

No. 155, Original

IN THE
Supreme Court of the United States

STATE OF TEXAS, *Plaintiff,*

v.

COMMONWEALTH OF PENNSYLVANIA, *et al.,*
Defendants.

On Motion for Leave to File a Bill of Complaint

**Motion for Leave to File Brief *Amicus Curiae*
and Brief *Amicus Curiae* of
U.S. Representative Mike Johnson and
105 Other Members of the U.S. House of
Representatives in Support of
Plaintiff's Motion for Leave to
File a Bill of Complaint and
Motion for a Preliminary Injunction**

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December 10, 2020

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IN THE
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STATE OF TEXAS, *Plaintiff*,

v.

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

Motion for Leave to File Brief *Amicus Curiae*

Pursuant to subparagraph 2(b) of Rule 37, *amici* U.S. Representative Mike Johnson, *et al.*, hereby move the Court for leave to file a brief *amicus curiae* in support of Plaintiff Texas' Motion for Leave to File a Bill of Complaint and Motion for Preliminary Injunction.

This brief is being filed timely, as it was filed by approximately the same time as Defendants response to Plaintiff's motions.

In support of their motion, these *amici* state:

Identity of *Amici Curiae*

As members of the federal legislature, *Amici* seek to protect the constitutional role of state legislatures in establishing the manner by which Presidential Electors are appointed to ensure the Electoral College selects the candidate for President of the United States that was chosen by counting only lawful votes.

Amici include 106 U.S. Representatives currently serving in the 116th Congress, listed above.

Relevance of *Amicus* Brief to Motion for Leave to File a Bill of Complaint

This brief *amicus curiae* presents the concern of *amici* as Members of Congress, shared by untold millions of their constituents, that the unconstitutional irregularities involved in the 2020 presidential election cast doubt upon its outcome and the integrity of the American system of elections. *Amici* respectfully aver that the broad scope and impact of the various irregularities in the Defendant states necessitate careful and timely review by this Court.

On the merits, this *amicus* brief defends the constitutional authority of state legislatures as the only bodies duly authorized to establish the manner by which presidential electors are appointed, one of the central issues in the pending litigation. As members of the federal legislature, these *amici* seek to protect the constitutional role of state legislatures in determining the manner by which states choose their electors.

The Positions of the Parties

Due to the press of time to file this *amicus* brief before the deadline given to Defendants and the need to coordinate among the *amici*, the position of the parties on this motion is unknown.

Conclusion

For the foregoing reasons, *amici* respectfully request the Court to grant them leave to file the brief *amicus curiae* which is appended hereto.

Respectfully submitted

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INTEREST OF THE *AMICI CURIAE*¹

The interest of the *amici curiae* is set forth in the preceding motion for leave to file.

SUMMARY OF ARGUMENT

The Framers of the United States Constitution provided that presidential electors be appointed in a manner directed by the state “Legislature[s].” Art. II, § 1, cl. 2. The legislature of every Defendant state had established detailed rules by which that state’s appointment of presidential electors should have been conducted. However, in the months before the 2020 election, those rules were deliberately changed by both state and non-state actors. The clear authority of those state legislatures to determine the rules for appointing electors was usurped at various times by governors, secretaries of state, election officials, state courts, federal courts, and private parties.

¹ It is hereby certified that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

These *amici* appear as 106 Members of Congress and respectfully request that this Court uphold the plenary authority of the state legislatures to establish the manner by which electors are appointed, and determine the constitutional validity of any ballots cast under rules and procedures established by actors or public bodies other than state legislatures.

ARGUMENT

I. THE U.S. CONSTITUTION GIVES PLENARY AUTHORITY TO STATE LEGISLATURES TO DETERMINE THE MANNER OF APPOINTING PRESIDENTIAL ELECTORS.

The Framers of our U.S. Constitution granted plenary authority to state legislatures to “appoint” electors to choose a President. The Electors Clause, Art. II, § 1, cl. 2, directs that: “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....” The one constraint the Framers imposed upon the power of state legislatures was that: “The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day

shall be the same throughout the United States.”
Art. II, § 1, cl. 4.

In 3 U.S.C. § 1, Congress established the date on which elections would be held: “The electors of President and Vice President shall be appointed, in each State, on the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President.” This year, that date was November 3, 2020. However, reaffirming the state legislatures’ plenary constitutional authority under the Electors Clause, 3 U.S.C. § 2 provides that if there is a disruption of the ordinary process, and a state “has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct.”

The reasons for the creation of a transient, independent body of electors to be entrusted with the duty to select a President and Vice President are clearly explained in *The Federalist Papers*. The process of electing the President through a vote of electors was designed to guard against both domestic political corruption and what the Framers thought was the “chief” danger to the nation — the threat posed by foreign governments to influence the

selection of our President. As Alexander Hamilton noted in *Federalist Paper* No. 68:

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. How could they better gratify this, than by raising a creature of their own to the chief magistracy of the union? But the convention have guarded against all danger of this sort, with the most provident and judicious attention. [G. Carey & J. McClellan, eds. The Federalist, No. 68 (Alexander Hamilton) (Liberty Fund: 2001).]

The offices of President and Vice President were created by the U.S. Constitution, and when a state legislature exercises its power to determine the manner in which electors are chosen, that power is governed solely by the federal Constitution. See *Leser v. Garnett*, 258 U.S. 130, 137 (1922) (the function of state legislature in carrying out a federal function derived from the U.S. Constitution “transcends any limitations sought to be imposed by

the people of a State”). No state constitution, state law, state governor, state election official, or court can alter or constrain that grant of power.

More than a century ago, this Court applied the plain meaning of the Electors Clause and recognized the exclusive authority of the state legislatures to act for the people with respect to selection of electors. The Court explained:

The appointment of these electors is thus placed absolutely and wholly with the legislatures of the several States. They may be chosen by the legislature, or the legislature may provide that they shall be elected by the people of the State at large, or in districts, as are members of congress, which was the case formerly in many States; and it is, no doubt, competent for the legislature to authorize the governor, or the Supreme Court of the State, or any other agent of its will, to appoint these electors. This power is conferred upon the legislatures of the States by the Constitution of the United States, and cannot be taken from them or modified by their State constitutions ... Whatever provisions may be made by statute, or by the state constitution, to choose electors by the people, there is no

doubt of the right of the legislature to resume the power at any time, for it can neither be taken away nor abdicated. [*McPherson v. Blacker*, 146 U.S. 1, 34-35 (1892) (emphasis added) (citations omitted).]

Because the Framers recognized elections could be corrupted or stolen, they created the Electoral College as a safeguard and empowered state legislatures to ensure the integrity of our unique election system. Yet before the 2020 election, rationalized in some instances by the occasion of the novel coronavirus pandemic, the constitutional authority of state legislatures was simply usurped by various governors, state courts, state election officials, and others. *See* Sections II-V, *infra*.

Due in large part to those usurpations, the election of 2020 has been riddled with an unprecedented number of serious allegations of fraud and irregularities. National polls indicate a large percentage of Americans now have serious doubts about not just the outcome of the presidential contest, but also the future reliability of our election system itself. *Amici* respectfully aver it is the solemn duty of this Court to provide an objective review of these anomalies and to determine for the people if indeed the Constitution has been followed and the rule of law maintained.

As this Court has long noted, “No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.” *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

II. THE USURPATION OF LEGISLATIVE POWER IN PENNSYLVANIA PRODUCED UNCONSTITUTIONAL BALLOTS.

The U.S. Constitution empowers only the Pennsylvania Legislature to determine the manner for appointing presidential electors in that state. Any state executive or judicial attempt to determine the manner of choosing electors — especially any attempt that directly contradicts the will of the state legislature — is void *ab initio*.

Pennsylvania’s Secretary of the Commonwealth, Kathy Boockvar, violated Article II of the U.S. Constitution when she usurped legislative power by unilaterally abrogating Pennsylvania statutes that mandate signature verification on mail-in and absentee ballots. Acting with its exclusive authority under Article II, the Pennsylvania General Assembly requires all applications for absentee or mail-in ballots for non-disabled and non-military voters to “

be **signed** by the applicant.” 25 PA. STAT. §§ 3146.2(d) & 3050.12(c) (emphasis added). Signature verification mandates are further explained in 25 PA. STAT. 3050(a.3)(1)-(2) and § 3146.8(g)(3)-(7).

The Pennsylvania Secretary of State usurped legislative power by purporting to remove the signature mandate under the guise of settling an election lawsuit with the League of Women Voters of Pennsylvania and issued “guidance” contrary to legislative act. *See League of Women Voters of Pennsylvania v. Boockvar*, No. 2:20-cv-03850-PBT (E.D. Pa. Aug. 7, 2020). The unconstitutional “guidance” stated: “The Pennsylvania Election Code does not authorize the county board of elections to set aside returned absentee or mail-in ballots based solely on signature analysis by the county board of elections.”

The Pennsylvania Supreme Court violated Article II of the U.S. Constitution when it usurped state legislative power by unilaterally abrogating Pennsylvania statutes that require all mail-in ballots to be received by 8:00 p.m. on election day. The Pennsylvania General Assembly requires, at 2019 Pa. Legis. Serv. Act 2019-77, that the deadline for a county board of elections to receive a mail-in ballot is 8:00 p.m. on election day. 25 PA. STAT. §§ 3146.6(c), 3150.16(c). The Pennsylvania Supreme Court,

without any authorization by the Pennsylvania General Assembly, usurped legislative power by extending that deadline to three days after Election Day. *Pa. Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020).

Plaintiff Texas has documented in this matter numerous other examples of non-legislative actions that usurped Pennsylvania legislative power, including the following:

- Postmarking of Ballots Changed. The Pennsylvania Supreme Court usurped and contravened state legislative power by adopting “a presumption that even *non-postmarked ballots* were presumptively timely.” Texas Complaint, para. 48.
- Poll-Watcher Access Denied. “Local election officials in Philadelphia and Allegheny Counties decided not to follow 25 PA. STAT. § 3146.8(b) for the opening, counting, and recording of absentee and mail-in ballots.” Texas Complaint, para. 49.
- Unequal Curing of Ballots. Secretary Boockvar usurped and contravened state legislative power by allowing unequal and illegal curing of select ballots. Texas Complaint, paras. 50, 54.

- Premature Removal of Ballots from Secure Containers. Secretary Boockvar usurped and contravened state legislative power by creating a system to allow “illegal removal of ballots from their locked containers prematurely.” Texas Complaint, para. 51.

III. THE USURPATION OF LEGISLATIVE POWER IN GEORGIA PRODUCED UNCONSTITUTIONAL BALLOTS.

The U.S. Constitution empowers only the Georgia Legislature to determine the manner for appointing presidential electors in that state. Any state executive or judicial attempt to determine the manner of choosing electors — especially any attempt that directly contradicts the will of the state legislature — is void *ab initio*.

Georgia’s Secretary of State, Brad Raffensperger, violated Article II of the U.S. Constitution when he usurped legislative power by purporting to issue procedures that were in direct conflict with Georgia’s Legislative Acts governing the choosing of electors.

Acting with exclusive authority under Article II, the Georgia Legislature mandates that ballots be signed, and if they are not, that they undergo a rigorous and specific process to cure any unsigned

ballots. O.C.G.A. § 21-2-386(a)(1)(B)-(C); O.C.G.A. § 21-2-419(c)(2).

The Georgia Secretary of State usurped legislative power by purporting to “materially change the statutory requirements for reviewing signatures on absentee ballot envelopes to confirm the voter’s identity by making it far more difficult to challenge defective signatures beyond the express mandatory procedures set forth at GA. CODE § 21-2-386(a)(1)(B).” Texas Complaint, para 70.

The Georgia Legislature prohibits the opening of absentee ballots until after the polls open on Election Day. O.C.G.A. § 21-2-386(a)(2). In clear violation of the law, the State Election Board — not the legislature — purported to change Georgia law and allow processing of ballots up to three weeks before Election Day. Secretary of State Rule 183-114-0.9-.15. *See* Texas Complaint, para 67.

IV. THE USURPATION OF LEGISLATIVE POWER IN MICHIGAN PRODUCED UNCONSTITUTIONAL BALLOTS.

The U.S. Constitution empowers only the Michigan Legislature to determine the manner for appointing presidential electors in that state. Any state executive or judicial attempt to determine the manner of choosing electors — especially any

attempt that directly contradicts the will of the state legislature — is void *ab initio*.

Michigan law states that registered voters may request and vote by an absentee ballot without giving a reason. Mich. Const. Art. 2, § 4. However, all such ballots must be requested by the voter through a careful and secure application process requiring a signature. M.C.L. § 168.759(3). Michigan's Secretary of State, Jocelyn Benson, violated Article II of the U.S. Constitution when she usurped state legislative power by refusing to follow the secure application process and instead set up a website whereby persons could request an absentee ballot without a signature. *See Texas Complaint*, paras. 85-87, 89.

Michigan law requires that distribution of absentee ballot applications must be performed at the local level by clerks and not by the Michigan Secretary of State. § 168.759(3)(b). Michigan's Secretary of State violated Article II of the Constitution when she seized local power granted by the legislature and distributed 7.7 million absentee ballot applications. She lacked the authority to mail

out even one absentee ballot application.² *See* Texas Complaint, paras. 80-84.

Moreover, the Michigan Legislature requires that absentee ballots be inspected and approved by placing the signature or stamp of the inspector on the ballot envelope confirming that the ballot was inspected and is in compliance with the legislative procedure for absentee ballots. *See* MCL § 168.765a(6).

Election officials in Wayne County, Michigan violated Article II of the U.S. Constitution when they consciously and systematically refused to follow the inspection and security requirements set by the Michigan Legislature to ensure absentee ballots were cast by actual voters. *See* Texas Complaint, paras. 92-95.

V. THE USURPATION OF LEGISLATIVE POWER IN WISCONSIN PRODUCED UNCONSTITUTIONAL BALLOTS.

The U.S. Constitution empowers only the Wisconsin Legislature to determine the manner for appointing presidential electors in that state. Any state executive or judicial attempt to determine the

² *See* Michigan Secretary of State press release, “[All voters receiving applications to vote by mail](#)” (May 19, 2020).

manner of choosing electors — especially any attempt that directly contradicts the will of the state legislature — is void *ab initio*.

The Wisconsin Legislature values voter integrity and guards against risks inherent in absentee ballots and mandates that improperly cast absentee ballots “may not be counted.” Wis. Stat. § 6.87(6).

The Wisconsin Legislature provides that “voting by absentee ballot is a privilege exercised wholly outside the traditional safeguards of the polling place. The legislature finds that the privilege of voting by absentee ballot must be carefully regulated to prevent the potential for fraud or abuse[.]” Wis. Stat. § 6.84(1).

Accordingly, the Wisconsin Legislature systemically prohibits the use of drop boxes for ballots by mandating that local government may establish an alternate site for absentee ballot delivery but that the site must be staffed as though it were a normal delivery office. The site “shall be staffed” Wis. Stat. 6.855(3), and “the municipal clerk shall operate such site as though it were his or her office for absentee ballot purposes and shall ensure that such site is adequately staffed.” Wis. Stat. 7.15(2m).

Nevertheless, the non-legislative Wisconsin Elections Commission (“WEC”) and other local officials unconstitutionally created “hundreds of drop boxes to collect absentee ballots — including the use of unmanned drop boxes.” Texas Complaint, para. 107. The fact that the WEC deems ballot drop boxes “secure” does not make them secure or lawful according to the will of the Wisconsin Legislature, which requires ballots to be taken to a normal “office for absentee ballot purposes” (not a mere drop box) and with professional and “adequate staff” (not left unstaffed and unguarded).

In addition to the previous requirements that absentee ballots be collected in staffed offices, the state legislature further requires that ballots be “mailed by the elector, or delivered in person, to the municipal clerk issuing the ballot or ballots.” Wis. Stat. § 6.87(4)(b)1.

Absentee ballots placed in a drop box are neither “mailed” nor “delivered in person to the municipal clerk,” and by Legislative act “may not be counted.” Wis. Stat. § 6.87(6). The ban on counting noncompliant absentee ballots is “mandatory” and emphasized further by the legislature when it again states: “Ballots cast in contravention of the procedures specified in those provisions may not be counted. Ballots counted in contravention of the

procedures specified in those provisions may not be included in the certified result of any election.” Wis. Stat. § 6.84(2).

Despite the clear requirements of the law, non-legislative actors purported to change the will of the legislature by creating and encouraging unsecure “drop-boxes to facilitate return of absentee ballots.” Wisconsin Safe Voting Plan 2020, at 4 (June 15, 2020).³ The unmanned absentee ballot drop-off sites are specifically prohibited by the Wisconsin Legislature, as they do not comply with Wisconsin law expressly defining “[a]lternate absentee ballot site[s]”. Wis. Stat. 6.855(1), (3).

Any count or certification of the presidential election in Wisconsin that includes absentee ballots cast in drop boxes is in direct violation of the manner prescribed by the Wisconsin Legislature. Such count and certification is likewise in violation of Article II of the U.S. Constitution, which empowers only state legislatures to direct the manner for appointing electors to choose our next President.

³ See Wisconsin Safe Voting Plan 2020 submitted to the Center for Tech & Civic Life, June 15, 2020, by the Mayors of Madison, Milwaukee, Racine, Kenosha, and Green Bay.

CONCLUSION

Our constitutional republic has endured for nearly two and a half centuries based on the consent of the governed. That consent is grounded in the confidence of our people in the legitimacy of our institutions of government. Among our most fundamental institutions is the system of free and fair elections that we rely upon, and any erosion in that foundation jeopardizes the stability of our republic.

Fortunately, the Framers of our Constitution provided for this moment. It is now the duty of this Honorable Court to objectively review the facts presented by the Plaintiff in this historic case, render judgment upon the unconstitutional actions in the Defendant states, and restore the confidence of all Americans that the rule of law will be upheld today and our elections in the future will be secured.

For the reasons stated above, the Plaintiff's Motion for Leave to File a Bill of Complaint and Motion for a Preliminary Injunction should be granted.

Respectfully submitted,

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