No. __A_____

In the Supreme Court of the United States

LOUIE GOHMERT, TYLER BOWYER, NANCY COTTLE, JAKE HOFFMAN, ANTHONY KERN, JAMES R. LAMON, SAM MOORHEAD, ROBERT MONTGOMERY, LORAINE PELLEGRINO, GREG SAFSTEN, KELLI WARD AND MICHAEL WARD,
Applicants,

v.

THE HONORABLE MICHAEL R. PENCE, VICE PRESIDENT OF THE UNITED STATES, IN HIS OFFICIAL CAPACITY.
Respondent.

EMERGENCY APPLICATION TO THE HONORABLE SAMUEL A. ALITO AS CIRCUIT JUSTICE FOR THE FIFTH CIRCUIT FOR ADMINISTRATIVE STAY AND INTERIM RELIEF PENDING RESOLUTION OF A TIMELY FILED PETITION FOR A WRIT OF *CERTIORARI*

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PARTIES TO THE PROCEEDING

Applicants (plaintiffs-appellants below) are U.S. Rep. Louie Gohmert (TX-1), Tyler Bowyer, Nancy Cottle, Jake Hoffman, Anthony Kern, James R. Lamon, Sam Moorhead, Robert Montgomery, Loraine Pellegrino, Greg Safsten, Kelli Ward, and Michael Ward.

Respondent (defendant-appellee below) is the Honorable Michael R. Pence, Vice President of the United States, in his official capacity.

CORPORATE DISCLOSURE STATEMENT

The applicants are natural persons with no parent corporation or stock

RELATED PROCEEDINGS

There are related proceedings in the United States District Court for the Eastern District of Texas and the United States Court of Appeals for the Fifth Circuit:

- *Gohmert v. Pence,* No. 6:20-CV-00660-JDK (E.D. Tex.) (dismissed Jan. 1, 2021)
- *Gohmert v. Pence,* No. 21-40001 (5th Cir.) (decided Jan. 2, 2021)

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To the Honorable Samuel A. Alito as Circuit Justice for the Fifth Circuit:

Pursuant to this Court's Rule 22.2,[1] U.S. Rep. Louie Gohmert (TX-1), Tyler Bowyer, Nancy Cottle, Jake Hoffman, Anthony Kern, James R. Lamon, Sam Moorhead, Robert Montgomery, Loraine Pellegrino, Greg Safsten, Kelli Ward, and Michael Ward—plaintiffs- appellants below—respectfully apply for an order pursuant to the All Writs Act, 28 U.S.C. § 1651(a), directing respondent Vice President of the United States to refrain from invoking the dispute-resolution provisions of the Electoral Count Act of 1887, PUB. L. NO. 49-90, 24 Stat. 373 ("ECA") (codified in pertinent part at 3 U.S.C. §§ 5, 15) for the duration of this Court's consideration of a timely filed petition for a writ of *certiorari*. As set forth in the argument below, the ECA violates the Electors Clause, the Twelfth Amendment, and the Constitution's structural protections of liberty.

By *per curiam* order dated January 2, 2021, the Fifth Circuit *sua sponte* affirmed (App. 16a) the district court's dismissal of Applicants' action for the reasons stated by the district court's order dated January 1, 2021 (App. 16a). Applicants have not yet decided whether to seek rehearing or *en banc* in the Fifth Circuit before petitioning for a writ of *certiorari*. Including the 60-day extension granted by this Court's COVID-pandemic order dated March 19, 2020, a petition for a writ of *certiorari* is currently due by June 1, 2021. Given the exigency of resolving the 2020 presidential election before January 20, 2021, Applicants propose an expedited

[1] Alternatively, this Court could treat this application as a motion pursuant to Rule 21.2(c) and require ten copies of the application.

schedule for the filing and resolution of a petition for a writ of *certiorari*. Alternatively, Applicants respectfully submit that the relief requested in this application could resolve this matter.

INTRODUCTION

> *A man dies when he refuses to stand up for that which is right. A man dies when he refuses to stand up for justice. A man dies when he refuses to take a stand for that which is true.*
>
> *Martin Luther King, Jr.*

On January 6th, a joint session of Congress will convene to formally elect the President. The respondent, Vice-President Pence, will preside. Under the Constitution, he has the authority to conduct that proceeding as he sees fit. He may count elector votes certified by a state's executive, or he can prefer a competing slate of duly qualified electors. He may ignore all electors from a certain state. That is the power bestowed upon him by the Constitution.

For over a century, the counting of elector votes and proclaiming the winner was a formality to which the prying eye of the media and those outside the halls of the government paid no attention. But not this time. Our nation stands at the crossroads of a Constitutional crisis fraught by chaos and turmoil brought into play by a viral plague, anti-democratic interference from domestic and foreign sources, and hastily enacted State voting measures ostensibly placed to protect voters from catching the plague. At stake is Americans' confidence in the integrity of their electoral system and mechanisms of government – not to mention the results of the election itself.

Entreaties to the judicial branch to address these pressing electoral issues has proven ineffectual to date, in large measure due to use of legal principles which permit the defeating of consideration of the merits of the claims and procedural barriers that inhibit the introduction of evidence of fraud. The courts of this nation have demurred in the face of mounting evidence of sophisticated vote and voter fraud, prompting the States which experienced these injustices to pursue hastily called investigations. In the meantime, constitutionally mandated deadlines have marched forward, thrusting the issue into the halls of Congress, which has made clear its intent to rely upon a statute that is facially unconstitutional.

Into this fray, Applicant Rep. Gohmert, along with 140 of his Republican House colleagues have announced that they will object to the counting of state certified electors pledged to former Vice-President Biden because of the mounting and convincing evidence of voter fraud in key swing states whose combined electoral count prove determinative of the election results. App. 62a-65a. The contest for President now rides on a conflicted Congress, with one side adamant that the election was "the most secure in this nation's history" and the other just as firm in their conviction that the election was "rigged."

The Court is now asked to rule on a pressing and critical question: which set of rules does Vice-President Pence follow when confronted by these objections and this crisis? The rules set by the Constitution, or those in a simple statute, 3 USC 15, last updated in 1948 by a session of Congress long ago ended. Applicants are not asking this Court to choose a winner of the presidential contest. Nor are they asking

the Court to rule on whether there was pervasive fraud in the swing states that are subject to objection. Those are matters left to the January 6th joint session of Congress. The issue before this Court hinges on an obvious and elementary concept: that a federal statute cannot conflict with or abrogate the United States Constitution.

This case focuses on a clear historical perspective of the role of the Vice President in the electoral process. Below, we set forth a brief study of the background to the Vice-President's weighty and prudential powers afforded under the Constitution – the foundation of American democracy -- which unequivocally entrusts to him all the prerogatives and rights to determine what electoral votes to count or to disregard that are attendant to his role as President of the Senate. We further explain how 3 USC 15 is unconstitutional and why it is of no force or effect whatsoever. Finally, we discuss why the courts below have erred.

We respectfully submit that the courts below did not heed Dr. King's prescient words quoted above. We are looking for this Court's courage and wisdom to prevent the "death" of this country's faith in its electoral process. By applying to this court of last resort, Applicants are confident and hopeful that you will indeed appreciate Dr. King's warning that: *"A man dies when he refuses to take a stand for that which is true*." The application for an administrative stay and interim relief should be granted.

RULE 23.3 POSES NO BAR TO THE RELIEF REQUESTED

Applicants moved for interim relief in the district court, but the Fifth Circuit sua sponte affirmed the district court's dismissal before Applicants could seek interim relief in the Fifth Circuit. Under the circumstances, to the extent that Rule 23 applies,

Applicants respectfully submit that the extraordinary-circumstance exception to this Court's Rule 23.3 applies.

> Except in the *most extraordinary circumstances*, an *application for a stay* will not be entertained unless the relief requested was first sought in the appropriate court or courts below or from a judge or judges thereof.

SUP. CT. R. 23.3 (emphasis added). This rule is inapposite for two reasons: (1) Applicants do not request a stay (*i.e.*, all of Rule 23 does not apply); and (2) even if Applicants were requesting a stay, Rule 23.3's extraordinary-circumstances provision is a matter for judicial determination and plainly applies here.

First, while Applicants seek interim injunctive and declaratory relief, not all injunctive relief qualifies as a "stay." The relevant "definitions indicate that 'stay' is a subset of the broader term 'enjoin'; it is a 'kind of injunction' directed at a judicial case or proceedings within it." *Teshome-Gebreegziabher v. Mukasey*, 528 F.3d 330, 333 (4th Cir. 2008), *abrogated in part on other grounds*, *Nken v. Holder*, 556 U.S. 418, 423 (2009); *id.* ("a suspension of the case or some designated proceedings within it. It is a *kind of injunction* with which a court freezes its proceedings at a particular point.") (emphasis in original, quoting *Black's Law Dictionary* 1413 (6th ed. 1990)). This Court's motions-practice rules last included a reference to injunctive relief before the 1990 amendments to the rules, Stern & Gressman, SUPREME COURT PRACTICE § 17.11 (11th ed. 2013), presumably because the "stay" rule does not include authority for a preliminary injunction. *Id.* Instead, the All Writs Act provides that authority:

> I note first that applicants are seeking not merely a stay of a lower court judgment, but an injunction against the enforcement of a presumptively valid state statute. The All

> Writs Act, 28 U.S.C. § 1651(a) (1994 ed.), is the only source of this Court's authority to issue such an injunction.

Brown v. Gilmore, 533 U.S. 1301, 1303 (2001) (Rehnquist, C.J., in chambers).[2] If Rule 23 does not apply, then Rule 23.3's restrictions do not apply.

But even if Rule 23.3 did apply, the justices of this Court must apply Rule 23.3 because its extraordinary-circumstances provision requires a judicial determination of whether Applicants' case presents an extraordinary circumstance. Under the circumstances, the All Writs Act provides jurisdiction: "The Supreme Court and all courts established by Act of Congress may issue *all writs necessary or appropriate* in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a) (emphasis added). The question whether extraordinary relief is warranted requires a judicial determination..

STANDARD OF REVIEW

Standing and other questions of jurisdiction are reviewed *de novo*. "The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals." *Singleton v. Wulff*, 428 U.S. 106, 121 (1976). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that

[2] Section I, *infra*, discusses this Court's jurisdiction under the All Writs Act.

an injunction is in the public interest." *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 21 (2008).[3]

CONSTITUTIONAL AND LEGISLATIVE BACKGROUND

The pertinent constitutional and statutory provisions are reproduced in the Appendix ("App."), and their history and context are summarized here.

The Vice Presidents of the Framers' Generation Acted as Presiding Officers and Established Rules of Parliamentary Procedure

While the discussion of the Vice President's role in the Constitutional Convention and Ratification Debates is sparse, two of the most significant Framers of the Declaration of Independence, John Adams and Thomas Jefferson, subsequently served as Vice Presidents. In these roles, they immediately established that the Vice President was not merely a ceremonial position, but rather served in an active and leading role as Presiding Officer of the Senate in establishing rules of parliamentary procedure for the new Congress.

Vice President Adams drew upon his knowledge of British parliamentary procedure in presiding over the Senate. *See* Richard Allan Baker, The Senate of the United States: "*Supreme Executive Council of the Nation*," 1787-1800, in 1 THE

[3] If Applicants sought a "stay" as distinct from interim relief, a stay pending the timely filing and ultimate resolution of a petition for a writ of *certiorari* is appropriate when there is "(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." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). For "close cases," the Court "will balance the equities and weigh the relative harms to the applicant and to the respondent." *Id.*

CONGRESS OF THE UNITED STATES, 1787-1989, at 135, 148 (Joel H. Silbey ed., 1991). Vice President Jefferson, also on expert on British parliamentary procedure, authored the Senate's first manual of procedure. *See* Thomas Jefferson, *A Manual of Parliamentary Practice: for the Use of the Senate of the United States*, in Jefferson's PARLIAMENTARY WRITINGS: "PARLIAMENTARY POCKET-BOOK" AND A MANUAL OF PARLIAMENTARY PRACTICE (Wilbur Samuel Howell ed., 1988).

Thus, these two most important men who not only contributed to the founding documents of the country, but also established and documented the Senate's first rules as Presiding Officers, did not see their role as clerks or tabulators in counting votes. They were candidates and parliamentarians who also established the rules and processes for deciding the winner of the office of President (*i.e.*, them in both cases). They knew that the role of "President of the Senate" did not mean a toothless, helpless, clerk.

The process for electing the President was one of the most divisive of all issues debated in the Philadelphia Convention, with competing proposals for direct election, federal congressional election and state election argued. *See* 3 Jonathan Elliot, *Debates on the Adoption of the Federal Constitution* at 547 (James McClellan & M.E. Bradford eds., James River Press 1989) (2d ed. 1836). Sixty ballots were taken before the original 1787 Constitution was adopted, pursuant to which electors from each State, appointed by the State Legislature under the Electors Clause, elect the President; or in the event no candidate receives a majority as counted by the Vice

President, the House of Representatives chooses the President by the "one vote per state delegation" rule. *Id.*

U.S. CONST. art II, § 1, cl. 3, amended by U.S. CONST. amend. XII. Article II of the Constitution provides, in relevant part:

> The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. *The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted*.

U.S. Const., art. II, § 1, cl. 3 (amended by U.S. CONST. amend. XII) (emphasis added).

In *The Federalist* No. 68, Alexander Hamilton provides the rationale both for the unique role of Presidential Electors in electing the President of the United States, and the Vice President's role in the Electoral College. Hamilton first explains that the choice of indirect election through electors, rather than direct democracy, because it is preferable for "[a] small number of persons, selected by their fellow-citizens from the general mass, will be most likely to possess the information and discernment requisite to such complicated investigations," and it will "afford as little opportunity as possible to tumult and disorder." Hamilton, Alexander. *The Federalist* No. 68, at 410-11 (C. Rossiter, ed. 1961).

Further, the Electoral College should not meet as a national body in one place, but instead should meet and elect the President in each State:

> And as the electors, chosen in each State, are to assemble and vote in the State in which they are chosen, this detached and divided situation will expose them much less to heats and ferments, which might be communicated from them to the people, than if they were all to be convened at one time, in one place.
>
> Nothing was more to be desired than that every practicable obstacle should be opposed to cabal, intrigue, and corruption. These most deadly adversaries of republican government might naturally have been expected to make their approaches from more than one quarter, but chiefly from the desire in foreign powers to gain an improper ascendant in our councils.

Id.

If no candidate should receive a majority of the Electors' vote, then and only then, should the decision should be made by the national legislature, namely the House of Representatives:

> But as a majority of the votes might not always happen to centre in one man, and as it might be unsafe to permit less than a majority to be conclusive, it is provided that, in such a contingency, the House of Representatives[4] shall select out of the candidates who shall have the five highest number of votes, the man who in their opinion may be best qualified for the office.

Id.

Finally, *The Federalist* No. 68 addresses the role of the Vice President:

> One is, that to secure at all times the possibility of a definite resolution of the body, it is necessary that the President should have only a casting vote. … And to take the senator of any State from his seat as senator, to place

[4] As set forth in the final version of art. II, § 1, cl. 3, the selection by the House of Representatives was through a vote of State Delegations, not a majority of members.

> him in that of President of the Senate, would be to exchange, in regard to the State from which he came, a constant for a contingent vote.

Id.

Presidential Electoral Count Provisions

The presidential electoral count procedures in the original Constitution are largely identical to those in the Twelfth Amendment. These procedures—in particular those regarding the Vice President's role as Presiding Officer in counting electoral votes and the House's "one vote per state delegation" for choosing the President—were carried over into the Twelfth Amendment *verbatim* -- with one important exception.

A critical and near fatal flaw in this process became apparent immediately after the Presidency of George Washington, in the elections of 1796 and 1800, namely, that the while the original Constitutional language gave each elector two votes, "it did not allow the electors to designate one of their votes for President and one for Vice President." Nathan L. Colvin & Edward B. Foley, *The Twelfth Amendment: A Constitutional Ticking Time Bomb*, 65 U. MIAMI L. REV. 475, 489 (2010). As a result, "the vice presidency went to the losing Presidential candidate with the largest number of electoral votes." Richard K. Neumann, *The Revival of Impeachment as a Partisan Political Weapon*, 34 HASTINGS CONST. L.Q. 161, 180 (2002).

The Election of 1800

Thomas Jefferson lost the election of 1796 to John Adams, receiving the second highest number of electoral votes. As a result, he became President Adams' Vice President. Jefferson ran for President again in 1800 for the Democratic-Republican

Party, as the candidate for President and Aaron Burr as candidate for Vice President. As sitting Vice President, Vice President Jefferson was also President of the Senate and Presiding Officer over the Electoral College proceedings. As such, he was responsible for counting electoral votes for himself and competing candidates.

Legislative History and Ratification

In 1803, both Houses approved the text of the Twelfth Amendment, and 13 of 17 States had ratified it by June of 1804. Colvin & Foley at 490. The Amendment provides, in relevant part:

> The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate; -- *The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted*.

U.S. CONST. amend. XII (emphasis added).

Commentators argue that the passive voice in the sentence "and the votes shall then be counted" means that the President of the Senate, the Vice President, has "further powers hidden in the passive voice" which today would be referenced as "discretion." Bruce Ackerman & David Fontana, *Thomas Jefferson Counts Himself into the Presidency*, 90 VA. L. REV. 551, 629 (2004).

This is consistent with the Framers' original intent and their inherent bias that a presiding officer was not merely a ceremonial figure, but one that has authority to render substantive decisions in the face of disputes or other disruptions to the electoral process devolved to his mandate.

The Congress That Enacted 3 U.S.C. § 5 Recognized that It Required a Constitutional Amendment but Adopted the ECA as a Shortcut Because They did not Have the Votes

In Section 2 of the Electoral Count Act of 1887, codified at 3 U.S.C. § 5, Congress sought to require States to resolve any disputes over the appointment of Presidential electors to avoid the necessity for Congress to do so in the 1876 election. "What Congress wanted was for the states to develop, or apply, their existing, more streamlined election laws to Presidential Elections." Stephen A. Siegel, *The Conscientious Congressman's Guide to the Electoral Count Act of 1887*, 56 FLA. L. REV. 541, 585 (2004). Members of Congress recognized at the time that they could not require states to do so "absent a constitutional amendment." Id. at 586 (citations omitted). Because Congress was "[u]nable to agree on any constitutional amendment," it attempted, "to remove, as far as it is possible to be done by legislation . . ., a difficulty which grows out of an imperfection in the Constitution itself.'" *Id.* at 658-59 (*quoting* 17 CONG. REC. 1019 (1886) (statement of Sen. Hoar)).

This was a continuation of Congress' prior debate over the repeal of the Reconstruction-Era Twenty-Second Joint Rule of 1865 ("Joint Rule"), which had authorized either house of Congress to reject a State's electors. Republicans had been dominant in the Reconstruction Era following 1865, but by 1875 it was "anticipated

that the Democrats would control the House of Representatives for the first time in two decades," and "Senate Republicans were no longer willing to allow the House to unilaterally discard electoral votes that could turn the outcome of the election or throw the election to the House." Colvin & Foley at 499.

In the run up to the 1876 election, the Senate debated repeal or modification of the Joint Rule where the "primary disagreement" was whether Congress could adopt a rule permitting one house of Congress to reject a State's electoral votes "without a constitutional amendment," and "[t]he dividing lines were drawn between those who did not believe the Constitution gave Congress a right to say whether votes shall be counted or not be counted and those who did." *Id.* at 500 (internal quotations and citations omitted). Consequently, if Congress itself cannot determine whether to count (or not count votes), then that function must remain with the President of the Senate.

History of Competing State Electoral Slates

Historical precedent for dual electoral slates getting to the President of the Senate arose before the ECA. While the circumstances varied, in the Tilden and Hayes election of 1876 several states submitted two or three slates of electors with at least one each for Tilden and Hayes. There were also serious allegations of violence, voter intimidation, fraud, and corruption.

- **Florida:** Three sets of electors: (1) For Hayes, from Board of State Canvassers and signed by the Governor; (2) For Tilden, alleging violence, voter intimidation, fraud, and discarding Tilden ballots, "the slate of Presidential

electors pledged to Tilden decided to go ahead and meet as if they were the authorized Electoral College delegates from Florida," certified by Florida Attorney General; and (3) For Tilden, when the Florida legislature called for a new canvas, which certified electors for Tilden, and a Florida court ruling that Tilden electors were legitimate, and the newly elected Democratic Governor certified a third slate of electors for Tilden. Colvin & Foley at 503-04.

- **Louisiana:** "The first slate of electors was for Hayes; it came from the canvassing board and was certified by the ostensible governor. The second was for Tilden, with these electors disregarding the work of the canvassing board on the ground that the board was corrupt. This slate was certified by a different individual who purported to be the lawful governor. The third slate was in effect a duplicate of the first." *Id.* at 504.
- **South Carolina:** "South Carolina submitted two slates, one for Hayes from the Board of Canvassers, certified by the governor, and another for Tilden, alleging that the Tilden electors were the rightful voters." *Id.*
- **Oregon:** "In Oregon, the voters had elected a postmaster general as one of Hayes's electors, a possible violation of the constitutional prohibition against federal office holders acting as electors. Because of this, the elector resigned from his office as postmaster, and Oregon law allowed the remaining electors to choose a replacement; they chose the resigned elector. The Democratic Oregon governor refused to certify this slate of electors and instead certified a slate with two Hayes electors and a Tilden elector as a replacement for the

former postmaster. The secretary of state, on the other hand, submitted a certificate that contained the three original Hayes electors and noted that there was no question that the Hayes electors received the most votes on election day." *Id.* at 504-05.

As a result of this tumult, Congress found a quick fix to potential future disruptions through enactment of the Electoral Count Act.

Binding Law, Congressional Rule, or Unreviewable Statement of Principle/Moral Obligation?

"Whether the ECA is a statute or a joint rule enacted in statutory form is ambiguous. In truth, both theories underlay its enactment. The difference between the two theories disappears, however, to the extent that the ECA involves political questions not subject to judicial review. The difference between the two theories also disappears to the extent that Congress self-enforces its own internal rules." Siegel at 565.

Internal Rule: "Many congressmen spoke in opposition to the ECA on the grounds that legislating the matter was an unconstitutional attempt to bind Congress's discretion. It was unconstitutional, they said, because enacting and amending legislation required Presidential approval (or an extraordinary majority in Congress), and thus improperly involved the President in implementing the rules for determining Presidential Elections. In addition, one Congress could never bind another in this matter. Congress could govern itself, they reasoned, by enacting concurrent rules for each vote count, or a continuing joint rule which the houses could amend at any time." Siegel at 560-61.

Binding Legislation: "Many other congressmen believed that electoral vote counting was a proper subject for binding legislation. Congress's rulemaking authority governed its own proceedings, and the ECA was properly legislative because through it the two houses adopted rules to govern each other's actions. Moreover, the power to count electoral votes was a power vested in the national government, and the Sweeping Clause allows Congress to "make all Laws which shall be necessary and proper for carrying into Execution . . . all . . . Powers vested by this Constitution in the Government of the United States, or in any Department . . . thereof." Siegel at 561.

Unreviewable/Unenforceable Statement of Principle/Moral Obligation: "These congressmen assumed that Congress's electoral count decisions were not subject to judicial review. Because they believed that '[n]o power in this Government can or ever will set aside and annul the declaration of who is elected President . . . when that declaration is made in the presence of the two Houses of Congress.'" Siegel at 563.

"Yet, to these congressmen, an unenforceable law was better than no agreement at all. In addition, they believed an unenforceable law was better than a joint rule because of the law's greater ability to bind Congress's conscience and create a moral obligation to abide by its terms. Congress understood that even if the ECA enacted rules of only moral obligation, it nonetheless would constrain behavior both outside and inside Congress." Siegel at 564.

While the concept of non-binding "rulemaking statutes" and "anti-entrenchment clauses" developed during the 20th Century, "a number of Congressmen stated during debate on the ECA that this measure would attempt in vain to entrench procedures that would bind future Congresses." Chris Land & David Schultz, *On The Unenforceability of the Electoral Count Act*, 13 RUTGERS J.L. & PUB. POL'Y 340, 376 (2016) (*citing* 8 CONG. REC. 164 (1878)). As stated by Sen. Augustus Garland in debate on a precursor to the ECA: "*An act passed by a previous Congress assuming to bind ... a succeeding Congress need not be repealed because it is void; and for that I reason I oppose this bill*." *Id.* (Emphasis added).

Applicants could not have stated the principle any clearer. The ECA is void and unconstitutional because a previous Congress cannot bind a succeeding one.

Applicants' Requested Remedy Is Warranted

Some argue that abandoning the ECA will create havoc and cast the upcoming Joint Session on January 6 into turmoil. They offer a "parade of horribles" about making the Vice President a dictator and disenfranchising voters and argue that the assembled House and Senate must serve a role in the counting. These concerns do not justify continuing with a statutory scheme that flies in the face of the Constitution and the Framer's intent.

The first concern ignores the presumption of regularity that this Court must accord to not only the Vice President but also the House and Senate: "The presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." *Merck Sharp & Dohme Corp. v. Albrecht*, 139 S.Ct.

1668, 1684 (2019) (interior quotations omitted). This Court should reject the idea not only that the Vice President might falsely erect barriers to counting a lawful vote but also that—if the Vice President did so—the House and Senate would vote inconsistently with that lawful vote.

The second concern ignores the historical context that, when the Electors Clause and the Twelfth Amendment were ratified *state legislatures* picked electors. Under the Twelfth Amendment, when the vote of the state legislatures' electors is inconclusive—for whatever reason—the national legislature picks the President. While disenfranchising voters did not enter into the constitutional provision, that claim also presupposes that one can determine by January 6 or January 20 who *lawfully* won the election, which is not the case here.

The third concern—that the assembled House and Senate must serve a role—has it entirely backward. In a normal count as in all elections since 1876, their role is ceremonial for a ministerial count. In a contested election like this one, their only role during the Vice President's presiding over the joint session is to be on hand to serve their actual role of being called *immediately* to vote for the President in the House and the Vice President in the Senate. *See* U.S. CONST. amend. XII.

While the ECA's defenders argue that "we know better" than those who framed the Constitution, their scare tactics conflict with the Constitution's built-in protections because the Constitution did not leave matters to chance. It empowered the Vice-President to take control of the proceeding and resolve disputes. *See generally* Vasan Kesavan, *Is the Electoral Count Act Unconstitutional?*, 80 N.C. L.

REV. 1653 (2002) (finding ECA unconstitutional and highlighting Twelfth Amendment's constitutional safeguards). At a minimum, the Twelfth Amendment provided for the House, *voting by state delegation*, to resolve a disputed electoral college count. Therefore, the remedy sought by Applicants is easily crafted. The Court should declare that:

- ECA sections 5 and 15 are unconstitutional.
- When a member of the House objects to a slate of electors or between two slates of competing electors presented for any single state, the Vice President, as President of the Senate, shall determine the dispute as he sees fit. He may choose between competing elector slates or he may choose to disregard electors altogether from any state.
- If after all the states' electors are counted, no single candidate has 270 votes, the House shall vote for President, which each State delegation having one vote.

The Argument section, *infra*, demonstrates Applicants' entitlement to that relief.

FACTUAL AND LITIGATION BACKGROUND

The facts relevant to this motion are set forth in the Complaint (App. 22a) and the exhibits filed below (App. 50a-65a), which are incorporated herein by reference.

Applicants present here only a summary.

1. The Applicants include Rep. Louie Gohmert—a Member of the U.S. House of Representatives, representing Texas's First Congressional District in both the current and the next Congress—who seeks to enjoin the operation of the Electoral

Count Act to prevent a deprivation of his rights and the rights of those he represents under the Twelfth Amendment. The Applicants also include the entire slate of Republican Presidential Electors for the State of Arizona, as well as an outgoing and incoming member of the Arizona Legislature. On December 14, 2020, pursuant to the requirements of applicable state laws, the Constitution, and the Electoral Count Act, the Applicant Arizona Electors, convened at the Arizona State Capitol, and cast Arizona's electoral votes for President Donald J. Trump and Vice President Michael R. Pence. On the same date, the Republican Presidential Electors for the States of Georgia, Pennsylvania, and Wisconsin met at their respective State Capitols to cast their States' electoral votes for President Trump and Vice President Pence (or in the case of Michigan, attempted to do so but were blocked by the Michigan State Police, and ultimately voted on the grounds of the State Capitol).

2. There are now competing slates of Republican and Democratic electors in five States with Republican majorities in both houses of their State Legislatures—Arizona, Georgia, Michigan, Pennsylvania, and Wisconsin (*i.e.*, the Contested States)—that collectively have 73 electoral votes, which are more than sufficient to determine the winner of the 2020 General Election. On December 14, 2020, in Arizona and the other Contested States, the Democratic Party's slate of electors convened in the State Capitol to cast their electoral votes for former Vice President Joseph R. Biden and Senator Kamala Harris. On the same day, Arizona Governor Doug Ducey and Secretary of State Katie Hobbs submitted the Certificate of Ascertainment with

the Biden electoral votes to the National Archivist pursuant to the Electoral Count Act.

3. Republican Senators and Republican Members of the House of Representatives have also expressed their intent to oppose the certified slates of electors from the Contested States due to the substantial evidence of voter fraud in the 2020 General Election. Multiple Senators and House Members have stated that they will object to the Biden electors at the January 6, 2021 Joint Session of Congress. These public statements by legislators make it a near certainty that at least one Senator and one House Member will follow through on their commitments and invoke the (unconstitutional) Electoral Count Act's dispute resolution procedures.

4. Respondent Vice President Pence, in his capacity as President of the Senate and Presiding Officer at the January 6, 2021 Joint Session of Congress to select the next President, will be presented with the following circumstances: (1) competing slates of electors from the State of Arizona and the other Contested States, (2) that represent sufficient electoral votes (a) if counted, to determine the winner of the 2020 General Election, or (b) if not counted, to deny either President Trump or former Vice President Biden sufficient votes to win outright; and (3) objections from at least one Senator and at least one Member of the House of Representatives to the counting of electoral votes from one or more of the Contested States and thereby invoking the unconstitutional procedures set forth in Section 15 of the Electoral Count Act.

5. As a result, Respondent Vice President Pence will necessarily have to decide whether to follow the unconstitutional provisions of the Electoral Count Act or the Twelfth Amendment to the U.S. Constitution at the January 6, 2021 Joint Session of Congress. This approaching deadline establishes the urgency for this Court to issue a declaratory judgment that Sections 5 and 15 of the Electoral Count Act are unconstitutional and provide the undisputed factual basis for this Court to do so on an expedited basis, and to enjoin Respondent Vice President Pence from following any Electoral Count Act procedures in 3 U.S.C. §§ 5 and 15 because they are unconstitutional under the Twelfth Amendment.

6. In the interval between Applicants' filing their motion and reply in district court, Sen. Josh Hawley of Missouri has announced his intent to object to Biden electors (App. 54a-55a, 57a-58a). In the interval since the district court ruled, at least eleven more Senators announced their intent to object, according to the Senate.gov website for Senator Marsha Blackburn of Tennessee.[5] On the House side, in addition to Applicant Louie Gohmert ("Rep. Gohmert"), approximately 140 Republican Members of the House have announced plans to object to the Biden electors (App. 62a-65a).

7. In addition to the opposition (ECF #18) filed by the Respondent, Vice President Michael R. Pence, the Democrat-dominated Bipartisan Legal Advisory Group ("BLAG") of the U.S. House of Representatives filed an *amicus* brief (ECF #22),

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[5] Available at https://www.blackburn.senate.gov/2021/1/blackburn-hagerty-and-colleagues-will-vote-to-oppose-electoral-college-results (last visited Jan. 2, 2021).

with the two Republican BLAG members (the Republican Leader and the Republican Whip) dissenting. In addition, a Texas resident who supports former Vice President Joseph R. Biden's candidacy moved to intervene (ECF #19), also filing a motion to dismiss (ECF #20), and a Colorado elector for Mr. Biden moved to intervene in a unified document (ECF #15) that includes a section opposing the merits of Applicants' claims. For purposes of their Motion, Applicants treated the would-be intervenors' filings as *amicus* briefs opposed to Applicants' Motion. *See*, *e.g.*, *Lelsz v. Kavanagh*, 98 F.R.D. 11, 13 (E.D. Tex. 1982) (denying leave to intervene but allowing movant to file *amicus* brief).

8. Additionally, several Michigan Republican electors moved to intervene as plaintiffs.

9. The district court dismissed for lack of standing, without a hearing. App. 1a-13a.

10. Applicants appealed and filed an emergency motion to set an expedited briefing schedule, which prompted a motions panel of the Fifth Circuit to "affirm the judgment essentially for the reasons stated by the district court," App. 16a, based on the briefing from the district court (*i.e.*, without affording Applicants an opportunity to respond to the district court's order). *Id.* The Fifth Circuit indicated that the mandate would "issue forthwith." *Id.* The Clerk subsequently certified the order as the Fifth Circuit's mandate. *Id.*

ARGUMENT

I. THE ALL WRITS ACT GIVES THIS COURT JURISDICTION TO ENTER INTERIM RELIEF PENDING THE TIMELY FILING OF A PETITION FOR A WRIT OF *CERTIORARI*.

The All Writs Act provides jurisdiction for interim relief to preserve the full range of the controversy *now* for this Court's consideration upon the Applicants' *future* appeal to this Court:

> The All Writs Act empowers the federal courts to issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law. The exercise of this power is in the nature of appellate jurisdiction where directed to an inferior court, and *extends to the potential jurisdiction of the appellate court where an appeal is not then pending but may be later perfected*.

FTC v. Dean Foods Co., 384 U.S. 597, 603 (1966) (interior quotations and citations omitted, emphasis added) (*citing Ex parte Crane*, 5 Pet. 190, 193 (1832) (Marshall, C.J.); *Ex parte Bradstreet*, 7 Pet. 634 (1833) (Marshall, C.J.)). The All Writs Act provides "a limited judicial power to preserve the court's jurisdiction or maintain the *status quo* by injunction pending review of an agency's action through the prescribed statutory channels," and that "power has been deemed merely incidental to the courts' jurisdiction to review" the ultimate merits of the future appeal. *Id.* at 604 (alterations omitted). As explained in this section, that power is appropriate in this case.

Without interim relief, the Vice President will invoke the Electoral Count Act's unconstitutional dispute-resolution process to pick the next President, after which the 2020 election will not be able to right itself: if the wrong winner is picked, even

the impeachment of that winner would not install the correct winner. That is the type of harm that justifies action under the All Writs Act. For example, in *Sampson v. Murray*, 415 U.S. 61, 76-77 (1974), the Court was concerned "that refusal to grant the injunction would result in the practical disappearance of one of the entities whose merger the [applicant] sought to challenge" and that "[t]he disappearance, in turn, would mean that the [applicant] and the court entrusted … to review the … decision, would be incapable of … fashioning effective relief." Under the circumstances, "invocation of the All Writs Act, as a preservative of jurisdiction, was considered appropriate," *id.*, which applies equally here as in *Sampson*.

In another instance where the Court's invoking the All Writs Act shares themes at issue here, *La Buy v. Howes Leather Co.*, 352 U.S. 249, 259 (1957), refused to permit reference of antitrust cases to a master. "In *La Buy,* the District Judge on his own motion referred to a special master two complex, protracted antitrust cases on the eve of trial. … The master, a member of the bar, was to hear and decide the entire case, subject to review by the District Judge under the 'clearly erroneous' test." *Mathews v. Weber*, 423 U.S. 261, 274 (1976). Here, invoking the House and Senate to undertake dispute resolution in a manner not contemplated anywhere in the Constitution would repeat aspects of *La Buy* that justified resort to the All Writs Act.

In addition, this Court also can rely on § 2106 for additional authority to resolve this matter:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct

> the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

28 U.S.C. § 2106. As § 2106 makes clear, this Court can not only alter the judgment from the lower court but also require further proceedings.

II. APPLICANTS HAVE STANDING.

Article III standing presents the tripartite test of whether the party invoking a court's jurisdiction raises an "injury in fact" under Article III: (a) a legally cognizable injury (b) that is both caused by the challenged action, and (c) redressable by a court. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561-62 (1992). The task of establishing standing varies, depending "considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue." *Id* at 561. If so, "there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it." *Id.* at 562. If not, standing may depend on third-party action:

> When … a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed. In that circumstance, causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction—and perhaps on the response of others as well.

Id. (emphasis in original). Here, Applicants can assert both first-party and third-party injuries, with the showing for standing easier for the first-party injuries. Specifically, Vice President Pence's action under the unconstitutional Electoral Count

Act would have the effect of ratifying injuries inflicted—in the first instance—by third parties in Arizona.

A. Applicants have suffered an injury in fact.

Applicants have standing as a member of the United States House of Representatives, Members of the Arizona Legislature, and as Presidential Electors for the State of Arizona.

Rep. Louie Gohmert is a Member of the U.S. House of Representatives, representing Texas's First Congressional District in both the current and the next Congress. Rep. Louie Gohmert requests declaratory and injunctive relief to prevent action as prescribed by 3 U.S.C. § 5, and 3 U.S.C. § 15 and to give the power back to the states to vote for the President in accordance with the Twelfth Amendment. Otherwise he will not be able to vote as a Congressional Representative in accordance with the Twelfth Amendment, and instead, his vote in the House, if there is disagreement, will be eliminated by the current statutory construct under the Electoral Count Act, or diluted by votes of the Senate and ultimately by passing the final determination to the state Executives.

In the event that objections occur leading to a vote in the House of Representatives, then under the Twelfth Amendment, on January 6, in the new House of Representatives, there will be twenty-seven states led by Republican majorities, and twenty states led by Democrat majorities, and three states that are tied. Twenty-six seats are required for a victor under the Twelfth Amendment, and further that, under the Twelfth Amendment, in the event neither candidate wins twenty-six seats by March 4, then the then-current Vice President would be declared

the President. However, if the Electoral Count Act is followed, this one vote on a state-by-state basis in the House of Representatives for President simply would not occur and would deprive this Member of his constitutional right as a sitting member of a Republican delegation, where his vote matters.

The Twelfth Amendment specifically states that "if no person have such majority, 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, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote." The authority to vote with this authority is taken from the House of Representatives, of which Mr. Gohmert is a member, and usurped by statutory construct set forth in 3 U.S.C. § 5 and 3 U.S.C. § 15. Therein the authority is given back to the state's executive branch in the process of counting and in the event of disagreement—while also giving the Senate concurrent authority with the House to vote for President. As a result, the application of 3 U.S.C. § 5 and 3 U.S.C. § 15 would prevent Rep. Gohmert from exercising his constitutional duty to vote pursuant for President to the Twelfth Amendment.

Prior to December 14, 2020, Applicant Arizona Electors had standing under the Electors Clause as candidates for the office of Presidential Elector because, under Arizona law, a vote cast for the Republican Party's President and Vice President is cast for the Republican Presidential Electors. *See* ARIZ. REV. STAT. § 16-212. Accordingly, Applicant Arizona Electors, like other candidates for office, "have a

cognizable interest in ensuring that the final vote tally reflects the legally valid votes cast," as "[a]n inaccurate vote tally is a concrete and particularized injury to candidates such as the Electors." *Carson v. Simon*, 978 F.3d 1051, 1057 (8th Cir. 2020) (affirming that Presidential Electors have Article III and prudential standing under Electors Clause); *see also Wood v. Raffensperger*, No. 20-14418, 2020 WL 7094866, *10 (11th Cir. Dec. 5, 2020) (affirming that if Applicant voter had been a candidate for office "he could assert a personal, distinct injury" required for standing); *Trump v. Wis. Elections Comm'n*, No. 20-cv-1785, 2020 U.S. Dist. LEXIS 233765 at *26 (E.D. Wis. Dec. 12, 2020) (President Trump, "as candidate for election, has a concrete particularized interest in the actual results of the election."). Applicants suffer a "debasement" of their votes, which "state[s] a justiciable cause of action on which relief could be granted" *Wesberry v. Sanders*, 376 U.S. 1, 5-6 (1964) (citing *Baker v. Carr*, 369 U.S. 186 (1962)).

Under the Fifth Circuit's and this Court's precedents, Applicants' injuries are not generalized grievances insufficient for Article III. Rep. Gohmert has standing to challenge unconstitutional elector slates and to vote for President under the Twelfth Amendment as opposed to voting for objections under the Electoral Count Act. *See LULAC v. City of Boerne*, 659 F.3d 421, 430 (5th Cir. 2011); *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 845 (5th Cir. 1993) (*en banc*); *see* Section II.D, *infra*. The Arizona-Elector Applicants have standing to be counted or, if the unlawful non-enforcement of Arizona's election statutes by non-legislative actors stands, the Arizona-Elector Applicants have standing to nullify the

unlawful votes of the rival slate of electors. Although the district court thought the dispute speculative (App. 9a), the dispute is already fully extant. What the district judge appears to have meant is that Members of Congress may not object pursuant to the Electoral Count Act. Rep. Gohmert has said that he would, as have 140 other members of the House (App. 62a-65a), and at least two members of the Senate when Applicants were in district court (App. 54a-55a, 57a-61a). Since then, eleven additional Senators have announced plans to object, according to a Senate.gov press release.[6] A train wreck is not speculative when the train is already off the rails. The outcome may be uncertain, but procedural-rights standing does not depend on outcomes.

B. Applicants' injuries are traceable to the Vice President.

Rep. Gohmert faces imminent threat of injury that the Respondent will follow the unlawful Electoral Count Act and, in so doing, eviscerate Rep. Gohmert's constitutional right and duty to vote for President under the Twelfth Amendment. With injuries directly caused by a defendant, plaintiffs can show an injury in fact with "little question" of causation or redressability. *Defenders of Wildlife,* 504 U.S. at 561-62. Although the Respondent did not cause the underlying election fraud, the Respondent nonetheless will directly cause Rep. Gohmert's injury, which is causation—and redressability—under *Defenders of Wildlife*.

By contrast, the Arizona Electors suffer indirect injury *vis-à-vis* this Respondent. But for the alleged wrongful conduct of Arizona executive branch

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6 *See* note 5, *supra*, and accompanying text.

officials under color of law, the Applicant Arizona Electors would have been certified as the presidential electors for Arizona, and Arizona's Governor and Secretary of State would have transmitted uncontested votes for Donald J. Trump and Michael R. Pence to the Electoral College. The certification and transmission of a competing slate of Biden electors has resulted in a unique injury that only Applicant Arizona Electors could suffer, namely, having a competing slate of electors take their place and their votes in the Electoral College. While the Vice President did not cause Applicants' initial injury—that happened in Arizona—the Vice President stands in the position at the Joint Session on January 6 to ratify and purport to make lawful the unlawful injuries that Applicants suffered in Arizona. That is causation enough for Article III. For example:

> According to the USDA, the injury suffered by Sierra Club is caused by the independent actions (*i.e.*, pumping decisions) of third party farmers, over whom the USDA has no coercive control. Although we recognize that causation is not proven if the injury complained of is the result of the *independent* action of some third party not before the court, this does not mean that causation can be proven only if the governmental agency has coercive control over those third parties. Rather, the relevant inquiry in this case is whether the USDA has the ability through various programs to affect the pumping decisions of those third party farmers to such an extent that the plaintiff's injury could be relieved.

Sierra Club v. Glickman, 156 F.3d 606, 614 (5th Cir. 1998) (interior quotation marks, citations, and alterations omitted, emphasis in original); *Tel. & Data Sys. v. FCC*, 19 F.3d 42, 47 (D.C. Cir. 1994).

When third parties inflict injury that injury is traceable to government action if the injurious conduct "would have been illegal without that [governmental] action." *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 45 n.25 (1976). As explained below, Vice President Pence stands ready to ratify Applicants' injuries via the unconstitutional Electoral Count Act, which is causation enough to enjoin his actions. Alternatively, "plaintiff's injury could be relieved" within the meaning of *Sierra Club v. Glickman* if the Vice President rejected the Electoral Count Act as unconstitutional.

A procedural-rights plaintiff must also show that "fixing the alleged procedural violation could cause the agency to 'change its position' on the substantive action," *Ctr. for Biological Diversity v. United States EPA*, 937 F.3d 533, 543 (5th Cir. 2019), which is easy enough here/ Under the Electoral Count Act, the "Blue" or "Biden" states have a bare House majority in the Congress that will vote on January 6. Under the Twelfth Amendment, however, the "Red" or "Trump" states have a 27-20-3 majority where each state delegation gets one vote in the House's election of the President. That distinction satisfies both third-party causation and procedural-rights tests for Article III standing.

The Twelfth Amendment gives Respondent Vice President exclusive authority and sole discretion as to which set of electors to count or even whether to count no set of electors. If no candidate receives a majority of electoral votes, then the President is to be chosen by the House, where "the votes shall be taken by States, the representation from each state having one vote." U.S. CONST. amend. XII. If

Respondent Pence instead follows the procedures in Section 15 of the Electoral Count Act, Applicants' electoral votes will not be counted because (a) the Democratic majority House of Representatives will not "decide" to count the electoral votes of Applicant Republican electors; and (b) either the Senate will concur with the House not to count their votes, or the Senate will not concur, in which case, the electoral votes cast by Biden's electors shall be counted because the Biden slate of electors was certified by Arizona's executive. Under the Constitution, by contrast, the Vice President counts the votes and—if the count is indeterminate—the vote proceeds immediately to the House for President and to the Senate for Vice President. *See* U.S. CONST. amend. XII.[7]

Through declaratory and injunctive relief, Applicants ask this Court to prevent Respondent from invoking the unconstitutional Electoral Count Act. As in *OCA-Greater Houston v. Texas*, 867 F.3d 604, 613-14 (5th Cir. 2017), Respondent cannot rely on the Fifth Circuit's *en banc* decision in *Okpalobi v. Foster* because—unlike in *Okpalobi*—Applicants have sued someone who implements the statute that Applicants challenge. *Compare OCA-Greater Houston*, 867 F.3d at 613-14 *with*

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[7] This intent that the Vice President count the votes is borne out by a unanimous resolution attached to the final Constitution that described the procedures for electing the first President (*i.e.*, for the one time when there would not already be a sitting Vice President), stating in relevant part "that the Senators should appoint a President of the Senate, for the sole Purpose of receiving, opening and counting the Votes for President." 2 M. Farrand, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 666 (1911). For all subsequent elections, when there would be a Vice President to act as President of the Senate, the Constitution vests the opening and counting in the Vice President.

Okpalobi v. Foster, 244 F.3d 405, 415 (5th Cir. 2001) (*en banc*). (defendants had no "enforcement connection with the challenged statute").[8] Here, Respondent is the presiding officer of the process that Applicants seek to enjoin and declare unconstitutional. Under that circumstance, Applicants have "met [the] burden under *Lujan* to show that [their] injury is fairly traceable to and redressable by the defendant[]." *OCA-Greater Houston*, 867 F.3d at 614.

C. Federal courts can redress Applicants' injuries.

Even if a federal court would lack jurisdiction to *enjoin* the Vice President, *but see* Sections III.C.1-2, *infra* (immunity does not bar this action), this Court's authoritative declaration would provide redress enough. *See Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992) ("we may assume it is substantially likely that the President and other executive and congressional officials would abide by an authoritative interpretation of the census statute and constitutional provision by the District Court, even though they would not be directly bound by such a determination"). The Electoral Count Act is blatantly unconstitutional in many respects, *see* Section I.A, *infra*, and "it is the province and duty of the judicial department to determine in cases regularly brought before them, whether the powers of any branch of the government, and even those of the legislature in the enactment

[8] In *Okpalobi*, the plaintiffs had sued Louisiana's Governor and Attorney General to challenge a statute that empowered private parties and state courts to act. *See* 244 F.3d at 415.

of laws, have been exercised in conformity to the Constitution." *Powell v. McCormack*, 395 U.S. 486, 506 (1969) (interior quotations omitted).

Even if Applicants do not ultimately prevail under the process that the Twelfth Amendment requires, the relief requested would nonetheless redress their injuries from the unconstitutional Electoral Count Act process in two respects . First, with respect to seeking to follow the Twelfth Amendment procedure over that of 3 U.S.C. § 15, it would redress Rep. Gohmert's procedural injuries enough to proceed under the correct procedure, even if they do not prevail substantively. *FEC v. Akins*, 524 U.S. 11, 25 (1998). Second, with respect to the Arizona Electors, it would redress their unequal-footing injuries to treat all rival elector slates the same, even if the House and not the electors choose the next President. *Heckler v. Mathews,* 465 U.S. 728, 739-40 (1984) ("when the right invoked is that to equal treatment, the appropriate remedy is a *mandate* of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class") (citations and footnotes omitted, emphasis in original). In each respect, Article III does not require that Applicants show that they will prevail in order to show redressability.

The declaratory relief that Applicants request would redress their injuries enough for Article III and in the chart as set forth:

Event/Issue	3 U.S.C. § 15	Twelfth Amendment
One Congress purports to bind future Congresses	Yes	No
Rival slates of electors	Bicameral dispute resolution with no presentment; state executive breaks ties	Vice President counts; if inconclusive, House & Senate elect President & Vice President, respectively
Violates Presentment Clause	Yes	No
Role for state governors	Yes	No
House voters	Each member votes (*e.g.*, CA gets 53 votes, ND gets 1)	Each state delegation votes (*e.g.*, CA and ND get 1 vote)

As is plain from these material—and, here, dispositive—differences between the Twelfth Amendment and 3 U.S.C. § 15, the two provisions cannot be reconciled.

D. The procedural nature of Applicants' injuries lowers the Article III bar for immediacy and redressability.

Given that Applicants suffer a concrete injury to their voting rights, Applicants also can press their procedural injuries under the Electoral Count Act. Indeed, the "history of liberty has largely been the history of observance of procedural safeguards," *McNabb v. United States,* 318 U.S. 332, 347 (1943), and "'procedural rights' are special," *Defenders of Wildlife,* 504 U.S. at 572 n.7; *cf. Carey v. Piphus,* 435 U.S. 247, 266-67 (1978) ("right to procedural due process is 'absolute' [and] does not depend upon the merits of a claimant's substantive assertions"). Following the correct procedure is important, even if it might lead to the same undesired substantive result:

> 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). As such, Applicants can have standing to ensure that the government respects the required procedures.

For procedural injuries, Article III's redressability and immediacy requirements apply to the *procedural violation* that will (or someday might) injure a concrete interest, rather than to the concrete future injury. *Defenders of Wildlife,* 504 U.S. at 571-72 & n.7. Specifically, the injuries that Applicants assert affect the procedure by which the status of their votes will be considered, which lowers the thresholds for immediacy and redressability under this Court's and the Fifth Circuit's precedents. *Id.*; *Glickman*, 156 F.3d at 613 ("in a procedural rights case, … the plaintiff is not held to the normal standards for [redressability] and immediacy"); *accord Nat'l Treasury Employees Union v. U.S.,* 101 F.3d 1423, 1428-29 (D.C. Cir. 1996). Similarly, a plaintiff with concrete injury can invoke Constitution's structural protections of liberty. *Bond v. United States*, 564 U.S. 211, 222-23 (2011).

Voters from smaller states like Arizona suffer an equal-footing injury and a procedural injury *vis-à-vis* larger states like California because the Electoral Count Act purports to replace the process provided in the Twelfth Amendment. Under the ECA, California has five times the votes that Arizona has, but under the Twelfth Amendment California and Arizona each have one vote. *Compare* 3 U.S.C. § 15 *with* U.S. CONST. amend. XII. That analysis applies in third-party injury cases. *See Clinton v. New York*, 524 U.S. 417, 433 & n.22 (1998) (unequal-footing analysis applies to

indirect-injury plaintiffs); *cf. id.* at 456-57 (that analysis should apply only to equal-protection cases) (Scalia, J., dissenting). Nullification of a procedural protection and any related bargaining power is injury enough, even in third-party cases. *Clinton*, 524 U.S. at 433 & n.22. Thus, Applicants can have standing to enforce the original constitutional bargain for electing presidents, without the statutory gloss that Congress attempted to superimpose on that process in 1887.

E. Courts must assume the plaintiff's merits views to assess a plaintiff's standing to sue.

All of the briefs opposed to Applicants in the district court made the mistake of disputing Applicants on the merits to attack Applicants' standing. If that were how it works, every losing plaintiff would lose for lack of standing.

Put simply, that "confuses standing with the merits." *Initiative & Referendum Institute v. Walker,* 450 F.3d 1082, 1092 (10th Cir. 2006); *Adar v. Smith*, 639 F.3d 146, 150 (5th Cir. 2011) (*en banc*) ("standing does not depend upon ultimate success on the merits"); *accord Lac du Flambeau Band of Lake Superior Chippewa Indians v. Norton,* 422 F.3d 490, 501 (7th Cir. 2005); *In re Columbia Gas Systems Inc.,* 33 F.3d 294, 298 (3d Cir. 1994); *cf. Cantrell v. City of Long Beach,* 241 F.3d 674, 682 (9th Cir. 2001). Instead, federal courts have jurisdiction over a case if "the right of [plaintiffs] to recover under [their] complaint will be sustained if the ... laws of the United States are given one construction," even if the plaintiffs' rights "will be defeated if [those federal laws] are given another." *Wheeldin v. Wheeler,* 373 U.S. 647, 649 (1963) (interior quotations omitted). Accordingly, federal courts should assume *the plaintiff's* merits views in evaluating their jurisdiction to hear the plaintiff's claims: "standing

in no way depends on the merits of the plaintiff's contention that particular conduct is illegal." *Warth v. Seldin,* 422 U.S. 490, 500 (1975); *City of Waukesha v. EPA,* 320 F.3d 228, 235 (D.C. Cir. 2003) ("one must assume the validity of a plaintiff's substantive claim at the standing inquiry"); *Adar v. Smith*, *supra* (*en banc*).

With the idea in mind that this Court should assume Applicants' merits views in evaluating standing, the need to contest this election should become apparent. The Constitution's Elections Clause and Electors Clause give state legislatures the plenary power to set election provisions, and yet—citing the COVID pandemic as either a reason or as an excuse—non-legislative actors in all the contested states systematically eroded ballot-integrity measures like signature or witness requirements and registration or mail-in deadlines to the point where Applicants respectfully submit it is impossible to state who won from the mail-in votes because legal ones have been commingled with illegal ones.

Moreover, although ostensibly a question of state election law, these questions are federal the state election laws apply "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 v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70, 76 (2000). 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 v. Gore*, 531 U.S. 98, 113 (2000) (Rehnquist, C.J., concurring) ("*Bush II*").

F. The district court's standing analysis erred in key respects.

With the foregoing background, Applicants respectfully submit that the district court erred in finding that Applicants lack standing. Although only one plaintiff needs standing, both Rep. Gohmert's claims and the Arizona-Elector claims satisfy Article III's requirements for standing.

1. Rep. Gohmert has standing.

Rep. Gohmert's voting injury also answers BLAG's attempt to classify Rep. Gohmert's injuries under the rubric of legislative standing under *Raines v. Byrd*, 521 U.S. 811, 819-20 (1997). Under the legislative-standing decisions, a legislator or legislative body would only have standing for issues within their power (*e.g.*, information to be gotten by subpoena) or if they had a working majority of the relevant number of houses to enact or block legislation. *Va. House of Delegates v. Bethune-Hill*, 139 S.Ct. 1945, 1955 n.6 (2019) (single house in bicameral legislature); *Coleman v. Miller*, 307 U. S. 433, 446 (1939) (working majority of individual legislators). Here, Rep. Gohmert seeks to vote for President under the Twelfth Amendment rather than to vote for rival slates of electors under the Electoral Count Act's dispute-resolution proceedings. Significantly, the states in question have

impossibly commingled their legal and illegal ballots so that it is impossible to know the result. As indicated, under the Fifth Circuit's voting-rights cases, the denial of the opportunity to vote for a candidate is not a generalized grievance. Moreover, because this is a procedural injury: Does the presiding officer invoke the Twelfth Amendment in which each state delegation gets one vote to vote for President or the Electoral Count Act where—contrary to anything in the election-related parts of the Constitution—the states get representation based on population and state governors break ties between the two houses of Congress? As a procedural-injury plaintiff, Rep. Gohmert does not need to show he would prevail, a key distinction that Applicants raised and the lower courts completely ignored.

2. The Arizona-Elector Applicants have standing.

Like Rep. Gohmert, the Arizona-Elector Applicants suffer *procedural* injury, which the lower courts ignored. Similarly, the lower courts ignored Applicants' claim that rejecting *both* sets of Arizona electors would partially redress the Arizona-Elector Applicants' injury and largely ignored that the ECA—as invoked by the Vice President—would have the effect of ratifying the selection of the rival slate, thus providing traceability to the Vice President. Instead, the district judge argues that the Vice President's invoking the ECA lacks any "coercive effect" on Arizona's certification of electoral votes. *See* App. 11a (citing *Bennett v. Spear*, 520 U.S. 154, 168-69 (1997)). That is simply a *non sequitur*. Unless the Arizona legislature decertifies the rival slate of Arizona electors under the legislature's authority under the Electors Clause, the question now is how the Vice President counts votes in Washington, not what effect that has on certifications back in Arizona.

III. JURISDICTION OTHERWISE EXISTS.

The district court dismissed solely on the basis of Applicants' purported lack of standing. To obtain interim relief, Applicants must not only rebut the district court's holding about standing but also establish all other aspects of federal jurisdiction: "Absent an adequate jurisdictional basis for the Court's consideration of the merits, there is *no likelihood* that the Applicant will prevail on the merits." *Herwald v. Schweiker*, 658 F.2d 359, 363 (5th Cir. 1981) (emphasis added). In this section, Applicants establish federal jurisdiction over the entirety of Applicants' claims.

A. Applicants otherwise raise an Article III case or controversy.

While Article III jurisdiction most often involves standing—*i.e.*, a plaintiff's injury in fact, the defendant's causation or traceability, and the court's power to redress, *Defenders of Wildlife,* 504 U.S. at 561-62—the scope of Article III extends to other overlapping issues:

> "All of the doctrines that cluster about Article III—not only standing but mootness, ripeness, political question, and the like—relate in part, and in different though overlapping ways, to … the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government."

Allen v. Wright, 468 U.S. 737, 750 (1984) (quoting *Vander Jagt v. O'Neill,* 699 F.2d 1166, 1178-79 (D.C. Cir. 1983) (Bork, J., concurring)). As explained in the following eight subsections, all of these Article III gate-keeping tests are met here.

1. The parties do not seek the same relief.

In the district court, the Vice President argued that "Applicants' suit seeks to empower the Vice President to unilaterally and unreviewably decide objections to the

validity of electoral votes" such that "Plaintiffs are … not sufficiently adverse to the legal interests of the Vice President." But he seeks dismissal, whereas Applicants seek declaratory and injunctive relief. Moreover, Applicants express no opinion on whether the Vice President's actions would be *unreviewable*. Instead, Applicants merely seek declaratory and injunctive relief against an unconstitutional statute.

Accordingly, this is not an instance where "the parties desire precisely the same result" so that there is no Article III case or controversy. *GTE Sylvania, Inc. v. Consumers Union of the United States, Inc.,* 445 U.S. 375, 383 (1980) (interior quotations omitted); *Moore v. Charlotte-Mecklenburg Bd. of Educ.,* 402 U.S. 47, 47-48 (1971) (*per curiam*). The Respondent seeks the dismissal of this action, and Applicants ask for a judgment in their favor. Even if one Applicant and the Vice President were "friendly" in the sense of wanting the same thing, the other Applicants remain unaffected, because"[o]nly one plaintiff is needed to establish standing for each form of requested relief." *Pool v. City of Houston*, 978 F.3d 307, 312 n.7 (5th Cir. 2020) (citing *Town of Chester v. Laroe Estates, Inc.*, 137 S.Ct. 1645, 1651 (2017)).

2. <u>The political-question doctrine does not bar this action.</u>

The "political questions doctrine" can bar review of certain issues that the Constitution delegates to one of the other branches, but that bar does not apply to constitutional claims related to voting (other than claims brought under the Guaranty Clause of Article IV, § 4):

> 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. As in *Baker*, litigation over political rights is not the same as a political question.

3. <u>This action is not moot.</u>

"A case becomes moot only when it is *impossible* for a court to grant any effectual relief whatever to the prevailing party." *Knox v. SEIU, Local 1000*, 567 U.S. 298, 307 (2012) (internal quotations omitted, emphasis added). The joint session will not meet until January 6, and Congress could extend its statutory deadlines, as it did in connection with the only other similarly contested election. Ch. 37, 19 Stat. 227 (1877). Indeed, even without a new statute, the January 6 joint session could be extended or continued further into January. It remains possible for this Court to enter a judgment that addresses the constitutionality of the Electoral Count Act and its application to the 2020 election.[9]

4. <u>This action is ripe.</u>

It is undisputed that rival slates of electors have been submitted for an outcome-determinative number of electoral votes. It is indisputable that at least one Representative and one Senator will, or are likely to, object to the slates from these

[9] Indeed, the nearest *constitutional* deadline is January 20, U.S. CONST. amend. XX, and to establish mootness based on a Biden vote on January 6, the Vice President would need to establish that such a vote could not be reconsidered or vacated prior to the swearing in of the next president.

contested states.[10] The timing of future events provides no barrier to justiciability: "Where the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect." *Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp.,* 559 U.S. 662, 670 n.2 (2010). Indeed, even without objecting Representatives and Senators, the presence of an outcome-determinative number of rival slates of electors guarantees the need for the joint session to engage in some form of dispute-resolution process, which squarely presents the question of whether that process lies under the Electoral Count Act that Applicants challenge.

B. Prudential limits on Article III jurisdiction do not apply.

In addition to Article III's jurisdictional limits, the judiciary has adopted prudential limits on standing that bar judicial review even when the plaintiff meets Article III's minimum criteria. *See*, *e.g.*, *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.,* 454 U.S. 464, 475 (1982) (zone-of-interests test); *Secretary of State of Md. v. Joseph H. Munson Co.,* 467 U.S. 947, 955 (1984) (litigants must raise their own rights); *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 12 (2004) (litigants cannot sue over generalized grievances more appropriately addressed in the representative branches). "Unlike constitutional standing,

[10] The Senate.gov press release and the related news reports about objections next week when Congress convenes in joint session are judicially noticeable. *Concerned Citizens for Equal. v. McDonald*, 863 F. Supp. 393, 394 (E.D. Tex. 1994) (newspapers); *Kitty Hawk Aircargo, Inc. v. Chao*, 418 F.3d 453, 457 (5th Cir. 2005) (government website).

prudential standing arguments may be waived." *Bd. of Miss. Levee Comm'rs v. EPA*, 674 F.3d 409, 417-18 (5th Cir. 2012); *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014); *June Med. Servs. L.L.C. v. Russo*, 140 S.Ct. 2103, 2117 (2020) ("the rule that a party cannot ordinarily rest his claim to relief on the legal rights or interests of third parties … does not involve the Constitution's case-or-controversy requirement … [a]nd so … it can be forfeited or waived") (interior quotations and citations omitted). The Vice President raised only constitutional arguments against Applicants' standing, and he thus waived all non-jurisdictional arguments not raised in his opposition below.

Citing a public statement by one of the Arizona Elector Applicants, the Vice President and his *amici* argued or implied that that this is a "friendly suit" that the district court should dismiss. Any bar against friendly suits is prudential, not *jurisdictional*. *Rescue Army v. Municipal Court of City of Los Angeles*, 331 U.S. 549, 568-69 (1947); *New York City Transit Authority v. Beazer,* 440 U.S. 568, 583 (1979). As indicated in Section III.A.1, *supra*, this action is not "friendly" in the Article III sense. To the extent that the "friendly" remark refers to personal relationships, it would be irrelevant to this official-capacity action: "while friendship is a ground for recusal of a Justice where the personal fortune or the personal freedom of the friend is at issue, it has traditionally not been a ground for recusal where official action is at issue, no matter how important the *official action* was to the ambitions or the reputation of the Government officer." *Cheney v. United States Dist. Court*, 541 U.S.

913, 916 (2004) (Scalia, J., in chambers) (emphasis in original). But Applicants seek relief that Respondent opposes, which is not "friendly" in the prudential sense.

C. This action is otherwise within federal courts' jurisdiction.

In addition to satisfying Article III, Applicants' claims also fall squarely within federal jurisdiction.

1. The Speech or Debate Clause does not insulate the Vice President.

The Speech or Debate Clause provides that "Senators and Representatives" "shall not be questioned in any other Place" "for any Speech or Debate in either House":

> The Senators and Representatives … for any speech or debate in either House, … shall not be questioned in any other place.

U.S. CONST. art I, § 6, cl. 1. "Not everything a Member of Congress may regularly do is a legislative act within the protection of the Speech or Debate Clause," *Minton v. St. Bernard Par. Sch. Bd.*, 803 F.2d 129, 134-35 (5th Cir. 1986) (interior quotations omitted), because the "clause has been interpreted to protect only purely legislative activities," *Williams v. Brooks*, 945 F.2d 1322, 1326 (5th Cir. 1991) (internal quotation marks omitted), which renders it inapposite here. Where it applies, the Clause poses a jurisdictional bar not only to a court reaching the merits but also to putting the defendant to the burden of putting up a defense. *Powell*, 395 U.S. at 502-03. But "Legislative immunity does not, of course, bar all judicial review of legislative acts," *Powell*, 395 U.S. at 503, and the Speech or Debate Clause does not even apply—by its

terms—to the Vice President in his role as President of the Senate or to the Joint Session on January 6.

First, the Clause does not protect the Vice President acting in his role as President of the Senate. *See* U.S. CONST. art I, § 6, cl. 1; *cf. Common Cause v. Biden*, 748 F.3d 1280, 1284 (D.C. Cir. 2014) (declining to decide whether or not the Speech or Debate Clause protects the Vice President). At best for the Vice President, the question is an open one, but Applicants respectfully submit that the Constitution's plain language should govern: The Clause does not apply to the Vice President. Instead, as here, where an unprotected officer of the House or Senate implements an unconstitutional action of the House or Senate, the judiciary has the power to enjoin the officer, even if it would lack the power to enjoin the House, the Senate, or their Members. *Powell*, 395 U.S. at 505. In short, the Speech or Debate Clause does not protect Vice President Pence at all.

Second, even if the Speech or Debate Clause did protect the Vice President acting as President of the Senate for legislative activity in the Senate, the Joint Session on January 6 is no such action. *See* U.S. CONST. art I, § 6, cl. 1. This is an election, and the Vice President has no more authority to disenfranchise voters via unconstitutional means as any other person.

2. <u>Sovereign immunity does not bar this action.</u>

The Respondent is Vice President Pence named as a defendant in his official capacity as the Vice President of the United States. With respect to injunctive or declaratory relief, it is a historical fact that at the time that the states ratified the federal Constitution, the equitable, judge-made, common-law doctrine that allows use

of the sovereign's courts in the name of the sovereign to order the sovereign's officers to account for their unlawful conduct (*i.e.*, the rule of law) was as least as firmly established and as much a part of the legal system as the judge-made, common-law doctrine of federal sovereign immunity. Louis L. Jaffee, *The Right to Judicial Review I,* 71 HARV. L. REV. 401, 433 (1958); A.B.A. Section of Admin. Law & Regulatory Practice, *A Blackletter Statement of Federal Administrative Law*, 54 ADMIN. L. REV. 1, 46 (2002) (it is blackletter law that "suits against government officers seeking prospective equitable relief are not barred by the doctrine of sovereign immunity").

In determining whether the doctrine of *Ex parte Young* avoids immunity, a court need only conduct a "straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md. Inc. v. Pub. Serv. Comm'n of Maryland*, 535 U.S. 635, 645 (2002) (citations omitted). That is enough to survive a motion to dismiss on jurisdictional grounds: "The inquiry into whether suit lies under *Ex parte Young* does not include an analysis of the merits of the claim[.]" *Id.* at 638. Sovereign immunity poses no bar to jurisdiction here.[11]

[11] Indeed, the sovereign immunity afforded a Member of Congress is co-extensive with the protections afforded by the Speech or Debate Clause. In all other respects, Members of Congress are bound by the law to the same extent as other persons. *Davis v. Passman*, 442 U.S. 228, 246 (1979) ("although a suit against a Congressman for putatively unconstitutional actions taken in the course of his official conduct does raise special concerns counseling hesitation, we hold that these concerns are coextensive with the protections afforded by the Speech or Debate Clause").

The prayer for injunctive relief—that the Vice President be restrained from enforcing 3 U.S.C. § 5 and § 15 in contravention of the Twelfth Amendment of the Constitution—to instead follow the Twelfth Amendment, clearly satisfies the "straightforward inquiry." Applicants request declaratory relief to prevent unconstitutional action under 3 U.S.C. § 5 and § 15 and to give the power back to the states to vote for the President in accordance with the Twelfth Amendment. Therefore, the Respondent should be enjoined from proceeding to certify or count dueling electoral votes under the unconstitutional dispute resolution procedures in 3 U.S.C. § 5 and § 15, and instead to follow the constitutional process as set forth in the Twelfth Amendment of the Constitution.

Amicus BLAG argued in district court that Applicants named the wrong defendant and instead should have named the House and Senate as the parties that injured Applicants. For the reasons set forth above, Applicants respectfully submit that they have properly invoked an *Ex parte Young* officer suit against the Vice President for the unconstitutional application of the Electoral Count Act. To the extent that this Court disagrees, however, denial of relief would be inappropriate. Instead, even on appeal, this Court could allow Applicants to amend their complaint to join alternate officers such as the House and Senate parliamentarians or to name the United States as a defendant. *See Mullaney v. Anderson,* 342 U.S. 415, 416-17 (1952). Relying by analogy on FED. R. CIV. P. 21, *Mullaney* took the admittedly rare step of allowing post-*certiorari* intervention for two primary reasons: (1) earlier joinder would not have changed the course of the litigation (*i.e.,* late joinder did not

prejudice the other party), and (2) requiring the new parties to start over in district court would constitute a "needless waste" of resources:

> To grant the motion merely puts the principal, the real party in interest, in the position of his avowed agent. The addition of these two parties plaintiff can in no wise embarrass the defendant. *Nor would their earlier joinder have in any way affected the course of the litigation. To dismiss the present petition and require the new plaintiffs to start over in the District Court would entail needless waste and runs counter to effective judicial administration*—the more so since, with the silent concurrence of the defendant, the original plaintiffs were deemed proper parties below. Rule 21 will rarely come into play at this stage of a litigation. We grant the motion in view of the special circumstances before us.

Id. (emphasis added). Applicants respectfully submit that adding the United States as a defendant would be justified because this case presents a suitable "special circumstance" for allowing appellate joinder of parties.

Two additional reasons would justify this Court's allowing an amendment to name the United States as a defendant. First, the United States has waived sovereign immunity for suits seeking prospective injunctive or declaratory relief:

> An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States[.]

5 U.S.C. § 702. Second, as Applicants argued below, "[d]efective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts." 28 U.S.C. § 1653. If the Court finds the pleadings inadequate as the Vice President Pence, Applicants could amend their pleadings to include the United States as a defendant. *See also* FED. R. CIV. P. 15(a)(1)(B). In short, this Court either should disregard the non-problem that *amicus* BLAG cited or should allow Applicants to cure it.

3. <u>This case presents a federal question, and abstention principles do not apply.</u>

Article III, § 2, of the Federal Constitution provides that, "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority[.]" It is clear that the cause of action is one which "arises under" the Federal Constitution. *Baker*, 369 U.S. at 199. In *Baker*, the Applicants alleged that, by means of a 1901 Tennessee statute that arbitrarily and capriciously apportioned the seats in the General Assembly among the State's 95 counties and failed to reapportion them subsequently notwithstanding substantial growth and redistribution of the State's population, they suffered a "debasement of their votes" and were thereby denied the equal protection of the laws guaranteed them by the Fourteenth Amendment. They sought, *inter alia*, a declaratory judgment that the 1901 statute is unconstitutional and an injunction restraining certain state officers from conducting any further elections under it. *Id*. The *Baker* line of cases recognizes that "that voters who allege facts showing disadvantage to themselves as individuals have standing to sue."

The federal and constitutional nature of these controversies deprives abstention doctrines of any relevance whatsoever. First, state laws for the appointment of presidential electors are federalized by the operation of The Electoral Count Act of 1887. *McPherson v. Blacker*, 146 U.S. 1, 27 (1892); *Bush II*, 531 U.S. at 113 (Rehnquist, C.J., concurring) ("A significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question."). Second, "[i]t 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). 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." *Gralike*, 531 U.S. at 522 (internal quotations omitted).

A more quintessentially federal question than which slate of electors will be counted under the Twelfth Amendment and 3 U.S.C. § 15 to elect the President and Vice President can scarcely be imagined.

4. Applicants are entitled to an expedited declaratory judgment.

Under Rule 57, an expedited declaratory judgment is appropriate where, as here, it would "terminate the controversy" based on undisputed or relatively undisputed facts. *See* FED. R. CIV. P. 57, Advisory Committee Notes. The facts relevant to this controversy are not in dispute, namely: (1) there are competing slates of electors for Arizona and the other Contested States that have been or will be submitted to the Electoral College; (2) the Contested States collectively have

sufficient (contested) electoral votes to determine the winner of the 2020 General Election—President Trump or former Vice President Biden; (3) legislators in Arizona and other Contested States have contested the certification of their State's electoral votes by State executives, due to substantial evidence of voter fraud that is the subject of ongoing litigation and investigations; and (4) Senators and Members of the House of Representatives have expressed their intent to challenge the electors and electoral votes certified by State executives in the Contested States.

As a result, Respondent Vice President Pence, in his capacity as President of the Senate and as the Presiding Officer for the January 6, 2021 Joint Session of Congress will be have to decide between (a) following the requirements of the Twelfth Amendment, and exercising his exclusive authority and sole discretion in deciding which slate of electors and electoral votes to count for Arizona, or neither, or (b) following the distinct and inconsistent procedures set forth in Section 15 of the Electoral Count Act. The expedited declaratory judgment requested, namely, declaring that Section 5 and 15 of the Electoral Count Act are unconstitutional to the extent they conflict with the Twelfth Amendment and the Electors Clause, and that Respondent Pence may not follow these unconstitutional procedures, will terminate the controversy. Further, as discussed below, the requested declaratory judgment would also establish that Applicants meet all of the requirements for any additional injunctive relief required to effectuate the declaratory judgment by enjoining Respondent Pence from violating the Twelfth Amendment.

With the advent of the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202 ("DJA"), equitable relief in the form of a declaration of the law is even more readily available that traditional equitable relief in the form of injunctions. The federal-question statute, 28 U.S.C. § 1331, provides subject-matter jurisdiction for nonstatutory review of federal agency action. *Califano v. Sanders,* 430 U.S. 99, 105 (1977) (1976 amendments to § 1331 removed the amount-in-controversy threshold for "any [federal-question] action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity") (*quoting* Pub. L. 94-574, 90 Stat. 2721 (1976)), and 28 U.S.C. § 2201(a) authorizes declaratory relief "whether or not further relief … could be sought." *Accord Duke Power Co. v. Carolina Envtl. Study Group, Inc.,* 438 U.S. 59, 70-71 n.15 (1978); *Steffel v. Thompson,* 415 U.S. 452, 471-72 (1974). Since 1976, § 1331 has authorized DJA actions against federal officers, regardless of the amount in controversy. *Sanders,* 430 U.S. at 105 (quoted *supra*). Declaratory relief makes it even easier for parties to obtain pre-enforcement review.[12]

Significantly, the availability of declaratory relief against federal officers predates the Administrative Procedure Act, 5 U.S.C. §§ 551-706 ("APA"), *see* WILLIAM

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[12] In 1980, Congress amended § 1331 to its current form, PUB. L. NO. 96-486, § 2(a), 94 Stat. 2369 (1980), without repealing the 1976 amendment relied on by *Sanders* and its progeny. H.R. REP. NO. 96-1461, at 3-4, *reprinted in* 1980 U.S.C.C.A.N. 5063, 5065; *Bowen v. Massachusetts,* 487 U.S. 879, 891 n.16 (1988); *United States v. Mitchell,* 463 U.S. 206, 227 & n.32 (1983); *cf. Morton v. Mancari,* 417 U.S. 535, 550 (1974) (repeal by implication is disfavored). Indeed, "'repeals by implication are disfavored,' and this canon of construction applies with particular force when the asserted repealer would remove a remedy otherwise available." *Schlesinger v. Councilman,* 420 U.S. 738, 752 (1975).

J. HUGHES, FEDERAL PRACTICE § 25387 (1940 & Supp. 1945); EDWIN BORCHARD, DECLARATORY JUDGMENTS, 787-88, 909-10 (1941), and the APA did not displace such relief, either as enacted in 1946 or as amended in 1976. *See* 5 U.S.C. § 559; *Darby v. Cisneros,* 509 U.S. 137, 153 (1993) (rejecting argument that 1976 APA amendments expanded APA's preclusion of review). Thus, even if APA § 10(c) precludes declaratory relief *under the APA,* 5 U.S.C. § 704, suitable plaintiffs nonetheless can obtain that relief *under the DJA*.

The Fifth Circuit has identified a nonexclusive list of seven factors that a district court must consider when exercising its discretion to hear, stay, or dismiss a case brought under the DJA.

> (1) whether there is a pending state action in which all of the matters in controversy may be fully litigated; (2) whether the plaintiff filed suit in anticipation of a lawsuit filed by the defendant; (3) whether the plaintiff engaged in forum shopping in bringing the suit; (4) whether possible inequities in allowing the declaratory plaintiff to gain precedence in time or to change forums exist; (5) whether the federal court is a convenient forum for the parties and witnesses; (6) whether retaining the lawsuit would serve the purposes of judicial economy; and (7) whether the federal court is being called on to construe a state judicial decree involving the same parties and entered by the court before whom the parallel state suit between the same parties is pending.

Sherwin-Williams Co. v. Holmes Cty., 343 F.3d 383, 388 (5th Cir. 2003); *see also Frye v. Anadarko Petroleum Corp.*, 953 F.3d 285, 293-94 (5th Cir. 2019) (requiring actual controversy, the court's authority for declaratory relief, and the court's discretion).

Applicants met the Fifth Circuit's *Sherwin-Williams* factors for declaratory relief:

- **Pending state action**. There is no pending state action.
- **Anticipatory suit**. The declaratory-judgment Applicants did not race the Respondent to the courthouse; Respondent did not plan to sue Applicants.
- **Forum shopping**. Rep. Gohmert is the lead plaintiff and has brought suit in his home district as Title 28 allows federal plaintiffs to do. Applicant Arizona Electors have no other ties to this forum, but their claims do not materially change the claims.
- **Possible inequities on timing and forum**. Rep. Gohmert is the lead plaintiff and has brought suit in his home district as Title 28 allows federal plaintiffs to do.
- **Federal court's convenience**. Given that Applicants have sued the Vice President of the United States on a question of federal law, a state forum would not be an option.
- **Judicial economy**. There are no concerns about judicial economy because this is the only action between the parties.
- **Federalism concerns from parallel actions**. There are no parallel state-court actions for Rep. Gohmert, and—although the Arizona Elector Applicants have engaged in state-court litigation—the issues here are purely federal.

The Fifth Circuit's primary concern with declaratory-judgment actions is whether, under that the standard of *Brillhart v. Excess Ins. Co. of Am.*, 316 U.S. 491 (1942),

"the questions in controversy between the parties to the federal suit … can be better settled in the proceeding pending in the state court." *Sherwin-Williams*, 343 F.3d at 389 (quoting *Brillhart v. Excess Ins. Co. of Am.*, 316 U.S. at 494). As indicated, this is an entirely federal action that does not raise that concern.

Under the parallel *Anadarko Petroleum* standards, declaratory relief is also appropriate under the exigent circumstances here:

- **An actual controversy is imminent**. The concern with that an actual controversy exists is easily met by the exigent circumstances of a contested election potentially being decided under an unconstitutional process as early as January 6. *See* Section III.A.4, *supra*. That does not trigger the Fifth Circuit's concern that the dispute is "not sufficiently definite and immediate to be justiciable." *Anadarko Petro. Corp.*, 953 F.3d at 293.
- **Jurisdiction**. This Court has jurisdiction for this dispute, *see* Section III, *supra*, and none of the concerns about superior state-court jurisdiction or burdens of factual proof for diversity jurisdiction enter into the analysis. *See id.*
- **Discretion**. Applicants respectfully submit that this Court must address the constitutional concerns presented here: "The power to interpret the Constitution in a case or controversy remains in the Judiciary." *City of Boerne v. Flores*, 521 U.S. 507, 524 (1997).

Provided that this Court finds federal jurisdiction to exist, this Court should not hesitate to declare—for the benefit of the Vice President and Congress—what the Constitution requires.

IV. THE *WINTER* FACTORS FAVOR ENTRY OF INTERIM RELIEF.

Although the Vice President focused on jurisdiction in the district Court, this Court may elect to consider the *Winter* factors on the equity of granting relief.

A. Applicants have a substantial likelihood of success.

The first and most important *Winter* factor is the likelihood of movants' prevailing. *Winter,* 555 U.S. at 20. Applicants are likely to prevail because this Court has jurisdiction for this action, *see* Sections II-III, *supra*, and because the Electoral Count Act is blatantly unconstitutional.

1. Unconstitutional laws are nullities.

At the outset, if the Electoral Count Act violates the Constitution, the Electoral Count Act is a nullity:

> [I]t is the province and duty of the judicial department to determine in cases regularly brought before them, whether the powers of any branch of the government, and even those of the legislature in the enactment of laws, have been exercised in conformity to the Constitution; and if they have not, to treat their acts as *null and void*.

Powell, 395 U.S. at 506 (interior quotations omitted, emphasis added). "Due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds." *United States v. Morrison*, 529 U.S. 598, 607 (2000) (finding Congress exceeded its authority under the Commerce Clause in regulating an area of

the law left to the States. "Constitutional deprivations may not be justified by some remote administrative benefit to the State." *Harman v. Forssenius*, 380 U.S. 528, 542-43 (1965). Put simply, "that which is not supreme must yield to that which is supreme." *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 448 (1827). Although *Brown* arose in a federal-versus-state context, the same simple truth applies in a constitution-versus-statute context: the supreme enactment controls the lesser enactment.

2. The Electoral Count Act violates the Electors Clause and the Twelfth Amendment.

The requested expedited summary proceeding granting declaratory judgment will address the merits of Applicants' claims, which raise only legal issues as to whether the provisions of Sections 5 and 15 of the Electoral Count Act addressing the counting of electoral votes from competing slates of electors for a given state are in conflict with the Twelfth Amendment and the Electors Clause and are therefore unconstitutional. In other words, if the Court grants the requested relief, that holding and relief will be granted because the Court has found that these provisions of the Electoral Count Act are unconstitutional and that Applicants have in fact succeeded on the merits.

By purporting to make States' appointment of Presidential electors conclusive, 3 U.S.C. § 5, the Electoral Count Act takes away the authority given to the Vice-President under the Twelfth Amendment. Sim3 U.S.C. § 15 in relevant part states that both Houses, referencing the House of Representatives and the Senate, may concurrently reject certified votes, and further that if there is a disagreement, then,

in that case, the votes of the electors who have been certified by the Executive of the State shall be determinative.

The Constitution is unambiguously clear that: "The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted" "… and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives [who] shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote." Whereas 3 U.S.C. § 15 and the incorporated referenced to 3 U.S.C. § 5 delegate the authority to the Executive of the State in the event of disagreement, in direct conflict with the Twelfth Amendment and directly taking the opportunity of Presidential Electors' competing slates from being counted.[13]

3. The Electoral Count Act violates the Constitution's structural protections of liberty.

The Electoral Count Act exceeds the power of Congress to enact because "one legislature may not bind the legislative authority of its successors," *United States v.*

[13] Similarly, 3 U.S.C. § 6 is inconsistent with the Electors Clause—which provides that electors "shall sign and certify, and transmit sealed to the seat of the government of the Unit-ed States" the results of their vote, U.S. CONST. art. II, § 1, cl. 2-3—because § 6 relies on state executives to forward the results of the electors' vote to the Archivist for delivery to Congress. 3 U.S.C. § 6. Although the means of delivery are arguably inconsequential, the Constitution vests state executives with no role whatsoever in the process of electing a President. A state executive lends no official imprimatur to a given slate of electors under the Constitution.

Winstar Corp., 518 U.S. 839, 872 (1996), which is a foundational and "centuries-old concept," *id.*, that traces to Blackstone's maxim that "Acts of parliament derogatory from the power of subsequent parliaments bind not." *Id.* (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *90). "There is no constitutionally prescribed method by which one Congress may require a future Congress to interpret or discharge a constitutional responsibility in any particular way." Laurence H. Tribe, *Erog v. Hsub and Its Disguises: Freeing* Bush v. Gore *from Its Hall of Mirrors*, 115 HARV. L. REV. 170, 267 n.388 (2001). Thus, the Electoral Count Act is a nullity because it exceeded the power of Congress to enact.

The ECA also violates the Presentment Clause by purporting to create a type of bicameral order, resolution, or vote that is not presented to the President:

> *Every Order, Resolution, or Vote*, to Which the Concurrence of the Senate and House of Representatives may be necessary (*except on a question of Adjournment*) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

U.S. CONST. art. I, § 7, cl. 3 (emphasis added). The House and Senate cannot resolve the issues that the Electoral Count Act asks them to resolve without either a supermajority in both houses or presentment.

The Electoral Count Act similarly improperly restricts the authority of the House of Representatives and the Senate to control their internal discretion and procedures pursuant to Article I, Section 5 which provides that "[e]ach House may determine the Rules of its Proceedings …" U.S. CONST. art. I, § 5, cl. 2. The Electoral

Count Act also delegates tie-breaking authority to State executives (who have no agency under the Electors Clause or election amendments) when a State presents competing slates that Congress cannot resolve. As such, the Electoral Count Act also violates the non-delegation doctrine, the separation-of-powers and anti-entrenchment doctrines. *See generally* Chris Land & David Schultz, *On the Unenforceability of the Electoral Count Act*, 13 Rutgers J.L. & Pub. Policy 340, 364-377 (2016).

As indicated, Applicants have standing to press these structural protections of liberty because Applicants suffer concrete injury in the debasement of their votes.

4. The Necessary and Proper Clause does not save the Electoral Count Act.

In the district court, *amicus* BLAG argues that the Necessary and Proper Clause authorized Congress to enact the Electoral Count Act.[14] But the Twelfth Amendment is not one of the "foregoing powers" under the Clause, *id.*, and the Twelfth Amendment does not expressly vest any power in the Congress to count votes or to vote, unless and until no candidate achieves a majority of electoral votes. *See* U.S. CONST. amend. XII. To the extent that the Constitution does vest a dispute-resolution power for the vote-counting function, that power could just as easily be assigned to the Vice President as an "officer thereof" as to Congress itself under the

[14] The Clause provides that "Congress shall have power … [t]o make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof." U.S. CONST. art. I, § 8, cl. 18.

express terms of the Necessary and Proper Clause. U.S. CONST. art. I, § 8, cl. 18. Indeed, Vice Presidents Adams and Jefferson undertook such actions in the 1796 and 1800 elections, Bruce Ackerman & David Fontana, *Thomas Jefferson Counts Himself into the Presidency*, 90 VA. L. REV. 551, 585, 571-90 (2004), and the United States adopted the Twelfth Amendment shortly thereafter, without trimming the Vice President's responsibilities.

Indeed, as Justice Story explained, neither the original Constitution nor the Twelfth Amendment included a dispute-resolution provision:

> In the original plan, as well as in the amendment, no provision is made for the discussion or decision of any questions, which may arise, as to the regularity and authenticity of the returns of the electoral votes …. It seems to have been taken for granted, that no question could ever arise on the subject; and that nothing more was necessary, than to open the certificates, which were produced, in the presence of both houses, and to count the names and numbers, as returned.

J. Story, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1464 (Boston, Hilliard, Gray, & Co. 1833). Whatever the Vice President's dispute-resolution powers, the House's theory of dispute resolution by the House and Senate is constitutionally impossible.

Constitutional law recognizes two distinct types of unconstitutionality: "laws for the accomplishment of objects not entrusted to the government" and those "which are prohibited by the constitution." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819). Put another way, "a federal statute, in addition to *being authorized* by Art. I, § 8, must also '*not [be] prohibited*' by the Constitution." *United States v.*

Comstock, 560 U.S. 126, 135 (2010) (*quoting McCulloch*, 17 U.S. (4 Wheat.) at 421) (alterations in *Comstock*, emphasis added). 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." *Brushaber v. Union Pac. R. Co.*, 240 U.S. 1, 24 (1916). As applied here, that means that the Necessary and Proper Clause did not authorize the joint session or the two houses, separately, to violate the Presentment Clause. Under the Presentment Clause, all votes, resolutions, and orders—except adjournments—require presentment.

The fact that Congress steadfastly believed in bicameral resolutions steadfastly until this Court resolved the issue, almost 200 years into the Constitution, in *INS v. Chadha,* 462 U.S. 919, 946 (1983), which goes a long way to explaining how the Electoral Count Act survived 133 years:

> A close reading of *Chadha*, unavailable of course to the participants in the Electoral Count Act debates, fortifies the basic argument made by Senator George and casts further doubt upon the constitutionality of the Electoral Count Act. The *Chadha* Court carefully explained why the "one-House veto" provision of the Immigration and Nationality Act was subject to the requirements of bicameralism and presentment in Article I. The Court began by noting that whether actions taken by either House are, in law and fact, an exercise of legislative power depends not on their form but upon whether they contain matter which is properly to be regarded as legislative in its character and effect. The Court then described the one-House veto provision in that case as one that had the purpose and effect of altering the legal rights, duties and relations of persons, including the Attorney General, Executive Branch officials and Chadha, all outside the legislative branch[.]

Vasan Kesavan, *Is the Electoral Count Act Unconstitutional*?, 80 N.C.L. REV. 1653, 1791 (2002). A second factor is that the last election where the Electoral Count Act would have mattered was in 1876 (*i.e.*, more than a decade *prior* to its enactment). It should be no surprise that Applicants bring this suit now, a fortnight after an electoral vote in which the Electoral Count Act matters for the first time. These two factors—the advent of *Chadha* in 1983 and the novelty of this pandemic election in 2020—readily answer balancing the equities: " BLAG's incredulity about "why now?"

5. <u>The action is not barred by laches.</u>

Amicus BLAG cited laches—namely, an "unreasonable, prejudicial delay in commencing suit," *Petrella v. MGM*, 572 U.S. 663, 667 (2014)—as a basis to dismiss this action or deny relief. Because Applicants did not have a ripe claim until December 14, 2020 and filed this action on December 27, 2020, laches presents no question of unreasonable delay. Applicants' timing is measured from their claims' arising, not from the enactment of the Electoral Count Act in 1887:

> It is axiomatic that a claim that has not yet accrued is not ripe for adjudication.

Sid Richardson Carbon & Gasoline Co. v. Interenergy Res., 99 F.3d 746, 756 (5th Cir. 1996). For that reason, Justice Blackmun aptly called laches "precisely the opposite argument" from ripeness. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 915 n.16 (1990) (Blackmun, J., dissenting); *accord What-A-Burger of Va., Inc. v. Whataburger, Inc.*, 357 F.3d 441, 449-50 (4th Cir. 2004) ("'One cannot be guilty of laches until his right ripens into one entitled to protection. For only then can his torpor be deemed inexcusable'") (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); *Profitness Physical Therapy Ctr. v. Pro-Fit Orthopedic & Sports Physical Therapy P.C.*, 314 F.3d 62, 70 (2d Cir. 2002). Because Applicants could not have brought this action before the electoral college vote on December 14, 2020., this Court should reject any suggestion of unreasonable delay.

Even if Applicants had delayed bringing suit, the Respondent still would need to show *prejudice* as a prerequisite to obtaining dismissal for laches. *Envtl. Def. Fund, Inc. v. Alexander*, 614 F.2d 474, 479 (5th Cir. 1980). The test for prejudice requires balancing the equities: "Measuring prejudice entails balancing equities." *Id.* The Vice Presidency has not acquired a vested right to violate the Constitution just because 133 years have passed since Congress enacted the Electoral Count Act in 1887. The passage of time does not bar fresh challenges to the application of unconstitutional or *ultra vires* laws or regulations. *Texas v. United States*, 749 F.2d 1144, 1146 (5th Cir. 1985). "Arbitrary [governmental] action becomes no less so by simple dint of repetition." *Judulang v. Holder*, 565 U.S. 42, 61 (2011). In truth, however, the Electoral Count Act has laid dormant since its enactment in 1887, and the only prior elections in which it might have mattered occurred prior to 1887 (*e.g.*, 1800 or 1876). The Respondent cannot claim "prejudice" from a suit that challenges the Electoral Count Act in the first election since that statute's enactment in 1887 where the statute could unconstitutionally affect the outcome.

B. Applicants will suffer irreparable injury.

Applicants' votes will be counted or not counted at the January 6 joint session. The failure to count a lawful vote is an irreparable injury. *See*, *e.g.*, *Obama for Am. v.*

Husted, 697 F.3d 423, 436 (6th Cir. 2012) ("A restriction on the fundamental right to vote … constitutes irreparable injury."). Indeed, the deprivation of any fundamental right constitutes irreparable injury, *Murphree v. Winter*, 589 F. Supp. 374, 381 (S.D. Miss. 1984) (citing *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976)), and voting rights are "a fundamental political right, because [they are] preservative of all rights." *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964) (internal quotations omitted). Moreover, if the counting of votes proceeds under the Electoral Count Act, Applicants' votes will be adjudicated via an unconstitutional procedure, which also qualifies as irreparable harm: there will be no opportunity to revisit the issue. As with standing for procedural injuries, irreparable harm from a procedural violation requires an underlying concrete injury or due-process interest, which Applicants have and which will be irretrievably lost if the Vice President proceeds under the Electoral Count Act. Under the circumstances, Applicants' procedural harms also are irreparable. *Commissioner v. Shapiro*, 424 U.S. 614, 629-30 (1976).

C. Applicants need not demonstrate irreparable harm for declaratory relief.

"The traditional prerequisite for the granting of injunctive relief, demonstration of irreparable injury, is not a prerequisite to the granting of a declaratory relief" because the Declaratory Judgments Act "provides an adequate remedy and at law, and hence a showing of irreparable injury is unnecessary." 10 FED. PROC., L. ED. § 23:4 (citing 28 U.S.C. § 2201 and *Steffel v. Thompson*, 415 U.S. 452 (1974)). "The existence of another adequate remedy does not preclude a declaratory judgment that is otherwise appropriate." FED. R. CIV. P. 57; *accord*

Marine Chance Shipping v. Sebastian, 143 F.3d 216, 218-19 (5th Cir. 1998); *Tierney v. Schweiker,* 718 F.2d 449, 457 (D.C. Cir. 1983); 28 U.S.C. § 2201. Similarly, a prior formal or informal demand to the defendant is not a prerequisite to seeking declaratory relief, *Rowan Cos. v. Griffin*, 876 F.2d 26, 28 (5th Cir. 1989), and showing "irreparable injury… is not necessary for the issuance of a declaratory judgment." *Tierney,* 718 F.2d at 457 (*citing Steffel,* 415 U.S. at 471-72). Thus, even if not entitled to injunctive relief, Applicants still would be entitled to declaratory relief.

D. The balance of equities favors Applicants.

"Traditional equitable principles requiring the balancing of public and private interests control the grant of declaratory or injunctive relief in the federal courts." *Webster v. Doe*, 486 U.S. 592, 604-05 (1988). The scope of requested injunctive relief—directing Respondent Pence to carry out his duties as President of the Senate and as Presiding Officer for the January 6, 2021 Joint Session of Congress in compliance with the U.S. Constitution—is drawn as narrowly as possible and does not require Respondent Pence to take any affirmative action apart from those he is authorized to take under the Twelfth Amendment. Moreover, it is difficult to imagine how the relief requested, which *expands rather than restricts* Respondent's discretion and authority, by eliminating facially unconstitutional restrictions could cause any hardship.

E. The public interest favors Applicants.

The last stay criterion is the public interest. Where the parties dispute the lawfulness of government actions, the public interest collapses into the merits: "It is always in the public interest to prevent the violation of a party's constitutional rights." *Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 458 n.9 (5th Cir. 2014)

(alterations omitted); *ACLU v. Ashcroft*, 322 F.3d 240, 247 (3d Cir. 2003) ("the public interest [is] not served by the enforcement of an unconstitutional law") (interior quotation omitted); *Washington v. Reno*, 35 F.3d 1093, 1103 (6th Cir. 1994) (recognizing "greater public interest in having governmental agencies abide by the federal laws"); *League of Women Voters of the United States v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016) ("no public interest in the perpetuation of unlawful [government] action"); *cf. Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 595 (5th Cir. 2006) ("injunction serves the public interest in that it enforces the correct and constitutional application of Texas's duly-enacted election laws"). Here the declaratory and injunctive relief sought vindicates both Respondent Vice President's plenary authority as President of the Senate and Presiding Officer to count electoral votes, as well as the constitutional rights of the Applicants to have their electoral votes counted in the manner that the Constitution provides, the rights of the Arizona legislative Applicants under the Electors Clause to appoint Presidential Electors for the State of Arizona, and the right of Rep Gohmert and those he represents to have their vote counted in the manner that the Twelfth Amendment provides.

REQUESTED RELIEF

Applicants respectfully request that the Circuit Justice—or the full Court, if referred to the Court—enter an administrative stay against the Vice President's invoking the Electoral Count Act's dispute-resolution process under 3 U.S.C. § 15

until further order of the Circuit Justice or Court, as well as either a briefing schedule for this motion for interim relief or on the merits.[15]

CONCLUSION

For the foregoing reasons, Applicants respectfully submit that the Circuit Justice or this Court should issue the requested administrative and interim relief for the pendency of the Court's resolution of a timely filed petition for a writ of *certiorari*.

Dated: January 6, 2021

Respectfully submitted,

/s/ Sidney Powell

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[15] This Court can treat a stay application as a petition for a writ of *certiorari*. *See Purcell v. Gonzalez*, 549 U.S. 1, 6 (2006) (treating application to stay injunction pending appeal as petition for *certiorari*, granting *certiorari*, and ruling on merits): *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983) (treating application for stay of execution as a petition for writ of *certiorari*).

CERTIFICATE OF SERVICE

The undersigned certifies that, on this date, a true and correct copy of the foregoing application and its appendix was served by U.S. Priority Mail, postage prepaid, on the following counsel for the respondent:

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In addition, the undersigned further certifies that, on this date, he sent a PDF courtesy copy of the foregoing application and its appendix to the above-listed counsel at the email addresses indicated above.

The undersigned further certifies that, on this date, the foregoing application and its appendix were electronically filed with the Court, and an original and ten true and correct copies of the foregoing application and its appendix were dispatched to the Court by messenger for filing.

Dated: January 6, 2021

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