Subject: Montana public record requests
Date: Friday, November 5, 2021 at 6:27:01 PM Eastern Daylight Time
From: Nerison, Kyler
To: AO Records
Attachments: image001.jpg

EXTERNAL SENDER

Thank you again for bringing this to my attention. Earlier I sent via file transfer documents compiled by the previous administration. I believe this will contain most if not all of the documents you are seeking in your requests dated February 8, February 16, and March 18. Please let me know if you have trouble accessing the files. It isn't the most user-friendly service.

If you would like us to conduct new searches based on your specific parameters in the February 8 request, we estimate the search to take 15.75 hours at an hourly rate of $30.38 (2016 mid-point salary for Band 6 Management Analyst) after the first half-hour. If you would like us to conduct this search, please reply to this email confirming and send a check for $463.29 to the address below.

If you would like us to conduct new searches based on your specific parameters in the March 18 request, we estimate the search to take 15.5 hours at an hourly rate of $30.38 (2016 mid-point salary for Band 6 Management Analyst) after the first half-hour. If you would like us to conduct this search, please reply to this email confirming and send a check for $455.70 to the address below.

If you would like to conduct both searches, we can save some staff time by doing them together. In this case, the total would be $858.23.

Regarding the February 16 request, I believe all of the records you seek would be contained in the documents I am sending via file transfer. Please let me know if you disagree.

For the July 26th request, we estimate the search to take a total of 13.5 hours at $42.29 (average hourly rate of employees whose records you are requesting) after the first half hour. If you would like us to conduct this search, please reply to this email confirming and send a check for $549.77 to the address below.

Make checks out to Montana Department of Justice.

Office of the Attorney General

Attn: Kyler Nerison

215 N. Sanders St.

Helena, MT 59601

Kyler Nerison

Communications Director

Attorney General Austin Knudsen, Montana Department of Justice

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406-444-2031

Kyler.nerison@mt.gov

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ATTORNEY GENERAL
STATE OF MONTANA

Tim Fox
Attorney General

Department of Justice
Joseph P. Mazurek Justice Building
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

December 31, 2020

Chris D. Tweeten
101 W. Artemos Drive
Missoula, MT 59803

RE: Your records request

Dear Mr. Tweeten:

On December 10, 2020, this office received your request for "all public records related to the decision to join" the the multi-state amicus brief in the case of *Texas v. Pennsylvania* (Supreme Court of the United States Docket No. 22O155).

All responsive records are included in the pdf titled "Binder1," which is on the enclosed USB drive. A digital copy of your request is also included on the drive for reference.

Sincerely,

John Barnes
Director of Communications

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CHRIS D. TWEETEN
101 W. Artemos Drive
Missoula, MT 59803
Tel. 406-459-0255
christiantweeten@gmail.com

December 10, 2020

The Hon. Tim Fox
Attorney General
P.O. Box 201401
Helena, MT 59401-1401

Re: Records Request, *Texas v. Pennsylvania*

Dear General Fox:

This is a request for production of public records held by your office, brought under Article II, section 9 of the Montana Constitution and Title 2, Chapter 6, part 10, Montana Code Annotated. On or about December 9, 2020, your office announced that you had decided to join the State of Montana as a co-sponsor of a brief amicus curiae drafted by the Missouri Attorney General's office (hereafter "the Missouri brief") in support of the Petitioner in the case of *Texas v. Pennsylvania*, Supreme Court of the United States Docket No. 22O155, Original. This letter requests production of all public records related to the decision to join the Missouri brief.

For purposes of this request, "public record" has the meaning set forth in Mont. Code Ann. § 2-6-1002 (13). Unless the context suggests otherwise, "you" means you personally or any employee of the Montana Department of Justice. A public record is "related to the decision to join the Missouri Brief" if the public record mentions the *Texas v. Pennsylvania* case cited above.

The categories of public records sought are: All written or electronic records related to the decision to join the Missouri brief, including but not limited to written or electronic communication regarding the decision to join the brief (1) sent between members of your staff or between you personally and one or more members of your staff; (2) sent by you to or received by you from the office of the Attorney General of any other state; (3) sent by you to or received by you from any political campaign; (4) sent by you to or received by you from President Donald

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Trump or any member of his cabinet, employee of a federal cabinet office, or member of the White House staff; (5) sent by you to or received by you from any other officer of the government of the state of Montana, in either the executive or legislative branches; (6) sent by you to or received by you from any person elected to be inaugurated as an officer of the State of Montana, executive or legislative, in the general election held on November 3, 2020; (7) sent by you to or received by you from any employee of the National Association of Attorneys General or any employee of the Republican Attorneys General Association. "Electronic records" includes but is not limited to messages and attachments sent via the State's electronic mail (email) system, messages and attachments sent via the State's text messaging system, and any electronic information or document, draft or final, held in any electronic format, that may be retrieved through a computer workstation or other electronic device on which the official business of your office is or has been transacted. This request includes public records generated or received either before or after the filing of the Missouri brief. It is my intent that this request be as broad as may be allowed under Montana law; therefore any doubt as to whether a public record is within the scope of this request should be resolved in favor of producing the public record.

Time is of the essence. You will be leaving office in less than four weeks, Although you are legally obligated to transfer all public records held by your office to your successor, Mont. Code Ann. § 2-6-1013(1), I know from personal experience that records can be lost or inadvertently destroyed in times of transition between Attorneys General. I therefore respectfully request that you notify me in writing pursuant to Mont. Code Ann. § 2-6-1009(1) no later than 5:00 p.m. on Wednesday, December 16, 2020, if you intend to deny this request in whole or in part. I further respectfully request that you instruct all employees and staff members of your office, and the Director of the State Department of Administration, to segregate and preserve any public records that may be responsive to this request.

I look forward to your cooperation in producing these records. Thank you for your consideration of this request.

Chris D. Tweeten

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Copy by email:
timfox@mt.gov
ssegrest@mt.gov

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From:	Deal, Marianna
To:	Nuelle, Chris; Deal, Marianna
Subject:	[EXTERNAL] Embargoed until 3:00 p.m. CT today, 12/9/20
Date:	Wednesday, December 9, 2020 1:22:16 PM
Attachments:	2020-12-09 - Texas v. Pennsylvania - Amicus Brief of Missouri et al. - Final with Tables.pdf 2020.12.09 Certificate of Service.pdf 2020.12.09 Certificate of Compliance.pdf texasamicistates.pdf

All,

You're receiving this email because your state attorney general signed on to our amicus brief in the Supreme Court case State of Texas v. Commonwealth of Pennsylvania, State of Georgia, State of Michigan and State of Wisconsin.

I've attached a sample press release, please feel free to use as much or as little as you'd like. The brief has been filed. I also attached a copy of the brief and certificates of service and compliance.

As of right now, we will be sending out our press release at **3:00 pm CT/4:00 pm EST.** Very sorry for the tight turnaround. Please do not send releases out before that embargo time.

Feel free to email me here or call me at 573-645-9367 with any questions/concerns.

Thank you, Marianna

This email message, including the attachments, is from the Missouri Attorney General's Office. It is for the sole use of the intended recipient(s) and may contain confidential and privileged information, including that covered by § 32.057, RSMo. Any unauthorized review, use, disclosure or distribution is prohibited. If you are not the intended recipient, please contact the sender by reply email and destroy all copies of the original message. Thank you.

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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 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

AMERICAN OVERSIGHT

P.O. Box 899
Jefferson City, MO 65102
John.Sauer@ago.mo.gov
(573) 751-8870
Counsel for Amici Curiae

AMERICAN OVERSIGHT

No. 22O155

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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

AMERICAN OVERSIGHT

P.O. Box 899
Jefferson City, MO 65102
John.Sauer@ago.mo.gov
(573) 751-8870
Counsel for Amici Curiae

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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.

For the State of Pennsylvania:

Tom Wolf	Josh Shapiro
PENNSYLVANIA GOVERNOR	PENNSYLVANIA ATTORNEY GENERAL
Office of the Governor	
508 Main Capitol Building	John Bartley DeLone
Harrisburg, PA 17120	15th Floor, Strawberry Square
(717) 787-2500	Harrisburg, PA 17120
	jdelone@attorneygeneral.gov
	(717) 787-2500
	Counsel of Record

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For the State of Georgia:

Brian Kemp	Christopher M. Carr
GEORGIA GOVERNOR	GEORGIA ATTORNEY GENERAL
Office of the Governor	Office of the Attorney General
206 Washington Street	40 Capitol Square, SW
Suite 203, State Capitol	Atlanta, GA 30334
Atlanta, GA 30334	(404) 458-3600
(404) 656-1776	

For the State of Michigan:

Gretchen Whitmer	Dana Nessel
MICHIGAN GOVERNOR	MICHIGAN ATTORNEY GENERAL
Office of the Governor	G. Mennen Williams Building
P.O. Box 30013	525 W. Ottawa Street
Lansing, MI 48909	P.O. Box 30212
(517) 373-3400	Lansing, MI 48909
	(517) 373-1110

For the State of Wisconsin:

Anthony S. Evers	Joshua L. Kaul
WISCONSIN GOVERNOR	WISCONSIN ATTORNEY GENERAL
Office of the Governor	Wisconsin Department of Justice
115 East, State Capitol	17 West Main Street, P.O. Box 7857
Madison WI 53702	Madison, WI 53707-7857
(414) 227-4344	(608) 287-4202

For the State of Texas:

Greg Abbott	Ken Paxton
TEXAS GOVERNOR	TEXAS ATTORNEY GENERAL
Office of the Governor	Office of the Attorney General
P.O. Box 12428	P.O. Box 12548
Austin, Texas 78711	Austin, Texas 78711
(512) 463-2000	(512) 463-2100

The following email addresses have also been served electronically:

governorsoffice@michigan.gov
ccarr@law.ga.gov
governorsoffice@michigan.gov
dnessel@michigan.gov

AMERICAN OVERSIGHT

Everslnfo@wisconsin.gov
kauljl@doj.state.wi.us
govcorrespcrm@pa.gov
jshapiro@attorneygeneral.gov
kenneth.paxton@oag.texas.gov

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

AMERICAN OVERSIGHT

No. 22O155

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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.

For the State of Pennsylvania:

Tom Wolf	Josh Shapiro
PENNSYLVANIA GOVERNOR	PENNSYLVANIA ATTORNEY GENERAL
Office of the Governor	
508 Main Capitol Building	John Bartley DeLone
Harrisburg, PA 17120	15th Floor, Strawberry Square
(717) 787-2500	Harrisburg, PA 17120
	jdelone@attorneygeneral.gov
	(717) 787-2500
	Counsel of Record

AMERICAN OVERSIGHT

For the State of Georgia:

Brian Kemp	Christopher M. Carr
GEORGIA GOVERNOR	GEORGIA ATTORNEY GENERAL
Office of the Governor	Office of the Attorney General
206 Washington Street	40 Capitol Square, SW
Suite 203, State Capitol	Atlanta, GA 30334
Atlanta, GA 30334	(404) 458-3600
(404) 656-1776	

For the State of Michigan:

Gretchen Whitmer	Dana Nessel
MICHIGAN GOVERNOR	MICHIGAN ATTORNEY GENERAL
Office of the Governor	G. Mennen Williams Building
P.O. Box 30013	525 W. Ottawa Street
Lansing, MI 48909	P.O. Box 30212
(517) 373-3400	Lansing, MI 48909
	(517) 373-1110

For the State of Wisconsin:

Anthony S. Evers	Joshua L. Kaul
WISCONSIN GOVERNOR	WISCONSIN ATTORNEY GENERAL
Office of the Governor	Wisconsin Department of Justice
115 East, State Capitol	17 West Main Street, P.O. Box 7857
Madison WI 53702	Madison, WI 53707-7857
(414) 227-4344	(608) 287-4202

For the State of Texas:

Greg Abbott	Ken Paxton
TEXAS GOVERNOR	TEXAS ATTORNEY GENERAL
Office of the Governor	Office of the Attorney General
P.O. Box 12428	P.O. Box 12548
Austin, Texas 78711	Austin, Texas 78711
(512) 463-2000	(512) 463-2100

The following email addresses have also been served electronically:

governorsoffice@michigan.gov
ccarr@law.ga.gov
governorsoffice@michigan.gov
dnessel@michigan.gov

AMERICAN OVERSIGHT

Everslnfo@wisconsin.gov
kauljl@doj.state.wi.us
govcorrespcrm@pa.gov
jshapiro@attorneygeneral.gov
kenneth.paxton@oag.texas.gov

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

AMERICAN OVERSIGHT

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
Solicitor General
Counsel of Record

Counsel for Amici Curiae
(additional counsel listed on signature page)

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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, 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.

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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

AMERICAN OVERSIGHT

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

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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

AMERICAN OVERSIGHT

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

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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

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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

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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*

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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.

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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

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

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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

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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

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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.

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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.

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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

[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/.

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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

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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

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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

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"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

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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

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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

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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.

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Respectfully submitted,

ERIC S. SCHMITT
Attorney General

D. John Sauer
Solicitor General
Counsel of Record
Justin D. Smith
Deputy Attorney General
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

ADDITIONAL COUNSEL

Steve Marshall
Attorney General
STATE OF ALABAMA

Douglas J. Peterson
Attorney General
STATE OF NEBRASKA

Leslie Rutledge
Attorney General
STATE OF ARKANSAS

Wayne Stenehjem
Attorney General
STATE OF NORTH DAKOTA

Ashley Moody
Attorney General
STATE OF FLORIDA

Mike Hunter
Attorney General
STATE OF OKLAHOMA

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Curtis T. Hill, Jr.
Attorney General
STATE OF INDIANA

Alan Wilson
Attorney General
STATE OF SOUTH CAROLINA

Derek Schmidt
Attorney General
STATE OF KANSAS

Jason R. Ravnsborg
Attorney General
STATE OF SOUTH DAKOTA

Jeff Landry
Attorney General
STATE OF LOUISIANA

Herbert H. Slatery III
Attorney General
STATE OF TENNESSEE

Lynn Fitch
Attorney General
STATE OF MISSISSIPPI

Sean D. Reyes
Attorney General
STATE OF UTAH

Tim Fox
Attorney General
STATE OF MONTANA

Patrick Morrisey
Attorney General
STATE OF WEST VIRGINIA

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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 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
Solicitor General
Counsel of Record

Counsel for Amici Curiae
(additional counsel listed on signature page)

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U.S. Dep't of Justice, *Federal Prosecution of Election Offenses* (8th ed. Dec. 2017) 3, 4

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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, 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.

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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.

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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

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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

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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

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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

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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

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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

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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*

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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.

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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

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

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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

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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

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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.

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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.

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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/.

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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

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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

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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

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"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

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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

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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

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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.

AMERICAN OVERSIGHT

December 9, 2020

Respectfully submitted,

ERIC S. SCHMITT
Attorney General

D. John Sauer
Solicitor General
Counsel of Record
Justin D. Smith
Deputy Attorney General
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

ADDITIONAL COUNSEL

Steve Marshall
Attorney General
STATE OF ALABAMA

Douglas J. Peterson
Attorney General
STATE OF NEBRASKA

Leslie Rutledge
Attorney General
STATE OF ARKANSAS

Wayne Stenehjem
Attorney General
STATE OF NORTH DAKOTA

Ashley Moody
Attorney General
STATE OF FLORIDA

Mike Hunter
Attorney General
STATE OF OKLAHOMA

AMERICAN OVERSIGHT

Curtis T. Hill, Jr.
Attorney General
STATE OF INDIANA

Alan Wilson
Attorney General
STATE OF SOUTH CAROLINA

Derek Schmidt
Attorney General
STATE OF KANSAS

Jason R. Ravnsborg
Attorney General
STATE OF SOUTH DAKOTA

Jeff Landry
Attorney General
STATE OF LOUISIANA

Herbert H. Slatery III
Attorney General
STATE OF TENNESSEE

Lynn Fitch
Attorney General
STATE OF MISSISSIPPI

Sean D. Reyes
Attorney General
STATE OF UTAH

Tim Fox
Attorney General
STATE OF MONTANA

Patrick Morrisey
Attorney General
STATE OF WEST VIRGINIA

AMERICAN OVERSIGHT

From:	Schlichting, Melissa
To:	Barnes, John; Bennion, Jonathan; Burton, Anastasia; Fox, Tim
Subject:	FW: 22O155 - Texas v. Pennsylvania (U.S.) - Amicus Brief of Missouri and 16 Other States - Final
Date:	Wednesday, December 9, 2020 1:45:26 PM
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

Embargoed until 2:30 pm Mountain

From: Sauer, John <John.Sauer@ago.mo.gov>
Sent: Wednesday, December 9, 2020 1:03 PM
To: 'LaCour, Edmund' <Edmund.LaCour@AlabamaAG.gov>; 'nicholas.bronni@arkansasag.gov' <nicholas.bronni@arkansasag.gov>; 'John Guard' <John.Guard@myfloridalegal.com>; 'Fisher, Tom' <Tom.Fisher@atg.in.gov>; 'Chanay, Jeff' <Jeff.Chanay@ag.ks.gov>; 'Murrill, Elizabeth' <MurrillE@ag.louisiana.gov>; 'Michelle Williams' <Michelle.Williams@ago.ms.gov>; Schlichting, Melissa <MSchlichting@mt.gov>; 'Campbell, Jim' <Jim.Campbell@nebraska.gov>; 'Seibel, Troy T.' <tseibel@nd.gov>; 'Mithun Mansinghani' <mithun.mansinghani@oag.ok.gov>; 'Emory Smith' <ESmith@scag.gov>; 'Ravnsborg, Jason' <Jason.Ravnsborg@state.sd.us>; 'Andree S. Blumstein' <Andree.Blumstein@ag.tn.gov>; 'Melissa Holyoak' <melissaholyoak@agutah.gov>; 'Lindsay S. See' <Lindsay.S.See@wvago.gov>
Subject: [EXTERNAL] 22O155 - Texas v. Pennsylvania (U.S.) - Amicus Brief of Missouri and 16 Other States - Final

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

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AMERICAN OVERSIGHT

Attorney General NAME Joins Coalition of State Attorneys General to File Amicus Brief in State of Texas Supreme Court Voting Case

Dateline. – Today, Attorney General (NAME) joined a coalition of 17 state attorneys general, led by Missouri Attorney General Eric Schmitt, in filing an amicus brief in State of Texas v. Commonwealth of Pennsylvania, State of Georgia, State of Michigan and State of Wisconsin to urge the Court to grant Texas' motion related to its original action filed yesterday. The brief can be found here (Insert link)

(Insert quote)

The brief states that the Texas "Bill of Complaint raises constitutional questions of great public importance that warrant this Court's review."

There are three main arguments in the brief. First, the separation of powers provision of the Constitution's Elector's Clause is a structural check on government that safeguards liberty. Second, stripping away safeguards of voting by mail can create risks of voter fraud. And, finally, the defendant states abolished critical safeguards against fraud in voting by mail.

For the first argument, the brief argues that 1) only laws enacted by state legislatures can establish "the times, places and manner of holding elections for Senators and Representatives," 2) this law applies to the selection of Presidential electors, 3) non-legislative actors in each of the defendant states encroached on the election authority of the legislatures, violating the separation of powers, and 4) this violation of the Constitution's separation of powers undermines the liberty of all Americans, including the voters in the amici states.

To illustrate the risks of voter fraud in mail in voting and absentee ballot voting, the brief cites several sources that all express the same concerns about mail-in voting and absentee ballot voting, including the U.S. Supreme Court case *Crawford v. Marion County Election Board,* the Carter-Baker Commission on Federal Election Reform, the U.S. Department of Justice's manual on *Federal Prosecution of Election Offenses*, the U.S. Government Accountability Office, and more.

Additionally, the brief cites several previous examples of voter fraud by mail-in or absentee voting, including:

- In November 2019, the Berkeley, Missouri Mayor Ted Hoskins was indicted on five felony counts of absentee ballot fraud. Mayor Hoskins allegedly went to the homes of elderly residents to harvest absentee ballots and altered absentee ballots after he had procured them from voters;
- In May 2020, the leader of the New Jersey NAACP called for a new election for a city council position in Paterson, New Jersey citing allegations of vote-by-mail fraud.
- In 2016, Hector Ramirez, a candidate for Assembly in the Bronx, was indicted on 242 counts related to voter fraud. Prosecutors alleged that Ramirez wrote his name in on forged absentee ballots;
- A 2018 federal Congressional race in North Carolina was overturned after political operatives were indicted and arrested for absentee ballot fraud. The charges alleged that the operatives improperly collected and potentially tampered with ballots to swing the close election in their favor;

AMERICAN OVERSIGHT

- A 2016 State House race in Missouri was overturned and a special election was ordered after allegations of absentee ballot fraud surfaced.

The brief notes recently decided Missouri election cases that dealt with potential election fraud, including *Mo. State Conference of the NAACP* v. *State.* In that case, 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."

Finally, the brief alleges that the defendant states abolished safeguards that would have been critical to preventing fraud in voting by mail. First, non-legislative actors in Pennsylvania, Georgia and Michigan abolished or undermined signature verification requirements. Second, non-legislative actors altered the statutory rules for secure handling of absentee and mail-in ballots in Pennsylvania, Michigan and Wisconsin. Third, the Bill of Complaint also alleges that certain counties in the defendant states excluded bipartisan observers from participating in the opening of ballots and the ballot counting process. For example, it alleges that election officials in Philadelphia and Allegheny County, Pennsylvania "violated state law by excluding Republican observes from the opening, counting and recording of ballots." It also alleges that election officials in Wayne County, Michigan violated state statutes by "systematically excluding poll watchers and canvassers." Finally, the brief argues that the Pennsylvania Supreme Count enhanced opportunities for fraud by mandating that late ballots must be counted even when they were not postmarked or had no legible postmark, and thus there was no evidence they were mailed by Election Day.

The brief concludes by asking the Court to grant Texas' motion for leave to file a Bill of Complaint.

Along with Missouri, attorneys general from Alabama, Arkansas, Florida, Indiana, Louisiana, Kansas, Mississippi, Montana, Nebraska, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Utah and West Virginia also signed on to the brief.

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Bennion, Jonathan

From: Schlichting, Melissa
Sent: Wednesday, December 9, 2020 1:45 PM
To: Barnes, John; Bennion, Jonathan; Burton, Anastasia; Fox, Tim
Subject: FW: 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

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To: 'LaCour, Edmund' <Edmund.LaCour@AlabamaAG.gov>; 'nicholas.bronni@arkansasag.gov' <nicholas.bronni@arkansasag.gov>; 'John Guard' <John.Guard@myfloridalegal.com>; 'Fisher, Tom' <Tom.Fisher@atg.in.gov>; 'Chanay, Jeff' <Jeff.Chanay@ag.ks.gov>; 'Murrill, Elizabeth' <MurrillE@ag.louisiana.gov>; 'Michelle Williams' <Michelle.Williams@ago.ms.gov>; Schlichting, Melissa <MSchlichting@mt.gov>; 'Campbell, Jim' <Jim.Campbell@nebraska.gov>; 'Seibel, Troy T.' <tseibel@nd.gov>; 'Mithun Mansinghani' <mithun.mansinghani@oag.ok.gov>; 'Emory Smith' <ESmith@scag.gov>; 'Ravnsborg, Jason' <Jason.Ravnsborg@state.sd.us>; 'Andree S. Blumstein' <Andree.Blumstein@ag.tn.gov>; 'Melissa Holyoak' <melissaholyoak@agutah.gov>; 'Lindsay S. See' <Lindsay.S.See@wvago.gov>
Subject: [EXTERNAL] 22O155 - Texas v. Pennsylvania (U.S.) - Amicus Brief of Missouri and 16 Other States - Final

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Thank you,

John Sauer

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Bennion, Jonathan

From: Sauer, John <John.Sauer@ago.mo.gov>
Sent: Wednesday, December 9, 2020 1:09 PM
To: Bennion, Jonathan
Subject: [EXTERNAL] FW: Texas v. Pennsylvania, et al. - Amicus Brief of Missouri, at al. - Joins requested by 1:00 p.m. Central Tomorrow, 12/9
Attachments: AG TIM FOX SIGNATURE Blue.jpg

From: Schlichting, Melissa <MSchlichting@mt.gov>
Sent: Wednesday, December 9, 2020 12:29 PM
To: Sauer, John <John.Sauer@ago.mo.gov>
Cc: Fox, Tim <TimFox@mt.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

Montana Attorney General Tim Fox WILL JOIN the amicus. Attached is his electronic signature for use only in this filing. Thank you.

Melissa Schlichting
Deputy Attorney General and
Legal Services Division Administrator
Montana Department of Justice
Direct Line: 406-444-3602

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From: Sauer, John <John.Sauer@ago.mo.gov>
Sent: Wednesday, December 9, 2020 10:21 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,

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Joseph' <StJohnJ@ag.louisiana.gov>; 'Kristi.Johnson@ago.ms.gov' <Kristi.Johnson@ago.ms.gov>; Burton, Anastasia <ABurton@mt.gov>; Schlichting, Melissa <MSchlichting@mt.gov>; 'Lindsay S. See' <Lindsay.S.See@wvago.gov>; Bennion, Jonathan <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

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>

AMERICAN OVERSIGHT

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.

AMERICAN OVERSIGHT

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

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Bennion, Jonathan

From: Sauer, John <John.Sauer@ago.mo.gov>
Sent: Wednesday, December 9, 2020 1:08 PM
To: Bennion, Jonathan
Subject: [EXTERNAL] FW: 22O155 - Texas v. Pennsylvania (U.S.) - Amicus Brief of Missouri and 16 Other States - Final
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Thank you,

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Bennion, Jonathan

From: Sauer, John <John.Sauer@ago.mo.gov>
Sent: Wednesday, December 9, 2020 11:56 AM
To: 'Mithun Mansinghani'; 'Murrill, Elizabeth'; 'Melissa Holyoak'; 'nicholas.bronni@arkansasag.gov'; 'Vincent Wagner'; 'ed.sniffen@alaska.gov'; Smith, Justin; 'Amit.Agarwal@myfloridalegal.com'; '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'; Burton, Anastasia; Schlichting, Melissa; 'Lindsay S. See'; Bennion, Jonathan; '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: [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>
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Utah and Tennessee have joined as well

From: Sauer, John
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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>
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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>;

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

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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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From: Sauer, John
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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'

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<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-

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-

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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,

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John Sauer

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Bennion, Jonathan

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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

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

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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

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

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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>;

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'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

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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>
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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

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'

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<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>;

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'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

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Bennion, Jonathan

From: Sauer, John <John.Sauer@ago.mo.gov>
Sent: Wednesday, December 9, 2020 11:46 AM
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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

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

From: Sauer, John
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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

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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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>;

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'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>
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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

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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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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.

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Thanks a lot,

John Sauer

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Bennion, Jonathan

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

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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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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

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Bennion, Jonathan

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Sent: Wednesday, December 9, 2020 10:21 AM
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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
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

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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

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AMERICAN OVERSIGHT

From:	Deal, Marianna
To:	Nuelle, Chris; Deal, Marianna
Subject:	[EXTERNAL] Embargoed until 3:00 p.m. CT today, 12/9/20
Date:	Wednesday, December 9, 2020 1:22:16 PM
Attachments:	2020-12-09 - Texas v. Pennsylvania - Amicus Brief of Missouri et al. - Final with Tables.pdf 2020.12.09 Certificate of Service.pdf 2020.12.09 Certificate of Compliance.pdf texasamicistates.pdf

All,

You're receiving this email because your state attorney general signed on to our amicus brief in the Supreme Court case State of Texas v. Commonwealth of Pennsylvania, State of Georgia, State of Michigan and State of Wisconsin.

I've attached a sample press release, please feel free to use as much or as little as you'd like. The brief has been filed. I also attached a copy of the brief and certificates of service and compliance.

As of right now, we will be sending out our press release at **3:00 pm CT/4:00 pm EST.** Very sorry for the tight turnaround. Please do not send releases out before that embargo time.

Feel free to email me here or call me at 573-645-9367 with any questions/concerns.

Thank you, Marianna

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From: Brocker, Liz
To: Burton, Anastasia
Subject: [EXTERNAL] RE: Press release
Date: Wednesday, December 9, 2020 2:26:19 PM

We have a prepared statement that we are sending out individually to media who contact us – no general release. Liz

"Only the US Supreme Court can ultimately decide cases of controversy among the states under our Constitution. That is why we have joined the state of Missouri and other states asking the Justices to hear and decide the case recently filed by Texas. We have asked the Court to consider the merits of Texas' case before the Electoral College meets on Monday," said Stenehjem.

From: Burton, Anastasia <ABurton@mt.gov>
Sent: Wednesday, December 9, 2020 1:01 PM
To: Brocker, Liz <lbrocker@nd.gov>
Subject: RE: Press release

CAUTION: This email originated from an outside source. Do not click links or open attachments unless you know they are safe.

Do you plan to?

From: Brocker, Liz <lbrocker@nd.gov>
Sent: Wednesday, December 9, 2020 11:59 AM
To: Burton, Anastasia <ABurton@mt.gov>
Subject: [EXTERNAL] RE: Press release

We haven't issued anything. Liz

From: Burton, Anastasia <ABurton@mt.gov>
Sent: Wednesday, December 9, 2020 12:31 PM
To: Brocker, Liz <lbrocker@nd.gov>
Subject: Press release

CAUTION: This email originated from an outside source. Do not click links or open attachments unless you know they are safe.

Hi, Liz. Hope you're doing well. Would you mind sharing the news release or statement you're sending to press regarding the Texas lawsuit?

Thank you,

AMERICAN OVERSIGHT

Anastasia Burton
Deputy Communications Director
Attorney General Tim Fox, Montana Department of Justice
406.444.9869
Web [gcc02.safelinks.protection.outlook.com] [gcc02.safelinks.protection.outlook.com]|
Facebook [gcc02.safelinks.protection.outlook.com] [gcc02.safelinks.protection.outlook.com]
|Twitter [gcc02.safelinks.protection.outlook.com] [gcc02.safelinks.protection.outlook.com]|
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From:	Sauer, John
To:	"Mithun Mansinghani"; "Murrill, Elizabeth"; "Melissa Holyoak"; "nicholas.bronni@arkansasag.gov"; "Vincent Wagner"; "ed.sniffen@alaska.gov"; Smith, Justin; "Amit.Agarwal@myfloridalegal.com"; "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"; Burton, Anastasia; Schlichting, Melissa; "Lindsay S. See"; Bennion, Jonathan; "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:	[EXTERNAL] RE: Texas v. Pennsylvania, et al. - Amicus Brief of Missouri, at al. - Joins requested by 1:00 p.m. Central Tomorrow, 12/9
Date:	Wednesday, December 9, 2020 8:10:47 AM
Attachments:	2020-12-09 - Texas v. Pennsylvania - Amicus Brief of Missouri et al.docx

All-

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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'

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<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.

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Thanks a lot,

John Sauer

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From:	Sauer, John
To:	"Mithun Mansinghani"; "Murrill, Elizabeth"; "Melissa Holyoak"; "nicholas.bronni@arkansasag.gov"; "Vincent Wagner"; "ed.sniffen@alaska.gov"; Smith, Justin; "Amit.Agarwal@myfloridalegal.com"; "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"; Burton, Anastasia; Schlichting, Melissa; "Lindsay S. See"; Bennion, Jonathan; "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:	[EXTERNAL] RE: Texas v. Pennsylvania, et al. - Amicus Brief of Missouri, at al. - Joins requested by 1:00 p.m. Central Tomorrow, 12/9
Date:	Wednesday, December 9, 2020 10:27:21 AM
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.

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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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Best, John Sauer

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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
Date:	Wednesday, December 9, 2020 11:49:45 AM

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

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Florida and North Dakota have joined as well

From: Sauer, John
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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>
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P.S. South Carolina just joined too. Thanks, John

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<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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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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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>;

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'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>;

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'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>;

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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

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Date:	Wednesday, December 9, 2020 11:56:57 AM

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>
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Florida and North Dakota have joined as well

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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'

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

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'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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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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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.

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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-

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

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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.

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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

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From:	Sauer, John
To:	"Mithun Mansinghani"; "Murrill, Elizabeth"; "Melissa Holyoak"; "nicholas.bronni@arkansasag.gov"; "Vincent Wagner"; "ed.sniffen@alaska.gov"; Smith, Justin; "Amit.Agarwal@myfloridalegal.com"; "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"; Burton, Anastasia; Schlichting, Melissa; "Lindsay S. See"; Bennion, Jonathan; "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)"
Subject:	[EXTERNAL] Texas v. Pennsylvania, et al. - Amicus Brief of Missouri, at al. - Joins requested by 1:00 p.m. Central Tomorrow, 12/9
Date:	Tuesday, December 8, 2020 5:17:05 PM
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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AMERICAN OVERSIGHT

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

AMERICAN OVERSIGHT

P.O. Box 899
Jefferson City, MO 65102
John.Sauer@ago.mo.gov
(573) 751-8870
Counsel for Amici Curiae

AMERICAN OVERSIGHT

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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

AMERICAN OVERSIGHT

P.O. Box 899
Jefferson City, MO 65102
John.Sauer@ago.mo.gov
(573) 751-8870
Counsel for Amici Curiae

AMERICAN OVERSIGHT

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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.

For the State of Pennsylvania:

Tom Wolf	Josh Shapiro
PENNSYLVANIA GOVERNOR	PENNSYLVANIA ATTORNEY GENERAL
Office of the Governor	
508 Main Capitol Building	John Bartley DeLone
Harrisburg, PA 17120	15th Floor, Strawberry Square
(717) 787-2500	Harrisburg, PA 17120
	jdelone@attorneygeneral.gov
	(717) 787-2500
	Counsel of Record

AMERICAN OVERSIGHT

For the State of Georgia:	
Brian Kemp	Christopher M. Carr
GEORGIA GOVERNOR	GEORGIA ATTORNEY GENERAL
Office of the Governor	Office of the Attorney General
206 Washington Street	40 Capitol Square, SW
Suite 203, State Capitol	Atlanta, GA 30334
Atlanta, GA 30334	(404) 458-3600
(404) 656-1776	
For the State of Michigan:	
Gretchen Whitmer	Dana Nessel
MICHIGAN GOVERNOR	MICHIGAN ATTORNEY GENERAL
Office of the Governor	G. Mennen Williams Building
P.O. Box 30013	525 W. Ottawa Street
Lansing, MI 48909	P.O. Box 30212
(517) 373-3400	Lansing, MI 48909
	(517) 373-1110
For the State of Wisconsin:	
Anthony S. Evers	Joshua L. Kaul
WISCONSIN GOVERNOR	WISCONSIN ATTORNEY GENERAL
Office of the Governor	Wisconsin Department of Justice
115 East, State Capitol	17 West Main Street, P.O. Box 7857
Madison WI 53702	Madison, WI 53707-7857
(414) 227-4344	(608) 287-4202
For the State of Texas:	
Greg Abbott	Ken Paxton
TEXAS GOVERNOR	TEXAS ATTORNEY GENERAL
Office of the Governor	Office of the Attorney General
P.O. Box 12428	P.O. Box 12548
Austin, Texas 78711	Austin, Texas 78711
(512) 463-2000	(512) 463-2100

The following email addresses have also been served electronically:

governorsoffice@michigan.gov
ccarr@law.ga.gov
governorsoffice@michigan.gov
dnessel@michigan.gov

AMERICAN OVERSIGHT

Everslnfo@wisconsin.gov
kauljl@doj.state.wi.us
govcorrespcrm@pa.gov
jshapiro@attorneygeneral.gov
kenneth.paxton@oag.texas.gov

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

AMERICAN OVERSIGHT

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For the State of Pennsylvania:

Tom Wolf	Josh Shapiro
PENNSYLVANIA GOVERNOR	PENNSYLVANIA ATTORNEY GENERAL
Office of the Governor	
508 Main Capitol Building	John Bartley DeLone
Harrisburg, PA 17120	15th Floor, Strawberry Square
(717) 787-2500	Harrisburg, PA 17120
	jdelone@attorneygeneral.gov
	(717) 787-2500
	Counsel of Record

AMERICAN OVERSIGHT

For the State of Georgia:

Brian Kemp	Christopher M. Carr
GEORGIA GOVERNOR	GEORGIA ATTORNEY GENERAL
Office of the Governor	Office of the Attorney General
206 Washington Street	40 Capitol Square, SW
Suite 203, State Capitol	Atlanta, GA 30334
Atlanta, GA 30334	(404) 458-3600
(404) 656-1776	

For the State of Michigan:

Gretchen Whitmer	Dana Nessel
MICHIGAN GOVERNOR	MICHIGAN ATTORNEY GENERAL
Office of the Governor	G. Mennen Williams Building
P.O. Box 30013	525 W. Ottawa Street
Lansing, MI 48909	P.O. Box 30212
(517) 373-3400	Lansing, MI 48909
	(517) 373-1110

For the State of Wisconsin:

Anthony S. Evers	Joshua L. Kaul
WISCONSIN GOVERNOR	WISCONSIN ATTORNEY GENERAL
Office of the Governor	Wisconsin Department of Justice
115 East, State Capitol	17 West Main Street, P.O. Box 7857
Madison WI 53702	Madison, WI 53707-7857
(414) 227-4344	(608) 287-4202

For the State of Texas:

Greg Abbott	Ken Paxton
TEXAS GOVERNOR	TEXAS ATTORNEY GENERAL
Office of the Governor	Office of the Attorney General
P.O. Box 12428	P.O. Box 12548
Austin, Texas 78711	Austin, Texas 78711
(512) 463-2000	(512) 463-2100

The following email addresses have also been served electronically:

governorsoffice@michigan.gov
ccarr@law.ga.gov
governorsoffice@michigan.gov
dnessel@michigan.gov

AMERICAN OVERSIGHT

Everslnfo@wisconsin.gov
kauljl@doj.state.wi.us
govcorrespcrm@pa.gov
jshapiro@attorneygeneral.gov
kenneth.paxton@oag.texas.gov

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

AMERICAN OVERSIGHT

No. _____, Original

In the Supreme Court of the United States

STATE OF TEXAS,

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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)
Austin, TX 78711-2548
kenneth.paxton@oag.texas.gov
(512) 936-1414

* *Counsel of Record*

AMERICAN OVERSIGHT

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No. _____, Original

In the Supreme Court of the United States

STATE OF TEXAS,

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Defendants.

MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

Pursuant to 28 U.S.C. § 1251(a) and this Court's Rule 17, the 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.

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- 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

AMERICAN OVERSIGHT

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

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, TX 78711-2548
kenneth.paxton@oag.texas.gov
(512) 936-1414

* Counsel of Record

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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)
Austin, TX 78711-2548
kenneth.paxton@oag.texas.gov
(512) 936-1414

* 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

AMERICAN OVERSIGHT

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

---

[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/

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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.

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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

AMERICAN OVERSIGHT

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.

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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

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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

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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

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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.

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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).

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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.

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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/

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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

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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

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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.

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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

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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

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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

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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

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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.

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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

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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.

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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.

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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.

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> (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

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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

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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.

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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.

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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

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

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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.

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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.

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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

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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

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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

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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

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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

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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-

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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).

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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.

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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.

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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

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, TX 78711-2548
kenneth.paxton@oag.texas.gov
(512) 936-1414

* Counsel of Record

AMERICAN OVERSIGHT

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

Ken Paxton*
Attorney General of Texas

Brent Webster
First Assistant Attorney General of Texas

Lawrence Joseph
Special Counsel to the Attorney General of Texas

P.O. Box 12548 (MC 059)
Austin, TX 78711-2548
kenneth.paxton@oag.texas.gov
(512) 936-1414

*Counsel of Record

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Defendants.

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE

Pursuant to S.Ct. Rule 17.3 and U.S. CONST. art. III, § 2, the 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

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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.

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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.

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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

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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

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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

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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)

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(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

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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).

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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.

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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).

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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

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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.

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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.

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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

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> 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:

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> 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

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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

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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:

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> 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

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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.

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> 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.

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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)).

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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).

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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.

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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

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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

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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.*

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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).

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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

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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

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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)).

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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.

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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

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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*
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)
Austin, TX 78711-2548
kenneth.paxton@oag.texas.gov
(512) 936-1414

* Counsel of Record

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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.

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MT-AG-21-0188, 21-0224, 21-0356-A-000237

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

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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

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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.

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- 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

[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").

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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

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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.

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- 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

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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

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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

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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

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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

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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

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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

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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

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)
Austin, TX 78711-2548
kenneth.paxton@oag.texas.gov
(512) 936-1414

* Counsel of Record

Counsel for Plaintiffs

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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

Ken Paxton
Counsel of Record
Attorney General of Texas
Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, TX 78711-2548
Kenneth.paxton@oag.texas.gov
(512) 936-1414

Counsel for Plaintiffs

AMERICAN OVERSIGHT

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:

[Brian Kemp
Office of the Governor
206 Washington Street
Suite 203, State Capitol
Atlanta, GA 30334
Tel: (404) 656-1776
Email: governorsoffice@michigan.gov

Christopher M. Carr
Office of the Attorney General
40 Capitol Square, SW
Atlanta, GA 30334
Tel: (404) 458-3600
Email: ccarr@law.ga.gov

Gretchen Whitmer
Office of the Governor
P.O. Box 30013
Lansing, MI 48909
Tel: 517-373-3400
Email: governorsoffice@michigan.gov

Dana Nessel
G. Mennen Williams Building
525 W. Ottawa Street
P.O. Box 30212
Lansing, MI 48909
Tel: 517-373-1110
Email: dnessel@michigan.gov

Anthony S. Evers
Office of the Governor
115 East, State Capitol
Madison WI 53702
Tel: (414) 227-4344
Email: EversInfo@wisconsin.gov

Joshua L. Kaul
Wisconsin Department of Justice
17 West Main Street, P.O. Box 7857
Madison, WI 53707-7857
Tel: (608) 287-4202
Email: kauljl@doj.state.wi.us

Tom Wolf
Office of the Governor
508 Main Capitol Building
Harrisburg, PA 17120
Tel: 717-787-2500
Email: govcorrespcrm@pa.gov

Josh Shapiro
Office of Attorney General
Strawberry Square
Harrisburg, PA 17120
Tel.: 717.787.3391
Email: jshapiro@attorneygeneral.gov

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Executed December 7, 2020, at Washington, DC,

/s/ Lawrence J. Joseph
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

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)
Austin, TX 78711-2548
kenneth.paxton@oag.texas.gov
(512) 936-1414

* *Counsel of Record*

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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

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

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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

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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

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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.

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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

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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).

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> (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

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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.

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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

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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).

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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.

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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

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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).

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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-

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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)).

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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.

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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….

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> 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

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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

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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.

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5. <u>This action is not moot and will not become moot.</u>

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. <u>This matter is ripe for review.</u>

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

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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.

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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

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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.

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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.

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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

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"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.

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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.

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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.

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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."

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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).

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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

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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.

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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)).

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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,

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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Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, TX 78711-2548
kenneth.paxton@oag.texas.gov
(512) 936-1414

* *Counsel of Record*

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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 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
Solicitor General
Counsel of Record

Counsel for Amici Curiae
(additional counsel listed on signature page)

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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, 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.

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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.

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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

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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

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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

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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

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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

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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

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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*

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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.

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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

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

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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

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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

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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.

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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.

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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/.

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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

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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

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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

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"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

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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

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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

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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.

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Respectfully submitted,

ERIC S. SCHMITT
Attorney General

D. John Sauer
Solicitor General
Counsel of Record
Justin D. Smith
Deputy Attorney General
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

ADDITIONAL COUNSEL

Steve Marshall
Attorney General
STATE OF ALABAMA

Douglas J. Peterson
Attorney General
STATE OF NEBRASKA

Leslie Rutledge
Attorney General
STATE OF ARKANSAS

Wayne Stenehjem
Attorney General
STATE OF NORTH DAKOTA

Ashley Moody
Attorney General
STATE OF FLORIDA

Mike Hunter
Attorney General
STATE OF OKLAHOMA

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Curtis T. Hill, Jr.
Attorney General
STATE OF INDIANA

Alan Wilson
Attorney General
STATE OF SOUTH CAROLINA

Derek Schmidt
Attorney General
STATE OF KANSAS

Jason R. Ravnsborg
Attorney General
STATE OF SOUTH DAKOTA

Jeff Landry
Attorney General
STATE OF LOUISIANA

Herbert H. Slatery III
Attorney General
STATE OF TENNESSEE

Lynn Fitch
Attorney General
STATE OF MISSISSIPPI

Sean D. Reyes
Attorney General
STATE OF UTAH

Tim Fox
Attorney General
STATE OF MONTANA

Patrick Morrisey
Attorney General
STATE OF WEST VIRGINIA

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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 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
Solicitor General
Counsel of Record

Counsel for Amici Curiae
(additional counsel listed on signature page)

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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, 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.

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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.

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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

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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

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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

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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

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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

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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

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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*

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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.

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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

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

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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

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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

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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.

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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.

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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/.

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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

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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

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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

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"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

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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

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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

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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.

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Respectfully submitted,

ERIC S. SCHMITT
Attorney General

D. John Sauer
Solicitor General
Counsel of Record
Justin D. Smith
Deputy Attorney General
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

ADDITIONAL COUNSEL

Steve Marshall
Attorney General
STATE OF ALABAMA

Douglas J. Peterson
Attorney General
STATE OF NEBRASKA

Leslie Rutledge
Attorney General
STATE OF ARKANSAS

Wayne Stenehjem
Attorney General
STATE OF NORTH DAKOTA

Ashley Moody
Attorney General
STATE OF FLORIDA

Mike Hunter
Attorney General
STATE OF OKLAHOMA

AMERICAN OVERSIGHT

Curtis T. Hill, Jr.
Attorney General
STATE OF INDIANA

Alan Wilson
Attorney General
STATE OF SOUTH CAROLINA

Derek Schmidt
Attorney General
STATE OF KANSAS

Jason R. Ravnsborg
Attorney General
STATE OF SOUTH DAKOTA

Jeff Landry
Attorney General
STATE OF LOUISIANA

Herbert H. Slatery III
Attorney General
STATE OF TENNESSEE

Lynn Fitch
Attorney General
STATE OF MISSISSIPPI

Sean D. Reyes
Attorney General
STATE OF UTAH

Tim Fox
Attorney General
STATE OF MONTANA

Patrick Morrisey
Attorney General
STATE OF WEST VIRGINIA

AMERICAN OVERSIGHT

From: Attorney General's Office
To: Burton, Anastasia; Barnes, John
Subject: Courtesy Copy: Montana Files Brief Supporting Texas Election Lawsuit
Date: Wednesday, December 9, 2020 2:30:46 PM

This is a courtesy copy of an email bulletin sent by John Barnes.

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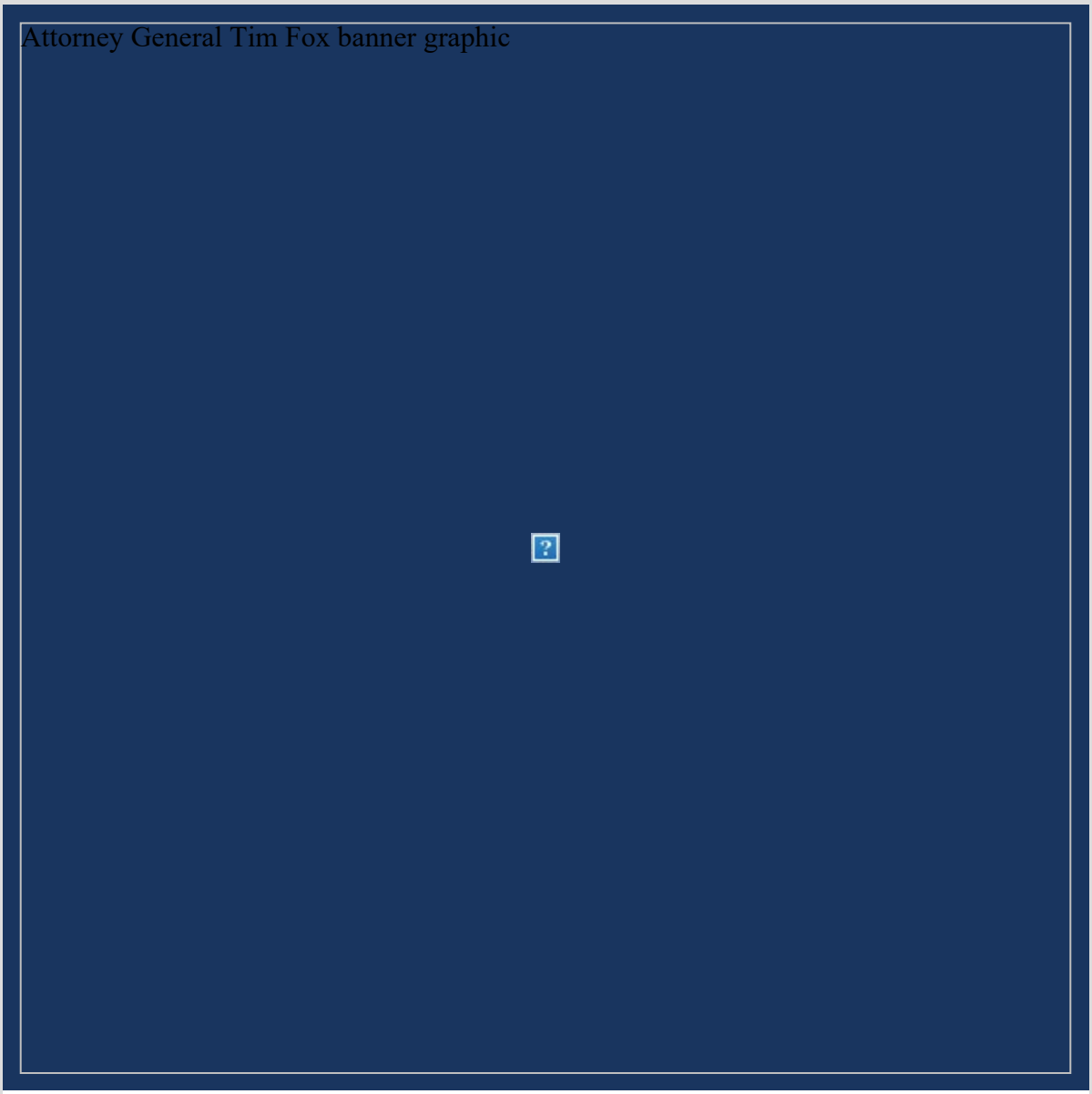

FOR IMMEDIATE RELEASE: December 9, 2020

AMERICAN OVERSIGHT

CONTACT: John Barnes | John.Barnes@mt.gov | 444-2031

Montana Files Brief Supporting Texas Election Lawsuit

HELENA - Today, Montana and 16 other states filed an amicus brief with the U.S. Supreme Court in the case *State of Texas v. Commonwealth of Pennsylvania, State of Georgia, State of Michigan and State of Wisconsin*. Supporting Texas, Montana is urging the court to accept the case.

"While the odds of the U.S. Supreme Court accepting Texas's belated lawsuit against Georgia, Michigan, Pennsylvania, and Wisconsin are slim at best, the case raises important constitutional questions about the separation of powers and the integrity of mail-in ballots in those defendant states," Attorney General Tim Fox said. "For that reason, Montana and 16 other states have filed an amicus brief supporting Texas to encourage the nation's highest court to address these concerns and bring much-needed finality to this election."

The amicus (friend of the court) brief argues that:

1. Only laws enacted by state legislatures can establish "the times, places and manner of holding elections for Senators and Representatives."
2. This law applies to the selection of presidential electors.
3. Non-legislative actors in each of the defendant states (Pennsylvania, Georgia, Michigan, Wisconsin) encroached on the election authority of the legislatures, violating the separation of powers.
4. This violation of the Constitution's separation of powers undermines the liberty of all Americans.

View or download the amicus brief here.

-END-

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ATTORNEY GENERAL'S OFFICE
MONTANA DEPARTMENT OF JUSTICE
215 North Sanders | P.O. Box 201401 | Helena, MT 59620-1401 | 406-444-2026

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AMERICAN OVERSIGHT

From: Dale Schowengerdt
To: Fox, Tim; Bennion, Jonathan; Schlichting, Melissa
Subject: [EXTERNAL] RE: States" intervention motion
Date: Thursday, December 10, 2020 10:32:33 AM
Attachments: image001.png

I also meant to mention that Texas had filed a motion for a preliminary injunction. The Court ordered Pennsylvania, et al., to respond to that motion by 3:00 pm today. I would expect a pretty quick decision from the Court on that, likely by tomorrow.

Dale Schowengerdt
406.457.2040

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From: Dale Schowengerdt
Sent: Thursday, December 10, 2020 10:31 AM
To: Fox, Tim <TimFox@mt.gov>; Bennion, Jonathan <JonBennion@mt.gov>; Schlichting, Melissa <MSchlichting@mt.gov>
Subject: States' intervention motion

Six states, led by Missouri, filed a motion to intervene this morning in the Texas original action, "as modified" by the President's motion to intervene. The other states are Arkansas, Louisiana, Mississippi, South Carolina, and Utah.

Both motions are attached. As you'll see, they really focus on the elector's clause claim, arguing that changes made for mail-in ballots and other procedures must be made by the legislature, not state other officials. Let me know if you have any questions.

Dale

DALE SCHOWENGERDT [crowleyfleck.com]
900 North Last Chance Gulch, Suite 200
Helena, MT 59601
Main: 406.449.4165
Direct: 406.457.2040

[crowleyfleck.com]

WITH OFFICES IN MONTANA, NORTH DAKOTA, AND WYOMING:

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Schlichting, Melissa

From: Schlichting, Melissa
Sent: Wednesday, December 9, 2020 8:46 AM
To: Dale Schowengerdt (dschowengerdt@crowleyfleck.com)
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.docx

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Best, John Sauer

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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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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

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Schlichting, Melissa

From: Schlichting, Melissa
Sent: Wednesday, December 9, 2020 8:29 AM
To: Fox, Tim
Subject: FW: 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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AMERICAN OVERSIGHT

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)

AMERICAN OVERSIGHT

TABLE OF CONTENTS

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TABLE OF AUTHORITIES

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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

[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.

AMERICAN OVERSIGHT

"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

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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

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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

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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.

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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

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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

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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

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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.

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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.

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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.

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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.

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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.

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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/.

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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

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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

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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

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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

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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

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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

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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.

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December 9, 2020

Respectfully submitted,

ERIC S. SCHMITT
Attorney General

D. John Sauer
Solicitor General
Counsel of Record
Justin D. Smith
Deputy Attorney General
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

ADDITIONAL COUNSEL

[To be inserted]

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Schlichting, Melissa

From: Sauer, John <John.Sauer@ago.mo.gov>
Sent: Wednesday, December 9, 2020 8:04 AM
To: 'Mithun Mansinghani'; 'Murrill, Elizabeth'; 'Melissa Holyoak'; 'nicholas.bronni@arkansasag.gov'; 'Vincent Wagner'; 'ed.sniffen@alaska.gov'; Smith, Justin; 'Amit.Agarwal@myfloridalegal.com'; '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'; Burton, Anastasia; Schlichting, Melissa; 'Lindsay S. See'; Bennion, Jonathan; '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: [EXTERNAL] 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

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>;

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'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

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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

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)

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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, [redacted].[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

[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.

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"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

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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

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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

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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.

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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

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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

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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

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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.

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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.

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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.

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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.

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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.

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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/.

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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

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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

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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

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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

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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

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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

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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.

AMERICAN OVERSIGHT

December 9, 2020

Respectfully submitted,

ERIC S. SCHMITT
Attorney General

D. John Sauer
Solicitor General
Counsel of Record
Justin D. Smith
Deputy Attorney General
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

ADDITIONAL COUNSEL

[To be inserted]

AMERICAN OVERSIGHT

Schlichting, Melissa

From: Sauer, John <John.Sauer@ago.mo.gov>
Sent: Wednesday, December 9, 2020 10:21 AM
To: 'Mithun Mansinghani'; 'Murrill, Elizabeth'; 'Melissa Holyoak'; 'nicholas.bronni@arkansasag.gov'; 'Vincent Wagner'; 'ed.sniffen@alaska.gov'; Smith, Justin; 'Amit.Agarwal@myfloridalegal.com'; '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'; Burton, Anastasia; Schlichting, Melissa; 'Lindsay S. See'; Bennion, Jonathan; '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: [EXTERNAL] 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>;

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'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,

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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

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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, ARKANSAS, LOUISIANA, ~~AND~~ MISSISSIPPI, AND 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)

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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 [redacted].[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.

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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

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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

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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).

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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

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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).

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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).

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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*

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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.

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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.

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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

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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

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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.river-fronttimes.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.

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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.

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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/.

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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

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"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,

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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~~ed~~ 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

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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

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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.

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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

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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.

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December 9, 2020

Respectfully submitted,

ERIC S. SCHMITT
Attorney General

D. John Sauer
Solicitor General
Counsel of Record
Justin D. Smith
Deputy Attorney General
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

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

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Schlichting, Melissa

From: Sauer, John <John.Sauer@ago.mo.gov>
Sent: Wednesday, December 9, 2020 11:30 AM
To: Schlichting, Melissa
Cc: Fox, Tim; Johnson, Jeff; Smith, Justin
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

Great, thanks a lot, glad to have you on board!

From: Schlichting, Melissa <MSchlichting@mt.gov>
Sent: Wednesday, December 9, 2020 12:29 PM
To: Sauer, John <John.Sauer@ago.mo.gov>
Cc: Fox, Tim <TimFox@mt.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

Montana Attorney General Tim Fox WILL JOIN the amicus. Attached is his electronic signature for use only in this filing. Thank you.

Melissa Schlichting
Deputy Attorney General and
Legal Services Division Administrator
Montana Department of Justice
Direct Line: 406-444-3602

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From: Sauer, John <John.Sauer@ago.mo.gov>
Sent: Wednesday, December 9, 2020 10:21 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,

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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

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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.

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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

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Schlichting, Melissa

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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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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

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Schlichting, Melissa

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Sent: Wednesday, December 9, 2020 11:33 AM
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P.S. South Carolina just joined too. Thanks, John

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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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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-

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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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>;

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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

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John Sauer

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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

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

From: Sauer, John
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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

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>;

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'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

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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

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Schlichting, Melissa

From: Sauer, John <John.Sauer@ago.mo.gov>
Sent: Wednesday, December 9, 2020 11:49 AM
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Utah and Tennessee have joined as well

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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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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>;

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'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'

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<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>;

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'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

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Schlichting, Melissa

From: Sauer, John <John.Sauer@ago.mo.gov>
Sent: Wednesday, December 9, 2020 11:56 AM
To: 'Mithun Mansinghani'; 'Murrill, Elizabeth'; 'Melissa Holyoak'; 'nicholas.bronni@arkansasag.gov'; 'Vincent Wagner'; 'ed.sniffen@alaska.gov'; Smith, Justin; 'Amit.Agarwal@myfloridalegal.com'; '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'; Burton, Anastasia; Schlichting, Melissa; 'Lindsay S. See'; Bennion, Jonathan; '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: [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>
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Utah and Tennessee have joined as well

From: Sauer, John
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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

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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>;

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

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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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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'

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<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

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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-

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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,

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John Sauer

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Schlichting, Melissa

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Sent: Wednesday, December 9, 2020 12:03 PM
To: Sauer, John; 'Murrill, Elizabeth'; 'Melissa Holyoak'; 'nicholas.bronni@arkansasag.gov'; 'Vincent Wagner'; 'ed.sniffen@alaska.gov'; Smith, Justin; 'Amit.Agarwal@myfloridalegal.com'; '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'; Burton, Anastasia; Schlichting, Melissa; 'Lindsay S. See'; Bennion, Jonathan; '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: [EXTERNAL] 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

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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>;

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'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>;

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'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>
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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' <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-

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Best, John Sauer

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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

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From: Schlichting, Melissa
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To: Barnes, John
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Attachments: 2020-12-09 - Texas v. Pennsylvania - Amicus Brief of Missouri et al. - Circulation Redline.docx

From: Sauer, John <John.Sauer@ago.mo.gov>
Sent: Wednesday, December 9, 2020 10:21 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>; Burton, Anastasia <ABurton@mt.gov>; Schlichting, Melissa <MSchlichting@mt.gov>; 'Lindsay S. See' <Lindsay.S.See@wvago.gov>; Bennion, Jonathan <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

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

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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>
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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, ARKANSAS, LOUISIANA, ~~AND~~ MISSISSIPPI, AND _____ 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)

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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.

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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

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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

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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).

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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

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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).

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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).

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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*

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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.

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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.

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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

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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

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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.

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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.

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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/.

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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

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"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,

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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

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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

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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.

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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

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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.

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December 9, 2020

Respectfully submitted,

ERIC S. SCHMITT
Attorney General

D. John Sauer
Solicitor General
Counsel of Record
Justin D. Smith
Deputy Attorney General
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

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

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Schlichting, Melissa

From: Sauer, John <John.Sauer@ago.mo.gov>
Sent: Wednesday, December 9, 2020 1:03 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'
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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

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AMERICAN OVERSIGHT

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
Solicitor General
Counsel of Record

Counsel for Amici Curiae
(additional counsel listed on signature page)

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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, 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.

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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.

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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

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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

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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

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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

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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

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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

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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*

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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.

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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

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

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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

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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

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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.

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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.

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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

[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/.

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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

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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

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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

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"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

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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

AMERICAN OVERSIGHT

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

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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.

AMERICAN OVERSIGHT

December 9, 2020

Respectfully submitted,

ERIC S. SCHMITT
Attorney General

D. John Sauer
Solicitor General
Counsel of Record
Justin D. Smith
Deputy Attorney General
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

ADDITIONAL COUNSEL

Steve Marshall
Attorney General
STATE OF ALABAMA

Douglas J. Peterson
Attorney General
STATE OF NEBRASKA

Leslie Rutledge
Attorney General
STATE OF ARKANSAS

Wayne Stenehjem
Attorney General
STATE OF NORTH DAKOTA

Ashley Moody
Attorney General
STATE OF FLORIDA

Mike Hunter
Attorney General
STATE OF OKLAHOMA

AMERICAN OVERSIGHT

Curtis T. Hill, Jr.
Attorney General
STATE OF INDIANA

Alan Wilson
Attorney General
STATE OF SOUTH CAROLINA

Derek Schmidt
Attorney General
STATE OF KANSAS

Jason R. Ravnsborg
Attorney General
STATE OF SOUTH DAKOTA

Jeff Landry
Attorney General
STATE OF LOUISIANA

Herbert H. Slatery III
Attorney General
STATE OF TENNESSEE

Lynn Fitch
Attorney General
STATE OF MISSISSIPPI

Sean D. Reyes
Attorney General
STATE OF UTAH

Tim Fox
Attorney General
STATE OF MONTANA

Patrick Morrisey
Attorney General
STATE OF WEST VIRGINIA

AMERICAN OVERSIGHT

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

AMERICAN OVERSIGHT

P.O. Box 899
Jefferson City, MO 65102
John.Sauer@ago.mo.gov
(573) 751-8870
Counsel for Amici Curiae

AMERICAN OVERSIGHT

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.

For the State of Pennsylvania:

Tom Wolf
PENNSYLVANIA GOVERNOR
Office of the Governor
508 Main Capitol Building
Harrisburg, PA 17120
(717) 787-2500

Josh Shapiro
PENNSYLVANIA ATTORNEY GENERAL

John Bartley DeLone
15th Floor, Strawberry Square
Harrisburg, PA 17120
jdelone@attorneygeneral.gov
(717) 787-2500
Counsel of Record

AMERICAN OVERSIGHT

For the State of Georgia:

Brian Kemp
GEORGIA GOVERNOR
Office of the Governor
206 Washington Street
Suite 203, State Capitol
Atlanta, GA 30334
(404) 656-1776

Christopher M. Carr
GEORGIA ATTORNEY GENERAL
Office of the Attorney General
40 Capitol Square, SW
Atlanta, GA 30334
(404) 458-3600

For the State of Michigan:

Gretchen Whitmer
MICHIGAN GOVERNOR
Office of the Governor
P.O. Box 30013
Lansing, MI 48909
(517) 373-3400

Dana Nessel
MICHIGAN ATTORNEY GENERAL
G. Mennen Williams Building
525 W. Ottawa Street
P.O. Box 30212
Lansing, MI 48909
(517) 373-1110

For the State of Wisconsin:

Anthony S. Evers
WISCONSIN GOVERNOR
Office of the Governor
115 East, State Capitol
Madison WI 53702
(414) 227-4344

Joshua L. Kaul
WISCONSIN ATTORNEY GENERAL
Wisconsin Department of Justice
17 West Main Street, P.O. Box 7857
Madison, WI 53707-7857
(608) 287-4202

For the State of Texas:

Greg Abbott
TEXAS GOVERNOR
Office of the Governor
P.O. Box 12428
Austin, Texas 78711
(512) 463-2000

Ken Paxton
TEXAS ATTORNEY GENERAL
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711
(512) 463-2100

The following email addresses have also been served electronically:

governorsoffice@michigan.gov
ccarr@law.ga.gov
governorsoffice@michigan.gov
dnessel@michigan.gov

AMERICAN OVERSIGHT

Everslnfo@wisconsin.gov
kauljl@doj.state.wi.us
govcorrespcrm@pa.gov
jshapiro@attorneygeneral.gov
kenneth.paxton@oag.texas.gov

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

AMERICAN OVERSIGHT

From: Schlichting, Melissa
To: Dale Schowengerdt (dschowengerdt@crowleyfleck.com)
Subject: Texas v. PA, GA, MI and WI
Date: Wednesday, December 9, 2020 8:55:00 AM
Attachments: Crowley (Texas v. PA, GA, MI and WI) - K Draft.docx
image001.png

Attached is a draft contract for the Texas case evaluation. I used the same one we did for Driscoll. Thanks.

Melissa

Melissa Schlichting
Deputy Attorney General and
Legal Services Division Administrator
Montana Department of Justice
Direct Line: 406-444-3602

CONFIDENTIALITY NOTICE: This email contains information from the Montana Attorney General's Office which is confidential and/or privileged. If you are not the intended recipient, please do not disclose, copy, distribute or use the contents of this information. Please notify me by return email and delete the information you received in error immediately. Thank you.

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CONTRACT FOR SERVICES

THIS CONTRACT FOR SERVICES ("Contract") is entered into by and between the **Montana Department of Justice, Legal Services Division** (DOJ) whose address and phone number are 215 North Sanders, Helena, MT 59601 / 406.444.2026 and **Crowley Fleck PLLP** (Contractor), whose address and phone number is 900 N. Last Chance Gulch # 200, Helena, MT 59601 / 406.449.4165.

1. TERM, EFFECTIVE DATE AND DURATION

The Contract's term shall commence effective December 9, 2020 and it will remain in effect until terminated and/or completed as set forth in this Contract and the engagement letter attached as Exhibit "A".

2. SERVICES AND/OR SUPPLIES

Contractor shall provide DOJ with the professional legal services more specifically described on the Engagement Letter attached hereto as Exhibit "A". The Contractor will perform the services with the standard of professional care and skill customarily provided in the performance of such services, and shall use reasonable efforts to perform the professional legal services to the satisfaction of DOJ.

The State and Contractor acknowledge and agree that, to the extent the engagement letter attached as Exhibit "A" and the terms of this services agreement conflict in any way, then the terms of the engagement letter shall control and supersede the terms of this services agreement. Further, the State and Contractor acknowledge and agree that the terms of this services agreement and the engagement letter attached as Exhibit "A" are subject, in all cases, to the requirements and provisions of the Montana Rules of Professional Conduct applicable to attorneys.

3. CONSIDERATION/PAYMENT

3.1 Payment Schedule. In consideration of the Contractor's provision of the services set forth on Exhibit "A", DOJ shall pay Contractor in accordance with the terms set forth on Exhibit "A", in an amount not to exceed $10,000.00, to assist with a limited scope engagement to evaluate a potential joinder or amicus brief at the United States Supreme Court involving election law matters (*Texas v. Pennsylvania, Georgia, Michigan and Wisconsin*).

3.2 Payment Terms. Payment will be made upon DOJ's receipt of itemized invoices from Contractor for the completed work on a monthly basis as described in Exhibit "A".

4. NON-EXCLUSIVE CONTRACT

This Contract is for the convenience of DOJ and is considered to be a "Non-exclusive" use contract. Therefore, DOJ may obtain this particular product/service from sources other than the Contractor.

5. ACCESS, RETENTION AND OWNERSHIP OF RECORDS

5.1 Access to Records. Contractor shall provide DOJ, Legislative Auditor, or their authorized agents access to any records necessary to determine Contract compliance. DOJ

AMERICAN OVERSIGHT

may terminate this Contract without incurring liability for Contractor's refusal to allow access as required by this section. (18-1-118, MCA)

5.2 Retention Period. Contractor shall create and retain any necessary records documenting its provision of the services rendered under this Contract for a period of eight years after either the completion date of this Contract or termination of the Contract.

5.3 Confidentiality. Contractor agrees, whether during or after the term of this Contract, to hold in confidence and not for any reason or purpose use or disclose any confidential information, proprietary information, or trade secret information of DOJ. If Contractor breaches this provision, it shall forfeit all future payments due hereunder.

6. ASSIGNMENT, TRANSFER, AND SUBCONTRACTING

Contractor may not assign, transfer, or subcontract any portion of this Contract without DOJ's prior written consent. (18-4-141, MCA). Contractor is responsible to DOJ for the acts and omissions of all subcontractors or agents and of persons directly or indirectly employed by such subcontractors, and for the acts and omissions of persons employed directly by Contractor. No contractual relationships exist between any subcontractor and DOJ under this Contract.

7. REQUIRED INSURANCE

Contractor shall maintain for the duration of this Contract, at its cost and expense, insurance against claims for injuries to persons or damages to property, including contractual liability, which may arise from or in connection with the performance of the work by Contractor, agents, employees, representatives, assigns, or subcontractors. Contractor shall also maintain, at its cost and expense, professional liability insurance.

8. COMPLIANCE WITH WORKERS' COMPENSATION ACT

Contractor shall comply with the provisions of the Montana Workers' Compensation Act while performing work for DOJ in accordance with 39-71-401, 39-71-405, and 39-71-417, MCA. Proof of compliance must be in the form of workers' compensation insurance, an independent contractor's exemption, or documentation of corporate officer status. Neither Contractor nor its employees are State employees.

9. COMPLIANCE WITH LAWS

Contractor shall, in performance of work under this Contract, fully comply with all applicable federal, state, or local laws, rules, regulations, and executive orders including but not limited to, the Montana Human Rights Act, the Equal Pay Act of 1963, the Civil Rights Act of 1964, the Age Discrimination Act of 1975, the Americans with Disabilities Act of 1990, and Section 504 of the Rehabilitation Act of 1973. Contractor is the employer for the purpose of providing healthcare benefits and paying any applicable penalties, fees and taxes under the Patient Protection and Affordable Care Act [P.l. 111-148, 124 Stat. 119]. Any subletting or subcontracting by Contractor subjects subcontractors to the same provisions. In accordance with 49-3-207, MCA, and Executive Order No. 04-2016 Contractor agrees that the hiring of persons to perform this Contract will be made on the basis of merit and qualifications and there will be no discrimination based on race, color, sex, pregnancy, childbirth or medical conditions related to pregnancy or childbirth, political or religious affiliation or ideas, culture, creed, social origin or condition, genetic information, sexual orientation, gender identity or expression,

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national origin, ancestry, age, disability, military service or veteran status, or marital status by the persons performing this Contract.

10. REGISTRATION WITH THE SECRETARY OF STATE

Any business intending to transact business in Montana must register with the Montana Secretary of State. Businesses that are incorporated in another state or country, but which are conducting activity in Montana, must determine whether they are transacting business in Montana in accordance with 35-1-1026 and 35-8-1001, MCA. Such businesses may want to obtain the guidance of their attorney or accountant to determine whether their activity is considered transacting business.

If businesses determine that they are transacting business in Montana, they must register with the Secretary of State and obtain a certificate of authority to demonstrate that they are in good standing in Montana. To obtain registration materials, call the Office of the Secretary of State at (406) 444-3665, or visit their website at http://sos.mt.gov.

11. EVENT OF BREACH – REMEDIES

11.1 Event of Breach by Contractor. Any one or more of the following Contractor acts or omissions constitute an event of material breach under this Contract:

- Products or services furnished fail to conform to any requirement;
- Failure to submit any report required by this Contract;
- Failure to perform any of the other terms and conditions of this Contract, including but not limited to beginning work under this Contract without prior DOJ approval or breaching.
- Voluntary or involuntary bankruptcy or receivership.

11.2 Event of Breach by DOJ. DOJ's failure to perform any material terms or conditions of this Contract constitutes an event of breach.

11.3 Actions in Event of Breach. Upon Contractor's material breach, DOJ may:

- Terminate this Contract and pursue any of its remedies under this Contract, at law, or in equity; or
- Treat this Contract as materially breached and pursue any of its remedies under this Contract, at law, or in equity.

Upon DOJ's material breach, Contractor may:

- Terminate this Contract and pursue any of its remedies under this Contract, at law, or in equity; or
- Treat this Contract as materially breached and, except as the remedy is limited in this Contract, pursue any of its remedies under this Contract, at law, or in equity.

12. FORCE MAJEURE

Neither party is responsible for failure to fulfill its obligations due to causes beyond its reasonable control, including without limitation, acts or omissions of government or military authority, acts of God, materials shortages, transportation delays, fires, floods, labor

AMERICAN OVERSIGHT

disturbances, riots, wars, terrorist acts, or any other causes, directly or indirectly beyond the reasonable control of the nonperforming party, so long as such party uses its best efforts to remedy such failure or delays. A party affected by a force majeure condition shall provide written notice to the other party within a reasonable time of the onset of the condition. In no event, however, shall the notice be provided later than five working days after the onset. If the notice is not provided within the five-day period, then a party may not claim a force majeure event. A force majeure condition suspends a party's obligations under this Contract, unless the parties mutually agree that the obligation is excused because of the condition.

13. WAIVER OF BREACH

Either party's failure to enforce any contract provisions after any event of breach is not a waiver of its right to enforce the provisions and exercise appropriate remedies if the breach occurs again. Neither party may assert the defense of waiver in these situations.

14. CONTRACT LIASONS

All project management and coordination on DOJ's behalf must be through a single point of contact designated as DOJ's liaison. Contractor shall designate a liaison that will provide the single point of contact for management and coordination of Contractor's work. All work performed under this Contract must be coordinated between DOJ's liaison and Contractor's liaison.

Melissa Schlichting is DOJ's liason
Montana Dept. of Justice
215 North Sanders
Helena, MT 59601
T: 406.444.2026
Email: mschlichting@mt.gov

Dale Schowengerdt is Contractor's liason
Crowley Fleck PLLP
900 N. Last Chance Gulch, #200
Helena, MT 59601
T: 406.449.4165
Email: dschowengerdt@crowleyfleck.com

15. NOTIFICATIONS

DOJ's liaison and Contractor's liaison may be changed by written notice to the other party. Written notices, requests, or complaints must first be directed to the liaison. Notice may be provided by personal service, mail, or facsimile. If notice is provided by personal service or facsimile, the notice is effective upon receipt; if notice is provided by mail, the notice is effective within three business days of mailing. A signed and dated acknowledgement of the notice is required of both parties.

16. CHOICE OF LAW AND VENUE

Montana law governs this Contract. The parties agree that any litigation concerning this Contract must be brought in the First Judicial District in and for the County of Lewis and Clark, State of Montana, and each party shall pay its own costs and attorney fees.

17. TAX EXEMPTION

AMERICAN OVERSIGHT

DOJ and the State of Montana are exempt from Federal Excise Taxes (#81-0302402) except as otherwise provided in the federal Patient Protection and Affordable Care Act [P.l. 111-148, 124 Stat. 119].

18. SEVERABILITY

A declaration by any court or any other binding legal source that any provision of the Contract is illegal and void shall not affect the legality and enforceability of any other provision of the Contract, unless the provisions are mutually and materially dependent.

19. SCOPE, ENTIRE AGREEMENT, AND AMENDMENT

This Contract consists of **ten (10)** numbered pages, including attachments. These documents reflect the entire agreement of the parties and supersede any and all prior agreements, representations and understandings. Any amendment or modification of this agreement must be in the form of a written amendment document signed by both parties.

20. WAIVER

State's waiver of any Contractor obligation or responsibility in a specific situation is not a waiver in a future similar situation or is not a waiver of any other Contractor obligation or responsibility.

21. EXECUTION / FACSIMILE SIGNATURES

The parties through their authorized agents have executed this Contract on the dates set out below. This agreement may be executed by facsimile or scanned signature pages, and each such signature will be deemed binding for all purposes hereof without delivery of an original signature being thereafter required.

MONTANA DEPARTMENT OF JUSTICE	**CROWLEY FLECK, PLLP**
BY: _____ (Name/Title)	BY: _____ (Name/Title)
DATE: _____	DATE: _____

APPROVED AS TO LEGAL CONTENT:

By: _____
DOJ CSD Legal Counsel

AMERICAN OVERSIGHT

Schlichting, Melissa

From: Sauer, John <John.Sauer@ago.mo.gov>
Sent: Tuesday, December 8, 2020 5:11 PM
To: 'Mithun Mansinghani'; 'Murrill, Elizabeth'; 'Melissa Holyoak'; 'nicholas.bronni@arkansasag.gov'; 'Vincent Wagner'; 'ed.sniffen@alaska.gov'; Smith, Justin; 'Amit.Agarwal@myfloridalegal.com'; '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'; 'KristiJohnson@ago.ms.gov'; Burton, Anastasia; Schlichting, Melissa; 'Lindsay S. See'; Bennion, Jonathan; '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)'
Subject: [EXTERNAL] 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

This email message, including the attachments, is from the Missouri Attorney General's Office. It is for the sole use of the intended recipient(s) and may contain confidential and privileged information, including that covered by § 32.057, RSMo. Any unauthorized review, use, disclosure or distribution is prohibited. If you are not the intended recipient, please contact the sender by reply email and destroy all copies of the original message. Thank you.

AMERICAN OVERSIGHT

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)
Austin, TX 78711-2548
kenneth.paxton@oag.texas.gov
(512) 936-1414

* *Counsel of Record*

AMERICAN OVERSIGHT

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AMERICAN OVERSIGHT

No. _____, Original

In the Supreme Court of the United States

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.

AMERICAN OVERSIGHT

- 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

AMERICAN OVERSIGHT

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

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, TX 78711-2548
kenneth.paxton@oag.texas.gov
(512) 936-1414

* Counsel of Record

AMERICAN OVERSIGHT

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

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, TX 78711-2548
kenneth.paxton@oag.texas.gov
(512) 936-1414

* 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

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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/

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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.

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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

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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.

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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

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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

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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

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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.

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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).

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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.

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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/

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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

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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

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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.

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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

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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

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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

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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

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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.

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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

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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.

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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.

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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.

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(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

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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

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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.

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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.

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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

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

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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.

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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.

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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

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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

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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

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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

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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

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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-

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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).

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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.

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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.

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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

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, TX 78711-2548
kenneth.paxton@oag.texas.gov
(512) 936-1414

* Counsel of Record

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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

Ken Paxton*
Attorney General of Texas

Brent Webster
First Assistant Attorney General of Texas

Lawrence Joseph
Special Counsel to the Attorney General of Texas

P.O. Box 12548 (MC 059)
Austin, TX 78711-2548
kenneth.paxton@oag.texas.gov
(512) 936-1414

*Counsel of Record

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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

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

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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.

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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.

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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

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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

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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

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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)

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(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

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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).

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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.

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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).

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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

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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.

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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.

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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

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> 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:

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> 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

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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

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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:

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> 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

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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.

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> 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.

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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)).

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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).

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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.

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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

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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

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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.*

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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).

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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

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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

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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)).

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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.

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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

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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*
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)
Austin, TX 78711-2548
kenneth.paxton@oag.texas.gov
(512) 936-1414

* Counsel of Record

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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.

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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

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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

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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.

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- 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

[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").

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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

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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.

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- 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

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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

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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

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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

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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

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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

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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

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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

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)
Austin, TX 78711-2548
kenneth.paxton@oag.texas.gov
(512) 936-1414

* Counsel of Record

Counsel for Plaintiffs

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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

Ken Paxton
Counsel of Record
Attorney General of Texas
Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, TX 78711-2548
Kenneth.paxton@oag.texas.gov
(512) 936-1414

Counsel for Plaintiffs

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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:

[Brian Kemp
Office of the Governor
206 Washington Street
Suite 203, State Capitol
Atlanta, GA 30334
Tel: (404) 656-1776
Email: governorsoffice@michigan.gov

Christopher M. Carr
Office of the Attorney General
40 Capitol Square, SW
Atlanta, GA 30334
Tel: (404) 458-3600
Email: ccarr@law.ga.gov

Gretchen Whitmer
Office of the Governor
P.O. Box 30013
Lansing, MI 48909
Tel: 517-373-3400
Email: governorsoffice@michigan.gov

Dana Nessel
G. Mennen Williams Building
525 W. Ottawa Street
P.O. Box 30212
Lansing, MI 48909
Tel: 517-373-1110
Email: dnessel@michigan.gov

Anthony S. Evers
Office of the Governor
115 East, State Capitol
Madison WI 53702
Tel: (414) 227-4344
Email: EversInfo@wisconsin.gov

Joshua L. Kaul
Wisconsin Department of Justice
17 West Main Street, P.O. Box 7857
Madison, WI 53707-7857
Tel: (608) 287-4202
Email: kauljl@doj.state.wi.us

Tom Wolf
Office of the Governor
508 Main Capitol Building
Harrisburg, PA 17120
Tel: 717-787-2500
Email: govcorrespcrm@pa.gov

Josh Shapiro
Office of Attorney General
Strawberry Square
Harrisburg, PA 17120
Tel.: 717.787.3391
Email: jshapiro@attorneygeneral.gov

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Executed December 7, 2020, at Washington, DC,

/s/ Lawrence J. Joseph
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

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)
Austin, TX 78711-2548
kenneth.paxton@oag.texas.gov
(512) 936-1414

* *Counsel of Record*

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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

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

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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

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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

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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.

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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

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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).

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> (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

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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.

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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

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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).

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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.

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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

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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).

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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-

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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)).

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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.

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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....

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> 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

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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

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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.

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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

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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.

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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

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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.

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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.

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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. <u>Defendant States violated the Electors Clause by modifying their legislatures' election laws through non-legislative action.</u>

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

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"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.

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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.

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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.

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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."

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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).

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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

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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.

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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)).

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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,

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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Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, TX 78711-2548
kenneth.paxton@oag.texas.gov
(512) 936-1414

* *Counsel of Record*

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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

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)

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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.

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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

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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

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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).

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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

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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).

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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).

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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).

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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.

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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.

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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

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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

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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.

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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.

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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/.

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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

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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

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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-

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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

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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

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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

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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.

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Respectfully submitted,

ERIC S. SCHMITT
Attorney General

D. John Sauer
Solicitor General
Counsel of Record
Justin D. Smith
Deputy Attorney General
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

ADDITIONAL COUNSEL

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