

No. 22O155

In the
Supreme Court of the United States

State of Texas,

Plaintiff,

vs.

Commonwealth of Pennsylvania,
State of Georgia, State of Michigan,
State of Wisconsin,

Defendants.

Brief of Legislators and Voters Group in Support of
Motion for Leave to File
Complaint-in-Intervention

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INTRODUCTION

The proposed complaint-in-intervention is important to the resolution of the claims brought by Texas against Pennsylvania, Michigan, Wisconsin and Georgia. In the Texas complaint, Texas asks the U.S. Supreme Court to adjudicate state-by-state the magnitude of election irregularities and improprieties against razor-thin margins of victory.

Alternatively, the proposed complaint-in-intervention asks the U.S. Supreme Court under Article II for a declaratory judgment and injunction to require the state legislatures to vote for post-election certification of their Presidential electors if they want their respective Presidential elector votes to count. The proposed complaint-in-intervention alleges that the state legislatures, instead of the U.S. Supreme Court, are the constitutionally-required final word on post-election certification of Presidential electors if their votes are to count toward the election of President and Vice President.

Basically, the proposed complaint-in-intervention presents the following question of law:

Whether Defendant State Legislatures violate the Electors Clause (or, in the alternative, the Fourteenth Amendment) by delegating wholly and perpetually the post-election certification of election results to state election officials and judges as a ministerial duty.

FACTS

The proposed complaint-in-intervention seeks a declaratory judgment and an injunction against the various Defendants to establish a constitutional process for the selection of Presidential electors from Pennsylvania, Michigan, Wisconsin and Georgia (“Defendant States”) relating to the November 3, 2020 election of President and Vice President and future elections.

The state legislatures’ wholesale and perpetual delegation to state election officials and judges of post-election certification has opened the door to election irregularities and improprieties in an unprecedented magnitude without state legislative post-election certification.

The proposed complaint-in-intervention alleges that each of the Defendant States’ election officials or judges flagrantly violated state laws governing elections for the appointment of presidential electors. The States’ election irregularities and improprieties have cast doubt on the outcome of Presidential contests determined by razor-thin margins.

The Pennsylvania allegations are found at paragraphs ___ through. ___.

The Michigan allegations are found at paragraphs ___ through ___.

The Wisconsin allegations are found at paragraphs ___ through ___.

The Georgia allegations are found at paragraphs ___ through ___.

Under these circumstances, the proposed Plaintiffs allege that the Defendant States' state legislatures violated their Article II duties by not conducting a post-election certification of their respective Presidential electors.

ARGUMENT

The motion to intervene should be granted as a matter of right or as a matter of permission.

I. Plaintiffs should be allowed to intervene as a matter of right because there is a sound reason to do so and the guidelines of Rule 24(a) are met.

Rule 17 of the Rules of the Supreme Court covers original actions between states under 28 U.S.C. § 1251. Rule 17 states:

2. The form of pleadings and motions prescribed by the Federal Rules of Civil Procedure is followed. In other respects, those Rules and the Federal Rules of Evidence may be taken as guides.

Rule 24 of the Federal Rules of Civil Procedure provides the guide for intervention as a matter of right:

(a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:...

(2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

A. Intervention is warranted in this public law case because the Court has a sound reason to grant intervention.

Under Rule 24 of the Federal Rules of Civil Procedure, intervention is allowed if there is a sound judicial reason to do so:

A person can be entitled to intervene in an action in a federal court where, even though not within the precise bounds of the provisions governing intervention, there is a sound reason to allow the intervention.

Ordinarily, whether a person can intervene in an action in the federal courts is controlled by provisions in the Federal Rules of Civil Procedure; however, failure to come within the precise bounds of such provisions does not necessarily bar intervention if there is a sound reason to allow it. Thus, even though grounds for intervention under a literal interpretation of Rule 24 do not exist, a court ... can even permit intervention by private groups in unusual cases where the public interest is sufficiently imperative.

35A C.J.S. Federal Civil Procedure § 167 (citations omitted)(emphasis added).

Accordingly, this Court held in *Missouri-Kansas Pipe Line Co. v. U.S.*, 312 U.S. 502, 506 (1941) that under certain circumstances intervention of right applied, even though the technical requirements of Federal Rule 24 were not precisely met

for intervention, because safeguarding parties' interests cannot be left to only public officials' and the courts' discretion:

Plainly enough, the circumstances under which interested outsiders should be allowed to become participants in a litigation is, barring very special circumstances, a matter for the nisi prius court. But where the enforcement of a public law also demands distinct safeguarding of private interests by giving them a formal status in the decree, the power to enforce rights thus sanctioned is not left to the public authorities nor put in the keeping of the district court's discretion.

Id. So, in certain public law cases, private parties may have a right of intervention because a matter can't be left solely to the public authorities' and the court's discretion.

This case is similar to *Missouri-Kansas Pipe Line Co.* because it is a public law case, where the states' public officials and court, under the circumstances, should not be left to determine the outcome. The proposed complaint-in-intervention is brought by voters in each of the Defendant States. Voters have a different view of elections than state elected officials. Yet, voters were not included in Texas's original complaint against Pennsylvania, Michigan, Wisconsin and Georgia. So, there is a "sound reason" to grant intervention: it is essential that voters from the respective states be included in litigation involving the process for post-election certification of Presidential electors.

In fact, voters have a unique remedy here under Article II. State legislative post-election certification of Presidential electors is the voters' Article II remedy when state election officials' and judges' irregularities and improprieties are of such a magnitude to affect the election's outcome. The proposed complaint-in-intervention is based on this Article II remedy.

The state legislatures of Defendant States and other states violate their express duties under Article II of the U.S. Constitution by wholly delegating the post-election certification of Presidential electors to state election officials and judges. The Electors Clause of Article II of the Constitution requires the state legislature to direct the manner of appointment of a State's Presidential electors:

Each state shall appoint, in such manner as the Legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress...

But, the state legislatures of Defendant States have completely abdicated their Article II role of appointing Presidential electors by perpetually delegating the Article II responsibility of post-election certification of Presidential electors to state executive branch officials and judges.

Specifically, in each state, the Electoral College statutes perpetually delegate the appointment of Presidential electors to

state executive branch election officials or judges. The delegation is so complete that the state legislatures take no vote at all on appointment of Presidential Electors to the Electoral College.

Electoral College State Statutes

State	Statutes	Content
Pennsylvania	25 P.A. ch. 14, §§ 2878, 3191, 3192, 3193	Public election, time and place for Electoral College, replacing absentee electors, how to nominate, etc.
Michigan	Mich. Comp. Laws §§ 168.41, et seq.	Elector requirements, Board of Canvassers, Governor, Secretary of State, time, place, manner, etc.
Wisconsin	Wis. Stat. §§ 7.75, 8.18	Sets date, time, place and participants of Electoral College vote, faithless electors.
Georgia	Ga. Code §§ 21-2-10, et seq.	Independent electors, faithless electors and nominations.

In Pennsylvania, Michigan, Georgia and Wisconsin, there are no state legislative post-election certification votes for Presidential electors.

The Plaintiffs claim that the Electors Clause, as the Framers intended, requires each state legislature to conduct post-election certification of the Presidential electors. Anything short of a state legislative post-election certification is unconstitutional.

It is unconstitutional because Article II does not allow the state legislature to wholly and perpetually delegate the post-election certification to the state executive and judicial branches. Instead, Article II requires the state legislatures as the people's representatives in each state to vote affirmatively to certify the election results in order to have the states' Presidential elector votes count.

The deadline for the state legislatures' post-election certification to be submitted to the Vice President for counting in the U.S. Congress is January 6, 2020 under 3 U.S.C. § 15. If the state legislatures miss that deadline, the appointment of the Presidential electors from that state is constitutionally invalid for the purpose of counting toward electing the President and Vice President.

B. The proposed complaint-in-intervention satisfies the technical requirements for intervention as a matter of right.

The proposed complaint in intervention also satisfies the technical requirements for intervention as a matter of right.

First, the proposed plaintiff-intervenors claim "an interest relating to the property or transaction that is the subject of the action." The movants claim that as voters in their respective

states they have an interest in the state legislatures conducting post-election certification votes of Presidential electors.

As voters, each individual Plaintiff-intervenor has a fundamental right to vote.¹ Thus, each individual proposed Plaintiff-intervenor has a recognized protectable interest. As the U.S. Supreme Court has long recognized, a person's right to vote is “individual and personal in nature.”² Thus, “voters who allege facts showing disadvantage to themselves as individuals have standing to sue” to remedy that disadvantage.³ “Safeguarding the integrity of the electoral process is a fundamental task of the Constitution, and [the courts] must be keenly sensitive to signs that its validity may be impaired.”⁴ “Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy.”⁵

By federal and state election laws, the federal and state governments have agreed to protect the fundamental right to vote by maintaining the integrity of an election contest as fair, honest, and unbiased to maintain the structure of the democratic

¹ *Reynolds v. Sims*, 377 U.S. 533, 554–55, 562 (1964).

² *Id.* 377 U.S. at 561.

³ *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018).

⁴ *Johnson v. FCC*, 829 F.2d 157, 163 (D.C. Cir. 1987).

⁵ *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006).

process.⁶ The voters, in turn, agree to accept the government’s announcement of the winner of an election contest, including federal elections, to maintain the integrity of the democratic system of the United States. “No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live.”⁷ But the right to vote is the right to participate in an electoral process that is necessarily structured to maintain the integrity of the democratic system.”⁸

This arrangement constitutes a “social contract” between the voter and the government as an agreement among the people of a state about the rules that will define their government.⁹ Social contract theory provided the background against which the Constitution was adopted. “Because of this social contract

⁶ *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997) (“States certainly have an interest in protecting the integrity, fairness, and efficiency of their ballots and election processes as means for electing public officials.”). *See also, e.g.* Plts Amended Compl. ¶¶37–45.

⁷ *Burdick v. Takushi*, 504 U.S. 428, 441 (1992) *quoting Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

⁸ *Id.*, (citations omitted). *See also, e.g.* Plts Amended Compl. ¶¶46–49.

⁹ *Dumonde v. U.S.*, 87 Fed. Cl. 651, 653 (Fed. Cl. 2009) (“Historically, the Constitution has been interpreted as a social contract between the Government and people of the United States,” *citing Marbury v. Madison*, 1 Cranch 137, 5 U.S. 137, 176 (1803). *See e.g.* Plts Amended Compl. ¶50.

theory, the Framers and the public at the time of the revolution and framing conceived governments as resulting from an agreement among people to provide a means for enforcing existing rights.”¹⁰ “The aim of a social contract theory is to show that members of some society have reason to endorse and comply with the fundamental social rules, laws, institutions, and/or principles of that society. Put simply, it is concerned with public justification, i.e., ‘of determining whether or not a given regime is legitimate and therefore worthy of loyalty.’”¹¹

The uniformity of election laws is part of that contract to protect the right to vote. Hence, the right to vote is intertwined with the integrity of an election process. The loss of the integrity of the election process renders the right to vote meaningless.¹² Here, the Defendant States’ election irregularities and improprieties are so exceed the razor-thin margins to cast doubt

¹⁰ Greg Serienko, *Social Contract Neutrality and the Religion Clauses of the Federal Constitution*, 57 Ohio St. L. J. 1263, 1269.

¹¹ *Contemporary Approaches to the Social Contract*, <https://plto.stanford.edu/entries/contractarianism-contemporary/> (last visited Dec. 8, 2020).

¹² “Legitimacy is the crucial currency of government in our democratic age. Only elections that are transparent and fair will be regarded as legitimate...But elections without integrity cannot provide the winners with legitimacy, the losers with security and the public with confidence in their leaders and institutions.” <https://www.kofiannanfoundation.org/supporting-democracy-and-elections-with-integrity/uganda-victory-without-legitimacy-is-no-victory-at-all/> (Last visited Dec. 8, 2020).

on the razor-thin margins of victory and, thus, threaten the social contract itself.

The Article II social contract with the voters is, in part, the assurance of their state legislature voting for post-election certification of Presidential electors. Arising from the social contract is the integrity of the election process to protect the voter's right to vote. In the state legislatures perpetually delegating post-election certification of Presidential electors to election officials and judges—as a core government function—the state legislatures delegated post-election certification to state election officials and judges when Article II requires the state legislatures to conduct post-election certification.

This social contract is what is personally at risk for the Plaintiffs in the outcome of the controversy.¹³ As much as the government has a compelling interest in fair and honest elections with accompanying laws and regulations to ensure that objective to preserve the democratic system of government, so too the voter has an interest in state election officials and judges violating the election laws in favor of a pre-determined result.

Furthermore, the voter has a compelling interest in the maintenance of a democratic system of government under the

¹³ *Gill*, 138 S.Ct. at 1923.

Ninth Amendment through the election process, beyond controversies regarding governmental attempts to interfere with the right to vote. Here, the voter did not enter into a contract with the state election official and judges to give them discretion for state election irregularities and improprieties—of any kind—regardless of how benign they might be. The voter’s social contract is with the state legislature—who under Article II must conduct post-election certification of the Presidential electors. The Article II requirement of the state legislature casting a post-election certification vote for Presidential electors is the voters’ constitutional “insurance policy” against the risk of state election officials and judges engaging in election irregularities and improprieties in favor of a pre-determined outcome.

The voter have been willing to accept laws and regulations imposed upon an election process to serve the government’s compelling interest in the integrity of that process. So, while it is fair to create public governmental regulatory schemes to promote the compelling interests to protect the right to vote, and therefore, a voter’s right of associational choices under the First Amendment,¹⁴ those rights are infringed when the state

¹⁴ *Anderson v. Celebrezze*, 460 U.S. 780, 788–89 (1983).

legislatures abdicate the constitutionally-required role of post-election certification of Presidential electors.¹⁵

For federal elections, state legislatures under Article II, have no authority to delegate post-election certification of Presidential electors to state election officials or state judges. Yet, they did. That is the harm for the voters. It is the Electors Clause that gives state legislatures the exclusive right to post-election certification of Presidential electors—not state election officials and judges.

This lawsuit is not about voter fraud. The harm here is the loss of a voter remedy under Article II conducted as a core *governmental* function under federal and state election laws to ensure the integrity of the election. In turn, the acceptance of the outcome without state legislative post-election certification of Presidential electors interferes with the social contract between the voter and the government.

Second, the proposed complaint-in-intervention “is so situated that disposing of the action may as a practical matter impair or impede the movant’s ability to protect its interest.” The proposed complaint-in-intervention is so situated. Basically, the

¹⁵ *Id.*

proposed complaint-in-intervention presents the following question of law:

Whether Defendant State Legislatures violate the Electors Clause (or, in the alternative, the Fourteenth Amendment) by delegating wholly and perpetually the post-election certification of election results to state election officials and judges as a ministerial duty.

In the Texas complaint, Texas asks the U.S. Supreme Court to adjudicate state-by-state the magnitude of election irregularities and improprieties against razor-thin margins of victory. In contradiction, the proposed complaint-in-intervention alleges that the state legislatures, instead of the U.S. Supreme Court, are the constitutionally-required final word on post-election certification of Presidential electors if the state's votes are to count toward the election of President and Vice President. In turn, the proposed complaint-in-intervention asks the U.S. Supreme Court under Article II for a declaratory judgment and injunction to require the state legislatures to vote for post-election certification of their Presidential electors if they want their respective Presidential elector votes to count. So, if the Texas lawsuit is adjudicated without reference to the proposed complaint-in-intervention, the disposition of the Texas lawsuit as a practical matter impairs or impedes the proposed plaintiff-intervenors' ability to protect their interests in the state

legislatures under Article II, not the United Supreme Court, rendering final post-election certification of Presidential electors.

Third, for similar reasons, the existing parties do not “adequately represent” the interests of movants. Texas has legal claims which do not cover the proposed complaint-in-intervention. The proposed complaint-in-intervention alleges that Defendant States are violating Article II. So, neither Texas nor the Defendant States are adequately representing the movants’ interests.

II. Alternatively, the Court should allow permissive intervention.

Alternatively, the Court should allow permissive intervention. Rule 17 of the Rules of the Supreme Court covers original actions between states under 28 U.S.C. § 1251. Rule 17 states:

2. The form of pleadings and motions prescribed by the Federal Rules of Civil Procedure is followed. In other respects, those Rules and the Federal Rules of Evidence may be taken as guides.

Rule 24 of the Federal Rules of Civil Procedure provides the guide for permissive intervention:

(b) Permissive Intervention.

(1) *In General.* On timely motion, the court may permit anyone to intervene who:... (B) has a claim or defense that shares with the main action a common question of law or fact.

Permissive intervention should be allowed because the complaint-in-intervention shares with the Texas complaint a common question of law. In the Texas complaint, Texas asks the U.S. Supreme Court to adjudicate state-by-state the magnitude of election irregularities and improprieties against razor-thin margins of victory. Similarly, the proposed complaint-in-intervention alleges that the post-election certification of Presidential electors is required if the state's votes are to count toward the election of President and Vice President. So, permissive intervention is warranted because of a common question of law.

Finally, Rule 24(b)(3) of the Federal Rules of Civil Procedure on intervention requires consideration of undue delay or prejudice on other parties:

(3) *Delay or Prejudice.* In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

Here, Texas has already asked for an expedited proceeding. The movants have timely moved for intervention. The case is of nationwide importance. The movants' participation does not unduly delay or prejudice the adjudication of the original parties' rights.

CONCLUSION

As explained above, there is a sound reason for the Court to grant the motion to intervene. So, the Court should do so.

Dated: December 10, 2020

Respectfully submitted.

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