STATE OF NORTH DAKOTA
OFFICE OF ATTORNEY GENERAL
STATE CAPITOL
600 E. BOULEVARD AVE DEPT 125
BISMARCK, ND 58505-0040
(701) 328-2210
www.attorneygeneral.nd.gov

TO: Christine Monahan, records@americanoversight.org FROM: Liz Brocker, PIO

Re: Your request for records DATE February 9, 2021

You requested records[1]:

- Relating to the December, 2020 Amicus brief filed by the State of Texas with the US Supreme Court.

■ Attached are [the records you requested] [additional records responsive to your request].

■ These records relate specifically to the referenced Amicus Brief, and have been provided in response to previous requests in December, 2020. There is no charge for these records. If, however, you intended your request to cover communications between November 3, 2020 and *January 20, 2021*, involving the individuals named in 1(a) and 1(b) on ***any subject,*** then we will respond in the next few days with an estimate of the charges for locating said records and a separate estimate for the cost of reviewing any records for redactions. In that case, I refer you to the paragraph below, regarding charges.

■ You also requested records relating to "attempts to petition the US Department of Justice to support efforts to overturn state election results." With regard to that request, the records you requested cannot be provided because no such records exist.

☐ The estimated cost for the requested records is calculated as follows:

Actual cost of technology resources	$_____
_____ pages @ 25¢ per page	$_____
_____ other copies @ $_____ each	$_____
_____ hours for locating records @ $25/hr (after the 1st hour)	$_____
_____ hours for redacting records @ $25/hr (after the 1st hour)	$_____
TOTAL:	$_____

☐ Estimated costs are payable *in advance*. We do not waive estimated costs. *After* we receive a *cashier's* check/money order for the estimated costs, payable to "Office of Attorney General," we will begin work on your request. We estimate it will take approximately _____ days to complete your request.

☐ If we do not receive [payment] [clarification] from you within ten (10) days from today's date, we will consider your request withdrawn.

☐ Your request did not reasonably identify specific records. We cannot comply with your request without clarification. Please call me at (701) 328-2210.

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[1] A public entity does not have to convert its records to another format, create or compile records that do not exist, or obtain records originating from another public entity that it does not have in its possession. A public entity has no obligation to respond to requests for *information*, to respond questions about its duties, functions or operations, or to explain the content of its records.

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	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

Nos. 20-542, 20-574

In the Supreme Court of the United States

REPUBLICAN PARTY OF PENNSYLVANIA,
Petitioner,

v.

KATHY BOOCKVAR, IN HER OFFICIAL CAPACITY AS PENNSYLVANIA SECRETARY OF STATE, ET AL.,
Respondents.

JOSEPH B. SCARNATI, III, ET AL.
Petitioners,

v.

KATHY BOOCKVAR, IN HER OFFICIAL CAPACITY AS PENNSYLVANIA SECRETARY OF STATE, ET AL.,

On Petitions for Writs of Certiorari to the Pennsylvania Supreme Court

BRIEF OF THE STATE OF MISSOURI AND XX OTHER STATES AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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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INTEREST OF *AMICI CURIAE*

The Pennsylvania Supreme Court's decision overstepped its constitutional responsibility, encroached on the authority of the Pennsylvania legislature, and violated the plain language of the Election Clauses. *See* U.S. CONST. art. I, § 4, cl. 2; *id.* art. II, § 1, cl. 4. Worse still, the decision exacerbated the risk of mail-in ballot fraud by permitting mail-in ballots that are not postmarked or have no legible postmark to be received and counted several days after the election. The decision provided a window of time after Election Day, when the preliminary results were announced, in which unscrupulous actors could attempt to influence a close Presidential election in Pennsylvania and elsewhere. And it enhanced the opportunities for fraud by requiring boards of elections to count late-received ballots even if there is no evidence that those ballots were cast before Election Day, because they have no legible postmark.

Amici are the States of Missouri, ___. *Amici* have at least two compelling interests in the outcome of 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 U.S. Constitution's Election Clauses reflect a carefully calibrated balance of power among state actors, and they assign specific functions to the "Legislature thereof" in each State. *Id.* Our system of federalism relies on separation of powers to preserve liberty at every level of government, and the separation of powers in the Election Clauses is no exception to this principle. The States thus have a strong interest in preserving the proper roles of state legislatures and state courts in the administration of federal elections,

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and thus safeguarding the individual liberty of their citizens.

Second, States outside Pennsylvania have a strong interest in preventing the effective invalidation of their own voters' choices through illegal voting in Pennsylvania. This Court has long recognized that "in the context of a Presidential election," "the impact of the votes cast in each State is affected by the votes cast for the various candidates in other States." *Anderson* v. *Celebrezze*, 460 U.S. 780, 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.*

The decision below raises two concerns about illegal voting. First, ballots cast outside the clear and unambiguous rules established by the Pennsylvania legislature are illegal. Second, by exacerbating the risks of fraud, the Pennsylvania Supreme Court's decision raises the specter of late voting that is not just illegal, but outright fraudulent. As this Court has stated: "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, without its being distorted by fraudulently cast votes." *Anderson* v. *United States*, 417 U.S. 211, 227 (1974). Regardless of the election's outcome, only *legal* ballots should be counted.

As with other separation-of-powers provisions in the Constitution, the Election Clauses' explicit allocation of authority to state legislatures to regulate federal elections is a structural check on governmental power that preserves liberty. Encroachment on this authority by another state actor undermines the specific design for separation of

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powers in the Constitution. The violation of separation of powers in this case threatens the liberty of all Americans, not just Pennsylvanians. And it diminishes their most precious liberties—the right to vote for President of the United States.[1]

REASONS FOR GRANTING THE PETITIONS

"Our 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* (8th ed. Dec. 2017), at 1. "When the election process is corrupted, democracy is jeopardized." *Id.* "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, without its being distorted by fraudulently cast votes." *Anderson*, 417 U.S. at 227.

The Pennsylvania Supreme Court's decision overstepped its constitutional authority and encroached on the authority granted to the Pennsylvania legislature by the plain text of the U.S. Constitution's Election Clauses. *See* U.S. CONST. art. I, § 4, cl. 2; *id.* art. II, § 1, cl. 4. It thus undermined Americans' liberty by violating the separation of powers set forth in the Election Clauses.

The decision also aggravated the risks of fraud, abuse, and the appearance of fraud and abuse in

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[1] All counsel of record received timely notice of the intent to file this amicus brief under Supreme Court Rule 37.2(a). Pursuant to Rule 37.6, *amici curiae* certify that this brief was not written in whole or in part by counsel for any party, and no person or entity other than *amici curiae* and its counsel has made a monetary contribution to the preparation and submission of this brief.

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voting by mail in Pennsylvania. It permitted unscrupulous actors to know results reported on Election Day before deciding to pursue fraudulent activities. It enhanced opportunities for such illicit acts by ordering boards of elections to count mail-in ballots even if they have no postmark or no legible postmark, and thus no indication that they were sent on or before Election Day.

These choices undermined public confidence in the Presidential election in Pennsylvania and created unwarranted opportunities for fraud. This Court should grant expedited review and reverse the decision below.

I. The Election Clauses' Separation-of-Powers Provisions Safeguard 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). And a state supreme

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court cannot invoke a state constitution to circumscribe that legislative power. *Palm Beach Cty. Canvassing Bd.*, 531 U.S. at 77.

Here, "[t]he Supreme Court of Pennsylvania has issued a decree that squarely alters an important statutory provision enacted by the Pennsylvania 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.). In doing so, the Court (1) admitted that the Legislature's Election Day deadline was unambiguous, (2) conceded that the Election Day deadline was constitutional on its face, (3) relied on the slimmest of evidentiary rationales for its decision, (4) departed its own prior holding on the exact same question just a few months earlier, and (5) disregarded an admirably clear severability clause that was enacted by the Pennsylvania legislature for the very purpose of *preventing* Pennsylvania courts from making such post-hoc changes to Pennsylvania's mail-in voting system. *See id.* at *1–2; *see also* App. 43a, 44a, 45a–47a, 48a & n.26. The decision also contradicted the overwhelming weight of authority from other courts, including this Court, that have addressed the same question during this election cycle. *See infra* Part III.

In the course of this jurisprudential misadventure, the Pennsylvania Supreme Court encroached upon the "plenary" authority of the Pennsylvania legislature over the conduct of the Presidential election in that State. *Bush*, 531 U.S. at 104. This encroachment on the authority explicitly granted to another state actor in the regulation of

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Presidential elections constitutes a clear violation of the separation of powers. "[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 has recognized that the separation-of-powers provisions in the Constitution, which allocate authority to specific governmental actors to the exclusion of others, are designed to preserve liberty. "It is the proud boast of our democracy that we have 'a government of laws, and not of men.'" *Morrison* v. *Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting). "The Framers of the Federal Constitution . . . viewed the principle of separation of powers as the absolutely central guarantee of a just Government." *Id.* "Without a secure structure of separated powers, our Bill of Rights would be worthless, as are the bills of rights of many nations of the world that have adopted, or even improved upon, the mere words of ours." *Id.* "The purpose of the separation and equilibration of powers in general . . . was not merely to assure effective government but to preserve individual freedom." *Id.* at 727.

This principle of preserving liberty applies both to the horizontal separation of powers among the branches of government, and the vertical separation of powers between the federal government and the States. "The federal system rests on what might at first seem a counterintuitive insight, that 'freedom is enhanced by the creation of two governments, not one.'" *Bond* v. *United States*, 564 U.S. 211, 220–21

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(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 Election Clauses' grant of authority to state *Legislatures* implicates both horizontal and vertical separation of powers. The Clauses allocate to each State—not to federal actors—the authority to dictate the manner of selecting Presidential electors. And within each State, they explicitly allocate that authority to a single branch of state government: to the "Legislature thereof."

It is no accident that the Constitution allocates such authority to state Legislatures, rather than executive officers such as Governors, or judicial officers such as state Supreme Courts. As was frequently recognized at the Constitutional Convention, the Legislature is the branch most responsive to the People and most democratically

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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 Election Clauses prohibit the very arrogation of power over Presidential elections by non-legislative officials that the Pennsylvania Supreme Court perpetrated in this case. By violating the Constitution's separation of powers, the Pennsylvania Supreme Court undermined the liberty of all Pennsylvanians, and, in this Presidential election, the liberty of all Americans.

II. Voting by Mail Creates Unique Risks of Fraud, Including in Pennsylvania.

The Pennsylvania Supreme Court's decision suffers from another critical defect: it enhanced the

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risks of fraudulent voting by mail. Overwhelming public evidence demonstrates that voting by mail presents unique opportunities for fraud and abuse, opportunities which unscrupulous actors have often exploited. The decision below exacerbated these risks.

For decades, responsible observers have cautioned about the grave risks of fraud in voting by mail. 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).

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).[2] According to the Carter-Baker Commission, "[a]bsentee balloting is vulnerable to abuse in several ways." *Id.* These abuses include interception of blank ballots, "pressure" and "intimidation" of elderly and vulnerable voters, "vote buying schemes" that are "far more difficult to detect when citizens vote by mail," and ballot tampering by third-party operatives after a ballot is marked. *Id.* The Commission noted that "absentee balloting in other states has been a major

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

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source of fraud." *Id.* at 35. And the Commission recommended that "States … need to do more to prevent … absentee ballot fraud." *Id.* at v.

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. *See* U.S. Dep't of Justice, *Federal Prosecution of Election Offenses* (8th ed. Dec. 2017), at 28-29.[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]

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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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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, found 491 known and reported cases of absentee ballot fraud over the 12-year period from 2000 to 2012—approximately 41 cases per year. *See* News21, *Election Fraud in America* (visited Nov. 6, 2020).[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 public records. *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 simply 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* (visited Nov. 6, 2020).[6] This database identifies 24 cases of proven election fraud in Pennsylvania, including four cases of criminal convictions for fraudulent use of

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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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absentee ballots in Pennsylvania since 2010. *See id.* 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.* (emphasis added).

The public record abounds with recent examples of such fraudulent absentee-ballot schemes, including many examples in *amici* States, and many examples in Pennsylvania. 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

[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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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, 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

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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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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 increased such 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,'

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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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[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. Most notable here, the public reports indicate recurring issues of absentee-ballot fraud in Pennsylvania in particular. *See, e.g.,* Alex Rose, *Collingsdale man charged with voter fraud,* DELAWARE COUNTY TIMES (Nov. 21, 2018) (*available at* https://bit.ly/356c5wd) (perpetrator confessed to having third parties sign absentee ballots of deceased voters); Joseph Kohut*, Gallagher resigns from Taylor council pleads guilty to three charges,* THE TIMES-TRIBUNE (Apr. 3, 2015) (*available at* https://bit.ly/36i3HcJ); T. Ove, *Ex-Harmar police chief pleads guilty to ballot tampering,* PITTSBURGH POST-GAZETTE (Sept. 26, 2014) (*available at* https://bit.ly/32j4HMk) (defendant "admitted that he violated election laws by soliciting absentee ballots for his wife and a running mate in the 2009 Democratic primary for township supervisor"); *Com. v. Bailey*, 775 A.2d 881, 883 (Pa. Commw. Ct. 2001) (candidate convicted of absentee ballot fraud); Bill Heitzel, *Six of seven charges against Austin Murphy dismissed,* PITTSBURGH POST-GAZETTE (June 22, 1999) (*available at* https://bit.ly/2I9KlxU) (grand jury found that three individuals "forged absentee ballots for nursing home residents"); *Marks v. Stinson*, No. CIV. A. 93-6157, 1994 WL 146113, at *7–22 (E.D. Pa. Apr. 26, 1994) (documenting coordinated and extensive campaign of absentee ballot fraud).

Just a few weeks ago, a Missouri court considered extensive expert testimony reviewing absentee-ballot fraud cases like these, and it aptly summarized their

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common features. *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). 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. 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.* For all these reasons, this Court should also recognize that "the threat of mail-in ballot fraud is real." *Id.* at 2.

III. The Pennsylvania Supreme Court's Decision Exacerbated the Risks of Ballot Fraud.

In addition to violating the Election Clause, the decision below exacerbated the risks fraud and abuse in mail-in voting in Pennsylvania. First, it 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, it enhanced the opportunities for fraud by mandating, in a cursory footnote, that late ballots must be counted

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even when they are not postmarked or have no legible postmark, and thus there is no evidence they were mailed by Election Day. This decision created needless vulnerability to actual fraud and undermined public confidence in a Presidential election.

First, the U.S. Department of Justice's Manual on *Federal Prosecution of Election Offenses* emphasizes that election fraud typically occurs when the parties anticipate a close election, creating a strong motive to try to flip the outcome of the election through fraudulent activity. DOJ Manual, at 2-3, 27. As the Manual states, "the conditions most conducive to election fraud are close factional competition within an electoral jurisdiction for an elected position that matters." *Id.* at 2-3. "Election fraud does not normally occur in jurisdictions where one political faction enjoys widespread support among the electorate, because in such a situation it is usually unnecessary or impractical to resort to election fraud in order to control local public offices." *Id.* at 27. "Instead, election fraud occurs most frequently when there are fairly equal political factions, and when the stakes involved in who controls public offices are weighty." *Id.* "In sum, election fraud is most likely to occur in electoral jurisdictions where there is close factional competition for an elected position that matters." *Id.*

The cases of absentee-ballot fraud discussed above confirm the DOJ's insight. They repeatedly show that the motive for absentee-ballot fraud is strongest, and fraud is most likely to occur, when the expected outcome of the decision is close. For example, the notorious absentee-ballot fraud in the 2018 North Carolina congressional race occurred in an election

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that was decided by less than 1,000 votes of over 280,000 cast. The Hoskins indictment in St. Louis, Missouri occurred after a series of elections that were decided by tiny margins of less than 100 votes. The indictment of Bronx assemblyman Hector Ramirez occurred after an election that was decided by two votes. Many other similar examples of absentee ballot fraud in close elections abound.

In a typical Presidential election, it is often hard to predict in advance whether the outcome will be close in any particular State, and whether that State's decision will affect the outcome of the election. But the Pennsylvania Supreme Court's decision in this case created a window of time for unscrupulous actors to wait and see until after Election Day whether the outcome would be close enough—both in Pennsylvania, and in the nation as a whole—to make attempting fraud worthwhile.

To be sure, certain designated categories of ballots, such as military and overseas ballots, may be received after Election Day in any election, and for good reasons. But the Pennsylvania decision here extended that post-Election Day deadline to many more voters in Pennsylvania. And, in the process, it stripped away critical safeguards against fraud, as discussed below. Combined, these factors created an unnecessary risk of fraud in voting by mail.

Second, the Pennsylvania Supreme Court's decision enhanced the opportunities to commit such fraud. Footnote 26 of the Supreme Court's decision states as follows:

> We likewise incorporate the Secretary's recommendation addressing ballots received within this period that *lack a postmark or other proof of mailing*, or for which *the postmark or*

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> *other proof of mailing is illegible*. Accordingly, in such cases, we conclude that a ballot received on or before 5:00 p.m. on November 6, 2020, will be *presumed to have been mailed by Election Day* unless a preponderance of the evidence demonstrates that it was mailed after Election Day.

App. 48a, n.26 (emphases added). In other words, the court ordered that any ballot received within three days after Election Day would be deemed timely cast even if there was no evidence that it was submitted before Election Day. *Id.*

As the numerous cases discussed above show, *see supra* Part II, fraud in voting by mail frequently involves the interception, alteration, and fraudulent submission of absentee or mail-in ballots, many thousands of which remain unaccounted-for after every election. This was true in the North Carolina absentee-ballot fraud scheme in 2018, in both Missouri examples discussed above, in the Bronx assemblyman scheme, and in several of the Pennsylvania examples cited above, among many others. *See supra* Part II. Many such schemes have occurred in recent years, and that they have evaded detection over multiple election cycles. It is unknown how many such schemes may simply go undetected permanently. The Pennsylvania court's decision, therefore, needlessly exacerbated the risk of fraudulent voting.

Finally, there was no strong reason to create these risks of fraud. The Pennsylvania decision in this case is an outlier that rests on a feeble justification of putative mailing delays, unsupported by hard evidence. Many similar cases in States across the country sought to extend Election-Day receipt

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deadlines, and the vast majority of them were rejected. *See, e.g., Dem. Nat'l Comm.* v. *Wisc. State Leg.*, No. 20A66 (U.S. Oct. 26, 2020) (affirming court of appeals stay of six-day extension to receive ballots after election day). As the Seventh Circuit stated, "laws setting an Election-Day deadline for receipt of all ballots are valid during a pandemic, as they are valid without one." *Common Cause Indiana* v. *Lawson*, 977 F.3d 663 (7th Cir. 2020); *see also Org. for Black Struggle* v. *Ashcroft*, No. 20-3121, 2020 WL 6257167, at *3 (8th Cir. Oct. 23, 2020); *New Georgia Project* v. *Raffensperger*, 976 F.3d 1278, 2020 WL 5877588 (11th Cir. 2020); *Arizona Democratic Party* v. *Hobbs*, 976 F.3d 1081, 2020 WL 5903488 (9th Cir. 2020); *Dem. Nat'l Comm.* v. *Wisc. State Leg.*, No. 20A66 (U.S. Oct. 26, 2020); *League of Women Voters of Delaware, Inc.* v. *Dep't of Elections*, No. CV 2020-0761-SG, 2020 WL 5998161, at *4 (Del. Ch. Oct. 9, 2020); *All. for Retired Americans* v. *Sec'y of State*, 2020 WL 625526, *7 (Me. Oct. 23, 2020); *League of Women Voters of Michigan* v. *Sec'y of State*, No. 353654, 2020 WL 3980216, at *12 (Mich. Ct. App. July 14, 2020), *appeal denied*, 946 N.W.2d 307 (Mich. 2020); *DCCC* v. *Ziriax*, No. 20-CV-211-JED-JFJ, 2020 WL 5569576, at *20 (N.D. Okla. Sept. 17, 2020).

CONCLUSION

This Court should grant the petitions, grant expedited review, and reverse the Pennsylvania Supreme Court's judgment.

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November 9, 2020

Respectfully submitted,

ERIC S. SCHMITT
Attorney General

D. John Sauer
Solicitor General
Counsel of Record
Jeff P. Johnson
Deputy Solicitor 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

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Nos. 20-542, 20-574

In the Supreme Court of the United States

REPUBLICAN PARTY OF PENNSYLVANIA,
Petitioner,

v.

KATHY BOOCKVAR, IN HER OFFICIAL CAPACITY AS PENNSYLVANIA SECRETARY OF STATE, ET AL.,
Respondents.

JOSEPH B. SCARNATI, III, ET AL.
Petitioners,

v.

KATHY BOOCKVAR, IN HER OFFICIAL CAPACITY AS PENNSYLVANIA SECRETARY OF STATE, ET AL.,

On Petitions for Writs of Certiorari to the Pennsylvania Supreme Court

BRIEF OF THE STATE OF MISSOURI AND XX OTHER STATES AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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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INTEREST OF *AMICI CURIAE*

The Pennsylvania Supreme Court's decision overstepped its constitutional responsibility, encroached on the authority of the Pennsylvania legislature, and violated the plain language of the Election Clauses. *See* U.S. CONST. art. I, § 4, cl. 2; *id.* art. II, § 1, cl. 4. Worse still, the decision exacerbated the risk for mail-in ballot fraud by permitting mail-in ballots that are not postmarked or have no legible postmark to be received and counted several days after the election. The decision provided a window of time after Election Day, when the preliminary results were announced, in which unscrupulous actors could attempt to influence a close Presidential election in Pennsylvania and elsewhere. And it enhanced the opportunities for fraud by requiring boards of elections to count late-received ballots even if there is no evidence that those ballots were cast before Election Day, because they have no legible postmark.

Amici are the States of Missouri, ___. *Amici* have at least two compelling interests in the outcome of 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 U.S. Constitution's Election Clauses reflect a carefully calibrated balance of power among state actors, and they assign specific functions to the "Legislature thereof" in each State. *Id.* Our system of federalism relies on separation of powers to preserve liberty at every level of government, and the separation of powers in the Election Clauses is no exception to this principle. The States thus have a strong interest in preserving the proper roles of state legislatures and state courts in the administration of federal elections,

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and thus safeguarding the individual liberty of their citizens.

Second, States outside Pennsylvania have a strong interest in preventing the effective invalidation of their own voters' choices through illegal voting in Pennsylvania. This Court has long recognized that "in the context of a Presidential election," "the impact of the votes cast in each State is affected by the votes cast for the various candidates in other States." *Anderson* v. *Celebrezze*, 460 U.S. 780, 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.*

The decision below raises two concerns about illegal voting. First, ballots cast outside the clear and unambiguous rules established by the Pennsylvania legislature are illegal. Second, by exacerbating the risks of fraud, the Pennsylvania Supreme Court's decision raises the specter of late voting that is not just illegal, but outright fraudulent. As this Court has stated: "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, without its being distorted by fraudulently cast votes." *Anderson* v. *United States*, 417 U.S. 211, 227 (1974). Regardless of the election's outcome, only *legal* ballots should be counted.

As with other separation-of-powers provisions in the Constitution, the Election Clauses' explicit allocation of authority to state legislatures to regulate federal elections is a structural check on governmental power that preserves liberty. Encroachment on this authority by another state actor undermines the specific design for separation of

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powers in the Constitution. The violation of separation of powers in this case threatens the liberty of all Americans, not just Pennsylvanians. And it diminishes their most precious liberties—the right to vote for President of the United States.[1]

REASONS FOR GRANTING THE PETITIONS

"Our 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* (8th ed. Dec. 2017), at 1. "When the election process is corrupted, democracy is jeopardized." *Id.* "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, without its being distorted by fraudulently cast votes." *Anderson*, 417 U.S. at 227.

The Pennsylvania Supreme Court's decision overstepped its constitutional authority and encroached on the authority granted to the Pennsylvania legislature by the plain text of the U.S. Constitution's Election Clauses. *See* U.S. CONST. art. I, § 4, cl. 2; *id.* art. II, § 1, cl. 4. It thus undermined Americans' liberty by violating the separation of powers set forth in the Election Clauses.

The decision also aggravated the risks of fraud, abuse, and the appearance of fraud and abuse in

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[1] All counsel of record received timely notice of the intent to file this amicus brief under Supreme Court Rule 37.2(a). Pursuant to Rule 37.6, *amici curiae* certify that this brief was not written in whole or in part by counsel for any party, and no person or entity other than *amici curiae* and its counsel has made a monetary contribution to the preparation and submission of this brief.

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voting by mail in Pennsylvania. It permitted unscrupulous actors to know results reported on Election Day before deciding to pursue fraudulent activities. It enhanced opportunities for such illicit acts by ordering boards of elections to count mail-in ballots even if they have no postmark or no legible postmark, and thus no indication that they were sent on or before Election Day.

These choices undermined public confidence in the Presidential election in Pennsylvania and created unwarranted opportunities for fraud. This Court should grant expedited review and reverse the decision below.

I. The Election Clauses' Separation-of-Powers Provisions Safeguard 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). And a state supreme

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court cannot invoke a state constitution to circumscribe that legislative power. *Palm Beach Cty. Canvassing Bd.*, 531 U.S. at 77.

Here, "[t]he Supreme Court of Pennsylvania has issued a decree that squarely alters an important statutory provision enacted by the Pennsylvania 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.). In doing so, the Court (1) admitted that the Legislature's Election Day deadline was unambiguous, (2) conceded that the Election Day deadline was constitutional on its face, (3) relied on the slimmest of evidentiary rationales for its decision, (4) departed its own prior holding on the exact same question just a few months earlier, and (5) disregarded an admirably clear severability clause that was enacted by the Pennsylvania legislature for the very purpose of *preventing* Pennsylvania courts from making such post-hoc changes to Pennsylvania's mail-in voting system. *See id.* at *1–2; *see also* App. 43a, 44a, 45a–47a, 48a & n.26. The decision also contradicted the overwhelming weight of authority from other courts, including this Court, that have addressed the same question during this election cycle. *See infra* Part III.

In the course of this jurisprudential misadventure, the Pennsylvania Supreme Court encroached upon the "plenary" authority of the Pennsylvania legislature over the conduct of the Presidential election in that State. *Bush*, 531 U.S. at 104. This encroachment on the authority explicitly granted to another state actor in the regulation of

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Presidential elections constitutes a clear violation of the separation of powers. "[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 has recognized that the separation-of-powers provisions in the Constitution, which allocate authority to specific governmental actors to the exclusion of others, are designed to preserve liberty. "It is the proud boast of our democracy that we have 'a government of laws, and not of men.'" *Morrison* v. *Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting). "The Framers of the Federal Constitution . . . viewed the principle of separation of powers as the absolutely central guarantee of a just Government." *Id.* "Without a secure structure of separated powers, our Bill of Rights would be worthless, as are the bills of rights of many nations of the world that have adopted, or even improved upon, the mere words of ours." *Id.* "The purpose of the separation and equilibration of powers in general . . . was not merely to assure effective government but to preserve individual freedom." *Id.* at 727.

This principle of preserving liberty applies both to the horizontal separation of powers among the branches of government, and the vertical separation of powers between the federal government and the States. "The federal system rests on what might at first seem a counterintuitive insight, that 'freedom is enhanced by the creation of two governments, not one.'" *Bond* v. *United States*, 564 U.S. 211, 220–21

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(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 Election Clauses' grant of authority to state *Legislatures* implicates both horizontal and vertical separation of powers. The Clauses allocate to each State—not to federal actors—the authority to dictate the manner of selecting Presidential electors. And within each State, they explicitly allocate that authority to a single branch of state government: to the "Legislature thereof."

It is no accident that the Constitution allocates such authority to state Legislatures, rather than executive officers such as Governors, or judicial officers such as state Supreme Courts. As was frequently recognized at the Constitutional Convention, the Legislature is the branch most responsive to the People and most democratically

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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); s*ee* 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 Election Clauses prohibit the very arrogation of power over Presidential elections by non-legislative officials that the Pennsylvania Supreme Court perpetrated in this case. By violating the Constitution's separation of powers, the Pennsylvania Supreme Court undermined the liberty of all Pennsylvanians, and, in this Presidential election, the liberty of all Americans.

II. Voting by Mail Creates Unique Risks of Fraud, Including in Pennsylvania.

The Pennsylvania Supreme Court's decision suffers from another critical defect: it enhanced the

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risks of fraudulent voting by mail. Overwhelming public evidence demonstrates that voting by mail presents unique opportunities for fraud and abuse, opportunities which unscrupulous actors have often exploited. The decision below exacerbated these risks.

For decades, responsible observers have cautioned about the grave risks of fraud in voting by mail. 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).

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).[2] According to the Carter-Baker Commission, "[a]bsentee balloting is vulnerable to abuse in several ways." *Id.* These abuses include interception of blank ballots, "pressure" and "intimidation" of elderly and vulnerable voters, "vote buying schemes" that are "far more difficult to detect when citizens vote by mail," and ballot tampering by third-party operatives after a ballot is marked. *Id.* The Commission noted that "absentee balloting in other states has been a major

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

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source of fraud." *Id.* at 35. And the Commission recommended that "States … need to do more to prevent … absentee ballot fraud." *Id.* at v.

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. *See* U.S. Dep't of Justice, *Federal Prosecution of Election Offenses* (8th ed. Dec. 2017), at 28-29.[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]

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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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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, found 491 known and reported cases of absentee ballot fraud over the 12-year period from 2000 to 2012—approximately 41 cases per year. *See* News21, *Election Fraud in America* (visited Nov. 6, 2020).[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 public records. *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 simply 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* (visited Nov. 6, 2020).[6] This database identifies 24 cases of proven election fraud in Pennsylvania, including four cases of criminal convictions for fraudulent use of

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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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absentee ballots in Pennsylvania since 2010. *See id.* 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.* (emphasis added).

The public record abounds with recent examples of such fraudulent absentee-ballot schemes, including many examples in *amici* States, and many examples in Pennsylvania. 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

[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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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 was sufficient 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, 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

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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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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 increased such 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,'

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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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[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 publicly reported cases highlight the same concerns about the vulnerability of voting by mail to fraud and abuse. Most notable here, the public reports indicate recurring issues of absentee-ballot fraud in Pennsylvania in particular. *See, e.g.,* Alex Rose, *Collingsdale man charged with voter fraud,* DELAWARE COUNTY TIMES (Nov. 21, 2018) (*available at* https://bit.ly/356c5wd) (perpetrator confessed to having third parties sign absentee ballots of deceased voters); Joseph Kohut*, Gallagher resigns from Taylor council pleads guilty to three charges,* THE TIMES-TRIBUNE (Apr. 3, 2015) (*available at* https://bit.ly/36i3HcJ); T. Ove, *Ex-Harmar police chief pleads guilty to ballot tampering,* PITTSBURGH POST-GAZETTE (Sept. 26, 2014) (*available at* https://bit.ly/32j4HMk) (defendant "admitted that he violated election laws by soliciting absentee ballots for his wife and a running mate in the 2009 Democratic primary for township supervisor"); *Com. v. Bailey*, 775 A.2d 881, 883 (Pa. Commw. Ct. 2001) (candidate convicted of absentee ballot fraud); Bill Heitzel, *Six of seven charges against Austin Murphy dismissed,* PITTSBURGH POST-GAZETTE (June 22, 1999) (*available at* https://bit.ly/2I9KlxU) (grand jury found that three individuals "forged absentee ballots for nursing home residents"); *Marks v. Stinson*, No. CIV. A. 93-6157, 1994 WL 146113, at *7–22 (E.D. Pa. Apr. 26, 1994) (documenting coordinated and extensive campaign of absentee ballot fraud).

Just a few weeks ago, a Missouri court considered extensive expert testimony reviewing absentee-ballot fraud cases like these, and it aptly summarized their

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common features. *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). 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. 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.* For all these reasons, this Court should also recognize that "the threat of mail-in ballot fraud is real." *Id.* at 2.

III. The Pennsylvania Supreme Court's Decision Created Ideal Conditions for Ballot Fraud.

In addition to violating the Election Clause, the decision below exacerbated the risks fraud and abuse in mail-in voting in Pennsylvania. First, it 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, it enhanced the opportunities for fraud by mandating, in a cursory footnote, that late ballots must be counted

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even when they are not postmarked or have no legible postmark, and thus there is no evidence they were mailed by Election Day. This decision created needless vulnerability to actual fraud and undermined public confidence in a Presidential election.

First, the U.S. Department of Justice's Manual on *Federal Prosecution of Election Offenses* emphasizes that election fraud typically occurs when the parties anticipate a close election, giving a motive to try to flip the outcome of the election through fraudulent activity. DOJ Manual, at 2-3, 27. As the Manual states, "the conditions most conducive to election fraud are close factional competition within an electoral jurisdiction for an elected position that matters." *Id.* at 2-3. "Election fraud does not normally occur in jurisdictions where one political faction enjoys widespread support among the electorate, because in such a situation it is usually unnecessary or impractical to resort to election fraud in order to control local public offices." *Id.* at 27. "Instead, election fraud occurs most frequently when there are fairly equal political factions, and when the stakes involved in who controls public offices are weighty – as is often the case when patronage jobs are a major source of employment, or when illicit activities are being protected from law enforcement scrutiny." *Id.* "In sum, election fraud is most likely to occur in electoral jurisdictions where there is close factional competition for an elected position that matters." *Id.*

The cases of absentee-ballot fraud discussed above confirm the DOJ's insight. They repeatedly show that the motive for absentee-ballot fraud is strongest, and fraud is most likely to occur, when the expected

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outcome of the decision is close. For example, the notorious absentee-ballot fraud in the 2018 North Carolina congressional race occurred in an election that was decided by less than 1,000 votes of over 280,000 cast. The Hoskins indictment in St. Louis, Missouri occurred after a series of elections that were decided by tiny margins of less than 100 votes. The indictment of Bronx assemblyman Hector Ramirez occurred after an election that was decided by two votes. Many other similar examples of absentee ballot fraud in close elections abound.

In a typical Presidential election, it is often hard to predict in advance whether the outcome will be close in any particular State. But the Pennsylvania Supreme Court's decision in this case created a window of time for unscrupulous actors to wait and see until after Election Day whether the outcome would be close enough—both in Pennsylvania, and in the nation as a whole—to make attempting fraud worthwhile.

To be sure, certain designated categories of ballots, such as military and overseas ballots, may be received after Election Day in any election, and for good reasons. But the Pennsylvania decision here extended that post-Election Day deadline to many more voters in Pennsylvania. And, in the process, it stripped away critical safeguards against fraud, as discussed below. Combined, these factors created an unnecessary risk of fraud in voting by mail.

Second, the Pennsylvania Supreme Court's decision enhanced the opportunities to commit such fraud. Footnote 26 of the Supreme Court's decision states as follows:

> We likewise incorporate the Secretary's recommendation addressing ballots received

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> within this period that *lack a postmark or other proof of mailing*, or for which *the postmark or other proof of mailing is illegible*. Accordingly, in such cases, we conclude that a ballot received on or before 5:00 p.m. on November 6, 2020, will be *presumed to have been mailed by Election Day* unless a preponderance of the evidence demonstrates that it was mailed after Election Day.

App. 48a, n.26 (emphases added). In other words, the court ordered that any ballot received within three days after Election Day would be deemed timely cast even if there was no evidence that it was submitted before Election Day. *Id.*

As the numerous cases discussed above show, *see supra* Part II, fraud in voting by mail frequently involves the interception, alteration, and fraudulent submission of absentee or mail-in ballots, many thousands of which remain unaccounted-for after every election. This was true in the North Carolina absentee-ballot fraud scheme in 2018, in both Missouri examples discussed above, in the Bronx assemblyman scheme, and in several of the Pennsylvania examples cited above, among many others. *See supra* Part II. Many such schemes have occurred in recent years, and that they have evaded detection over multiple election cycles. It is unknown how many such schemes may simply go undetected permanently. The Pennsylvania court's decision, therefore, needlessly exacerbated the risk of fraudulent voting.

Finally, there was no strong reason to create these risks of fraud. The Pennsylvania decision in this case is an outlier that rests on a feeble justification of putative mailing delays, unsupported by hard

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evidence. Many similar cases in States across the country sought to extend Election-Day receipt deadlines, and the vast majority of them were rejected. *See, e.g., Dem. Nat'l Comm.* v. *Wisc. State Leg.*, No. 20A66 (U.S. Oct. 26, 2020) (affirming court of appeals stay of six-day extension to receive ballots after election day). As the Seventh Circuit stated, "laws setting an Election-Day deadline for receipt of all ballots are valid during a pandemic, as they are valid without one." *Common Cause Indiana* v. *Lawson*, 977 F.3d 663 (7th Cir. 2020); *see also Org. for Black Struggle* v. *Ashcroft*, No. 20-3121, 2020 WL 6257167, at *3 (8th Cir. Oct. 23, 2020); *New Georgia Project* v. *Raffensperger*, 976 F.3d 1278, 2020 WL 5877588 (11th Cir. 2020); *Arizona Democratic Party* v. *Hobbs*, 976 F.3d 1081, 2020 WL 5903488 (9th Cir. 2020); *Dem. Nat'l Comm.* v. *Wisc. State Leg.*, No. 20A66 (U.S. Oct. 26, 2020); *League of Women Voters of Delaware, Inc.* v. *Dep't of Elections*, No. CV 2020-0761-SG, 2020 WL 5998161, at *4 (Del. Ch. Oct. 9, 2020); *All. for Retired Americans* v. *Sec'y of State*, 2020 WL 625526, *7 (Me. Oct. 23, 2020); *League of Women Voters of Michigan* v. *Sec'y of State*, No. 353654, 2020 WL 3980216, at *12 (Mich. Ct. App. July 14, 2020), *appeal denied*, 946 N.W.2d 307 (Mich. 2020); *DCCC* v. *Ziriax*, No. 20-CV-211-JED-JFJ, 2020 WL 5569576, at *20 (N.D. Okla. Sept. 17, 2020).

CONCLUSION

This Court should grant the petitions, grant expedited review, and reverse the Pennsylvania Supreme Court's judgment.

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November 9, 2020

Respectfully submitted,

ERIC S. SCHMITT
Attorney General

D. John Sauer
Solicitor General
Counsel of Record
Jeff P. Johnson
Deputy Solicitor 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

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Nos. 20-542, 20-574

In the Supreme Court of the United States

REPUBLICAN PARTY OF PENNSYLVANIA,
Petitioner,

v.

KATHY BOOCKVAR, IN HER OFFICIAL CAPACITY AS PENNSYLVANIA SECRETARY OF STATE, ET AL.,
Respondents.

JOSEPH B. SCARNATI, III, ET AL.
Petitioners,

v.

KATHY BOOCKVAR, IN HER OFFICIAL CAPACITY AS PENNSYLVANIA SECRETARY OF STATE, ET AL.,

On Petitions for Writs of Certiorari to the Pennsylvania Supreme Court

BRIEF OF THE STATE OF MISSOURI AND XX OTHER STATES AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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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INTEREST OF *AMICI CURIAE*

The Pennsylvania Supreme Court's decision overstepped its constitutional responsibility, encroached on the authority of the Pennsylvania legislature, and violated the plain language of the Election Clauses. *See* U.S. CONST. art. I, § 4, cl. 2; *id.* art. II, § 1, cl. 4. Worse still, the decision exacerbated the risk of mail-in ballot fraud by permitting mail-in ballots that are not postmarked or have no legible postmark to be received and counted several days after the election. The decision provided a window of time after Election Day, when the preliminary results were announced, in which unscrupulous actors could attempt to influence a close Presidential election in Pennsylvania and elsewhere. And it enhanced the opportunities for fraud by requiring boards of elections to count late-received ballots even if there is no evidence that those ballots were cast before Election Day, because they have no legible postmark.

Amici are the States of Missouri, ___. *Amici* have at least two compelling interests in the outcome of 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 U.S. Constitution's Election Clauses reflect a carefully calibrated balance of power among state actors, and they assign specific functions to the "Legislature thereof" in each State. *Id.* Our system of federalism relies on separation of powers to preserve liberty at every level of government, and the separation of powers in the Election Clauses is no exception to this principle. The States thus have a strong interest in preserving the proper roles of state legislatures and state courts in the administration of federal elections,

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and thus safeguarding the individual liberty of their citizens.

Second, States outside Pennsylvania have a strong interest in preventing the effective invalidation of their own voters' choices through illegal voting in Pennsylvania. This Court has long recognized that "in the context of a Presidential election," "the impact of the votes cast in each State is affected by the votes cast for the various candidates in other States." *Anderson* v. *Celebrezze*, 460 U.S. 780, 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.*

The decision below raises two concerns about illegal voting. First, ballots cast outside the clear and unambiguous rules established by the Pennsylvania legislature are illegal. Second, by exacerbating the risks of fraud, the Pennsylvania Supreme Court's decision raises the specter of late voting that is not just illegal, but outright fraudulent. As this Court has stated: "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, without its being distorted by fraudulently cast votes." *Anderson* v. *United States*, 417 U.S. 211, 227 (1974). Regardless of the election's outcome, only *legal* ballots should be counted.

As with other separation-of-powers provisions in the Constitution, the Election Clauses' explicit allocation of authority to state legislatures to regulate federal elections is a structural check on governmental power that preserves liberty. Encroachment on this authority by another state actor undermines the specific design for separation of

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powers in the Constitution. The violation of separation of powers in this case threatens the liberty of all Americans, not just Pennsylvanians. And it diminishes their most precious liberties—the right to vote for President of the United States.[1]

REASONS FOR GRANTING THE PETITIONS

"Our 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* (8th ed. Dec. 2017), at 1. "When the election process is corrupted, democracy is jeopardized." *Id.* "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, without its being distorted by fraudulently cast votes." *Anderson*, 417 U.S. at 227.

The Pennsylvania Supreme Court's decision overstepped its constitutional authority and encroached on the authority granted to the Pennsylvania legislature by the plain text of the U.S. Constitution's Election Clauses. *See* U.S. CONST. art. I, § 4, cl. 2; *id.* art. II, § 1, cl. 4. It thus undermined Americans' liberty by violating the separation of powers set forth in the Election Clauses.

The decision also aggravated the risks of fraud, abuse, and the appearance of fraud and abuse in

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[1] All counsel of record received timely notice of the intent to file this amicus brief under Supreme Court Rule 37.2(a). Pursuant to Rule 37.6, *amici curiae* certify that this brief was not written in whole or in part by counsel for any party, and no person or entity other than *amici curiae* and its counsel has made a monetary contribution to the preparation and submission of this brief.

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voting by mail in Pennsylvania. It permitted unscrupulous actors to know results reported on Election Day before deciding to pursue fraudulent activities. It enhanced opportunities for such illicit acts by ordering boards of elections to count mail-in ballots even if they have no postmark or no legible postmark, and thus no indication that they were sent on or before Election Day.

These choices undermined public confidence in the Presidential election in Pennsylvania and created unwarranted opportunities for fraud. This Court should grant expedited review and reverse the decision below.

I. The Election Clauses' Separation-of-Powers Provisions Safeguard 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). And a state supreme

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court cannot invoke a state constitution to circumscribe that legislative power. *Palm Beach Cty. Canvassing Bd.*, 531 U.S. at 77.

Here, "[t]he Supreme Court of Pennsylvania has issued a decree that squarely alters an important statutory provision enacted by the Pennsylvania 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.). In doing so, the Court (1) admitted that the Legislature's Election Day deadline was unambiguous, (2) conceded that the Election Day deadline was constitutional on its face, (3) relied on the slimmest of evidentiary rationales for its decision, (4) departed its own prior holding on the exact same question just a few months earlier, and (5) disregarded an admirably clear severability clause that was enacted by the Pennsylvania legislature for the very purpose of *preventing* Pennsylvania courts from making such post-hoc changes to Pennsylvania's mail-in voting system. *See id.* at *1–2; *see also* App. 43a, 44a, 45a–47a, 48a & n.26. The decision also contradicted the overwhelming weight of authority from other courts, including this Court, that have addressed the same question during this election cycle. *See infra* Part III.

In the course of this jurisprudential misadventure, the Pennsylvania Supreme Court encroached upon the "plenary" authority of the Pennsylvania legislature over the conduct of the Presidential election in that State. *Bush*, 531 U.S. at 104. This encroachment on the authority explicitly granted to another state actor in the regulation of

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Presidential elections constitutes a clear violation of the separation of powers. "[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 has recognized that the separation-of-powers provisions in the Constitution, which allocate authority to specific governmental actors to the exclusion of others, are designed to preserve liberty. "It is the proud boast of our democracy that we have 'a government of laws, and not of men.'" *Morrison* v. *Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting). "The Framers of the Federal Constitution . . . viewed the principle of separation of powers as the absolutely central guarantee of a just Government." *Id.* "Without a secure structure of separated powers, our Bill of Rights would be worthless, as are the bills of rights of many nations of the world that have adopted, or even improved upon, the mere words of ours." *Id.* "The purpose of the separation and equilibration of powers in general . . . was not merely to assure effective government but to preserve individual freedom." *Id.* at 727.

This principle of preserving liberty applies both to the horizontal separation of powers among the branches of government, and the vertical separation of powers between the federal government and the States. "The federal system rests on what might at first seem a counterintuitive insight, that 'freedom is enhanced by the creation of two governments, not one.'" *Bond* v. *United States*, 564 U.S. 211, 220–21

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(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 Election Clauses' grant of authority to state *Legislatures* implements both horizontal and vertical separation of powers. The Clauses allocate to each State—not to federal actors—the authority to dictate the manner of selecting Presidential electors. And within each State, they explicitly allocate that authority to a single branch of state government: to the "Legislature thereof."

It is no accident that the Constitution allocates such authority to state Legislatures, rather than executive officers such as Governors, 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

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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 Election Clauses prohibit the very arrogation of power over Presidential elections by non-legislative officials that the Pennsylvania Supreme Court perpetrated in this case. By violating the Constitution's separation of powers, the Pennsylvania Supreme Court undermined the liberty of all Pennsylvanians, and, in this Presidential election, the liberty of all Americans.

II. Voting by Mail Creates Unique Risks of Fraud, Including in Pennsylvania.

The Pennsylvania Supreme Court's decision suffers from another critical defect: it enhanced the

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risks of fraudulent voting by mail. Overwhelming public evidence demonstrates that voting by mail presents unique opportunities for fraud and abuse, opportunities which unscrupulous actors have often exploited. The decision below exacerbated these risks.

For decades, responsible observers have cautioned about the grave risks of fraud in voting by mail. 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).

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).[2] According to the Carter-Baker Commission, "[a]bsentee balloting is vulnerable to abuse in several ways." *Id.* These abuses include interception of blank ballots, "pressure" and "intimidation" of elderly and vulnerable voters, "vote buying schemes" that are "far more difficult to detect when citizens vote by mail," and ballot tampering by third-party operatives after a ballot is marked. *Id.* The Commission noted that "absentee balloting in other states has been a major source of fraud." *Id.* at

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

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35. And the Commission recommended that "States … need to do more to prevent … absentee ballot fraud." *Id.* at v.

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. *See* 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]

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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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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, found 491 known and reported cases of absentee ballot fraud over the 12-year period from 2000 to 2012—approximately 41 cases per year. *See* News21, *Election Fraud in America* (visited Nov. 6, 2020).[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* (visited Nov. 6, 2020).[6] This database identifies 24 cases of proven election fraud in Pennsylvania, including four cases of criminal convictions for fraudulent use of

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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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absentee ballots in Pennsylvania since 2010. *See id.* 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, including many examples in *amici* States, and many examples in Pennsylvania. 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

[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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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, 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

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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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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 increased such 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,'

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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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[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. Most notable here, the public reports indicate recurring issues of absentee-ballot fraud in Pennsylvania in particular. *See, e.g.,* Alex Rose, *Collingsdale man charged with voter fraud,* DELAWARE COUNTY TIMES (Nov. 21, 2018) (*available at* https://bit.ly/356c5wd) (perpetrator confessed to having third parties sign absentee ballots of deceased voters); Joseph Kohut*, Gallagher resigns from Taylor council pleads guilty to three charges,* THE TIMES-TRIBUNE (Apr. 3, 2015) (*available at* https://bit.ly/36i3HcJ); T. Ove, *Ex-Harmar police chief pleads guilty to ballot tampering,* PITTSBURGH POST-GAZETTE (Sept. 26, 2014) (*available at* https://bit.ly/32j4HMk) (defendant "admitted that he violated election laws by soliciting absentee ballots for his wife and a running mate in the 2009 Democratic primary for township supervisor"); *Com. v. Bailey*, 775 A.2d 881, 883 (Pa. Commw. Ct. 2001) (candidate convicted of absentee ballot fraud); Bill Heitzel, *Six of seven charges against Austin Murphy dismissed,* PITTSBURGH POST-GAZETTE (June 22, 1999) (*available at* https://bit.ly/2I9KlxU) (grand jury found that three individuals "forged absentee ballots for nursing home residents," amid allegations that "fraudulent voting has been practiced for decades, is widespread and benefits several entrenched elected officials" in the county); *Marks v. Stinson*, No. CIV. A. 93-6157, 1994 WL 146113, at *7–22 (E.D. Pa. Apr. 26, 1994) (documenting a coordinated and extensive campaign of absentee ballot fraud).

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Just a few weeks ago, a Missouri court considered extensive expert testimony reviewing absentee-ballot fraud cases like these, and it aptly summarized their common features. *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). 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. 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.* For the same reasons, this Court should also recognize that "the threat of mail-in ballot fraud is real." *Id.* at 2.

III. The Pennsylvania Supreme Court's Decision Exacerbated the Risks of Ballot Fraud.

In addition to violating the Election Clauses, the decision below exacerbated the risks fraud and abuse in mail-in voting in Pennsylvania. First, it 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

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fraud in Pennsylvania would be worthwhile. Second, it enhanced the opportunities for fraud by mandating, in a cursory footnote, 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. This decision created needless vulnerability to actual fraud and undermined public confidence in a Presidential election.

First, the U.S. Department of Justice's Manual on *Federal Prosecution of Election Offenses* emphasizes that election fraud typically occurs when the parties anticipate a close election, creating a strong motive to try to flip the outcome of the election through fraudulent activity. DOJ Manual, at 2-3, 27. As the Manual states, "the conditions most conducive to election fraud are close factional competition within an electoral jurisdiction for an elected position that matters." *Id.* at 2-3. "Election fraud does not normally occur in jurisdictions where one political faction enjoys widespread support among the electorate, because in such a situation it is usually unnecessary or impractical to resort to election fraud in order to control local public offices." *Id.* at 27. "Instead, election fraud occurs most frequently when there are fairly equal political factions, and when the stakes involved in who controls public offices are weighty." *Id.* "In sum, election fraud is most likely to occur in electoral jurisdictions where there is close factional competition for an elected position that matters." *Id.*

The cases of absentee-ballot fraud discussed above confirm the DOJ's insight. They repeatedly show that the motive for absentee-ballot fraud is strongest, and fraud is most likely to occur, when the expected outcome of the decision is close. For example, the

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notorious absentee-ballot fraud in the 2018 North Carolina congressional race occurred in an election that was decided by less than 1,000 votes of over 280,000 cast. The Hoskins indictment in St. Louis, Missouri occurred after a series of elections that were decided by tiny margins of less than 100 votes. The indictment of Bronx assemblyman Hector Ramirez occurred after an election that was decided by two votes. The public record contains many other similar examples of absentee ballot fraud in close elections.

In a typical Presidential election, it is often hard to predict in advance whether the outcome will be close in any particular State, and whether that State's decision will affect the outcome of the election. But the Pennsylvania Supreme Court's decision in this case created a window of time for unscrupulous actors to wait and see until after Election Day whether the outcome would be close enough—both in Pennsylvania, and in the nation as a whole—to make attempting fraud worthwhile.

To be sure, certain designated categories of ballots, such as military and overseas ballots, may be received after Election Day in any election, and for good reasons. But the Pennsylvania decision here extended that post-Election Day deadline to many more voters in Pennsylvania. And, in the process, it stripped away critical safeguards against fraud, as discussed below. Combined, these factors created an unnecessary risk of fraud in voting by mail.

Second, the Pennsylvania Supreme Court's decision enhanced the opportunities to commit such fraud. Footnote 26 of the Supreme Court's decision states as follows:

> We likewise incorporate the Secretary's recommendation addressing ballots received

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> within this period that *lack a postmark or other proof of mailing*, or for which *the postmark or other proof of mailing is illegible*. Accordingly, in such cases, we conclude that a ballot received on or before 5:00 p.m. on November 6, 2020, will be *presumed to have been mailed by Election Day* unless a preponderance of the evidence demonstrates that it was mailed after Election Day.

App. 48a, n.26 (emphases added). In other words, the court ordered that any ballot received within three days after Election Day would be deemed timely cast even if there was no evidence that it was submitted before Election Day. *Id.*

As the numerous cases discussed above show, *see supra* Part II, fraud in voting by mail frequently involves the interception, alteration, and fraudulent submission of absentee or mail-in ballots. This was true in the North Carolina absentee-ballot fraud scheme in 2018, in both Missouri examples discussed above, in the Bronx assemblyman scheme, and in some of the Pennsylvania examples cited above, among many others. *See supra* Part II. Many such schemes have occurred in recent years, and that they have evaded detection over multiple election cycles. It is unknown how many such schemes may simply go undetected permanently. The Pennsylvania court's decision, therefore, needlessly exacerbated the risk of fraudulent voting.

Finally, there was no strong reason to create these risks of fraud. The Pennsylvania decision in this case is an outlier that rests on a feeble justification of putative mailing delays, unsupported by hard evidence. Many similar cases in States across the country sought to extend Election-Day receipt

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deadlines, and the vast majority of them were rejected. *See, e.g., Dem. Nat'l Comm.* v. *Wisc. State Leg.*, No. 20A66 (U.S. Oct. 26, 2020) (affirming the Court of Appeals' stay of a six-day extension to receive ballots after Election Day). As the Seventh Circuit stated, "laws setting an Election-Day deadline for receipt of all ballots are valid during a pandemic, as they are valid without one." *Common Cause Indiana* v. *Lawson*, 977 F.3d 663 (7th Cir. 2020); *see also Org. for Black Struggle* v. *Ashcroft*, No. 20-3121, 2020 WL 6257167, at *3 (8th Cir. Oct. 23, 2020); *New Georgia Project* v. *Raffensperger*, 976 F.3d 1278, 2020 WL 5877588 (11th Cir. 2020); *Arizona Democratic Party* v. *Hobbs*, 976 F.3d 1081, 2020 WL 5903488 (9th Cir. 2020); *Dem. Nat'l Comm.* v. *Wisc. State Leg.*, No. 20A66 (U.S. Oct. 26, 2020); *League of Women Voters of Delaware, Inc.* v. *Dep't of Elections*, No. CV 2020-0761-SG, 2020 WL 5998161, at *4 (Del. Ch. Oct. 9, 2020); *All. for Retired Americans* v. *Sec'y of State*, 2020 WL 625526, *7 (Me. Oct. 23, 2020); *League of Women Voters of Michigan* v. *Sec'y of State*, No. 353654, 2020 WL 3980216, at *12 (Mich. Ct. App. July 14, 2020), *appeal denied*, 946 N.W.2d 307 (Mich. 2020); *DCCC* v. *Ziriax*, No. 20-CV-211-JED-JFJ, 2020 WL 5569576, at *20 (N.D. Okla. Sept. 17, 2020).

CONCLUSION

This Court should grant the petitions, grant expedited review, and reverse the Pennsylvania Supreme Court's judgment.

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November 9, 2020

Respectfully submitted,

ERIC S. SCHMITT
Attorney General

D. John Sauer
Solicitor General
Counsel of Record
Jeff P. Johnson
Deputy Solicitor 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

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No. _____, Original

In the Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

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

Defendants.

MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

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,

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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.

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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

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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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No. _____, Original

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STATE OF TEXAS,

Plaintiff,

v.

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

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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

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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

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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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, 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]

---

[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. <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, 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

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

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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

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 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

AMERICAN OVERSIGHT

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 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*

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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

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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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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

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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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, 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]

---

[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. <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, 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

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

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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

---

[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

[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 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

[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.

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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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, contradict~~ed~~ 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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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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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

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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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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

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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 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

[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, contradict~~ed~~ 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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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, _____.[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.

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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]

AMERICAN OVERSIGHT

Nos. 20-542, 20-547

IN THE

Supreme Court of the United States

JOSEPH B. SCARNATI III, *President Pro Tempore*, AND
JAKE CORMAN, *Majority Leader of the Pennsylvania Senate*,

Petitioners,

v.

KATHY BOOCKVAR, *Secretary of Pennsylvania, et al.*

Respondents.

On Petitions for a Writ of Certiorari to
the Supreme Court of Pennsylvania

Brief of Amici Curiae Oklahoma and _3_ other States in support of Petitioners

MIKE HUNTER
Attorney General of Oklahoma

BRYAN CLEVELAND
Asst. Solicitor General

MITHUN MANSINGHANI
Solicitor General
Counsel of Record

OKLAHOMA OFFICE OF THE
ATTORNEY GENERAL
313 NE Twenty-First St.
Oklahoma City, OK 73105
(405) 522-4932
mithun.mansinghani@oag.ok.gov

[Additional Counsel Listed on the Final Page]

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Nos. 20-542, 20-547

QUESTIONS PRESENTED

A Pennsylvania statute unambiguously provides that absentee and mail-in ballots must be received by Election Day. Brushing that requirement aside, a 4– 3 majority of the Pennsylvania Supreme Court extended the deadline by three days. The majority also required election officials to presume that any ballot received by its judicially created deadline that lacks an intelligible postmark was mailed by Election Day, unless a preponderance of the evidence demonstrates otherwise. The questions presented are:

1. Whether the Pennsylvania Supreme Court majority usurped the Pennsylvania General Assembly's plenary authority to "direct [the] Manner" for appointing electors for President and Vice President, U.S. Const. art. II, § 1, cl. 2, and broad power to prescribe "[t]he Times, Places, and Manner" for congressional elections, id. art. I, § 4, cl. 1.

2. Whether the majority's extension and presumption are preempted by federal statutes that establish a uniform nationwide federal Election Day.

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INTERESTS OF *AMICI CURIAE*

The court below enjoined "[t]he most common state deadline for election officials to receive absentee/mailed ballots"—"Election Day when the polls close."[1] Prior to the pandemic, over thirty states, including many of the *amici* states, had this deadline.[2] Yet the Pennsylvania Supreme Court took it upon itself to fashion a new deadline, declaring that the one used by the majority of states for many decades must be judicially rewritten because of COVID-19.

Amici states have important interests in enforcing the absentee ballot deadlines created by their legislatures and ensuring such statutes cannot be amended by state courts merely because some voters will not act in a timely fashion to comply. More broadly, this election cycle demonstrates the immense importance to the states of the questions presented in this case: almost five hundred cases have filed in almost every state, many of which sought to alter state election statutes on the eve of—and often in the midst of—the 2020 general election.[3] These have resulted in a patchwork of court rulings that usurp the legislative role and create new election rules in substitution of the judgment made by the people's representatives. *Amici* states therefore

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[1] *Voting Outside the Polling Place: Absentee, All-Mail and other Voting at Home Options*, NAT'L CONF. OF STATE LEGIS., https://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx.

[2] *VOPP: Table 11: Receipt and Postmark Deadlines for Absentee Ballots*, NAT'L CONF. OF STATE LEGIS., https://www.ncsl.org/research/elections-and-campaigns/vopp-table-11-receipt-and-postmark-deadlines-for-absentee-ballots.aspx.

[3] *See* Stanford-MIT Healthy Elections Project, *COVID-Related Election Litigation Tracker*, https://healthyelections-case-tracker.stanford.edu/.

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have a strong interest in securing this Court's clear direction to courts in every state—for this election and future ones—that the Constitution's election clauses do not countenance judicial alteration of election laws based on little more than inherently-legislative policy judgments.

SUMMARY OF THE ARGUMENT

States legislatures must necessarily chose a point by which to stop receiving ballots and start counting votes, consistent with federal law setting the Election Day for federal officers. The deadline requiring absentee ballots to be received by Election Day promotes an efficient and orderly election, allowing states to expeditiously certify election results to bring certainty, clarity, stability, and legitimacy to our democratic system—sooner rather than later. States also have an interest in choosing not to have postmark deadlines, which can be difficult to implement and enforce, lead to the invalidation of some ballots received after Election Day but not others, increase the risk of voters casting ballots after initial election results are released, and undermines confidence in an election if the Election Day results change from votes that are received days after.

Such deadlines cannot be judicially rewritten merely because some voters will not act in a timely fashion to comply. Pennsylvania voters have 50 days to return their absentee ballot to ensure that it is received by Election Day, so failure to do so is not the fault of state election law. *See Rosario v. Rockefeller*, 410 U.S. 752, 758 (1973). That is why many courts, both before and during the pandemic, have upheld

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Election Day receipt deadlines—and COVID-19 does not make these laws unconstitutional. Regardless of the virus and the policy choice of how election laws should be changed due to recent circumstances, balancing interests in counting as many tardy voters as possible with electoral order, legitimacy, efficiency, and certainty is quintessentially a *legislative* judgment. The decision of the court below to strike a different balance, writing in a new postmark deadline with an arbitrary three-day-after-Election-Day cutoff, improperly abrogated the state legislature's prerogative to set "the ***Times***, Places and Manner of holding Elections." U.S. CONST. art. I, § 4 (emphasis added).

The contrary conclusion by the Pennsylvania Supreme Court rested on the assumption that local, state, and federal officials will be unprepared for increased absentee voting—an assumption that was unjustified and has since proven wrong—and that it would be better policy to change the deadline so that some (but not all) ballots postmarked on election day will be counted. In this end, this was nothing more than a state court acting in a legislative capacity to change election rules for a federal election—a job the Constitution instead gives to state legislatures. With hundreds of cases filed in courts in almost every state creating mass uncertainty, state legislatures can no longer reliably set election rules without a significant possibility that some court somewhere will think better of them. This Court should grant certiorari to uphold the Constitution's command that it is the legislative branch of each state, not the judicial branch, that determines federal election rules.

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ARGUMENT

I. States have important interests in absentee ballot receipt deadlines.

It is well-settled that absentee ballot receipt deadlines serve the "strong" and "important" state interests in "conducting an efficient election, maintaining order, quickly certifying election results, and preventing fraud." *New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1282 (11th Cir. 2020); *see also Common Cause Indiana v. Lawson*, 977 F.3d 663 (7th Cir. 2020) ("Counting the votes, and announcing the results, as soon as possible after the polls close serves a civic interest."); *Utah Republican Party v. Cox*, 892 F.3d 1066, 1077 (10th Cir. 2018) (election deadlines serve "a state's legitimate interest in providing order, stability, and legitimacy to the electoral process"); *Thomas v. Andino*, 3:20CV1552, 2020 WL 2617329, at *26 (D.S.C. May 25, 2020) ("setting specific election deadlines is part and parcel of a state's generalized interest in the orderly administration of elections," noting also the state's interest in "'ensuring a smooth process for [voters] to cast ballots and officials to count those ballots'"); *Friedman v. Snipes*, 345 F. Supp. 2d 1356, 1377 (S.D. Fla. 2004) ("[T]he State's interests in ensuring a fair and honest election and to count votes within a reasonable time justifies the light imposition on Plaintiffs' right to vote."). After all, states must have a point at which they stop receiving ballots and start counting them to determine the winner. *See Democratic Nat'l Comm. v. Wisconsin State Legislature*, 20A66, 2020 WL 6275871, at *1 (U.S. Oct. 26, 2020) (Gorsuch, J., concurring in denial

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of application to vacate stay) ("Elections must end sometime, a single deadline supplies clear notice, and requiring ballots be in by election day puts all voters on the same footing."); *Cox*, 892 F.3d at 1077; *Friedman*, 345 F. Supp. 2d at 1377.

While within the discretion of state legislatures, states also have strong interests in *not* using a postmark deadline like the one enacted by the court below. Ballot receipt deadlines avoid the numerous problems with reading sometimes-inscrutable postmarks and determining how to handle missing postmarks—a situation more likely to occur as USPS rushes to deliver late-arriving prepaid ballots. *See DCCC v. Ziriax*, No. 4:20CV211, 2020 WL 5569576, at *10 (N.D. Okla. Sept. 17, 2020). Such postmark issues have led to bitter election contests and thousands of absentee ballots rejected in states using a postmark deadline. *See Gallagher v. N.Y. State Bd. of Elections*, No. 20CV5504, 2020 WL 4496849, at *18 (S.D.N.Y. Aug. 3, 2020).

The Court below avoided such issues by mandating we *assume* all ballots were postmarked by Election Day unless proven otherwise, *see* Pet. App. 36a n.20, but that only creates other problems, including "the remote possibility that in an extremely close election … a person who did not vote on or before election day can fill out and submit a ballot later," *Nielsen v. DeSantis*, No. 4:20CV236, 2020 WL 5552872, at *1 (N.D. Fla. June 24, 2020). That is, the decision below to presumptively accept all ballots for three days following the election, even without a legible postmark, creates the very real risk of persons being able to fill out and submit ballots after Election Day

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and after initial returns have been reported. *Cf. Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) ("Extending the date by which ballots may be cast by voters … fundamentally alters the nature of the election.").

This is not solely an in-state concern. Other states have a strong interest in the outcome of national elections as they play out across the country, and there is a strong federal concern with ensuring the timely and accurate reporting of state votes for federal officers. Both within the state and nationally, an Election Day receipt deadline "secures voter confidence in the election: voters become less sure of the results if a candidate is declared a winner on or shortly after election day, but the results are changed several days or a week later." *Ziriax*, 2020 WL 5569576, at *19.

To be sure, any election deadline "will invariably burden some voters. . . for whom the earlier time is inconvenient." *Cox*, 892 F.3d at 1077. But a "generally applicable deadline that applied to all would-be absentee voters" generally does not pose constitutional problems. *Mays v. LaRose*, 951 F.3d 775, 792 (6th Cir. 2020); *see also Griffin v. Roupas*, 385 F.3d 1128, 1130 (7th Cir. 2004) (every election law "is going to exclude, either de jure or de facto, some people from voting").

As this Court explained in *Rosario v. Rockefeller*, if a voter "could have" met an election-related deadline, missing that deadline is due to "their own failure to take timely steps to effect their enrollment," not due to a burden on the right to vote. 410 U.S. at 758. Lack of "sufficient awareness of the relevant circumstances and the likely consequences" of the deadline does not create a valid constitutional claim because

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such an argument could be maintained against any deadline. *Id.* at 758 n.7. Earlier this year, this Court observed that voters who wait weeks into absentee voting and request a ballot at the last minute are suffering the typical burden of a "late-requesting voter[]," not a burden improperly imposed by the state legislature. *See Republican Nat'l Comm.*, 140 S. Ct. at 1207. And the Court has long given "little weight" to any alleged interest in "making a late rather than an early decision." *Burdick v. Takushi*, 504 U.S. 428, 437 (1992) (quoting *Storer v. Brown*, 415 U.S. 724, 736 (1974)).

Thus, while some voters will inevitably fail to comply with *any* deadline—including the postmark-and-three-days-after-Election-Day deadline invented by the Pennsylvania Supreme Court—courts have held in this and other election-related contexts that "voters who fail to get their vote in early cannot blame [state] law for their inability to vote; they must blame 'their own failure to take timely steps.'" *Thomas*, 2020 WL 2617329, at *26 (quoting *Rosario,* 410 U.S. at 758); *see also Common Cause Indiana v. Lawson*, 977 F.3d 663 (7th Cir. 2020) ("those who act at the last minute assume risks even without a pandemic"); *New Ga. Project*, 976 F.3d at 1282 ("Voters must simply take reasonable steps and exert some effort to ensure that their ballots are submitted on time…."); *id.* at 1286 (Lagoa, J., concurring); *Ziriax*, 2020 WL 5569576, at *18 ("Because the State offers voters wishing to vote by absentee ballot options to ensure their votes are timely returned, voters who fail to ensure timely return of their ballots should not blame the law for their inability to vote."); *Grossman v. Sec'y of the Commonwealth*, 485 Mass. 541, 2020 WL 5033954, at *6

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(2020); *Friedman*, 345 F. Supp. 2d at 1377-78; *cf. also Lawrence v. Blackwell*, 430 F.3d 368, 373 (6th Cir. 2005); *Democracy N.C. v. N.C. State Bd. of Elections*, No. 1:20CV457, 2020 WL 4484063, at *38-40 (M.D.N.C. Aug. 4, 2020); *Isabel v. Reagan*, 394 F. Supp. 3d 966, 982-83 (D. Ariz. 2019); *Chelsea Collaborative, Inc. v. Sec'y of Commonwealth*, 100 N.E.3d 326, 335 (Mass. 2018); *Crum v. Duran*, 390 P.3d 971, 976 (N.M. 2017); *Gallagher v. Ind. State Election Bd.*, 598 N.E.2d 510, 516 (Ind. 1992).

Statistics about how many voters in fact did not comply with the deadline are irrelevant because they do not give the reasons for failure to comply: whether it was because these voters were unable to meet the deadline or instead because they did not take reasonable efforts to comply, perhaps because they chose to wait too long to request or return their absentee ballot. *See Ziriax*, 2020 WL 5569576, at *18. Regulations that can be complied with by reasonable efforts are not significant burdens to the right to vote. *See Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 198 (2008); *New Ga. Project*, 976 F.3d at 1282; *Frank v. Walker*, 819 F.3d 384, 386-87 (7th Cir. 2016). "An absentee voter is responsible for acting with sufficient time to ensure timely delivery of her ballot," just like other voters "must take appropriate precautions by heading to the polls with a sufficient cushion of time to account for traffic, weather, or other conditions that might otherwise interfere with their ability to arrive in time to cast a ballot." *Ziriax*, 2020 WL 5569576, at *18. It is therefore wrong to characterize these voters as not having their ballots counted due to 'no fault of their own,' since such voters assumed the risks of waiting too long to request and/or receive

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their ballot, even if such risks are exacerbated by outside events. Such voters are not "disenfranchised"—they're tardy. *See Democratic Nat'l Comm.*, 20A66, 2020 WL 6275871, at *7 (Kavanaugh, J., concurring in denial of application to vacate stay); *New Ga. Project*, 976 F.3d at 1282.

Accordingly, the decision of the court below to focus on those voters who wait until the very last possible to point to request an absentee ballot (7 days before the election), Pet. App. 47a, rather than the opportunity for every voter to request a ballot up to 50 days before the election, 25 P.S. § 3150.12a, is a lean fig leaf for redrafting the deadline. Pennsylvania's decision to provide a large temporal window to request a ballot does not create "an extremely condensed timeline," Pet. App. 47a; instead, it provides voters *more opportunities* to vote absentee, leaving it to voters to use those options responsibly, *see Democratic Nat'l Comm.*, 20A66, 2020 WL 6275871, at *9 (Kavanaugh, J., concurring in denial of application to vacate stay).

All this is why numerous courts across the country have upheld Election Day receipt deadlines for absentee ballots. *Org. for Black Struggle v. Ashcroft*, 20-3121, 2020 WL 6257167, at *3 (8th Cir. Oct. 23, 2020); *Common Cause Indiana v. Lawson*, 977 F.3d 663 (7th Cir. 2020); *Democratic Nat'l Comm. v. Bostelmann*, 977 F.3d 639 (7th Cir. 2020); *Arizona Democratic Party v. Hobbs*, 976 F.3d 1081 (9th Cir. 2020); *New Ga. Project*, 976 F.3d at 1280 (staying district court order that "manufactured its own ballot deadline"); *Ziriax*, 2020 WL 5569576, at *18-20; *Nielsen*, 2020 WL 5552872, at *1; *Thomas*, 2020 WL 2617329, at *26; *Friedman*, 345 F. Supp. 2d at

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1377; *Grossman*, 485 Mass. 541, 2020 WL 5033954, at *7; *All. for Retired Americans v. Sec'y of State*, 2020 ME 123, 2020 WL 6255526 (Me. 2020); *American Women, et al., v. State of Missouri, et al.*, No. 20AC-CC00333 (Mo. Cir. Cole Cty. Oct. 22, 2020); *Michigan All. for Retired Americans v. Sec'y of State*, No. 354993, 2020 WL 6122745 (Mich. Ct. App. Oct. 16, 2020). As even the court below admitted, "there is nothing constitutionally infirm about a deadline of 8:00 p.m. on Election Day for the receipt of ballots." Pet. App. 44a. Indeed, because there is no right to vote absentee, a challenge to an absentee deadline "does not implicate the right to vote at all."[4]

The reality of the coronavirus pandemic does not change the important state interests in enforcing their voting laws as written. As many courts have noted, the states did not create the virus or impose the pandemic's burden on voters—COVID-19 is not state action that subjects otherwise-valid state laws to abrogation.[5] At most,

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[4] *New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1281 (11th Cir. 2020); *see also id.* at 16, 20 (Lagoa, J., concurring); *McDonald v. Bd. of Election Comm'rs of Chicago*, 394 U.S. 802, 807 (1969) (the "claimed right to receive absentee ballots" is not "the right to vote"); *Crawford*, 553 U.S. at 209 (Scalia, J., concurring in the judgment); *Tully*, 2020 WL 5905325, at *1; *Mays*, 951 F.3d at 786, 792 (6th Cir. 2020); *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 403-04 (5th Cir. 2020); *Griffin*, 385 F.3d at 1130; *Tully v. Okeson*, No. 1:20CV1271, 2020 WL 4926439, at *3-4 (S.D. Ind. Aug. 21, 2020).

[5] *See Tully*, No. 20-2605, 2020 WL 5905325, at *1, *5, & *7; *New Ga. Project*, 976 F.3d at 1284; *Thompson v. DeWine*, No. 20-3526, 2020 WL 5542883, at *1 (6th Cir. Sep. 16, 2020); *Thompson v. DeWine*, 959 F.3d 804, 810 (6th Cir. 2020); *Tex. Democratic Party*, 961 F.3d at 405 ; *id.* at 415-16 (Ho, J., concurring); *Clark v. Edwards*, Nos. 20CV283, 20CV308, 2020 WL 3415376, at *10-11 (M.D. La. June 22, 2020); *Coalition for Good Governance v. Raffensperger*, No. 1:20CV1677, 2020 WL 2509092, at *3 n.2. (N.D. Ga. May 14, 2020).

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COVID-19 is now part of the "usual burden on voting" that arises "arising out of life's vagaries," and thus not a burden that renders a state law unconstitutional. *Crawford*, 553 U.S. at 197-98. Following repeated direction from this Court, *see New Ga. Project*, 976 F.3d at 1283-84 & n.2 (collecting cases), many lower courts have declined to alter election laws during an emergency, including this latest pandemic. *See Carson v. Simon*, No. 20-3139, 2020 WL 6335967, at *6 (8th Cir. Oct. 29, 2020); *Thompson v. Dewine*, 959 F.3d 804, 813 (6th Cir. 2020); *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 408 (5th Cir. 2020); *Sinner v. Jaeger*, No. 3:20CV76, 2020 WL 3244143, at *6 (D.N.D. June 15, 2020); *Williams v. DeSantis*, No. 1:20CV67, Doc. 12 (N.D. Fla. Mar. 17, 2020); *see also Bethea v. Deal*, No. 2:16CV140, 2016 WL 6123241, at *2-3 (S.D. Ga. Oct. 19, 2016) (Hurricane Matthew). Because of the states' important interests in Election Day ballot receipt deadlines, and in not subjecting themselves to the problems created by postmark deadlines, the decision to change between one and the other is properly left to state legislatures.

II. Review is warranted because, like the court below, state courts are with increasing frequency assuming the constitutional role assigned to state legislatures.

Because states have strong reasons to adopt receipt deadlines instead of postmark deadlines, the choice between the two, like any deadline in election law, requires a "balance between promoting smooth and accurate elections, on the one hand, and encouraging voter turnout, on the other." *ACORN v. Bysiewicz*, 413 F. Supp. 2d

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119, 124 (D. Conn. 2005). That balance is "***quintessentially a legislative judgment***." *Id.* (emphasis added) (quoting *Griffin*, 385 F.3d at 1131); *see also Tully v. Okeson*, No. 20-2605, 2020 WL 5905325, at *1, *7 (7th Cir. Oct. 6, 2020). Put another way, "any deadline has aspects of arbitrariness to it, including one crafted by the court," *All. for Retired Americans v. Sec'y of State*, 2020 WL 6255526, at *6, and while "ultimately any deadline" means some "ballots will arrive too late to be counted[,] … [w]hat that deadline should be is a policy decision"—that is, a legislative decision. *League of Women Voters of Michigan v. Sec'y of State*, No. 353654, 2020 WL 3980216, at *8 (Mich. Ct. App. July 14, 2020), *appeal denied*, 946 N.W.2d 307 (Mich. 2020), *reconsideration denied*, 948 N.W.2d 70 (Mich. 2020).

The Constitution grants the power to prescribe such policy decisions about "the Times, Places and Manner of holding Elections" to "each State *by the Legislature thereof*." U.S. CONST. art. I, § 4 (emphasis added). State legislatures have "broad powers to determine the conditions under which the right of suffrage may be exercised." *Shelby Cnty. v. Holder*, 570 U.S. 529, 543 (2013). And they have "significant flexibility in implementing their own voting systems." *John Doe No. 1 v. Reed*, 561 U.S. 186, 195 (2010). The court below acknowledged as much:

> We are fully cognizant that a balance must be struck between providing voters ample time to request mail-in ballots, while also building enough flexibility into the election timeline to guarantee that ballot has time to travel through the USPS delivery system to ensure that the completed ballot can be counted in the election. Moreover, we recognize that the determination of that balance is fully enshrined within the authority granted to the Legislature under the United States and Pennsylvania Constitutions.

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Pet. App. 45a.

The Pennsylvania Supreme Court nonetheless chose to "alter" the legislature's duly-enacted election law based on the state's experience with its June primary. Pet. App. 48a-49a & n.25. But speculation about the state and local officials' ability to handle a long prepared for general election during COVID-19 cannot properly be based on their performance early in the pandemic. By the court's own recounting, problems in the primary occurred because "the Boards were inundated with over 1.8 million requests for mail-in ballots, rather than the expected 80,000 - 100,000, due in large part to the COVID-19 pandemic, which caused many voters to be wary of congregating in polling places." Pet. App. 28a. But unlike in June, where the number of absentee ballot requests far exceeded expectations, election administrators *expected* "that 3 million electors will seek mail-in or absentee ballots for the General Election." Pet. App. 31a-32a. Indeed, it appears that Pennsylvania election officials overestimated the number of absentee ballots. Pennsylvania Department of State, *Unofficial Returns*, https://www.electionreturns.pa.gov/ (around 2.6 million mail ballots cast for President). Not surprisingly, state primaries that took place later during the pandemic have seen smoother elections,[6] and the recent general election largely has not shown massive problems with voters being able to receive timely-requested ballots.

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[6] Nathan Rakich, *We've Had 56 Statewide Elections During The Pandemic. Here's What We Learned From Them.*, FIVETHIRTYEIGHT (Oct. 1, 2020), https://fivethirtyeight.com/features/weve-had-56-statewide-elections-during-the-pandemic-heres-what-we-learned-from-them/.

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This shows why courts cannot simply assume that state and local public servants will refuse to learn the lessons of the past and won't take significant steps to address the expected increased volume of absentee ballot requests. Pennsylvania did not in fact suffer the sorts of delays caused by unprepared local election officials during the general election as it did during the primary—the most significant delays were instead caused by litigation.[7] Contrary to predictions about hundreds of thousands of ballots not being counted in Pennsylvania and other states absent a deadline extension, one Respondent here claims only a tiny fraction of ballots have so far trickled in after Election Day. *See* Response of Luzerne County Board of Elections to Emergency Application for Injunction Pending Certiorari Review at 3 (Nov. 7, 2020). Clearly, voters are easily able to comply with the deadline enacted by the Pennsylvania Legislature.

Moreover, the same policy concerns with in-person voting in June cannot be assumed to hold in November, now that much more is known about the virus. Only after state primaries in the early months of the pandemic (when fear of the unknown was at its height) did a scientific consensus develop that in-person voting does not pose a high risk of causing a viral outbreak. For example, in Wisconsin, the first state to hold elections after the stay-at-home orders that nonetheless saw large in-person

[7] *See* Kristen Holmes, Ellie Kaufman, and Kelly Mena, *Start of Pennsylvania's election on hold because of ballot delay*, CNN (Sept. 13, 2020), https://www.cnn.com/2020/09/13/politics/2020-election-pennsylvania-ballot-delay/index.html.

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voting, a CDC study concluded: "No clear increase in cases, hospitalizations, or deaths was observed after the election."[8] Similarly, an earlier study stated: "There was no increase in COVID-19 new case daily rates observed for Wisconsin or its three largest counties following the election on April 7, 2020, as compared to the US, during the post-incubation interval period."[9] And a third study using different methods reached the same result: "There is no evidence to date that there was a surge of infections due to the April 7, 2020 election in Wisconsin."[10] South Korea also held a national in-person election with record turnout and zero transmission of the coronavirus from voting.[11] Thus, unlike in June, the conventional wisdom was to encourage, rather

[8] Paradis *et al.*, Public Health Efforts to Mitigate COVID-19 Transmission During the April 7, 2020, Election — City of Milwaukee, Wisconsin, March 13–May 5, 2020 (July 31, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6930a4-H.pdf.

[9] Berry, Mulekar, & Berry, Wisconsin April 2020 Election Not Associated with Increase in COVID-19 Infection Rates (April 28, 2020), https://www.medrxiv.org/content/10.1101/2020.04.23.20074575v1.

[10] Leung & Wu, No Detectable Surge in SARS-CoV-2 Transmission due to the April 7, 2020 Wisconsin Election (April 29, 2020), https://www.medrxiv.org/content/10.1101/2020.04.24.20078345v1.full.pdf.

[11] Do Kyung Ryuk, Jeong Hyeon Oh, & Yewon Sung, *Elections During a Pandemic: South Korea Shows How to Safely Hold a National Election During the COVID-19 Crisis*, THE WILSON CENTER (May 19, 2020), https://www.wilsoncenter.org/blog-post/elections-during-pandemic-south-korea-shows-how-safely-hold-national-election-during.

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than discourage, in-person voting as a safe and secure way to cast a ballot,[12] which perhaps explains why Pennsylvania saw lower-than-expected absentee voting.

None of this is to say that had the predictions of the court below been correct, its decision would have been justified. Rather, it demonstrates the problem with courts making legislative judgments—balancing policy considerations based on speculative predictions and competing electoral values. The sort of conjecture relied upon by the court below is not factfinding or legal interpretation, but simply usurpation of this legislative role. To say otherwise is to hold there is no meaningful distinction between judicial and legislative functions and no substance to the foundational American concept of the separation of powers.

Consider a counterfactual: suppose the Pennsylvania Legislature had created a postmark deadline that accepted absentee ballots received within three days of Election Day. What is to prevent a state court from rewriting this deadline, perhaps at the suggestion of the state secretary, to require accepting ballots for an extra (fourth) day after the election, using the same reasoning as that below? Nothing. After all, that new deadline will also result in some votes extra votes being counted—

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[12] *See* Abby Phillip, Jeremy Herb, & Kristen Holmes, *Democrats scramble to soothe voter fears about in-person voting ahead of November election*, CNN (Sept. 17, 2020), https://www.cnn.com/2020/09/17/politics/election-2020-democrats-in-person-voting/index.html; Russel Berman, *If You Can Grocery Shop in Person, You Can Vote in Person: Experts now say the health risk of casting an in-person ballot is relatively low. Will Democrats tell their voters that?*, THE ATLANTIC (Sept. 8, 2020), https://www.theatlantic.com/politics/archive/2020/09/voting-during-pandemic-pretty-safe/616084/.

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we are told the magnitude matters not—and would better accommodate predicted delays in processing applications and the mail system without affecting the rest of the election calendar. *See* Pet. App. 48a-49a; *compare also Democratic Nat'l Comm.*, 2020 WL 6275871, at *2 (Gorsuch, J., concurring) *and id.* at *10 (Kavanaugh, J., concurring) *with id.* at *15 & n.5 (Kagan, J., dissenting). Almost no deadline the legislature could set would be secure from alteration by the courts in the exact same factual scenario of this case. Here, the Pennsylvania Supreme Court made an election policy judgment based on uncertain predictions of the future, contrary to the judgments of that branch of the Pennsylvania government the Constitution specifically vests with the authority to make election policy choices: the state legislature. The inescapable reality is that it is now the judiciary that sets the times and manner of federal elections, occasionally with the consent by some executive official, not the state legislature.

The consequences of such state court usurpation could ripple nationally in the future, even if not in this present election. The experience of the states during the 2020 election cycle confirms the immense importance of the questions presented. Almost 500 cases were filed flooding the courts in almost every state, many with demands to judicially alter election rules; regrettably, some courts like the one below have acceded to these requests.[13] Election law has become so chaotic that it is now

[13] *See* Stanford-MIT Healthy Elections Project, *supra* note 3.

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impossible for state legislatures to know in advance whether the election rules they have enacted will or will not be reimagined by courts. This ever-worsening reality is hardly what the Constitution envisions: "The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof …." U.S. CONST. art. I, § 4.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari to review the Pennsylvania Supreme Court's clear encroachment on the state legislature's federal constitutional prerogative to set the times and manner of holding federal elections. Review is warranted now, even after the election, to secure the constitutional framework for our most fundamental democratic processes. The Court need not wait for the next election cycle to precipitate yet another deluge of litigation allowing state courts to once again amend state law right before the election—and for the beneficiaries of these unconstitutional actions to argue that there is once again not enough time for this Court's careful merits review.

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Respectfully submitted,

November 9, 2020

MIKE HUNTER
Attorney General of Oklahoma
MITHUN MANSINGHANI
Solicitor General
Counsel of Record
BRYAN CLEVELAND
Asst. Solicitor General

OKLAHOMA OFFICE OF THE
ATTORNEY GENERAL
313 NE Twenty-First St.
Oklahoma City, OK 73105
(405) 522-4932
mithun.mansinghani@oag.ok.gov

AMERICAN OVERSIGHT

Nos. 20-542, 20-547

IN THE

Supreme Court of the United States

JOSEPH B. SCARNATI III, *President Pro Tempore*, AND
JAKE CORMAN, *Majority Leader of the Pennsylvania Senate*,

Petitioners,

v.

KATHY BOOCKVAR, *Secretary of Pennsylvania, et al.*

Respondents.

On Petitions for a Writ of Certiorari to
the Supreme Court of Pennsylvania

Brief of Amici Curiae Oklahoma and __ other States in support of Petitioners

MIKE HUNTER
Attorney General of Oklahoma

BRYAN CLEVELAND
Asst. Solicitor General

MITHUN MANSINGHANI
Solicitor General
Counsel of Record

OKLAHOMA OFFICE OF THE
ATTORNEY GENERAL
313 NE Twenty-First St.
Oklahoma City, OK 73105
(405) 522-4932
mithun.mansinghani@oag.ok.gov

[Additional Counsel Listed on the Final Page]

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Nos. 20-542, 20-547

QUESTIONS PRESENTED

A Pennsylvania statute unambiguously provides that absentee and mail-in ballots must be received by Election Day. Brushing that requirement aside, a 4– 3 majority of the Pennsylvania Supreme Court extended the deadline by three days. The majority also required election officials to presume that any ballot received by its judicially created deadline that lacks an intelligible postmark was mailed by Election Day, unless a preponderance of the evidence demonstrates otherwise. The questions presented are:

1. Whether the Pennsylvania Supreme Court majority usurped the Pennsylvania General Assembly's plenary authority to "direct [the] Manner" for appointing electors for President and Vice President, U.S. Const. art. II, § 1, cl. 2, and broad power to prescribe "[t]he Times, Places, and Manner" for congressional elections, id. art. I, § 4, cl. 1.

2. Whether the majority's extension and presumption are preempted by federal statutes that establish a uniform nationwide federal Election Day.

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Interests of *Amici Curiae*

The court below enjoined "[t]he most common state deadline for election officials to receive absentee/mailed ballots"—"Election Day when the polls close."[1] Prior to the pandemic, over thirty states, including many of the *amici* states, had this deadline.[2] Yet the Pennsylvania Supreme Court took it upon itself to fashion a new deadline, declaring that the one used by the majority of states for many decades must be judicially rewritten because of the COVID-19 pandemic.

Amici states have important interests in enforcing the absentee ballot deadlines created by their legislatures and ensuring such statutes cannot be amended by state courts merely because some voters will not act in a timely fashion to comply. This election cycle demonstrates the immense importance to the states of the questions presented in this case: almost five hundred cases have filed in almost every state, many of which sought to alter state election rules on the eve of—and often in the midst of—the 2020 general election.[3] Cases across the country resulted in a patchwork of court rulings that usurped the legislative role and created new election rules in substitution of the judgment made by the people's representatives. The *amici*

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[1] *Voting Outside the Polling Place: Absentee, All-Mail and other Voting at Home Options*, NAT'L CONF. OF STATE LEGIS., https://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx.

[2] *VOPP: Table 11: Receipt and Postmark Deadlines for Absentee Ballots*, NAT'L CONF. OF STATE LEGIS., https://www.ncsl.org/research/elections-and-campaigns/vopp-table-11-receipt-and-postmark-deadlines-for-absentee-ballots.aspx.

[3] *See* Stanford-MIT Healthy Elections Project, *COVID-Related Election Litigation Tracker*, https://healthyelections-case-tracker.stanford.edu/.

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states therefore have a strong interest in securing this Court's clear direction to courts in every state that judicial altering of election laws based on little more than policy judgments inherently legislative in nature will not receive this Court's approval.[4]

Summary of the Argument

States legislatures must necessarily chose a point by which to stop receiving ballots and start counting votes, consistent with federal law setting the Election Day for federal officers. The deadline requiring absentee ballots to be received by Election Day promotes an efficient and orderly election, allowing states to expeditiously certify election results to bring certainty, clarity, stability, and legitimacy to our democratic system—sooner rather than later. States also have an interest in choosing not to have postmark deadlines, which can be difficult to implement and enforce, lead to the invalidation of some post-Election Day ballots and not others, increase the risk of voters casting ballots after initial results are released, and undermines confidence in an election if the Election Day results change from votes that continue to be tallied days and weeks after.

Such deadlines cannot be judicially rewritten merely because some voters will not act in a timely fashion to comply. Pennsylvania voters have 50 days to return their absentee ballot to ensure that it is received by Election Day, so failure to do so

[4] Amici notified the parties of the intention to file this brief and submit this brief pursuant to Sup. Ct. Rule 37.4.

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is not the fault of state election law. *See Rosario v. Rockefeller*, 410 U.S. 752, 758 (1973). That is why many courts, both before and during the pandemic, have upheld Election Day receipt deadlines—and COVID-19 does not make these laws unconstitutional. Regardless of the virus and the policy choice of how election laws should be changed due to recent circumstances, balancing interests in counting as many tardy voters as possible with electoral order, legitimacy, efficiency, and certainty is quintessentially a *legislative* judgment. The decision of the court below to strike a different balance, writing in a new postmark deadline with an arbitrary three-day-after-Election-Day cutoff, improperly abrogated the state legislature's prerogative to set "the ***Times***, Places and Manner of holding Elections." U.S. CONST. art. I, § 4 (emphasis added).

The contrary conclusion by the Pennsylvania Supreme Court rested on the unjustified assumption that local, state, and federal officials will be unable to properly conduct an election with increased absentee voting. Indeed, since state primaries earlier this year, a scientific consensus has developed about the safety of in-person voting, leading to calls from both sides of the aisle to vote in-person. But with hundreds of cases filed in courts in almost every state creating mass uncertainty, state legislatures can no longer reliably set election rules without a significant possibility that some court somewhere will think better of them. This Court should grant certiorari to uphold the Constitution's command that it is the legislative branch of each state, not the judicial branch, that determines federal election rules.

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Reasons for Granting the Petitions

I. States have important interests in absentee ballot receipt deadlines, which are set pursuant to a quintessentially legislative judgment.

It is well-settled that absentee ballot receipt deadlines serve the "strong" and "important" state interests in "conducting an efficient election, maintaining order, quickly certifying election results, and preventing fraud." *New Ga. Project v. Raffensperger*, No. 20-13360, slip op. at 6 (11th Cir. Oct. 2, 2020); *see also Common Cause Indiana v. Lawson*, 977 F.3d 663 (7th Cir. 2020) ("Counting the votes, and announcing the results, as soon as possible after the polls close serves a civic interest."); *Utah Republican Party v. Cox*, 892 F.3d 1066, 1077 (10th Cir. 2018) (election deadlines serve "a state's legitimate interest in providing order, stability, and legitimacy to the electoral process"); *Thomas v. Andino*, 3:20CV1552, 2020 WL 2617329, at *26 (D.S.C. May 25, 2020) ("setting specific election deadlines is part and parcel of a state's generalized interest in the orderly administration of elections," noting also the state's interest in "'ensuring a smooth process for [voters] to cast ballots and officials to count those ballots'"); *Friedman v. Snipes*, 345 F. Supp. 2d 1356, 1377 (S.D. Fla. 2004) ("[T]he State's interests in ensuring a fair and honest election and to count votes within a reasonable time justifies the light imposition on Plaintiffs' right to vote."). After all, states must have a point at which they stop receiving ballots and start counting them to determine the winner. *See Democratic Nat'l Comm. v. Wisconsin State Legislature*, 20A66, 2020 WL 6275871, at *1 (U.S. Oct. 26, 2020) (Gorsuch, J., concurring in denial of application to vacate stay) ("Elections must end sometime, a

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single deadline supplies clear notice, and requiring ballots be in by election day puts all voters on the same footing."); *Cox*, 892 F.3d at 1077; *Friedman*, 345 F. Supp. 2d at 1377.

While within the discretion of state legislatures, states also have strong interests in *not* using a postmark deadline like the one enacted by the court below. Ballot receipt deadlines avoid the numerous problems with reading sometimes-inscrutable postmarks and determining how to handle missing postmarks—a situation more likely to occur as USPS rushes to deliver late-arriving prepaid ballots. *See DCCC v. Ziriax*, No. 4:20CV211, 2020 WL 5569576, at *10 (N.D. Okla. Sept. 17, 2020). Such postmark issues have led to bitter election contests and thousands of absentee ballots rejected in states using a postmark deadline. *See Gallagher v. N.Y. State Bd. of Elections*, 20 CIV. 5504 (AT), 2020 WL 4496849, at *18 (S.D.N.Y. Aug. 3, 2020).

The Court below avoided such issues by mandating we *assume* all ballots were postmarked by election day unless proven otherwise, but that only creates other problems, including "the remote possibility that in an extremely close election … a person who did not vote on or before election day can fill out and submit a ballot later." *Nielsen v. DeSantis*, No. 4:20CV236, 2020 WL 5552872, at *1 (N.D. Fla. June 24, 2020). That is, the decision below to presumptively accept all ballots for three days following the election, even without a legible postmark, creates the very real risk of persons being able to fill out and submit ballots after Election Day and after initial returns have been reported. *Cf. Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S.

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Ct. 1205, 1207 (2020) ("Extending the date by which ballots may be cast by voters … fundamentally alters the nature of the election.").

This is not solely an in-state concern. Other states have a strong interest in the outcome of national elections as they play out across the country, and there is a strong federal concern with ensuring the timely and accurate reporting of state votes for federal officers. Thus, both within the state and nationally, an Election Day receipt deadline "secures voter confidence in the election: voters become less sure of the results if a candidate is declared a winner on or shortly after election day, but the results are changed several days or a week later." *DCCC v. Ziriax*, No. 4:20CV211, 2020 WL 5569576, at *19 (N.D. Okla. Sept. 17, 2020).

To be sure, any election deadline "will invariably burden some voters. . . for whom the earlier time is inconvenient." *Cox*, 892 F.3d at 1077. But a "generally applicable deadline that applied to all would-be absentee voters would likely survive" constitutional muster, "even if it resulted in disenfranchisement for certain . . . individuals." *Mays v. LaRose*, 951 F.3d 775, 792 (6th Cir. 2020); *see also Griffin v. Roupas*, 385 F.3d 1128, 1130 (7th Cir. 2004) (every election law "is going to exclude, either de jure or de facto, some people from voting").

As this Court explained in *Rosario v. Rockefeller*, if a voter "could have" met an election-related deadline, missing that deadline is due to "their own failure to take timely steps to effect their enrollment." 410 U.S. at 758. Lack of "sufficient awareness of the relevant circumstances and the likely consequences" of the deadline does not

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create a valid constitutional claim because such an argument could be maintained against any deadline. *Id.* at 758 n.7. Earlier this year, this Court observed that voters who wait weeks into absentee voting and request a ballot at the last minute are suffering the typical burden of a "late-requesting voter[]," not a burden improperly imposed by the state. *See Republican Nat'l Comm.*, 140 S. Ct. at 1207. And the Court has long given "little weight" to any alleged interest in "making a late rather than an early decision." *Burdick v. Takushi*, 504 U.S. 428, 437 (1992) (quoting *Storer v. Brown*, 415 U.S. 724, 736 (1974)).

Thus, while some voters will inevitably fail to comply with *any* deadline—including the postmark-and-three-days-after-Election-Day deadline invented by the Pennsylvania Supreme Court—courts have held in this and other election-related contexts that "voters who fail to get their vote in early cannot blame [state] law for their inability to vote; they must blame 'their own failure to take timely steps.'" *Thomas*, 2020 WL 2617329, at *26 (quoting *Rosario,* 410 U.S. at 758); *see also Common Cause Indiana v. Lawson*, 977 F.3d 663 (7th Cir. 2020) ("those who act at the last minute assume risks even without a pandemic"); *New Ga. Project*, No. 20-13360, slip op. at 6 (11th Cir. Oct. 2, 2020) ("Voters must simply take reasonable steps and exert some effort to ensure that their ballots are submitted on time…."); *id.* at 17 (Lagoa, J., concurring); *Ziriax*, 2020 WL 5569576, at *18 ("Because the State offers voters wishing to vote by absentee ballot options to ensure their votes are timely returned, voters who fail to ensure timely return of their ballots should not blame the

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law for their inability to vote."); *Grossman v. Sec'y of the Commonwealth*, 485 Mass. 541, 2020 WL 5033954, at *6 (2020); *Friedman*, 345 F. Supp. 2d at 1377-78; *cf. also Lawrence v. Blackwell*, 430 F.3d 368, 373 (6th Cir. 2005); *Democracy N.C. v. N.C. State Bd. of Elections*, No. 1:20CV457, 2020 WL 4484063, at *38-40 (M.D.N.C. Aug. 4, 2020); *Isabel v. Reagan*, 394 F. Supp. 3d 966, 982-83 (D. Ariz. 2019); *Chelsea Collaborative, Inc. v. Sec'y of Commonwealth*, 100 N.E.3d 326, 335 (Mass. 2018); *Crum v. Duran*, 390 P.3d 971, 976 (N.M. 2017); *Gallagher v. Ind. State Election Bd.*, 598 N.E.2d 510, 516 (Ind. 1992).

Statistics about how many voters in fact did not comply with the deadline are irrelevant because they do not give the reasons for failure to comply: whether it was because these voters were unable to meet the deadline or instead because they did not take reasonable efforts to comply, perhaps because they chose to wait too long to request or return their absentee ballot. *See Ziriax*, 2020 WL 5569576, at *18. Regulations that can be complied with by reasonable efforts are not significant burdens to the right to vote. *See Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 198 (2008); *New Ga. Project*, No. 20-13360, slip op. at 6 (11th Cir. Oct. 2, 2020) ; *Frank v. Walker*, 819 F.3d 384, 386-87 (7th Cir. 2016). "An absentee voter is responsible for acting with sufficient time to ensure timely delivery of her ballot," just like other voters "must take appropriate precautions by heading to the polls with a sufficient cushion of time to account for traffic, weather, or other conditions that might otherwise interfere with their ability to arrive in time to cast a ballot." *Ziriax*, 2020 WL 5569576, at *18. It is

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wrong to characterize these voters as not having their ballots counted due to 'no fault of their own,' since such voters assumed the risks of waiting too long to request and/or receive their ballot, even if such risks are exacerbated by well-known outside events. Such voters are not "disenfranchised"—they're tardy. *See Democratic Nat'l Comm.*, 20A66, 2020 WL 6275871, at *7 (Kavanaugh, J., concurring in denial of application to vacate stay); *New Ga. Project*, No. 20-13360, slip op. at 6 (11th Cir. Oct. 2, 2020).

Accordingly, the decision of the court below to focus on those voters who wait until the very last possible to point to request an absentee ballot (7 days before the election), Pet. App. 47a, rather than the opportunity for every voter to request a ballot up to 50 days before the election, 25 P.S. § 3150.12a, is a lean fig leaf for redrafting the deadline. Pennsylvania's decision to provide a large temporal window to request a ballot does not create "an extremely condensed timeline," Pet. App. 47a; instead, it provides voters *more opportunities* to vote absentee, leaving it to voters to use those options responsibly, *see Democratic Nat'l Comm.*, 20A66, 2020 WL 6275871, at *9 (Kavanaugh, J., concurring in denial of application to vacate stay).

All this is why numerous courts across the country have upheld Election Day receipt deadlines for absentee ballots. *Org. for Black Struggle v. Ashcroft*, 20-3121, 2020 WL 6257167, at *3 (8th Cir. Oct. 23, 2020); *Common Cause Indiana v. Lawson*, 977 F.3d 663 (7th Cir. 2020); *Democratic Nat'l Comm. v. Bostelmann*, 977 F.3d 639 (7th Cir. 2020); *Arizona Democratic Party v. Hobbs*, 976 F.3d 1081 (9th Cir. 2020); *New Ga. Project*, No. 20-13360, slip op. at 2 (11th Cir. Oct. 2, 2020) (staying district

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court order that "manufactured its own ballot deadline"); *Ziriax*, 2020 WL 5569576, at *18-20; *Nielsen*, 2020 WL 5552872, at *1; *Thomas*, 2020 WL 2617329, at *26; *Friedman*, 345 F. Supp. 2d at 1377; *Grossman*, 485 Mass. 541, 2020 WL 5033954, at *7; *All. for Retired Americans v. Sec'y of State*, 2020 ME 123; *American Women, et al., v. State of Missouri, et al.*, No. 20AC-CC00333 (Mo. Cir. Ct. Cole Cty. Oct. 22, 2020); *Michigan All. for Retired Americans v. Sec'y of State*, No. 354993, 2020 WL 6122745 (Mich. Ct. App. Oct. 16, 2020). As even the court below admitted, "there is nothing constitutionally infirm about a deadline of 8:00 p.m. on Election Day for the receipt of ballots." Pet. App. 44a. Indeed, because there is no right to vote absentee, a challenge to an absentee deadline "does not implicate the right to vote at all."[5]

The reality of the coronavirus pandemic does not change the important state interests in enforcing their voting laws as written. As many courts have noted, the states did not create the virus or impose the pandemic's burden on voters—COVID-19 is not state action that subjects otherwise-valid state laws to abrogation.[6] At most,

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[5] *New Ga. Project v. Raffensperger*, No. 20-13360, slip op. at 5 (11th Cir. Oct. 2, 2020); *see also id.* at 16, 20 (Lagoa, J., concurring); *McDonald v. Bd. of Election Comm'rs of Chicago*, 394 U.S. 802, 807 (1969) (the "claimed right to receive absentee ballots" is not "the right to vote"); *Crawford*, 553 U.S. at 209 (Scalia, J., concurring in the judgment); *Tully*, 2020 WL 5905325, at *1; *Mays*, 951 F.3d at 786, 792 (6th Cir. 2020); *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 403-04 (5th Cir. 2020); *Griffin*, 385 F.3d at 1130; *Tully v. Okeson*, No. 1:20CV1271, 2020 WL 4926439, at *3-4 (S.D. Ind. Aug. 21, 2020).

[6] *See Tully*, No. 20-2605, 2020 WL 5905325, at *1, *5, & *7; *New Ga. Project*, No. 20-13360, slip op. at 10 (11th Cir. Oct. 2, 2020); *Thompson v. DeWine*, No. 20-3526, 2020 WL 5542883, at *1 (6th Cir. Sep. 16, 2020); *Thompson v. DeWine*, 959 F.3d 804, 810

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COVID-19 is now part of the "usual burden on voting" that arises "arising out of life's vagaries," and thus not a burden that renders a state law unconstitutional. *Crawford*, 553 U.S. at 197-98. Following repeated direction from this Court, *see New Ga. Project*, No. 20-13360, slip op. at 8 n.2 (11th Cir. Oct. 2, 2020) (collecting cases), many lower courts have declined to alter election laws during an emergency, including this latest pandemic. *See Sinner v. Jaeger*, No. 3:20CV76, 2020 WL 3244143, at *6 (D.N.D. June 15, 2020); *Williams v. DeSantis*, No. 1:20CV67, Doc. 12 (N.D. Fla. Mar. 17, 2020); *see also Bethea v. Deal*, No. 2:16CV140, 2016 WL 6123241, at *2-3 (S.D. Ga. Oct. 19, 2016) (Hurricane Matthew).

In the end, any deadline in election law is a "balance between promoting smooth and accurate elections, on the one hand, and encouraging voter turnout, on the other." *ACORN v. Bysiewicz*, 413 F. Supp. 2d 119, 124 (D. Conn. 2005). The balance between these two interests is "***quintessentially a legislative judgment***." *Id.* (emphasis added) (quoting *Griffin*, 385 F.3d at 1131); *see also Tully v. Okeson*, No. 20-2605, 2020 WL 5905325, at *1, *7 (7th Cir. Oct. 6, 2020). Put another way, "any deadline has aspects of arbitrariness to it, including one crafted by the court," *All. for Retired Americans v. Sec'y of State*, 2020 ME 123, ¶ 20, and while "ultimately any deadline carries with it the possibility that voters will be disenfranchised as their

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(6th Cir. 2020); *Tex. Democratic Party*, 961 F.3d at 405 ; *id.* at 415-16 (Ho, J., concurring); *Clark v. Edwards*, Nos. 20CV283, 20CV308, 2020 WL 3415376, at *10-11 (M.D. La. June 22, 2020); *Coalition for Good Governance v. Raffensperger*, No. 1:20CV1677, 2020 WL 2509092, at *3 n.2. (N.D. Ga. May 14, 2020).

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ballots will arrive too late to be counted … [w]hat that deadline should be is a policy decision"—that is, a legislative decision. *League of Women Voters of Michigan v. Sec'y of State*, No. 353654, 2020 WL 3980216, at *8 (Mich. Ct. App. July 14, 2020), *appeal denied*, 946 N.W.2d 307 (Mich. 2020), *reconsideration denied*, 948 N.W.2d 70 (Mich. 2020).

The Constitution grants the power to prescribe such policy decisions about "the Times, Places and Manner of holding Elections" to "each State ***by the Legislature thereof***." U.S. CONST. art. I, § 4 (emphasis added). State legislatures have "broad powers to determine the conditions under which the right of suffrage may be exercised." *Shelby Cnty. v. Holder*, 570 U.S. 529, 543 (2013). And they have "significant flexibility in implementing their own voting systems," *John Doe No. 1 v. Reed*, 561 U.S. 186, 195 (2010), which includes setting deadlines. The court below acknowledged as much:

> We are fully cognizant that a balance must be struck between providing voters ample time to request mail-in ballots, while also building enough flexibility into the election timeline to guarantee that ballot has time to travel through the USPS delivery system to ensure that the completed ballot can be counted in the election. Moreover, we recognize that the determination of that balance is fully enshrined within the authority granted to the Legislature under the United States and Pennsylvania Constitutions.

Pet. App. 45a. This Court should grant certiorari to review the Pennsylvania Supreme Court's admitted encroachment on the state legislature's federal constitutional prerogative to set the times and manner of holding federal elections.

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II. The Pennsylvania Supreme Court's reasoning cannot justify its rewriting of election laws.

The Pennsylvania Supreme Court chose to "alter" the legislature's duly-enacted election law based on the state's experience with its June primary. Pet. App. 48a-49a & n.25. But speculation about the state and local officials' inability to handle a long prepared for general election during COVID-19 cannot properly be based on its performance early in the pandemic. By the court's own recounting, problems in the primary occurred because "the Boards were inundated with over 1.8 million requests for mail-in ballots, rather than the expected 80,000 - 100,000, due in large part to the COVID-19 pandemic, which caused many voters to be wary of congregating in polling places." Pet. App. 28a. But unlike in June, where the number of absentee ballot requests far exceeded expectations, election administrators *expected* "that 3 million electors will seek mail-in or absentee ballots for the General Election." Pet. App. 31a-32a. Indeed, state primaries that took place later during the pandemic have seen *lower* absentee voting rates and smoother elections.[7]

Courts cannot simply assume that state and local public servants will refuse to learn the lessons of the past and won't take significant steps to address the expected increased volume of absentee ballot requests. Indeed, Pennsylvania did not in

[7] Nathan Rakich, *We've Had 56 Statewide Elections During The Pandemic. Here's What We Learned From Them.*, FIVETHIRTYEIGHT (Oct. 1, 2020), https://fivethirtyeight.com/features/weve-had-56-statewide-elections-during-the-pandemic-heres-what-we-learned-from-them/.

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fact suffer the sorts of delays caused by unprepared local election officials during the general election as it did during the primary—the most significant delays were instead caused by litigation.[8] Contrary to predictions about hundreds of thousands of ballots not being counted in Pennsylvania and other states absent a deadline extension, one Respondent here claims only a tiny fraction of ballots have so far trickled in after election day. *See* Response of Luzerne County Board of Elections to Emergency Application for Injunction Pending Certiorari Review at 3 (Nov. 7, 2020). Clearly, voters are easily able to comply with the deadline enacted by the Pennsylvania Legislature, and judicial conjecture about the abilities of executive officials cannot suffice to justify usurpation of this legislative role.

Moreover, the same aversion to in-person voting in June cannot be assumed to hold November, now that much more is known about the virus. Only after state primaries in the early months of the pandemic (when fear of the unknown was at its height) did a scientific consensus develop that in-person voting does not pose a high risk of causing a viral outbreak. For example, in Wisconsin, the first state to hold elections after the stay-at-home orders that nonetheless saw large in-person voting, a CDC study concluded: "No clear increase in cases, hospitalizations, or deaths was

[8] *See* Kristen Holmes, Ellie Kaufman, and Kelly Mena, *Start of Pennsylvania's election on hold because of ballot delay*, CNN (Sept. 13, 2020), https://www.cnn.com/2020/09/13/politics/2020-election-pennsylvania-ballot-delay/index.html.

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observed after the election."[9] Similarly, an earlier study stated: "There was no increase in COVID-19 new case daily rates observed for Wisconsin or its three largest counties following the election on April 7, 2020, as compared to the US, during the post-incubation interval period."[10] And a third study using different methods reached the same result: "There is no evidence to date that there was a surge of infections due to the April 7, 2020 election in Wisconsin."[11] South Korea also held a national in-person election with record turnout and zero transmission of the coronavirus from voting.[12] Thus, unlike in June, the conventional wisdom was to encourage, rather than discourage, in-person voting as a safe and secure way to cast a ballot.[13]

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[9] Paradis et al., Public Health Efforts to Mitigate COVID-19 Transmission During the April 7, 2020, Election — City of Milwaukee, Wisconsin, March 13–May 5, 2020 (July 31, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6930a4-H.pdf.

[10] Berry, Mulekar, & Berry, Wisconsin April 2020 Election Not Associated with Increase in COVID-19 Infection Rates (April 28, 2020), https://www.medrxiv.org/content/10.1101/2020.04.23.20074575v1.

[11] Leung & Wu, No Detectable Surge in SARS-CoV-2 Transmission due to the April 7, 2020 Wisconsin Election (April 29, 2020), https://www.medrxiv.org/content/10.1101/2020.04.24.20078345v1.full.pdf.

[12] Do Kyung Ryuk, Jeong Hyeon Oh, & Yewon Sung, *Elections During a Pandemic: South Korea Shows How to Safely Hold a National Election During the COVID-19 Crisis*, THE WILSON CENTER (May 19, 2020), https://www.wilsoncenter.org/blog-post/elections-during-pandemic-south-korea-shows-how-safely-hold-national-election-during.

[13] *See* Abby Phillip, Jeremy Herb, & Kristen Holmes, *Democrats scramble to soothe voter fears about in-person voting ahead of November election*, CNN (Sept. 17, 2020), https://www.cnn.com/2020/09/17/politics/election-2020-democrats-in-person-voting/index.html; Russel Berman, *If You Can Grocery Shop in Person, You Can Vote in Person: Experts now say the health risk of casting an in-person ballot is relatively*

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Ultimately, the Pennsylvania Supreme Court made an election policy judgment based on uncertain predictions of the future, contrary to the judgments of that branch of the Pennsylvania government the Constitution specifically vests with the authority to make election policy choices: the state legislature. But because federal elections are at issue, the consequences of such state court usurpation could ripple nationally in the future, even if not in this present election.

The 2020 election cycle demonstrates the immense importance of the questions presented. Almost 500 cases were filed flooding the courts in almost every state, many with demands to judicially alter election rules; regrettably, some courts like the one below have acceded to these requests.[14] Election law has become so chaotic that it is now impossible for state legislatures to know in advance whether the election rules they have enacted will or will not be reimagined by courts. This ever-worsening reality is hardly what the Constitution envisions: "The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof …." U.S. CONST. art. I, § 4.

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low. Will Democrats tell their voters that?, THE ATLANTIC (Sept. 8, 2020), https://www.theatlantic.com/politics/archive/2020/09/voting-during-pandemic-pretty-safe/616084/.

[14] *See* Stanford-MIT Healthy Elections Project, *COVID-Related Election Litigation Tracker*, https://healthyelections-case-tracker.stanford.edu/.

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Conclusion

For the foregoing reasons, the Court should grant the petitions for a writ of certiorari.

Respectfully submitted,

November 9, 2020

MIKE HUNTER
Attorney General of Oklahoma
MITHUN MANSINGHANI
Solicitor General
Counsel of Record
BRYAN CLEVELAND
Asst. Solicitor General

OKLAHOMA OFFICE OF THE
ATTORNEY GENERAL
313 NE Twenty-First St.
Oklahoma City, OK 73105
(405) 522-4932
mithun.mansinghani@oag.ok.gov

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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

MOTION FOR LEAVE TO FILE AND BRIEF OF *AMICUS CURIAE* OHIO IN SUPPORT OF NEITHER PARTY

DAVE YOST
Ohio Attorney General

BENJAMIN M. FLOWERS*
**Counsel of Record*
Ohio Solicitor General
MICHAEL J.HENDERSHOT
Chief Deputy Solicitor General
30 E. Broad St., 17th Fl.
Columbus, Ohio 43215
614-466-8980
bflowers@
ohioattorneygeneral.gov

Counsel for Amicus Curiae the State of Ohio

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MOTION FOR LEAVE TO FILE

Ohio respectfully moves for leave to file an *amicus curiae* brief in support of neither party. It is unclear whether any such motion is required. Under Rule 37.4, Ohio is permitted to file an *amicus* brief without first obtaining leave. But under Rule 37.2(a), all *amici* must provide counsel for the parties with notice of their intent to file an amicus brief more than ten days before the brief's due date. It is unclear when any *amicus* briefs in this expedited proceeding would be due, and so it is unclear whether Ohio can provide timely notice. What is more, while Ohio attempted to provide notice to counsel for all parties on December 10, 2020, it has not been able to confirm the contact information for each party's counsel. So, in an abundance of caution, Ohio moves for leave to file this brief.

Ohio has previously argued that this Court has mandatory jurisdiction in original actions, and that it therefore lacks authority to deny leave to file bills of complaint. *See Arizona v. Sackler*, No. 22O151, Br. of Ohio and *amici* States (Sept. 26, 2019). Its *amicus* brief in this case will address something else: the proper understanding of the Electors Clause, U.S. Const. art. II, §1, cl.2; the incompatibility of the Clause and the remedy that Texas seeks; and the need for a Supreme Court ruling, at the earliest available opportunity, on the proper application of the Clause to cases in which state courts or state executive officers alter election rules in presidential elections.

Ohio believes its brief would be of value to the Court's decisionmaking process, and respectfully moves for leave to file.

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Respectfully submitted,

DAVE YOST
Ohio Attorney General

BENJAMIN M. FLOWERS*
**Counsel of Record*
Ohio Solicitor General
MICHAEL J. HENDERSHOT
Chief Deputy Solicitor General
30 East Broad St., 17th Fl.
Columbus, Ohio 43215
614-466-8980
bflowers@ohioattorneygeneral.gov

Counsel for Amicus Curiae
the State of Ohio

DECEMBER 2020

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STATEMENT OF AMICUS INTEREST AND SUMMARY OF ARGUMENT*

The Presidential Electors Clause provides: "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress." Art. II, §1, cl.2. Ohio has previously taken the position that this language means what it says. In a brief filed just last month, it argued that this Clause must be understood as empowering "state legislatures, not state courts, [to] set the rules for picking presidential electors." *Republican Party of Pa. v. Boockvar*, Nos. 20-542, 20-574, Br. of *Amicus Curiae* Ohio in Support of Petitioners 3 (Nov. 9, 2020). This means that state courts violate the Constitution when they use judge-made doctrines or strained interpretations to change the legislatively fashioned rules governing the manner by which presidential electors are chosen. *Id*. at 5.

The Electors Clause means today what it meant a month ago. Ohio hopes this Court agrees. But either way, the States need this Court to decide, at the earliest available opportunity, the question whether the Electors Clause permits state courts (and state executive officials) to alter the rules by which presidential elections are conducted. The People need an answer, too. Until they get one, elections will continue to be plagued by doubts regarding whether the President was chosen in the constitutionally prescribed manner.

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* Ohio attempted to notify all parties, through the parties' attorneys, of its intent to file this *amicus* brief on December 10, 2020.

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Ohio is submitting this brief under Rule 37.4 to address these points.

ARGUMENT

Article II of the Constitution directs that "[e]ach State shall appoint" presidential electors "in such Manner as the Legislature thereof may direct." Art. II, §1, cl.2. Whatever "the Legislature thereof" means, it does not mean "the courts thereof." Thus, when state election codes dictate the manner for appointing presidential electors, state courts must respect the legislature's work: they may not change the rules by which electors are chosen through judge-made doctrines or by rewriting statutes in the guise of interpretation. *See Democratic Nat'l Comm. v. Wis. State Legislature*, 592 U.S. __, slip op. 9 n.1 (2020) (Kavanaugh, J., concurring); *Bush v. Gore*, 531 U.S. 98, 120 (2000) (Rehnquist, C.J., concurring); *see also Republican Party of Pa. v. Boockvar*, 592 U.S. __, slip op. 1 (2020) (Statement of Alito, J.). This does not mean that state-court interpretations of state law are entitled to no deference. But at some point, a purported "interpretation" becomes "not a construction" of the relevant text, "but a rewriting of it." *State Bd. of Equalization of Cal. v. Young's Market Co.*, 299 U.S. 59, 62 (1936). The Electors Clause prohibits such rewritings in the context of presidential elections.

Precisely because Ohio holds this view about the meaning of the Electors Clause, it cannot support Texas's plea for relief. Texas seeks a "remand to the State legislatures to allocate electors in a manner consistent with the Constitution." Br. in Support of Motion for Leave to File 16. Such an order would violate, not honor, the Electors Clause. Federal courts, just

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like state courts, lack authority to change the legislatively chosen method for appointing presidential electors. And so federal courts, just like state courts, lack authority to order legislatures to appoint electors without regard to the results of an already-completed election.

What is more, the relief that Texas seeks would undermine a foundational premise of our federalist system: the idea that the States are sovereigns, free to govern themselves. The federal government has only those powers that the Constitution gives to it. And nothing in the Constitution empowers courts to issue orders affirmatively directing the States how to exercise their constitutional authority. *See Missouri v. Jenkins*, 515 U.S. 70, 132–33 (1995) (Thomas, J., concurring). The courts have no more business ordering the People's representatives how to choose electors than they do ordering the People themselves how to choose their dinners. In the Federalist Papers, Hamilton endorsed the idea that "there is no liberty, if the power of judging be not separated from the legislative and executive powers." The Federalist No. 78 (Hamilton), p. 523 (Cooke, ed., 1961). He was talking about the separation of federal powers. But the principle applies with equal (and perhaps greater) force as applied to the Constitution's separation of state and federal power. As this Court is fond of noting, the "Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other." *Saenz v. Roe*, 526 U.S. 489, 504 n.17 (1999) (quoting *U.S. Term Limits v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring)). "By denying any one government complete

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jurisdiction over all the concerns of public life, federalism" ensures that one government is able to check overreach by the other, and thus "protects the liberty of the individual from arbitrary power." *Bond v. United States*, 564 U.S. 211, 222 (2011). By asking this Court to direct four sovereign States in the exercise of *their* authority under the Electors Clause, Texas erodes both this structure and the protection that the structure provides.

Although Ohio does not endorse Texas's proposed relief, it does endorse its call for a ruling on the meaning of the Electors Clause. More precisely, Ohio urges the Court to decide, at the earliest available opportunity, whether state courts and state executive actors violate the Electors Clause when they change the rules by which presidential elections are run. In late October, Justice Alito predicted that the Court's failure to decide that question in another case had "needlessly created conditions that could lead to serious post-election problems." *Boockvar*, 592 U.S. __, slip op. at 1 (Statement of Alito, J.). Unfortunately, he was right. In many States, citizens voted for President under rules created by state judiciaries and state executive actors rather than state legislatures. *See, e.g.*, *id.*, slip op. at 1–2; *Moore v. Circosta*, 592 U.S. __, slip op. 1–2 (2020) (Gorsuch, J., dissenting from denial of application for injunctive relief); *Tex. League of United Latin Am. Citizens v. Hughs*, 978 F.3d 136, 151–52 (5th Cir. 2020) (Ho, J., concurring). Because this Court has never decided whether the Electors Clause permits such alterations to the method for choosing presidential electors, Americans are left to wonder whether the process by which they voted for President was consistent with our country's founding charter. Those doubts will linger, "robbing the winners of" a

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victory that all Americans will deem legitimate, and "the losers of the peace that comes from a fair defeat." *United States v. Windsor*, 570 U.S. 744, 802 (2013) (Scalia, J., dissenting).

The importance of the public's constitutional doubts, however, pales in comparison to the importance of the public's concerns regarding basic fairness. In States around the country, judges and executive officials changed the rules that would govern the election "immediately preceding or during" the election. *Wise v. Circosta*, 978 F.3d 93, 104 (4th Cir. 2020) (Wilkinson, J., dissenting); *see also Pa. Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020). If there is anything more American than representative government, it is a firm conviction that the rules ought not be changed after the game has begun. Because this Court has never held that the Electors Clause forbids state courts and state executive officers from meddling with state legislatures' work, state courts and state executive officers retained leeway to change the rules in the final stretch of election season. It is not unreasonable to wonder—and many millions of Americans do—whether those hastily implemented changes exposed the election systems to vulnerabilities. Nor is it unreasonable to object on fairness grounds—as many millions of Americans do—to changing the voting rules when the election is impending and the changes' impact on the results can be predicted. These concerns undermine "public confidence in the integrity of the electoral process." *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 197 (2008) (Stevens, J., op.). That confidence is necessary if there is to be "citizen participation in the democratic process," which is itself necessary for the success of the American project. *Id.*

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It may prove difficult at this late date to fashion a remedy that does not create equal or greater harms. But there will be an election in 2024, another four years after that, and so on. If only to prevent the doubts that have tainted this election from arising again in some future election, the Court should decide, as soon as possible, the extent of the power that the Electors Clause confers on state legislatures and withholds from other actors.

CONCLUSION

The Court should issue a decision on the meaning of the Electors Clause at the earliest available opportunity.

Respectfully submitted,

DAVE YOST
Ohio Attorney General

BENJAMIN M. FLOWERS*
**Counsel of Record*
Ohio Solicitor General
MICHAEL J. HENDERSHOT
Chief Deputy Solicitor General
30 East Broad St., 17th Fl.
Columbus, Ohio 43215
614-466-8980
bflowers@ohioattorneygeneral.gov

Counsel for Amicus Curiae
the State of Ohio

DECEMBER 2020

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*

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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

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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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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

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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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, 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]

---

[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. <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, 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

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

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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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Brocker, Liz

From: Mithun Mansinghani <mithun.mansinghani@oag.ok.gov>
Sent: Tuesday, November 10, 2020 8:11 AM
To: Stenehjem, Wayne K.
Subject: Re: [EXTERNAL] RE: Amicus Brief re Pennsylvania Ballot Receipt Deadline

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

Unfortunately no, we filed it last night. But I've seen in the past states file a letter with the Court saying they support a previously-filed brief. Let me see if I can find an example of that for you.

Mithun

Sent from my iPhone

On Nov 10, 2020, at 8:04 AM, Stenehjem, Wayne K. <wstenehjem@nd.gov> wrote:

Can we still join this brief?
Wayne Stenehjem
ND

From: Mithun Mansinghani <mithun.mansinghani@oag.ok.gov>
Sent: Sunday, November 8, 2020 10:45 PM
To: Sauer, John <John.Sauer@ago.mo.gov>; Murrill, Elizabeth <MurrillE@ag.louisiana.gov>; Melissa Holyoak <melissaholyoak@agutah.gov>; nicholas.bronni@arkansasag.gov; Vincent Wagner <vincent.wagner@arkansasag.gov>; ed.sniffen@alaska.gov; Smith, Justin <Justin.Smith@ago.mo.gov>; Amit.Agarwal@myfloridalegal.com; 'Kane, Brian' <brian.kane@ag.idaho.gov>; tom.fisher@atg.in.gov; julia.payne@atg.in.gov; toby.crouse@ag.ks.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>; Blake, Julie <Julie.Blake@ago.mo.gov>; Kristi.Johnson@ago.ms.gov; ABurton@mt.gov; MSchlichting@mt.gov; Lindsay S. See <Lindsay.S.See@wvago.gov>; jonbennion@mt.gov; Stenehjem, Wayne K. <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 <rcantrell@agutah.gov>; james.kaste@wyo.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>
Cc: Bryan Cleveland <bryan.cleveland@oag.ok.gov>; Andy Ferguson <andy.ferguson@oag.ok.gov>
Subject: RE: Amicus Brief re Pennsylvania Ballot Receipt Deadline

AMERICAN OVERSIGHT

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

All: I have attached an updated brief that cleans up some citations and refines certain arguments. So far, Indiana, Tennessee, and West Virginia have joined Oklahoma's brief. A few others have expressed interest. Again, let me know if you would like to join by **noon (CST) Monday, Nov. 9**.

Thanks,

Mithun

From: Sauer, John <John.Sauer@ago.mo.gov>
Sent: Sunday, November 8, 2020 7:14 AM
To: Mithun Mansinghani <mithun.mansinghani@oag.ok.gov>; Murrill, Elizabeth <MurrillE@ag.louisiana.gov>; Melissa Holyoak <melissaholyoak@agutah.gov>; nicholas.bronni@arkansasag.gov; Vincent Wagner <vincent.wagner@arkansasag.gov>; ed.sniffen@alaska.gov; Amit.Agarwal@myfloridalegal.com; 'Kane, Brian' <brian.kane@ag.idaho.gov>; tom.fisher@atg.in.gov; julia.payne@atg.in.gov; toby.crouse@ag.ks.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>; Blake, Julie <Julie.Blake@ago.mo.gov>; Kristi.Johnson@ago.ms.gov; ABurton@mt.gov; MSchlichting@mt.gov; Lindsay S. See <Lindsay.S.See@wvago.gov>; jonbennion@mt.gov; wstenehjem@nd.gov; Benjamin.flowers@ohioattorneygeneral.gov; ESmith@scag.gov; BCook@scag.gov; steven.blair@state.sd.us; Sherri.Wald@state.sd.us; Sarah.Campbell@ag.tn.gov; tom.fisher@atg.in.gov; Andree.Blumstein@ag.tn.gov; matthew.frederick@texasattorneygeneral.gov; Kyle.Hawkins@oag.texas.gov; Ric Cantrell <rcantrell@agutah.gov>; james.kaste@wyo.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>
Cc: Bryan Cleveland <bryan.cleveland@oag.ok.gov>; Andy Ferguson <andy.ferguson@oag.ok.gov>; Smith, Justin <Justin.Smith@ago.mo.gov>
Subject: [EXTERNAL] RE: Amicus Brief re Pennsylvania Ballot Receipt Deadline

Thanks a lot, Mithun. For reference, attached is Missouri's draft amicus brief referred to in Mithun's email below, which most of you should also have received yesterday afternoon. Thanks, John

From: Mithun Mansinghani <mithun.mansinghani@oag.ok.gov>
Sent: Sunday, November 8, 2020 12:48 AM
To: Murrill, Elizabeth <MurrillE@ag.louisiana.gov>; Melissa Holyoak <melissaholyoak@agutah.gov>; nicholas.bronni@arkansasag.gov; Vincent Wagner <vincent.wagner@arkansasag.gov>; ed.sniffen@alaska.gov; Amit.Agarwal@myfloridalegal.com; 'Kane, Brian' <brian.kane@ag.idaho.gov>; tom.fisher@atg.in.gov; julia.payne@atg.in.gov; toby.crouse@ag.ks.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>; Blake, Julie <Julie.Blake@ago.mo.gov>; Sauer, John <John.Sauer@ago.mo.gov>; Kristi.Johnson@ago.ms.gov; ABurton@mt.gov; MSchlichting@mt.gov; Lindsay S. See <Lindsay.S.See@wvago.gov>; jonbennion@mt.gov; wstenehjem@nd.gov; Benjamin.flowers@ohioattorneygeneral.gov; ESmith@scag.gov; BCook@scag.gov; steven.blair@state.sd.us; Sherri.Wald@state.sd.us; Sarah.Campbell@ag.tn.gov; tom.fisher@atg.in.gov; Andree.Blumstein@ag.tn.gov; matthew.frederick@texasattorneygeneral.gov; Kyle.Hawkins@oag.texas.gov; Ric Cantrell <rcantrell@agutah.gov>; james.kaste@wyo.gov; Jim.Campbell@nebraska.gov; Thomas T. Lampman <Thomas.T.Lampman@wvago.gov>; Jessica A. Lee

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<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>
Cc: Bryan Cleveland <bryan.cleveland@oag.ok.gov>; Andy Ferguson <andy.ferguson@oag.ok.gov>
Subject: Amicus Brief re Pennsylvania Ballot Receipt Deadline

All,

Many of you joined our stay-stage amicus in support of the Pennsylvania legislature and Republican Party challenging the Pennsylvania Supreme Court's decision to alter the state's absentee ballot receipt deadline. Many of you also may have received Missouri's cert-stage amicus brief in this case circulated earlier today. Oklahoma has also decided to draft a cert-stage amicus brief in this case touching on different issues. While Missouri's brief focuses on the prerogative of state legislatures to set election rules and the risks of voter fraud from absentee voting, especially with the sort of deadline imposed by the PA Supreme Court, Oklahoma's cert-stage brief (largely similar to our stay-stage brief) focuses on the state's interests in ballot receipt deadlines and how setting such deadlines are ultimately a legislative choice.

Attached is Oklahoma's draft brief, which will undergo more formatting and refining as the weekend progresses. We are fine if you decide to sign onto Missouri's brief instead, but we ask that you sign onto our brief only if you are not signing onto Missouri's, per what we believe is the Supreme Court's directions on amici attempting to join multiple briefs within the same stage. Because of the time-sensitive nature of this case, we ask for joins by **noon (CST) Monday, Nov. 9**. Let me know if you have any questions.

Thanks,

Mithun Mansinghani
Solicitor General

Oklahoma Office of the Attorney General
313 NE 21st Street, Oklahoma City, OK 73105
(405) 522-4392 | Mithun.Mansinghani@oag.ok.gov

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AMERICAN OVERSIGHT

Nos. 20-542, 20-574

In the Supreme Court of the United States

REPUBLICAN PARTY OF PENNSYLVANIA,
Petitioner,

v.

KATHY BOOCKVAR, IN HER OFFICIAL CAPACITY AS PENNSYLVANIA SECRETARY OF STATE, ET AL.,
Respondents.

JOSEPH B. SCARNATI, III, ET AL.
Petitioners,

v.

KATHY BOOCKVAR, IN HER OFFICIAL CAPACITY AS PENNSYLVANIA SECRETARY OF STATE, ET AL.,

On Petitions for Writs of Certiorari to the Pennsylvania Supreme Court

BRIEF OF THE STATE OF MISSOURI AND XX OTHER STATES AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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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INTEREST OF *AMICI CURIAE*

The Pennsylvania Supreme Court's decision overstepped its constitutional responsibility, encroached on the authority of the Pennsylvania legislature, and violated the plain language of the Election Clauses. *See* U.S. CONST. art. I, § 4, cl. 2; *id.* art. II, § 1, cl. 4. Worse still, the decision exacerbated the risk for mail-in ballot fraud by permitting mail-in ballots that are not postmarked or have no legible postmark to be received and counted several days after the election. The decision provided a window of time after Election Day, when the preliminary results were announced, in which unscrupulous actors could attempt to influence a close Presidential election in Pennsylvania and elsewhere. And it enhanced the opportunities for fraud by requiring boards of elections to count late-received ballots even if there is no evidence that those ballots were cast before Election Day, because they have no legible postmark.

Amici are the States of Missouri, ___. *Amici* have at least two compelling interests in the outcome of 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 U.S. Constitution's Election Clauses reflect a carefully calibrated balance of power among state actors, and they assign specific functions to the "Legislature thereof" in each State. *Id.* Our system of federalism relies on separation of powers to preserve liberty at every level of government, and the separation of powers in the Election Clauses is no exception to this principle. The States thus have a strong interest in preserving the proper roles of state legislatures and state courts in the administration of federal elections,

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and thus safeguarding the individual liberty of their citizens.

Second, States outside Pennsylvania have a strong interest in preventing the effective invalidation of their own voters' choices through illegal voting in Pennsylvania. This Court has long recognized that "in the context of a Presidential election," "the impact of the votes cast in each State is affected by the votes cast for the various candidates in other States." *Anderson* v. *Celebrezze*, 460 U.S. 780, 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.*

The decision below raises two concerns about illegal voting. First, ballots cast outside the clear and unambiguous rules established by the Pennsylvania legislature are illegal. Second, by exacerbating the risks of fraud, the Pennsylvania Supreme Court's decision raises the specter of late voting that is not just illegal, but outright fraudulent. As this Court has stated: "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, without its being distorted by fraudulently cast votes." *Anderson* v. *United States*, 417 U.S. 211, 227 (1974). Regardless of the election's outcome, only *legal* ballots should be counted.

As with other separation-of-powers provisions in the Constitution, the Election Clauses' explicit allocation of authority to state legislatures to regulate federal elections is a structural check on governmental power that preserves liberty. Encroachment on this authority by another state actor undermines the specific design for separation of

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powers in the Constitution. The violation of separation of powers in this case threatens the liberty of all Americans, not just Pennsylvanians. And it diminishes their most precious liberties—the right to vote for President of the United States.[1]

REASONS FOR GRANTING THE PETITIONS

"Our 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* (8th ed. Dec. 2017), at 1. "When the election process is corrupted, democracy is jeopardized." *Id.* "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, without its being distorted by fraudulently cast votes." *Anderson*, 417 U.S. at 227.

The Pennsylvania Supreme Court's decision overstepped its constitutional authority and encroached on the authority granted to the Pennsylvania legislature by the plain text of the U.S. Constitution's Election Clauses. *See* U.S. CONST. art. I, § 4, cl. 2; *id.* art. II, § 1, cl. 4. It thus undermined Americans' liberty by violating the separation of powers set forth in the Election Clauses.

The decision also aggravated the risks of fraud, abuse, and the appearance of fraud and abuse in

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[1] All counsel of record received timely notice of the intent to file this amicus brief under Supreme Court Rule 37.2(a). Pursuant to Rule 37.6, *amici curiae* certify that this brief was not written in whole or in part by counsel for any party, and no person or entity other than *amici curiae* and its counsel has made a monetary contribution to the preparation and submission of this brief.

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voting by mail in Pennsylvania. It permitted unscrupulous actors to know results reported on Election Day before deciding to pursue fraudulent activities. It enhanced opportunities for such illicit acts by ordering boards of elections to count mail-in ballots even if they have no postmark or no legible postmark, and thus no indication that they were sent on or before Election Day.

These choices undermined public confidence in the Presidential election in Pennsylvania and created unwarranted opportunities for fraud. This Court should grant expedited review and reverse the decision below.

I. The Election Clauses' Separation-of-Powers Provisions Safeguard 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). And a state supreme

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court cannot invoke a state constitution to circumscribe that legislative power. *Palm Beach Cty. Canvassing Bd.*, 531 U.S. at 77.

Here, "[t]he Supreme Court of Pennsylvania has issued a decree that squarely alters an important statutory provision enacted by the Pennsylvania 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.). In doing so, the Court (1) admitted that the Legislature's Election Day deadline was unambiguous, (2) conceded that the Election Day deadline was constitutional on its face, (3) relied on the slimmest of evidentiary rationales for its decision, (4) departed its own prior holding on the exact same question just a few months earlier, and (5) disregarded an admirably clear severability clause that was enacted by the Pennsylvania legislature for the very purpose of *preventing* Pennsylvania courts from making such post-hoc changes to Pennsylvania's mail-in voting system. *See id.* at *1–2; *see also* App. 43a, 44a, 45a–47a, 48a & n.26. The decision also contradicted the overwhelming weight of authority from other courts, including this Court, that have addressed the same question during this election cycle. *See infra* Part III.

In the course of this jurisprudential misadventure, the Pennsylvania Supreme Court encroached upon the "plenary" authority of the Pennsylvania legislature over the conduct of the Presidential election in that State. *Bush*, 531 U.S. at 104. This encroachment on the authority explicitly granted to another state actor in the regulation of

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Presidential elections constitutes a clear violation of the separation of powers. "[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 has recognized that the separation-of-powers provisions in the Constitution, which allocate authority to specific governmental actors to the exclusion of others, are designed to preserve liberty. "It is the proud boast of our democracy that we have 'a government of laws, and not of men.'" *Morrison* v. *Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting). "The Framers of the Federal Constitution . . . viewed the principle of separation of powers as the absolutely central guarantee of a just Government." *Id.* "Without a secure structure of separated powers, our Bill of Rights would be worthless, as are the bills of rights of many nations of the world that have adopted, or even improved upon, the mere words of ours." *Id.* "The purpose of the separation and equilibration of powers in general . . . was not merely to assure effective government but to preserve individual freedom." *Id.* at 727.

This principle of preserving liberty applies both to the horizontal separation of powers among the branches of government, and the vertical separation of powers between the federal government and the States. "The federal system rests on what might at first seem a counterintuitive insight, that 'freedom is enhanced by the creation of two governments, not one.'" *Bond* v. *United States*, 564 U.S. 211, 220–21

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(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 Election Clauses' grant of authority to state *Legislatures* implicates both horizontal and vertical separation of powers. The Clauses allocate to each State—not to federal actors—the authority to dictate the manner of selecting Presidential electors. And within each State, they explicitly allocate that authority to a single branch of state government: to the "Legislature thereof."

It is no accident that the Constitution allocates such authority to state Legislatures, rather than executive officers such as Governors, or judicial officers such as state Supreme Courts. As was frequently recognized at the Constitutional Convention, the Legislature is the branch most responsive to the People and most democratically

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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); *see* 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 Election Clauses prohibit the very arrogation of power over Presidential elections by non-legislative officials that the Pennsylvania Supreme Court perpetrated in this case. By violating the Constitution's separation of powers, the Pennsylvania Supreme Court undermined the liberty of all Pennsylvanians, and, in this Presidential election, the liberty of all Americans.

II. Voting by Mail Creates Unique Risks of Fraud, Including in Pennsylvania.

The Pennsylvania Supreme Court's decision suffers from another critical defect: it enhanced the

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risks of fraudulent voting by mail. Overwhelming public evidence demonstrates that voting by mail presents unique opportunities for fraud and abuse, opportunities which unscrupulous actors have often exploited. The decision below exacerbated these risks.

For decades, responsible observers have cautioned about the grave risks of fraud in voting by mail. 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).

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).[2] According to the Carter-Baker Commission, "[a]bsentee balloting is vulnerable to abuse in several ways." *Id.* These abuses include interception of blank ballots, "pressure" and "intimidation" of elderly and vulnerable voters, "vote buying schemes" that are "far more difficult to detect when citizens vote by mail," and ballot tampering by third-party operatives after a ballot is marked. *Id.* The Commission noted that "absentee balloting in other states has been a major

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

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source of fraud." *Id.* at 35. And the Commission recommended that "States ... need to do more to prevent ... absentee ballot fraud." *Id.* at v.

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. *See* U.S. Dep't of Justice, *Federal Prosecution of Election Offenses* (8th ed. Dec. 2017), at 28-29.[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]

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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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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, found 491 known and reported cases of absentee ballot fraud over the 12-year period from 2000 to 2012—approximately 41 cases per year. *See* News21, *Election Fraud in America* (visited Nov. 6, 2020).[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 public records. *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 simply 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* (visited Nov. 6, 2020).[6] This database identifies 24 cases of proven election fraud in Pennsylvania, including four cases of criminal convictions for fraudulent use of

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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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absentee ballots in Pennsylvania since 2010. *See id.* 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.* (emphasis added).

The public record abounds with recent examples of such fraudulent absentee-ballot schemes, including many examples in *amici* States, and many examples in Pennsylvania. 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

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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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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 was sufficient 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, 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

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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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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 increased such 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,'

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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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[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 publicly reported cases highlight the same concerns about the vulnerability of voting by mail to fraud and abuse. Most notable here, the public reports indicate recurring issues of absentee-ballot fraud in Pennsylvania in particular. *See, e.g.,* Alex Rose, *Collingsdale man charged with voter fraud,* DELAWARE COUNTY TIMES (Nov. 21, 2018) (*available at* https://bit.ly/356c5wd) (perpetrator confessed to having third parties sign absentee ballots of deceased voters); Joseph Kohut, *Gallagher resigns from Taylor council pleads guilty to three charges,* THE TIMES-TRIBUNE (Apr. 3, 2015) (*available at* https://bit.ly/36i3HcJ); T. Ove, *Ex-Harmar police chief pleads guilty to ballot tampering,* PITTSBURGH POST-GAZETTE (Sept. 26, 2014) (*available at* https://bit.ly/32j4HMk) (defendant "admitted that he violated election laws by soliciting absentee ballots for his wife and a running mate in the 2009 Democratic primary for township supervisor"); *Com. v. Bailey*, 775 A.2d 881, 883 (Pa. Commw. Ct. 2001) (candidate convicted of absentee ballot fraud); Bill Heitzel, *Six of seven charges against Austin Murphy dismissed,* PITTSBURGH POST-GAZETTE (June 22, 1999) (*available at* https://bit.ly/2I9KlxU) (grand jury found that three individuals "forged absentee ballots for nursing home residents"); *Marks v. Stinson*, No. CIV. A. 93-6157, 1994 WL 146113, at *7–22 (E.D. Pa. Apr. 26, 1994) (documenting coordinated and extensive campaign of absentee ballot fraud).

Just a few weeks ago, a Missouri court considered extensive expert testimony reviewing absentee-ballot fraud cases like these, and it aptly summarized their

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common features. *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). 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. 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.* For all these reasons, this Court should also recognize that "the threat of mail-in ballot fraud is real." *Id.* at 2.

III. The Pennsylvania Supreme Court's Decision Created Ideal Conditions for Ballot Fraud.

In addition to violating the Election Clause, the decision below exacerbated the risks fraud and abuse in mail-in voting in Pennsylvania. First, it 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, it enhanced the opportunities for fraud by mandating, in a cursory footnote, that late ballots must be counted

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even when they are not postmarked or have no legible postmark, and thus there is no evidence they were mailed by Election Day. This decision created needless vulnerability to actual fraud and undermined public confidence in a Presidential election.

First, the U.S. Department of Justice's Manual on *Federal Prosecution of Election Offenses* emphasizes that election fraud typically occurs when the parties anticipate a close election, giving a motive to try to flip the outcome of the election through fraudulent activity. DOJ Manual, at 2-3, 27. As the Manual states, "the conditions most conducive to election fraud are close factional competition within an electoral jurisdiction for an elected position that matters." *Id.* at 2-3. "Election fraud does not normally occur in jurisdictions where one political faction enjoys widespread support among the electorate, because in such a situation it is usually unnecessary or impractical to resort to election fraud in order to control local public offices." *Id.* at 27. "Instead, election fraud occurs most frequently when there are fairly equal political factions, and when the stakes involved in who controls public offices are weighty – as is often the case when patronage jobs are a major source of employment, or when illicit activities are being protected from law enforcement scrutiny." *Id.* "In sum, election fraud is most likely to occur in electoral jurisdictions where there is close factional competition for an elected position that matters." *Id.*

The cases of absentee-ballot fraud discussed above confirm the DOJ's insight. They repeatedly show that the motive for absentee-ballot fraud is strongest, and fraud is most likely to occur, when the expected

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outcome of the decision is close. For example, the notorious absentee-ballot fraud in the 2018 North Carolina congressional race occurred in an election that was decided by less than 1,000 votes of over 280,000 cast. The Hoskins indictment in St. Louis, Missouri occurred after a series of elections that were decided by tiny margins of less than 100 votes. The indictment of Bronx assemblyman Hector Ramirez occurred after an election that was decided by two votes. Many other similar examples of absentee ballot fraud in close elections abound.

In a typical Presidential election, it is often hard to predict in advance whether the outcome will be close in any particular State. But the Pennsylvania Supreme Court's decision in this case created a window of time for unscrupulous actors to wait and see until after Election Day whether the outcome would be close enough—both in Pennsylvania, and in the nation as a whole—to make attempting fraud worthwhile.

To be sure, certain designated categories of ballots, such as military and overseas ballots, may be received after Election Day in any election, and for good reasons. But the Pennsylvania decision here extended that post-Election Day deadline to many more voters in Pennsylvania. And, in the process, it stripped away critical safeguards against fraud, as discussed below. Combined, these factors created an unnecessary risk of fraud in voting by mail.

Second, the Pennsylvania Supreme Court's decision enhanced the opportunities to commit such fraud. Footnote 26 of the Supreme Court's decision states as follows:

> We likewise incorporate the Secretary's recommendation addressing ballots received

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> within this period that *lack a postmark or other proof of mailing*, or for which *the postmark or other proof of mailing is illegible*. Accordingly, in such cases, we conclude that a ballot received on or before 5:00 p.m. on November 6, 2020, will be *presumed to have been mailed by Election Day* unless a preponderance of the evidence demonstrates that it was mailed after Election Day.

App. 48a, n.26 (emphases added). In other words, the court ordered that any ballot received within three days after Election Day would be deemed timely cast even if there was no evidence that it was submitted before Election Day. *Id.*

As the numerous cases discussed above show, *see supra* Part II, fraud in voting by mail frequently involves the interception, alteration, and fraudulent submission of absentee or mail-in ballots, many thousands of which remain unaccounted-for after every election. This was true in the North Carolina absentee-ballot fraud scheme in 2018, in both Missouri examples discussed above, in the Bronx assemblyman scheme, and in several of the Pennsylvania examples cited above, among many others. *See supra* Part II. Many such schemes have occurred in recent years, and that they have evaded detection over multiple election cycles. It is unknown how many such schemes may simply go undetected permanently. The Pennsylvania court's decision, therefore, needlessly exacerbated the risk of fraudulent voting.

Finally, there was no strong reason to create these risks of fraud. The Pennsylvania decision in this case is an outlier that rests on a feeble justification of putative mailing delays, unsupported by hard

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evidence. Many similar cases in States across the country sought to extend Election-Day receipt deadlines, and the vast majority of them were rejected. *See, e.g., Dem. Nat'l Comm.* v. *Wisc. State Leg.*, No. 20A66 (U.S. Oct. 26, 2020) (affirming court of appeals stay of six-day extension to receive ballots after election day). As the Seventh Circuit stated, "laws setting an Election-Day deadline for receipt of all ballots are valid during a pandemic, as they are valid without one." *Common Cause Indiana* v. *Lawson*, 977 F.3d 663 (7th Cir. 2020); *see also Org. for Black Struggle* v. *Ashcroft*, No. 20-3121, 2020 WL 6257167, at *3 (8th Cir. Oct. 23, 2020); *New Georgia Project* v. *Raffensperger*, 976 F.3d 1278, 2020 WL 5877588 (11th Cir. 2020); *Arizona Democratic Party* v. *Hobbs*, 976 F.3d 1081, 2020 WL 5903488 (9th Cir. 2020); *Dem. Nat'l Comm.* v. *Wisc. State Leg.*, No. 20A66 (U.S. Oct. 26, 2020); *League of Women Voters of Delaware, Inc.* v. *Dep't of Elections*, No. CV 2020-0761-SG, 2020 WL 5998161, at *4 (Del. Ch. Oct. 9, 2020); *All. for Retired Americans* v. *Sec'y of State*, 2020 WL 625526, *7 (Me. Oct. 23, 2020); *League of Women Voters of Michigan* v. *Sec'y of State*, No. 353654, 2020 WL 3980216, at *12 (Mich. Ct. App. July 14, 2020), *appeal denied*, 946 N.W.2d 307 (Mich. 2020); *DCCC* v. *Ziriax*, No. 20-CV-211-JED-JFJ, 2020 WL 5569576, at *20 (N.D. Okla. Sept. 17, 2020).

CONCLUSION

This Court should grant the petitions, grant expedited review, and reverse the Pennsylvania Supreme Court's judgment.

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November 9, 2020

Respectfully submitted,

ERIC S. SCHMITT
Attorney General

D. John Sauer
Solicitor General
Counsel of Record
Jeff P. Johnson
Deputy Solicitor 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

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Brocker, Liz

From: Sauer, John <John.Sauer@ago.mo.gov>
Sent: Monday, November 9, 2020 5:10 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; Blake, Julie; Kristi.Johnson@ago.ms.gov; ABurton@mt.gov; MSchlichting@mt.gov; Lindsay S. See; jonbennion@mt.gov; Stenehjem, Wayne K.; 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: Republican Party of Pa. v. Boockvar - Draft Amicus Brief of Missouri et al. - Deadline NOON Central today
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All-

Attached please find an updated draft of Missouri's proposed amicus brief in Republican Party of Pennsylvania v. Boockvar, the cert petitions challenging the Pennsylvania Supreme Court's decision extending the deadline to count mail-in ballots, including those without postmarks or with illegible postmarks. This version is nearly identical to the version circulated on Saturday, with minor formatting and phrasing changes. Missouri, Alabama, and Louisiana have joined this brief. Please let us know by NOON Central today if you wish to join.

Many thanks,

John Sauer

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Nos. 20-542, 20-574

In the Supreme Court of the United States

REPUBLICAN PARTY OF PENNSYLVANIA,
Petitioner,

v.

KATHY BOOCKVAR, IN HER OFFICIAL CAPACITY AS PENNSYLVANIA SECRETARY OF STATE, ET AL.,
Respondents.

JOSEPH B. SCARNATI, III, ET AL.
Petitioners,

v.

KATHY BOOCKVAR, IN HER OFFICIAL CAPACITY AS PENNSYLVANIA SECRETARY OF STATE, ET AL.,

On Petitions for Writs of Certiorari to the Pennsylvania Supreme Court

BRIEF OF THE STATE OF MISSOURI AND XX OTHER STATES AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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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INTEREST OF *AMICI CURIAE*

The Pennsylvania Supreme Court's decision overstepped its constitutional responsibility, encroached on the authority of the Pennsylvania legislature, and violated the plain language of the Election Clauses. *See* U.S. CONST. art. I, § 4, cl. 2; *id.* art. II, § 1, cl. 4. Worse still, the decision exacerbated the risk of mail-in ballot fraud by permitting mail-in ballots that are not postmarked or have no legible postmark to be received and counted several days after the election. The decision provided a window of time after Election Day, when the preliminary results were announced, in which unscrupulous actors could attempt to influence a close Presidential election in Pennsylvania and elsewhere. And it enhanced the opportunities for fraud by requiring boards of elections to count late-received ballots even if there is no evidence that those ballots were cast before Election Day, because they have no legible postmark.

Amici are the States of Missouri, ___. *Amici* have at least two compelling interests in the outcome of 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 U.S. Constitution's Election Clauses reflect a carefully calibrated balance of power among state actors, and they assign specific functions to the "Legislature thereof" in each State. *Id.* Our system of federalism relies on separation of powers to preserve liberty at every level of government, and the separation of powers in the Election Clauses is no exception to this principle. The States thus have a strong interest in preserving the proper roles of state legislatures and state courts in the administration of federal elections,

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and thus safeguarding the individual liberty of their citizens.

Second, States outside Pennsylvania have a strong interest in preventing the effective invalidation of their own voters' choices through illegal voting in Pennsylvania. This Court has long recognized that "in the context of a Presidential election," "the impact of the votes cast in each State is affected by the votes cast for the various candidates in other States." *Anderson* v. *Celebrezze*, 460 U.S. 780, 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.*

The decision below raises two concerns about illegal voting. First, ballots cast outside the clear and unambiguous rules established by the Pennsylvania legislature are illegal. Second, by exacerbating the risks of fraud, the Pennsylvania Supreme Court's decision raises the specter of late voting that is not just illegal, but outright fraudulent. As this Court has stated: "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, without its being distorted by fraudulently cast votes." *Anderson* v. *United States*, 417 U.S. 211, 227 (1974). Regardless of the election's outcome, only *legal* ballots should be counted.

As with other separation-of-powers provisions in the Constitution, the Election Clauses' explicit allocation of authority to state legislatures to regulate federal elections is a structural check on governmental power that preserves liberty. Encroachment on this authority by another state actor undermines the specific design for separation of

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powers in the Constitution. The violation of separation of powers in this case threatens the liberty of all Americans, not just Pennsylvanians. And it diminishes their most precious liberties—the right to vote for President of the United States.[1]

REASONS FOR GRANTING THE PETITIONS

"Our 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* (8th ed. Dec. 2017), at 1. "When the election process is corrupted, democracy is jeopardized." *Id.* "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, without its being distorted by fraudulently cast votes." *Anderson*, 417 U.S. at 227.

The Pennsylvania Supreme Court's decision overstepped its constitutional authority and encroached on the authority granted to the Pennsylvania legislature by the plain text of the U.S. Constitution's Election Clauses. *See* U.S. CONST. art. I, § 4, cl. 2; *id.* art. II, § 1, cl. 4. It thus undermined Americans' liberty by violating the separation of powers set forth in the Election Clauses.

The decision also aggravated the risks of fraud, abuse, and the appearance of fraud and abuse in

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[1] All counsel of record received timely notice of the intent to file this amicus brief under Supreme Court Rule 37.2(a). Pursuant to Rule 37.6, *amici curiae* certify that this brief was not written in whole or in part by counsel for any party, and no person or entity other than *amici curiae* and its counsel has made a monetary contribution to the preparation and submission of this brief.

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voting by mail in Pennsylvania. It permitted unscrupulous actors to know results reported on Election Day before deciding to pursue fraudulent activities. It enhanced opportunities for such illicit acts by ordering boards of elections to count mail-in ballots even if they have no postmark or no legible postmark, and thus no indication that they were sent on or before Election Day.

These choices undermined public confidence in the Presidential election in Pennsylvania and created unwarranted opportunities for fraud. This Court should grant expedited review and reverse the decision below.

I. The Election Clauses' Separation-of-Powers Provisions Safeguard 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). And a state supreme

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court cannot invoke a state constitution to circumscribe that legislative power. *Palm Beach Cty. Canvassing Bd.*, 531 U.S. at 77.

Here, "[t]he Supreme Court of Pennsylvania has issued a decree that squarely alters an important statutory provision enacted by the Pennsylvania 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.). In doing so, the Court (1) admitted that the Legislature's Election Day deadline was unambiguous, (2) conceded that the Election Day deadline was constitutional on its face, (3) relied on the slimmest of evidentiary rationales for its decision, (4) departed its own prior holding on the exact same question just a few months earlier, and (5) disregarded an admirably clear severability clause that was enacted by the Pennsylvania legislature for the very purpose of *preventing* Pennsylvania courts from making such post-hoc changes to Pennsylvania's mail-in voting system. *See id.* at *1–2; *see also* App. 43a, 44a, 45a–47a, 48a & n.26. The decision also contradicted the overwhelming weight of authority from other courts, including this Court, that have addressed the same question during this election cycle. *See infra* Part III.

In the course of this jurisprudential misadventure, the Pennsylvania Supreme Court encroached upon the "plenary" authority of the Pennsylvania legislature over the conduct of the Presidential election in that State. *Bush*, 531 U.S. at 104. This encroachment on the authority explicitly granted to another state actor in the regulation of

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Presidential elections constitutes a clear violation of the separation of powers. "[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 has recognized that the separation-of-powers provisions in the Constitution, which allocate authority to specific governmental actors to the exclusion of others, are designed to preserve liberty. "It is the proud boast of our democracy that we have 'a government of laws, and not of men.'" *Morrison* v. *Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting). "The Framers of the Federal Constitution . . . viewed the principle of separation of powers as the absolutely central guarantee of a just Government." *Id.* "Without a secure structure of separated powers, our Bill of Rights would be worthless, as are the bills of rights of many nations of the world that have adopted, or even improved upon, the mere words of ours." *Id.* "The purpose of the separation and equilibration of powers in general . . . was not merely to assure effective government but to preserve individual freedom." *Id.* at 727.

This principle of preserving liberty applies both to the horizontal separation of powers among the branches of government, and the vertical separation of powers between the federal government and the States. "The federal system rests on what might at first seem a counterintuitive insight, that 'freedom is enhanced by the creation of two governments, not one.'" *Bond* v. *United States*, 564 U.S. 211, 220–21

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(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 Election Clauses' grant of authority to state *Legislatures* implements both horizontal and vertical separation of powers. The Clauses allocate to each State—not to federal actors—the authority to dictate the manner of selecting Presidential electors. And within each State, they explicitly allocate that authority to a single branch of state government: to the "Legislature thereof."

It is no accident that the Constitution allocates such authority to state Legislatures, rather than executive officers such as Governors, 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

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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 Election Clauses prohibit the very arrogation of power over Presidential elections by non-legislative officials that the Pennsylvania Supreme Court perpetrated in this case. By violating the Constitution's separation of powers, the Pennsylvania Supreme Court undermined the liberty of all Pennsylvanians, and, in this Presidential election, the liberty of all Americans.

II. Voting by Mail Creates Unique Risks of Fraud, Including in Pennsylvania.

The Pennsylvania Supreme Court's decision suffers from another critical defect: it enhanced the

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risks of fraudulent voting by mail. Overwhelming public evidence demonstrates that voting by mail presents unique opportunities for fraud and abuse, opportunities which unscrupulous actors have often exploited. The decision below exacerbated these risks.

For decades, responsible observers have cautioned about the grave risks of fraud in voting by mail. 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).

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).[2] According to the Carter-Baker Commission, "[a]bsentee balloting is vulnerable to abuse in several ways." *Id.* These abuses include interception of blank ballots, "pressure" and "intimidation" of elderly and vulnerable voters, "vote buying schemes" that are "far more difficult to detect when citizens vote by mail," and ballot tampering by third-party operatives after a ballot is marked. *Id.* The Commission noted that "absentee balloting in other states has been a major source of fraud." *Id.* at

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

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35. And the Commission recommended that "States ... need to do more to prevent ... absentee ballot fraud." *Id.* at v.

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. *See* 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]

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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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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, found 491 known and reported cases of absentee ballot fraud over the 12-year period from 2000 to 2012—approximately 41 cases per year. *See* News21, *Election Fraud in America* (visited Nov. 6, 2020).[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* (visited Nov. 6, 2020).[6] This database identifies 24 cases of proven election fraud in Pennsylvania, including four cases of criminal convictions for fraudulent use of

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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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absentee ballots in Pennsylvania since 2010. *See id.* 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, including many examples in *amici* States, and many examples in Pennsylvania. 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

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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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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, 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

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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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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 increased such 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,'

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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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[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. Most notable here, the public reports indicate recurring issues of absentee-ballot fraud in Pennsylvania in particular. *See, e.g.*, Alex Rose, *Collingsdale man charged with voter fraud,* DELAWARE COUNTY TIMES (Nov. 21, 2018) (*available at* https://bit.ly/356c5wd) (perpetrator confessed to having third parties sign absentee ballots of deceased voters); Joseph Kohut, *Gallagher resigns from Taylor council pleads guilty to three charges,* THE TIMES-TRIBUNE (Apr. 3, 2015) (*available at* https://bit.ly/36i3HcJ); T. Ove, *Ex-Harmar police chief pleads guilty to ballot tampering,* PITTSBURGH POST-GAZETTE (Sept. 26, 2014) (*available at* https://bit.ly/32j4HMk) (defendant "admitted that he violated election laws by soliciting absentee ballots for his wife and a running mate in the 2009 Democratic primary for township supervisor"); *Com. v. Bailey*, 775 A.2d 881, 883 (Pa. Commw. Ct. 2001) (candidate convicted of absentee ballot fraud); Bill Heitzel, *Six of seven charges against Austin Murphy dismissed,* PITTSBURGH POST-GAZETTE (June 22, 1999) (*available at* https://bit.ly/2I9KlxU) (grand jury found that three individuals "forged absentee ballots for nursing home residents," amid allegations that "fraudulent voting has been practiced for decades, is widespread and benefits several entrenched elected officials" in the county); *Marks v. Stinson*, No. CIV. A. 93-6157, 1994 WL 146113, at *7–22 (E.D. Pa. Apr. 26, 1994) (documenting a coordinated and extensive campaign of absentee ballot fraud).

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Just a few weeks ago, a Missouri court considered extensive expert testimony reviewing absentee-ballot fraud cases like these, and it aptly summarized their common features. *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). 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. 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.* For the same reasons, this Court should also recognize that "the threat of mail-in ballot fraud is real." *Id.* at 2.

III. The Pennsylvania Supreme Court's Decision Exacerbated the Risks of Ballot Fraud.

In addition to violating the Election Clauses, the decision below exacerbated the risks fraud and abuse in mail-in voting in Pennsylvania. First, it 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

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fraud in Pennsylvania would be worthwhile. Second, it enhanced the opportunities for fraud by mandating, in a cursory footnote, 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. This decision created needless vulnerability to actual fraud and undermined public confidence in a Presidential election.

First, the U.S. Department of Justice's Manual on *Federal Prosecution of Election Offenses* emphasizes that election fraud typically occurs when the parties anticipate a close election, creating a strong motive to try to flip the outcome of the election through fraudulent activity. DOJ Manual, at 2-3, 27. As the Manual states, "the conditions most conducive to election fraud are close factional competition within an electoral jurisdiction for an elected position that matters." *Id.* at 2-3. "Election fraud does not normally occur in jurisdictions where one political faction enjoys widespread support among the electorate, because in such a situation it is usually unnecessary or impractical to resort to election fraud in order to control local public offices." *Id.* at 27. "Instead, election fraud occurs most frequently when there are fairly equal political factions, and when the stakes involved in who controls public offices are weighty." *Id.* "In sum, election fraud is most likely to occur in electoral jurisdictions where there is close factional competition for an elected position that matters." *Id.*

The cases of absentee-ballot fraud discussed above confirm the DOJ's insight. They repeatedly show that the motive for absentee-ballot fraud is strongest, and fraud is most likely to occur, when the expected outcome of the decision is close. For example, the

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notorious absentee-ballot fraud in the 2018 North Carolina congressional race occurred in an election that was decided by less than 1,000 votes of over 280,000 cast. The Hoskins indictment in St. Louis, Missouri occurred after a series of elections that were decided by tiny margins of less than 100 votes. The indictment of Bronx assemblyman Hector Ramirez occurred after an election that was decided by two votes. The public record contains many other similar examples of absentee ballot fraud in close elections.

In a typical Presidential election, it is often hard to predict in advance whether the outcome will be close in any particular State, and whether that State's decision will affect the outcome of the election. But the Pennsylvania Supreme Court's decision in this case created a window of time for unscrupulous actors to wait and see until after Election Day whether the outcome would be close enough—both in Pennsylvania, and in the nation as a whole—to make attempting fraud worthwhile.

To be sure, certain designated categories of ballots, such as military and overseas ballots, may be received after Election Day in any election, and for good reasons. But the Pennsylvania decision here extended that post-Election Day deadline to many more voters in Pennsylvania. And, in the process, it stripped away critical safeguards against fraud, as discussed below. Combined, these factors created an unnecessary risk of fraud in voting by mail.

Second, the Pennsylvania Supreme Court's decision enhanced the opportunities to commit such fraud. Footnote 26 of the Supreme Court's decision states as follows:

> We likewise incorporate the Secretary's recommendation addressing ballots received

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> within this period that *lack a postmark or other proof of mailing*, or for which *the postmark or other proof of mailing is illegible*. Accordingly, in such cases, we conclude that a ballot received on or before 5:00 p.m. on November 6, 2020, will be *presumed to have been mailed by Election Day* unless a preponderance of the evidence demonstrates that it was mailed after Election Day.

App. 48a, n.26 (emphases added). In other words, the court ordered that any ballot received within three days after Election Day would be deemed timely cast even if there was no evidence that it was submitted before Election Day. *Id.*

As the numerous cases discussed above show, *see supra* Part II, fraud in voting by mail frequently involves the interception, alteration, and fraudulent submission of absentee or mail-in ballots. This was true in the North Carolina absentee-ballot fraud scheme in 2018, in both Missouri examples discussed above, in the Bronx assemblyman scheme, and in some of the Pennsylvania examples cited above, among many others. *See supra* Part II. Many such schemes have occurred in recent years, and that they have evaded detection over multiple election cycles. It is unknown how many such schemes may simply go undetected permanently. The Pennsylvania court's decision, therefore, needlessly exacerbated the risk of fraudulent voting.

Finally, there was no strong reason to create these risks of fraud. The Pennsylvania decision in this case is an outlier that rests on a feeble justification of putative mailing delays, unsupported by hard evidence. Many similar cases in States across the country sought to extend Election-Day receipt

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deadlines, and the vast majority of them were rejected. *See, e.g., Dem. Nat'l Comm.* v. *Wisc. State Leg.*, No. 20A66 (U.S. Oct. 26, 2020) (affirming the Court of Appeals' stay of a six-day extension to receive ballots after Election Day). As the Seventh Circuit stated, "laws setting an Election-Day deadline for receipt of all ballots are valid during a pandemic, as they are valid without one." *Common Cause Indiana* v. *Lawson*, 977 F.3d 663 (7th Cir. 2020); *see also Org. for Black Struggle* v. *Ashcroft*, No. 20-3121, 2020 WL 6257167, at *3 (8th Cir. Oct. 23, 2020); *New Georgia Project* v. *Raffensperger*, 976 F.3d 1278, 2020 WL 5877588 (11th Cir. 2020); *Arizona Democratic Party* v. *Hobbs*, 976 F.3d 1081, 2020 WL 5903488 (9th Cir. 2020); *Dem. Nat'l Comm.* v. *Wisc. State Leg.*, No. 20A66 (U.S. Oct. 26, 2020); *League of Women Voters of Delaware, Inc.* v. *Dep't of Elections*, No. CV 2020-0761-SG, 2020 WL 5998161, at *4 (Del. Ch. Oct. 9, 2020); *All. for Retired Americans* v. *Sec'y of State*, 2020 WL 625526, *7 (Me. Oct. 23, 2020); *League of Women Voters of Michigan* v. *Sec'y of State*, No. 353654, 2020 WL 3980216, at *12 (Mich. Ct. App. July 14, 2020), *appeal denied*, 946 N.W.2d 307 (Mich. 2020); *DCCC* v. *Ziriax*, No. 20-CV-211-JED-JFJ, 2020 WL 5569576, at *20 (N.D. Okla. Sept. 17, 2020).

CONCLUSION

This Court should grant the petitions, grant expedited review, and reverse the Pennsylvania Supreme Court's judgment.

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November 9, 2020

Respectfully submitted,

ERIC S. SCHMITT
Attorney General

D. John Sauer
Solicitor General
Counsel of Record
Jeff P. Johnson
Deputy Solicitor 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

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Brocker, Liz

From: Sauer, John <John.Sauer@ago.mo.gov>
Sent: Wednesday, December 9, 2020 11:21 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'; 'ABurton@mt.gov'; 'MSchlichting@mt.gov'; 'Lindsay S. See'; 'jonbennion@mt.gov'; Stenehjem, Wayne K.; 'Benjamin.flowers@ohioattorneygeneral.gov'; 'ESmith@scag.gov'; 'BCook@scag.gov'; 'steven.blair@state.sd.us'; 'Sherri.Wald@state.sd.us'; 'Sarah.Campbell@ag.tn.gov'; 'tom.fisher@atg.in.gov'; 'Andree.Blumstein@ag.tn.gov'; 'matthew.frederick@texasattorneygeneral.gov'; 'Kyle.Hawkins@oag.texas.gov'; 'Ric Cantrell'; 'james.kaste@wyo.gov'; 'Jim.Campbell@nebraska.gov'; 'Thomas T. Lampman'; 'Jessica A. Lee'; 'Lindsay S. See'; 'Roysden, Beau'; 'Bash, Zina'; 'masagsve@nd.gov'; 'Harley Kirkland'; 'Eddie Lacour'; 'Hudson, Kian'; 'Kuhn, Matt F (KYOAG)'; 'Michelle Williams'; 'krissy.nobile@ago.ms.gov'
Subject: RE: Texas v. Pennsylvania, et al. - Amicus Brief of Missouri, at al. - Joins requested by 1:00 p.m. Central Tomorrow, 12/9
Attachments: 2020-12-09 - Texas v. Pennsylvania - Amicus Brief of Missouri et al. - Circulation Redline.docx

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

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>;

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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

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-

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ND-AG-21-0189-A-000793

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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Brocker, Liz

From: Sauer, John <John.Sauer@ago.mo.gov>
Sent: Wednesday, December 9, 2020 9:04 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'; 'ABurton@mt.gov'; 'MSchlichting@mt.gov'; 'Lindsay S. See'; 'jonbennion@mt.gov'; Stenehjem, Wayne K.; 'Benjamin.flowers@ohioattorneygeneral.gov'; 'ESmith@scag.gov'; 'BCook@scag.gov'; 'steven.blair@state.sd.us'; 'Sherri.Wald@state.sd.us'; 'Sarah.Campbell@ag.tn.gov'; 'tom.fisher@atg.in.gov'; 'Andree.Blumstein@ag.tn.gov'; 'matthew.frederick@texasattorneygeneral.gov'; 'Kyle.Hawkins@oag.texas.gov'; 'Ric Cantrell'; 'james.kaste@wyo.gov'; 'Jim.Campbell@nebraska.gov'; 'Thomas T. Lampman'; 'Jessica A. Lee'; 'Lindsay S. See'; 'Roysden, Beau'; 'Bash, Zina'; 'masagsve@nd.gov'; 'Harley Kirkland'; 'Eddie Lacour'; 'Hudson, Kian'; 'Kuhn, Matt F (KYOAG)'; 'Michelle Williams'; 'krissy.nobile@ago.ms.gov'
Subject: RE: Texas v. Pennsylvania, et al. - Amicus Brief of Missouri, at al. - Joins requested by 1:00 p.m. Central Tomorrow, 12/9
Attachments: 2020-12-09 - Texas v. Pennsylvania - Amicus Brief of Missouri et al.docx

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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>;

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

All-

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

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

Thanks a lot,

John Sauer

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Brocker, Liz

From: Sauer, John <John.Sauer@ago.mo.gov>
Sent: Monday, November 9, 2020 12:10 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'; Blake, Julie; 'Kristi.Johnson@ago.ms.gov'; 'ABurton@mt.gov'; 'MSchlichting@mt.gov'; 'Lindsay S. See'; 'jonbennion@mt.gov'; Stenehjem, Wayne K.; '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: RE: Republican Party of Pa. v. Boockvar - Draft Amicus Brief of Missouri et al. - Deadline NOON Central today

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Many thanks to the ten States that have joined this amicus brief: Missouri, Alabama, Arkansas, Florida, Kentucky, Louisiana, Mississippi, South Carolina, South Dakota, and Texas. We are finalizing the brief now and will file shortly, so if your State would like to join, please let me know within the next 20 minutes or so. Thanks everyone!!

From: Sauer, John
Sent: Monday, November 9, 2020 10:35 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>; Blake, Julie <Julie.Blake@ago.mo.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'

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<elacour@ago.state.al.us>; 'Hudson, Kian' <Kian.Hudson@atg.in.gov>; 'Kuhn, Matt F (KYOAG)' <Matt.Kuhn@ky.gov>
Subject: RE: Republican Party of Pa. v. Boockvar - Draft Amicus Brief of Missouri et al. - Deadline NOON Central today

All-

Just a quick reminder about the imminent deadline to join this amicus brief about mail-in ballots in Pennsylvania. The deadline is NOON Central today. So far, Missouri, Alabama, Arkansas, Kentucky, Louisiana, Mississippi, and South Carolina have joined, with several others expressing interest.

Thanks a lot,

John Sauer

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Subject: Republican Party of Pa. v. Boockvar - Draft Amicus Brief of Missouri et al. - Deadline NOON Central today

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Attached please find an updated draft of Missouri's proposed amicus brief in Republican Party of Pennsylvania v. Boockvar, the cert petitions challenging the Pennsylvania Supreme Court's decision extending the deadline to count mail-in ballots, including those without postmarks or with illegible postmarks. This version is nearly identical to the version circulated on Saturday, with minor formatting and phrasing changes. Missouri, Alabama, and Louisiana have joined this brief. Please let us know by NOON Central today if you wish to join.

Many thanks,

John Sauer

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Brocker, Liz

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Subject: RE: Republican Party of Pa. v. Boockvar - Draft Amicus Brief of Missouri et al. - Deadline NOON Central today
Attachments: 2020-11-09 - Republican Party of PA v. Boockvar -Draft Amicus Brief of States.docx

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All-

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<Kian.Hudson@atg.in.gov>; Kuhn, Matt F (KYOAG) <Matt.Kuhn@ky.gov>
Subject: Republican Party of Pa. v. Boockvar - Draft Amicus Brief of Missouri et al. - Deadline NOON Central today

All-

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Many thanks,

John Sauer

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Brocker, Liz

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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; Blake, Julie; Kristi.Johnson@ago.ms.gov; ABurton@mt.gov; MSchlichting@mt.gov; Lindsay S. See; jonbennion@mt.gov; Stenehjem, Wayne K.; 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
Cc: Bryan Cleveland; Andy Ferguson
Subject: RE: Amicus Brief re Pennsylvania Ballot Receipt Deadline
Attachments: Amicus Br of Okla re PA Ballot Receipt Deadline (Draft 2).docx

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All: I have attached an updated brief that cleans up some citations and refines certain arguments. So far, Indiana, Tennessee, and West Virginia have joined Oklahoma's brief. A few others have expressed interest. Again, let me know if you would like to join by **noon (CST) Monday, Nov. 9**.

Thanks,

Mithun

From: Sauer, John <John.Sauer@ago.mo.gov>
Sent: Sunday, November 8, 2020 7:14 AM
To: Mithun Mansinghani <mithun.mansinghani@oag.ok.gov>; Murrill, Elizabeth <MurrillE@ag.louisiana.gov>; Melissa Holyoak <melissaholyoak@agutah.gov>; nicholas.bronni@arkansasag.gov; Vincent Wagner <vincent.wagner@arkansasag.gov>; ed.sniffen@alaska.gov; Amit.Agarwal@myfloridalegal.com; 'Kane, Brian' <brian.kane@ag.idaho.gov>; tom.fisher@atg.in.gov; julia.payne@atg.in.gov; toby.crouse@ag.ks.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>; Blake, Julie <Julie.Blake@ago.mo.gov>; Kristi.Johnson@ago.ms.gov; ABurton@mt.gov; MSchlichting@mt.gov; Lindsay S. See <Lindsay.S.See@wvago.gov>; jonbennion@mt.gov; wstenehjem@nd.gov; Benjamin.flowers@ohioattorneygeneral.gov; ESmith@scag.gov; BCook@scag.gov; steven.blair@state.sd.us; Sherri.Wald@state.sd.us; Sarah.Campbell@ag.tn.gov; tom.fisher@atg.in.gov; Andree.Blumstein@ag.tn.gov; matthew.frederick@texasattorneygeneral.gov; Kyle.Hawkins@oag.texas.gov; Ric Cantrell <rcantrell@agutah.gov>; james.kaste@wyo.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>
Cc: Bryan Cleveland <bryan.cleveland@oag.ok.gov>; Andy Ferguson <andy.ferguson@oag.ok.gov>; Smith, Justin

AMERICAN OVERSIGHT

<Justin.Smith@ago.mo.gov>
Subject: [EXTERNAL] RE: Amicus Brief re Pennsylvania Ballot Receipt Deadline

Thanks a lot, Mithun. For reference, attached is Missouri's draft amicus brief referred to in Mithun's email below, which most of you should also have received yesterday afternoon. Thanks, John

---

From: Mithun Mansinghani <mithun.mansinghani@oag.ok.gov>
Sent: Sunday, November 8, 2020 12:48 AM
To: Murrill, Elizabeth <MurrillE@ag.louisiana.gov>; Melissa Holyoak <melissaholyoak@agutah.gov>; nicholas.bronni@arkansasag.gov; Vincent Wagner <vincent.wagner@arkansasag.gov>; ed.sniffen@alaska.gov; Amit.Agarwal@myfloridalegal.com; 'Kane, Brian' <brian.kane@ag.idaho.gov>; tom.fisher@atg.in.gov; julia.payne@atg.in.gov; toby.crouse@ag.ks.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>; Blake, Julie <Julie.Blake@ago.mo.gov>; Sauer, John <John.Sauer@ago.mo.gov>; Kristi.Johnson@ago.ms.gov; ABurton@mt.gov; MSchlichting@mt.gov; Lindsay S. See <Lindsay.S.See@wvago.gov>; jonbennion@mt.gov; wstenehjem@nd.gov; Benjamin.flowers@ohioattorneygeneral.gov; ESmith@scag.gov; BCook@scag.gov; steven.blair@state.sd.us; Sherri.Wald@state.sd.us; Sarah.Campbell@ag.tn.gov; tom.fisher@atg.in.gov; Andree.Blumstein@ag.tn.gov; matthew.frederick@texasattorneygeneral.gov; Kyle.Hawkins@oag.texas.gov; Ric Cantrell <rcantrell@agutah.gov>; james.kaste@wyo.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>
Cc: Bryan Cleveland <bryan.cleveland@oag.ok.gov>; Andy Ferguson <andy.ferguson@oag.ok.gov>
Subject: Amicus Brief re Pennsylvania Ballot Receipt Deadline

All,

Many of you joined our stay-stage amicus in support of the Pennsylvania legislature and Republican Party challenging the Pennsylvania Supreme Court's decision to alter the state's absentee ballot receipt deadline. Many of you also may have received Missouri's cert-stage amicus brief in this case circulated earlier today. Oklahoma has also decided to draft a cert-stage amicus brief in this case touching on different issues. While Missouri's brief focuses on the prerogative of state legislatures to set election rules and the risks of voter fraud from absentee voting, especially with the sort of deadline imposed by the PA Supreme Court, Oklahoma's cert-stage brief (largely similar to our stay-stage brief) focuses on the state's interests in ballot receipt deadlines and how setting such deadlines are ultimately a legislative choice.

Attached is Oklahoma's draft brief, which will undergo more formatting and refining as the weekend progresses. We are fine if you decide to sign onto Missouri's brief instead, but we ask that you sign onto our brief only if you are not signing onto Missouri's, per what we believe is the Supreme Court's directions on amici attempting to join multiple briefs within the same stage. Because of the time-sensitive nature of this case, we ask for joins by **noon (CST) Monday, Nov. 9**. Let me know if you have any questions.

Thanks,

Mithun Mansinghani
Solicitor General

Oklahoma Office of the Attorney General
313 NE 21st Street, Oklahoma City, OK 73105
(405) 522-4392 | Mithun.Mansinghani@oag.ok.gov

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Brocker, Liz

From: Sauer, John <John.Sauer@ago.mo.gov>
Sent: Sunday, November 8, 2020 7:14 AM
To: 'Mithun Mansinghani'; Murrill, Elizabeth; Melissa Holyoak; nicholas.bronni@arkansasag.gov; Vincent Wagner; ed.sniffen@alaska.gov; 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; Blake, Julie; Kristi.Johnson@ago.ms.gov; ABurton@mt.gov; MSchlichting@mt.gov; Lindsay S. See; jonbennion@mt.gov; Stenehjem, Wayne K.; 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
Cc: Bryan Cleveland; Andy Ferguson; Smith, Justin
Subject: RE: Amicus Brief re Pennsylvania Ballot Receipt Deadline
Attachments: 2020-11-07 - Republican Party of PA v. Boockvar -Draft Amicus Brief of States.docx

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Thanks a lot, Mithun. For reference, attached is Missouri's draft amicus brief referred to in Mithun's email below, which most of you should also have received yesterday afternoon. Thanks, John

From: Mithun Mansinghani <mithun.mansinghani@oag.ok.gov>
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To: Murrill, Elizabeth <MurrillE@ag.louisiana.gov>; Melissa Holyoak <melissaholyoak@agutah.gov>; nicholas.bronni@arkansasag.gov; Vincent Wagner <vincent.wagner@arkansasag.gov>; ed.sniffen@alaska.gov; Amit.Agarwal@myfloridalegal.com; 'Kane, Brian' <brian.kane@ag.idaho.gov>; tom.fisher@atg.in.gov; julia.payne@atg.in.gov; toby.crouse@ag.ks.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>; Blake, Julie <Julie.Blake@ago.mo.gov>; Sauer, John <John.Sauer@ago.mo.gov>; Kristi.Johnson@ago.ms.gov; ABurton@mt.gov; MSchlichting@mt.gov; Lindsay S. See <Lindsay.S.See@wvago.gov>; jonbennion@mt.gov; wstenehjem@nd.gov; Benjamin.flowers@ohioattorneygeneral.gov; ESmith@scag.gov; BCook@scag.gov; steven.blair@state.sd.us; Sherri.Wald@state.sd.us; Sarah.Campbell@ag.tn.gov; tom.fisher@atg.in.gov; Andree.Blumstein@ag.tn.gov; matthew.frederick@texasattorneygeneral.gov; Kyle.Hawkins@oag.texas.gov; Ric Cantrell <rcantrell@agutah.gov>; james.kaste@wyo.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>
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Thanks,

Mithun Mansinghani
Solicitor General

Oklahoma Office of the Attorney General
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(405) 522-4392 | Mithun.Mansinghani@oag.ok.gov

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Brocker, Liz

From: Sagsveen, Matthew A.
Sent: Wednesday, December 9, 2020 11:29 AM
To: Stenehjem, Wayne K.
Subject: FW: Texas v. Pennsylvania, et al. - Amicus Brief of Missouri, at al. - Joins requested by 1:00 p.m. Central Tomorrow, 12/9
Attachments: 2020-12-09 - Texas v. Pennsylvania - Amicus Brief of Missouri et al. - Circulation Redline.docx

From: Sauer, John <John.Sauer@ago.mo.gov>
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>; Stenehjem, Wayne K. <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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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!

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Thanks a lot, John Sauer

From: Sauer, John
Sent: Wednesday, December 9, 2020 9:04 AM
To: 'Mithun Mansinghani' <mithun.mansinghani@oag.ok.gov>; 'Murrill, Elizabeth' <MurrillE@ag.louisiana.gov>; 'Melissa Holyoak' <melissaholyoak@agutah.gov>; 'nicholas.bronni@arkansasag.gov' <nicholas.bronni@arkansasag.gov>; 'Vincent Wagner' <vincent.wagner@arkansasag.gov>; 'ed.sniffen@alaska.gov' <ed.sniffen@alaska.gov>; Smith, Justin <justin.smith@ago.mo.gov>; 'Amit.Agarwal@myfloridalegal.com' <Amit.Agarwal@myfloridalegal.com>; 'Kane, Brian' <brian.kane@ag.idaho.gov>; 'tom.fisher@atg.in.gov' <tom.fisher@atg.in.gov>; 'julia.payne@atg.in.gov' <julia.payne@atg.in.gov>; 'toby.crouse@ag.ks.gov' <toby.crouse@ag.ks.gov>; 'Chad.Meredith@ky.gov' <Chad.Meredith@ky.gov>; 'Andrew Pinson' <APinson@LAW.GA.GOV>; 'jeff.chanay' <jeff.chanay@ag.ks.gov>; 'St. John, Joseph' <StJohnJ@ag.louisiana.gov>; 'Kristi.Johnson@ago.ms.gov' <Kristi.Johnson@ago.ms.gov>; 'ABurton@mt.gov' <ABurton@mt.gov>; 'MSchlichting@mt.gov' <MSchlichting@mt.gov>; 'Lindsay S. See' <Lindsay.S.See@wvago.gov>; 'jonbennion@mt.gov' <jonbennion@mt.gov>; 'wstenehjem@nd.gov' <wstenehjem@nd.gov>; 'Benjamin.flowers@ohioattorneygeneral.gov' <Benjamin.flowers@ohioattorneygeneral.gov>; 'ESmith@scag.gov' <ESmith@scag.gov>; 'BCook@scag.gov' <BCook@scag.gov>; 'steven.blair@state.sd.us' <steven.blair@state.sd.us>; 'Sherri.Wald@state.sd.us' <Sherri.Wald@state.sd.us>; 'Sarah.Campbell@ag.tn.gov' <Sarah.Campbell@ag.tn.gov>; 'tom.fisher@atg.in.gov' <tom.fisher@atg.in.gov>; 'Andree.Blumstein@ag.tn.gov' <Andree.Blumstein@ag.tn.gov>; 'matthew.frederick@texasattorneygeneral.gov' <matthew.frederick@texasattorneygeneral.gov>; 'Kyle.Hawkins@oag.texas.gov' <Kyle.Hawkins@oag.texas.gov>; 'Ric Cantrell' <rcantrell@agutah.gov>; 'james.kaste@wyo.gov' <james.kaste@wyo.gov>; 'Jim.Campbell@nebraska.gov' <Jim.Campbell@nebraska.gov>; 'Thomas T. Lampman' <Thomas.T.Lampman@wvago.gov>; 'Jessica A. Lee' <Jessica.A.Lee@wvago.gov>; 'Lindsay S. See' <Lindsay.S.See@wvago.gov>; 'Roysden, Beau' <Beau.Roysden@azag.gov>; 'Bash, Zina' <Zina.Bash@oag.texas.gov>; 'masagsve@nd.gov'; 'Harley Kirkland' <HKirkland@scag.gov>; 'Eddie Lacour' <elacour@ago.state.al.us>; 'Hudson, Kian' <Kian.Hudson@atg.in.gov>; 'Kuhn, Matt F (KYOAG)' <Matt.Kuhn@ky.gov>; 'Michelle Williams' <Michelle.Williams@ago.ms.gov>; 'krissy.nobile@ago.ms.gov' <krissy.nobile@ago.ms.gov>
Subject: RE: Texas v. Pennsylvania, et al. - Amicus Brief of Missouri, at al. - Joins requested by 1:00 p.m. Central Tomorrow, 12/9

All-

Thank you for considering this amicus brief on such short notice. So far, Louisiana and Arkansas have joined, with several others expressing interest. I have attached an updated draft that includes minor, non-substantive edits, and which adjusts the language of the concluding paragraphs in response to comments from an interested state. The Supreme Court issued an order last night ordering the Defendant States (MI, PA, WS, GA) to file a response for the Motion for Leave to File Bill of Complaint and request for interim injunctive relief by 3:00 pm tomorrow. Given this highly accelerated briefing schedule, we would like to file this brief as soon as possible this afternoon to give the Court the most time possible to read it. Accordingly, we would prefer not to extend the deadline past 1:00 p.m. Central today, so please let us know by then if you are interested. Thanks a lot!

Best, John Sauer

From: Sauer, John
Sent: Tuesday, December 8, 2020 6:11 PM
To: 'Mithun Mansinghani' <mithun.mansinghani@oag.ok.gov>; 'Murrill, Elizabeth' <MurrillE@ag.louisiana.gov>; 'Melissa Holyoak' <melissaholyoak@agutah.gov>; 'nicholas.bronni@arkansasag.gov' <nicholas.bronni@arkansasag.gov>; 'Vincent Wagner' <vincent.wagner@arkansasag.gov>; 'ed.sniffen@alaska.gov' <ed.sniffen@alaska.gov>; Smith, Justin <justin.smith@ago.mo.gov>; 'Amit.Agarwal@myfloridalegal.com' <Amit.Agarwal@myfloridalegal.com>; 'Kane, Brian' <brian.kane@ag.idaho.gov>; 'tom.fisher@atg.in.gov' <tom.fisher@atg.in.gov>; 'julia.payne@atg.in.gov' <julia.payne@atg.in.gov>; 'toby.crouse@ag.ks.gov' <toby.crouse@ag.ks.gov>; 'Chad.Meredith@ky.gov' <Chad.Meredith@ky.gov>; 'Andrew Pinson' <APinson@LAW.GA.GOV>; 'jeff.chanay' <jeff.chanay@ag.ks.gov>; 'St. John, Joseph' <StJohnJ@ag.louisiana.gov>; 'Kristi.Johnson@ago.ms.gov' <Kristi.Johnson@ago.ms.gov>; 'ABurton@mt.gov'

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

All-

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

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

Thanks a lot,

John Sauer

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Brocker, Liz

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Sent: Tuesday, December 8, 2020 6:17 PM
To: Stenehjem, Wayne K.; Seibel, Troy T.
Subject: FW: Texas v. Pennsylvania, et al. - Amicus Brief of Missouri, at al. - Joins requested by 1:00 p.m. Central Tomorrow, 12/9
Attachments: 2020-12-07 - Texas v. Pennsylvania, et al. - Bill of Complaint.pdf; 2020-12-08 - Texas v. Pennsylvania - Amicus Brief of Missouri et al.docx

Attached is a new amicus request.

From: Sauer, John <John.Sauer@ago.mo.gov>
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>; Stenehjem, Wayne K. <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

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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

AMERICAN OVERSIGHT

ND-AG-21-0189-A-000809

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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Brocker, Liz

From: Stenehjem, Wayne K.
Sent: Saturday, November 7, 2020 3:59 PM
To: ajaeger@nd.gov
Cc: Seibel, Troy T.
Subject: FW: Republican Party of Pennsylvania v. Boockvar - Draft Amicus Brief - NOON Monday deadline
Attachments: 2020-11-07 - Republican Party of PA v. Boockvar -Draft Amicus Brief of States.docx

Al,
As we discussed.
Wayne

From: Sauer, John <John.Sauer@ago.mo.gov>
Sent: Saturday, November 7, 2020 3:39 PM
To: 'Murrill, Elizabeth' <MurrillE@ag.louisiana.gov>; Amit.Agarwal@myfloridalegal.com; Nicholas Bronni <nicholas.bronni@arkansasag.gov>; Andrew Pinson <APinson@LAW.GA.GOV>; tom.fisher@atg.in.gov; brian.kane@ag.idaho.gov; Dave Bydalek <dave.bydalek@nebraska.gov>; james.smith@nebraska.gov; Emory Smith <ESmith@scag.gov>; Parkin Hunter <phunter@scag.gov>; Sherri.Wald@state.sd.us; Lynell.Erickson@state.sd.us; Kyle.Hawkins@oag.texas.gov; Kristi Johnson <Kristi.Johnson@ago.ms.gov>; Lindsay S. See <Lindsay.S.See@wvago.gov>; Stenehjem, Wayne K. <wstenehjem@nd.gov>; Melissa Holyoak <melissaholyoak@agutah.gov>; Mithun Mansinghani <mithun.mansinghani@oag.ok.gov>; LaCour, Edmund <Edmund.LaCour@AlabamaAG.gov>; ed.sniffen@alaska.gov; beau.roysden@azag.gov; Chad Meredith <chad.meredith@ky.gov>; Payne, Julia <Julia.Payne@atg.in.gov>; 'ben.flowers@ohioattorneygeneral.gov' <ben.flowers@ohioattorneygeneral.gov>; Sagsveen, Matthew A. <masagsve@nd.gov>; Andree Blumstein <andree.blumstein@ag.tn.gov>; Sarah K. Campbell <Sarah.Campbell@ag.tn.gov>; Lindsay S. See <Lindsay.S.See@wvago.gov>; 'Bash, Zina' <Zina.Bash@oag.texas.gov>
Cc: Smith, Justin <Justin.Smith@ago.mo.gov>
Subject: Republican Party of Pennsylvania v. Boockvar - Draft Amicus Brief - NOON Monday deadline

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Dear Counsel-

Attached is a proposed draft amicus brief supporting the cert petitions in *Republican Party of Pennsylvania v. Boockvar* and the related case in the Supreme Court. The amicus brief argues that (1) the Election Clauses' allocation of authority to the "Legislature thereof" in each State is a structural separation-of-powers provision that provides an important safeguard to individual liberty, and (2) there are real risks of fraud in voting-by-mail, which the Pennsylvania decision exacerbated by extending the deadline to submit ballots past Election Day and counting ballots with no postmark or an illegible postmark as timely. Given the time-sensitive nature of this case, we would like to file this brief, if possible, by Monday afternoon, so please let us know by noon Central time on Monday if you would like to join. Thank you all for your consideration on such short notice.

Thank you,

John Sauer

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Brocker, Liz

From: Seibel, Troy T.
Sent: Wednesday, December 9, 2020 2:44 PM
To: Stenehjem, Wayne K.; Brocker, Liz
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

Troy T. Seibel
Chief Deputy Attorney General
Office of Attorney General
600 E. Boulevard Ave., Dept. 125
Bismarck, ND 58505
701-328-2210
tseibel@nd.gov

From: Sauer, John <John.Sauer@ago.mo.gov>
Sent: Wednesday, December 9, 2020 2:03 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: 22O155 - Texas v. Pennsylvania (U.S.) - Amicus Brief of Missouri and 16 Other States - Final

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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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Brocker, Liz

From: Mithun Mansinghani <mithun.mansinghani@oag.ok.gov>
Sent: Sunday, November 8, 2020 12:48 AM
To: Murrill, Elizabeth; Melissa Holyoak; nicholas.bronni@arkansasag.gov; Vincent Wagner; ed.sniffen@alaska.gov; 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; Julie.Blake@ago.mo.gov; john.sauer@ago.mo.gov; Kristi.Johnson@ago.ms.gov; ABurton@mt.gov; MSchlichting@mt.gov; Lindsay S. See; jonbennion@mt.gov; Stenehjem, Wayne K.; 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
Cc: Bryan Cleveland; Andy Ferguson
Subject: Amicus Brief re Pennsylvania Ballot Receipt Deadline
Attachments: Amicus Br of Okla re PA Ballot Receipt Deadline.docx

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All,

Many of you joined our stay-stage amicus in support of the Pennsylvania legislature and Republican Party challenging the Pennsylvania Supreme Court's decision to alter the state's absentee ballot receipt deadline. Many of you also may have received Missouri's cert-stage amicus brief in this case circulated earlier today. Oklahoma has also decided to draft a cert-stage amicus brief in this case touching on different issues. While Missouri's brief focuses on the prerogative of state legislatures to set election rules and the risks of voter fraud from absentee voting, especially with the sort of deadline imposed by the PA Supreme Court, Oklahoma's cert-stage brief (largely similar to our stay-stage brief) focuses on the state's interests in ballot receipt deadlines and how setting such deadlines are ultimately a legislative choice.

Attached is Oklahoma's draft brief, which will undergo more formatting and refining as the weekend progresses. We are fine if you decide to sign onto Missouri's brief instead, but we ask that you sign onto our brief only if you are not signing onto Missouri's, per what we believe is the Supreme Court's directions on amici attempting to join multiple briefs within the same stage. Because of the time-sensitive nature of this case, we ask for joins by **noon (CST) Monday, Nov. 9**. Let me know if you have any questions.

Thanks,

Mithun Mansinghani
Solicitor General

Oklahoma Office of the Attorney General
313 NE 21st Street, Oklahoma City, OK 73105
(405) 522-4392 | Mithun.Mansinghani@oag.ok.gov

AMERICAN OVERSIGHT

Brocker, Liz

From: Nicolai, James E.
Sent: Wednesday, December 9, 2020 4:06 PM
To: Sagsveen, Matthew A.
Subject: Trump's motion to intervene
Attachments: Trump Motion to Intervene (Texas v Pennsylvania et al).pdf

Not much new here. Apart from arguing about his right to intervene, repeats the same points made by Texas in its motion for leave to file a bill of complaint.

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Brocker, Liz

From:	Nicolai, James E.
Sent:	Thursday, December 10, 2020 2:29 PM
To:	Stenehjem, Wayne K.
Cc:	Sagsveen, Matthew A.
Subject:	Texas v. Pennsylvania
Attachments:	Ohio amicus (Texas v Pennslyvania).pdf

Hi Wayne.

Lots of goings on today in Texas's election lawsuit, some of which you may already be aware. Six states (Missouri, Arkansas, Louisiana, Mississippi, South Carolina, and Utah) filed a joint motion to intervene directly in the case.

In addition, six more motions to file amicus briefs were filed, plus the responses by the four defendant states.

I am attaching Ohio's amicus brief. It says it is not in favor of either side, says the Court should not grant Texas the relief it seeks, but nevertheless urges the Court to take the case up for the purpose of answering the basic question raised in Texas's suit regarding whether non-legislators (courts and executive officials) can change a state's election laws midstream of an election.

I still think it is most likely that the Court will deny this in one sentence, as they did with the Pennsylvania case a couple days ago, but Ohio's suggestion is consistent with the "outside chance" I mentioned about the Court denying any injunctive relief with respect to this particular election, but still allowing the bill of complaint to proceed and later issuing an opinion on the primary legal issue raised regarding the meaning of the Elector's Clause.

Jim

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

MOTION FOR LEAVE TO FILE AND BRIEF OF *AMICUS CURIAE* OHIO IN SUPPORT OF NEITHER PARTY

DAVE YOST
Ohio Attorney General

BENJAMIN M. FLOWERS*
**Counsel of Record*
Ohio Solicitor General
MICHAEL J.HENDERSHOT
Chief Deputy Solicitor General
30 E. Broad St., 17th Fl.
Columbus, Ohio 43215
614-466-8980
bflowers@
ohioattorneygeneral.gov

Counsel for Amicus Curiae the State of Ohio

AMERICAN OVERSIGHT

MOTION FOR LEAVE TO FILE

Ohio respectfully moves for leave to file an *amicus curiae* brief in support of neither party. It is unclear whether any such motion is required. Under Rule 37.4, Ohio is permitted to file an *amicus* brief without first obtaining leave. But under Rule 37.2(a), all *amici* must provide counsel for the parties with notice of their intent to file an amicus brief more than ten days before the brief's due date. It is unclear when any *amicus* briefs in this expedited proceeding would be due, and so it is unclear whether Ohio can provide timely notice. What is more, while Ohio attempted to provide notice to counsel for all parties on December 10, 2020, it has not been able to confirm the contact information for each party's counsel. So, in an abundance of caution, Ohio moves for leave to file this brief.

Ohio has previously argued that this Court has mandatory jurisdiction in original actions, and that it therefore lacks authority to deny leave to file bills of complaint. *See Arizona v. Sackler*, No. 22O151, Br. of Ohio and *amici* States (Sept. 26, 2019). Its *amicus* brief in this case will address something else: the proper understanding of the Electors Clause, U.S. Const. art. II, §1, cl.2; the incompatibility of the Clause and the remedy that Texas seeks; and the need for a Supreme Court ruling, at the earliest available opportunity, on the proper application of the Clause to cases in which state courts or state executive officers alter election rules in presidential elections.

Ohio believes its brief would be of value to the Court's decisionmaking process, and respectfully moves for leave to file.

AMERICAN OVERSIGHT

Respectfully submitted,

DAVE YOST
Ohio Attorney General

BENJAMIN M. FLOWERS*
**Counsel of Record*
Ohio Solicitor General
MICHAEL J. HENDERSHOT
Chief Deputy Solicitor General
30 East Broad St., 17th Fl.
Columbus, Ohio 43215
614-466-8980
bflowers@ohioattorneygeneral.gov

Counsel for Amicus Curiae
the State of Ohio

DECEMBER 2020

AMERICAN OVERSIGHT

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AMERICAN OVERSIGHT

STATEMENT OF AMICUS INTEREST AND SUMMARY OF ARGUMENT*

The Presidential Electors Clause provides: "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress." Art. II, §1, cl.2. Ohio has previously taken the position that this language means what it says. In a brief filed just last month, it argued that this Clause must be understood as empowering "state legislatures, not state courts, [to] set the rules for picking presidential electors." *Republican Party of Pa. v. Boockvar*, Nos. 20-542, 20-574, Br. of *Amicus Curiae* Ohio in Support of Petitioners 3 (Nov. 9, 2020). This means that state courts violate the Constitution when they use judge-made doctrines or strained interpretations to change the legislatively fashioned rules governing the manner by which presidential electors are chosen. *Id.* at 5.

The Electors Clause means today what it meant a month ago. Ohio hopes this Court agrees. But either way, the States need this Court to decide, at the earliest available opportunity, the question whether the Electors Clause permits state courts (and state executive officials) to alter the rules by which presidential elections are conducted. The People need an answer, too. Until they get one, elections will continue to be plagued by doubts regarding whether the President was chosen in the constitutionally prescribed manner.

---

* Ohio attempted to notify all parties, through the parties' attorneys, of its intent to file this *amicus* brief on December 10, 2020.

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Ohio is submitting this brief under Rule 37.4 to address these points.

ARGUMENT

Article II of the Constitution directs that "[e]ach State shall appoint" presidential electors "in such Manner as the Legislature thereof may direct." Art. II, §1, cl.2. Whatever "the Legislature thereof" means, it does not mean "the courts thereof." Thus, when state election codes dictate the manner for appointing presidential electors, state courts must respect the legislature's work: they may not change the rules by which electors are chosen through judge-made doctrines or by rewriting statutes in the guise of interpretation. *See Democratic Nat'l Comm. v. Wis. State Legislature*, 592 U.S. __, slip op. 9 n.1 (2020) (Kavanaugh, J., concurring); *Bush v. Gore*, 531 U.S. 98, 120 (2000) (Rehnquist, C.J., concurring); *see also Republican Party of Pa. v. Boockvar*, 592 U.S. __, slip op. 1 (2020) (Statement of Alito, J.). This does not mean that state-court interpretations of state law are entitled to no deference. But at some point, a purported "interpretation" becomes "not a construction" of the relevant text, "but a rewriting of it." *State Bd. of Equalization of Cal. v. Young's Market Co.*, 299 U.S. 59, 62 (1936). The Electors Clause prohibits such rewritings in the context of presidential elections.

Precisely because Ohio holds this view about the meaning of the Electors Clause, it cannot support Texas's plea for relief. Texas seeks a "remand to the State legislatures to allocate electors in a manner consistent with the Constitution." Br. in Support of Motion for Leave to File 16. Such an order would violate, not honor, the Electors Clause. Federal courts, just

AMERICAN OVERSIGHT

like state courts, lack authority to change the legislatively chosen method for appointing presidential electors. And so federal courts, just like state courts, lack authority to order legislatures to appoint electors without regard to the results of an already-completed election.

What is more, the relief that Texas seeks would undermine a foundational premise of our federalist system: the idea that the States are sovereigns, free to govern themselves. The federal government has only those powers that the Constitution gives to it. And nothing in the Constitution empowers courts to issue orders affirmatively directing the States how to exercise their constitutional authority. *See Missouri v. Jenkins*, 515 U.S. 70, 132–33 (1995) (Thomas, J., concurring). The courts have no more business ordering the People's representatives how to choose electors than they do ordering the People themselves how to choose their dinners. In the Federalist Papers, Hamilton endorsed the idea that "there is no liberty, if the power of judging be not separated from the legislative and executive powers." The Federalist No. 78 (Hamilton), p. 523 (Cooke, ed., 1961). He was talking about the separation of federal powers. But the principle applies with equal (and perhaps greater) force as applied to the Constitution's separation of state and federal power. As this Court is fond of noting, the "Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other." *Saenz v. Roe*, 526 U.S. 489, 504 n.17 (1999) (quoting *U.S. Term Limits v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring)). "By denying any one government complete

AMERICAN OVERSIGHT

jurisdiction over all the concerns of public life, federalism" ensures that one government is able to check overreach by the other, and thus "protects the liberty of the individual from arbitrary power." *Bond v. United States*, 564 U.S. 211, 222 (2011). By asking this Court to direct four sovereign States in the exercise of *their* authority under the Electors Clause, Texas erodes both this structure and the protection that the structure provides.

Although Ohio does not endorse Texas's proposed relief, it does endorse its call for a ruling on the meaning of the Electors Clause. More precisely, Ohio urges the Court to decide, at the earliest available opportunity, whether state courts and state executive actors violate the Electors Clause when they change the rules by which presidential elections are run. In late October, Justice Alito predicted that the Court's failure to decide that question in another case had "needlessly created conditions that could lead to serious post-election problems." *Boockvar*, 592 U.S. __, slip op. at 1 (Statement of Alito, J.). Unfortunately, he was right. In many States, citizens voted for President under rules created by state judiciaries and state executive actors rather than state legislatures. *See, e.g.*, *id.*, slip op. at 1–2; *Moore v. Circosta*, 592 U.S. __, slip op. 1–2 (2020) (Gorsuch, J., dissenting from denial of application for injunctive relief); *Tex. League of United Latin Am. Citizens v. Hughs*, 978 F.3d 136, 151–52 (5th Cir. 2020) (Ho, J., concurring). Because this Court has never decided whether the Electors Clause permits such alterations to the method for choosing presidential electors, Americans are left to wonder whether the process by which they voted for President was consistent with our country's founding charter. Those doubts will linger, "robbing the winners of" a

AMERICAN OVERSIGHT

victory that all Americans will deem legitimate, and "the losers of the peace that comes from a fair defeat." *United States v. Windsor*, 570 U.S. 744, 802 (2013) (Scalia, J., dissenting).

The importance of the public's constitutional doubts, however, pales in comparison to the importance of the public's concerns regarding basic fairness. In States around the country, judges and executive officials changed the rules that would govern the election "immediately preceding or during" the election. *Wise v. Circosta*, 978 F.3d 93, 104 (4th Cir. 2020) (Wilkinson, J., dissenting); *see also Pa. Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020). If there is anything more American than representative government, it is a firm conviction that the rules ought not be changed after the game has begun. Because this Court has never held that the Electors Clause forbids state courts and state executive officers from meddling with state legislatures' work, state courts and state executive officers retained leeway to change the rules in the final stretch of election season. It is not unreasonable to wonder—and many millions of Americans do—whether those hastily implemented changes exposed the election systems to vulnerabilities. Nor is it unreasonable to object on fairness grounds—as many millions of Americans do—to changing the voting rules when the election is impending and the changes' impact on the results can be predicted. These concerns undermine "public confidence in the integrity of the electoral process." *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 197 (2008) (Stevens, J., op.). That confidence is necessary if there is to be "citizen participation in the democratic process," which is itself necessary for the success of the American project. *Id.*

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It may prove difficult at this late date to fashion a remedy that does not create equal or greater harms. But there will be an election in 2024, another four years after that, and so on. If only to prevent the doubts that have tainted this election from arising again in some future election, the Court should decide, as soon as possible, the extent of the power that the Electors Clause confers on state legislatures and withholds from other actors.

CONCLUSION

The Court should issue a decision on the meaning of the Electors Clause at the earliest available opportunity.

Respectfully submitted,

DAVE YOST
Ohio Attorney General

BENJAMIN M. FLOWERS*
**Counsel of Record*
Ohio Solicitor General
MICHAEL J. HENDERSHOT
Chief Deputy Solicitor General
30 East Broad St., 17th Fl.
Columbus, Ohio 43215
614-466-8980
bflowers@ohioattorneygeneral.gov

Counsel for Amicus Curiae
the State of Ohio

DECEMBER 2020

AMERICAN OVERSIGHT

Brocker, Liz

From: Sagsveen, Matthew A.
Sent: Monday, December 14, 2020 9:35 AM
To: Nicolai, James E.
Subject: Open Records Request

We have received an open records request for all records relating to the Texas case...just FYI

AMERICAN OVERSIGHT

Brocker, Liz

From: Sagsveen, Matthew A.
Sent: Wednesday, December 9, 2020 5:47 PM
To: Nicolai, James E.
Subject: RE: Texas v Pennsylvania

Interesting.

From: Nicolai, James E. <jnicolai@nd.gov>
Sent: Wednesday, December 9, 2020 3:42 PM
To: Sagsveen, Matthew A. <masagsve@nd.gov>
Subject: Texas v Pennsylvania

A collection of conservative Republicans filed this motion for leave to file an amicus brief in support of Michigan, Pennsylvania, Georgia, and Wisconsin.

Primary point made is that state courts are supposed to be the final arbiter of election contests/challenges, not the Supreme Court.

I expect this argument will be made by the 4 states tomorrow in their response as well.

FYI, Trump also filed a motion to intervene. Haven't reviewed that yet, but will forward it in a minute.

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Brocker, Liz

From: Nicolai, James E.
Sent: Friday, December 11, 2020 5:56 PM
To: Stenehjem, Wayne K.
Cc: Sagsveen, Matthew A.; Seibel, Troy T.
Subject: Texas v. Pennsylvania
Attachments: Texas v Pennsylvania order.pdf

Not quite one sentence, but close.

Here is the actual order if you haven't already seen it.

AMERICAN OVERSIGHT

(ORDER LIST: 592 U.S.)

FRIDAY, DECEMBER 11, 2020

ORDER IN PENDING CASE

155, ORIG. TEXAS V. PENNSYLVANIA, ET AL.

The State of Texas's motion for leave to file a bill of complaint is denied for lack of standing under Article III of the Constitution. Texas has not demonstrated a judicially cognizable interest in the manner in which another State conducts its elections. All other pending motions are dismissed as moot.

Statement of Justice Alito, with whom Justice Thomas joins: In my view, we do not have discretion to deny the filing of a bill of complaint in a case that falls within our original jurisdiction. See *Arizona* v. *California*, 589 U. S. ___ (Feb. 24, 2020) (Thomas, J., dissenting). I would therefore grant the motion to file the bill of complaint but would not grant other relief, and I express no view on any other issue.

CERTIORARI GRANTED

20-222 GOLDMAN SACHS GROUP, ET AL. V. AR TEACHER RETIREMENT, ET AL.

The petition for a writ of certiorari is granted.

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Brocker, Liz

From: Nicolai, James E.
Sent: Wednesday, December 9, 2020 4:38 PM
To: Sagsveen, Matthew A.
Subject: Texas v Pennsylvania
Attachments: Arizona's motion for leave (Texas v Pennsylvania et al).pdf

Arizona just weighed in supporting Texas.

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.

MOTION FOR LEAVE TO FILE AN AMICUS BRIEF FOR THE STATE OF ARIZONA AND MARK BRNOVICH, ARIZONA ATTORNEY GENERAL

MARK BRNOVICH
Attorney General
BRUNN W. ROYSDEN III
Solicitor General
Counsel of Record
OFFICE OF THE ARIZONA ATTORNEY GENERAL
2005 N. Central Ave.
Phoenix, AZ 85004
(602) 542-5025
beau.roysden@azag.gov

Counsel for the State of Arizona and Mark Brnovich, Arizona Attorney General

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MOTION FOR LEAVE TO FILE

The State of Arizona and Mark Brnovich, Arizona Attorney General (collectively, the "State of Arizona") respectfully move for leave to file a brief as amici curiae respecting the motions for leave to file a bill of complaint and for a preliminary injunction in this case. *See* Sup. Ct. R. 37.2(a). If granted leave, the State of Arizona's brief will make two primary points.[1]

The State of Arizona will first argue that election integrity is of paramount importance. "Every voter" in a federal election "has a right under the Constitution to have his [or her] vote fairly counted, without its being distorted by fraudulently cast votes." *Anderson* v. *United States*, 417 U.S. 211, 227 (1974). Given this paramount importance, the State of Arizona, through its Attorney General, vigilantly fights to ensure election integrity, including for the 2020 election. The Attorney General participated in eight different suits to defend from attack Arizona election laws that were enacted by its Legislature. Indeed, in just a few months, the State of Arizona and its Attorney General will appear before this Court in the critical case of *Brnovich et al. v. Democratic National Committee et al.*, No. 19-1257, and urge the Court to adopt a construction of Section 2 of the Voting Rights Act that not only follows the text of that statute but also recognizes that to ensure "fair and honest" elections marked by "order, rather than chaos," "there must be a substantial regulation of elections." *Storer v. Brown*, 415 U.S. 724, 730 (1974) (emphasis added);

---

[1] Arizona has been named in another original action pending in this Court, which is captioned *Donofrio v. Pennsylvania et al.* That original action names many of the same States as this case. Given that pending case, the State of Arizona's brief would be limited to the points discussed below.

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see also *Smiley v. Holm*, 285 U.S. 355, 366 (1932) ("[E]xperience shows" those "necessary" regulations include not just voting "procedure[s]" but also "safeguards" for the "prevention of fraud and corrupt practices.").

The State will also argue that if this Court exercises jurisdiction over Texas's complaint, it is equally important that the Court act quickly to give the Nation certainty. As a preliminary matter, it is the State of Arizona's consistent position that this Court's jurisdiction over actions between states is exclusive and non-discretionary. *See Arizona v. California*, 140 S. Ct. 684, 684-85 (2020) (Thomas, J., dissenting). The State recognizes, however, that the Court's current jurisprudence is that its jurisdiction over such matters is discretionary. If the Court either revisits its prior holdings or exercises discretion to accept jurisdiction here, then it is critical the Court resolve this challenge quickly to give the Nation certainty.

CONCLUSION

The State respectfully request that the Court grant leave to file an amicus brief respecting Texas's motions.

AMERICAN OVERSIGHT

ND-AG-21-0189-A-000837

December 9, 2020

Respectfully submitted.

/s/ Brunn W. Roysden III

Mark Brnovich
Attorney General
Brunn W. Roysden III
Solicitor General
Counsel of Record
OFFICE OF THE ARIZONA
ATTORNEY GENERAL
2005 N. Central Ave.
Phoenix, AZ 85004
(602) 542-5025
beau.roysden@azag.gov

Counsel for the State of Arizona and Mark Brnovich, Arizona Attorney General

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Brocker, Liz

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Sent: Wednesday, December 9, 2020 2:21 PM
To: Sagsveen, Matthew A.
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16 by my count. Wonder what made Wayne decide to sign on.

From: Sagsveen, Matthew A. <masagsve@nd.gov>
Sent: Wednesday, December 9, 2020 1:08 PM
To: Nicolai, James E. <jnicolai@nd.gov>
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Oklahoma joins as well.

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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

Indiana has joined

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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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Utah and Tennessee have joined as well

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Florida and North Dakota have joined as well

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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

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

From: Sauer, John
Sent: Wednesday, December 9, 2020 12:32 PM
To: 'Mithun Mansinghani' <mithun.mansinghani@oag.ok.gov>; 'Murrill, Elizabeth' <MurrillE@ag.louisiana.gov>; 'Melissa Holyoak' <melissaholyoak@agutah.gov>; 'nicholas.bronni@arkansasag.gov' <nicholas.bronni@arkansasag.gov>; 'Vincent Wagner' <vincent.wagner@arkansasag.gov>; 'ed.sniffen@alaska.gov' <ed.sniffen@alaska.gov>; Smith, Justin <justin.smith@ago.mo.gov>; 'Amit.Agarwal@myfloridalegal.com' <Amit.Agarwal@myfloridalegal.com>; 'Kane, Brian' <brian.kane@ag.idaho.gov>; 'tom.fisher@atg.in.gov' <tom.fisher@atg.in.gov>; 'julia.payne@atg.in.gov' <julia.payne@atg.in.gov>; 'toby.crouse@ag.ks.gov' <toby.crouse@ag.ks.gov>; 'Chad.Meredith@ky.gov' <Chad.Meredith@ky.gov>; 'Andrew Pinson' <APinson@LAW.GA.GOV>; 'jeff.chanay' <jeff.chanay@ag.ks.gov>; 'St. John, Joseph' <StJohnJ@ag.louisiana.gov>; 'Kristi.Johnson@ago.ms.gov' <Kristi.Johnson@ago.ms.gov>; 'ABurton@mt.gov' <ABurton@mt.gov>; 'MSchlichting@mt.gov' <MSchlichting@mt.gov>; 'Lindsay S. See' <Lindsay.S.See@wvago.gov>; 'jonbennion@mt.gov' <jonbennion@mt.gov>; 'wstenehjem@nd.gov' <wstenehjem@nd.gov>; 'Benjamin.flowers@ohioattorneygeneral.gov' <Benjamin.flowers@ohioattorneygeneral.gov>; 'ESmith@scag.gov' <ESmith@scag.gov>; 'BCook@scag.gov' <BCook@scag.gov>; 'steven.blair@state.sd.us' <steven.blair@state.sd.us>; 'Sherri.Wald@state.sd.us' <Sherri.Wald@state.sd.us>; 'Sarah.Campbell@ag.tn.gov' <Sarah.Campbell@ag.tn.gov>; 'tom.fisher@atg.in.gov' <tom.fisher@atg.in.gov>; 'Andree.Blumstein@ag.tn.gov' <Andree.Blumstein@ag.tn.gov>; 'matthew.frederick@texasattorneygeneral.gov' <matthew.frederick@texasattorneygeneral.gov>; 'Kyle.Hawkins@oag.texas.gov' <Kyle.Hawkins@oag.texas.gov>; 'Ric Cantrell' <rcantrell@agutah.gov>; 'james.kaste@wyo.gov' <james.kaste@wyo.gov>; 'Jim.Campbell@nebraska.gov' <Jim.Campbell@nebraska.gov>; 'Thomas T. Lampman' <Thomas.T.Lampman@wvago.gov>; 'Jessica A. Lee' <Jessica.A.Lee@wvago.gov>; 'Lindsay S. See' <Lindsay.S.See@wvago.gov>; 'Roysden, Beau' <Beau.Roysden@azag.gov>; 'Bash, Zina' <Zina.Bash@oag.texas.gov>; 'masagsve@nd.gov'; 'Harley Kirkland' <HKirkland@scag.gov>; 'Eddie Lacour' <elacour@ago.state.al.us>; 'Hudson, Kian' <Kian.Hudson@atg.in.gov>; 'Kuhn, Matt F (KYOAG)' <Matt.Kuhn@ky.gov>; 'Michelle Williams' <Michelle.Williams@ago.ms.gov>; 'krissy.nobile@ago.ms.gov' <krissy.nobile@ago.ms.gov>
Subject: RE: Texas v. Pennsylvania, et al. - Amicus Brief of Missouri, at al. - Joins requested by 1:00 p.m. Central Tomorrow, 12/9

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

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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'

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<julia.payne@atg.in.gov>; 'toby.crouse@ag.ks.gov' <toby.crouse@ag.ks.gov>; 'Chad.Meredith@ky.gov' <Chad.Meredith@ky.gov>; 'Andrew Pinson' <APinson@LAW.GA.GOV>; 'jeff.chanay' <jeff.chanay@ag.ks.gov>; 'St. John, Joseph' <StJohnJ@ag.louisiana.gov>; 'Kristi.Johnson@ago.ms.gov' <Kristi.Johnson@ago.ms.gov>; 'ABurton@mt.gov' <ABurton@mt.gov>; 'MSchlichting@mt.gov' <MSchlichting@mt.gov>; 'Lindsay S. See' <Lindsay.S.See@wvago.gov>; 'jonbennion@mt.gov' <jonbennion@mt.gov>; 'wstenehjem@nd.gov' <wstenehjem@nd.gov>; 'Benjamin.flowers@ohioattorneygeneral.gov' <Benjamin.flowers@ohioattorneygeneral.gov>; 'ESmith@scag.gov' <ESmith@scag.gov>; 'BCook@scag.gov' <BCook@scag.gov>; 'steven.blair@state.sd.us' <steven.blair@state.sd.us>; 'Sherri.Wald@state.sd.us' <Sherri.Wald@state.sd.us>; 'Sarah.Campbell@ag.tn.gov' <Sarah.Campbell@ag.tn.gov>; 'tom.fisher@atg.in.gov' <tom.fisher@atg.in.gov>; 'Andree.Blumstein@ag.tn.gov' <Andree.Blumstein@ag.tn.gov>; 'matthew.frederick@texasattorneygeneral.gov' <matthew.frederick@texasattorneygeneral.gov>; 'Kyle.Hawkins@oag.texas.gov' <Kyle.Hawkins@oag.texas.gov>; 'Ric Cantrell' <rcantrell@agutah.gov>; 'james.kaste@wyo.gov' <james.kaste@wyo.gov>; 'Jim.Campbell@nebraska.gov' <Jim.Campbell@nebraska.gov>; 'Thomas T. Lampman' <Thomas.T.Lampman@wvago.gov>; 'Jessica A. Lee' <Jessica.A.Lee@wvago.gov>; 'Lindsay S. See' <Lindsay.S.See@wvago.gov>; 'Roysden, Beau' <Beau.Roysden@azag.gov>; 'Bash, Zina' <Zina.Bash@oag.texas.gov>; 'masagsve@nd.gov'; 'Harley Kirkland' <HKirkland@scag.gov>; 'Eddie Lacour' <elacour@ago.state.al.us>; 'Hudson, Kian' <Kian.Hudson@atg.in.gov>; 'Kuhn, Matt F (KYOAG)' <Matt.Kuhn@ky.gov>; 'Michelle Williams' <Michelle.Williams@ago.ms.gov>; 'krissy.nobile@ago.ms.gov' <krissy.nobile@ago.ms.gov>
Subject: RE: Texas v. Pennsylvania, et al. - Amicus Brief of Missouri, at al. - Joins requested by 1:00 p.m. Central Tomorrow, 12/9

All-

Attached please find a redline with minor changes to this brief to address issues raised by several States. Thank you to Nebraska and West Virginia for proposing these changes. Arkansas, Louisiana, and Mississippi have joined, with many others expressing interest. Our printer has given a hard deadline of 1:00 pm, so please do let us know by then if you would like to join!

Thanks a lot, John Sauer

From: Sauer, John
Sent: Wednesday, December 9, 2020 9:04 AM
To: 'Mithun Mansinghani' <mithun.mansinghani@oag.ok.gov>; 'Murrill, Elizabeth' <MurrillE@ag.louisiana.gov>; 'Melissa Holyoak' <melissaholyoak@agutah.gov>; 'nicholas.bronni@arkansasag.gov' <nicholas.bronni@arkansasag.gov>; 'Vincent Wagner' <vincent.wagner@arkansasag.gov>; 'ed.sniffen@alaska.gov' <ed.sniffen@alaska.gov>; Smith, Justin <justin.smith@ago.mo.gov>; 'Amit.Agarwal@myfloridalegal.com' <Amit.Agarwal@myfloridalegal.com>; 'Kane, Brian' <brian.kane@ag.idaho.gov>; 'tom.fisher@atg.in.gov' <tom.fisher@atg.in.gov>; 'julia.payne@atg.in.gov' <julia.payne@atg.in.gov>; 'toby.crouse@ag.ks.gov' <toby.crouse@ag.ks.gov>; 'Chad.Meredith@ky.gov' <Chad.Meredith@ky.gov>; 'Andrew Pinson' <APinson@LAW.GA.GOV>; 'jeff.chanay' <jeff.chanay@ag.ks.gov>; 'St. John, Joseph' <StJohnJ@ag.louisiana.gov>; 'Kristi.Johnson@ago.ms.gov' <Kristi.Johnson@ago.ms.gov>; 'ABurton@mt.gov' <ABurton@mt.gov>; 'MSchlichting@mt.gov' <MSchlichting@mt.gov>; 'Lindsay S. See' <Lindsay.S.See@wvago.gov>; 'jonbennion@mt.gov' <jonbennion@mt.gov>; 'wstenehjem@nd.gov' <wstenehjem@nd.gov>; 'Benjamin.flowers@ohioattorneygeneral.gov' <Benjamin.flowers@ohioattorneygeneral.gov>; 'ESmith@scag.gov' <ESmith@scag.gov>; 'BCook@scag.gov' <BCook@scag.gov>; 'steven.blair@state.sd.us' <steven.blair@state.sd.us>; 'Sherri.Wald@state.sd.us' <Sherri.Wald@state.sd.us>; 'Sarah.Campbell@ag.tn.gov' <Sarah.Campbell@ag.tn.gov>; 'tom.fisher@atg.in.gov' <tom.fisher@atg.in.gov>; 'Andree.Blumstein@ag.tn.gov' <Andree.Blumstein@ag.tn.gov>; 'matthew.frederick@texasattorneygeneral.gov' <matthew.frederick@texasattorneygeneral.gov>; 'Kyle.Hawkins@oag.texas.gov' <Kyle.Hawkins@oag.texas.gov>; 'Ric Cantrell' <rcantrell@agutah.gov>; 'james.kaste@wyo.gov' <james.kaste@wyo.gov>; 'Jim.Campbell@nebraska.gov' <Jim.Campbell@nebraska.gov>; 'Thomas T. Lampman' <Thomas.T.Lampman@wvago.gov>; 'Jessica A. Lee' <Jessica.A.Lee@wvago.gov>; 'Lindsay S. See' <Lindsay.S.See@wvago.gov>; 'Roysden, Beau' <Beau.Roysden@azag.gov>; 'Bash, Zina' <Zina.Bash@oag.texas.gov>; 'masagsve@nd.gov'; 'Harley Kirkland' <HKirkland@scag.gov>; 'Eddie Lacour' <elacour@ago.state.al.us>; 'Hudson, Kian' <Kian.Hudson@atg.in.gov>; 'Kuhn, Matt F (KYOAG)' <Matt.Kuhn@ky.gov>; 'Michelle Williams'

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<Michelle.Williams@ago.ms.gov>; 'krissy.nobile@ago.ms.gov' <krissy.nobile@ago.ms.gov>
Subject: RE: Texas v. Pennsylvania, et al. - Amicus Brief of Missouri, at al. - Joins requested by 1:00 p.m. Central Tomorrow, 12/9

All-

Thank you for considering this amicus brief on such short notice. So far, Louisiana and Arkansas have joined, with several others expressing interest. I have attached an updated draft that includes minor, non-substantive edits, and which adjusts the language of the concluding paragraphs in response to comments from an interested state. The Supreme Court issued an order last night ordering the Defendant States (MI, PA, WS, GA) to file a response for the Motion for Leave to File Bill of Complaint and request for interim injunctive relief by 3:00 pm tomorrow. Given this highly accelerated briefing schedule, we would like to file this brief as soon as possible this afternoon to give the Court the most time possible to read it. Accordingly, we would prefer not to extend the deadline past 1:00 p.m. Central today, so please let us know by then if you are interested. Thanks a lot!

Best, John Sauer

From: Sauer, John
Sent: Tuesday, December 8, 2020 6:11 PM
To: 'Mithun Mansinghani' <mithun.mansinghani@oag.ok.gov>; 'Murrill, Elizabeth' <MurrillE@ag.louisiana.gov>; 'Melissa Holyoak' <melissaholyoak@agutah.gov>; 'nicholas.bronni@arkansasag.gov' <nicholas.bronni@arkansasag.gov>; 'Vincent Wagner' <vincent.wagner@arkansasag.gov>; 'ed.sniffen@alaska.gov' <ed.sniffen@alaska.gov>; Smith, Justin <justin.smith@ago.mo.gov>; 'Amit.Agarwal@myfloridalegal.com' <Amit.Agarwal@myfloridalegal.com>; 'Kane, Brian' <brian.kane@ag.idaho.gov>; 'tom.fisher@atg.in.gov' <tom.fisher@atg.in.gov>; 'julia.payne@atg.in.gov' <julia.payne@atg.in.gov>; 'toby.crouse@ag.ks.gov' <toby.crouse@ag.ks.gov>; 'Chad.Meredith@ky.gov' <Chad.Meredith@ky.gov>; 'Andrew Pinson' <APinson@LAW.GA.GOV>; 'jeff.chanay' <jeff.chanay@ag.ks.gov>; 'St. John, Joseph' <StJohnJ@ag.louisiana.gov>; 'Kristi.Johnson@ago.ms.gov' <Kristi.Johnson@ago.ms.gov>; 'ABurton@mt.gov' <ABurton@mt.gov>; 'MSchlichting@mt.gov' <MSchlichting@mt.gov>; 'Lindsay S. See' <Lindsay.S.See@wvago.gov>; 'jonbennion@mt.gov' <jonbennion@mt.gov>; 'wstenehjem@nd.gov' <wstenehjem@nd.gov>; 'Benjamin.flowers@ohioattorneygeneral.gov' <Benjamin.flowers@ohioattorneygeneral.gov>; 'ESmith@scag.gov' <ESmith@scag.gov>; 'BCook@scag.gov' <BCook@scag.gov>; 'steven.blair@state.sd.us' <steven.blair@state.sd.us>; 'Sherri.Wald@state.sd.us' <Sherri.Wald@state.sd.us>; 'Sarah.Campbell@ag.tn.gov' <Sarah.Campbell@ag.tn.gov>; 'tom.fisher@atg.in.gov' <tom.fisher@atg.in.gov>; 'Andree.Blumstein@ag.tn.gov' <Andree.Blumstein@ag.tn.gov>; 'matthew.frederick@texasattorneygeneral.gov' <matthew.frederick@texasattorneygeneral.gov>; 'Kyle.Hawkins@oag.texas.gov' <Kyle.Hawkins@oag.texas.gov>; 'Ric Cantrell' <rcantrell@agutah.gov>; 'james.kaste@wyo.gov' <james.kaste@wyo.gov>; 'Jim.Campbell@nebraska.gov' <Jim.Campbell@nebraska.gov>; 'Thomas T. Lampman' <Thomas.T.Lampman@wvago.gov>; 'Jessica A. Lee' <Jessica.A.Lee@wvago.gov>; 'Lindsay S. See' <Lindsay.S.See@wvago.gov>; 'Roysden, Beau' <Beau.Roysden@azag.gov>; 'Bash, Zina' <Zina.Bash@oag.texas.gov>; 'masagsve@nd.gov'; 'Harley Kirkland' <HKirkland@scag.gov>; 'Eddie Lacour' <elacour@ago.state.al.us>; 'Hudson, Kian' <Kian.Hudson@atg.in.gov>; 'Kuhn, Matt F (KYOAG)' <Matt.Kuhn@ky.gov>
Subject: Texas v. Pennsylvania, et al. - Amicus Brief of Missouri, at al. - Joins requested by 1:00 p.m. Central Tomorrow, 12/9

All-

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

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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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Brocker, Liz

From: Sagsveen, Matthew A.
Sent: Wednesday, December 9, 2020 10:58 AM
To: Brocker, Liz
Subject: FW: Texas v. Pennsylvania et al

From: Nicolai, James E. <jnicolai@nd.gov>
Sent: Wednesday, December 9, 2020 10:51 AM
To: Sagsveen, Matthew A. <masagsve@nd.gov>
Subject: Texas v. Pennsylvania et al

Hey Matt.

Here are my comments regarding the soundness of the legal arguments in the Texas election lawsuit.

The basic legal principle advanced in the lawsuit is that the Electors Clause of Article II, § 1 of the United States Constitution requires the "Legislature thereof" in each State to administer federal elections. Texas argues that Pennsylvania, Michigan, Georgia, and Wisconsin all violated this constitutional principle by modifying existing election laws this year, in response to the COVID pandemic, that were not adopted or ratified by the respective legislative bodies in those states.

I believe that basic underlying legal principle is sound. See Bush v. Gore, 531 U.S. 98, 104 (2000) ("[T]he state legislature's power to select the manner for appointing electors is plenary."); Republican Party of Pennsylvania v. Boockvar, No. 20-542, 2020 WL 6304626, at *1 (U.S. Oct. 28, 2020 (Alito, J.) (emphasizing a State Legislature's "authority under the Constitution of the United States to make rules governing the conduct of elections for federal office").

This basic underlying principle was addressed recently by the Eighth Circuit Court of Appeals in deciding whether Minnesota's Secretary of State could, in response to the COVID pandemic, override an election law adopted by the Minnesota Legislature. The Eighth Circuit answered that question NO, stating:

> The analysis is relatively straightforward. By its plain terms, the Electors Clause vests the power to determine the manner of selecting electors exclusively in the "Legislature" of each state. U.S. Const. art. II, § 1, cl. 2; McPherson v. Blacker, 146 U.S. 1, 27, 13 S.Ct. 3, 36 L.Ed. 869 (1892) ("The constitution .... leaves it to the legislature exclusively[.]"). And this vested authority is not just the typical legislative power exercised pursuant to a state constitution. Rather, when a state legislature enacts statutes governing presidential elections, it operates "by virtue of a direct grant of authority" under the United States Constitution. Bush v. Palm Beach Cnty. Canvassing Bd., 531 U.S. 70, 76, 121 S.Ct. 471, 148 L.Ed.2d 366 (2000). Consequently, only the Minnesota Legislature, and

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not the Secretary, has plenary authority to establish the manner of conducting the presidential election in Minnesota.

Simply put, the Secretary has no power to override the Minnesota Legislature. In fact, a legislature's power in this area is such that it "cannot be taken from them or modified" even through "their state constitutions." McPherson, 146 U.S. at 35, 13 S.Ct. 3; see also Palm Beach, 531 U.S. at 76–77, 121 S.Ct. 471. Thus, the Secretary's attempt to re-write the laws governing the deadlines for mail-in ballots in the 2020 Minnesota presidential election is invalid. However well-intentioned and appropriate from a policy perspective in the context of a pandemic during a presidential election, it is not the province of a state executive official to re-write the state's election code, at least as it pertains to selection of presidential electors. The democratically-enacted election rules in Minnesota provide that mail-in votes must be received by 8:00 p.m. on Election Day in order to be counted (or 3:00 p.m. if delivered in person). Minn. Stat. § 203B.08. The rule of law, as established by the United States Constitution and the Minnesota Legislature, dictates these rules must be followed notwithstanding the Secretary's instructions to the contrary. There is no pandemic exception to the Constitution. See Democratic Nat'l Comm. v. Wis. State Legislature, No. 20A66, —— U.S. ——, —— S.Ct. ——, ——, —— L.Ed.2d —— —, 2020 WL 6275871, at *4 (Oct. 26, 2020) (*DNC*) (Kavanaugh, J., concurring in denial of application for stay) (" '[T]he design of electoral procedures is a legislative task,' including during a pandemic.") (internal citation omitted).

Carson v. Simon, 978 F.3d 1051, 1059–60 (8th Cir. 2020)

Consistent with what the Eighth Circuit concluded in Carson v. Simon, Texas argues that non-legislative actors in all four states changed existing elections law in violation of the Electors Clause of the U.S. Constitution, the same way that Minnesota's Secretary of State violated the Elector's Clause by attempting to override an existing election statute adopted by Minnesota's Legislature.

Texas further argues the acts of these non-legislators resulted in ballots being cast in all four states in violation of existing state law, and thus those votes are invalid and dilute the votes of valid voters. See Anderson v. United States, 417 U.S. 211, 227 (1974) ("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."). In other words, invalid votes (i.e., those allowed pursuant to the acts of non-legislators instead of existing state law) cast in Michigan, Georgia, Pennsylvania, and Wisconsin will impact the presidential election and dilute the votes of valid electors in other states, including Texas. I also believe this vote dilution principle is sound, and is consistent with what we argued in the Brakebill case.

With that said, I do not anticipate the Supreme Court will grant Texas the injunctive relief it seeks or interfere with the 2020 Presidential election in any way. See Purcell v. Gonzalez, 549 U.S. 1 (2006) (indicating that courts, including the Supreme Court, should not interfere with elections that are already underway even when there is a strong likelihood that a plaintiff has shown a constitutional violation, dues to the interests of preserving the public's confidence in the election process).

But I do think there is an outside chance that the Supreme Court will allow Texas's lawsuit to go forward, and at some later date issue an opinion -- that has no impact on the current election – on

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the underlying legal principle advanced by Texas in this case. That is, to say for the sake of future elections that non-legislative actors cannot modify existing state election laws governing presidential elections: that function is solely within the province of State Legislature's.

Jim

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ND-AG-21-0189-A-000848

Brocker, Liz

From: Nicolai, James E.
Sent: Thursday, December 10, 2020 2:29 PM
To: Stenehjem, Wayne K.
Cc: Sagsveen, Matthew A.
Subject: Texas v. Pennsylvania
Attachments: Ohio amicus (Texas v Pennslyvania).pdf

Hi Wayne.

Lots of goings on today in Texas's election lawsuit, some of which you may already be aware. Six states (Missouri, Arkansas, Louisiana, Mississippi, South Carolina, and Utah) filed a joint motion to intervene directly in the case.

In addition, six more motions to file amicus briefs were filed, plus the responses by the four defendant states.

I am attaching Ohio's amicus brief. It says it is not in favor of either side, says the Court should not grant Texas the relief it seeks, but nevertheless urges the Court to take the case up for the purpose of answering the basic question raised in Texas's suit regarding whether non-legislators (courts and executive officials) can change a state's election laws midstream of an election.

I still think it is most likely that the Court will deny this in one sentence, as they did with the Pennsylvania case a couple days ago, but Ohio's suggestion is consistent with the "outside chance" I mentioned about the Court denying any injunctive relief with respect to this particular election, but still allowing the bill of complaint to proceed and later issuing an opinion on the primary legal issue raised regarding the meaning of the Elector's Clause.

Jim

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Brocker, Liz

From: Sauer, John <John.Sauer@ago.mo.gov>
Sent: Saturday, November 7, 2020 3:39 PM
To: 'Murrill, Elizabeth'; Amit.Agarwal@myfloridalegal.com; Nicholas Bronni; Andrew Pinson; tom.fisher@atg.in.gov; brian.kane@ag.idaho.gov; Dave Bydalek; james.smith@nebraska.gov; Emory Smith; Parkin Hunter; Sherri.Wald@state.sd.us; Lynell.Erickson@state.sd.us; Kyle.Hawkins@oag.texas.gov; Kristi Johnson; Lindsay S. See; Stenehjem, Wayne K.; Melissa Holyoak; Mithun Mansinghani; LaCour, Edmund; ed.sniffen@alaska.gov; beau.roysden@azag.gov; Chad Meredith; Payne, Julia; 'ben.flowers@ohioattorneygeneral.gov'; Sagsveen, Matthew A.; Andree Blumstein; Sarah K. Campbell; Lindsay S. See; 'Bash, Zina'
Cc: Smith, Justin
Subject: Republican Party of Pennsylvania v. Boockvar - Draft Amicus Brief - NOON Monday deadline
Attachments: 2020-11-07 - Republican Party of PA v. Boockvar -Draft Amicus Brief of States.docx

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Dear Counsel-

Attached is a proposed draft amicus brief supporting the cert petitions in *Republican Party of Pennsylvania v. Boockvar* and the related case in the Supreme Court. The amicus brief argues that (1) the Election Clauses' allocation of authority to the "Legislature thereof" in each State is a structural separation-of-powers provision that provides an important safeguard to individual liberty, and (2) there are real risks of fraud in voting-by-mail, which the Pennsylvania decision exacerbated by extending the deadline to submit ballots past Election Day and counting ballots with no postmark or an illegible postmark as timely. Given the time-sensitive nature of this case, we would like to file this brief, if possible, by Monday afternoon, so please let us know by noon Central time on Monday if you would like to join. Thank you all for your consideration on such short notice.

Thank you,

John Sauer

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Brocker, Liz

From: Mithun Mansinghani <mithun.mansinghani@oag.ok.gov>
Sent: Wednesday, December 9, 2020 1:03 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'; 'ABurton@mt.gov'; 'MSchlichting@mt.gov'; 'Lindsay S. See'; 'jonbennion@mt.gov'; Stenehjem, Wayne K.; 'Benjamin.flowers@ohioattorneygeneral.gov'; 'ESmith@scag.gov'; 'BCook@scag.gov'; 'steven.blair@state.sd.us'; 'Sherri.Wald@state.sd.us'; 'Sarah.Campbell@ag.tn.gov'; 'tom.fisher@atg.in.gov'; 'Andree.Blumstein@ag.tn.gov'; 'matthew.frederick@texasattorneygeneral.gov'; 'Kyle.Hawkins@oag.texas.gov'; 'Ric Cantrell'; 'james.kaste@wyo.gov'; 'Jim.Campbell@nebraska.gov'; 'Thomas T. Lampman'; 'Jessica A. Lee'; 'Lindsay S. See'; 'Roysden, Beau'; 'Bash, Zina'; 'masagsve@nd.gov'; 'Harley Kirkland'; 'Eddie Lacour'; 'Hudson, Kian'; 'Kuhn, Matt F (KYOAG)'; 'Michelle Williams'; 'krissy.nobile@ago.ms.gov'
Subject: RE: Texas v. Pennsylvania, et al. - Amicus Brief of Missouri, at al. - Joins requested by 1:00 p.m. Central Tomorrow, 12/9

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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>

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Indiana has joined

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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>;

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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

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>;

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'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

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!

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Thanks a lot, John Sauer

From: Sauer, John
Sent: Wednesday, December 9, 2020 9:04 AM
To: 'Mithun Mansinghani' <mithun.mansinghani@oag.ok.gov>; 'Murrill, Elizabeth' <MurrillE@ag.louisiana.gov>; 'Melissa Holyoak' <melissaholyoak@agutah.gov>; 'nicholas.bronni@arkansasag.gov' <nicholas.bronni@arkansasag.gov>; 'Vincent Wagner' <vincent.wagner@arkansasag.gov>; 'ed.sniffen@alaska.gov' <ed.sniffen@alaska.gov>; Smith, Justin <justin.smith@ago.mo.gov>; 'Amit.Agarwal@myfloridalegal.com' <Amit.Agarwal@myfloridalegal.com>; 'Kane, Brian' <brian.kane@ag.idaho.gov>; 'tom.fisher@atg.in.gov' <tom.fisher@atg.in.gov>; 'julia.payne@atg.in.gov' <julia.payne@atg.in.gov>; 'toby.crouse@ag.ks.gov' <toby.crouse@ag.ks.gov>; 'Chad.Meredith@ky.gov' <Chad.Meredith@ky.gov>; 'Andrew Pinson' <APinson@LAW.GA.GOV>; 'jeff.chanay' <jeff.chanay@ag.ks.gov>; 'St. John, Joseph' <StJohnJ@ag.louisiana.gov>; 'Kristi.Johnson@ago.ms.gov' <Kristi.Johnson@ago.ms.gov>; 'ABurton@mt.gov' <ABurton@mt.gov>; 'MSchlichting@mt.gov' <MSchlichting@mt.gov>; 'Lindsay S. See' <Lindsay.S.See@wvago.gov>; 'jonbennion@mt.gov' <jonbennion@mt.gov>; 'wstenehjem@nd.gov' <wstenehjem@nd.gov>; 'Benjamin.flowers@ohioattorneygeneral.gov' <Benjamin.flowers@ohioattorneygeneral.gov>; 'ESmith@scag.gov' <ESmith@scag.gov>; 'BCook@scag.gov' <BCook@scag.gov>; 'steven.blair@state.sd.us' <steven.blair@state.sd.us>; 'Sherri.Wald@state.sd.us' <Sherri.Wald@state.sd.us>; 'Sarah.Campbell@ag.tn.gov' <Sarah.Campbell@ag.tn.gov>; 'tom.fisher@atg.in.gov' <tom.fisher@atg.in.gov>; 'Andree.Blumstein@ag.tn.gov' <Andree.Blumstein@ag.tn.gov>; 'matthew.frederick@texasattorneygeneral.gov' <matthew.frederick@texasattorneygeneral.gov>; 'Kyle.Hawkins@oag.texas.gov' <Kyle.Hawkins@oag.texas.gov>; 'Ric Cantrell' <rcantrell@agutah.gov>; 'james.kaste@wyo.gov' <james.kaste@wyo.gov>; 'Jim.Campbell@nebraska.gov' <Jim.Campbell@nebraska.gov>; 'Thomas T. Lampman' <Thomas.T.Lampman@wvago.gov>; 'Jessica A. Lee' <Jessica.A.Lee@wvago.gov>; 'Lindsay S. See' <Lindsay.S.See@wvago.gov>; 'Roysden, Beau' <Beau.Roysden@azag.gov>; 'Bash, Zina' <Zina.Bash@oag.texas.gov>; 'masagsve@nd.gov'; 'Harley Kirkland' <HKirkland@scag.gov>; 'Eddie Lacour' <elacour@ago.state.al.us>; 'Hudson, Kian' <Kian.Hudson@atg.in.gov>; 'Kuhn, Matt F (KYOAG)' <Matt.Kuhn@ky.gov>; 'Michelle Williams' <Michelle.Williams@ago.ms.gov>; 'krissy.nobile@ago.ms.gov' <krissy.nobile@ago.ms.gov>
Subject: RE: Texas v. Pennsylvania, et al. - Amicus Brief of Missouri, at al. - Joins requested by 1:00 p.m. Central Tomorrow, 12/9

All-

Thank you for considering this amicus brief on such short notice. So far, Louisiana and Arkansas have joined, with several others expressing interest. I have attached an updated draft that includes minor, non-substantive edits, and which adjusts the language of the concluding paragraphs in response to comments from an interested state. The Supreme Court issued an order last night ordering the Defendant States (MI, PA, WS, GA) to file a response for the Motion for Leave to File Bill of Complaint and request for interim injunctive relief by 3:00 pm tomorrow. Given this highly accelerated briefing schedule, we would like to file this brief as soon as possible this afternoon to give the Court the most time possible to read it. Accordingly, we would prefer not to extend the deadline past 1:00 p.m. Central today, so please let us know by then if you are interested. Thanks a lot!

Best, John Sauer

From: Sauer, John
Sent: Tuesday, December 8, 2020 6:11 PM
To: 'Mithun Mansinghani' <mithun.mansinghani@oag.ok.gov>; 'Murrill, Elizabeth' <MurrillE@ag.louisiana.gov>; 'Melissa Holyoak' <melissaholyoak@agutah.gov>; 'nicholas.bronni@arkansasag.gov' <nicholas.bronni@arkansasag.gov>; 'Vincent Wagner' <vincent.wagner@arkansasag.gov>; 'ed.sniffen@alaska.gov' <ed.sniffen@alaska.gov>; Smith, Justin <justin.smith@ago.mo.gov>; 'Amit.Agarwal@myfloridalegal.com' <Amit.Agarwal@myfloridalegal.com>; 'Kane, Brian' <brian.kane@ag.idaho.gov>; 'tom.fisher@atg.in.gov' <tom.fisher@atg.in.gov>; 'julia.payne@atg.in.gov' <julia.payne@atg.in.gov>; 'toby.crouse@ag.ks.gov' <toby.crouse@ag.ks.gov>; 'Chad.Meredith@ky.gov' <Chad.Meredith@ky.gov>; 'Andrew Pinson' <APinson@LAW.GA.GOV>; 'jeff.chanay' <jeff.chanay@ag.ks.gov>; 'St. John,

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ND-AG-21-0189-A-000855

Joseph' <StJohnJ@ag.louisiana.gov>; 'Kristi.Johnson@ago.ms.gov' <Kristi.Johnson@ago.ms.gov>; 'ABurton@mt.gov' <ABurton@mt.gov>; 'MSchlichting@mt.gov' <MSchlichting@mt.gov>; 'Lindsay S. See' <Lindsay.S.See@wvago.gov>; 'jonbennion@mt.gov' <jonbennion@mt.gov>; 'wstenehjem@nd.gov' <wstenehjem@nd.gov>; 'Benjamin.flowers@ohioattorneygeneral.gov' <Benjamin.flowers@ohioattorneygeneral.gov>; 'ESmith@scag.gov' <ESmith@scag.gov>; 'BCook@scag.gov' <BCook@scag.gov>; 'steven.blair@state.sd.us' <steven.blair@state.sd.us>; 'Sherri.Wald@state.sd.us' <Sherri.Wald@state.sd.us>; 'Sarah.Campbell@ag.tn.gov' <Sarah.Campbell@ag.tn.gov>; 'tom.fisher@atg.in.gov' <tom.fisher@atg.in.gov>; 'Andree.Blumstein@ag.tn.gov' <Andree.Blumstein@ag.tn.gov>; 'matthew.frederick@texasattorneygeneral.gov' <matthew.frederick@texasattorneygeneral.gov>; 'Kyle.Hawkins@oag.texas.gov' <Kyle.Hawkins@oag.texas.gov>; 'Ric Cantrell' <rcantrell@agutah.gov>; 'james.kaste@wyo.gov' <james.kaste@wyo.gov>; 'Jim.Campbell@nebraska.gov' <Jim.Campbell@nebraska.gov>; 'Thomas T. Lampman' <Thomas.T.Lampman@wvago.gov>; 'Jessica A. Lee' <Jessica.A.Lee@wvago.gov>; 'Lindsay S. See' <Lindsay.S.See@wvago.gov>; 'Roysden, Beau' <Beau.Roysden@azag.gov>; 'Bash, Zina' <Zina.Bash@oag.texas.gov>; 'masagsve@nd.gov'; 'Harley Kirkland' <HKirkland@scag.gov>; 'Eddie Lacour' <elacour@ago.state.al.us>; 'Hudson, Kian' <Kian.Hudson@atg.in.gov>; 'Kuhn, Matt F (KYOAG)' <Matt.Kuhn@ky.gov>
Subject: Texas v. Pennsylvania, et al. - Amicus Brief of Missouri, at al. - Joins requested by 1:00 p.m. Central Tomorrow, 12/9

All-

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

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

Thanks a lot,

John Sauer

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Brocker, Liz

From: Sauer, John <John.Sauer@ago.mo.gov>
Sent: Wednesday, December 9, 2020 12:56 PM
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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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Indiana has joined

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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

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>;

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

From: Sauer, John
Sent: Wednesday, December 9, 2020 12:32 PM
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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'

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

All-

Attached please find a redline with minor changes to this brief to address issues raised by several States. Thank you to Nebraska and West Virginia for proposing these changes. Arkansas, Louisiana, and Mississippi have joined, with many others expressing interest. Our printer has given a hard deadline of 1:00 pm, so please do let us know by then if you would like to join!

Thanks a lot, John Sauer

From: Sauer, John
Sent: Wednesday, December 9, 2020 9:04 AM
To: 'Mithun Mansinghani' <mithun.mansinghani@oag.ok.gov>; 'Murrill, Elizabeth' <MurrillE@ag.louisiana.gov>; 'Melissa Holyoak' <melissaholyoak@agutah.gov>; 'nicholas.bronni@arkansasag.gov' <nicholas.bronni@arkansasag.gov>; 'Vincent Wagner' <vincent.wagner@arkansasag.gov>; 'ed.sniffen@alaska.gov' <ed.sniffen@alaska.gov>; Smith, Justin <justin.smith@ago.mo.gov>; 'Amit.Agarwal@myfloridalegal.com' <Amit.Agarwal@myfloridalegal.com>; 'Kane, Brian' <brian.kane@ag.idaho.gov>; 'tom.fisher@atg.in.gov' <tom.fisher@atg.in.gov>; 'julia.payne@atg.in.gov' <julia.payne@atg.in.gov>; 'toby.crouse@ag.ks.gov' <toby.crouse@ag.ks.gov>; 'Chad.Meredith@ky.gov' <Chad.Meredith@ky.gov>; 'Andrew Pinson' <APinson@LAW.GA.GOV>; 'jeff.chanay' <jeff.chanay@ag.ks.gov>; 'St. John, Joseph' <StJohnJ@ag.louisiana.gov>; 'Kristi.Johnson@ago.ms.gov' <Kristi.Johnson@ago.ms.gov>; 'ABurton@mt.gov' <ABurton@mt.gov>; 'MSchlichting@mt.gov' <MSchlichting@mt.gov>; 'Lindsay S. See' <Lindsay.S.See@wvago.gov>; 'jonbennion@mt.gov' <jonbennion@mt.gov>; 'wstenehjem@nd.gov' <wstenehjem@nd.gov>; 'Benjamin.flowers@ohioattorneygeneral.gov' <Benjamin.flowers@ohioattorneygeneral.gov>; 'ESmith@scag.gov' <ESmith@scag.gov>; 'BCook@scag.gov' <BCook@scag.gov>; 'steven.blair@state.sd.us' <steven.blair@state.sd.us>; 'Sherri.Wald@state.sd.us' <Sherri.Wald@state.sd.us>; 'Sarah.Campbell@ag.tn.gov' <Sarah.Campbell@ag.tn.gov>; 'tom.fisher@atg.in.gov' <tom.fisher@atg.in.gov>; 'Andree.Blumstein@ag.tn.gov' <Andree.Blumstein@ag.tn.gov>; 'matthew.frederick@texasattorneygeneral.gov' <matthew.frederick@texasattorneygeneral.gov>; 'Kyle.Hawkins@oag.texas.gov' <Kyle.Hawkins@oag.texas.gov>; 'Ric Cantrell' <rcantrell@agutah.gov>; 'james.kaste@wyo.gov' <james.kaste@wyo.gov>; 'Jim.Campbell@nebraska.gov' <Jim.Campbell@nebraska.gov>; 'Thomas T. Lampman' <Thomas.T.Lampman@wvago.gov>; 'Jessica A. Lee' <Jessica.A.Lee@wvago.gov>; 'Lindsay S. See' <Lindsay.S.See@wvago.gov>; 'Roysden, Beau' <Beau.Roysden@azag.gov>; 'Bash, Zina' <Zina.Bash@oag.texas.gov>; 'masagsve@nd.gov'; 'Harley Kirkland' <HKirkland@scag.gov>; 'Eddie Lacour' <elacour@ago.state.al.us>; 'Hudson, Kian' <Kian.Hudson@atg.in.gov>; 'Kuhn, Matt F (KYOAG)' <Matt.Kuhn@ky.gov>; 'Michelle Williams' <Michelle.Williams@ago.ms.gov>; 'krissy.nobile@ago.ms.gov' <krissy.nobile@ago.ms.gov>
Subject: RE: Texas v. Pennsylvania, et al. - Amicus Brief of Missouri, at al. - Joins requested by 1:00 p.m. Central Tomorrow, 12/9

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All-

Thank you for considering this amicus brief on such short notice. So far, Louisiana and Arkansas have joined, with several others expressing interest. I have attached an updated draft that includes minor, non-substantive edits, and which adjusts the language of the concluding paragraphs in response to comments from an interested state. The Supreme Court issued an order last night ordering the Defendant States (MI, PA, WS, GA) to file a response for the Motion for Leave to File Bill of Complaint and request for interim injunctive relief by 3:00 pm tomorrow. Given this highly accelerated briefing schedule, we would like to file this brief as soon as possible this afternoon to give the Court the most time possible to read it. Accordingly, we would prefer not to extend the deadline past 1:00 p.m. Central today, so please let us know by then if you are interested. Thanks a lot!

Best, John Sauer

From: Sauer, John
Sent: Tuesday, December 8, 2020 6:11 PM
To: 'Mithun Mansinghani' <mithun.mansinghani@oag.ok.gov>; 'Murrill, Elizabeth' <MurrillE@ag.louisiana.gov>; 'Melissa Holyoak' <melissaholyoak@agutah.gov>; 'nicholas.bronni@arkansasag.gov' <nicholas.bronni@arkansasag.gov>; 'Vincent Wagner' <vincent.wagner@arkansasag.gov>; 'ed.sniffen@alaska.gov' <ed.sniffen@alaska.gov>; Smith, Justin <justin.smith@ago.mo.gov>; 'Amit.Agarwal@myfloridalegal.com' <Amit.Agarwal@myfloridalegal.com>; 'Kane, Brian' <brian.kane@ag.idaho.gov>; 'tom.fisher@atg.in.gov' <tom.fisher@atg.in.gov>; 'julia.payne@atg.in.gov' <julia.payne@atg.in.gov>; 'toby.crouse@ag.ks.gov' <toby.crouse@ag.ks.gov>; 'Chad.Meredith@ky.gov' <Chad.Meredith@ky.gov>; 'Andrew Pinson' <APinson@LAW.GA.GOV>; 'jeff.chanay' <jeff.chanay@ag.ks.gov>; 'St. John, Joseph' <StJohnJ@ag.louisiana.gov>; 'Kristi.Johnson@ago.ms.gov' <Kristi.Johnson@ago.ms.gov>; 'ABurton@mt.gov' <ABurton@mt.gov>; 'MSchlichting@mt.gov' <MSchlichting@mt.gov>; 'Lindsay S. See' <Lindsay.S.See@wvago.gov>; 'jonbennion@mt.gov' <jonbennion@mt.gov>; 'wstenehjem@nd.gov' <wstenehjem@nd.gov>; 'Benjamin.flowers@ohioattorneygeneral.gov' <Benjamin.flowers@ohioattorneygeneral.gov>; 'ESmith@scag.gov' <ESmith@scag.gov>; 'BCook@scag.gov' <BCook@scag.gov>; 'steven.blair@state.sd.us' <steven.blair@state.sd.us>; 'Sherri.Wald@state.sd.us' <Sherri.Wald@state.sd.us>; 'Sarah.Campbell@ag.tn.gov' <Sarah.Campbell@ag.tn.gov>; 'tom.fisher@atg.in.gov' <tom.fisher@atg.in.gov>; 'Andree.Blumstein@ag.tn.gov' <Andree.Blumstein@ag.tn.gov>; 'matthew.frederick@texasattorneygeneral.gov' <matthew.frederick@texasattorneygeneral.gov>; 'Kyle.Hawkins@oag.texas.gov' <Kyle.Hawkins@oag.texas.gov>; 'Ric Cantrell' <rcantrell@agutah.gov>; 'james.kaste@wyo.gov' <james.kaste@wyo.gov>; 'Jim.Campbell@nebraska.gov' <Jim.Campbell@nebraska.gov>; 'Thomas T. Lampman' <Thomas.T.Lampman@wvago.gov>; 'Jessica A. Lee' <Jessica.A.Lee@wvago.gov>; 'Lindsay S. See' <Lindsay.S.See@wvago.gov>; 'Roysden, Beau' <Beau.Roysden@azag.gov>; 'Bash, Zina' <Zina.Bash@oag.texas.gov>; 'masagsve@nd.gov'; 'Harley Kirkland' <HKirkland@scag.gov>; 'Eddie Lacour' <elacour@ago.state.al.us>; 'Hudson, Kian' <Kian.Hudson@atg.in.gov>; 'Kuhn, Matt F (KYOAG)' <Matt.Kuhn@ky.gov>
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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ND-AG-21-0189-A-000861

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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Brocker, Liz

From: Sauer, John <John.Sauer@ago.mo.gov>
Sent: Wednesday, December 9, 2020 12:49 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'; 'Kristi.Johnson@ago.ms.gov'; 'ABurton@mt.gov'; 'MSchlichting@mt.gov'; 'Lindsay S. See'; 'jonbennion@mt.gov'; Stenehjem, Wayne K.; 'Benjamin.flowers@ohioattorneygeneral.gov'; 'ESmith@scag.gov'; 'BCook@scag.gov'; 'steven.blair@state.sd.us'; 'Sherri.Wald@state.sd.us'; 'Sarah.Campbell@ag.tn.gov'; 'tom.fisher@atg.in.gov'; 'Andree.Blumstein@ag.tn.gov'; 'matthew.frederick@texasattorneygeneral.gov'; 'Kyle.Hawkins@oag.texas.gov'; 'Ric Cantrell'; 'james.kaste@wyo.gov'; 'Jim.Campbell@nebraska.gov'; 'Thomas T. Lampman'; 'Jessica A. Lee'; 'Lindsay S. See'; 'Roysden, Beau'; 'Bash, Zina'; 'masagsve@nd.gov'; 'Harley Kirkland'; 'Eddie Lacour'; 'Hudson, Kian'; 'Kuhn, Matt F (KYOAG)'; 'Michelle Williams'; 'krissy.nobile@ago.ms.gov'
Subject: RE: Texas v. Pennsylvania, et al. - Amicus Brief of Missouri, at al. - Joins requested by 1:00 p.m. Central Tomorrow, 12/9

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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' <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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Sent: Wednesday, December 9, 2020 12:32 PM
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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

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

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To: 'Mithun Mansinghani' <mithun.mansinghani@oag.ok.gov>; 'Murrill, Elizabeth' <MurrillE@ag.louisiana.gov>; 'Melissa

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Holyoak' <melissaholyoak@agutah.gov>; 'nicholas.bronni@arkansasag.gov' <nicholas.bronni@arkansasag.gov>; 'Vincent Wagner' <vincent.wagner@arkansasag.gov>; 'ed.sniffen@alaska.gov' <ed.sniffen@alaska.gov>; Smith, Justin <justin.smith@ago.mo.gov>; 'Amit.Agarwal@myfloridalegal.com' <Amit.Agarwal@myfloridalegal.com>; 'Kane, Brian' <brian.kane@ag.idaho.gov>; 'tom.fisher@atg.in.gov' <tom.fisher@atg.in.gov>; 'julia.payne@atg.in.gov' <julia.payne@atg.in.gov>; 'toby.crouse@ag.ks.gov' <toby.crouse@ag.ks.gov>; 'Chad.Meredith@ky.gov' <Chad.Meredith@ky.gov>; 'Andrew Pinson' <APinson@LAW.GA.GOV>; 'jeff.chanay' <jeff.chanay@ag.ks.gov>; 'St. John, Joseph' <StJohnJ@ag.louisiana.gov>; 'Kristi.Johnson@ago.ms.gov' <Kristi.Johnson@ago.ms.gov>; 'ABurton@mt.gov' <ABurton@mt.gov>; 'MSchlichting@mt.gov' <MSchlichting@mt.gov>; 'Lindsay S. See' <Lindsay.S.See@wvago.gov>; 'jonbennion@mt.gov' <jonbennion@mt.gov>; 'wstenehjem@nd.gov' <wstenehjem@nd.gov>; 'Benjamin.flowers@ohioattorneygeneral.gov' <Benjamin.flowers@ohioattorneygeneral.gov>; 'ESmith@scag.gov' <ESmith@scag.gov>; 'BCook@scag.gov' <BCook@scag.gov>; 'steven.blair@state.sd.us' <steven.blair@state.sd.us>; 'Sherri.Wald@state.sd.us' <Sherri.Wald@state.sd.us>; 'Sarah.Campbell@ag.tn.gov' <Sarah.Campbell@ag.tn.gov>; 'tom.fisher@atg.in.gov' <tom.fisher@atg.in.gov>; 'Andree.Blumstein@ag.tn.gov' <Andree.Blumstein@ag.tn.gov>; 'matthew.frederick@texasattorneygeneral.gov' <matthew.frederick@texasattorneygeneral.gov>; 'Kyle.Hawkins@oag.texas.gov' <Kyle.Hawkins@oag.texas.gov>; 'Ric Cantrell' <rcantrell@agutah.gov>; 'james.kaste@wyo.gov' <james.kaste@wyo.gov>; 'Jim.Campbell@nebraska.gov' <Jim.Campbell@nebraska.gov>; 'Thomas T. Lampman' <Thomas.T.Lampman@wvago.gov>; 'Jessica A. Lee' <Jessica.A.Lee@wvago.gov>; 'Lindsay S. See' <Lindsay.S.See@wvago.gov>; 'Roysden, Beau' <Beau.Roysden@azag.gov>; 'Bash, Zina' <Zina.Bash@oag.texas.gov>; 'masagsve@nd.gov'; 'Harley Kirkland' <HKirkland@scag.gov>; 'Eddie Lacour' <elacour@ago.state.al.us>; 'Hudson, Kian' <Kian.Hudson@atg.in.gov>; 'Kuhn, Matt F (KYOAG)' <Matt.Kuhn@ky.gov>; 'Michelle Williams' <Michelle.Williams@ago.ms.gov>; 'krissy.nobile@ago.ms.gov' <krissy.nobile@ago.ms.gov>
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All-

Thank you for considering this amicus brief on such short notice. So far, Louisiana and Arkansas have joined, with several others expressing interest. I have attached an updated draft that includes minor, non-substantive edits, and which adjusts the language of the concluding paragraphs in response to comments from an interested state. The Supreme Court issued an order last night ordering the Defendant States (MI, PA, WS, GA) to file a response for the Motion for Leave to File Bill of Complaint and request for interim injunctive relief by 3:00 pm tomorrow. Given this highly accelerated briefing schedule, we would like to file this brief as soon as possible this afternoon to give the Court the most time possible to read it. Accordingly, we would prefer not to extend the deadline past 1:00 p.m. Central today, so please let us know by then if you are interested. Thanks a lot!

Best, John Sauer

From: Sauer, John
Sent: Tuesday, December 8, 2020 6:11 PM
To: 'Mithun Mansinghani' <mithun.mansinghani@oag.ok.gov>; 'Murrill, Elizabeth' <MurrillE@ag.louisiana.gov>; 'Melissa Holyoak' <melissaholyoak@agutah.gov>; 'nicholas.bronni@arkansasag.gov' <nicholas.bronni@arkansasag.gov>; 'Vincent Wagner' <vincent.wagner@arkansasag.gov>; 'ed.sniffen@alaska.gov' <ed.sniffen@alaska.gov>; Smith, Justin <justin.smith@ago.mo.gov>; 'Amit.Agarwal@myfloridalegal.com' <Amit.Agarwal@myfloridalegal.com>; 'Kane, Brian' <brian.kane@ag.idaho.gov>; 'tom.fisher@atg.in.gov' <tom.fisher@atg.in.gov>; 'julia.payne@atg.in.gov' <julia.payne@atg.in.gov>; 'toby.crouse@ag.ks.gov' <toby.crouse@ag.ks.gov>; 'Chad.Meredith@ky.gov' <Chad.Meredith@ky.gov>; 'Andrew Pinson' <APinson@LAW.GA.GOV>; 'jeff.chanay' <jeff.chanay@ag.ks.gov>; 'St. John, Joseph' <StJohnJ@ag.louisiana.gov>; 'Kristi.Johnson@ago.ms.gov' <Kristi.Johnson@ago.ms.gov>; 'ABurton@mt.gov' <ABurton@mt.gov>; 'MSchlichting@mt.gov' <MSchlichting@mt.gov>; 'Lindsay S. See' <Lindsay.S.See@wvago.gov>; 'jonbennion@mt.gov' <jonbennion@mt.gov>; 'wstenehjem@nd.gov' <wstenehjem@nd.gov>; 'Benjamin.flowers@ohioattorneygeneral.gov' <Benjamin.flowers@ohioattorneygeneral.gov>; 'ESmith@scag.gov' <ESmith@scag.gov>; 'BCook@scag.gov' <BCook@scag.gov>; 'steven.blair@state.sd.us' <steven.blair@state.sd.us>; 'Sherri.Wald@state.sd.us' <Sherri.Wald@state.sd.us>; 'Sarah.Campbell@ag.tn.gov' <Sarah.Campbell@ag.tn.gov>;

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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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Brocker, Liz

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Florida and North Dakota have joined as well

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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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'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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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

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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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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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ND-AG-21-0189-A-000871

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Brocker, Liz

From: Sauer, John <John.Sauer@ago.mo.gov>
Sent: Wednesday, December 9, 2020 12:45 PM
To: Seibel, Troy T.
Cc: Sagsveen, Matthew A.; Smith, Justin; Johnson, Jeff
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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From: Seibel, Troy T. <tseibel@nd.gov>
Sent: Wednesday, December 9, 2020 12:43 PM
To: Sauer, John <John.Sauer@ago.mo.gov>
Cc: Sagsveen, Matthew A. <masagsve@nd.gov>
Subject: FW: Texas v. Pennsylvania, et al. - Amicus Brief of Missouri, at al. - Joins requested by 1:00 p.m. Central Tomorrow, 12/9
Importance: High

John,

ND joins. Thanks.

Troy T. Seibel
Chief Deputy Attorney General
Office of Attorney General
600 E. Boulevard Ave., Dept. 125
Bismarck, ND 58505
701-328-2210
tseibel@nd.gov

From: Sagsveen, Matthew A. <masagsve@nd.gov>
Sent: Tuesday, December 8, 2020 6:17 PM
To: Stenehjem, Wayne K. <wstenehjem@nd.gov>; Seibel, Troy T. <tseibel@nd.gov>
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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<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>; Stenehjem, Wayne K. <wstenehjem@nd.gov>; 'Benjamin.flowers@ohioattorneygeneral.gov' <Benjamin.flowers@ohioattorneygeneral.gov>; 'ESmith@scag.gov' <ESmith@scag.gov>; 'BCook@scag.gov' <BCook@scag.gov>; 'steven.blair@state.sd.us' <steven.blair@state.sd.us>; 'Sherri.Wald@state.sd.us' <Sherri.Wald@state.sd.us>; 'Sarah.Campbell@ag.tn.gov' <Sarah.Campbell@ag.tn.gov>; 'tom.fisher@atg.in.gov' <tom.fisher@atg.in.gov>; 'Andree.Blumstein@ag.tn.gov' <Andree.Blumstein@ag.tn.gov>; 'matthew.frederick@texasattorneygeneral.gov' <matthew.frederick@texasattorneygeneral.gov>; 'Kyle.Hawkins@oag.texas.gov' <Kyle.Hawkins@oag.texas.gov>; 'Ric Cantrell' <rcantrell@agutah.gov>; 'james.kaste@wyo.gov' <james.kaste@wyo.gov>; 'Jim.Campbell@nebraska.gov' <Jim.Campbell@nebraska.gov>; 'Thomas T. Lampman' <Thomas.T.Lampman@wvago.gov>; 'Jessica A. Lee' <Jessica.A.Lee@wvago.gov>; 'Lindsay S. See' <Lindsay.S.See@wvago.gov>; 'Roysden, Beau' <Beau.Roysden@azag.gov>; 'Bash, Zina' <Zina.Bash@oag.texas.gov>; 'masagsve@nd.gov'; 'Harley Kirkland' <HKirkland@scag.gov>; 'Eddie Lacour' <elacour@ago.state.al.us>; 'Hudson, Kian' <Kian.Hudson@atg.in.gov>; 'Kuhn, Matt F (KYOAG)' <Matt.Kuhn@ky.gov>

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Thanks a lot,

John Sauer

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Brocker, Liz

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Sent: Wednesday, December 9, 2020 12:43 PM
To: John.Sauer@ago.mo.gov
Cc: Sagsveen, Matthew A.
Subject: FW: Texas v. Pennsylvania, et al. - Amicus Brief of Missouri, at al. - Joins requested by 1:00 p.m. Central Tomorrow, 12/9
Attachments: 2020-12-07 - Texas v. Pennsylvania, et al. - Bill of Complaint.pdf; 2020-12-08 - Texas v. Pennsylvania - Amicus Brief of Missouri et al.docx

Importance: High

John,

ND joins. Thanks.

Troy T. Seibel
Chief Deputy Attorney General
Office of Attorney General
600 E. Boulevard Ave., Dept. 125
Bismarck, ND 58505
701-328-2210
tseibel@nd.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, ___ 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

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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.* "Every voter" in a federal election "has a right under the Constitution to have his vote fairly counted, without its being distorted by fraudulently cast votes." *Anderson* v. *United States*, 417 U.S. 211, 227 (1974).

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

---

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

AMERICAN OVERSIGHT

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

AMERICAN OVERSIGHT

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

AMERICAN OVERSIGHT

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.

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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Brocker, Liz

From: Sauer, John <John.Sauer@ago.mo.gov>
Sent: Wednesday, December 9, 2020 12:33 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'; 'Kristi.Johnson@ago.ms.gov'; 'ABurton@mt.gov'; 'MSchlichting@mt.gov'; 'Lindsay S. See'; 'jonbennion@mt.gov'; Stenehjem, Wayne K.; 'Benjamin.flowers@ohioattorneygeneral.gov'; 'ESmith@scag.gov'; 'BCook@scag.gov'; 'steven.blair@state.sd.us'; 'Sherri.Wald@state.sd.us'; 'Sarah.Campbell@ag.tn.gov'; 'tom.fisher@atg.in.gov'; 'Andree.Blumstein@ag.tn.gov'; 'matthew.frederick@texasattorneygeneral.gov'; 'Kyle.Hawkins@oag.texas.gov'; 'Ric Cantrell'; 'james.kaste@wyo.gov'; 'Jim.Campbell@nebraska.gov'; 'Thomas T. Lampman'; 'Jessica A. Lee'; 'Lindsay S. See'; 'Roysden, Beau'; 'Bash, Zina'; 'masagsve@nd.gov'; 'Harley Kirkland'; 'Eddie Lacour'; 'Hudson, Kian'; 'Kuhn, Matt F (KYOAG)'; 'Michelle Williams'; 'krissy.nobile@ago.ms.gov'
Subject: RE: Texas v. Pennsylvania, et al. - Amicus Brief of Missouri, at al. - Joins requested by 1:00 p.m. Central Tomorrow, 12/9

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

From: Sauer, John
Sent: Wednesday, December 9, 2020 12:32 PM
To: 'Mithun Mansinghani' <mithun.mansinghani@oag.ok.gov>; 'Murrill, Elizabeth' <MurrillE@ag.louisiana.gov>; 'Melissa Holyoak' <melissaholyoak@agutah.gov>; 'nicholas.bronni@arkansasag.gov' <nicholas.bronni@arkansasag.gov>; 'Vincent Wagner' <vincent.wagner@arkansasag.gov>; 'ed.sniffen@alaska.gov' <ed.sniffen@alaska.gov>; Smith, Justin <justin.smith@ago.mo.gov>; 'Amit.Agarwal@myfloridalegal.com' <Amit.Agarwal@myfloridalegal.com>; 'Kane, Brian' <brian.kane@ag.idaho.gov>; 'tom.fisher@atg.in.gov' <tom.fisher@atg.in.gov>; 'julia.payne@atg.in.gov' <julia.payne@atg.in.gov>; 'toby.crouse@ag.ks.gov' <toby.crouse@ag.ks.gov>; 'Chad.Meredith@ky.gov' <Chad.Meredith@ky.gov>; 'Andrew Pinson' <APinson@LAW.GA.GOV>; 'jeff.chanay' <jeff.chanay@ag.ks.gov>; 'St. John, Joseph' <StJohnJ@ag.louisiana.gov>; 'Kristi.Johnson@ago.ms.gov' <Kristi.Johnson@ago.ms.gov>; 'ABurton@mt.gov' <ABurton@mt.gov>; 'MSchlichting@mt.gov' <MSchlichting@mt.gov>; 'Lindsay S. See' <Lindsay.S.See@wvago.gov>; 'jonbennion@mt.gov' <jonbennion@mt.gov>; 'wstenehjem@nd.gov' <wstenehjem@nd.gov>; 'Benjamin.flowers@ohioattorneygeneral.gov' <Benjamin.flowers@ohioattorneygeneral.gov>; 'ESmith@scag.gov' <ESmith@scag.gov>; 'BCook@scag.gov' <BCook@scag.gov>; 'steven.blair@state.sd.us' <steven.blair@state.sd.us>; 'Sherri.Wald@state.sd.us' <Sherri.Wald@state.sd.us>; 'Sarah.Campbell@ag.tn.gov' <Sarah.Campbell@ag.tn.gov>; 'tom.fisher@atg.in.gov' <tom.fisher@atg.in.gov>; 'Andree.Blumstein@ag.tn.gov' <Andree.Blumstein@ag.tn.gov>; 'matthew.frederick@texasattorneygeneral.gov' <matthew.frederick@texasattorneygeneral.gov>; 'Kyle.Hawkins@oag.texas.gov' <Kyle.Hawkins@oag.texas.gov>; 'Ric Cantrell' <rcantrell@agutah.gov>; 'james.kaste@wyo.gov' <james.kaste@wyo.gov>; 'Jim.Campbell@nebraska.gov' <Jim.Campbell@nebraska.gov>; 'Thomas T. Lampman' <Thomas.T.Lampman@wvago.gov>; 'Jessica A. Lee' <Jessica.A.Lee@wvago.gov>; 'Lindsay S. See' <Lindsay.S.See@wvago.gov>; 'Roysden, Beau' <Beau.Roysden@azag.gov>; 'Bash, Zina' <Zina.Bash@oag.texas.gov>; 'masagsve@nd.gov'; 'Harley Kirkland' <HKirkland@scag.gov>; 'Eddie Lacour' <elacour@ago.state.al.us>; 'Hudson, Kian' <Kian.Hudson@atg.in.gov>; 'Kuhn, Matt F (KYOAG)' <Matt.Kuhn@ky.gov>; 'Michelle Williams' <Michelle.Williams@ago.ms.gov>; 'krissy.nobile@ago.ms.gov' <krissy.nobile@ago.ms.gov>

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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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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>;

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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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Brocker, Liz

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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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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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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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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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Brocker, Liz

From: Sauer, John <John.Sauer@ago.mo.gov>
Sent: Wednesday, December 9, 2020 9:04 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'; 'ABurton@mt.gov'; 'MSchlichting@mt.gov'; 'Lindsay S. See'; 'jonbennion@mt.gov'; Stenehjem, Wayne K.; 'Benjamin.flowers@ohioattorneygeneral.gov'; 'ESmith@scag.gov'; 'BCook@scag.gov'; 'steven.blair@state.sd.us'; 'Sherri.Wald@state.sd.us'; 'Sarah.Campbell@ag.tn.gov'; 'tom.fisher@atg.in.gov'; 'Andree.Blumstein@ag.tn.gov'; 'matthew.frederick@texasattorneygeneral.gov'; 'Kyle.Hawkins@oag.texas.gov'; 'Ric Cantrell'; 'james.kaste@wyo.gov'; 'Jim.Campbell@nebraska.gov'; 'Thomas T. Lampman'; 'Jessica A. Lee'; 'Lindsay S. See'; 'Roysden, Beau'; 'Bash, Zina'; 'masagsve@nd.gov'; 'Harley Kirkland'; 'Eddie Lacour'; 'Hudson, Kian'; 'Kuhn, Matt F (KYOAG)'; 'Michelle Williams'; 'krissy.nobile@ago.ms.gov'
Subject: RE: Texas v. Pennsylvania, et al. - Amicus Brief of Missouri, at al. - Joins requested by 1:00 p.m. Central Tomorrow, 12/9
Attachments: 2020-12-09 - Texas v. Pennsylvania - Amicus Brief of Missouri et al.docx

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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,

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Joseph' <StJohnJ@ag.louisiana.gov>; 'Kristi.Johnson@ago.ms.gov' <Kristi.Johnson@ago.ms.gov>; 'ABurton@mt.gov' <ABurton@mt.gov>; 'MSchlichting@mt.gov' <MSchlichting@mt.gov>; 'Lindsay S. See' <Lindsay.S.See@wvago.gov>; 'jonbennion@mt.gov' <jonbennion@mt.gov>; 'wstenehjem@nd.gov' <wstenehjem@nd.gov>; 'Benjamin.flowers@ohioattorneygeneral.gov' <Benjamin.flowers@ohioattorneygeneral.gov>; 'ESmith@scag.gov' <ESmith@scag.gov>; 'BCook@scag.gov' <BCook@scag.gov>; 'steven.blair@state.sd.us' <steven.blair@state.sd.us>; 'Sherri.Wald@state.sd.us' <Sherri.Wald@state.sd.us>; 'Sarah.Campbell@ag.tn.gov' <Sarah.Campbell@ag.tn.gov>; 'tom.fisher@atg.in.gov' <tom.fisher@atg.in.gov>; 'Andree.Blumstein@ag.tn.gov' <Andree.Blumstein@ag.tn.gov>; 'matthew.frederick@texasattorneygeneral.gov' <matthew.frederick@texasattorneygeneral.gov>; 'Kyle.Hawkins@oag.texas.gov' <Kyle.Hawkins@oag.texas.gov>; 'Ric Cantrell' <rcantrell@agutah.gov>; 'james.kaste@wyo.gov' <james.kaste@wyo.gov>; 'Jim.Campbell@nebraska.gov' <Jim.Campbell@nebraska.gov>; 'Thomas T. Lampman' <Thomas.T.Lampman@wvago.gov>; 'Jessica A. Lee' <Jessica.A.Lee@wvago.gov>; 'Lindsay S. See' <Lindsay.S.See@wvago.gov>; 'Roysden, Beau' <Beau.Roysden@azag.gov>; 'Bash, Zina' <Zina.Bash@oag.texas.gov>; 'masagsve@nd.gov'; 'Harley Kirkland' <HKirkland@scag.gov>; 'Eddie Lacour' <elacour@ago.state.al.us>; 'Hudson, Kian' <Kian.Hudson@atg.in.gov>; 'Kuhn, Matt F (KYOAG)' <Matt.Kuhn@ky.gov>
Subject: Texas v. Pennsylvania, et al. - Amicus Brief of Missouri, at al. - Joins requested by 1:00 p.m. Central Tomorrow, 12/9

All-

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

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

Thanks a lot,

John Sauer

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

Second, *amici* States have a strong interest in ensuring that the votes of their own citizens are not diluted by the unconstitutional administration of elections in other States. When non-legislative actors in other States encroach on the authority of the

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

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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

Brocker, Liz

From: Sauer, John <John.Sauer@ago.mo.gov>
Sent: Tuesday, December 8, 2020 6:11 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'; 'Kristi.Johnson@ago.ms.gov'; 'ABurton@mt.gov'; 'MSchlichting@mt.gov'; 'Lindsay S. See'; 'jonbennion@mt.gov'; Stenehjem, Wayne K.; '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: 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

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

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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Brocker, Liz

From: Nicolai, James E.
Sent: Tuesday, December 8, 2020 4:55 PM
To: Sagsveen, Matthew A.
Subject: Texas v Pennsylvania et al
Attachments: Texas v Pennsylvania et al.pdf

Hey Matt.

I do not know if you have had a chance to review the election lawsuit that Texas filed against Pennsylvania, Michigan, Wisconsin, and Georgia today. But I was asked to pass on to you a message from Jim S. in the Secretary of State's office that if some other state decides to file an amicus brief in support of Texas, and North Dakota gets asked to sign on to the amicus brief, he is in support of North Dakota doing so.

Jim

P.S. I attached the motion for leave that Texas filed with the Supreme Court.

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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.

MOTION OF DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, TO INTERVENE IN HIS PERSONAL CAPACITY AS CANDIDATE FOR RE-ELECTION, PROPOSED BILL OF COMPLAINT IN INTERVENTION, AND BRIEF IN SUPPORT OF MOTION TO INTERVENE

John C. Eastman
Counsel of Record
One University Dr.
Orange, CA 92866
(714) 628-2587
jeastman@chapman.edu

Counsel for Plaintiff in Intervention

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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,
STATE OF WISCONSIN,

Defendants,

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES,
IN HIS PERSONAL CAPACITY AS CANDIDATE FOR
RE-ELECTION TO THE OFFICE OF PRESIDENT,
Plaintiff in Intervention.

MOTION TO INTERVENE

John C. Eastman
Counsel of Record
One University Dr.
Orange, CA 92866
(714) 628-2587
jeastman@chapman.edu

AMERICAN OVERSIGHT

Donald J. Trump, President of the United States, respectfully seeks leave to intervene in the pending original jurisdiction matter of *State of Texas v. Commonwealth of Pennsylvania, et al.*, No. 22O155 (filed Dec. 7, 2020).

Plaintiff in Intervention seeks leave to file the accompanying Bill of Complaint in Intervention against the Commonwealth of Pennsylvania and the States of Georgia, Michigan, and Wisconsin ("Defendant States"), challenging their administration of the 2020 presidential election.

There is no Eleventh Amendment bar to the intervention by a private party whose rights are affected by an original action between States. See, *Maryland v. Louisiana,* 451 U.S. 725, 745, fn. 21 (1981) ("[I]t is not unusual to permit intervention of private parties in original actions"); *Arizona v. California,* 460 U.S. 605, 614 ([O]ur judicial power over the controversy is not enlarged by granting leave to intervene, and the States' sovereign immunity, protected by the Eleventh Amendment, is not compromised"). *See also*, *Texas v. Louisiana*, 416 U.S. 965 (1974) (city in Texas permitted to intervene); *Arizona v. California*, 373 U.S. 546 (1963) (state agencies); *Oklahoma v. Texas*, 258 U.S. 574, 581 (1922) (noting that numerous parties intervened to make claims to the property over which the Court had taken control and that "ancillary" jurisdiction over such claims was proper "although independent suits to enforce the claims could not be entertained in that court").

As set forth in the accompanying brief and Complaint in Intervention, election officials in each of the Defendant States altered or otherwise failed to enforce state election laws in the conduct of the 2020

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election. The violations of *state* election law, which is the "manner" the Legislatures of the States have established for choosing presidential electors, violates the Electors Clause of the U.S. Constitution and thus this matter arises 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). Moreover, as explained more fully in the complaint filed by Texas, the number of ballots affected by illegal conduct of state elections officials greatly exceeds the current margin between Plaintiff in Intervention and his opponent in the election for the Office of President in each of the respective Defendant States, and the four Defendant States collectively have a sufficient number of electoral votes to affect the result of the vote in the Electoral College for the Office of President. Proposed Plaintiff in Intervention therefore clearly has a stake in the outcome of this litigation.

This Court should grant leave to file the Complaint in Intervention.

December 9, 2020

Respectfully submitted,

John C. Eastman
Counsel of Record
One University Dr.
Orange, CA 92866
(714) 628-2587
jeastman@chapman.edu

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,
STATE OF WISCONSIN,

Defendants,

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES,
IN HIS PERSONAL CAPACITY AS CANDIDATE FOR
RE-ELECTION TO THE OFFICE OF PRESIDENT,
Plaintiff in Intervention.

BILL OF COMPLAINT IN INTERVENTION

John C. Eastman
Counsel of Record
One University Dr.
Orange, CA 92866
(714) 628-2587
jeastman@chapman.edu

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BILL OF COMPLAINT IN INTERVENTION

Our Country is deeply divided in ways that it arguably has not been seen since the election of 1860. There is a high level of distrust between the opposing sides, compounded by the fact that, in the election just held, election officials in key swing states, for apparently partisan advantage, failed to conduct their state elections in compliance with state election law, in direct violation of the plenary power that Article II of the U.S. Constitution confers on the *Legislatures* of the States. Indeed, a recent poll by the reputable Rasmussen polling firm indicates that 47% of all Americans (including 75% of Republicans and 30% of Democrats), believe that it is "likely" or "very likely" the election was stolen from the current incumbent President.[1]

The fact that nearly half of the country believes the election was stolen should come as no surprise. President Trump prevailed on nearly every historical indicia of success in presidential elections. For example, he won both Florida and Ohio; no candidate in history—Republican or Democrat—has ever lost the election after winning both States. And he won these traditional swing states by large margins—Ohio by 8 percentage points and 475,660 votes; Florida by 3.4 percentage points and 371,686 votes. He won 18 of the country's 19 so-called "bellwether" counties—counties

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[1] *See* Leah Barkoukis, "What Do Democrats Think About the Integrity of the Election? One Poll Shows Surprising Findings," Townhall.com (Dec. 1, 2020), available at https://townhall.com/tipsheet/leahbar koukis/2020/12/01/30-percent-of-dems-think-their-party-cheated-n2580862.

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whose vote, historically, almost always goes for the candidate who wins the election.[2] Initial analysis indicates that he won 26 percent of non-white voters, the highest percentage for any Republican candidate since 1960,[3] a fairly uniform national trend that was inexplicably not followed in key cities and counties in the Defendant States. And he had coattails but, as some commentators have cleverly noted, apparently no coat. That is, Republican candidates for the U.S. Senate and U.S. House, down to Republican candidates and the state and local level, all out-performed expectations and won in much larger numbers than predicted, yet the candidate for President at the top of the ticket who provided those coattails did not himself get over his finish line in first place. This, despite the fact that the nearly 75 million votes he received—a record for any incumbent President—was nearly 12 million more than he received in the 2016 election, also a record (in contrast to the 2012 election, in which the incumbent received 3 million *fewer* votes than he had four years earlier but nevertheless prevailed). These things just don't normally happen, and a large percentage of the American people know that something is deeply amiss.

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[2] *See* John McCormick, "Bellwether Counties Nearly Wiped Out by 2020 Election," Wall Street Journal Online (Nov. 13, 2020); "Bellwether Counties Dry Up," Wall Street Journal, print edition (Nov. 14, 2020).

[3] *See* Matthew Impelli, "Trump Wins Highest Percent of Nonwhite Voters of Any Republican in 60 Years," Newsweek (Nov. 5, 2020), available at https://www.newsweek.com/trump-wins-highest-percent-nonwhite-voters-any-republican-60-years-doubles-lgbtq-support-2016-1545294

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This Court adjudicates cases arising under the Constitution and laws of the United States, of course. It does not decide elections. That is the role of voters who cast lawful ballots. But the Constitution does contain rules that are obligatory on all agents of government—including those who conduct elections.

When election officials conduct elections in a manner that contravenes of the Constitution of the United States, grave harm is done not just to the candidates on the ballot but to the citizenry's faith in the election process itself.

In the 2020 election, under the guise of responding to the COVID-19 pandemic, election officials in several key states, sometimes on their own and sometimes in connection with court actions brought by partisan advocates, made a systematic effort to weaken measures to ensure fair and impartial elections by creating new rules for the conduct of the elections—rules that were never approved by the legislatures of the defendant states as required by Article II of the United States Constitution. These new rules were aimed at weakening, ignoring, or overriding provisions of state law that are aimed at ensuring the integrity of the voting process.

As more particularly alleged in the Bill of Complaint filed by the State of Texas, for the first time in history, these officials flooded their States with millions of ballots sent through the mail, or placed in drop boxes, with little or no chain of custody and, at the same time, intentionally weakened or eliminated the few existing security measures protecting the integrity of the vote—signature verification and witness requirements.

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For example, Pennsylvania's Secretary of State issued guidance purporting to suspend the signature verification requirements, in direct violation of state law. In Michigan, the Secretary of State illegally flooded the state with absentee ballot applications mailed to every registered voter despite the fact that state law strictly limits the ballot application process. In Wisconsin, the largest cities all deployed hundreds of unmanned, unsecured absentee ballot drop boxes that were all invalid means of returning absentee votes under state law. In Georgia, the Secretary of State instituted a series of unlawful policies, including processing ballots weeks before election day and destructively revising signature and identity verification procedures.

In all cases, absentee ballots were mailed to people without even a perfunctory attempt to verify the recipient's identity or eligibility to vote, including residency, citizenship, and criminal records. When returned and counted, the ballots were typically separated from their security envelopes, divorcing them from any information that could have helped determine whether the votes were legally cast.

The effort to weaken ballot security measures did not merely arise in an atmosphere of chaos of an election arising in a global pandemic. There was a nationwide campaign to weaken ballot security and integrity through over three hundred lawsuits filed by partisan

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operatives in the months and weeks prior to the 2020 election.[4]

To the extent these drastic and fraud-inducing changes in state election law were done without the consent of the state legislature, the *federal* constitution was violated. Article II provides that only state legislatures can make rules for presidential elections. Election officials—either on their own or in cooperation with courts—cannot change the rules either weeks in advance or in the midst of the election process.

This is no mere procedural requirement. For without compliance with the rule of law, elections are subject to the very real prospect that fraud could occur in the election.

Leaving ballot boxes in public parking lots invites fraud. And when the traditional rules for validating voter signatures and identity are waived, overruled, or ignored, the opportunity for fraud is greatly increased.

And when the most common method of detecting fraud—comparing signatures of voters with their registration documents—is ignored, or envelopes are destroyed, proof of the fraud becomes extremely difficult. The unlawful actions of election officials effectively destroy the evidence by which the fraud may be detected.

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[4] *See* Amy Sherman, "2020 election lawsuits and ballot access: what you need to know," Politifact (Nov. 2, 2020, available at https://www.politifact.com/article/2020/nov/02/2020-election-lawsuits-and-ballot-access-what-you-/ (referring to Stanford-MIT Healthy Elections Project litigation tracker https://healthyelections-case-tracker.stanford.edu/cases).

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It is not necessary for the Plaintiff in Intervention to prove that fraud occurred, however; it is only necessary to demonstrate that the elections in the defendant States materially deviated from the "manner" of choosing electors established by their respective state Legislatures.

By failing to follow the rule of law, these officials put our nation's belief in elected self-government at risk.

This Court should issue a declaratory judgment that the defendant States have violated the Constitution and the rights of the Plaintiff in Intervention by conducting the elections according to unauthorized rules created by officials and courts rather than by the pre-existing requirements of state law. And it should further direct the defendant States to review their election results in compliance with pre-existing state law and count only lawfully cast ballots and thereby determine who truly won the contest for President of the United States. Only then will the public's faith in the election process be restored, and only then will voters on either side of the intensely partisan divide be able to find solace in a result that was obtained after a fair electoral fight, where every *legal* vote was counted but where those votes were not diluted or negated by the casting and counting of *illegal* votes.

Against that background, Donald J. Trump, President of the United States, adopts by reference and joins in the Bill of Complaint submitted by Plaintiff State of Texas, with the following modifications:

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JURISDICTION

1. Because this is a Complaint in Intervention to a matter already pending pursuant to this Court's original jurisdiction over "controversies between two or more States," U.S. Const. art. III, § 2, cl. 2; 28 U.S.C. § 1251(a), intervention is permissible even absent independent grounds for the exercise of this Court's original jurisdiction. *See, e.g., Maryland v. Louisiana*, 451 U.S. 725, 745 n.21 (1981) (permitting intervention of private parties as plaintiffs); *Texas v. Louisiana*, 416 U.S. 965 (1974) (city in Texas permitted to intervene); *Arizona v. California*, 373 U.S. 546 (1963) (state agencies); *Oklahoma v. Texas*, 258 U.S. 574, 581 (1922) (noting that numerous parties intervened to make claims to the property over which the Court had taken control and that "ancillary" jurisdiction over such claims was proper "although independent suits to enforce the claims could not be entertained in that court").

2. In matters invoking this Court's original jurisdiction, this Court looks to the Federal Rules of Civil Procedure as a guide. Rule 17.2

PARTIES

3. Plaintiff in Intervention, Donald J. Trump, the current President of the United States and a candidate for re-election as President at the general election that was held on November 3, 2020, is domiciled in the State of Florida. He seeks to intervene in this matter in his personal capacity as a candidate for re-election to the office of President of the United States. Defendants are the Commonwealth of Pennsylvania and the States of Georgia, Michigan, and Wisconsin, which are sovereign states of the United States.

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ADDITIONAL FACTS

4. 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 alter the statutory requirements for signature verification. O.C.G.A. §21-2-381(b) requires that election officials match the signature and other information on an application for absentee ballot with the voter registration information on file, and § 21-2-386(a) likewise requires that the signature on any returned absentee ballot be compared with *both* the registration signature and the application signature, before that ballot can be counted. Yet pursuant to the Settlement, those standards were changed to allow absentee ballots to be counted if the signature matched *only* the signature on the absentee ballot application without the necessity of also matching the signature on the voter registration card. Such statutory requirements are designed to minimize the risk of fraud in the absentee ballot process, yet likely as a result of the Settlement requiring that these statutory requirements be ignored, the invalidity rate of absentee ballots dropped from the historic average of about three percent to a miniscule rejection rate of .37%, with the result that approximately 40,000 ballots were counted that, based on historical rejection rates, should not have been counted.

5. Georgia's legislature has not ratified these material changes to statutory law mandated by the Settlement, including altered signature verification requirements and early opening of ballots. The relevant

AMERICAN OVERSIGHT

legislation that was violated by the Settlement did not include a severability clause.

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

7. 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.

COUNT I: ELECTORS CLAUSE

8. Plaintiff in Intervention repeats and re-alleges the allegations of paragraphs 1-7, above, as if fully set forth herein, and also incorporates by references the allegations of paragraphs 1-134 set out in the Bill of Complaint filed by the State of Texas.

9. 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.

10. Non-legislative actors lack authority to amend or nullify election statutes. *Bush v. Gore*, 531 U.S. 98, 104 (2000).

11. The actions set out in paragraphs 29-134 of the Texas Bill of Complaint, as well as those set out in in paragraphs 4-7 above, constitute non-legislative changes to State election law by executive-branch

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

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

PRAYER FOR RELIEF

WHEREFORE, Plaintiff in Intervention 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.

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

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

D. If any of the Defendant States have already appointed Electors to the Electoral College using the 2020 election results, direct that such States'

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legislatures, pursuant to 3 U.S.C. § 2 and U.S. CONST. art. II, §1, cl. 2, have the authority to appoint a new set of Electors in a manner that does not violate the Electors Clause, or to appoint no Electors at all.

E. Award costs to Plaintiff in Intervention.

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

December 9, 2020

Respectfully submitted,

John C. Eastman
Counsel of Record
One University Dr.
Orange, CA 92866
(714) 628-2587
jeastman@chapman.edu

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NO. 22O155, ORIGINAL

In the Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, IN HIS CAPACITY AS CANDIDATE FOR RE-ELECTION,

Plaintiff,

v.

COMMONWEALTH OF PENNSYLVANIA; TOM WOLF, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF PENNSYLVANIA; *ET AL.*

Defendants,

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, IN HIS PERSONAL CAPACITY AS CANDIDATE FOR RE-ELECTION TO THE OFFICE OF PRESIDENT,

Plaintiff in Intervention.

BRIEF IN SUPPORT OF MOTION TO INTERVENE

John C. Eastman
Counsel of Record
One University Dr.
Orange, CA 92866
(714) 628-2587
jeastman@chapman.edu

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On December 7, 2020, the State of Texas moved for leave to file a Bill of Complaint against the Commonwealth of Pennsylvania and the States of Georgia, Michigan, and Wisconsin ("Defendant States"), challenging the Defendant States' conduct of the November 3, 2020 election for President. *Texas v. Pennsylvania et al.*, No. 22O155 (S. Ct., filed Dec. 7, 2020). It also filed a motion to expedite and a motion for preliminary injunction and temporary restraining order or, alternatively, for stay and administrative stay. *Id.* On December 8, 2020, this Court ordered the Defendant States to provide a response to the motion and to the accompanying motion for a preliminary injunction and temporary restraining order by 3:00 p.m. on Thursday, December 10. *Id.* Donald J. Trump, President of the United States, seeks leave to intervene to protect his unique and substantial personal interests as a candidate for re-election to the Office of President in the November 3, 2020 election.

ARGUMENT

I. Intervention Is Warranted Because Donald Trump's Unique Interest in the Outcome of the 2020 Election In Which He Was a Candidate Will Be Directly Affected By Any Equitable Relief Afforded or Denied By This Court.

This Court has recognized that in specified circumstances, parties other than states have a "compelling interest" that is not represented by a party state, and thus should be permitted to intervene in original cases that will directly affect that interest. *New Jersey v. New York,* 345 U.S. 369, 373 (1953) (per curiam).

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While Plaintiff State of Texas has asserted its important right not to have its electoral votes *diluted* by the illegal and unconstitutional conduct of the Defendant States, Compl. at 4, the candidate whose pledged electors were not elected has an even more direct injury caused by that illegal conduct, namely, his own re-election to the Office of President. This interest would be directly affected by any equitable relief granted or denied by this Court in the pending matter.

As noted extensively in the Bill of Complaint and accompanying brief filed by Texas, certain officials in the Defendant States, using the Covid-19 pandemic as an excuse, ignored or suspended the operation of numerous state laws designed to protect the integrity of the ballot. They 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"). Eligibility for absentee ballots was expanded without statutory authorization, signature verification and other voter identification requirements were altered or ignored, and access by observers to the processing and counting of absentee ballots was blocked or constrained, all in violation of existing laws in the Defendant States. *See* Compl. at ¶¶ 29-134. The United Nations Declaration of Principles for International Election Observation (endorsed by, among others, the Organization of American States, of which the United States is a member) acknowledges the importance of "political contestants" being "allowed to monitor all processes related to elections and observe procedures, including among other things the functioning of electronic and other

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electoral technologies inside polling stations, counting centers and other electoral facilities, as well as the transport of ballots and other sensitive materials." DECLARATION OF PRINCIPLES FOR INTERNATIONAL ELECTION OBSERVATION, Principal 14, p. 5 (Oct. 27, 2005).[5] The United States State Department has also found that "prohibition of local independent observers at polling stations" is one of the factors demonstrating that elections are "not free and fair." Michael Pompeo, "Press Statement: Presidential Elections in Belarus" (Aug. 10, 2020).[6]

Because the U.S. Constitution assigns plenary power for determining the "manner" of choosing presidential electors to the *Legislature* of the State, U.S. Const. art. II, § 1, cl. 2; *Bush v. Gore*, 531 U.S. 98, 104 (2000) those actions by non-legislative election officials in the state, which were not authorized or ratified by the state Legislature, were unconstitutional. *See, e.g., Bush II*, 531 U.S. at 103-105; *McPherson v. Blacker,* 146 U.S. 1, 35 (1892).

As Texas noted in its brief, the Article II assignment to state legislatures of the power to decide the manner of choosing electors 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 fails to conduct a valid election—for any reason—"the electors may be appointed on a

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[5] Available at https://www.cartercenter.org/resources/pdfs/peace/democracy/des/declaration_code_english_revised.pdf.

[6] At https://www.state.gov/presidential-elections-in-belarus/.

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

The illegal suspension or violation of state law thus calls directly into question the certification of the results of the elections in Defendant States for Vice President Joe Biden, Proposed Plaintiff in Intervention's opponent in the election. President Trump's interest in the outcome of this litigation could therefore not be more acute.

Moreover, Defendant States have a combined total 62 electoral votes. Absent those votes, President Trump appears to have 232 electoral votes and former Vice President Biden appears to have 244, both well short of the 270 electoral votes necessary to constitute a majority of the total number of electoral votes and prevail in the election pursuant to the terms of the Twelfth Amendment. Thus, Defendant States' electors will determine the outcome of the election. Alternatively, if Defendant States are unable to certify 38 or more electors, neither candidate will have a majority of the total number of electors in the Electoral College, in which case the election would devolve to the House of Representatives under the Twelfth Amendment.

This Court looks to the Federal Rules of Civil Procedure in matters arising under its original jurisdiction, but does so only as a "guide." S. Ct. Rule 17.2; *Arizona v. California*, 460 U.S. 605, 614 (1983); *Utah v. United States*, 394 U.S. 89, 95 (1969). This Court's own jurisprudence on intervention in original actions, rather than the jurisprudence in the district courts on the application of Rule 24 of the Rules of Civil Procedure, is controlling. Proposed Plaintiff in Intervention meets the requirements for intervention of right or, at

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the very least, permissive intervention, as those requirements have been applied by this Court.

A. Donald Trump meets the Rule 24(a) requirements for intervention as of right.

The requirements for a motion to intervene as of right are: (1) timely application, (2) an interest relating to the subject matter of the action, (3) potential impairment, as a practical matter, of that interest by the disposition of the action, and (4) lack of adequate representation of the interest by the existing parties to the action. *State v. City of Chicago*, 912 F.3d 979 (7th Cir. 2019). Each of these requirements must be evaluated liberally in favor of intervention:

> A liberal policy in favor of intervention serves both efficient resolution of issues and broadened access to the courts. By allowing parties with a practical interest in the outcome of a particular case to intervene, [the court] often prevent[s] or simplifies] future litigation involving related interests; at the same time, [the court] allow[s] an additional interested party to express its views ....

United States v. City of Los Angeles, 288 F.3d 391, 398 (9th Cir. 2002).

The motion to intervene, filed within days of the filing of the original motion for leave to file a Bill of Complaint and before the expedited date set by the Court for response by the Defendant States, is clearly timely.

As a candidate for office at the election at issue, President Trump just as clearly has an interest related to the subject matter of the litigation, which interest will be affected whether this Court decides to

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grant or to deny the equitable relief sought by Texas. He has "a personal interest in winning and holding office," *Hoblock v. Albany Cty. Bd. of Elections*, 233 F.R.D. 95, 99 (N.D.N.Y. 2005), as well as in ensuring that the election was conducted legally and constitutionally, *see generally Bush v. Gore*, 531 U.S. 98 (2000).

Finally, Plaintiff in Intervention arguably meets the "adequacy of representation" prerequisite of Rule 24(a) because his interests as a candidate are sufficiently distinct from those pressed by Texas. The burden of showing inadequacy of representation by existing parties is "minimal." *Trbovich v. United Mine Workers*, 404 U.S.528, 538 n.10 (1972).

Texas has expressly noted that its primary interest is in who is elected as *Vice President*, because the Vice President serves as the President of the Senate, in which Texas's own sovereign interests are represented. Brief at 13. President Trump's primary interest is in whether he is re-elected as *President*. Texas also seeks to ensure that the votes cast by its citizens are not unlawfully *diluted* by illegal votes case in the Defendant States; President Trump seeks to have the votes cast in the Defendant States unlawfully for his opponent to be deemed invalid. Although the interests of voters and candidates overlap and "do not lend themselves to neat separation," *Anderson v. Celebrezze*, 460 U.S. 780, 786 (1983) (quoting *Bullock v. Carter*, 405 U.S. 134, 143 (1972)), they are distinct interests. *See, e.g.*, *Bullock*, 405 U.S. at 143 (assessing a candidate's challenge to a filing fee under a different standard than it had previously applied to poll taxes on voters). The interests of candidates and voters "are not aligned, since Candidates have a personal interest

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in winning and holding office, while the voters simply in having their votes counted and protected, regardless of who they actually voted for." *Hoblock*, 233 F.R.D. at 99. President Trump's interests here are distinct enough to warrant intervention as of right even under Rule 24(a) itself.

Moreover, although the relief that Texas is seeking is the same that President Trump will be seeking in intervention, this Court has not applied the "adequacy of representation" requirement of Rule 24 as strictly when considering requests to intervene in matters arising under its original jurisdiction. It has, for example, allowed for "*at a minimum*" "permissive intervention" by Indian Tribes where the United States' action on their behalf "would bind the Tribes to any judgment," rejecting the States' argument in the case that the presence of the United States already insured adequacy of representation. *Arizona v. California*, 460 U.S. at 615 (emphasis added). "The Indians' participation in litigation critical to their welfare should not be discouraged," the Court held. *Id.* So, too, in this case. The President's participation in litigation critical to his election should be welcomed.

B. Alternatively, Donald Trump meets the Rule 24(b) requirements for permissive intervention, as applied in original jurisdiction matters.

Rule 24(b) provides the grounds for permissive intervention. "On timely motion, the court may permit anyone to intervene who ... (B) has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. Proc. 24(b)(1). In addition, "In exercising its discretion, the court must consider whether the intervention will unduly or prejudice the

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adjudication of the original parties' rights." *Id.* at 24(b)(3). Although the requirements merely serve as a "guide" in this Court on original jurisdiction matters, President Trump easily meets them.

First, President Trump's claims about the illegal violations of state law that occurred in the Defendant States, in contravention of the authority provided to the Legislatures of those States by Article II of the U.S. Constitution, is identical to the principal legal claim made by Texas, and it is based on the same set of facts asserted by Texas.

Second, President Trump's motion to intervene is filed only days after the original action was filed. It is therefore clearly "timely," and because it does not raise additional issues for adjudication, it will not "prejudice the adjudication of the original parties' rights," unduly or otherwise.

The lower courts have also considered several other factors in deciding whether to grant permissive intervention, including: whether there is an independent ground for jurisdiction, *Beckman Industries, Inc. v. International Ins. Co.*, 966 F.2d 470 (9th Cir. 1992); the nature and extent of the proposed intervenor's interests and whether the intervenor's participation will contribute to the full development of underlying factual issues and to the just and equitable resolution of the legal questions presented, *U.S. Postal Service v. Brennan*, 579 F.2d 188 (2nd Cir. 1978); and even whether the interests of proposed intervenors are adequately represented by existing parties, *Venegas v. Skaggs,* 867 F.2d 527 (9th Cir. 1989), though some courts treat adequacy of representation as a point of distinction between permissive intervention and intervention as of right.

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But for the Eleventh Amendment, there would be no doubt that President Trump could invoke the original jurisdiction of this Court by his own initiative. There is original jurisdiction under Article III, § 2, cl. 2, because this is a case "in which a State [is] a party." No additional statutory grant of jurisdiction is required. "The original jurisdiction of the Supreme Court is conferred not by the Congress but by the Constitution itself. This jurisdiction is self-executing, and needs no legislative implementation." *California v. Arizona*, 440 U.S. 59, 65 (1979) (citing *Kentucky v. Dennison*, 65 U.S. (24 How.) 66, 96 (1860); *Florida v. Georgia*, 58 U.S. (17 How.) 478, 492 (1854); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 332 (1816)).

There is also jurisdiction under Article III, § 2, cl. 1 because this case "arises under [the] Constitution." The Electors Clause of Article II, § 1 assigns plenary power to the State Legislatures to determine the manner of choosing electors. Violations by non-legislative officials of the statutory scheme established in pursuance of that power therefor violates the Electors Clause. *See Bush v. Gore*, 531 U.S. at 105; *see also id.* at 113 (Rehnquist, C.J., concurring) (any "significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question").

There is also diversity jurisdiction under Article III, § 2, cl. 1, because the complaint in intervention is a suit between a State and a citizen of another State. President Trump, a citizen of the state of Florida, is diverse from each of the Defendant States.

There is no Eleventh Amendment bar to this action because it is an intervention in a suit between two or more States. *See, e.g., Maryland v. Louisiana*, 451

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U.S. 725, 745 n.21 (1981) (("[I]t is not unusual to permit intervention of private parties in original actions"); *Texas v. Louisiana*, 416 U.S. 965 (1974) (city in Texas permitted to intervene); *Arizona v. California*, 373 U.S. 546 (1963) (state agencies); *Oklahoma v. Texas*, 258 U.S. 574, 581 (1922) (noting that numerous parties intervened to make claims to the property over which the Court had taken control and that "ancillary" jurisdiction over such claims was proper "although independent suits to enforce the claims could not be entertained in that court").

Second, because proposed Plaintiff in Intervention does not seek to bring new claims against the States, and only asks to participate in an adjudication of his vital rights as a candidate that will be addressed in this cases for which there already is jurisdiction, "the States' sovereign immunity protected by the Eleventh Amendment is not compromised." *Arizona v. California*, 460 U.S. at 614 (citing *Maryland v. Louisiana,* 451 U.S. 725, 745, n. 21 (1981)).

As for the nature and extent of the proposed intervenor's interests and whether the intervenor's participation will contribute to the full development of underlying factual issues and to the just and equitable resolution of the legal questions presented, President Trump's interest in his *own* election is sufficiently distinct from the interests asserted by Texas to warrant at least permissive intervention.

Finally, to the extent it should be considered at all under the permissive intervention head, this Court's holding in *Arizona v. California* that Indian Tribes with claims to water rights that were already being advanced by the United States "on their behalf" nevertheless qualified "at a minimum" for permissive

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intervention against an adequacy of representation challenge, 460 U.S. at 615, is sufficient to warrant at least permissive intervention here as well.

II. President Trump's Proposed Complaint in Intervention Meets the Standards Set By This Court.

Original proceedings in this Court follow the Federal Rules of Civil Procedure. "The form of pleadings and motions prescribed by the Federal Rules of Civil Procedure are followed." S. Ct. Rule 17.2. This would include motions for leave to intervene, and therefore such a motion "must state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought." Fed. R. Civ. Proc. Rule 24(c). The complaint must set out "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. Proc. Rule 8(a)(2). President Trump's proposed Bill of Complaint in Intervention, which is attached hereto, meets those requirements.

A. The claims raise a "case or controversy."

Like any other action, an original action must meet the Article III criteria for a case or controversy: 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). Plaintiff in Intervention has standing under those rules.

As a candidate, President Trump clearly has a cognizable, particularized injury to challenge an election that was conducted contrary to state law, and therefore contrary to the "manner" set out by state legislatures in exercising their plenary power under Article

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II of the federal constitution. The violations of state law were caused by the Defendant States and the election officials of the States. And a declaration by this Court that, as a result of those violations, electors cannot be legally certified or cast votes in the electoral college (at least until separately ratified by the state Legislature) would provide redress for the Plaintiff in Intervention's injury.

1. Plaintiff in Intervention suffered an injury in fact.

Candidates for the office of President clearly have standing to challenge a state's compliance with the election laws pursuant to which the election for presidential electors is conducted, even though, technically, the election chooses the electors who are pledged to that candidate, not the candidate himself. *See, e.g., Storer v. Brown*, 415 U.S. 724, 738 n.9 (1974).

2. The Defendant States caused the injuries.

Non-legislative officials, in the Defendant States, either on their own initiative or in conjunction with lawsuits designed to change state law, directly caused the challenged violations of the Electors Clause. In the case of Georgia, acquiesced to such changes by settling a federal lawsuit. The Defendants thus caused Plaintiff in Intervention's injuries.

3. The requested relief would redress the injuries.

Plaintiff in Intervention adopts the arguments of the State of Texas relative to redressability. Brief 15-17.

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B. Plaintiff in Intervention also 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). Prudential doctrines pose no barrier here.

First, the injuries asserted here are "arguably within the zone of interests to be protected or regulated by the ... constitutional guarantee in question." *Camp*, 397 U.S. at 153. The Court has relied on the structure of the Constitution to provide the one-person, one-vote standard, *Wesberry v. Sanders*, 376 U.S. 1, 7-8 & n.10 (1964), and this case is similar. The structure of the Electoral College provides that each State is allocated a certain number of Electors depending upon that State's representation in Congress and that each State must abide by constitutional requirements in the appointment of its Electors. When the election in a State violates those requirements in a presidential election, the interests of the candidates in that election are harmed.

C. Balance of Equities

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*

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the power at any time, for it can neither be taken away or abdicated.

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

Plaintiff in Intervention adopts the arguments of Texas relative to mootness, ripeness, political question, adequacy of an alternate remedy or forum, Brief 17-22.

III. The Preservation of the Rule of Law Is Essential for the Preservation of Our Nation's Belief In the Legitimacy of Self-Government

Despite the chaos of election night and the days which followed, the media has consistently proclaimed that no widespread voter fraud has been proven. But this observation misses the point. The constitutional issue is not whether voters committed fraud but whether state officials violated the law by systematically loosening the measures for ballot integrity so that fraud becomes undetectable.

Over three hundred cases were brought to undermine existing state law relative to ballot security and integrity.[7] These cases had a design and a purpose. But this Court has made it clear that courts do not have the authority to erect their own standards for

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[7] *See* Amy Sherman, "2020 election lawsuits and ballot access: what you need to know," Politifact (Nov. 2, 2020), available at https://www.politifact.com/article/2020/nov/02/2020-election-lawsuits-and-ballot-access-what-you-/ (referring to Stanford-MIT Healthy Elections Project litigation tracker https://healthyelections-case-tracker.stanford.edu/cases).

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presidential elections. *Bush v. Gore,* 531 U.S. 98 (2000).

Creating rules by litigation and by executive officials can be done in certain contexts, but a presidential election is not one of them. Only state legislatures can make such rules.

The public record demonstrates a ballot-counting process replete with chaos, confusion, and partisan bias. These things on their own do not create a constitutional crisis. A true constitutional crisis arises when non-legislative officials seek to change the rules of the game in a manner that is contrary to the dictates of the Constitution.

A pronouncement "we played by the rules" rings hollow when the persons making such claims changed the rules in an unauthorized manner.

Whatever doubt there is about fraud by voters or political operatives, there is no doubt that the officials of the Defendant States changed the rules of the contest in an unauthorized manner.

A candidate for President of the United States and every citizen of this country are entitled by the Constitution to something far better. They are entitled to an election where every *lawful* vote counts and that every effort to change the law in an unauthorized manner is met with a clear answer. Such actions are unconstitutional.

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CONCLUSION

Plaintiff in Intervention's Motion to Intervene should be granted.

December 9, 2020

Respectfully submitted,

John C. Eastman
Counsel of Record
One University Dr.
Orange, CA 92866
(714) 628-2587
jeastman@chapman.edu

AMERICAN OVERSIGHT

Brocker, Liz

From: Nicolai, James E.
Sent: Wednesday, December 9, 2020 10:51 AM
To: Sagsveen, Matthew A.
Subject: Texas v. Pennsylvania et al

Hey Matt.

Here are my comments regarding the soundness of the legal arguments in the Texas election lawsuit.

The basic legal principle advanced in the lawsuit is that the Electors Clause of Article II, § 1 of the United States Constitution requires the "Legislature thereof" in each State to administer federal elections. Texas argues that Pennsylvania, Michigan, Georgia, and Wisconsin all violated this constitutional principle by modifying existing election laws this year, in response to the COVID pandemic, that were not adopted or ratified by the respective legislative bodies in those states.

I believe that basic underlying legal principle is sound. See Bush v. Gore, 531 U.S. 98, 104 (2000) ("[T]he state legislature's power to select the manner for appointing electors is plenary."); Republican Party of Pennsylvania v. Boockvar, No. 20-542, 2020 WL 6304626, at *1 (U.S. Oct. 28, 2020 (Alito, J.) (emphasizing a State Legislature's "authority under the Constitution of the United States to make rules governing the conduct of elections for federal office").

This basic underlying principle was addressed recently by the Eighth Circuit Court of Appeals in deciding whether Minnesota's Secretary of State could, in response to the COVID pandemic, override an election law adopted by the Minnesota Legislature. The Eighth Circuit answered that question NO, stating:

> The analysis is relatively straightforward. By its plain terms, the Electors Clause vests the power to determine the manner of selecting electors exclusively in the "Legislature" of each state. U.S. Const. art. II, § 1, cl. 2; McPherson v. Blacker, 146 U.S. 1, 27, 13 S.Ct. 3, 36 L.Ed. 869 (1892) ("The constitution .... leaves it to the legislature exclusively[.]"). And this vested authority is not just the typical legislative power exercised pursuant to a state constitution. Rather, when a state legislature enacts statutes governing presidential elections, it operates "by virtue of a direct grant of authority" under the United States Constitution. Bush v. Palm Beach Cnty. Canvassing Bd., 531 U.S. 70, 76, 121 S.Ct. 471, 148 L.Ed.2d 366 (2000). Consequently, only the Minnesota Legislature, and not the Secretary, has plenary authority to establish the manner of conducting the presidential election in Minnesota.
>
> Simply put, the Secretary has no power to override the Minnesota Legislature. In fact, a legislature's power in this area is such that it "cannot be taken from them or modified" even through "their state constitutions." McPherson, 146 U.S. at 35, 13 S.Ct. 3; see also Palm Beach, 531 U.S. at 76–77, 121 S.Ct. 471. Thus, the Secretary's attempt to re-write the laws governing the deadlines for mail-in ballots in the

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2020 Minnesota presidential election is invalid. However well-intentioned and appropriate from a policy perspective in the context of a pandemic during a presidential election, it is not the province of a state executive official to re-write the state's election code, at least as it pertains to selection of presidential electors. The democratically-enacted election rules in Minnesota provide that mail-in votes must be received by 8:00 p.m. on Election Day in order to be counted (or 3:00 p.m. if delivered in person). Minn. Stat. § 203B.08. The rule of law, as established by the United States Constitution and the Minnesota Legislature, dictates these rules must be followed notwithstanding the Secretary's instructions to the contrary. There is no pandemic exception to the Constitution. See Democratic Nat'l Comm. v. Wis. State Legislature, No. 20A66, —— U.S. ——, —— S.Ct. ——, ——, —— L.Ed.2d ——, 2020 WL 6275871, at *4 (Oct. 26, 2020) (*DNC*) (Kavanaugh, J., concurring in denial of application for stay) (" '[T]he design of electoral procedures is a legislative task,' including during a pandemic.") (internal citation omitted).

Carson v. Simon, 978 F.3d 1051, 1059–60 (8th Cir. 2020)

Consistent with what the Eighth Circuit concluded in Carson v. Simon, Texas argues that non-legislative actors in all four states changed existing elections law in violation of the Electors Clause of the U.S. Constitution, the same way that Minnesota's Secretary of State violated the Elector's Clause by attempting to override an existing election statute adopted by Minnesota's Legislature.

Texas further argues the acts of these non-legislators resulted in ballots being cast in all four states in violation of existing state law, and thus those votes are invalid and dilute the votes of valid voters. See Anderson v. United States, 417 U.S. 211, 227 (1974) ("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."). In other words, invalid votes (i.e., those allowed pursuant to the acts of non-legislators instead of existing state law) cast in Michigan, Georgia, Pennsylvania, and Wisconsin will impact the presidential election and dilute the votes of valid electors in other states, including Texas. I also believe this vote dilution principle is sound, and is consistent with what we argued in the Brakebill case.

With that said, I do not anticipate the Supreme Court will grant Texas the injunctive relief it seeks or interfere with the 2020 Presidential election in any way. See Purcell v. Gonzalez, 549 U.S. 1 (2006) (indicating that courts, including the Supreme Court, should not interfere with elections that are already underway even when there is a strong likelihood that a plaintiff has shown a constitutional violation, dues to the interests of preserving the public's confidence in the election process).

But I do think there is an outside chance that the Supreme Court will allow Texas's lawsuit to go forward, and at some later date issue an opinion -- that has no impact on the current election – on the underlying legal principle advanced by Texas in this case. That is, to say for the sake of future elections that non-legislative actors cannot modify existing state election laws governing presidential elections: that function is solely within the province of State Legislature's.

Jim

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Brocker, Liz

From: Sagsveen, Matthew A.
Sent: Wednesday, December 9, 2020 9:13 AM
To: Stenehjem, Wayne K.
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

I will give you a call.

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

Second, *amici* States have a strong interest in ensuring that the votes of their own citizens are not diluted by the unconstitutional administration of elections in other States. When non-legislative actors in other States encroach on the authority of the

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

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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.

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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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Brocker, Liz

From: Sagsveen, Matthew A.
Sent: Wednesday, December 9, 2020 8:40 AM
To: Nicolai, James E.
Subject: RE: Texas v. Pennsylvania, et al. - Amicus Brief of Missouri, at al. - Joins requested by 1:00 p.m. Central Tomorrow, 12/9

Stop down when you have a minute.

From: Nicolai, James E. <jnicolai@nd.gov>
Sent: Wednesday, December 9, 2020 8:36 AM
To: Sagsveen, Matthew A. <masagsve@nd.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

The decision whether we join this amicus is more political than it is legal. Let me know if you need more input from me beyond that.

From: Sagsveen, Matthew A. <masagsve@nd.gov>
Sent: Tuesday, December 8, 2020 6:17 PM
To: Nicolai, James E. <jnicolai@nd.gov>
Subject: FW: Texas v. Pennsylvania, et al. - Amicus Brief of Missouri, at al. - Joins requested by 1:00 p.m. Central Tomorrow, 12/9

From: Sauer, John <John.Sauer@ago.mo.gov>
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>; Stenehjem, Wayne K. <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'

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

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

Thanks a lot,

John Sauer

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Brocker, Liz

From: Stenehjem, Wayne K.
Sent: Tuesday, December 8, 2020 8:14 PM
To: Sagsveen, Matthew A.
Cc: Seibel, Troy T.
Subject: RE: Texas v. Pennsylvania, et al. - Amicus Brief of Missouri, at al. - Joins requested by 1:00 p.m. Central Tomorrow, 12/9

If you have a chance to review this, please do so and let me know in the morning.
Wayne

From: Sagsveen, Matthew A. <masagsve@nd.gov>
Sent: Tuesday, December 8, 2020 6:17 PM
To: Stenehjem, Wayne K. <wstenehjem@nd.gov>; Seibel, Troy T. <tseibel@nd.gov>
Subject: FW: Texas v. Pennsylvania, et al. - Amicus Brief of Missouri, at al. - Joins requested by 1:00 p.m. Central Tomorrow, 12/9

Attached is a new amicus request.

From: Sauer, John <John.Sauer@ago.mo.gov>
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>; Stenehjem, Wayne K. <wstenehjem@nd.gov>; 'Benjamin.flowers@ohioattorneygeneral.gov' <Benjamin.flowers@ohioattorneygeneral.gov>; 'ESmith@scag.gov' <ESmith@scag.gov>; 'BCook@scag.gov' <BCook@scag.gov>; 'steven.blair@state.sd.us' <steven.blair@state.sd.us>; 'Sherri.Wald@state.sd.us' <Sherri.Wald@state.sd.us>; 'Sarah.Campbell@ag.tn.gov' <Sarah.Campbell@ag.tn.gov>; 'tom.fisher@atg.in.gov' <tom.fisher@atg.in.gov>; 'Andree.Blumstein@ag.tn.gov' <Andree.Blumstein@ag.tn.gov>; 'matthew.frederick@texasattorneygeneral.gov' <matthew.frederick@texasattorneygeneral.gov>; 'Kyle.Hawkins@oag.texas.gov' <Kyle.Hawkins@oag.texas.gov>; 'Ric Cantrell' <rcantrell@agutah.gov>; 'james.kaste@wyo.gov' <james.kaste@wyo.gov>; 'Jim.Campbell@nebraska.gov' <Jim.Campbell@nebraska.gov>; 'Thomas T. Lampman' <Thomas.T.Lampman@wvago.gov>; 'Jessica A. Lee' <Jessica.A.Lee@wvago.gov>; 'Lindsay S. See' <Lindsay.S.See@wvago.gov>; 'Roysden, Beau' <Beau.Roysden@azag.gov>; 'Bash, Zina' <Zina.Bash@oag.texas.gov>; 'masagsve@nd.gov'; 'Harley Kirkland' <HKirkland@scag.gov>; 'Eddie Lacour' <elacour@ago.state.al.us>; 'Hudson, Kian' <Kian.Hudson@atg.in.gov>; 'Kuhn, Matt F (KYOAG)' <Matt.Kuhn@ky.gov>
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Thanks a lot,

John Sauer

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Brocker, Liz

From: Sagsveen, Matthew A.
Sent: Tuesday, December 8, 2020 6:17 PM
To: Stenehjem, Wayne K.; Seibel, Troy T.
Subject: FW: Texas v. Pennsylvania, et al. - Amicus Brief of Missouri, at al. - Joins requested by 1:00 p.m. Central Tomorrow, 12/9
Attachments: 2020-12-07 - Texas v. Pennsylvania, et al. - Bill of Complaint.pdf; 2020-12-08 - Texas v. Pennsylvania - Amicus Brief of Missouri et al.docx

Attached is a new amicus request.

From: Sauer, John <John.Sauer@ago.mo.gov>
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>; Stenehjem, Wayne K. <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

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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

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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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