No. 20A , Original

In the Supreme Court of the United States

STATE OF TEXAS,
Plaintiff,

v.

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

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

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

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

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

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

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

STATEMENT

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

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

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

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

- On August 7, 2020, the League of Women Voters of Pennsylvania and others filed a complaint against Secretary Boockvar and other local election officials, seeking "a declaratory judgment that Pennsylvania existing signature verification procedures for mail-in voting" were unlawful for a number of reasons, *League of Women Voters of Pennsylvania v. Boockvar*, No. 2:20-cv-03850-PBT, (E.D. Pa. Aug. 7, 2020), which the Pennsylvania defendants quickly settled resulting in guidance (App. 109a-114a)[1] issued on September 11, 2020, stating in relevant part: "The Pennsylvania Election Code does not authorize the county board of elections to set aside returned absentee or mail-in ballots based solely on signature analysis by the county board of elections." App. 113a.
- Acting under a generally worded clause that "Elections shall be free and equal," PA. CONST. art. I, §5, cl. 1, a 4-3 majority of Pennsylvania's Supreme Court in *Pa. Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020), extended the statutory deadline for mail-in ballots from Election Day to three days after Election Day and adopted a presumption that even *non-postmarked ballots* were presumptively timely. In addition, a great number of ballots were received after the statutory deadline. Because Pennsylvania misled this Court

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

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

- Contrary to Pennsylvania election law on providing poll-watchers access to the opening, counting, and recording of absentee ballots, local election officials in Philadelphia and Allegheny Counties decided not to follow 25 PA. STAT. § 3146.8(b). App. 127a-28a.
- Prior to the election, Secretary Boockvar sent an email to local election officials urging them to provide opportunities for various persons—including political parties—to contact voters to "cure" defective mail-in ballots. This process clearly violated several provisions of the state election code. App. 122a-24a. By removing the ballots for examination prior to seven o'clock a.m. on election day, Secretary Boockvar created a system whereby local officials could review ballots without the proper announcements, observation, and security. This entire scheme, which was only followed in Democrat majority counties, was blatantly illegal in that it permitted the illegal removal of ballots from their locked containers prematurely. App. 122a-24a.
- On December 4, 2020, fifteen members of the Pennsylvania House of Representatives issued a report (App. 139a-45a) to Congressman Scott Perry stating that "[t]he general election of 2020 in Pennsylvania was fraught with … documented irregularities and improprieties associated with mail-in balloting … [and] that the reliability of the mail-in votes in the Commonwealth

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

- On March 6, 2020, in *Democratic Party of Georgia v. Raffensperger*, No. 1:19-cv-5028-WMR (N.D. Ga.), Georgia's Secretary of State entered a Compromise Settlement Agreement and Release (App. 19a-24a) with the Democratic Party of Georgia (the "Settlement") to materially change the statutory requirements for reviewing signatures on absentee ballot envelopes to confirm the voter's identity by making it far more difficult to challenge defective signatures beyond the express mandatory procedures set forth at GA. CODE § 21-2-386(a)(1)(B), which is particularly disturbing because the legislature allowed persons *other than the voter* to apply for an absentee ballot, GA. CODE § 21-2-381(a)(1)(C), which means that the legislature likely was relying heavily on the signature-verification on ballots under GA. CODE § 21-2-386.
- Numerous poll challengers and an Election Department employee whistleblower have testified that the signature verification requirement was ignored in Wayne County in a case currently pending in the Michigan Supreme Court. App. 25a-51a.

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

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

- The two Republican members of the Board *rescinded their votes* to certify the vote in Wayne County, and signed affidavits alleging they were bullied and misled into approving election results and do not believe the votes should be certified until serious irregularities in Detroit votes are resolved. *See* Cicchetti Decl. at ¶ 29 (App. 8a).
- The Wayne County Statement of Votes Report lists 174,384 absentee ballots out of 566,694 absentee ballots tabulated (about 30.8%) as counted without a registration number for precincts in the City of Detroit. *See* Cicchetti Decl. at ¶ 27 (App. 8a). The number of votes not tied to a registered voter by itself exceeds Vice President Biden's margin of margin of 146,007 votes by more than 28,377 votes. The extra ballots cast most likely resulted from the phenomenon of Wayne County election workers running the same ballots through a tabulator multiple times, with Republican poll watchers obstructed or denied access, and election officials ignoring poll watchers' challenges, as documented by numerous declarations. App. 25a-51a.

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

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

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

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

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

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

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

Bush II, 531 U.S. at 104. Proceeding under the unconstitutional election is not an option.

Pursuant to 28 U.S.C. 1251(a), Plaintiff State has filed a motion for leave to file a bill of complaint today. As set forth in the complaint and outlined above, all Defendant States ran their 2020 election process in noncompliance with the ballot-integrity requirements of their State legislature's election statutes, generally using the COVID-19 pandemic as a pretext or rationale for doing so. In so doing, Defendant States disenfranchised not only their own voters, but also the voters of all other States: "the impact of the votes cast in each State is affected by the votes cast for the various candidates in other States." *Anderson v. Celebrezze*, 460 U.S. 780, 795 (1983).

ARGUMENT

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

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

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

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

Republic.

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

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

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

the following schedule for briefing and argument:

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

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

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

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

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

CONCLUSION

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

Dated: December 7, 2020

Respectfully submitted,

/s/ Ken Paxton

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CERTIFICATE AS TO FORM

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

Dated: December 7, 2020

Respectfully submitted,

/s/ Ken Paxton

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CERTIFICATE OF SERVICE

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

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Executed December 7, 2020, at Washington, DC,

/s/ Lawrence J. Joseph
Lawrence J. Joseph