp. to Pet. for Cert. at 15 n.12, *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. ___ (2000) (No. 00-836). Thus, the requirements for casting a correct vote were well established, had been made available to every voter prior to election day, and were followed by the overwhelming majority of voters.

Changing the rules for counting partially punched ballots after the election is fundamentally unfair. Allowing counties to count so-called "dimpled chads" and stray marks as votes constitutes an arbitrary deviation from these well-established election rules and dilutes the weight given to votes that were properly punched and counted. Changing the rules for counting partially punched ballots only in certain counties also dilutes the votes of those whose partially punched ballots are left ***21** uncounted in their county's manual recount because their county adheres to its pre-election rules. By ordering a new standardless statewide count, the Florida Supreme Court has validated these wholly arbitrary recounts and assured that innumerable non-votes will be added to a candidate's tally.[3]

Where there is no clear standard by which to evaluate inadequately marked ballots, election officials and judges will inevitably place political speech in the mouths of voters unwilling to vote for either candidate. For example, voters may enter the voting booth and have second thoughts about their decisions and change their minds mid-vote, leaving a "dimpled chad." If election officials count those indentations as votes, they are "stuffing the ballot box" by putting words into the voters' mouths.[4] The government cannot compel voters to speak when they have chosen to remain silent. *See West Virginia v. Barnette*, 319 U.S. 624, 631-41 (1943).

Under the Due Process Clause of the Fourteenth Amendment, voters have the right to have their individual ballots correctly counted and reported. ***22** *Gray v. Sanders*, 372 U.S. 368, 380 (1963). In this race, numerous ballots were correctly punched for the bulk of the races, leaving the choice for President and Vice President unselected. This indicates that, had these voters wanted to vote for any given presidential candidate, they not only knew how to do so, they had demonstrated their ability to do so. There was no option on these ballots for "NONE OF THE ABOVE." By correctly selecting candidates in other races and leaving only a "dimpled chad" or entirely unmarked portion for the presidential race, these voters exercised their right to refrain from speaking under the First Amendment. *See Wooley*, 430 U.S. at 714. Election officials should not be allowed to speak where voters have remained silent; for, with that silence, these citizens have voiced their views on the presidential race. *See Barnette*, 319 U.S. at 641 ("We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority.")

In the absence of a clear standard, the divination of these improperly marked ballots ultimately says more about the intent of the election officials than the intent of the voters. To affirm this arbitrary conduct, this Court would be "required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind." *Id.* at 634. By impermissibly attributing this political speech to citizens who elected not to vote in a particular race, election officials effectively "stuff the ballot box" and dilute the weight of the votes of those citizens who actually voted in this race. *Cf. Ex parte Siebold*, 100 U.S. 371; *United States v. Saylor*, 322 U.S. 385.

This action has violated the due process rights of those citizens who elected not to vote in this race and expected ***23** that their silence would be interpreted as it was intended — as a vote for "NONE OF THE ABOVE." *See Baker v. Carr*, 369 U.S. at 208; *United States v. Saylor*, 322 U.S. at 388 ("This case affirms that the elector's right intended to be protected is not only that to cast his ballot but that to have it honestly counted."); *Gray v. Sanders*, 372 U.S. at 380 ("The [United States Supreme]

Court has consistently recognized that all qualified voters have a constitutionally protected right 'to cast their ballots and have them ... correctly counted and reported.' ") (citations omitted). Voters who had second thoughts, or inadvertently made a stray mark, leaving only a "dimpled chad," could reasonably expect, after reading the voting instructions, that their "dimpled chad" would not be counted. Thus, by ordering the circuit court to embark on a standardless, statewide manual recount, the Florida Supreme Court not only violated the First Amendment rights of those voters who chose to remain silent, it violated the due process rights of both the voters who clearly selected a presidential candidate and those who chose to abstain from casting a vote in the presidential election.

C. By Changing the Definition of a "Valid Vote" and the Statutory Protest and Contest Periods, the Florida Supreme Court Gave an Unfair Advantage to a Campaign That Chose to "Front-Load" Its Challenges Into the Protest Period.

Under Florida law as it existed at the time of the election, a valid vote was cast, in those districts using punch cards, when the voting selection was "clearly and cleanly punched and there [were] no chips left hanging on the back of the card." Harris Resp. to Pet. for Cert. at 15 n.12, *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. ___ (2000) (No. 00-836). Based on these regulations, a candidate could reasonably expect that only those ballots that complied with these instructions would be ***24** tabulated. Moreover, under contemporary Florida law, a candidate could reasonably forego requesting a manual recount as part of an election protest because the protest period was so short. The candidate could reasonably choose to save his request for a manual recount until an election contest, where there would be more time. This was particularly true where the contest period was originally over four times longer than the protest period and, in addition to the manual recount, afforded the candidate the opportunity to create a full evidentiary record of all alleged election improprieties or illegality. Fla. Stat. § 102.112(3) (2000). As is evident from the events of the past few weeks, a manual recount can be an arduous and time-consuming process taking longer than a week — especially in large counties. A candidate who desired such recounts would likely know this and could reasonably decide to wait and request the manual recounts as part of an election contest where there would be more time.

By altering the definition of a "valid vote" and altering the statutory protest and contest periods, the Florida Supreme Court violated due process. As previously noted, by ordering a new standardless recount, the Florida Supreme Court sanctioned wholly arbitrary recounts and validated "dimpled chads" and stray marks as constituting valid votes. Moreover, by enlarging the statutory protest period from seven days to 19 days and shortening the contest period from 29 days to 16 days, the Florida Supreme Court thwarted the reasonable expectations of the candidates and gave a fundamentally unfair advantage to a campaign that chose to "front-load" its challenges into the protest period. "Had the candidates known that Florida's statutory election system allowed the selective mining of votes through its manual recount system, they might have made use of the system to request that at least some of the 180,000 ballots ***25** containing non-votes in the presidential race be examined...." *Touchston*, slip op. at 40 (Tjoflat, J., joined by Birch and Dubina, JJ., dissenting).

These post-election changes benefited the "front-loading" campaign by lowering the standards for determining a "valid vote" and then giving it the majority of the available time for its challenges while reducing the time available to the other campaign to respond in a contest. Had the candidates known that the requirements for a "valid vote" would be lowered and the protest period would have been lengthened, campaign strategies would have taken this into account. *See Roe I*, 43 F.3d at 582; *Brown v. O'Brien*, 469 F.3d at 569-70. By retroactively changing the election rules, however, the Supreme Court of Florida deprived the candidates of this opportunity.

III. THE FLORIDA SUPREME COURT UNLEASHED ARBITRARY RECOUNTS THAT VIOLATE DUE PROCESS AND EQUAL PROTECTION.

Aside from the constitutional problems of post-election judicially created rules for recounts, the decision of the Supreme Court of Florida requires partial, manual recounts that are wholly arbitrary and, hence, unconstitutional. In *Moore v. Ogilvie*, 394 U.S. 814, 818-19 (1969), this Court held that an "arbitrary formula" for the selection of presidential electors by the State of Illinois violated the Fourteenth Amendment. Similarly, in *O'Brien v. Skinner*, 414 U.S. 524, 530 (1974), this Court held that

"New York's election statutes, as construed by its highest court, discriminate[d] between categories of qualified voters in a way that, … [was] wholly arbitrary" and, therefore, violated the Fourteenth Amendment.

***26** As Chief Justice Wells explained, "The majority returns the case to the circuit court for this partial recount of under-votes on the basis of unknown or, at best, ambiguous standards with authority to obtain help from others, the credentials, qualifications, and objectivity of whom are totally unknown." Slip op. at 41 (Wells, C.J., dissenting). The Chief Justice reasoned that the Florida statute governing manual recounts "utterly fails to provide any meaningful standard." *Id.* at 51. In the light of this mandate of arbitrary recounts, Chief Justice Wells foresaw constitutional violations:

There is no doubt that every vote should be counted where there is a "clear indication of the intent of the voter." The problem is how a county canvassing board translates that directive to these punch cards. Should a county canvassing board count or not count a "dimpled chad" where the voter is able to successfully dislodge the chad in every other contest on that ballot? Here, the county canvassing boards disagree. Apparently, some do and some do not. Continuation of this system of county-by-county decisions regarding how a dimpled chad is counted is fraught with equal protection concerns which will eventually cause the election results in Florida to be stricken by the federal courts or Congress.

Id. at 51-52.

Chief Justice Wells also explained that the arbitrary nature of the manual recounts ordered by the Supreme Court of Florida is manifold:

The Court fails to make provision for: (1) the qualifications of those who count; (2) what standards are used in the count- are they the same standards for all ballots statewide or a continuation of the county-by-county ***27** constitutionally suspect standards; (3) who is to observe the count; (4) how one objects to the count; (5) who is entitled to object to the count; (6) whether a person may object to a counter; (7) the possible lack of personnel to conduct the count; (8) the fatigue of the counters; and (9) the effect of the differing intra-county standards.

Id. at 57.

Even before the Florida Supreme Court entered its latest decision, three judges of the United States Court of Appeals for the Eleventh Circuit concluded that the process for manual recounts in Florida was unconstitutional:

Florida's statutory election scheme envisions hand recounts to be an integral part of the process, providing a check when there are "error[s] in the vote tabulation which could affect the outcome of the election." *See* Fla. Stat. Ann. § 102.166(5). The 1989 Florida legislature, however, abdicated its responsibility to prescribe meaningful guidelines for ensuring that any such manual recount would be conducted fairly, accurately, and uniformly. While Florida's legislature was unquestionably vested with the power under Article II, Section One of the United States Constitution to devise its own procedures for selecting the state's electors, it was also required to ensure that whatever process it established comported with the equal protection and due process requirements of the Fourteenth Amendment to that same Constitution. Other states, such as Indiana, have provided clear and definitive standards under which manual recounts are to be conducted. *See* Ind. Code § 3-12-1-9.5 (providing in part that chads that have been ***28** pierced count as valid votes, but those with indentations that are not separated from the ballot card do not). Absent similar clear and certain standards, Florida's manual recount scheme cannot pass constitutional muster.

Touchston, slip op. at 64-65 (footnote omitted) (Birch, J., joined by Tjoflat and Dubina, JJ., dissenting). When the Eleventh Circuit considered this matter, manual recounts were not under way and Governor Bush had been certified as the winner, so a majority of the Eleventh Circuit concluded that Bush had not established irreparable harm. *See Siegel v. LePore*, No. 00-15981 (11th Cir. Dec. 6, 2000). That harm is now imminent.

IV. THIS CASE ILLUSTRATES THE IMPERATIVE OF LEGISLATIVE, NOT JUDICIAL, SUPREMACY IN ESTABLISHING ELECTION RULES TO ENSURE FUNDAMENTAL FAIRNESS.

Another similarity between the *Roe* litigation and the decision of the Florida Supreme Court is the special need for deferring to the exclusive, constitutional authority of legislative bodies to establish rules for voting before an election rather than allowing courts to create rules for voting to apply retroactively in post-election disputes. In both the *Roe* litigation and this case, the state courts failed to defer to the supremacy of the legislatures with disastrous results. In each case, the legislature also had sought to prevent the judicial chicanery that later occurred. Federal relief then became necessary to fulfill the guarantees of the First and Fourteenth Amendments that state courts not change legislative rules retroactively to alter the outcome of an election.

***29** In the *Roe* litigation, the State's pre-election rules plainly prohibited post-election intervention by the Alabama courts. *See* Ala. Code § 17-15-6 (1995) (discussed in *Roe I,* 43 F.3d at 577-78 & n.4; *Roe III*, 68 F.3d at 408-09 & n.7). In the *Roe* context of the election of the Chief Justice, Alabama law also provided that only the state legislature could hear and decide an election contest. Ala. Code §§ 17-15-50 to 17-15-63 (1995) (discussed in *Roe I*, 43 F.3d at 577).

Similarly, this case presents important issues of legislative supremacy in election matters that call into question the fundamental fairness of the decision of the Florida Supreme Court. The ultimate source of that legislative supremacy, of course, is the Constitution, which provides "Each State shall appoint, *in such manner as the Legislature thereof may direct*, a Number of Electors …." U.S. Const. art. II, § 1 (emphasis added). The Constitution does not refer this matter to the entire State government but to the State Legislature alone. Likewise, the National Legislature required, more than a century ago, that any post-election controversy regarding the appointment of presidential electors be resolved "by laws enacted prior to the day fixed for the appointment of the electors." 3 U.S.C. § 5. Representative William Craig Cooper of Ohio explained, in the congressional debate on this law, that Congress should prevent state judicial mischief in the appointment of presidential electors: "How could any court, how could any tribunal intelligently solve the claims of parties under a law which is made concurrent, to the very moment perhaps, with the trouble which they are to settle under the law?" 18 Cong. Rec. 47 (Dec. 8, 1886). Congress also provided that in the event of any failure to appoint electors "on the day prescribed by law, the electors may be appointed on a subsequent day *in such a manner as the legislature of* ***30** *such state may direct.*" 3 U.S.C. § 2 (1994) (emphasis added).

Both the Framers and Congress contemplated that the appointment of presidential electors was to be the exclusive province of state legislatures. "Without the intervention of the State legislatures, the President of the United States cannot be elected at all. They must in all cases have a great share in his appointment, and will perhaps, in most cases, of themselves determine it." The Federalist No. 45, at 291 (James Madison) (Clinton Rossiter ed., 1961). As in *Roe*, the judicial usurpation of this state legislative authority by the Supreme Court of Florida violated the Constitution, and its fundamental unfairness must be redressed by the federal judiciary.

CONCLUSION

The judgment of the Supreme Court of Florida should be reversed.

Footnotes

1 The Supreme Court of Florida's exercise of appellate jurisdiction over an election contest involving a presidential election also runs afoul of Article II, § 1, cl. 2 of the United States Constitution. The Florida election contest statute, Fla. Stat. § 102.168 (2000), does not provide for appellate review of the trial court's decision. As grounds for its jurisdiction, the court cited only the Florida Constitution, Fla. Const. art. V, § 3(b)(5). *Gore v. Harris,* slip op. at 1.

2 Other changes included eviscerating the deadline for submitting amended returns following an election protest and ordering the Leon County Supervisor of Elections to count Miami-Dade County ballots.

3 As noted by Judge Tjoflat, "[t]his bolsters [Petitioner's] claim of a *Roe*-type violation, which dilutes the votes of bona fide voters in violation of the First and Fourteenth Amendments." *Touchston v. McDermott*, No. 00-15985, slip op. at 40 (11th Cir. Dec. 6, 2000) (Tjoflat, J., joined by Birch and Dubina, JJ., dissenting). In *Roe*, there was no question as to voter intent; the contested ballots would have diluted valid votes simply because they were improperly executed. *Id.; Roe I*, 43 F. 3d at 581. This case is much more egregious than *Roe* because valid votes are being diluted not only by improperly executed votes, but also "by the inevitable counting of markings on ballots that were *not* intended as votes." *Touchston*, slip op. at 39 (Tjoflat, J., dissenting).

4 *Cf. United States v. Saylor*, 322 U.S. at 388 (holding that electors have the right to have their vote honestly counted and not diluted by stuffing the ballot box).

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KeyCite Yellow Flag - Negative Treatment
Not Followed on State Law Grounds Jefferson v. Commissioner of Revenue, Minn., August 2, 2001

121 S.Ct. 471
Supreme Court of the United States

George W. BUSH, Petitioner,
v.
PALM BEACH COUNTY CANVASSING BOARD, et al.

No. 00-836.
|
Dec. 4, 2000.

Synopsis
In declaratory judgment action filed by County canvassing boards, political party, and presidential candidate, seeking to require manual recounts of ballots and the certification of recount results, party and candidate filed emergency motion alleging that Florida Secretary of State had acted arbitrarily and in contempt of trial court's earlier ruling finding that Secretary could exercise her discretion in deciding whether to include late amended returns in statewide certification. The Circuit Court, Leon County, denied motion. Party and candidate appealed, and the First District Court of Appeal certified the matter to the Florida Supreme Court. After accepting jurisdiction, the Supreme Court of Florida, 772 So.2d 1220,reversed, holding that manual recounts were permissible, imposing deadline for return of ballot counts, and directing Secretary to accept manual counts submitted prior to that deadline. Certiorari was granted in part. The United States Supreme Court held that Florida Supreme Court's decision would be vacated and remanded, in light of uncertainty as to precise grounds for its decision, including whether, and to what extent, Florida Supreme Court considered federal statute and federal constitutional provision governing appointment of electors.

Vacated and remanded.

West Headnotes (7)

[1] **Federal Courts** ⇐ State constitutions, statutes, regulations, and ordinances

Generally, United States Supreme Court defers to a state court's interpretation of a state statute.

96 Cases that cite this headnote

[2] **United States** ⇐ Presidential electors

In the case of a law enacted by a state legislature applicable not only to elections to state offices, but also to the selection of Presidential electors, the legislature is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under provision of the United States Constitution stating that each State shall appoint, in such manner as legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress. U.S.C.A. Const. Art. 2, § 1, cl. 2.

12 Cases that cite this headnote

[3] **United States** ⇐ Presidential electors

In provision of the United States Constitution stating that each State shall appoint, "in such Manner as the Legislature thereof may direct," a number of electors equal to the whole number of senators and representatives to which the State may be entitled in the Congress, insertion of the words "in such manner as the legislature thereof may direct," while operating as a limitation upon the State in respect of any attempt to circumscribe the legislative power, cannot be held to operate as a limitation on that power itself. U.S.C.A. Const. Art. 2, § 1, cl. 2.

6 Cases that cite this headnote

[4] **Federal Courts** ⇐ Particular cases

United States Supreme Court would not address federal questions presented, and instead would vacate Florida Supreme Court decision extending deadline for accepting hand-counted ballots cast in presidential election in certain Florida counties, and remand for further proceedings, given uncertainty as to precise grounds for state court's decision, including uncertainty as to extent to which Florida

Supreme Court saw Florida Constitution as circumscribing legislature's authority under federal constitutional clause providing for State's appointment of electors "in such Manner as the Legislature thereof may direct," and uncertainty as to state court's consideration of federal statute governing determination of controversy as to appointment of electors. U.S.C.A. Const. Art. 2, § 1, cl. 2; 3 U.S.C.A. § 5.

14 Cases that cite this headnote

[5] **United States** ⇐ Presidential electors

Under statute governing determination of controversy as to appointment of electors, if state legislature has provided for final determination of contests or controversies by a law made prior to election day, that determination shall be conclusive if made at least six days prior to said time of meeting of the electors. 3 U.S.C.A. § 5.

3 Cases that cite this headnote

[6] **United States** ⇐ Presidential electors

Since federal statute governing determination of controversy as to appointment of electors contains a principle of federal law that would assure finality of State's determination if made pursuant to a state law in effect before the election, a legislative wish to take advantage of this "safe harbor" would counsel against any construction of a state election code that Congress might deem to be a change in the law. 3 U.S.C.A. § 5.

4 Cases that cite this headnote

[7] **Federal Courts** ⇐ State constitutions, statutes, regulations, and ordinances

Federal Courts ⇐ Federal constitution, treaties, and statutes

Federal Courts ⇐ Review of State Courts

It is fundamental that state courts be left free and unfettered by United States Supreme Court in interpreting their state constitutions, but it is equally important that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by U.S. Supreme Court of the validity under the federal constitution of state action, and intelligent exercise of Supreme Court's appellate powers compels Supreme Court to ask for the elimination of the obscurities and ambiguities from the opinions in such cases.

2 Cases that cite this headnote

Opinion

****472** ***73** PER CURIAM.

The Supreme Court of the State of Florida interpreted its elections statutes in proceedings brought to require manual recounts of ballots, and the certification of the recount results, for votes cast in the quadrennial Presidential election held on November 7, 2000. Governor George W. Bush, Republican candidate for the Presidency, filed a petition for certiorari to review the Florida Supreme Court decision. We granted certiorari on two of the questions presented by petitioner: whether the decision of the Florida Supreme Court, by effectively changing the State's elector appointment procedures after election day, violated the Due Process Clause or 3 U.S.C. § 5, and whether the decision of that court changed the manner in which the State's electors are to be selected, in violation of the legislature's power to designate the manner for selection under Art. II, § 1, cl. 2, of the United States Constitution. *Post*, 531 U.S. 1004, 121 S.Ct. 512, 148 L.Ed.2d 553.

On November 8, 2000, the day following the Presidential election, the Florida Division of Elections reported that Governor Bush had received 2,909,135 votes, and respondent Democrat Vice President Albert Gore, Jr., had received 2,907,351, a margin of 1,784 in Governor Bush's favor. Under Fla. Stat. § 102.141(4) (2000), because the margin of victory was equal to or less than one-half of one percent of the votes cast, an automatic machine recount occurred. The recount resulted in a much smaller margin of victory for Governor Bush. Vice President Gore then exercised his ***74** statutory right to submit written requests for manual recounts to the canvassing board of any county. See § 102.166. He requested recounts in four counties: Volusia, Palm Beach, Broward, and Miami-Dade.

The parties urged conflicting interpretations of the Florida Election Code respecting the authority of the canvassing

boards, the Secretary of State (hereinafter Secretary), and the Elections Canvassing Commission. On November 14, in an action brought by Volusia County, and joined by the Palm Beach County Canvassing Board, Vice President Gore, and the Florida Democratic Party, the Florida Circuit Court ruled that the statutory 7-day deadline was mandatory, but that the Volusia board could amend its returns at a later date. **473 The court further ruled that the Secretary, after "considering all attendant facts and circumstances," App. to Pet. for Cert. 49a, could exercise her discretion in deciding whether to include the late amended returns in the statewide certification.

The Secretary responded by issuing a set of criteria by which she would decide whether to allow a late filing. The Secretary ordered that, by 2 p.m. the following day, November 15, any county desiring to forward late returns submit a written statement of the facts and circumstances justifying a later filing. Four counties submitted statements, and, after reviewing the submissions, the Secretary determined that none justified an extension of the filing deadline. On November 16, the Florida Democratic Party and Vice President Gore filed an emergency motion in the state court, arguing that the Secretary had acted arbitrarily and in contempt of the court's earlier ruling. The following day, the court denied the motion, ruling that the Secretary had not acted arbitrarily and had exercised her discretion in a reasonable manner consistent with the court's earlier ruling. The Democratic Party and Vice President Gore appealed to the First District Court of Appeal, which certified the matter to the Florida Supreme Court. That court accepted *75 jurisdiction and *sua sponte* entered an order enjoining the Secretary and the Elections Canvassing Commission from finally certifying the results of the election and declaring a winner until further order of that court.

The Supreme Court, with the expedition requisite for the controversy, issued its decision on November 21. *Palm Beach County Canvassing Bd. v. Harris*, 772 So.2d 1220 (2000). As the court saw the matter, there were two principal questions: whether a discrepancy between an original machine return and a sample manual recount resulting from the way a ballot has been marked or punched is an "error in vote tabulation" justifying a full manual recount; and how to reconcile what it spoke of as two conflicts in Florida's election laws: (a) between the timeframe for conducting a manual recount under Fla. Stat. § 102.166 (2000) and the timeframe for submitting county returns under §§ 102.111 and 102.112, and (b) between § 102.111, which provides that the Secretary "shall ... ignor[e]" late election returns, and § 102.112, which provides that she "may ... ignor[e]" such returns.

With regard to the first issue, the court held that, under the plain text of the statute, a discrepancy between a sample manual recount and machine returns due to the way in which a ballot was punched or marked did constitute an "error in vote tabulation" sufficient to trigger the statutory provisions for a full manual recount.

With regard to the second issue, the court held that the "shall ... ignor[e]" provision of § 102.111 conflicts with the "may ... ignor[e]" provision of § 102.112, and that the "may ... ignor[e]" provision controlled. The court turned to the questions whether and when the Secretary may ignore late manual recounts. The court relied in part upon the right to vote set forth in the Declaration of Rights of the Florida Constitution in concluding that late manual recounts could be rejected only under limited circumstances. The court then stated: "[B]ecause of our reluctance to rewrite the Florida *76 Election Code, we conclude that we must invoke the equitable powers of this Court to fashion a remedy ...." 772 So.2d, at 1240. The court thus imposed a deadline of November 26, at 5 p.m., for a return of ballot counts. The 7-day deadline of § 102.111, assuming it would have applied, was effectively extended by 12 days. The court further directed the Secretary to accept manual counts submitted prior to that deadline.

[1] [2] [3] [4] As a general rule, this Court defers to a state court's interpretation of a state statute. But in the case of a law **474 enacted by a state legislature applicable not only to elections to state offices, but also to the selection of Presidential electors, the legislature is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under Art. II, § 1, cl. 2, of the United States Constitution. That provision reads:

> "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress ...."

Although we did not address the same question petitioner raises here, in *McPherson v. Blacker*, 146 U.S. 1, 25, 13 S.Ct. 3, 36 L.Ed. 869 (1892), we said:

> "[Art. II, § 1, cl. 2,] does not read that the people or the citizens shall appoint, but that 'each State shall'; and if the words 'in such manner as the legislature thereof may direct,' had been omitted, it would seem that the legislative

> power of appointment could not have been successfully questioned in the absence of any provision in the state constitution in that regard. Hence the insertion of those words, while operating as a limitation upon the State in respect of any attempt to circumscribe the legislative power, cannot be held to operate as a limitation on that power itself."

*77 There are expressions in the opinion of the Supreme Court of Florida that may be read to indicate that it construed the Florida Election Code without regard to the extent to which the Florida Constitution could, consistent with Art. II, § 1, cl. 2, "circumscribe the legislative power." The opinion states, for example, that "[t]o the extent that the Legislature may enact laws regulating the electoral process, those laws are valid only if they impose no 'unreasonable or unnecessary' restraints on the right of suffrage" guaranteed by the State Constitution. 772 So.2d, at 1236. The opinion also states that "[b]ecause election laws are intended to facilitate the right of suffrage, such laws must be liberally construed in favor of the citizens' right to vote ...." *Id.* at 1237.

[5] [6] In addition, 3 U.S.C. § 5 provides in pertinent part:

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

The parties before us agree that whatever else may be the effect of this section, it creates a "safe harbor" for a State insofar as congressional consideration of its electoral votes is concerned. If the state legislature has provided for final determination of contests or controversies by a law made prior to election day, that determination shall be conclusive if made at least six days prior to said time of meeting *78 of the electors. The Florida Supreme Court cited 3 U.S.C. §§ 1-10 in a footnote of its opinion, 772 So.2d, at 1238, n. 55, but did not discuss § 5. Since § 5 contains a principle of federal law that would assure finality of the State's determination if made pursuant to a state law in effect before the election, a legislative wish to take advantage of the "safe harbor" would counsel against any construction of the Election Code that Congress might deem to be a change in the law.

[7] After reviewing the opinion of the Florida Supreme Court, we find "that **475 there is considerable uncertainty as to the precise grounds for the decision." *Minnesota v. National Tea Co.*, 309 U.S. 551, 555, 60 S.Ct. 676, 84 L.Ed. 920 (1940). This is sufficient reason for us to decline at this time to review the federal questions asserted to be present. See *ibid.*

> "It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions. But it is equally important that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action. Intelligent exercise of our appellate powers compels us to ask for the elimination of the obscurities and ambiguities from the opinions in such cases." *Id.*, at 557, 60 S.Ct. 676.

Specifically, we are unclear as to the extent to which the Florida Supreme Court saw the Florida Constitution as circumscribing the legislature's authority under Art. II, § 1, cl. 2. We are also unclear as to the consideration the Florida Supreme Court accorded to 3 U.S.C. § 5. The judgment of the Supreme Court of Florida is therefore vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

All Citations

531 U.S. 70, 121 S.Ct. 471, 148 L.Ed.2d 366, 69 USLW 3380, 69 USLW 4020, 00 Cal. Daily Op. Serv. 9599, 2000 Daily Journal D.A.R. 12,827, 2000 CJ C.A.R. 6455, 14 Fla. L. Weekly Fed. S 19

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Disagreement Recognized by Stewart v. Blackwell, 6th Cir.(Ohio), April 21, 2006

121 S.Ct. 525
Supreme Court of the United States

George W. BUSH, et al., Petitioners,
v.
Albert GORE, Jr., et al.

No. 00–949.
|
Argued Dec. 11, 2000
|
Dec. 12, 2000.

Synopsis
Democratic candidates for President and Vice President of the United States filed complaint contesting certification of state results in presidential election. The Circuit Court, Leon County, N. Sanders Sauls, J., entered judgment denying all relief, and candidates appealed. The District Court of Appeal certified the matter to the Florida Supreme Court. On review, the Florida Supreme Court, 772 So.2d 1243, ordered manual recounts of ballots on which machines had failed to detect vote for President. Republican candidates filed emergency application for stay of Florida Supreme Court's mandate. The United States Supreme Court, 531 U.S. 1046, 121 S.Ct. 512, 148 L.Ed.2d 553,granted application, treating it as petition for writ of certiorari, and granted certiorari. The Supreme Court held that: (1) manual recounts ordered by Florida Supreme Court, without specific standards to implement its order to discern "intent of the voter," did not satisfy minimum requirement for non-arbitrary treatment of voters necessary, under Equal Protection Clause, to secure fundamental right to vote for President, and (2) remand of case to Florida Supreme Court for it to order constitutionally proper contest would not be appropriate remedy.

Reversed and remanded.

Chief Justice Rehnquist filed concurring opinion in which Justices Scalia and Thomas joined.

Justice Stevens filed dissenting opinion in which Justices Ginsburg and Breyer joined.

Justice Souter filed dissenting opinion in which Justice Breyer joined and Justices Stevens and Ginsburg joined in part.

Justice Ginsburg filed dissenting opinion in which Justice Stevens joined and Justices Souter and Breyer joined in part.

Justice Breyer filed dissenting opinion in which Justices Stevens and Ginsburg joined in part, and in which Justice Souter also joined in part.

West Headnotes (10)

[1] **United States**⇐Presidential electors

The individual citizen has no federal constitutional right to vote for electors for President of the United States unless and until state legislature chooses statewide election as means to implement its power to appoint members of Electoral College. U.S.C.A. Const. Art. 2, § 1, cl. 2.

46 Cases that cite this headnote

[2] **Election Law**⇐Right to vote effectively
United States⇐Presidential electors

When state legislature vests right to vote for President in its people, the right to vote as legislature has prescribed is fundamental, and one source of its fundamental nature lies in the equal weight accorded to each vote and equal dignity owed to each voter. U.S.C.A. Const. Art. 2, § 1, cl. 2.

47 Cases that cite this headnote

[3] **United States**⇐Presidential electors

The State, after granting individual citizens the

right to vote for electors for the President of the United States, can take back the power to appoint electors. U.S.C.A. Const. Art. 2, § 1, cl. 2.

28 Cases that cite this headnote

[4] **Constitutional Law**⇨Elections, Voting, and Political Rights
Election Law⇨Nature and source of right

The right to vote is protected in more than the initial allocation of the franchise; equal protection applies as well to the manner of its exercise. U.S.C.A. Const.Amend. 14.

45 Cases that cite this headnote

[5] **Constitutional Law**⇨Equality of Voting Power (One Person, One Vote)

Having once granted the right to vote on equal terms, the State may not, under Equal Protection Clause, value one person's vote over that of another by later arbitrary and disparate treatment. U.S.C.A. Const.Amend. 14.

119 Cases that cite this headnote

[6] **Election Law**⇨Right to vote effectively

Right of suffrage can be denied by debasement or dilution of weight of citizen's vote just as effectively as by wholly prohibiting free exercise of the franchise.

23 Cases that cite this headnote

[7] **Constitutional Law**⇨Conduct of Elections
Election Law⇨Inspection of Ballots and Recount

Manual recounts of ballots on which machines had failed to detect vote for President, as implemented in response to Florida Supreme Court's opinion which ordered that "intent of the voter" be discerned but did not supply specific standards to ensure uniform treatment, did not satisfy minimum requirement for non-arbitrary treatment of voters necessary, under Equal Protection Clause, to secure the fundamental right to vote for President. U.S.C.A. Const.Amend. 14.

199 Cases that cite this headnote

[8] **Constitutional Law**⇨Conduct of Elections

When state court orders statewide recount in Presidential election, equal protection requires that there be at least some assurance that rudimentary requirements of equal treatment and fundamental fairness are satisfied. U.S.C.A. Const.Amend. 14.

47 Cases that cite this headnote

[9] **Constitutional Law**⇨Conduct of Elections
Constitutional Law⇨Voters, candidates, and elections
Election Law⇨Inspection of Ballots and Recount
Election Law⇨Proceedings on recount or inspection

For state recount in presidential election to be conducted in compliance with requirements of equal protection and due process, it would require adoption of adequate statewide standards for determining what was a legal vote, and practicable procedures to implement them, and also orderly judicial review of any disputed matters that might arise. U.S.C.A. Const.Amend. 14.

69 Cases that cite this headnote

[10] **Election Law**⚖Inspection of Ballots and Recount
Federal Courts⚖Mandate; effect of decision in lower court; proceedings on remand

Following reversal of Florida Supreme Court's order requiring manual recounts in presidential election, United States Supreme Court could not remand case to Florida Supreme Court for it to order constitutionally proper contest, where safe-harbor date, six days before presidential electors would meet to vote, had passed; since Florida Supreme Court had said that Florida Legislature intended to obtain benefits of safe-harbor, that proposed remedy contemplated action in violation of Florida election code, and hence could not be part of "appropriate" order authorized by Florida's contest statute. 3 U.S.C.A. § 5; West's F.S.A. § 102.168(8).

47 Cases that cite this headnote

****527 *100** PER CURIAM.

I

On December 8, 2000, the Supreme Court of Florida ordered that the Circuit Court of Leon County tabulate by hand 9,000 ballots in Miami–Dade County. It also ordered the inclusion in the certified vote totals of 215 votes identified in Palm Beach County and 168 votes identified in Miami–Dade County for Vice President Albert Gore, Jr., and Senator Joseph Lieberman, Democratic candidates for President and Vice President. The State Supreme Court noted that petitioner George W. Bush asserted that the net gain for Vice President Gore in Palm Beach County was 176 votes, and directed the Circuit Court to resolve that dispute on remand. *Gore v. Harris,* 772 So.2d 1243, 1248, n. 6. The court further held that relief would require manual recounts in all Florida counties where so-called "undervotes" had not been subject to manual tabulation. The court ordered all manual recounts to begin at once. Governor Bush and Richard Cheney, Republican candidates for President and Vice President, filed an emergency application for a stay of this mandate. On December 9, we granted the application, treated the application as a petition for a writ of certiorari, and granted certiorari. *Post,* 531 U.S. 1046, 121 S.Ct. 512, 148 L.Ed.2d 553.

The proceedings leading to the present controversy are discussed in some detail in our opinion in *Bush v. Palm Beach County Canvassing Bd., ante,* 531 U.S. 70, 121 S.Ct. 471, 148 L.Ed.2d 366 (2000) *(per curiam) (Bush I).* On November 8, 2000, the day following the Presidential election, the Florida Division of Elections reported that petitioner Bush had received 2,909,135 votes, and respondent Gore had received 2,907,351 votes, a margin of ***101** 1,784 for ****528** Governor Bush. Because Governor Bush's margin of victory was less than "one-half of a percent ... of the votes cast," an automatic machine recount was conducted under § 102.141(4) of the election code, the results of which showed Governor Bush still winning the race but by a diminished margin. Vice President Gore then sought manual recounts in Volusia, Palm Beach, Broward, and Miami–Dade Counties, pursuant to Florida's election protest provisions. Fla. Stat. Ann. § 102.166 (Supp.2001). A dispute arose concerning the deadline for local county canvassing boards to submit their returns to the Secretary of State (Secretary). The Secretary declined to waive the November 14 deadline imposed by statute. §§ 102.111, 102.112. The Florida Supreme Court, however, set the deadline at November 26. We granted certiorari and vacated the Florida Supreme Court's decision, finding considerable uncertainty as to the grounds on which it was based. *Bush I,* 531 U.S., at 78, 121 S.Ct. 471. On December 11, the Florida Supreme Court issued a decision on remand reinstating that date. *Palm Beach County Canvassing Bd. v. Harris,* 772 So.2d 1273, 1290.

On November 26, the Florida Elections Canvassing Commission certified the results of the election and declared Governor Bush the winner of Florida's 25 electoral votes. On November 27, Vice President Gore, pursuant to Florida's contest provisions, filed a complaint in Leon County Circuit Court contesting the certification. Fla. Stat. Ann. § 102.168 (Supp.2001). He sought relief pursuant to § 102.168(3)(c), which provides that "[r]eceipt of a number of illegal votes or rejection of a number of legal votes sufficient to change or place in doubt the result of the election" shall be grounds for a contest. The Circuit Court denied relief, stating that Vice

President Gore failed to meet his burden of proof. He appealed to the First District Court of Appeal, which certified the matter to the Florida Supreme Court.

Accepting jurisdiction, the Florida Supreme Court affirmed in part and reversed in part. ***102** *Gore v. Harris,* 772 So.2d 1243 (2000). The court held that the Circuit Court had been correct to reject Vice President Gore's challenge to the results certified in Nassau County and his challenge to the Palm Beach County Canvassing Board's determination that 3,300 ballots cast in that county were not, in the statutory phrase, "legal votes."

The Supreme Court held that Vice President Gore had satisfied his burden of proof under § 102.168(3)(c) with respect to his challenge to Miami–Dade County's failure to tabulate, by manual count, 9,000 ballots on which the machines had failed to detect a vote for President ("undervotes"). *Id.,* at 1256. Noting the closeness of the election, the court explained that "[o]n this record, there can be no question that there are legal votes within the 9,000 uncounted votes sufficient to place the results of this election in doubt." *Id.,* at 1261. A "legal vote," as determined by the Supreme Court, is "one in which there is a 'clear indication of the intent of the voter.' " *Id.,* at 1257. The court therefore ordered a hand recount of the 9,000 ballots in Miami–Dade County. Observing that the contest provisions vest broad discretion in the circuit judge to "provide any relief appropriate under such circumstances," § 102.168(8), the Supreme Court further held that the Circuit Court could order "the Supervisor of Elections and the Canvassing Boards, as well as the necessary public officials, in all counties that have not conducted a manual recount or tabulation of the undervotes ... to do so forthwith, said tabulation to take place in the individual counties where the ballots are located." *Id.,* at 1262.

The Supreme Court also determined that both Palm Beach County and Miami–Dade County, in their earlier manual recounts, ****529** had identified a net gain of 215 and 168 legal votes for Vice President Gore. *Id.,* at 1260. Rejecting the Circuit Court's conclusion that Palm Beach County lacked the authority to include the 215 net votes submitted ***103** past the November 26 deadline, the Supreme Court explained that the deadline was not intended to exclude votes identified after that date through ongoing manual recounts. As to Miami–Dade County, the court concluded that although the 168 votes identified were the result of a partial recount, they were "legal votes [that] could change the outcome of the election." *Ibid.* The Supreme Court therefore directed the Circuit Court to include those totals in the certified results, subject to resolution of the actual vote total from the Miami–Dade partial recount.

The petition presents the following questions: whether the Florida Supreme Court established new standards for resolving Presidential election contests, thereby violating Art. II, § 1, cl. 2, of the United States Constitution and failing to comply with 3 U.S.C. § 5, and whether the use of standardless manual recounts violates the Equal Protection and Due Process Clauses. With respect to the equal protection question, we find a violation of the Equal Protection Clause.

II

A

The closeness of this election, and the multitude of legal challenges which have followed in its wake, have brought into sharp focus a common, if heretofore unnoticed, phenomenon. Nationwide statistics reveal that an estimated 2% of ballots cast do not register a vote for President for whatever reason, including deliberately choosing no candidate at all or some voter error, such as voting for two candidates or insufficiently marking a ballot. See Ho, More Than 2M Ballots Uncounted, AP Online (Nov. 28, 2000); Kelley, Balloting Problems Not Rare But Only in a Very Close Election Do Mistakes and Mismarking Make a Difference, Omaha World–Herald (Nov. 15, 2000). In certifying election results, the votes eligible for inclusion in the certification are the votes meeting the properly established legal requirements.

***104** This case has shown that punchcard balloting machines can produce an unfortunate number of ballots which are not punched in a clean, complete way by the voter. After the current counting, it is likely legislative bodies nationwide will examine ways to improve the mechanisms and machinery for voting.

B

[1] [2] [3] 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. U.S. Const., Art. II, § 1. This is the source for the statement in *McPherson v. Blacker,* 146 U.S. 1, 35, 13 S.Ct. 3, 36 L.Ed. 869 (1892), that the state legislature's power to select the manner for appointing electors is plenary; it may, if it so chooses, select the electors itself, which indeed was the manner used by state legislatures in several States for many years after the framing of our Constitution. *Id.,* at 28–33, 13 S.Ct. 3. History has now favored the voter, and in each of the several States the citizens themselves vote for Presidential electors. 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. The State, of course, after granting the franchise in the special context of Article II, can take back the power to appoint electors. See *id.,* at 35, 13 S.Ct. 3 (" '[T]here is no doubt of the right of the legislature to resume the power ****530** at any time, for it can neither be taken away nor abdicated' ") (quoting S.Rep. No. 395, 43d Cong., 1st Sess., 9 (1874)).

[4] [5] [6] The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that ***105** of another. See, *e.g., Harper v. Virginia Bd. of Elections,* 383 U.S. 663, 665, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966) ("[O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment"). 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." *Reynolds v. Sims,* 377 U.S. 533, 555, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964).

There is no difference between the two sides of the present controversy on these basic propositions. Respondents say that the very purpose of vindicating the right to vote justifies the recount procedures now at issue. The question before us, however, is whether the recount procedures the Florida Supreme Court has adopted are consistent with its obligation to avoid arbitrary and disparate treatment of the members of its electorate.

Much of the controversy seems to revolve around ballot cards designed to be perforated by a stylus but which, either through error or deliberate omission, have not been perforated with sufficient precision for a machine to register the perforations. In some cases a piece of the card—a chad—is hanging, say, by two corners. In other cases there is no separation at all, just an indentation.

[7] The Florida Supreme Court has ordered that the intent of the voter be discerned from such ballots. For purposes of resolving the equal protection challenge, it is not necessary to decide whether the Florida Supreme Court had the authority under the legislative scheme for resolving election disputes to define what a legal vote is and to mandate a manual recount implementing that definition. The recount mechanisms implemented in response to the decisions of the Florida Supreme Court do not satisfy the minimum requirement for nonarbitrary treatment of voters necessary to secure the fundamental right. Florida's basic command for the count of legally cast votes is to consider the "intent of ***106** the voter." 772 So.2d, at 1262. This is unobjectionable as an abstract proposition and a starting principle. The problem inheres in the absence of specific standards to ensure its equal application. The formulation of uniform rules to determine intent based on these recurring circumstances is practicable and, we conclude, necessary.

The law does not refrain from searching for the intent of the actor in a multitude of circumstances; and in some cases the general command to ascertain intent is not susceptible to much further refinement. In this instance, however, the question is not whether to believe a witness but how to interpret the marks or holes or scratches on an inanimate object, a piece of cardboard or paper which, it is said, might not have registered as a vote during the machine count. The factfinder confronts a thing, not a person. The search for intent can be confined by specific rules designed to ensure uniform treatment.

The want of those rules here has led to unequal evaluation of ballots in various respects. See *id.,* at 1267 (Wells, C.J., dissenting) ("Should a county canvassing board count or not count a 'dimpled chad' where the voter is able to successfully dislodge the chad in every other contest on that ballot? Here, the county canvassing boards disagree"). As seems to have been acknowledged at oral argument, the standards for accepting or rejecting contested ****531** ballots might vary not only from county to county but indeed within a single county from one recount team to another.

The record provides some examples. A monitor in Miami–Dade County testified at trial that he observed that three members of the county canvassing board applied

different standards in defining a legal vote. 3 Tr. 497, 499 (Dec. 3, 2000). And testimony at trial also revealed that at least one county changed its evaluative standards during the counting process. Palm Beach County, for example, began the process with a 1990 guideline which precluded counting completely attached chads, switched to a rule that considereda ***107** vote to be legal if any light could be seen through a chad, changed back to the 1990 rule, and then abandoned any pretense of a *per se* rule, only to have a court order that the county consider dimpled chads legal. This is not a process with sufficient guarantees of equal treatment.

An early case in our one-person, one-vote jurisprudence arose when a State accorded arbitrary and disparate treatment to voters in its different counties. *Gray v. Sanders,* 372 U.S. 368, 83 S.Ct. 801, 9 L.Ed.2d 821 (1963). The Court found a constitutional violation. We relied on these principles in the context of the Presidential selection process in *Moore v. Ogilvie,* 394 U.S. 814, 89 S.Ct. 1493, 23 L.Ed.2d 1 (1969), where we invalidated a county-based procedure that diluted the influence of citizens in larger counties in the nominating process. There we observed that "[t]he idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government." *Id.,* at 819, 89 S.Ct. 1493.

The State Supreme Court ratified this uneven treatment. It mandated that the recount totals from two counties, Miami–Dade and Palm Beach, be included in the certified total. The court also appeared to hold *sub silentio* that the recount totals from Broward County, which were not completed until after the original November 14 certification by the Secretary, were to be considered part of the new certified vote totals even though the county certification was not contested by Vice President Gore. Yet each of the counties used varying standards to determine what was a legal vote. Broward County used a more forgiving standard than Palm Beach County, and uncovered almost three times as many new votes, a result markedly disproportionate to the difference in population between the counties.

In addition, the recounts in these three counties were not limited to so-called undervotes but extended to all of the ballots. The distinction has real consequences. A manual recount of all ballots identifies not only those ballots which show no vote but also those which contain more than one, ***108** the so-called overvotes. Neither category will be counted by the machine. This is not a trivial concern. At oral argument, respondents estimated there are as many as 110,000 overvotes statewide. As a result, the citizen whose ballot was not read by a machine because he failed to vote for a candidate in a way readable by a machine may still have his vote counted in a manual recount; on the other hand, the citizen who marks two candidates in a way discernible by the machine will not have the same opportunity to have his vote count, even if a manual examination of the ballot would reveal the requisite indicia of intent. Furthermore, the citizen who marks two candidates, only one of which is discernible by the machine, will have his vote counted even though it should have been read as an invalid ballot. The State Supreme Court's inclusion of vote counts based on these variant standards exemplifies concerns with the remedial processes that were under way.

That brings the analysis to yet a further equal protection problem. The votes certified by the court included a partial total from one county, Miami–Dade. The Florida ****532** Supreme Court's decision thus gives no assurance that the recounts included in a final certification must be complete. Indeed, it is respondents' submission that it would be consistent with the rules of the recount procedures to include whatever partial counts are done by the time of final certification, and we interpret the Florida Supreme Court's decision to permit this. See 772 So.2d, at 1261–1262, n. 21 (noting "practical difficulties" may control outcome of election, but certifying partial Miami–Dade total nonetheless). This accommodation no doubt results from the truncated contest period established by the Florida Supreme Court in *Palm Beach County Canvassing Bd. v. Harris,* at respondents' own urging. The press of time does not diminish the constitutional concern. A desire for speed is not a general excuse for ignoring equal protection guarantees.

***109** In addition to these difficulties the actual process by which the votes were to be counted under the Florida Supreme Court's decision raises further concerns. That order did not specify who would recount the ballots. The county canvassing boards were forced to pull together ad hoc teams of judges from various Circuits who had no previous training in handling and interpreting ballots. Furthermore, while others were permitted to observe, they were prohibited from objecting during the recount.

The recount process, in its features here described, is inconsistent with the minimum procedures necessary to protect the fundamental right of each voter in the special instance of a statewide recount under the authority of a single state judicial officer. Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.

[8] The question before the Court is not whether local

entities, in the exercise of their expertise, may develop different systems for implementing elections. Instead, we are presented with a situation where a state court with the power to assure uniformity has ordered a statewide recount with minimal procedural safeguards. When a court orders a statewide remedy, there must be at least some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied.

Given the Court's assessment that the recount process underway was probably being conducted in an unconstitutional manner, the Court stayed the order directing the recount so it could hear this case and render an expedited decision. The contest provision, as it was mandated by the State Supreme Court, is not well calculated to sustain the confidence that all citizens must have in the outcome of elections. The State has not shown that its procedures include the necessary safeguards. The problem, for instance, of the estimated 110,000 overvotes has not been ***110** addressed, although Chief Justice Wells called attention to the concern in his dissenting opinion. See 772 So.2d, at 1264, n. 26.

[9] Upon due consideration of the difficulties identified to this point, it is obvious that the recount cannot be conducted in compliance with the requirements of equal protection and due process without substantial additional work. It would require not only the adoption (after opportunity for argument) of adequate statewide standards for determining what is a legal vote, and practicable procedures to implement them, but also orderly judicial review of any disputed matters that might arise. In addition, the Secretary has advised that the recount of only a portion of the ballots requires that the vote tabulation equipment be used to screen out undervotes, a function for which the machines were not designed. If a recount of overvotes were also required, perhaps even a second screening would be necessary. Use of the equipment for this purpose, and any new software developed for it, would have to be evaluated for accuracy by the Secretary, ****533** as required by Fla. Stat. Ann. § 101.015 (Supp.2001).

The Supreme Court of Florida has said that the legislature intended the State's electors to "participat[e] fully in the federal electoral process," as provided in 3 U.S.C. § 5. 772 So.2d, at 1289; see also *Palm Beach County Canvassing Bd. v. Harris*, 772 So.2d 1220, 1237 (Fla.2000). That statute, in turn, requires that any controversy or contest that is designed to lead to a conclusive selection of electors be completed by December 12. That date is upon us, and there is no recount procedure in place under the State Supreme Court's order that comports with minimal constitutional standards. Because it is evident that any recount seeking to meet the December 12 date will be unconstitutional for the reasons we have discussed, we reverse the judgment of the Supreme Court of Florida ordering a recount to proceed.

[10] ***111** Seven Justices of the Court agree that there are constitutional problems with the recount ordered by the Florida Supreme Court that demand a remedy. See *post*, at 545 (SOUTER, J., dissenting); *post*, at 551–552 (BREYER, J., dissenting). The only disagreement is as to the remedy. Because the Florida Supreme Court has said that the Florida Legislature intended to obtain the safe-harbor benefits of 3 U.S.C. § 5, Justice BREYER's proposed remedy—remanding to the Florida Supreme Court for its ordering of a constitutionally proper contest until December 18–contemplates action in violation of the Florida Election Code, and hence could not be part of an "appropriate" order authorized by Fla. Stat. Ann. § 102.168(8) (Supp.2001).

* * *

None are more conscious of the vital limits on judicial authority than are the Members of this Court, and none stand more in admiration of the Constitution's design to leave the selection of the President to the people, through their legislatures, and to the political sphere. When contending parties invoke the process of the courts, however, it becomes our unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront.

The judgment of the Supreme Court of Florida is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

Pursuant to this Court's Rule 45.2, the Clerk is directed to issue the mandate in this case forthwith.

It is so ordered.

Chief Justice REHNQUIST, with whom Justice SCALIA and Justice THOMAS join, concurring.

We join the *per curiam* opinion. We write separately because we believe there are additional grounds that

require us to reverse the Florida Supreme Court's decision.

***112 I**

We deal here not with an ordinary election, but with an election for the President of the United States. In *Burroughs v. United States,* 290 U.S. 534, 545, 54 S.Ct. 287, 78 L.Ed. 484 (1934), we said:

> "While presidential electors are not officers or agents of the federal government (*In re Green,* 134 U.S. 377, 379, 10 S.Ct. 586, 33 L.Ed. 951 [(1890)]), they exercise federal functions under, and discharge duties in virtue of authority conferred by, the Constitution of the United States. The President is vested with the executive power of the nation. The importance of his election and the vital character of its relationship to and effect upon the welfare and safety of the whole people cannot be too strongly stated."

Likewise, in *Anderson v. Celebrezze,* 460 U.S. 780, 794–795, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983) (footnote omitted), we ****534** said: "[I]n the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest. For the President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation."

In most cases, comity and respect for federalism compel us to defer to the decisions of state courts on issues of state law. That practice reflects our understanding that the decisions of state courts are definitive pronouncements of the will of the States as sovereigns. Cf. *Erie R. Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). Of course, in ordinary cases, the distribution of powers among the branches of a State's government raises no questions of federal constitutional law, subject to the requirement that the government be republican in character. See U.S. Const., Art. IV, § 4. But there are a few exceptional cases in which the Constitution imposes a duty or confers a power on a particular branch of a State's government. This is one of them. Article II, § 1, cl. 2, provides that "[e]ach State shall appoint, in such Manner as the *Legislature* thereof may direct," electors for President and Vice President. (Emphasis added.) Thus, ***113** the text of the election law itself, and not just its interpretation by the courts of the States, takes on independent significance.

In *McPherson v. Blacker,* 146 U.S. 1, 13 S.Ct. 3, 36 L.Ed. 869 (1892), we explained that Art. II, § 1, cl. 2, "convey[s] the broadest power of determination" and "leaves it to the legislature exclusively to define the method" of appointment. 146 U.S., at 27, 13 S.Ct. 3. A significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question.

Title 3 U.S.C. § 5 informs our application of Art. II, § 1, cl. 2, to the Florida statutory scheme, which, as the Florida Supreme Court acknowledged, took that statute into account. Section 5 provides that the State's selection of electors "shall be conclusive, and shall govern in the counting of the electoral votes" if the electors are chosen under laws enacted prior to election day, and if the selection process is completed six days prior to the meeting of the electoral college. As we noted in *Bush v. Palm Beach County Canvassing Bd.,* 531 U.S., at 78, 121 S.Ct. 471, 148 L.Ed.2d 366:

> "Since § 5 contains a principle of federal law that would assure finality of the State's determination if made pursuant to a state law in effect before the election, a legislative wish to take advantage of the 'safe harbor' would counsel against any construction of the Election Code that Congress might deem to be a change in the law."

If we are to respect the legislature's Article II powers, therefore, we must ensure that postelection state-court actions do not frustrate the legislative desire to attain the "safe harbor" provided by § 5.

In Florida, the legislature has chosen to hold statewide elections to appoint the State's 25 electors. Importantly, the legislature has delegated the authority to run the elections and to oversee election disputes to the Secretary of ***114** State (Secretary), Fla. Stat. Ann. § 97.012(1) (Supp.2001), and to state circuit courts, §§ 102.168(1), 102.168(8). Isolated sections of the code may well admit of more than one interpretation, but the general coherence of the legislative scheme may not be altered by judicial interpretation so as to wholly change the statutorily provided apportionment of responsibility among these various bodies. In any election but a Presidential election, the Florida Supreme Court can give as little or as much deference to Florida's executives as it chooses, so far as Article II is concerned, and this Court will have no cause to question the court's actions. But, with respect to a Presidential election, the court must be both mindful of the legislature's role under Article II in choosing the manner of appointing electors and deferential to those ****535** bodies expressly empowered by the legislature to carry out its constitutional mandate.

In order to determine whether a state court has infringed upon the legislature's authority, we necessarily must examine the law of the State as it existed prior to the action of the court. Though we generally defer to state courts on the interpretation of state law—see, *e.g., Mullaney v. Wilbur,* 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975)—there are of course areas in which the Constitution requires this Court to undertake an independent, if still deferential, analysis of state law.

For example, in *NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958), it was argued that we were without jurisdiction because the petitioner had not pursued the correct appellate remedy in Alabama's state courts. Petitioner had sought a state-law writ of certiorari in the Alabama Supreme Court when a writ of mandamus, according to that court, was proper. We found this state-law ground inadequate to defeat our jurisdiction because we were "unable to reconcile the procedural holding of the Alabama Supreme Court" with prior Alabama precedent. *Id.,* at 456, 78 S.Ct. 1163. The purported state-law ground was so novel, in our independent ***115** estimation, that "petitioner could not fairly be deemed to have been apprised of its existence." *Id.,* at 457, 78 S.Ct. 1163.

Six years later we decided *Bouie v. City of Columbia,* 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964), in which the state court had held, contrary to precedent, that the state trespass law applied to black sit-in demonstrators who had consent to enter private property but were then asked to leave. Relying upon *NAACP,* we concluded that the South Carolina Supreme Court's interpretation of a state penal statute had impermissibly broadened the scope of that statute beyond what a fair reading provided, in violation of due process. See 378 U.S., at 361–362, 84 S.Ct. 1697. What we would do in the present case is precisely parallel: hold that the Florida Supreme Court's interpretation of the Florida election laws impermissibly distorted them beyond what a fair reading required, in violation of Article II.[1]

This inquiry does not imply a disrespect for state *courts* but rather a respect for the constitutionally prescribed role of state *legislatures.* To attach definitive weight to the pronouncement of a state court, when the very question at issue is whether the court has actually departed from the statutory meaning, would be to abdicate our responsibility to enforce the explicit requirements of Article II.

***116 II**

Acting pursuant to its constitutional grant of authority, the Florida Legislature has created a detailed, if not perfectly crafted, statutory scheme that provides for appointment of Presidential electors by direct election. Fla. Stat. Ann. § 103.011 (1992). Under the statute, "[v]otes cast for the actual candidates for President and Vice President shall be counted as votes cast for the presidential electors supporting such candidates." *Ibid.* The legislature ****536** has designated the Secretary as the "chief election officer," with the responsibility to "[o]btain and maintain uniformity in the application, operation, and interpretation of the election laws." Fla. Stat. Ann. § 97.012 (Supp.2001). The state legislature has delegated to county canvassing boards the duties of administering elections. § 102.141. Those boards are responsible for providing results to the state Elections Canvassing Commission, comprising the Governor, the Secretary of State, and the Director of the Division of Elections. § 102.111. Cf. *Boardman v. Esteva,* 323 So.2d 259, 268, n. 5 (1975) ("The election process ... is committed to the executive branch of government through duly designated officials all charged with specific duties .... [The] judgments [of these officials] are entitled to be regarded by the courts as presumptively correct ...").

After the election has taken place, the canvassing boards receive returns from precincts, count the votes, and in the event that a candidate was defeated by 0.5% or less, conduct a mandatory recount. Fla. Stat. § 102.141(4) (2000). The county canvassing boards must file certified election returns with the Department of State by 5 p.m. on the seventh day following the election. § 102.112(1). The Elections Canvassing Commission must then certify the results of the election. § 102.111(1).

The state legislature has also provided mechanisms both for protesting election returns and for contesting certified ***117** election results. Section 102.166 governs protests. Any protest must be filed prior to the certification of election results by the county canvassing board. § 102.166(4)(b). Once a protest has been filed, "[t]he county canvassing board may authorize a manual recount." § 102.166(4)(c). If a sample recount conducted pursuant to § 102.166(5) "indicates an error in the vote tabulation which could affect the outcome of the election," the county canvassing board is instructed to: "(a) Correct the error and recount the remaining precincts with the vote tabulation system; (b) Request the Department of State to verify the tabulation software; or (c) Manually recount all ballots," § 102.166(5). In the event a canvassing board chooses to conduct a manual recount of all ballots, § 102.166(7) prescribes procedures

for such a recount.

Contests to the certification of an election, on the other hand, are controlled by § 102.168. The grounds for contesting an election include "[r]eceipt of a number of illegal votes or rejection of a number of legal votes sufficient to change or place in doubt the result of the election." § 102.168(3)(c). Any contest must be filed in the appropriate Florida circuit court, § 102.168(1), and the canvassing board or election board is the proper party defendant, § 102.168(4). Section 102.168(8) provides that "[t]he circuit judge to whom the contest is presented may fashion such orders as he or she deems necessary to ensure that each allegation in the complaint is investigated, examined, or checked, to prevent or correct any alleged wrong, and to provide any relief appropriate under such circumstances." In Presidential elections, the contest period necessarily terminates on the date set by 3 U.S.C. § 5 for concluding the State's "final determination" of election controversies.

In its first decision, *Palm Beach Canvassing Bd. v. Harris,* 772 So.2d 1220 (2000) (*Harris I*), the Florida Supreme Court extended the 7–day statutory certification deadline established ***118** by the legislature.[2] This modification of the code, by lengthening the protest period, necessarily shortened the contest period for Presidential elections. Underlying the extension of the certification deadline and the shortchanging of the contest period was, presumably, the clear implication that certification ****537** was a matter of significance: The certified winner would enjoy presumptive validity, making a contest proceeding by the losing candidate an uphill battle. In its latest opinion, however, the court empties certification of virtually all legal consequence during the contest, and in doing so departs from the provisions enacted by the Florida Legislature.

The court determined that canvassing boards' decisions regarding whether to recount ballots past the certification deadline (even the certification deadline established by *Harris I*) are to be reviewed *de novo,* although the Election Code clearly vests discretion whether to recount in the boards, and sets strict deadlines subject to the Secretary's rejection of late tallies and monetary fines for tardiness. See Fla. Stat. Ann. § 102.112 (Supp.2001). Moreover, the Florida court held that all late vote tallies arriving during the contest period should be automatically included in the certification regardless of the certification deadline (even the certification deadline established by *Harris I*), thus virtually eliminating both the deadline and the Secretary's discretion to disregard recounts that violate it.[3]

Moreover, the court's interpretation of "legal vote," and hence its decision to order a contest-period recount, plainly departed from the legislative scheme. Florida statutory law cannot reasonably be thought to *require* the counting of improperly ***119** marked ballots. Each Florida precinct before election day provides instructions on how properly to cast a vote, Fla. Stat. Ann. § 101.46 (1992); each polling place on election day contains a working model of the voting machine it uses, Fla. Stat. Ann. § 101.5611 (Supp.2001); and each voting booth contains a sample ballot, § 101.46. In precincts using punchcard ballots, voters are instructed to punch out the ballot cleanly:

> "AFTER VOTING, CHECK YOUR BALLOT CARD TO BE SURE YOUR VOTING SELECTIONS ARE CLEARLY AND CLEANLY PUNCHED AND THERE ARE NO CHIPS LEFT HANGING ON THE BACK OF THE CARD. Instructions to Voters, quoted in Brief for Respondent Harris et al. 13, n. 5.

No reasonable person would call it "an error in the vote tabulation," Fla. Stat. Ann. § 102.166(5) (Supp.2001), or a "rejection of ... legal votes," § 102.168(3)(c),[4] when electronic or electromechanical equipment performs precisely in the manner designed, and fails to count those ballots that are not marked in the manner that these voting instructions explicitly and prominently specify. The scheme that the Florida Supreme Court's opinion attributes to the legislature is one in which machines are *required* to be "capable of correctly counting votes," § 101.5606(4), but which nonetheless regularly produces elections in which legal votes are predictably *not* tabulated, so that in close elections manual recounts are regularly required. This is of course absurd. The Secretary, who is authorized by law to issue binding interpretations of the Election Code, §§ 97.012, 106.23, rejected this peculiar reading of the statutes. See DE 00–13 (opinion of the Division of Elections). The Florida Supreme Court, ***120** although it must defer to the Secretary's interpretations, see *Krivanek v. Take Back Tampa Political Committee,* 625 So.2d 840, 844 (Fla.1993), rejected her reasonable interpretation and embraced the peculiar one. See *Palm Beach County* ****538** *Canvassing Bd. v. Harris,* 772 So.2d 1273 (2000) (*Harris III*).

But as we indicated in our remand of the earlier case, in a Presidential election the clearly expressed intent of the legislature must prevail. And there is no basis for reading the Florida statutes as requiring the counting of improperly marked ballots, as an examination of the Florida Supreme Court's textual analysis shows. We will not parse that analysis here, except to note that the principal provision of the Election Code on which it relied, § 101.5614(5), was, as Chief Justice Wells pointed

out in his dissent in *Gore v. Harris*, 772 So.2d 1243, 1267 (2000) *(Harris II)*, entirely irrelevant. The State's Attorney General (who was supporting the Gore challenge) confirmed in oral argument here that never before the present election had a manual recount been conducted on the basis of the contention that "undervotes" should have been examined to determine voter intent. Tr. of Oral Arg. in *Bush v. Palm Beach County Canvassing Bd.*, O.T. 2000, No. 00–836, pp. 39–40, 2000 WL 1763666, at *39–*40; cf. *Broward County Canvassing Board v. Hogan*, 607 So.2d 508, 509 (Fla.Ct.App.1992) (denial of recount for failure to count ballots with "hanging paper chads"). For the court to step away from this established practice, prescribed by the Secretary, the state official charged by the legislature with "responsibility to ... [o]btain and maintain uniformity in the application, operation, and interpretation of the election laws," § 97.012(1), was to depart from the legislative scheme.

III

The scope and nature of the remedy ordered by the Florida Supreme Court jeopardizes the "legislative wish" to take ***121** advantage of the safe harbor provided by 3 U.S.C. § 5. *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S., at 78, 121 S.Ct. 471 *(per curiam)*. December 12, 2000, is the last date for a final determination of the Florida electors that will satisfy § 5. Yet in the late afternoon of December 8th—four days before this deadline—the Supreme Court of Florida ordered recounts of tens of thousands of so-called "undervotes" spread through 64 of the State's 67 counties. This was done in a search for elusive—perhaps delusive—certainty as to the exact count of 6 million votes. But no one claims that these ballots have not previously been tabulated; they were initially read by voting machines at the time of the election, and thereafter reread by virtue of Florida's automatic recount provision. No one claims there was any fraud in the election. The Supreme Court of Florida ordered this additional recount under the provision of the Election Code giving the circuit judge the authority to provide relief that is "appropriate under such circumstances." Fla. Stat. Ann. § 102.168(8) (Supp.2001).

Surely when the Florida Legislature empowered the courts of the State to grant "appropriate" relief, it must have meant relief that would have become final by the cutoff date of 3 U.S.C. § 5. In light of the inevitable legal challenges and ensuing appeals to the Supreme Court of Florida and petitions for certiorari to this Court, the entire recounting process could not possibly be completed by that date. Whereas the majority in the Supreme Court of Florida stated its confidence that "the remaining undervotes in these counties can be [counted] within the required time frame," 772 So.2d, at 1262, n. 22, it made no assertion that the seemingly inevitable appeals could be disposed of in that time. Although the Florida Supreme Court has on occasion taken over a year to resolve disputes over local elections, see, *e.g.*, *Beckstrom v. Volusia County Canvassing Bd.*, 707 So.2d 720 (1998) (resolving contest of sheriff's race 16 months after the ***122** election), it has heard and decided the appeals in the present case with great promptness. But the federal deadlines for ****539** the Presidential election simply do not permit even such a shortened process.

As the dissent noted:

> "In [the four days remaining], all questionable ballots must be reviewed by the judicial officer appointed to discern the intent of the voter in a process open to the public. Fairness dictates that a provision be made for either party to object to how a particular ballot is counted. Additionally, this short time period must allow for judicial review. I respectfully submit this cannot be completed without taking Florida's presidential electors outside the safe harbor provision, creating the very real possibility of disenfranchising those nearly six million voters who are able to correctly cast their ballots on election day." 772 So.2d, at 1269 (opinion of Wells, C.J.) (footnote omitted).

The other dissenters echoed this concern: "[T]he majority is departing from the essential requirements of the law by providing a remedy which is impossible to achieve and which will ultimately lead to chaos." *Id.*, at 1273 (Harding, J., dissenting, jointed by Shaw, J.).

Given all these factors, and in light of the legislative intent identified by the Florida Supreme Court to bring Florida within the "safe harbor" provision of 3 U.S.C. § 5, the remedy prescribed by the Supreme Court of Florida cannot be deemed an "appropriate" one as of December 8. It significantly departed from the statutory framework in place on November 7, and authorized open-ended further proceedings which could not be completed by December 12, thereby preventing a final determination by that date.

For these reasons, in addition to those given in the *per curiam* opinion, we would reverse.

***123** Justice STEVENS, with whom Justice GINSBURG and Justice BREYER join, dissenting.

The Constitution assigns to the States the primary responsibility for determining the manner of selecting the Presidential electors. See Art. II, § 1, cl. 2. When questions arise about the meaning of state laws, including election laws, it is our settled practice to accept the opinions of the highest courts of the States as providing the final answers. On rare occasions, however, either federal statutes or the Federal Constitution may require federal judicial intervention in state elections. This is not such an occasion.

The federal questions that ultimately emerged in this case are not substantial. Article II provides that "[e]ach *State* shall appoint, in such Manner as the Legislature *thereof* may direct, a Number of Electors." *Ibid.* (emphasis added). It does not create state legislatures out of whole cloth, but rather takes them as they come—as creatures born of, and constrained by, their state constitutions. Lest there be any doubt, we stated over 100 years ago in *McPherson v. Blacker,* 146 U.S. 1, 25, 13 S.Ct. 3, 36 L.Ed. 869 (1892), that "[w]hat is forbidden or required to be done by a State" in the Article II context "is forbidden or required of the legislative power under state constitutions as they exist." In the same vein, we also observed that "[t]he [State's] legislative power is the supreme authority except as limited by the constitution of the State." *Ibid.;* cf. *Smiley v. Holm,* 285 U.S. 355, 367, 52 S.Ct. 397, 76 L.Ed. 795 (1932).[1] The legislative ****540** power in Florida is subject to judicial review pursuant ***124** to Article V of the Florida Constitution, and nothing in Article II of the Federal Constitution frees the state legislature from the constraints in the State Constitution that created it. Moreover, the Florida Legislature's own decision to employ a unitary code for all elections indicates that it intended the Florida Supreme Court to play the same role in Presidential elections that it has historically played in resolving electoral disputes. The Florida Supreme Court's exercise of appellate jurisdiction therefore was wholly consistent with, and indeed contemplated by, the grant of authority in Article II.

It hardly needs stating that Congress, pursuant to 3 U.S.C. § 5, did not impose any affirmative duties upon the States that their governmental branches could "violate." Rather, § 5 provides a safe harbor for States to select electors in contested elections "by judicial or other methods" established by laws prior to the election day. Section 5, like Article II, assumes the involvement of the state judiciary in interpreting state election laws and resolving election disputes under those laws. Neither § 5 nor Article II grants federal judges any special authority to substitute their views for those of the state judiciary on matters of state law.

Nor are petitioners correct in asserting that the failure of the Florida Supreme Court to specify in detail the precise manner in which the "intent of the voter," Fla. Stat. Ann. § 101.5614(5) (Supp.2001), is to be determined rises to the level of a constitutional violation.[2] We found such a violation ***125** when individual votes within the same State were weighted unequally, see, *e.g., Reynolds v. Sims,* 377 U.S. 533, 568, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964), but we have never before called into question the substantive standard by which a State determines that a vote has been legally cast. And there is no reason to think that the guidance provided to the factfinders, ****541** specifically the various canvassing boards, by the "intent of the voter" standard is any less sufficient—or will lead to results any less uniform—than, for example, the "beyond a reasonable doubt" standard employed every day by ordinary citizens in courtrooms across this country.[3]

***126** Admittedly, the use of differing substandards for determining voter intent in different counties employing similar voting systems may raise serious concerns. Those concerns are alleviated—if not eliminated—by the fact that a single impartial magistrate will ultimately adjudicate all objections arising from the recount process. Of course, as a general matter, "[t]he interpretation of constitutional principles must not be too literal. We must remember that the machinery of government would not work if it were not allowed a little play in its joints." *Bain Peanut Co. of Tex. v. Pinson,* 282 U.S. 499, 501, 51 S.Ct. 228, 75 L.Ed. 482 (1931) (Holmes, J.). If it were otherwise, Florida's decision to leave to each county the determination of what balloting system to employ—despite enormous differences in accuracy[4]—might run afoul of equal protection. So, too, might the similar decisions of the vast majority of state legislatures to delegate to local authorities certain decisions with respect to voting systems and ballot design.

Even assuming that aspects of the remedial scheme might ultimately be found to violate the Equal Protection Clause, I could not subscribe to the majority's disposition of the case. As the majority explicitly holds, once a state legislature determines to select electors through a popular vote, the right to have one's vote counted is of constitutional stature. As the majority further acknowledges, Florida law holds that all ballots that reveal the intent of the voter constitute valid votes. Recognizing these principles, the majority nonetheless orders the termination of the contest proceeding before all

such votes have been tabulated. Under their own reasoning, ***127** the appropriate course of action would be to remand to allow more specific procedures for implementing the legislature's uniform general standard to be established.

In the interest of finality, however, the majority effectively orders the disenfranchisement of an unknown number of voters whose ballots reveal their intent—and are therefore legal votes under state law—but were for some reason rejected by ballot-counting machines. It does so on the basis of the deadlines set forth in Title 3 of the United States Code. *Ante,* at 532. But, as I have already noted, those provisions merely provide rules of decision for Congress to follow when selecting among conflicting slates of electors. *Supra,* at 540. They do not prohibit a State from counting what the majority concedes to be legal votes until a bona fide winner is determined. Indeed, in 1960, Hawaii appointed two slates of electors and Congress chose to count the one appointed on January 4, 1961, well after the Title 3 deadlines. See Josephson & Ross, Repairing the Electoral College, 22 J. Legis. 145, 166, n. 154 (1996).[5] Thus, nothing prevents the majority, ****542** even if it properly found an equal protection violation, from ordering relief appropriate to remedy that violation without depriving Florida voters of their right to have their votes counted. As the majority notes, "[a] desire for speed is not a general excuse for ignoring equal protection guarantees." *Ante,* at 532.

Finally, neither in this case, nor in its earlier opinion in *Palm Beach County Canvassing Bd. v. Harris,* 772 So.2d 1220 (2000), did the Florida Supreme Court make any substantive ***128** change in Florida electoral law.[6] Its decisions were rooted in long-established precedent and were consistent with the relevant statutory provisions, taken as a whole. It did what courts do[7]—it decided the case before it in light of the legislature's intent to leave no legally cast vote uncounted. In so doing, it relied on the sufficiency of the general "intent of the voter" standard articulated by the state legislature, coupled with a procedure for ultimate review by an impartial judge, to resolve the concern about disparate evaluations of contested ballots. If we assume—as I do—that the members of that court and the judges who would have carried out its mandate are impartial, its decision does not even raise a colorable federal question.

What must underlie petitioners' entire federal assault on the Florida election procedures is an unstated lack of confidence in the impartiality and capacity of the state judges who would make the critical decisions if the vote count were to proceed. Otherwise, their position is wholly without merit. The endorsement of that position by the majority of this Court can only lend credence to the most cynical appraisal of the work of judges throughout the land. It is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law. Time will one day heal the wound to that confidence that will be inflicted by today's decision. One thing, however, is certain. Although we may never know with complete certainty the identity of the winner of this year's Presidential election, ***129** the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law.

I respectfully dissent.

Justice SOUTER, with whom Justice BREYER joins, and with whom Justice STEVENS and Justice GINSBURG join as to all but Part III, dissenting.

The Court should not have reviewed either *Bush v. Palm Beach County Canvassing Bd.,* 531 U.S., at 70, 121 S.Ct. 471 (*per curiam*), or this case, and should not have stopped Florida's attempt to recount all undervote ballots, see 531 U.S., at 102, 121 S.Ct. 471, by issuing a stay of the Florida Supreme Court's orders during the period of this review, see *Bush v. Gore,* 531 U.S. 1046, 121 S.Ct. 512. If this Court had allowed the State to follow the course indicated by the opinions of its own Supreme Court, it is entirely possible that there would ultimately have been no issue requiring our review, and political tension could have worked itself out in the Congress following the procedure provided in ****543** 3 U.S.C. § 15. The case being before us, however, its resolution by the majority is another erroneous decision.

As will be clear, I am in substantial agreement with the dissenting opinions of Justice STEVENS, Justice GINSBURG, and Justice BREYER. I write separately only to say how straightforward the issues before us really are.

There are three issues: whether the State Supreme Court's interpretation of the statute providing for a contest of the state election results somehow violates 3 U.S.C. § 5; whether that court's construction of the state statutory provisions governing contests impermissibly changes a state law from what the State's legislature has provided, in violation of Article II, § 1, cl. 2, of the National Constitution; and whether the manner of interpreting markings on disputed ballots failing to cause machines to register votes for President (the undervote ballots) violates the equal protection or ***130** due process guaranteed by the Fourteenth Amendment. None of these issues is difficult to describe or to resolve.

I

The 3 U.S.C. § 5 issue is not serious. That provision sets certain conditions for treating a State's certification of Presidential electors as conclusive in the event that a dispute over recognizing those electors must be resolved in the Congress under 3 U.S.C. § 15. Conclusiveness requires selection under a legal scheme in place before the election, with results determined at least six days before the date set for casting electoral votes. But no State is required to conform to § 5 if it cannot do that (for whatever reason); the sanction for failing to satisfy the conditions of § 5 is simply loss of what has been called its "safe harbor." And even that determination is to be made, if made anywhere, in the Congress.

II

The second matter here goes to the State Supreme Court's interpretation of certain terms in the state statute governing election "contests," Fla. Stat. Ann. § 102.168 (Supp.2001); there is no question here about the state court's interpretation of the related provisions dealing with the antecedent process of "protesting" particular vote counts, § 102.166, which was involved in the previous case, *Bush v. Palm Beach County Canvassing Bd.* The issue is whether the judgment of the State Supreme Court has displaced the state legislature's provisions for election contests: is the law as declared by the court different from the provisions made by the legislature, to which the National Constitution commits responsibility for determining how each State's Presidential electors are chosen? See U.S. Const., Art. II, § 1, cl. 2. Bush does not, of course, claim that any judicial act interpreting a statute of uncertain meaning is enough to displace the legislative provision and violate Article II; statutes require interpretation, which does not without more affect the legislative character ***131** of a statute within the meaning of the Constitution. Brief for Petitioner in *Bush v. Palm Beach County Canvassing Bd.*, O.T. 2000, No. 00–836, p. 48, n. 22. What Bush does argue, as I understand the contention, is that the interpretation of § 102.168 was so unreasonable as to transcend the accepted bounds of statutory interpretation, to the point of being a nonjudicial act and producing new law untethered to the legislative Act in question.

The starting point for evaluating the claim that the Florida Supreme Court's interpretation effectively rewrote § 102.168 must be the language of the provision on which Gore relies to show his right to raise this contest: that the previously certified result in Bush's favor was produced by "rejection of a number of legal votes sufficient to change or place in doubt the result of the election." Fla. Stat. Ann. § 102.168(3)(c) (Supp.2001). None of the state court's interpretations is unreasonable to the point of displacing the ****544** legislative enactment quoted. As I will note below, other interpretations were of course possible, and some might have been better than those adopted by the Florida court's majority; the two dissents from the majority opinion of that court and various briefs submitted to us set out alternatives. But the majority view is in each instance within the bounds of reasonable interpretation, and the law as declared is consistent with Article II.

1. The statute does not define a "legal vote," the rejection of which may affect the election. The State Supreme Court was therefore required to define it, and in doing that the court looked to another election statute, § 101.5614(5), dealing with damaged or defective ballots, which contains a provision that no vote shall be disregarded "if there is a clear indication of the intent of the voter as determined by the canvassing board." The court read that objective of looking to the voter's intent as indicating that the legislature probably meant "legal vote" to mean a vote recorded on a ballot indicating what the voter intended. ***132** *Gore v. Harris*, 772 So.2d 1243, 1256–1257 (2000). It is perfectly true that the majority might have chosen a different reading. See, *e.g.*, Brief for Respondent Harris et al. 10 (defining "legal votes" as "votes properly executed in accordance with the instructions provided to all registered voters in advance of the election and in the polling places"). But even so, there is no constitutional violation in following the majority view; Article II is unconcerned with mere disagreements about interpretive merits.

2. The Florida court next interpreted "rejection" to determine what act in the counting process may be attacked in a contest. Again, the statute does not define the term. The court majority read the word to mean simply a failure to count. 772 So.2d, at 1257. That reading is certainly within the bounds of common sense, given the objective to give effect to a voter's intent if that can be determined. A different reading, of course, is possible. The majority might have concluded that "rejection"

should refer to machine malfunction, or that a ballot should not be treated as "reject[ed]" in the absence of wrongdoing by election officials, lest contests be so easy to claim that every election will end up in one. Cf. *id.*, at 1266 (Wells, C. J., dissenting). There is, however, nothing nonjudicial in the Florida majority's more hospitable reading.

3. The same is true about the court majority's understanding of the phrase "votes sufficient to change or place in doubt" the result of the election in Florida. The court held that if the uncounted ballots were so numerous that it was reasonably possible that they contained enough "legal" votes to swing the election, this contest would be authorized by the statute.' While the majority might have thought (as ***133** the trial judge did) that a probability, not a possibility, should be necessary to justify a contest, that reading is not required by the statute's text, which says nothing about probability. Whatever people of good will and good sense may argue about the merits of the Florida court's reading, there is no warrant for saying that it transcends the limits of reasonable statutory interpretation to the point of supplanting the statute enacted by the "legislature" within the meaning of Article II.

In sum, the interpretations by the Florida court raise no substantial question under ****545** Article II. That court engaged in permissible construction in determining that Gore had instituted a contest authorized by the state statute, and it proceeded to direct the trial judge to deal with that contest in the exercise of the discretionary powers generously conferred by Fla. Stat. Ann. § 102.168(8) (Supp.2001), to "fashion such orders as he or she deems necessary to ensure that each allegation in the complaint is investigated, examined, or checked, to prevent or correct any alleged wrong, and to provide any relief appropriate under such circumstances." As Justice GINSBURG has persuasively explained in her own dissenting opinion, our customary respect for state interpretations of state law counsels against rejection of the Florida court's determinations in this case.

III

It is only on the third issue before us that there is a meritorious argument for relief, as this Court's *per curiam* opinion recognizes. It is an issue that might well have been dealt with adequately by the Florida courts if the state proceedings had not been interrupted, and if not disposed of at the state level it could have been considered by the Congress in any electoral vote dispute. But because the course of ***134** state proceedings has been interrupted, time is short, and the issue is before us, I think it sensible for the Court to address it.

Petitioners have raised an equal protection claim (or, alternatively, a due process claim, see generally *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982)), in the charge that unjustifiably disparate standards are applied in different electoral jurisdictions to otherwise identical facts. It is true that the Equal Protection Clause does not forbid the use of a variety of voting mechanisms within a jurisdiction, even though different mechanisms will have different levels of effectiveness in recording voters' intentions; local variety can be justified by concerns about cost, the potential value of innovation, and so on. But evidence in the record here suggests that a different order of disparity obtains under rules for determining a voter's intent that have been applied (and could continue to be applied) to identical types of ballots used in identical brands of machines and exhibiting identical physical characteristics (such as "hanging" or "dimpled" chads). See, *e.g.*, Tr. 238–242 (Dec. 2–3, 2000) (testimony of Palm Beach County Canvassing Board Chairman Judge Charles Burton describing varying standards applied to imperfectly punched ballots in Palm Beach County during precertification manual recount); *id.*, at 497–500 (similarly describing varying standards applied in Miami–Dade County); Tr. of Hearing 8–10 (Dec. 8, 2000) (soliciting from county canvassing boards proposed protocols for determining voters' intent but declining to provide a precise, uniform standard). I can conceive of no legitimate state interest served by these differing treatments of the expressions of voters' fundamental rights. The differences appear wholly arbitrary.

In deciding what to do about this, we should take account of the fact that electoral votes are due to be cast in six days. I would therefore remand the case to the courts of Florida with instructions to establish uniform standards for evaluating the several types of ballots that have prompted differing ***135** treatments, to be applied within and among counties when passing on such identical ballots in any further recounting (or successive recounting) that the courts might order.

Unlike the majority, I see no warrant for this Court to assume that Florida could not possibly comply with this requirement before the date set for the meeting of electors, December 18. Although one of the dissenting justices of the State Supreme Court estimated that disparate standards potentially affected 170,000 votes,

Gore v. Harris, 772 So.2d, at 1272–1273, the number at issue is significantly smaller. The 170,000 figure apparently ****546** represents all uncounted votes, both undervotes (those for which no Presidential choice was recorded by a machine) and overvotes (those rejected because of votes for more than one candidate). Tr. of Oral Arg. 61–62. But as Justice BREYER has pointed out, no showing has been made of legal overvotes uncounted, and counsel for Gore made an uncontradicted representation to the Court that the statewide total of undervotes is about 60,000. *Id.*, at 62. To recount these manually would be a tall order, but before this Court stayed the effort to do that the courts of Florida were ready to do their best to get that job done. There is no justification for denying the State the opportunity to try to count all disputed ballots now.

I respectfully dissent.

Justice GINSBURG, with whom Justice STEVENS joins, and with whom Justice SOUTER and Justice BREYER join as to Part I, dissenting.

I

THE CHIEF JUSTICE acknowledges that provisions of Florida's Election Code "may well admit of more than one interpretation." *Ante*, at 534 (concurring opinion). But instead of respecting the state high court's province to say what the State's Election Code means, THE CHIEF JUSTICE maintains that Florida's Supreme Court has veered so far from the ordinary practice of judicial review that what it did cannot ***136** properly be called judging. My colleagues have offered a reasonable construction of Florida's law. Their construction coincides with the view of one of Florida's seven Supreme Court justices. *Gore v. Harris*, 772 So.2d 1243, 1264–1270 (Fla.2000) (Wells, C. J., dissenting); *Palm Beach County Canvassing Bd. v. Harris*, 772 So.2d 1273, 1291–1292 (Fla.2000) (on remand) (confirming, 6 to 1, the construction of Florida law advanced in *Gore*). I might join THE CHIEF JUSTICE were it my commission to interpret Florida law. But disagreement with the Florida court's interpretation of its own State's law does not warrant the conclusion that the justices of that court have legislated. There is no cause here to believe that the members of Florida's high court have done less than "their mortal best to discharge their oath of office," *Sumner v. Mata*, 449 U.S. 539, 549, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981), and no cause to upset their reasoned interpretation of Florida law.

This Court more than occasionally affirms statutory, and even constitutional, interpretations with which it disagrees. For example, when reviewing challenges to administrative agencies' interpretations of laws they implement, we defer to the agencies unless their interpretation violates "the unambiguously expressed intent of Congress." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). We do so in the face of the declaration in Article I of the United States Constitution that "All legislative Powers herein granted shall be vested in a Congress of the United States." Surely the Constitution does not call upon us to pay more respect to a federal administrative agency's construction of federal law than to a state high court's interpretation of its own state's law. And not uncommonly, we let stand state-court interpretations of *federal* law with which we might disagree. Notably, in the habeas context, the Court adheres to the view that "there is 'no intrinsic reason why the fact that a man is a federal judge ***137** should make him more competent, or conscientious, or learned with respect to [federal law] than his neighbor in the state courthouse.' " *Stone v. Powell*, 428 U.S. 465, 494, n. 35, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976) (quoting Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L.Rev. 441, 509 (1963)); see *O'Dell v. Netherland*, 521 U.S. 151, 156, 117 S.Ct. 1969, 138 L.Ed.2d 351 (1997) ("[T]he *Teague* doctrine validates reasonable, ****547** good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions.") (citing *Butler v. McKellar*, 494 U.S. 407, 414, 110 S.Ct. 1212, 108 L.Ed.2d 347 (1990)); O'Connor, Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge, 22 Wm. & Mary L.Rev. 801, 813 (1981) ("There is no reason to assume that state court judges cannot and will not provide a 'hospitable forum' in litigating federal constitutional questions.").

No doubt there are cases in which the proper application of federal law may hinge on interpretations of state law. Unavoidably, this Court must sometimes examine state law in order to protect federal rights. But we have dealt with such cases ever mindful of the full measure of respect we owe to interpretations of state law by a State's highest court. In the Contract Clause case, *General Motors Corp. v. Romein*, 503 U.S. 181, 112 S.Ct. 1105, 117 L.Ed.2d 328 (1992), for example, we said that although "ultimately we are bound to decide for ourselves whether a contract was made," the Court "accord [s] respectful consideration and great weight to the views of

the State's highest court." *Id.,* at 187, 112 S.Ct. 1105 (citing *Indiana ex rel. Anderson v. Brand,* 303 U.S. 95, 100, 58 S.Ct. 443, 82 L.Ed. 685 (1938)). And in *Central Union Telephone Co. v. Edwardsville,* 269 U.S. 190, 46 S.Ct. 90, 70 L.Ed. 229 (1925), we upheld the Illinois Supreme Court's interpretation of a state waiver rule, even though that interpretation resulted in the forfeiture of federal constitutional rights. Refusing to supplant Illinois law with a federal definition of waiver, ***138** we explained that the state court's declaration "should bind us unless so unfair or unreasonable in its application to those asserting a federal right as to obstruct it." *Id.,* at 195, 46 S.Ct. 90.[1]

In deferring to state courts on matters of state law, we appropriately recognize that this Court acts as an " 'outside[r]' lacking the common exposure to local law which comes from sitting in the jurisdiction." *Lehman Brothers v. Schein,* 416 U.S. 386, 391, 94 S.Ct. 1741, 40 L.Ed.2d 215 (1974). That recognition has sometimes prompted us to resolve doubts about the meaning of state law by certifying issues to a State's highest court, even when federal rights are at stake. Cf. *Arizonans for Official English v. Arizona,* 520 U.S. 43, 79, 117 S.Ct. 1055, 137 L.Ed.2d 170 (1997) ("Warnings against premature adjudication of constitutional questions bear heightened attention when a federal court is asked to invalidate a State's law, for the federal tribunal risks friction-generating error when it endeavors to construe a novel state Act not yet reviewed by the State's highest ***139** court."). Notwithstanding our authority to decide issues of state law underlying federal claims, we have used the certification device to afford state high courts an opportunity to inform us on matters of their own State's law ****548** because such restraint "helps build a cooperative judicial federalism." *Lehman Brothers,* 416 U.S., at 391, 94 S.Ct. 1741.

Just last Term, in *Fiore v. White,* 528 U.S. 23, 120 S.Ct. 469, 145 L.Ed.2d 353 (1999), we took advantage of Pennsylvania's certification procedure. In that case, a state prisoner brought a federal habeas action claiming that the State had failed to prove an essential element of his charged offense in violation of the Due Process Clause. *Id.,* at 25–26, 120 S.Ct. 469. Instead of resolving the state-law question on which the federal claim depended, we certified the question to the Pennsylvania Supreme Court for that court to "help determine the proper state-law predicate for our determination of the federal constitutional questions raised." *Id.,* at 29, 120 S.Ct. 469; *id.,* at 28, 120 S.Ct. 469 (asking the Pennsylvania Supreme Court whether its recent interpretation of the statute under which Fiore was convicted "was always the statute's meaning, even at the time of Fiore's trial"). THE CHIEF JUSTICE's willingness to *reverse* the Florida Supreme Court's interpretation of Florida law in this case is at least in tension with our reluctance in *Fiore* even to interpret Pennsylvania law before seeking instruction from the Pennsylvania Supreme Court. I would have thought the "cautious approach" we counsel when federal courts address matters of state law, *Arizonans,* 520 U.S., at 77, 117 S.Ct. 1055, and our commitment to "build[ing] cooperative judicial federalism," *Lehman Brothers,* 416 U.S., at 391, 94 S.Ct. 1741, demanded greater restraint.

Rarely has this Court rejected outright an interpretation of state law by a state high court. *Fairfax's Devisee v. Hunter's Lessee,* 7 Cranch 603, 3 L.Ed. 453 (1813), *NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958), and *Bouie v. City of Columbia,* 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964), cited by THE CHIEF JUSTICE, ***140** are three such rare instances. See *ante,* at 535–536, and n. 2. But those cases are embedded in historical contexts hardly comparable to the situation here. *Fairfax's Devisee,* which held that the Virginia Court of Appeals had misconstrued its own forfeiture laws to deprive a British subject of lands secured to him by federal treaties, occurred amidst vociferous States' rights attacks on the Marshall Court. G. Gunther & K. Sullivan, Constitutional Law 61–62 (13th ed.1997). The Virginia court refused to obey this Court's *Fairfax's Devisee* mandate to enter judgment for the British subject's successor in interest. That refusal led to the Court's pathmarking decision in *Martin v. Hunter's Lessee,* 1 Wheat. 304, 4 L.Ed. 97 (1816). *Patterson,* a case decided three months after *Cooper v. Aaron,* 358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed.2d 5 (1958), in the face of Southern resistance to the civil rights movement, held that the Alabama Supreme Court had irregularly applied its own procedural rules to deny review of a contempt order against the NAACP arising from its refusal to disclose membership lists. We said that "our jurisdiction is not defeated if the nonfederal ground relied on by the state court is 'without any fair or substantial support.' " 357 U.S., at 455, 78 S.Ct. 1163 (quoting *Ward v. Board of Commr's of Love Cty.,* 253 U.S. 17, 22, 40 S.Ct. 419, 64 L.Ed. 751 (1920)). *Bouie,* stemming from a lunch counter "sit-in" at the height of the civil rights movement, held that the South Carolina Supreme Court's construction of its trespass laws—criminalizing conduct not covered by the text of an otherwise clear statute—was "unforeseeable" and thus violated due process when applied retroactively to the petitioners. 378 U.S., at 350, 354, 84 S.Ct. 1697.

THE CHIEF JUSTICE's casual citation of these cases might lead one to believe they are part of a larger

collection of cases in which we said that the Constitution impelled us to train a skeptical eye on a state court's portrayal of state law. But one would be hard pressed, I think, to find additional cases that fit the mold. As Justice BREYER convincingly explains, see *post,* at 553–555 (dissenting opinion), this case ***141** involves nothing close to the kind ****549** of recalcitrance by a state high court that warrants extraordinary action by this Court. The Florida Supreme Court concluded that counting every legal vote was the overriding concern of the Florida Legislature when it enacted the State's Election Code. The court surely should not be bracketed with state high courts of the Jim Crow South.

THE CHIEF JUSTICE says that Article II, by providing that state legislatures shall direct the manner of appointing electors, authorizes federal superintendence over the relationship between state courts and state legislatures, and licenses a departure from the usual deference we give to state-court interpretations of state law. *Ante,* at 535 (concurring opinion) ("To attach definitive weight to the pronouncement of a state court, when the very question at issue is whether the court has actually departed from the statutory meaning, would be to abdicate our responsibility to enforce the explicit requirements of Article II."). The Framers of our Constitution, however, understood that in a republican government, the judiciary would construe the legislature's enactments. See U.S. Const., Art. III; The Federalist No. 78 (A.Hamilton). In light of the constitutional guarantee to States of a "Republican Form of Government," U.S. Const., Art. IV, § 4, Article II can hardly be read to invite this Court to disrupt a State's republican regime. Yet THE CHIEF JUSTICE today would reach out to do just that. By holding that Article II requires our revision of a state court's construction of state laws in order to protect one organ of the State from another, THE CHIEF JUSTICE contradicts the basic principle that a State may organize itself as it sees fit. See, *e.g., Gregory v. Ashcroft,* 501 U.S. 452, 460, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991) ("Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign."); *Highland Farms Dairy v. Agnew,* 300 U.S. 608, 612, 57 S.Ct. 549, 81 L.Ed. 835 (1937) ("How power shall be distributed by a state among its governmental organs is commonly, if not always, a question ***142** for the state itself.").[2] Article II does not call for the scrutiny undertaken by this Court.

The extraordinary setting of this case has obscured the ordinary principle that dictates its proper resolution: Federal courts defer to a state high court's interpretations of the State's own law. This principle reflects the core of federalism, on which all agree. "The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other." *Saenz v. Roe,* 526 U.S. 489, 504, n. 17, 119 S.Ct. 1518, 143 L.Ed.2d 689 (1999) (citing *U.S. Term Limits, Inc. v. Thornton,* 514 U.S. 779, 838, 115 S.Ct. 1842, 131 L.Ed.2d 881 (1995) (KENNEDY, J., concurring)). THE CHIEF JUSTICE's solicitude for the Florida Legislature comes at the expense of the more fundamental solicitude we owe to the legislature's sovereign. U.S. Const., Art. II, § 1, cl. 2 ("Each *State* shall appoint, in such Manner as the Legislature *thereof* may direct," the electors for President and Vice President (emphasis added)); *ante,* at 539–540 (STEVENS, J., dissenting).[3] Were the other ****550** Members of this Court as mindful as they generally are of our system of dual ***143** sovereignty, they would affirm the judgment of the Florida Supreme Court.

II

I agree with Justice STEVENS that petitioners have not presented a substantial equal protection claim. Ideally, perfection would be the appropriate standard for judging the recount. But we live in an imperfect world, one in which thousands of votes have not been counted. I cannot agree that the recount adopted by the Florida court, flawed as it may be, would yield a result any less fair or precise than the certification that preceded that recount. See, *e.g., McDonald v. Board of Election Comm'rs of Chicago,* 394 U.S. 802, 809, 89 S.Ct. 1404, 22 L.Ed.2d 739 (1969) (even in the context of the right to vote, the State is permitted to reform "one step at a time") (citing *Williamson v. Lee Optical of Okla., Inc.,* 348 U.S. 483, 489, 75 S.Ct. 461, 99 L.Ed. 563 (1955)).

Even if there were an equal protection violation, I would agree with Justice STEVENS, Justice SOUTER, and Justice BREYER that the Court's concern about "the December 12 deadline," *ante,* at 533, is misplaced. Time is short in part because of the Court's entry of a stay on December 9, several hours after an able circuit judge in Leon County had begun to superintend the recount process. More fundamentally, the Court's reluctance to let the recount go forward—despite its suggestion that "[t]he search for intent can be confined by specific rules designed to ensure uniform treatment," *ante,* at 530—ultimately turns on its own judgment about the practical realities of implementing a recount, not the judgment of those much closer to the process.

Equally important, as Justice BREYER explains, *post,* at 556 (dissenting opinion), the December 12 "deadline" for bringing Florida's electoral votes into 3 U.S.C. § 5's safe harbor lacks the significance the Court assigns it. Were that date to pass, Florida would still be entitled to deliver electoral votes Congress *must* count unless both Houses find that the votes "ha [d] not been ... regularly given." 3 U.S.C. § 15. The statute identifies other significant dates. See, *e.g.,* § 7 (specifying ***144** December 18 as the date electors "shall meet and give their votes"); § 12 (specifying "the fourth Wednesday in December"—this year, December 27—as the date on which Congress, if it has not received a State's electoral votes, shall request the state secretary of state to send a certified return immediately). But none of these dates has ultimate significance in light of Congress' detailed provisions for determining, on "the sixth day of January," the validity of electoral votes. § 15.

The Court assumes that time will not permit "orderly judicial review of any disputed matters that might arise." *Ante,* at 533. But no one has doubted the good faith and diligence with which Florida election officials, attorneys for all sides of this controversy, and the courts of law have performed their duties. Notably, the Florida Supreme Court has produced two substantial opinions within 29 hours of oral argument. In sum, the Court's conclusion that a constitutionally adequate recount is impractical is a prophecy the Court's own judgment will not allow to be tested. Such an untested prophecy should not decide the Presidency of the United States.

I dissent.

Justice BREYER, with whom Justice STEVENS and Justice GINSBURG join except as to Part I–A–1, and with whom Justice SOUTER joins as to Part I, dissenting.

The Court was wrong to take this case. It was wrong to grant a stay. It should ****551** now vacate that stay and permit the Florida Supreme Court to decide whether the recount should resume.

I

The political implications of this case for the country are momentous. But the federal legal questions presented, with one exception, are insubstantial.

***145** A

1

The majority raises three equal protection problems with the Florida Supreme Court's recount order: first, the failure to include overvotes in the manual recount; second, the fact that *all* ballots, rather than simply the undervotes, were recounted in some, but not all, counties; and third, the absence of a uniform, specific standard to guide the recounts. As far as the first issue is concerned, petitioners presented no evidence, to this Court or to any Florida court, that a manual recount of overvotes would identify additional legal votes. The same is true of the second, and, in addition, the majority's reasoning would seem to invalidate any state provision for a manual recount of individual counties in a statewide election.

The majority's third concern does implicate principles of fundamental fairness. The majority concludes that the Equal Protection Clause requires that a manual recount be governed not only by the uniform general standard of the "clear intent of the voter," but also by uniform subsidiary standards (for example, a uniform determination whether indented, but not perforated, "undervotes" should count). The opinion points out that the Florida Supreme Court ordered the inclusion of Broward County's undercounted "legal votes" even though those votes included ballots that were not perforated but simply "dimpled," while newly recounted ballots from other counties will likely include only votes determined to be "legal" on the basis of a stricter standard. In light of our previous remand, the Florida Supreme Court may have been reluctant to adopt a more specific standard than that provided for by the legislature for fear of exceeding its authority under Article II. However, since the use of different standards could favor one or the other of the candidates, since time was, and is, too short to permit the lower courts to iron out significant differences through ordinary ***146** judicial review, and since the relevant distinction was embodied in the order of the State's highest court, I agree that, in these very special circumstances, basic principles of

fairness may well have counseled the adoption of a uniform standard to address the problem. In light of the majority's disposition, I need not decide whether, or the extent to which, as a remedial matter, the Constitution would place limits upon the content of the uniform standard.

2

Nonetheless, there is no justification for the majority's remedy, which is simply to reverse the lower court and halt the recount entirely. An appropriate remedy would be, instead, to remand this case with instructions that, even at this late date, would permit the Florida Supreme Court to require recounting *all* undercounted votes in Florida, including those from Broward, Volusia, Palm Beach, and Miami–Dade Counties, whether or not previously recounted prior to the end of the protest period, and to do so in accordance with a single uniform standard.

The majority justifies stopping the recount entirely on the ground that there is no more time. In particular, the majority relies on the lack of time for the Secretary of State (Secretary) to review and approve equipment needed to separate undervotes. But the majority reaches this conclusion in the absence of *any* record evidence that the recount could not have been completed in the time allowed by the Florida Supreme Court. The majority finds facts outside of the record on matters that state ****552** courts are in a far better position to address. Of course, it is too late for any such recount to take place by December 12, the date by which election disputes must be decided if a State is to take advantage of the safe harbor provisions of 3 U.S.C. § 5. Whether there is time to conduct a recount prior to December 18, when the electors are scheduled to meet, is a matter for the state courts to determine. And whether, under Florida law, Florida ***147** could or could not take further action is obviously a matter for Florida courts, not this Court, to decide. See *ante,* at 533 *(per curiam).*

By halting the manual recount, and thus ensuring that the uncounted legal votes will not be counted under any standard, this Court crafts a remedy out of proportion to the asserted harm. And that remedy harms the very fairness interests the Court is attempting to protect. The manual recount would itself redress a problem of unequal treatment of ballots. As Justice STEVENS points out, see *ante,* at 541, and n. 4 (dissenting opinion), the ballots of voters in counties that use punchcard systems are more likely to be disqualified than those in counties using optical-scanning systems. According to recent news reports, variations in the undervote rate are even more pronounced. See Fessenden, No–Vote Rates Higher in Punch Card Count, N.Y. Times, Dec. 1, 2000, p. A29 (reporting that 0.3% of ballots cast in 30 Florida counties using optical-scanning systems registered no Presidential vote, in comparison to 1.53% in the 15 counties using Votomatic punchcard ballots). Thus, in a system that allows counties to use different types of voting systems, voters already arrive at the polls with an unequal chance that their votes will be counted. I do not see how the fact that this results from counties' selection of different voting machines rather than a court order makes the outcome any more fair. Nor do I understand why the Florida Supreme Court's recount order, which helps to redress this inequity, must be entirely prohibited based on a deficiency that could easily be remedied.

B

The remainder of petitioners' claims, which are the focus of THE CHIEF JUSTICE's concurrence, raise no significant federal questions. I cannot agree that THE CHIEF JUSTICE's unusual review of state law in this case, see *ante,* at 545–550 (GINSBURG, J., dissenting), is justified by reference either to Art. II, § 1, or to 3 U.S.C. § 5. Moreover, even were such ***148** review proper, the conclusion that the Florida Supreme Court's decision contravenes federal law is untenable.

While conceding that, in most cases, "comity and respect for federalism compel us to defer to the decisions of state courts on issues of state law," the concurrence relies on some combination of Art. II, § 1, and 3 U.S.C. § 5 to justify its conclusion that this case is one of the few in which we may lay that fundamental principle aside. *Ante,* at 534 (opinion of REHNQUIST, C.J.) The concurrence's primary foundation for this conclusion rests on an appeal to plain text: Art. II, § 1's grant of the power to appoint Presidential electors to the state "Legislature." *Ibid.* But neither the text of Article II itself nor the only case the concurrence cites that interprets Article II, *McPherson v. Blacker,* 146 U.S. 1, 13 S.Ct. 3, 36 L.Ed. 869 (1892), leads to the conclusion that Article II grants unlimited power to the legislature, devoid of any state constitutional limitations, to select the manner of appointing electors. See *id.,* at 41, 13 S.Ct. 3 (specifically referring to state

constitutional provision in upholding state law regarding selection of electors). Nor, as Justice STEVENS points out, have we interpreted the federal constitutional provision most analogous to Art. II, § 1—Art. I, § 4—in the strained manner put forth in the concurrence. *Ante,* at 539–540 and n. 1 (dissenting opinion).

The concurrence's treatment of § 5 as "inform[ing]" its interpretation of ****553** Article II, § 1, cl. 2, *ante,* at 534 (opinion of REHNQUIST, C. J.), is no more convincing. THE CHIEF JUSTICE contends that our opinion in *Bush v. Palm Beach County Canvassing Bd.,* 531 U.S., at 70, 121 S.Ct. 471 *(per curiam) (Bush I),* in which we stated that "a legislative wish to take advantage of [§ 5] would counsel against" a construction of Florida law that Congress might deem to be a change in law, 531 U.S., at 78, 121 S.Ct. 471, now means that *this* Court "must ensure that post-election state-court actions do not frustrate the legislative desire to attain the 'safe harbor' provided by § 5." *Ante,* at 534. However, § 5 is part of the rules that govern Congress' recognition of slates of electors. Nowhere in *Bush I* did we ***149** establish that *this* Court had the authority to enforce § 5. Nor did we suggest that the permissive "counsel against" could be transformed into the mandatory "must ensure." And nowhere did we intimate, as the concurrence does here, that a state-court decision that threatens the safe harbor provision of § 5 does so in violation of Article II. The concurrence's logic turns the presumption that legislatures would wish to take advantage of § 5's "safe harbor" provision into a mandate that trumps other statutory provisions and overrides the intent that the legislature *did* express.

But, in any event, the concurrence, having conducted its review, now reaches the wrong conclusion. It says that "the Florida Supreme Court's interpretation of the Florida election laws impermissibly distorted them beyond what a fair reading required, in violation of Article II." *Ante,* at 535 (opinion of REHNQUIST, C.J.). But what precisely is the distortion? Apparently, it has three elements. First, the Florida court, in its earlier opinion, changed the election certification date from November 14 to November 26. Second, the Florida court ordered a manual recount of "undercounted" ballots that could not have been fully completed by the December 12 "safe harbor" deadline. Third, the Florida court, in the opinion now under review, failed to give adequate deference to the determinations of canvassing boards and the Secretary.

To characterize the first element as a "distortion," however, requires the concurrence to second-guess the way in which the state court resolved a plain conflict in the language of different statutes. Compare Fla. Stat. Ann. § 102.166 (Supp.2001) (foreseeing manual recounts during the protest period) with § 102.111 (setting what is arguably too short a deadline for manual recounts to be conducted); compare § 102.112(1) (stating that the Secretary "may" ignore late returns) with § 102.111(1) (stating that the Secretary "shall" ignore late returns). In any event, that issue no longer has ***150** any practical importance and cannot justify the reversal of the different Florida court decision before us now.

To characterize the second element as a "distortion" requires the concurrence to overlook the fact that the inability of the Florida courts to conduct the recount on time is, in significant part, a problem of the Court's own making. The Florida Supreme Court thought that the recount could be completed on time, and, within hours, the Florida Circuit Court was moving in an orderly fashion to meet the deadline. This Court improvidently entered a stay. As a result, we will never know whether the recount could have been completed.

Nor can one characterize the third element as "impermissibl[e] distort[ion]" once one understands that there are two sides to the opinion's argument that the Florida Supreme Court "virtually eliminat[ed] the Secretary's discretion." *Ante,* at 535, 537 (REHNQUIST, C.J., concurring). The Florida statute in question was amended in 1999 to provide that the "grounds for contesting an election" include the "rejection of a number of legal votes sufficient to ... place in doubt the result of the election." Fla. Stat. Ann. §§ 102.168(3), (3)(c) (Supp.2001). And the parties have argued about the proper meaning of the statute's term ****554** "legal vote." The Secretary has claimed that a "legal vote" is a vote "properly executed in accordance with the instructions provided to all registered voters." Brief for Respondent Harris et al. 10. On that interpretation, punchcard ballots for which the machines cannot register a vote are not "legal" votes. *Id.,* at 14. The Florida Supreme Court did not accept her definition. But it had a reason. Its reason was that a different provision of Florida election laws (a provision that addresses damaged or defective ballots) says that no vote shall be disregarded "if there is a clear indication of the intent of the voter as determined by the canvassing board" (adding that ballots should not be counted "if it is impossible to determine the elector's choice"). Fla. Stat. Ann. § 101.5614(5) (Supp.2001). Given ***151** this statutory language, certain roughly analogous judicial precedent, *e.g., Darby v. State ex rel. McCollough,* 73 Fla. 922, 75 So. 411 (1917) *(per curiam),* and somewhat similar determinations by courts throughout the Nation, see cases cited *infra,* at 555, the Florida Supreme Court concluded that the term "legal vote" means a vote recorded on a ballot that clearly

reflects what the voter intended. *Gore v. Harris,* 772 So.2d 1243, 1254. That conclusion differs from the conclusion of the Secretary. But nothing in Florida law requires the Florida Supreme Court to accept as determinative the Secretary's view on such a matter. Nor can one say that the court's ultimate determination is so unreasonable as to amount to a constitutionally "impermissible distort[ion]" of Florida law.

The Florida Supreme Court, applying this definition, decided, on the basis of the record, that respondents had shown that the ballots undercounted by the voting machines contained enough "legal votes" to place "the result[s]" of the election "in doubt." Since only a few hundred votes separated the candidates, and since the "undercounted" ballots numbered tens of thousands, it is difficult to see how anyone could find this conclusion unreasonable-however strict the standard used to measure the voter's "clear intent." Nor did this conclusion "strip" canvassing boards of their discretion. The boards retain their traditional discretionary authority during the protest period. And during the contest period, as the court stated, "the Canvassing Board's actions [during the protest period] may constitute evidence that a ballot does or does not qualify as a legal vote." *Id.,* at 1260. Whether a local county canvassing board's discretionary judgment during the protest period not to conduct a manual recount will be set aside during a contest period depends upon whether a candidate provides additional evidence that the rejected votes contain enough "legal votes" to place the outcome of the race in doubt. To limit the local canvassing ***152** board's discretion in this way is not to eliminate that discretion. At the least, one could reasonably so believe.

The statute goes on to provide the Florida circuit judge with authority to "fashion such orders as he or she deems necessary to ensure that each allegation ... is *investigated, examined, or checked,* ... and to provide any relief appropriate." Fla. Stat. Ann. § 102.168(8) (Supp.2001) (emphasis added). The Florida Supreme Court did just that. One might reasonably disagree with the Florida Supreme Court's interpretation of these, or other, words in the statute. But I do not see how one could call its plain language interpretation of a 1999 statutory change so misguided as no longer to qualify as judicial interpretation or as a usurpation of the authority of the state legislature. Indeed, other state courts have interpreted roughly similar state statutes in similar ways. See, *e.g., In re Election of U.S. Representative for Second Congressional Dist.,* 231 Conn. 602, 621, 653 A.2d 79, 90–91 (1994) ("Whatever the process used to vote and to count votes, differences in technology should not furnish a basis for disregarding the bedrock principle that the purpose of the voting process is to ascertain the intent of the ****555** voters"); *Brown v. Carr,* 130 W.Va. 455, 460, 43 S.E.2d 401, 404–405 (1947) ("[W]hether a ballot shall be counted ... depends on the intent of the voter.... Courts decry any resort to technical rules in reaching a conclusion as to the intent of the voter").

I repeat, where is the "impermissible" distortion?

II

Despite the reminder that this case involves "an election for the President of the United States," *ante,* at 533 (REHNQUIST, C. J., concurring), no preeminent legal concern, or practical concern related to legal questions, required this Court to hear this case, let alone to issue a stay that stopped Florida's recount process in its tracks. With one exception, petitioners' claims do not ask us to vindicate a constitutional ***153** provision designed to protect a basic human right. See, *e.g., Brown v. Board of Education,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954). Petitioners invoke fundamental fairness, namely, the need for procedural fairness, including finality. But with the one "equal protection" exception, they rely upon law that focuses, not upon that basic need, but upon the constitutional allocation of power. Respondents invoke a competing fundamental consideration—the need to determine the voter's true intent. But they look to state law, not to federal constitutional law, to protect that interest. Neither side claims electoral fraud, dishonesty, or the like. And the more fundamental equal protection claim might have been left to the state court to resolve if and when it was discovered to have mattered. It could still be resolved through a remand conditioned upon issuance of a uniform standard; it does not require reversing the Florida Supreme Court.

Of course, the selection of the President is of fundamental national importance. But that importance is political, not legal. And this Court should resist the temptation unnecessarily to resolve tangential legal disputes, where doing so threatens to determine the outcome of the election.

The Constitution and federal statutes themselves make clear that restraint is appropriate. They set forth a road-map of how to resolve disputes about electors, even after an election as close as this one. That road-map foresees resolution of electoral disputes by *state* courts. See 3 U.S.C. § 5 (providing that, where a "State shall

have provided, by laws enacted prior to [election day], for its final determination of any controversy or contest concerning the appointment of ... electors ... by *judicial* or other methods," the subsequently chosen electors enter a safe harbor free from congressional challenge). But it nowhere provides for involvement by the United States Supreme Court.

To the contrary, the Twelfth Amendment commits to Congress the authority and responsibility to count electoral votes. A federal statute, the Electoral Count Act, enacted ***154** after the close 1876 Hayes–Tilden Presidential election, specifies that, after States have tried to resolve disputes (through "judicial" or other means), Congress is the body primarily authorized to resolve remaining disputes. See Electoral Count Act of 1887, 24 Stat. 373, 3 U.S.C. §§ 5, 6, and 15.

The legislative history of the Act makes clear its intent to commit the power to resolve such disputes to Congress, rather than the courts:

> "The two Houses are, by the Constitution, authorized to make the count of electoral votes. They can only count legal votes, and in doing so must determine, from the best evidence to be had, what are legal votes....
>
> . . . . .
>
> "The power to determine rests with the two houses, and there is no other constitutional tribunal." H.R. Rep. No. 1638, 49th Cong., 1st Sess., 2 (1886) (report submitted by Rep. Caldwell, Select Committee on the Election of President and Vice–President).

****556** The Member of Congress who introduced the Act added:

> "The power to judge of the legality of the votes is a necessary consequent of the power to count. The existence of this power is of absolute necessity to the preservation of the Government. The interests of all the States in their relations to each other in the Federal Union demand that the ultimate tribunal to decide upon the election of President should be a constituent body, in which the States in their federal relationships and the people in their sovereign capacity should be represented." 18 Cong. Rec. 30 (1886) (remarks of Rep. Caldwell).
>
> "Under the Constitution who else could decide? Who is nearer to the State in determining a question of vital importance to the whole union of States than the constituent body upon whom the Constitution has devolved the duty to count the vote?" *Id.*, at 31.

***155** The Act goes on to set out rules for the congressional determination of disputes about those votes. If, for example, a State submits a single slate of electors, Congress must count those votes unless both Houses agree that the votes "have not been ... regularly given." 3 U.S.C. § 15. If, as occurred in 1876, a State submits two slates of electors, then Congress must determine whether a slate has entered the safe harbor of § 5, in which case its votes will have "conclusive" effect. *Ibid.* If, as also occurred in 1876, there is controversy about "which of two or more of such State authorities ... is the lawful tribunal" authorized to appoint electors, then each House shall determine separately which votes are "supported by the decision of such State so authorized by its law." *Ibid.* If the two Houses of Congress agree, the votes they have approved will be counted. If they disagree, then "the votes of the electors whose appointment shall have been certified by the executive of the State, under the seal thereof, shall be counted." *Ibid.*

Given this detailed, comprehensive scheme for counting electoral votes, there is no reason to believe that federal law either foresees or requires resolution of such a political issue by this Court. Nor, for that matter, is there any reason to think that the Constitution's Framers would have reached a different conclusion. Madison, at least, believed that allowing the judiciary to choose the Presidential electors "was out of the question." Madison, July 25, 1787 (reprinted in 5 Elliot's Debates on the Federal Constitution 363 (2d ed. 1876)).

The decision by both the Constitution's Framers and the 1886 Congress to minimize this Court's role in resolving close federal Presidential elections is as wise as it is clear. However awkward or difficult it may be for Congress to resolve difficult electoral disputes, Congress, being a political body, expresses the people's will far more accurately than does an unelected Court. And the people's will is what elections are about.

***156** Moreover, Congress was fully aware of the danger that would arise should it ask judges, unarmed with appropriate legal standards, to resolve a hotly contested Presidential election contest. Just after the 1876 Presidential election, Florida, South Carolina, and Louisiana each sent two slates of electors to Washington. Without these States, Tilden, the Democrat, had 184 electoral votes, one short of the number required to win the Presidency. With those States, Hayes, his Republican opponent, would have had 185. In order to choose between the two slates of electors, Congress decided to appoint an electoral commission composed of five Senators, five Representatives, and five Supreme Court

Justices. Initially the Commission was to be evenly divided between Republicans and Democrats, with Justice David Davis, an Independent, to possess the decisive vote. However, when at the last minute the Illinois Legislature elected Justice Davis to the United States Senate, the final position on the Commission was ****557** filled by Supreme Court Justice Joseph P. Bradley.

The Commission divided along partisan lines, and the responsibility to cast the deciding vote fell to Justice Bradley. He decided to accept the votes by the Republican electors, and thereby awarded the Presidency to Hayes.

Justice Bradley immediately became the subject of vociferous attacks. Bradley was accused of accepting bribes, of being captured by railroad interests, and of an eleventh-hour change in position after a night in which his house "was surrounded by the carriages" of Republican partisans and railroad officials. C. Woodward, Reunion and Reaction 159–160 (1966). Many years later, Professor Bickel concluded that Bradley was honest and impartial. He thought that " 'the great question' for Bradley was, in fact, whether Congress was entitled to go behind election returns or had to accept them as certified by state authorities," an "issue of principle." The Least Dangerous Branch 185 (1962). Nonetheless, Bickel points out, the legal question upon which Justice ***157** Bradley's decision turned was not very important in the contemporaneous political context. He says that "in the circumstances the issue of principle was trivial, it was overwhelmed by all that hung in the balance, and it should not have been decisive." *Ibid.*

For present purposes, the relevance of this history lies in the fact that the participation in the work of the electoral commission by five Justices, including Justice Bradley, did not lend that process legitimacy. Nor did it assure the public that the process had worked fairly, guided by the law. Rather, it simply embroiled Members of the Court in partisan conflict, thereby undermining respect for the judicial process. And the Congress that later enacted the Electoral Count Act knew it.

This history may help to explain why I think it not only legally wrong, but also most unfortunate, for the Court simply to have terminated the Florida recount. Those who caution judicial restraint in resolving political disputes have described the quintessential case for that restraint as a case marked, among other things, by the "strangeness of the issue," its "intractability to principled resolution," its "sheer momentousness, ... which tends to unbalance judicial judgment," and "the inner vulnerability, the self-doubt of an institution which is electorally irresponsible and has no earth to draw strength from." *Id.*, at 184. Those characteristics mark this case.

At the same time, as I have said, the Court is not acting to vindicate a fundamental constitutional principle, such as the need to protect a basic human liberty. No other strong reason to act is present. Congressional statutes tend to obviate the need. And, above all, in this highly politicized matter, the appearance of a split decision runs the risk of undermining the public's confidence in the Court itself. That confidence is a public treasure. It has been built slowly over many years, some of which were marked by a Civil War and the tragedy of segregation. It is a vitally ***158** necessary ingredient of any successful effort to protect basic liberty and, indeed, the rule of law itself. We run no risk of returning to the days when a President (responding to this Court's efforts to protect the Cherokee Indians) might have said, "John Marshall has made his decision; now let him enforce it!" D. Loth, Chief Justice John Marshall and The Growth of the American Republic 365 (1948). But we do risk a self-inflicted wound—a wound that may harm not just the Court, but the Nation.

I fear that in order to bring this agonizingly long election process to a definitive conclusion, we have not adequately attended to that necessary "check upon our own exercise of power," "our own sense of self-restraint." ****558** *United States v. Butler*, 297 U.S. 1, 79, 56 S.Ct. 312, 80 L.Ed. 477 (1936) (Stone, J., dissenting). Justice Brandeis once said of the Court, "The most important thing we do is not doing." Bickel, *supra*, at 71. What it does today, the Court should have left undone. I would repair the damage done as best we now can, by permitting the Florida recount to continue under uniform standards.

I respectfully dissent.

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Footnotes

1 Similarly, our jurisprudence requires us to analyze the "background principles" of state property law to determine whether there has been a taking of property in violation of the Takings Clause. That constitutional guarantee would, of course, afford no protection against state power if our inquiry could be concluded by a state supreme court holding that state property law

accorded the plaintiff no rights. See *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992). In one of our oldest cases, we similarly made an independent evaluation of state law in order to protect federal treaty guarantees. In *Fairfax's Devisee v. Hunter's Lessee,* 7 Cranch 603, 3 L.Ed. 453 (1813), we disagreed with the Supreme Court of Appeals of Virginia that a 1782 state law had extinguished the property interests of one Denny Fairfax, so that a 1789 ejectment order against Fairfax supported by a 1785 state law did not constitute a future confiscation under the 1783 peace treaty with Great Britain. See *id.,* at 623; *Hunter v. Fairfax's Devisee,* 15 Va. 218, 1 Munf. 218 (1810).

2 We vacated that decision and remanded that case; the Florida Supreme Court reissued the same judgment with a new opinion on December 11, 2000, *Palm Beach County Canvassing Bd. v. Harris,* 772 So.2d 1273.

3 Specifically, the Florida Supreme Court ordered the Circuit Court to include in the certified vote totals those votes identified for Vice President Gore in Palm Beach County and Miami–Dade County.

4 It is inconceivable that what constitutes a vote that must be counted under the "error in the vote tabulation" language of the protest phase is different from what constitutes a vote that must be counted under the "legal votes" language of the contest phase.

1 "Wherever the term 'legislature' is used in the Constitution it is necessary to consider the nature of the particular action in view." 285 U.S., at 366, 52 S.Ct. 397. It is perfectly clear that the meaning of the words "Manner" and "Legislature" as used in Article II, § 1, parallels the usage in Article I, § 4, rather than the language in Article V.*U.S. Term Limits, Inc. v. Thornton,* 514 U.S. 779, 805, 115 S.Ct. 1842, 131 L.Ed.2d 881 (1995). Article I, § 4, and Article II, § 1, both call upon legislatures to act in a lawmaking capacity whereas Article V simply calls on the legislative body to deliberate upon a binary decision. As a result, petitioners' reliance on *Leser v. Garnett,* 258 U.S. 130, 42 S.Ct. 217, 66 L.Ed. 505 (1922), and *Hawke v. Smith (No. 1),* 253 U.S. 221, 40 S.Ct. 495, 64 L.Ed. 871 (1920), is misplaced.

2 The Florida statutory standard is consistent with the practice of the majority of States, which apply either an "intent of the voter" standard or an "impossible to determine the elector's choice" standard in ballot recounts. The following States use an "intent of the voter" standard: Ariz.Rev.Stat. Ann. § 16–645(A) (Supp.2000) (standard for canvassing write-in votes); Conn. Gen.Stat. § 9–150a(j) (1999) (standard for absentee ballots, including three conclusive presumptions); Ind.Code § 3–12–1–1 (1992); Me.Rev.Stat. Ann., Tit. 21–A, § 1(13) (1993); Md. Ann.Code, Art. 33, § 11–302(d) (2000 Supp.) (standard for absentee ballots); Mass. Gen. Laws § 70E (1991) (applying standard to Presidential primaries); Mich. Comp. Laws § 168.799a(3) (Supp.2000); Mo.Rev.Stat. § 115.453(3) (Cum.Supp.1998) (looking to voter's intent where there is substantial compliance with statutory requirements); Tex. Elec.Code Ann. § 65.009(c) (1986); Utah Code Ann. § 20A–4–104(5)(b) (Supp.2000) (standard for write-in votes), § 20A–4–105(6)(a) (standard for mechanical ballots); Vt. Stat. Ann., Tit. 17, § 2587(a) (1982); Va.Code Ann. § 24.2–644(A) (2000); Wash. Rev.Code § 29.62.180(1) (Supp.2001) (standard for write-in votes); Wyo. Stat. Ann. § 22–14–104 (1999). The following States employ a standard in which a vote is counted unless it is "impossible to determine the elector's [or voter's] choice": Ala.Code § 11–46–44(c) (1992), Ala.Code § 17–13–2 (1995); Ariz.Rev.Stat. Ann. § 16–610 (1996) (standard for rejecting ballot); Cal. Elec.Code Ann. § 15154(c) (West Supp.2000); Colo.Rev.Stat. § 1–7–309(1) (1999) (standard for paper ballots), § 1–7–508(2) (standard for electronic ballots); Del.Code Ann., Tit. 15, § 4972(4) (1999); Idaho Code § 34–1203 (1981); Ill. Comp. Stat., ch. 10, § 5/7–51 (1993) (standard for primaries), § 5/17–16 (standard for general elections); Iowa Code § 49.98 (1999); Me.Rev.Stat. Ann., Tit. 21–A §§ 696(2)(B), (4) (Supp.2000); Minn.Stat. § 204C.22(1) (1992); Mont.Code Ann. § 13–15–202 (1997) (not counting votes if "elector's choice cannot be determined"); Nev.Rev.Stat. § 293.367(d) (1995); N.Y. Elec. Law § 9–112(6) (McKinney 1998); N.C. Gen.Stat. §§ 163–169(b), 163–170 (1999); N.D. Cent.Code § 16.1–15–01(1) (Supp.1999); Ohio Rev.Code Ann. § 3505.28 (1994); Okla. Stat., Tit. 26, § 7–127(6) (1997); Ore.Rev.Stat. § 254.505(1) (1991); S.C.Code Ann. § 7–13–1120 (1977); S.D. Codified Laws § 12–20–7 (1995); Tenn.Code Ann. § 2–7–133(b) (1994); W. Va.Code § 3–6–5(g) (1999).

3 Cf. *Victor v. Nebraska,* 511 U.S. 1, 5, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994) ("The beyond a reasonable doubt standard is a requirement of due process, but the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so").

4 The percentage of nonvotes in this election in counties using a punchcard system was 3.92%; in contrast, the rate of error under the more modern optical-scan systems was only 1.43%. *Siegel v. LePore,* 234 F.3d 1163, 1202, 1213 (charts C and F) (C.A.11, Dec. 6, 2000). Put in other terms, for every 10,000 votes cast, punchcard systems result in 250 more nonvotes than optical-scan systems. A total of 3,718,305 votes were cast under punchcard systems, and 2,353,811 votes were cast under optical-scan systems. *Ibid.*

5 Republican electors were certified by the Acting Governor on November 28, 1960. A recount was ordered to begin on December

13, 1960. Both Democratic and Republican electors met on the appointed day to cast their votes. On January 4, 1961, the newly elected Governor certified the Democratic electors. The certification was received by Congress on January 6, the day the electoral votes were counted. Josephson & Ross, 22 J. Legis., at 166, n. 154.

6 When, for example, it resolved the previously unanswered question whether the word "shall" in Fla. Stat. Ann. § 102.111 (Supp.2001) or the word "may" in § 102.112 governs the scope of the Secretary of State's authority to ignore untimely election returns, it did not "change the law." Like any other judicial interpretation of a statute, its opinion was an authoritative interpretation of what the statute's relevant provisions have meant since they were enacted. *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312–313, 114 S.Ct. 1510, 128 L.Ed.2d 274 (1994).

7 "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed. 60 (1803).

* When the Florida court ruled, the totals for Bush and Gore were then less than 1,000 votes apart. One dissent pegged the number of uncounted votes in question at 170,000. *Gore v. Harris*, 772 So.2d 1243, 1272–1273 (2000) (Harding, J., dissenting). Gore's counsel represented to us that the relevant figure is approximately 60,000, Tr. of Oral Arg. 62, the number of ballots in which no vote for President was recorded by the machines.

1 See also *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1032, n. 18, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992) (South Carolina could defend a regulatory taking "if an *objectively reasonable application* of relevant precedents [by its courts] would exclude ... beneficial uses in the circumstances in which the land is presently found"); *Bishop v. Wood*, 426 U.S. 341, 344–345, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976) (deciding whether North Carolina had created a property interest cognizable under the Due Process Clause by reference to state law as interpreted by the North Carolina Supreme Court). Similarly, in *Gurley v. Rhoden*, 421 U.S. 200, 95 S.Ct. 1605, 44 L.Ed.2d 110 (1975), a gasoline retailer claimed that due process entitled him to deduct a state gasoline excise tax in computing the amount of his sales subject to a state sales tax, on the grounds that the legal incidence of the excise tax fell on his customers and that he acted merely as a collector of the tax. The Mississippi Supreme Court held that the legal incidence of the excise tax fell on petitioner. Observing that "a State's highest court is the final judicial arbiter of the meaning of state statutes," we said that "[w]hen a state court has made its own definitive determination as to the operating incidence, ... [w]e give this finding great weight in determining the natural effect of a statute, and if it is consistent with the statute's reasonable interpretation it will be deemed conclusive." *Id.*, at 208, 95 S.Ct. 1605 (citing *American Oil Co. v. Neill*, 380 U.S. 451, 455–456, 85 S.Ct. 1130, 14 L.Ed.2d 1 (1965)).

2 Even in the rare case in which a State's "manner" of making and construing laws might implicate a structural constraint, Congress, not this Court, is likely the proper governmental entity to enforce that constraint. See U.S. Const., Amdt. 12; 3 U.S.C. §§ 1–15; cf. *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565, 569, 36 S.Ct. 708, 60 L.Ed. 1172 (1916) (treating as a nonjusticiable political question whether use of a referendum to override a congressional districting plan enacted by the state legislature violates Art. I, § 4); *Luther v. Borden*, 7 How. 1, 42, 12 L.Ed. 581 (1849).

3 "[B]ecause the Framers recognized that state power and identity were essential parts of the federal balance, see The Federalist No. 39, the Constitution is solicitous of the prerogatives of the States, even in an otherwise sovereign federal province. The Constitution ... grants States certain powers over the times, places, and manner of federal elections (subject to congressional revision), Art. I, § 4, cl. 1 ..., and allows States to appoint electors for the President, Art. II, § 1, cl. 2." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 841–842, 115 S.Ct. 1842, 131 L.Ed.2d 881 (1995) (KENNEDY, J., concurring).

End of Document

John Guard

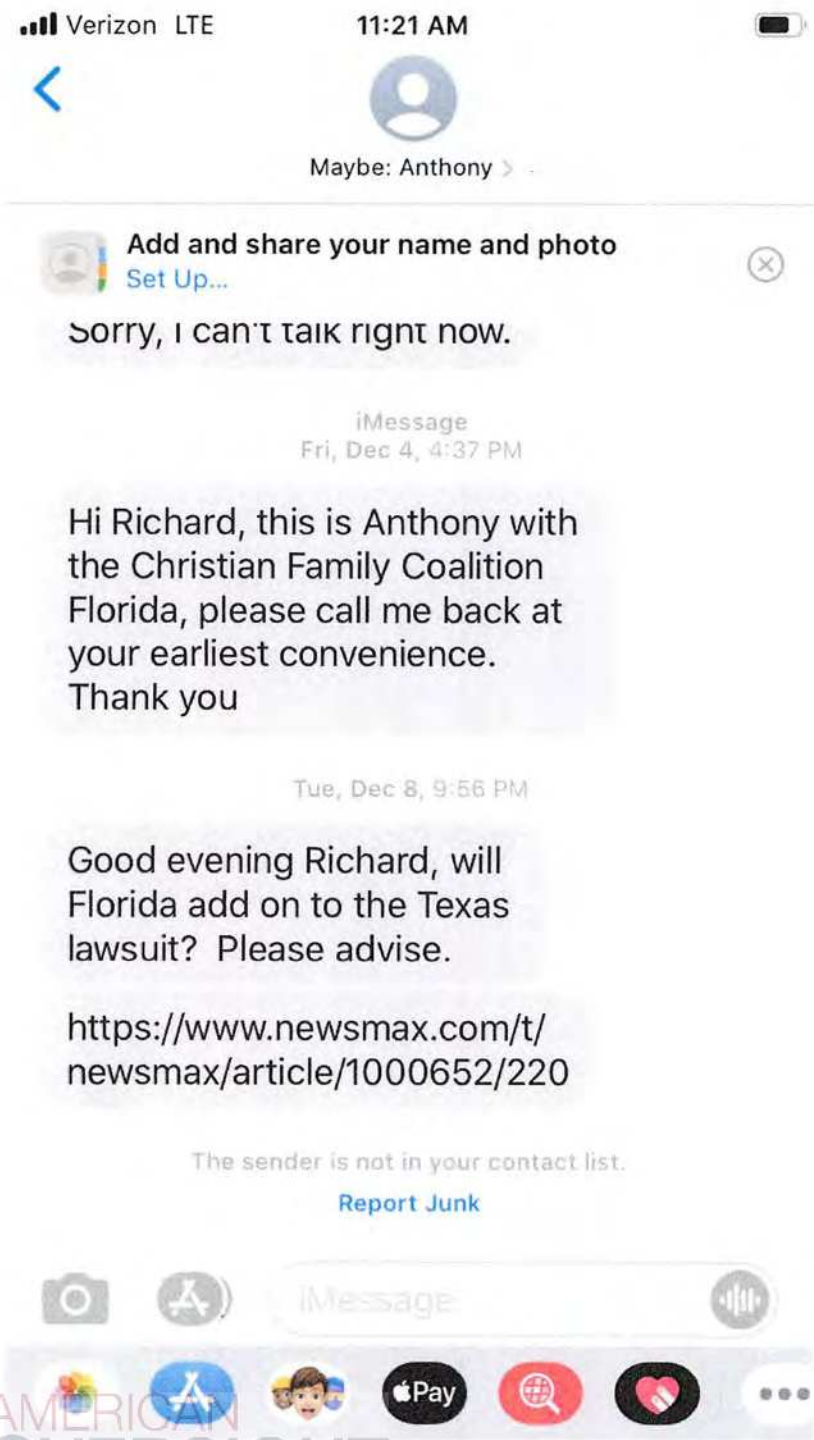
From: Catherine McNeill
Sent: Wednesday, December 9, 2020 11:29 AM
To: John Guard; Richard Martin
Subject: FW: Calls re Texas Lawsuit

From: Angela Beatty <Angela.Beatty@myfloridalegal.com>
Sent: Wednesday, December 9, 2020 10:50 AM
To: Catherine McNeill <cate.mcneill@myfloridalegal.com>
Subject: Calls re Texas Lawsuit

Hi, Catherine. I work in the criminal appeals division in Daytona. We have been getting a lot of calls about the state joining the Texas lawsuit that is going to the Supreme Court. Can you tell me how we should be directing these calls? We are currently directing them to the general number to file a complaint with the AG.

Thank you for your assistance with this.

Angela Beatty
Administrative Secretary
Office of The Florida Attorney General
444 Seabreeze Blvd., Suite 500
Daytona Beach, FL 32118
(386) 238-4990
(386) 238-4997 fax
Angela.Beatty@myfloridalegal.com
to e-file: crimappdab@myfloridalegal.com



Richard Martin

From: Larry Rayburn <larryrayburn75@gmail.com>
Sent: Wednesday, December 9, 2020 7:35 PM
To: Richard Martin
Subject: Florida to U.S. Supreme Court: Hear Texas lawsuit to overturn Biden win

Really?????

https://urldefense.proofpoint.com/v2/url?u=https-3A__www.tampabay.com_news_florida-2Dpolitics_2020_12_09_florida-2Dto-2Dus-2Dsupreme-2Dcourt-2Dhear-2Dtexas-2Dlawsuit-2Dto-2Doverturn-2Dbiden-2Dwin_&d=DwIFAg&c=VW5JLWXJaVcapeXcL_6RHSzucizvbTRh72MnzyhvSvo&r=0rT96mTkAix_PXgBcLtYMHjRkBIT_VfJme5r0BecqpZGE16R1cl8cqRPgUXGwSB5&m=-UfJ_hnEWZh-7Q-Pkp4RsT5jAm_HuZ7Cw4MAkIcogv8&s=cfGKgiKUkNupoPkUeq4Hgly8YdtHqc_eWOoMbm6DB3c&e=

Sent from my iPhone

From: Lauren Cassedy
To: Charles Trippe
Subject: Fwd: Texas lawsuit
Date: Tuesday, December 8, 2020 9:57:22 AM

Get Outlook for iOS

From: Gary Fineout <gfineout@politico.com>
Sent: Tuesday, December 8, 2020 9:40:54 AM
To: Gerald Whitney Ray <Whitney.Ray@myfloridalegal.com>
Cc: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>; Kylie Mason <Kylie.Mason@myfloridalegal.com>
Subject: Texas lawsuit

Good morning.

Just curious if Florida was asked to join the Texas lawsuit challenging the election results in four other states, and if so, why Florida declined.

https://www.texasattorneygeneral.gov/sites/default/files/images/admin/2020/Press/SCOTUSFiling.pdf?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=

Richard Martin

Subject:	Phone Conference with Amit Agarwal, John Guard, Richard Martin, and Charlie Trippe
Start:	Tue 12/8/2020 4:00 PM
End:	Tue 12/8/2020 4:30 PM
Recurrence:	(none)
Meeting Status:	Accepted
Organizer:	Executive.Staff
Required Attendees:	Amit Agarwal; John Guard; Richard Martin; Charles Trippe

Toll Free Dial in Number: 888-585-9008
Conference Room #: [redacted]

ASHLEY MOODY
ATTORNEY GENERAL
STATE OF FLORIDA

OFFICE OF THE ATTORNEY GENERAL
Office of Public Records

Nicholas J. Weilhammer
Office of the Attorney General
State of Florida
The Capitol, PL-01
Tallahassee, Florida 32399-1050
Phone: (850) 414-3300
Facsimile: 850-487-1705
Nicholas.weilhammer@myfloridalegal.com

October 22, 2021

VIA EMAIL

Christine Monahan
American Oversight
(records@americanoversight.org)

Dear Ms. Monahan:

This letter will follow up this office's production of over 1,400 pages of records responsive to your request for the following public records:

> "**All records reflecting any summaries, memoranda, or analyses prepared or distributed by any personnel in the Florida Attorney General's Office regarding the lawsuit Texas v. Pennsylvania, 592 U.S. ___ (2020).**
>
> **Please provide all responsive records from November 3, 2020, through December 12, 2020.**"

On July 13, 2021, you clarified that you are requesting records including "commentary."

After a search of all records referencing the lawsuit, in addition to the initial production, please see the attached additional records of commentary.

This office will not be imposing additional service charge for the additional labor to search all records. This letter and production will complete your public records requests to this office.

Sincerely,

s/ Nicholas J. Weilhammer

Nicholas J. Weilhammer

Attachment: Records

From: Jack Hagadorn
To: Chris Provenzano; Denaziah Watts; Frances Baker-Gavin; Harry Williams; Ingrid Thompson-Grant; Joyce Randall; Latoya Johnson; Lori Davies; Rhoda Poore; Silvia Cervantes; Tara Porter
Subject: Hey all: AG Moody signs on to Pennsylvania Ballot Brief
Date: Tuesday, November 10, 2020 10:53:14 AM
Attachments: image001.png

Hey all,

As noted below, AG Moody signs on to Pennsylvania Ballot Brief aimed at convincing the U.S. Supreme Court to overturn a ruling that allowed Pennsylvania elections officials to count some late-arriving absentee ballots.

We just need to make note of caller's concerns. We do not make comments or offer opinions. If asked, note the AG should issue a press release later addressing her joining the brief. However, we are making note of their concerns.

If they are adamant to do more, they are welcome to file an official comment by using our contact/complaint form online. It is a general purpose form.

NOTE: we do not need a lot of notes. Simply, Caller express support for the AG joining the brief, or caller expresses concern (or disagreement) with the AG joining the brief.

Categories as Election and close the HLM.

Thank you,
Jack

From: Crystal Fukushima <Crystal.Fukushima@myfloridalegal.com>
Sent: Tuesday, November 10, 2020 10:41 AM
To: Kym Oswald <Kym.Oswald@myfloridalegal.com>; Becky Kring <Becky.Kring@myfloridalegal.com>; Samantha Santana <Samantha.Santana@myfloridalegal.com>; Silvia Ledesma <Silvia.Ledesma@myfloridalegal.com>; Jack Hagadorn <Jack.Hagadorn@myfloridalegal.com>
Subject: AG Moody signs on to Pennsylvania Ballot Brief

This has already generated emails and will likely generate calls:

https://www.news4jax.com/news/2020/11/10/florida-attorney-general-signs-on-to-pennsylvania-ballot-brief/

TALLAHASSEE, Fla. – Florida Attorney General Ashley Moody signed on Monday to a brief aimed at convincing the U.S. Supreme Court to overturn a ruling that allowed Pennsylvania elections officials to count some late-arriving absentee ballots.

Moody was one of 10 Republicans attorneys general who filed the brief in a challenge to a decision by the Pennsylvania Supreme Court that allowed counting absentee ballots received up to three days after the Nov. 3 election.

The case is one of a flurry of lawsuits filed by Republicans alleging potential ballot fraud in various states.

President Donald Trump has fueled the allegations for months, including in recent days as results showed Democrat Joe Biden winning the presidential election.

The GOP attorneys general in **Monday's brief** said the decision by the Pennsylvania Supreme Court "exacerbated the risks of ballot fraud" in the key swing state.

The brief was filed by Moody and the attorneys general of Missouri, Alabama, Arkansas, Kentucky, Louisiana, Mississippi, South Carolina, South Dakota and Texas.

Crystal Fukushima
Deputy Director of Citizen Services

Office of Attorney General Ashley Moody
Crystal.Fukushima@myfloridalegal.com
Hotline: (850) 414-3990
Direct Line: (850) 414-3973

PL-01, The Capitol
Tallahassee, Florida 32399

From: Lori Davies
To: CS-STAFF
Subject: My previous email
Date: Wednesday, December 9, 2020 10:55:33 AM
Attachments: image001.png

I am sorry, ya'll. My email previously was incorrect. Per Kym, the article is not about the Texas lawsuit. Please see Kym's note below. Thanks.

From: Kym Oswald <Kym.Oswald@myfloridalegal.com>
Sent: Wednesday, December 9, 2020 10:52 AM
To: Crystal Fukushima <Crystal.Fukushima@myfloridalegal.com>; Lori Davies <Lori.Davies@myfloridalegal.com>
Subject: RE: FYI -

No this is not the Texas law suit that was the Pennsylvania lawsuit

Kym Oswald
Director of Citizen Services

Office of Attorney General Ashley Moody
Kym.Oswald@myfloridalegal.com
(850) 414-3930

PL-01, The Capitol
Tallahassee, Florida 32399

From: Crystal Fukushima <Crystal.Fukushima@myfloridalegal.com>
Sent: Wednesday, December 9, 2020 10:48 AM
To: Lori Davies <Lori.Davies@myfloridalegal.com>; Kym Oswald <Kym.Oswald@myfloridalegal.com>
Subject: RE: FYI -

Jack could probably explain it best.

From: Lori Davies <Lori.Davies@myfloridalegal.com>
Sent: Wednesday, December 9, 2020 10:46 AM
To: Kym Oswald <Kym.Oswald@myfloridalegal.com>; Crystal Fukushima <Crystal.Fukushima@myfloridalegal.com>
Subject: RE: FYI -

Is this regarding THE Texas lawsuit? Can someone tell us what it means?

From: Lori Davies
Sent: Wednesday, December 9, 2020 10:27 AM
To: CS-STAFF <CS-STAFF@myfloridalegal.com>
Subject: FYI -

Regarding Texas lawsuite –

https://www.foxnews.com/politics/live-updates-election-12-9-2020

From: Christopher Baum
To: Evan Ezray; James Percival; Jeffrey DeSousa; Kevin Golembiewski; David Costello
Subject: Re: Texas Original Jurisdiction Election Suit
Date: Tuesday, December 8, 2020 9:50:30 AM

I bet this royally pisses off the Republican SGs currently arguing that the Court's original jurisdiction is mandatory. Because this is Exhibit A for why the Court does not want to go down that road.

From: Christopher Baum <Christopher.Baum@myfloridalegal.com>
Date: Tuesday, December 8, 2020 at 9:46 AM
To: Evan Ezray <Evan.Ezray@myfloridalegal.com>, James Percival <James.Percival@myfloridalegal.com>, Jeffrey DeSousa <Jeffrey.DeSousa@myfloridalegal.com>, Kevin Golembiewski <Kevin.Golembiewski@myfloridalegal.com>, David Costello <David.Costello@myfloridalegal.com>
Subject: Re: Texas Original Jurisdiction Election Suit

Batshit insane, which is why Kyle is not on it. Must be the only guy in the Texas AG's front office who didn't quit/wasn't fired for alleging that Paxton committed crimes.

From: Evan Ezray <Evan.Ezray@myfloridalegal.com>
Date: Tuesday, December 8, 2020 at 9:37 AM
To: James Percival <James.Percival@myfloridalegal.com>, Jeffrey DeSousa <Jeffrey.DeSousa@myfloridalegal.com>, Christopher Baum <Christopher.Baum@myfloridalegal.com>, Kevin Golembiewski <Kevin.Golembiewski@myfloridalegal.com>, David Costello <David.Costello@myfloridalegal.com>
Subject: Texas Original Jurisdiction Election Suit

All,

Just wanted to flag a new election filing for the group. Texas just filed an original jurisdiction action against Pennsylvania, Georgia, Michigan, and Wisconsin, at SCOTUS alleging voting irregularities and *Bush v. Gore* violations.

A link is here, although it does not yet appear on the SCOTUS docket: https://www.texasattorneygeneral.gov/sites/default/files/images/admin/2020/Press/SCOTUSFiling.pdf?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=

Also interesting that this doesn't appear to be coming from the SG office.

Evan

From: Christopher Baum
To: Evan Ezray; James Percival; Jeffrey DeSousa; Kevin Golembiewski; David Costello
Subject: Re: Texas Original Jurisdiction Election Suit
Date: Tuesday, December 8, 2020 9:56:05 AM

...which would be true in any election case; so Massachusetts has standing to sue Mississippi for illegally gerrymandered districts?

From: Evan Ezray <Evan.Ezray@myfloridalegal.com>
Date: Tuesday, December 8, 2020 at 9:55 AM
To: Christopher Baum <Christopher.Baum@myfloridalegal.com>, James Percival <James.Percival@myfloridalegal.com>, Jeffrey DeSousa <Jeffrey.DeSousa@myfloridalegal.com>, Kevin Golembiewski <Kevin.Golembiewski@myfloridalegal.com>, David Costello <David.Costello@myfloridalegal.com>
Subject: RE: Texas Original Jurisdiction Election Suit

They try to cover that starting at page 68 of the pdf. They say they suffer harm as a state when other state's violate "constitutional" election law and that they bring parens patriae claims for their electors.

From: Christopher Baum <Christopher.Baum@myfloridalegal.com>
Sent: Tuesday, December 8, 2020 9:52 AM
To: James Percival <James.Percival@myfloridalegal.com>; Evan Ezray <Evan.Ezray@myfloridalegal.com>; Jeffrey DeSousa <Jeffrey.DeSousa@myfloridalegal.com>; Kevin Golembiewski <Kevin.Golembiewski@myfloridalegal.com>; David Costello <David.Costello@myfloridalegal.com>
Subject: Re: Texas Original Jurisdiction Election Suit

"because"

From: James Percival <James.Percival@myfloridalegal.com>
Date: Tuesday, December 8, 2020 at 9:50 AM
To: Evan Ezray <Evan.Ezray@myfloridalegal.com>, Jeffrey DeSousa <Jeffrey.DeSousa@myfloridalegal.com>, Christopher Baum <Christopher.Baum@myfloridalegal.com>, Kevin Golembiewski <Kevin.Golembiewski@myfloridalegal.com>, David Costello <David.Costello@myfloridalegal.com>
Subject: Re: Texas Original Jurisdiction Election Suit

What's the theory for how one state has standing to allege Bush v. Gore violations against another state...

From: Evan Ezray <Evan.Ezray@myfloridalegal.com>

Sent: Tuesday, December 8, 2020 9:37 AM
To: James Percival <James.Percival@myfloridalegal.com>; Jeffrey DeSousa <Jeffrey.DeSousa@myfloridalegal.com>; Christopher Baum <Christopher.Baum@myfloridalegal.com>; Kevin Golembiewski <Kevin.Golembiewski@myfloridalegal.com>; David Costello <David.Costello@myfloridalegal.com>
Subject: Texas Original Jurisdiction Election Suit

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Also interesting that this doesn't appear to be coming from the SG office.

Evan

From: Christopher Baum
To: Jeffrey DeSousa; James Percival; Evan Ezray; Kevin Golembiewski; David Costello
Subject: Re: Texas Original Jurisdiction Election Suit
Date: Tuesday, December 8, 2020 10:02:57 AM

Jonathan Williams points out that perhaps this is Paxton's request for a pardon

---

From: Christopher Baum <Christopher.Baum@myfloridalegal.com>
Date: Tuesday, December 8, 2020 at 9:56 AM
To: Jeffrey DeSousa <Jeffrey.DeSousa@myfloridalegal.com>, James Percival <James.Percival@myfloridalegal.com>, Evan Ezray <Evan.Ezray@myfloridalegal.com>, Kevin Golembiewski <Kevin.Golembiewski@myfloridalegal.com>, David Costello <David.Costello@myfloridalegal.com>
Subject: Re: Texas Original Jurisdiction Election Suit

Someone will draft an amicus and ask us to do so.

From: Jeffrey DeSousa <Jeffrey.DeSousa@myfloridalegal.com>
Date: Tuesday, December 8, 2020 at 9:56 AM
To: James Percival <James.Percival@myfloridalegal.com>, Christopher Baum <Christopher.Baum@myfloridalegal.com>, Evan Ezray <Evan.Ezray@myfloridalegal.com>, Kevin Golembiewski <Kevin.Golembiewski@myfloridalegal.com>, David Costello <David.Costello@myfloridalegal.com>
Subject: Re: Texas Original Jurisdiction Election Suit

My question is: have they asked Florida to join?

Jeffrey DeSousa
Chief Deputy Solicitor General
Florida Office of the Attorney General
107 W. Gaines Street
Tallahassee, Florida 32399
(850) 414-3830

From: James Percival <James.Percival@myfloridalegal.com>
Sent: Tuesday, December 8, 2020 9:55 AM
To: Christopher Baum <Christopher.Baum@myfloridalegal.com>; Evan Ezray <Evan.Ezray@myfloridalegal.com>; Jeffrey DeSousa <Jeffrey.DeSousa@myfloridalegal.com>; Kevin Golembiewski <Kevin.Golembiewski@myfloridalegal.com>; David Costello <David.Costello@myfloridalegal.com>
Subject: Re: Texas Original Jurisdiction Election Suit

It also seems weird to cite Marbury v. Madison for the proposition that the court should get involved in a political dispute.

From: Christopher Baum <Christopher.Baum@myfloridalegal.com>
Sent: Tuesday, December 8, 2020 9:52 AM
To: James Percival <James.Percival@myfloridalegal.com>; Evan Ezray <Evan.Ezray@myfloridalegal.com>; Jeffrey DeSousa <Jeffrey.DeSousa@myfloridalegal.com>; Kevin Golembiewski <Kevin.Golembiewski@myfloridalegal.com>; David Costello <David.Costello@myfloridalegal.com>
Subject: Re: Texas Original Jurisdiction Election Suit

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From: James Percival <James.Percival@myfloridalegal.com>
Date: Tuesday, December 8, 2020 at 9:50 AM
To: Evan Ezray <Evan.Ezray@myfloridalegal.com>, Jeffrey DeSousa <Jeffrey.DeSousa@myfloridalegal.com>, Christopher Baum <Christopher.Baum@myfloridalegal.com>, Kevin Golembiewski <Kevin.Golembiewski@myfloridalegal.com>, David Costello <David.Costello@myfloridalegal.com>
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Evan