No. 22O155

In the
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 a Bill of Complaint and Motion for Expediated Consideration and for Emergency Injunctive Relief or Stay

RESPONSE TO MOTION FOR LEAVE TO FILE BILL OF COMPLAINT AND TO MOTION FOR PRELIMINARY INJUNCTION AND TEMPORARY RESTRAINING ORDER OR STAY

JOSHUA L. KAUL
Attorney General of Wisconsin

THOMAS C. BELLAVIA
Counsel of Record
Assistant Attorney General

Wisconsin Department of Justice
17 West Main Street
Madison, WI 53703
(608) 266-8690
bellaviatc@doj.state.wi.us

QUESTIONS PRESENTED

1. Whether various jurisdictional deficiencies should persuade or otherwise prevent this Court from exercising original jurisdiction over the proposed bill of complaint?

2. Whether the bill of complaint should be dismissed under principles of laches and where the remedy sought would violate Wisconsin voters' constitutional rights and the separation of powers?

3. Whether the bill of complaint should be dismissed where Texas fails to state a claim upon which relief may be granted?

4. Whether Texas's requests for injunctive relief, or alternatively, a stay, should be denied?

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JURISDICTION

Plaintiff, the State of Texas, seeks leave to file an original action against Pennsylvania, Georgia, Michigan, and Wisconsin in this Court and pursuant to Article III, § 2, cl. 2 of the U.S. Constitution and 28 U.S.C. § 1251(a).

INTRODUCTION

Texas proposes an extraordinary intrusion into Wisconsin's and the other defendant States' elections, a task that the Constitution leaves to each State. Wisconsin has conducted its election and its voters have chosen a winning candidate for their State. Texas's bid to nullify that choice is devoid of a legal foundation or a factual basis. This Court should summarily dismiss the motion to file the bill of complaint.

Multiple factors weigh against exercising jurisdiction here. Texas does not have a cognizable interest in how Wisconsin runs its elections, and there are alternative forums to raise these issues. Such cases are taking place even as this brief in opposition is being filed.

Texas's choice to challenge Wisconsin law after the election also counsels against taking this case. Laches principles counsel that Texas cannot harm the interests of Wisconsin voters when it could easily have raised its concerns earlier. And the remedies it seeks would violate voters' due process rights and separation of powers principles.

Further, Texas's claims have no merit. It states no claim under the Electors Clause, equal protection, or due process, and its basic arguments about how Wisconsin state law works are flat out wrong.

Given all these facts, it is no surprise that Texas fails to establish any of the requisite factors necessary for granting preliminary relief. It has no likelihood of success on the merits of its clams, and the harm and public interest factors strongly weigh in favor of denying the extraordinary relief Texas seeks—stripping millions of voters of the choice they made.

This Court should deny the State of Texas's motion to file a bill of complaint and deny its motion for injunctive relief.

STATEMENT OF THE CASE

Underlying Texas's novel constitutional argument are three challenges to how the Wisconsin Elections Commission and local election officials administer elections in Wisconsin. The Commission is responsible for administering elections in Wisconsin. *See* Wis. Stat. § 5.05(1). One of its main responsibilities is to provide guidance regarding the requirements of state election law to local election officials and the voting public. *See, e.g.*, Wis. Stat. §§ 5.05(12), 7.08(3), 7.08(11). Although the Commission maintains the statewide list of registered voters (*see* Wis. Stat. §§ 5.05(15), 6.36), it does not have a direct role either in issuing in-person and absentee ballots to voters or in receiving and counting those ballots. That job is left to local election officials

at the county and municipal level. *See generally* Wis. Stat. §§ 7.10 (county clerk duties), 7.15 (municipal clerk duties), 7.51–7.60 (local canvassing provisions). Once local officials complete those tasks, they transmit the results to the Commission, which in turn tallies up the statewide results and certifies them. *See* Wis. Stat. § 7.70.

In the November 2020 election, nearly 3.3 million Wisconsin voters cast ballots for the office of President of the United States. Those votes have been counted, audited, and many have even been re-counted. There has been no indication of any fraud, or anything else that would call into question the reliability of the election results. To the contrary, every indication is that the outcome is correct. A statewide audit of electronic voting machines used in the November election found no systematic problems.

The losing candidate, President Donald Trump, exercised his right to a recount in the two most heavily Democratic counties. The recount confirmed that there were no errors in those counties; it did not materially change the vote tallies for either President Trump or Vice President Biden. Nothing uncovered during the recount pointed to fraud through hacked or otherwise manipulated voting machines.

There are three lawsuits currently being litigated in Wisconsin challenging the results of the Presidential election in the State: *Trump v. Biden*, No. 2020CV7092 (Wis. Cir. Ct. Milwaukee Cty.), President Trump's appeal of the recount determination; *Trump v. Wisconsin Elections*

Commission¸ No. 20-cv-1785-bhl (E.D. Wis.), another case by President Trump with claims similar to Texas's here; and *Feehan v. Wisconsin Elections Commission*¸ No. 20-cv-1771-pp (E.D. Wis.), a voter lawsuit dismissed by the district court late in the evening of December 9, 2020.

REASONS FOR DENYING THE PETITION AND REQUEST FOR PRELIMINARY RELIEF

I. This Court should not exercise original jurisdiction.

Original jurisdiction "'is of so delicate and grave a character that it" should not be "exercised save when the necessity [is] absolute.'" *Mississippi v. Louisiana*, 506 U.S. 73, 76 (1992) (quoting *Wyoming v. Oklahoma*, 502 U.S. 437, 450 (1992), *and Louisiana v. Texas*, 176 U.S. 1, 15 (1900)). The power to "control the conduct of one state at the suit of another" is "extraordinary." *New York v. New Jersey*, 256 U.S. 296, 309 (1921).

Using that power to overturn a state's election results would be unprecedented. In determining whether to exercise its original jurisdiction, this Court has long considered two factors: (1) "the nature of the interest of the complaining State"; and (2) "the availability of an alternative forum in which the issues tendered can be resolved." *Mississippi,* 506 U.S. at 77 (1992). Both factors weigh strongly against exercising jurisdiction here. Texas's complaint rests on baseless claims of election fraud that have already been aired in—and rejected by—

dozens of state and federal courts in lawsuits brought by plaintiffs with a far greater interest than Texas in their outcome.

A. Texas has no cognizable interest in challenging Wisconsin's administration of its own election laws.

Texas can demonstrate neither Article III standing nor the more demanding requirement of direct state injury under this Court's original-jurisdiction cases. To accept Texas's bill of complaint—a blanket challenge by one State to the manner in which four other States have administered their own elections, within their own borders, under their own election laws—would represent a substantial and unwarranted expansion of this Court's original jurisdiction.

At a minimum, to invoke this Court's original jurisdiction, Texas must demonstrate that it has "suffered a wrong through the action of the other State." *Maryland v. Louisiana*, 451 U.S. 725, 735–36 (1981). But Texas is unable to allege that Wisconsin itself did anything to directly injure Texas's sovereign interests. Instead, Texas advances a far more attenuated theory of injury—that the other States' supposed violations of their elections laws "debased the votes of citizens" in Texas. Mot. for P/I at 3. This speculative logic is not nearly enough to carry Texas's burden to prove, by "clear and convincing evidence," a "threatened invasion of [its] rights" "of serious magnitude," *New York*, 256 U.S. at 309. Indeed,

Texas's allegations fall far short of what would be required by Article III in any federal case—that is, a showing that a plaintiff has "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant[s], and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016).

It is well settled under the Court's original-jurisdiction cases that "a State has standing to sue only when its sovereign or quasi-sovereign interests are implicated and it is not merely litigating as a volunteer the personal claims of its citizens." *Pennsylvania v. New Jersey*, 426 U.S. 660, 665 (1976). Apart from attempting to rely on the "personal claims of its citizens" as electors or voters, Texas struggles to identify any traditional sovereign injury to support its claim under the Electors Clause. Instead, Texas proposes that this Court recognize a new "form of voting-rights injury"—an injury premised on the denial of "'equal suffrage in the Senate'" somehow caused by the election of the Vice President. Mot. for Prelim. Inj. at 14 (quoting U.S.Const. art. V, cl. 3). Texas makes no freestanding constitutional claim to this effect. In any event, this argument makes no sense. Texas does not (and cannot) argue that it now has fewer Senators than any other state. By definition, therefore, it maintains "equal suffrage in the Senate."

Texas's attempt to garner standing for its claims under the Equal Protection and Due Process Clauses fares no better. These "Clauses protect people, not States." *Pennsylvania*, 426 U.S. at 665.

If Texas's theory of injury were accepted, it would be too easy to reframe virtually any election or voting-rights dispute as implicating injuries to a States and thereby invoke this Court's original jurisdiction. New York or California could sue Texas or Alabama in this Court over their felon-disenfranchisement policies. Garden-variety election disputes would soon come to the Court in droves. "[I]f, by the simple expedient of bringing an action in the name of a State, this Court's original jurisdiction could be invoked to resolve what are, after all, suits to redress private grievances, [the Court's] docket would be inundated." *Pennsylvania*, 426 U.S. at 665. And the Constitution's distinction between suits by "States" and "Citizens" would be eviscerated. *Id.*

This case does not satisfy the direct-injury requirement. Texas speculates that Wisconsin's facilitation of mail-in voting during the pandemic may have increased the likelihood that third parties would engage in instances of voter fraud in Wisconsin. Texas does not offer a shred of evidence that any such fraud occurred. And Texas does not allege that Wisconsin directed or authorized any individual to engage in voter fraud. Nor would any such allegation be plausible.

In any event, this Court long made clear that its original jurisdiction does not extend to "political disputes between states arising out of [the alleged] maladministration of state laws by officials to the injury of citizens of another state." Stephen M.

Shapiro, et al, *Supreme Court Practice* 10-6 (11th ed. 2019); *see Louisiana v. Texas*, 176 U.S. 1, 15 (1900)) ("Jurisdiction over controversies of that sort does not embrace the determination of political questions, and, where no controversy exists between states, it is not for this Court to restrain the governor of a state in the discharge of his executive functions in a matter lawfully confided to his discretion and judgment."). It is hard to imagine a case that more clearly runs afoul of that principle than a dispute over the outcome of the presidential election, premised on the alleged maladministration of state election law.

Finally, Texas does not adequately explain how the extraordinary relief that it seeks from this Court is necessary to redress any perceived injury. Texas asks this Court to "remand to the State legislatures to allocate presidential electors." Mot. at 17. But Texas concedes that these legislatures "may review the presidential election results in their state and determine that [the] winner would be the same." Mot. at 18. They "would remain free to exercise their plenary authority under the Electors Clause in any constitutional manner they wish." *Id.*

B. Texas seeks to litigate claims that have already been brought in other fora.

Not only does Texas lack any cognizable interest in overturning Wisconsin or any other state's election, the claims it seeks to raise here are already being litigated in numerous courts. Indeed, much of Texas's complaint is borrowed from other lawsuits. President

Trump himself has raised precisely the same claims Texas seeks to litigate here. *Compare* Bill of Complaint ¶¶ 105–14, *with* Trump Wisconsin Compl. ¶¶ 168–206 (challenging use of absentee ballot drop boxes); Bill of Complaint ¶¶ 116–22, *with* Trump Wisconsin Compl. ¶¶ 74–108 (treatment of voters who are indefinitely confined); Bill of Complaint ¶¶ 123–25, *with* Trump Wisconsin Compl. ¶¶ 235–58 (application of witness address verification requirements). These lawsuits are much better vehicles for deciding the claims than an original action before this Court. Contrary to Texas's assertion, its complaint does not present a pure question of federal constitutional law. Texas's complaint is that the defendant states did not properly administer their own election laws.

Texas does not—and could not—dispute the lower courts' ability to fairly hear these claims. Instead, Texas argues that this Court can act quickly. But Texas's hurry is of its own making: it waited until weeks after the election to file its lawsuit.

C. Granting Texas's request would undermine the legitimacy of this Court and threaten faith in American democracy.

The ordinary factors that govern this Court's original jurisdiction demonstrate that this is not an "appropriate" case: The State that brought it has no legitimate interest in the claims (or even standing to pursue them), and courts across the country have already heard and rejected them. But, to be clear, this

case is not ordinary. Texas is asking this Court to overturn the will of the people of Wisconsin—and the nation—based on meritless accusations of election fraud. If this Court agrees to do so, it will not only irreparably harm its own legitimacy, but will lend fuel to a disinformation campaign aimed at undermining the legitimacy of our democracy.

Texas asserts that this Court's intervention is necessary to ensure faith in the election. But it is hard to imagine what could possibly undermine faith in democracy more than this Court permitting one state to enlist the Court in its attempt to overturn the election results in other states. Merely hearing this case—regardless of the outcome—would generate confusion, lend legitimacy to claims judges across the country have found meritless, and amplify the uncertainty and distrust these false claims have generated.

In short, what Texas seeks "is an unprecedented expansion of [this Court's] power . . . into one of the most intensely partisan aspects of American political life." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019). "That intervention would be unlimited in scope and duration—it would recur over and over again" with every national election. *Id.* With every national election, any state attorney general dissatisfied with another state's results could sue in this Court, diminishing the legitimacy of this Court and this democracy in the process. "Consideration of the impact of" Texas's request "on democratic principles cannot ignore the effect of the unelected

and politically unaccountable branch of the Federal Government assuming such an extraordinary and unprecedented role." *Id.*

Texas has no legitimate interest in overturning the will of Wisconsin's voters. This Court should not allow itself to become a vehicle for those upset at the outcome of an election to undemocratically overturn it.

II. Texas's suit is barred by principles of laches and the constitutional violations its desired remedy would cause.

A. Texas waited too long to bring suit.

Even though every single Wisconsin election administration issue about which Texas complains has been publicly known for months—and in one case, *years*—Texas inexplicably waited to challenge them until after the November election. This unreasonable delay merits dismissal on laches grounds, especially since Texas seeks to disenfranchise Wisconsin voters who already cast their absentee ballots in reliance on guidance from state election officials.

"Laches arises when an unwarranted delay in bringing a suit or otherwise pressing a claim produces prejudice." *Jones v. Markiewicz-Qualkinbush*, 842 F.3d 1053, 1060 (7th Cir. 2016) (citation omitted). "The obligation to seek injunctive relief in a timely manner in the election context is hardly a new concept." *Id.* "In the context of elections, . . . any claim against a state electoral procedure must be expressed

expeditiously." *Fulani v. Hogsett*, 917 F.2d 1028, 1031 (7th Cir. 1990).

Texas claims its complaints were not ripe before the election because they rested on contingent, future events that might not happen. (Mot P/I at 21.) That is nonsense.

Texas's attack on the propriety of filling in address information on absentee envelopes challenges a practice in use since the *2016* Presidential election, when the Commission first advised local election officials. The issue with voters who claimed to be "indefinitely confined" during COVID-19 was the subject of a Wisconsin Supreme Court decision in March, *See* Appx. A, *Jefferson v. Dane County*, No. 2020AP557-OA (Wis. Sup. Ct.), and the Commission issued guidance on March 29 that the Wisconsin Supreme Court approved. And the installation and use of absentee ballot drop boxes in almost every Wisconsin county received ample public discussion in the months leading up to the fall election.

Long before Wisconsin voters cast their ballots, Texas could have challenged every one of these election administration methods. That delay was clearly unwarranted. If Texas had brought a timely challenge before the election—and succeeded—Wisconsin voters could have adjusted their understanding of applicable voting procedures and cast their ballots accordingly. Instead, Texas waited until *after* the election and now seeks to pull the rug out from under voters who cannot recast their ballots. Rewarding this delay would obviously prejudice—indeed, disenfranchise—the millions of Wisconsin

voters who cast their ballots in reliance on these long-announced election practices. Laches prevents precisely this kind of gamesmanship by litigants who unreasonably sleep on their rights to the detriment of the public interest.

Indeed, the Michigan federal court in *King* dismissed similar election challenges on laches grounds, where the plaintiffs "could have brought their claims well in advance of or on Election Day" but did not. 2020 WL 7134198, at *7. The justification for applying laches was "at its peak," given that "[w]hile plaintiffs delayed, the ballots were cast; the votes were counted; and the results were certified." *Id.* The same is true here.

B. The post-election remedy Texas seeks would violate the due process rights of Wisconsin voters and is not supported by 3 U.S.C. § 2.

Even if laches did not bar Texas's claims, the remedy it seeks is unavailable. Texas asks this Court to enjoin any appointment of electors based on the results of the November 3 election, and to remand the appointment of electors in the defendant states to their respective state legislatures. Brief supporting M/L, 16–17. That relief is procedurally unprecedented, substantively extraordinary, and unconstitutional.

1. The relief Texas seeks would violate the due process rights of Wisconsin voters.

Texas suggests that such sweeping and radical relief is authorized by the role of state legislatures under the Electors Clause and by 3 U.S.C. § 2, a never-before-used statute that allows a state, under certain circumstances, to appoint its electors on a date later than the national election day. But both Article II and 3 U.S.C. § 2 must be construed consistent with the constitutional requirement of due process. To retroactively override Wisconsin's statutorily designated method for choosing presidential electors after the election has taken place, as Texas seeks, would violate Wisconsinites' federal due process rights by retroactively overriding election procedures that those voters relied on.

The U.S. Constitution provides that each state shall appoint its presidential electors "in such Manner as the Legislature thereof may direct." Art. II, § 1. In accordance with that provision, the Wisconsin Legislature has directed by statute that Wisconsin's presidential electors shall be appointed by popular election. *See* Wis. Stat. §§ 5.10, 5.64(1)(em), 8.25(1). The November 3, 2020, presidential election—which Texas seeks to invalidate—was conducted via popular vote in furtherance of that legislative directive. That directive, having now been carried out, cannot be retroactively undone and superseded by action of the Wisconsin Legislature. As the Pennsylvania Supreme Court rightly put it recently, "there is no basis in law by which the courts may . . . ignore the results of an

election and recommit the choice to the [the state legislature] to substitute its preferred slate of electors for the one chosen by a majority of [the state's] voters." *Kelly v. Commonwealth of Pennsylvania*, No. 68 MAP 2020, 2020 WL 7018314, at *3 (Pa. Nov. 28, 2020).

Once a state legislature has directed that the state's electors are to be appointed by popular election, the people's "right to vote as the legislature has prescribed is fundamental." *Bush*, 531 U.S. at 104 (per curiam). That fundamental right to vote includes "the right of qualified voters within a state to cast their ballots and have them counted." *United States v. Classic*, 313 U.S. 299, 315 (1941). Thus, the power that Article II vests in the state legislature is necessarily "subject to the limitation that [it] may not be exercised in a way that violates other specific provisions of the Constitution," including provisions that protect the fundamental right to vote. *Williams v. Rhodes*, 393 U.S. 23, 29 (1968). And while Article II unquestionably allows a state legislature to change the method for choosing the state's electors, it cannot make changes in such a manner or under circumstances that would violate the Due Process Clause of the Fourteenth Amendment. So while the Wisconsin Legislature could seek to amend the existing Wisconsin statutes to provide in *future* presidential contests for direct legislative appointment of presidential electors, the guarantee of due process forbids this Court from enforcing the type of post-election rule changes Texas seeks. *See Griffin v. Burns*, 570 F.2d 1065, 1079 (1st Cir. 1978) (retroactive invalidation of absentee ballots violated due process).

In general, a due process violation exists where "(1) likely reliance by voters on an established election procedure and/or official pronouncements about what the procedure will be in the coming election; and (2) significant disenfranchisement that results from a change in the election procedures." *Bennett v. Yoshina*, 140 F.3d 1218, 1227 (9th Cir. 1998). As relevant here, Wisconsin voters who reasonably relied on the established voting procedures that Texas only now challenges will be disenfranchised by the thousands, raising serious concerns of a due process violation. This Court should avoid granting a remedy that will create a constitutional violation. *See Wright v. Sumter Cty. Bd. of Elections & Registration*, 361 F. Supp. 3d 1296, 1301 (M.D. Ga. 2018) (declining to adopt remedial redistricting plan, and noting "the obligation of the Court to ensure that a remedial plan is constitutional"), *aff'd*, No. 18-11510, 2020 WL 6277718 (11th Cir. Oct. 27, 2020); *Baber v. Dunlap*, 349 F. Supp. 3d 68, 77-78 (D. Me. 2018) (observing "a certain degree of irony because the remedy plaintiffs seek could deprive more than 20,000 voters of what they understood to be a right to be counted with respect to the contest between [two candidates]," and noting that "such a result would [raise equal protection concerns about "valuing one class of voters . . . over another"); *see also Ford v. Tennessee Senate*, No. 06-2031, 2006 WL 8435145, at *14 (W.D. Tenn. Feb. 1, 2006) ("Voters whose right to vote is challenged must be afforded minimal, meaningful due process to include, notice and opportunity to be heard before they can be disenfranchised").

Federal courts have exhibited sensitivity to the reliance interests of voters in considering injunctive

relief in response to election challenges. For example, in *Griffin*, the First Circuit held that a Rhode Island Supreme Court decision unexpectedly changed state law after voters had relied on their absentee ballots being counted, and that "due process is implicated where the entire election process including as part thereof the state's administrative and judicial corrective process fails on its face to afford fundamental fairness." 570 F.2d at 1078.

Similarly, in *Northeast Ohio Coalition for Homeless v. Husted*, the Sixth Circuit considered a case in which wrong-precinct and deficient-affirmation provisional ballots were disqualified because of poll-worker error that caused the ballot deficiencies. 696 F.3d 580, 585 (6th Cir. 2012). The court noted that the Due Process Clause protects against "extraordinary voting restrictions that render the voting system fundamentally unfair," *id.* at 597, and concluded that "[t]o disenfranchise citizens whose only error was relying on poll-worker instructions appears to us to be fundamentally unfair," *id.* at 597. Accordingly, the Sixth Circuit affirmed a preliminary injunction entered by the district court that required ballots cast incorrectly as a result of poll-worker error to be counted. *Id.* at 589-90.

Because Texas made no effort to pursue these challenges earlier, thousands of Wisconsinites cast their votes in reliance on the procedures dictated to them by election officials. Widespread disenfranchisement for following the rules does not comport with due process or a healthy democracy.

2. Texas's invocation of 3 U.S.C. § 2 does not help it.

Texas's reliance on 3 U.S.C. § 2 fails for similar reasons. That statute provides that, "[w]henever 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. According to Texas, that statute applies not simply when a state "has failed to make a choice" on election day, 3 U.S.C. § 2, but rather "[w]hen a State fails to conduct a valid election for any reason," including because of the kinds of state election law violations alleged in this case. (Brief in Support of Motion for Leave to File Bill of Complaint, 5.) Texas's reading of 3 U.S.C. § 2 would raise serious doubts about its constitutionality, and the statutory language is readily susceptible to a less problematic interpretation.

Under Texas's interpretation of 3 U.S.C. § 2, a state that has held a popular presidential election on election day has nonetheless "failed to make a choice" of its electors on that day, if post-election litigation challenges the validity of certain votes under state law. There would be grave doubts, however, about the constitutionality of a statute that would allow a state legislature, whenever popular election results are disputed, to simply replace the popular choice with its own slate of electors. Such an unreasonable outcome would disenfranchise everyone who already voted and violate due process, as discussed above. That interpretation of 3 U.S.C. § 2 cannot be correct.

The better reading of the statute is that a state that holds a popular presidential election on election days "fails" to choose its electors on that day only where the completion of the election process on that date is prevented by some inherent feature of the state's election procedures or by some extraordinary occurrence, such as a widespread natural disaster or similar emergency that prevents a significant portion of the public from being able to vote. Under such a reading, the completion of the election process is delayed, but nobody is disenfranchised, and the due process concerns described above are avoided.

That reading of 3 U.S.C. § 2 is also consistent with the statute's legislative purpose. It arose out of Congress's establishment of a uniform national election date in 1845. Act of Jan. 23, 1845, 5 Stat. 721 (1845) (codified at 3 U.S.C. § 1). At that time, it was recognized in Congress that some states might adopt presidential election procedures that would sometimes require runoff elections, which would make it impossible to complete the selection of electors on election day. *See* Cong. Globe, 28th Cong., 2d Sess. 10, 14 (1844) (remarks of Rep. Hale). The purpose of the statute was to give states flexibility where state election procedures or an unforeseen emergency prevented the completion of the election process in a single day.

Here, it is undisputed that Wisconsin held and completed its popular vote on November 3, 2020, and therefore it "[made] a choice on the day prescribed by law." Where the state legislature has given the people the right to vote for President, and where the people have exercised that fundamental right, the goal of any

subsequent election dispute in the courts is simply to determine whom the people have chosen.

III. Texas fails to state a claim under the Electors Clause, due process, or equal protection, and its arguments about Wisconsin law are wrong on their face.

Even aside from these many threshold failures, Texas's Bill of Complaint fails to state a claim. It states no claim under the Electors Clause, due process, or equal protection, and its understanding of Wisconsin law is wrong on its face.

A. Texas's allegations of Wisconsin state election law violations fail to state an Electors Clause claim.

Count I of Texas's Bill of Complaint asserts a claim under the Electors Clause. That claim fails as a matter of law.

Contrary to Texas' hyperbolic rhetoric, it is well established that allegations of a violation of state law, including even a deliberate violation of state election laws by state election officials, do not state a claim under the U.S. Constitution. *See Shipley v. Chicago Bd. of Election Comm'rs*, 947 F.3d 1056, 1062 (7th Cir. 2020) (citation omitted); *see also Bognet v. Sec'y of the Comm. of Pennsylvania*, __ F.3d. __, 2020 WL 6686120, *6 (3d Cir., Nov. 13, 2020); ("[F]ederal courts are not venues for plaintiffs to assert a bare right 'to have the Government act in accordance with law.") (citation omitted); *Martinez v. Colon*, 54 F.3d 980, 989 (1st Cir. 1995) ("[T]he Constitution is not an empty

ledger awaiting the entry of an aggrieved litigant's recitation of alleged state law violations—no matter how egregious those violations may appear within the local legal framework.").

This non-interference principle rests on a "caution against excessive entanglement of federal courts in state election matters":

> The very nature of the federal union contemplates separate functions for the states. If every state election irregularity were considered a federal constitutional deprivation, federal courts would adjudicate every state election dispute, and the elaborate state election contest procedures, designed to assure speedy and orderly disposition of the multitudinous questions that may arise in the electoral process, would be superseded by a section 1983 gloss.

Bodine v. Elkhart Cty. Election Bd., 788 F.2d 1270, 1272 (7th Cir. 1986).

Texas's Electors Clause theory violates this core federalism principle, as it rests solely on allegations that various acts by state and local election officials in Wisconsin were inconsistent with state election statutes.

Texas's contrary position would swallow this fundamental rule of federalism. In their view, the alleged violations of state election statutes by state officials usurped the Wisconsin Legislature's constitutional authority to direct the manner of

appointing Wisconsin's presidential electors. That theory proves far too much, as it would convert virtually *any* alleged state law violation into a federal constitutional claim. The general rule that a violation of state law does not give rise to a federal constitutional claim, *see Shipley*, 947 F.3d at 1062, would no longer have any teeth and losing candidates could evade it simply by alleging that any violation of a statute enacted by the State Legislature is, *ipso facto*, an Electors Clause violation. That result would threaten to replace Wisconsin's "elaborate state election contest procedures" with federal court intervention in the "multitudinous questions that may arise in the electoral process," just as *Bodine* warned against. 788 F.2d at 1272.

That is why a federal district court in Michigan recently dismissed an Electors Clause claim like this one. *King v. Whitmer*, No. 20-13134, 2020WL7134198 (E.D. Mich.). There, too, the plaintiffs alleged that state officials violated the Electors Clause by deviating from the requirements of a state election code. *Id.* at *11. The court recognized that "Plaintiffs' claims are in fact state law claims disguised as federal claims" and dismissed them:

> By asking the Court to find that they have made out claims under the clauses due to alleged violations of the Michigan Election Code, Plaintiffs ask the Court to find that any alleged deviation from state election law amounts to a modification of state election law and opens the door to federal review. Plaintiffs cite to no case—and this Court

> found none—supporting such an expansive approach.

Id.

To justify federal court intervention in this state election law dispute, Texas relies primarily on this Court's decision in *Bush v. Gore*, 531 U.S. 98 (2000), but that decision does not support their Electors Clause claim. It is true that one of the issues identified by the Court in *Bush* was "whether the Florida Supreme Court established new standards for resolving Presidential election contests, thereby violating Art. II, § 1, cl. 2, of the United States Constitution." *Id.* at 103. The Court's holding, however, was based on finding a violation of the Equal Protection Clause of the Fourteenth Amendment, not a violation of the Electors Clause. *See id.* at 105–09. The Electors Clause issue was discussed in greater depth in a concurring opinion by Chief Justice Rehnquist, *see id.* at 111–22, but that opinion did not garner a majority and thus has no precedential effect.

In any event, the Rehnquist concurrence is distinguishable, for it addressed whether a state high court infringed upon the authority of the state's legislature by engaging in judicial interpretation that altered the "general coherence" of the state's election laws "so as to wholly change the statutorily provided apportionment of responsibility among" state election officials and the state courts. *Id.* at 114. Here, in contrast, Texas's theory has nothing to do with a state supreme court expressly overriding state election statutes after the election has occurred, but instead contends that state election officials violate the

Electors clause simply when they err in interpreting and applying state election statutes while administering an election.

In *Bush* there was no dispute that the Florida Supreme Court was overriding unambiguous provisions in that state's election code. Here, however, Texas argues that Wisconsin election officials violated the federal Constitution by adopting interpretations of Wisconsin election statutes with which Texas disagrees, and which are currently being hotly disputed in ongoing litigation in the Wisconsin state courts. The court in *Miller v. Treadwell*, 736 F. Supp. 2d 1240 (D. Alaska 2010), rejected just such an Elections Clause claim. There, the plaintiff contended that state officials violated state law by counting misspelled votes for write-in candidates. But the plaintiff's reliance on a debatable "interpretation" of state law could not support a federal claim, given that it was not "clearly contrary to the face of the statute" and the state's "past practice" was consistent with its approach. *Id.* at 1243. Here, Texas offers no more than that: debatable (and incorrect) interpretations of state election statutes that cannot possibly rise to the level of a federal constitutional claim without federalizing practically *all* state election disputes.

Perhaps most importantly, under Texas's overly expansive interpretation, the Electors Clause would go beyond authorizing state legislatures to direct the method for appointing state presidential electors, and would override the entire constitutional separation of powers in the states, even where—as in Wisconsin—the state legislature has adopted a method of

appointing electors that incorporates the constitutional structure of state government.

The Wisconsin Legislature has directed that the state's electors be appointed by popular vote for presidential candidates. *See* Wis. Stat. §§ 5.10, 5.64(1)(em), 8.25(1). Those popular presidential elections are conducted under the same statutory procedures that apply in other elections in Wisconsin, and are administered by the same state and local election officials who administer other elections. *See, generally,* Wis. Stat. chs. 5–12. And those procedures provide for the ordinary method of resolving disputes about their administration under Wisconsin's constitutional separation of powers.

It is an axiomatic principle of the separation of powers that executive branch officials, in order to carry out their constitutional function of executing statutes, necessarily must interpret the meaning of those statutes and must exercise executive judgment and discretion in applying them to particular facts. *See Bowsher v. Synar*, 478 U.S. 714, 733 (1986) ("Interpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law."); *Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue*, 2018 WI 75, ¶ 53, 382 Wis. 2d 496, 543, 914 N.W.2d 21 ("The executive . . . must determine for himself what the law requires (interpretation) so that he may carry it into effect (application). Our constitution not only does not forbid this, it requires it."). The Wisconsin Legislature adopted that fundamental division between the legislative and executive powers of the state when it chose to have Wisconsin's presidential electors

appointed through popular elections administered by the same state and local election officials who administer all other elections under Wisconsin's election statutes.

It is an equally axiomatic principle that the executive branch's interpretation and application of state statutes in particular situations are subject to review by the judicial branch. The Wisconsin Legislature adopted this principle, too, when it chose to have Wisconsin's presidential elections administered under the same election statutes that are routinely interpreted and applied by state courts in deciding election cases.

It goes without saying that state courts may sometimes conclude that executive officials have erred in interpreting and applying a state election statute. Such errors, when they occur, give rise to a claim of *ultra vires* action under state law. Such routine claims of executive branch error, however, do not automatically rise to the level of a constitutional claim that the executive is usurping the legislative function of changing the law. Even less do such claims of ultra vires action automatically give rise to a federal constitutional claim under the Electors Clause, or to the kind of multi-state constitutional crisis that Texas here seeks to invent.

B. Texas states no claim under due process or equal protection.

For similar reasons, Texas's equal protection and due process claims fail, as well. Even assuming Texas can stand in the shoes of voters, it merely asserts

state-law claims that are fully addressable through state procedures.

The federal "Constitution is not an election fraud statute." *Bodine*, 788 F.2d at 1271. The federal constitution "is implicated only when there is 'willful conduct which undermines the organic processes by which candidates are elected.'" *Id.* (citation omitted). Therefore, "garden variety election irregularities that could have been adequately dealt with through the procedures set forth in [state] law" do not support constitutional due process claims. *Id.*; *see also Bennett v. Yoshina*, 140 F.3d 1218, 1226 (9th Cir. 1998).

Texas relies on a vote-dilution theory, which it restyles as vote "diminish[ment]," Mot. for Leave at 8, or "debase[ment]," Mot. for P/I at 3. Although vote dilution theories may sometimes support federal claims, Texas's version does not. Recognized vote dilution claims involve state laws that structurally disadvantage certain groups in the voting process. For instance, *Reynolds v. Sims*, 377 U.S. 533 (1964), the case Texas relies on, held that state legislative districts must be apportioned by population to avoid diluting the votes of residents in disproportionately populous districts. Other vote dilution claims similarly target legislative apportionment schemes that disadvantage minorities in violation of either equal protection or the Voting Rights Act of 1965 ("VRA"). *See, e.g.*, *Thornburg v. Gingles*, 478 U.S. 30, 34 (1986) (multimember districts in North Carolina violated VRA by diluting black vote); *Miller v. Johnson*, 515 U.S. 900, 911 (1995) ("[A] vote dilution claim alleges that the State has enacted a particular voting scheme as a purposeful device '[t]o minimize or

cancel out the voting potential of racial or ethnic minorities.'" (citation omitted)).

Texas's theory, in contrast, rests on alleged vote counting violations and does not fit within this recognized malapportionment framework, as the Third Circuit held just days ago in *Bognet*, 2020 WL 6686210, at *11. There, individual voters alleged that votes arriving or cast after election day were unlawfully counted, thereby diluting the plaintiffs' votes in an unconstitutional manner. *Id.* at *9. The Third Circuit rejected this theory, explaining that "[c]ontrary to [this] conceptualization, vote dilution under the Equal Protection Clause is concerned with votes being weighed differently." *Id.* Recognizing this unprecedented kind of dilution claim would upset the delicate balance between state and federal authority over elections:

> [I]f dilution of lawfully cast ballots by the "unlawful" counting of invalidly cast ballots "were a true equal-protection problem, then it would transform every violation of state election law (and, actually, every violation of every law) into a potential federal equal-protection claim requiring scrutiny of the government's 'interest' in failing to do more to stop the illegal activity."

Bognet, 2020 WL 6686210, at *11 (citation omitted).

Texas's claim would implicate practically *any* state election, because "[i]n just about every election, votes are counted, or discounted, when the state

election code says they should not be. But the Constitution 'd[oes] not authorize federal courts to be state election monitors.'" *Boockvar*, 2020 WL 5997680, at *48 (citing *Gamza v. Aguirre*, 619 F.2d 449, 454 (5th Cir. 1980)). Yet "state election monitors" is exactly what federal courts would become, if unlawfully cast votes alone sufficed to state a constitutional claim.

C. Texas's assertions of violations of Wisconsin law are meritless on their face.

However Texas tries to dress up its quibbles about the Wisconsin election in federal garb, its understanding of Wisconsin election law is just plain wrong. The three practices it identifies all comport with Wisconsin statutes.

1. Drop boxes are legal under Wisconsin law.

Texas argues that voters violated Wisconsin law when they delivered their absentee ballots to drop boxes set up by local election officials around the state. Officials designated these boxes as absentee delivery sites to handle the expected increase in absentee voting during the November election cycle. They followed Commission advice on establishing secure drop boxes where voters could deliver their completed absentee ballots. Statewide, 66 of Wisconsin's 72 counties designated these boxes, and state legislative leaders "wholeheartedly support[ed] voters' use" of this "lawful" method.

Lawful it was: Wis. Stat. § 6.87(4)(b)1. permits absentee ballots to be returned through "deliver[y] in person, to the municipal clerk." Texas argues that drop boxes were illegal based on its mistaken assumption that drop boxes were "alternate absentee ballot sites" under a different statute, Wis. Stat. § 6.855(1), which municipalities may establish using certain procedures. But they were not. As section 6.855(1) explains, alternate ballot sites are places where people *vote*: an alternate site is a location where "electors of the municipality may *request and vote absentee ballots* and to which voted absentee ballots shall be returned." (emphasis added). That has nothing to do with the locations a clerk may designate to return absentee ballots completed in the voter's home. Drop boxes are a location that clerks may designate for such returns. Wis. Stat. § 6.87(4)(b)1.

2. The Wisconsin Supreme Court has approved of the Commission's guidance on indefinitely confined voters.

Texas also claims that Wisconsin violates its statutes by allowing voters who have identified as indefinitely confined to maintain that status. For voters who determine they are "indefinitely confined because of age, physical illness or infirmity or . . . disabled for an indefinite period," Wis. Stat. § 6.86(2)(a), Wisconsin law allows voters to cast absentee ballots without meeting photo identification requirements, which can be burdensome if the voter needs to leave her home to photocopy her ID. Texas complains that two municipalities made public statements on March 25, 2020, about indefinite

confinement eligibility during the COVID-19 pandemic. (Motion for Leave at 33.) But Texas fails to tell the whole story, which confirms that the Commission subsequently gave appropriate advice to all local election officials.

After the March 25 communications from the local officials that Texas complains of, a plaintiff brought suit in the Wisconsin Supreme Court objecting to it. On March 29, the Commission disseminated its own guidance concerning indefinitely confined status, "Guidance for Indefinitely Confined Electors COVID-19." It cautioned that while age or infirmity might cause a voter to become indefinitely confined during the pandemic, "Indefinitely confined status shall not be used by electors simply as a means to avoid the photo ID requirement without regard to whether they are indefinitely confined because of age, physical illness, infirmity or disability." The *Jefferson* court reviewed the March 29 guidance and concluded that it "provides the clarification on the purpose and proper use of the indefinitely confined status that is required at this time." *See* Appx. A, Supreme Court March 31, 2020 Order.

Texas offers no proof of a single voter who cast a ballot in the general election who did *not* qualify for indefinite confinement status. Instead, Texas simply points out that the total number of voters who identified as indefinitely confined increased in November 2020. Texas forgets that far more people voted overall, and absentee generally, in November 2020. According to Commission data, in 2020, roughly 10% of absentee voters across the State identified as indefinitely confined, roughly the same percentage of

absentee voters who did so in the 2016 Presidential election. Roughly 75,000 of those voters resided in Dane in Milwaukee Counties; the remaining 165,000 or so were spread throughout every other county in Wisconsin. The vast majority of these voters—around 199,000—were older than 50. In other words, the percentage of absentee voters claiming that status did not significantly increase, the voters were not concentrated in the more heavily Democratic counties, and it was overwhelmingly an older population more likely, due to "age" or "infirmity," to identify appropriately as indefinitely confined.

3. Wisconsin's practice for handling witness addresses, in place since 2016, followed state law.

Texas's third complaint is that, under longstanding Commission guidance, clerks fill in extra witness address information on ballot envelopes. Texas asserts that this violates Wisconsin law, but it is wrong.

When an absentee voter fills out an absentee ballot, an adult witness must be present to verify the voter's identity and other information. Wis. Stat. § 6.87(4)(b)1. To guarantee that a witness was actually present, absentee ballots contain a sworn certification by the witness attesting to the absentee voter's identity and residency. Wis. Stat. § 6.87(2). Below the certification, the witness signs her name and writes her address. *Id.* The purpose of a witness is to attest to the genuineness of the absentee voter's certification and to be available, if necessary, to

personally testify as to the matters witnessed. The address allows officials to contact the witness, if needed.

Occasionally, witnesses fill in only a street address but not a municipality, state or zip code, often when they live in the same household with the voter. Since before the 2016 presidential election, the Commission has advised local election officials statewide that clerks should "take corrective action in an attempt to remedy a witness address error" and suggested reliable ways to do so, including by filling in missing information when the voter and witness indicate they live at the same street address.

This longstanding practice comports with state law: the statute does not define for an envelope to be "missing the address" of the witness. In the context of needing to contact a witness in a given municipality, a street address might well suffice. And the statute does not prohibit individuals other than the witness from adding additional address information on the envelope.

IV. Texas cannot justify preliminary relief or a stay.

Texas cannot meet its burden to justify preliminary relief. A preliminary injunction "may only be awarded upon a clear showing that the Plaintiff is entitled to such relief." *Winter*, *v. Nat. Res. Def. Council*, 555 U.S. 7, 22 (2008); *see also Goodman v. Ill. Dep't of Fin. & Prof'l Regulation*, 430 F.3d 432, 437 (7th Cir. 2005) "A Plaintiff seeking a preliminary

injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Illinois Republican Party v. Pritzker*, 973 F.3d 760, 762 (7th Cir. 2020) (brackets added) (quoting *Winter*, 555 U.S. at 20.

As the discussion of the merits above demonstrates, Texas has failed to demonstrate that it is likely to succeed on the merits of its claims. Texas has no likelihood of success on the merits. This case has multiple threshold defects that would require dismissal. Texas lacks standing, its inexplicably late claim is barred by laches, and the relief it requests is barred by the Substantive Due Process Clause.

Texas has not shown that it would suffer irreparable harm. Indeed, such an order would only harm the millions of Wisconsin voters who determined the outcome of the election.

And the balance of equities and public interest favor denying an injunction. The public would be severely harmed by Texas's requested relief. Nullifying Wisconsin's election on the basis of a unprecedented legal theory outweighs the scant chance that Texas will succeed on its claims.

The same is true for the voters in the other States named in this complaint. Wisconsin agrees with Georgia, Michigan, Pennsylvania in the substance of their briefs filed today and in their efforts to

safeguard their sovereignty and to rebuff another State's effort to nullify their elections.

As explained by the Third Circuit, "[d]emocracy depends on counting all lawful votes promptly and finally, not setting them aside without weighty proof. The public must have confidence that our Government honors and respects their votes." *Donald J. Trump for President, Inc. v. Pennsylvania*, No. 20-3371, 2020 WL 7012522, at *9 (3d Cir. Nov. 27, 2020). The "public interest strongly favors finality, counting every lawful voter's vote, and not disenfranchising . . . voters who voted by mail." *Id.* That is because "[d]emocracy depends on counting all lawful votes promptly and finally, not setting them aside without weighty proof." *Id.*

CONCLUSION

For the reasons set forth above, this Court should deny Texas's motion for leave to file a bill of complaint against the name states and should deny Texas's motion for a preliminary injunction.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

THOMAS C. BELLAVIA
Counsel of Record
CHARLOTTE GIBSON
Assistant Attorneys General

Counsel for the State of Wisconsin

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-8690
bellaviatc@doj.state.wi.us

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