No. 22O155

In the Supreme Court of the United States

STATE OF TEXAS,
Plaintiff,
v.

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

On Motion for Leave to File a Bill of Complaint and Motion for Expedited Consideration and for Emergency Injunctive Relief or Stay

MOTION FOR LEAVE TO FILE AND *AMICUS CURIAE* BRIEF OF JUSTICE AND FREEDOM FUND IN SUPPORT OF PLAINTIFF

DEBORAH J. DEWART
620 E. Sabiston Drive
Swansboro, NC 28584-9674
(910) 326-4554
debcpalaw@earthlink.net

JAMES L. HIRSEN
Counsel of Record
505 S. Villa Real Drive
Suite 101
Anaheim Hills, CA 92807
(714) 283-8880
james@jameshirsen.com

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Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

MOTION FOR LEAVE TO FILE

Amicus curiae, Justice and Freedom Fund, respectfully moves for leave to file a short brief as *amicus curiae* brief in support of Plaintiff's (1) Motion for Leave to File a Bill of Complaint and (2) Motion for Preliminary Injunction and Temporary Restraining Order or, Alternatively, for Stay and Administrative Stay; and (3) Motion to Expedite (the "Plaintiff's Motions"). No counsel for any party authored this amicus brief in whole or in part and no person or entity other than *amicus curiae* made a monetary contribution to its preparation or submission.

Counsel for Intervenor Plaintiff, Donald J. Trump, President of the United States, and Counsel for Plaintiff State of Texas, consents to the filing of the enclosed amicus brief in support to Plaintiff's Motions. Defendants Wisconsin and Georgia do not oppose the filing; Defendants Pennsylvania and Michigan have not yet responded to amici counsel's request for consent.

Amicus curiae respectfully requests that the Court consider the arguments in the enclosed amicus brief. Justice and Freedom Fund has participated as *amicus curiae* in many cases before this Court, including cases that implicate the fundamental right to vote and other related rights such as political speech: *Citizens United v. FEC*, 558 U.S. 310 (2010); *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011); *Shelby County v. Holder*, 570 U.S. 529 (2013); *Minn. Majority v. Mansky*, 138 S. Ct. 1876 (2018).

Respectfully submitted,

James L. Hirsen
Counsel of Record
505 S. Villa Real Drive
Suite 101
Anaheim Hills, CA 92807
(714) 283-8880
james@jameshirsen.com

Deborah J. Dewart
620 E. Sabiston Drive
Swansboro, NC 28584-9674
(910) 326-4554
debcpalaw@earthlink.net

Counsel for Amicus Curiae

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae urges this Court to grant the Motion to File a Bill of Complaint, the Motion for Preliminary Injunction, and the Motion to Expedite filed by the Plaintiff State of Texas.

Justice and Freedom Fund is a California non-profit, tax-exempt corporation formed on September 24, 1998 to preserve and defend the constitutional liberties guaranteed to American citizens, through education, legal advocacy, and other means. JFF's founder is James L. Hirsen, professor of law at Trinity Law School and Biola University in Southern California and author of New York Times bestseller, *Tales from the Left Coast*, and *Hollywood Nation*. Mr. Hirsen is a frequent media commentator who has taught law school courses on constitutional law. Co-counsel Deborah J. Dewart is the author of *Death of a Christian Nation* (2010). JFF has made more than three dozen appearances in this Court as *amicus curiae*.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

America has just experienced an unprecedented rupture to the constitutional "glue" that has held the republic together. It is impossible to overstate the urgency of the case presented by the State of Texas. It is imperative that this Court acknowledge its exclusive jurisdiction and take appropriate action to ensure that

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[1] This brief is attached to *Amicus Curiae*'s Motion for Leave to File.

the 2020 presidential electors are appointed in a constitutionally appropriate manner.

Think of it as a bank heist, one in which armed robbers crash through the front doors and hightail it to different sections of the building. One approaches a teller and shoves a gun in his face. One sneaks over to the main computer and hacks away. Another goes into the vault and locks it behind him, so he can swap out real bills with counterfeits when no one is looking.

That pretty much sums up what happened in the 2020 presidential election. The election was stolen out from under the American people. And the crooks used many means to bring their devious plan to fruition.

Evidence of fraud is there for anyone to see, but the corporate media seem to be engaging in one of three strategies: stating that none exists; ignoring it altogether; or subjecting it to a "fact-checking" process. But the evidence in this election merry-go-round is massive. Indeed, the evidence is credible enough to warrant overturning the results in the battleground states of Pennsylvania, Michigan, Wisconsin, Georgia, Arizona, and Nevada—even before considering the staggering amount of statistical evidence and the mounting data involving tabulation machines and software.

Contrary to what has been reported, this election did not produce the largest *vote* tally in American history. Rather, it produced the largest *ballot* tally in American history. Shockingly, some ballots were deliberately destroyed and others were intentionally separated from their counterpart envelopes. Other

ballots that were scanned multiple times, "cured" prior to the date they were set to be opened, lost in predominantly Trump precincts, and even received before the date they were allegedly sent. While those tasked with the job of observation were prevented from carrying out their viewing responsibilities, others were busy voting multiple times. Even dead people got into the act, evidently casting ballots from the world beyond.

There are now hundreds of affidavits, videos, and statements that set forth various forms of wrongful behavior that occurred in the election tabulation process. Numerous election workers and postal employees have come forward to sign sworn statements under penalty of perjury that they were specifically instructed to backdate otherwise ineligible ballots. In several states, observers signed sworn statements under penalty of perjury that they were blocked from seeing the vote counting. Individuals in multiple states have also signed sworn statements under penalty of perjury regarding signatures that failed to match, optical scanners that were set to accept unverified ballots, and voter ID laws that were circumvented.

As America looked on with mouths agape, battleground states announced that the counting had been halted. Then, despite what was said, in the wee hours of the morning when most people were asleep, dumps of hundreds of thousands of ballots produced a disproportionate count for the Democratic presidential candidate. In a simultaneous occurrence, Pennsylvania, Wisconsin, Arizona, Nevada, and Georgia each pretended to stop ballot counting. But secretly they

continued to count. In Georgia, officials put a stop to election night counting under the guise that the premises had to be cleared out because a water pipe burst. This turned out to be a lie. A surveillance video shows election workers dismissing observers. Then, after all observers had left the premises, four cases of ballots were pulled out from underneath a table and large piles of ballots began to be tallied.

President Trump was leading in Georgia by more than 100,000 votes on election eve. But after 16 vote dumps over a six-hour period, his Democrat opponent was able to take the lead in a "statistically improbable" manner. President Trump was comfortably in the lead in Wisconsin on election night until a gigantic dump of ballots took place. Five percent of the state's total, about 170,000 votes, came in all at once. In the blink of an eye, the Democrat contender took a small lead. Similar statistically impossible numbers of late-arriving ballots arrived in other swing states after a fake stoppage of the counting. These also brought in just the right number of votes to give the Democrat challenger a slim lead.

Glaring swing state improprieties and non-legislative alterations of election law include the following:

—In Pennsylvania, where the Secretary of State unilaterally abrogated signature verification requirements for mail-in votes, a subcontractor for the U.S. Postal Service stated that he was towing a trailer with 144,000 to 288,000 ballots that were being shipped from New York to Pennsylvania. After the subcontractor had completed his delivery, the trailer

mysteriously disappeared from its parked location. As the Complaint explains in detail, Pennsylvania's count is now hopelessly compromised and it is impossible to accurate determine the results. (Motion for Leave to File Bill of Complaint, ¶¶ 41-63.)

—In Georgia, there were multiple non-legislative changes to state election law, including the Secretary of State's unilaterally abrogating the statutory requirements for signature verification of absentee votes. (Motion for Leave to File Bill of Complaint, ¶¶ 64-76.) In President Trump's Georgia lawsuit, allegations document over 300,000 illegal absentee voters who applied for absentee ballots prior to the legal date and were improperly counted, illegal votes from more than 66,000 underage residents, approximately 40,000 who moved without re-registering, almost 16,000 who moved out of state prior to the election, close to 5,000 out-of-state registrants, over 2,600 late-arriving absentee voters, more than 2,500 felons, over 2,400 unregistered voters, and almost 400 people who voted in two states.

—In Michigan, as in Pennsylvania and Georgia, the Secretary of State unilaterally abrogated safeguards for absentee voting. Unsolicited absentee ballots were mailed to millions of Michigan residents. (Motion for Leave to File Bill of Complaint, ¶¶ 77-102.) Election workers were directed to backdate tens of thousands of absentee ballots. Ballots for the Democratic nominee were scanned multiple times. And fake birthdates of non-registered voters were manually entered as a means of overriding the system and allowing their votes.

—In Wisconsin, non-legislative officials modified state election law to weaken established security procedures. A subcontractor for the U.S. Postal Service stated that he was told the postal service planned to backdate potentially tens of thousands of ballots. (Motion for Leave to File Bill of Complaint, ¶¶ 103-127.)

ARGUMENT

It is imperative that this Court enjoin Defendant States (Pennsylvania, Georgia, Michigan, Wisconsin) from certifying their electors using the results of the 2020 election, which suffer from massive unconstitutional irregularities

Defendant States violated U.S. Const. art. I, § 4 (the "Elections Clause") and art. II, § 1, cl. 2 (the "Electors Clause") by taking non-legislative actions that changed the election rules governing the selection of presidential electors and ultimately the outcome of the 2020 presidential election. Their conduct gutted the safeguards that assure election integrity, including signature verification, witness requirements, outer-envelope protections, and bipartisan observation by poll watchers. This Court should place the appointment and certification of electors back in the hands of Defendant States' respective legislatures and delay the deadline for appointment of electors (3 U.S.C. §§ 2, 5, 7) prior to the vote in the House of Representatives on January 6, 2021. 3 U.S.C. § 15.

I. THIS COURT HAS JURISDICTION AND IS THE SOLE AVAILABLE FORUM FOR THIS CASE. ARGUABLY THE COURT DOES NOT HAVE DISCRETION TO DECLINE IT.

This case implicates an urgent *federal* question. A federal question exists where a "right or immunity created by the Constitution or laws of the United States" is an "essential" element of plaintiff's case. *Gully v. First Nat'l Bank in Meridian*, 299 U.S. 109, 112 (1936); *see City of Chi. v. Int'l College of Surgeons*, 522 U.S. 156, 164 (1997). There is hardly a right more essential than protecting the integrity of a presidential election.

Ordinarily, "comity and respect for federalism compel" this Court to defer to state court decisions. *Bush v. Gore*, 531 U.S. 98, 112 (2000) (Rehnquist, C.J., concurring). But this case cannot possibly be resolved in state court. Like *Bush v. Gore*, this exceptional case implicates a *federal* constitutional mandate that "imposes a duty or confers a power on a particular branch of a State's government." *Id*. The constitutional text, Article II, § 1, cl. 2, requires the *state legislatures* to appoint the electors for President and Vice President. *Id*. at 112-113. This clause "conveys the broadest power of determination" and "leaves it to the legislature exclusively to define the method" of appointment. *McPherson v. Blacker, 146 U.S. 1, 27 (1892). Any "significant departure" from this scheme "presents a federal constitutional question." Bush v. Gore*, 531 U.S. at 113 (Rehnquist, C.J., concurring).

Federal jurisdiction extends to controversies between two or more states. U.S. Const. art. III, § 2.

Indeed, this Court has "*original* and *exclusive* jurisdiction of all controversies between two or more States." 28 U.S.C. § 1251(a) (emphasis added). This Court is the sole available forum to hear this critical case and provide a remedy. Only this Court can redress constitutional violations that span multiple states. Arguably the Court lacks discretion to decline it—unlike almost any other case. Normally the Court may either grant or decline review. Cases from federal appellate courts "may be reviewed" by this Court by writ of certiorari. 28 U.S.C. §1254(1). Final state court judgments "may be reviewed." 28 U.S.C. §1254(1). But 28 U.S.C. § 1251(a) is different because it grants original and exclusive jurisdiction to this Court. Even the immediately following subsection provides that this Court "shall have original *but not exclusive* jurisdiction" over other Article III matters. 28 U.S.C. § 1251(b) (emphasis added). "The Court's lack of discretion [§ 1251(a)] is confirmed by the fact that, unlike other matters within our original jurisdiction, our jurisdiction over controversies between States is exclusive." *Nebraska v. Colorado*, 136 S.Ct, 1034, 1034-35 (2016) (Thomas, J., dissenting); *see also New Mexico v. Colorado*, 137 S.Ct. 2319 (2017) (Thomas, J., dissenting). "We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Id.* at 1035, quoting *Cohens v. Virginia*, 19 U.S. 264, 6 Wheat 264, 404 (1821) (Marshall, C. J.). In some earlier cases, this Court interpreted its original jurisdiction "sparingly," even in cases between states where jurisdiction is also exclusive. *Wyoming v. Oklahoma*, 502 U.S. 437, 450 (1992), citing *Maryland* v. *Louisiana*, 451 U.S. 725, 739 (1981). But the Court considers "the seriousness and

dignity of the claim" as well as "the availability of another forum" that has jurisdiction and could provide "appropriate relief." *Wyoming v. Oklahoma*, 502 U.S. at 451, quoting *Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972), quoted in *California v. Texas*, 457 U.S. 164, 168 (1982). Here, this Court is the *only* available forum that has jurisdiction, and the *only* Court that can provide "appropriate" and timely relief.

II. STATE LEGISLATURES—NOT STATE CONSTITUTIONS OR STATE COURTS—HAVE PLENARY AUTHORITY TO REGULATE ELECTIONS AND APPOINT ELECTORS.

The U.S. Constitution grants state legislatures the exclusive right to regulate the time, place, manner for congressional elections, and plenary authority to appoint presidential electors. Nullification of state election law is especially egregious when it eliminates safeguards for election integrity, e.g., by establishing lax policies for mail-in ballots. Lawful elections are essential to preserving both our freedoms and our trust in the integrity of the process. State courts may enjoin enforcement of *unconstitutional* election laws but may not rewrite those laws. Even state constitutions cannot take away a state legislature's plenary power to select electors. *McPherson v. Blacker, 146 U.S. at 35; Bush v. Gore*, 531 U.S. at 76-77.

Recently, the Pennsylvania Supreme Court "issued a decree that squarely alter[ed]" important legislation passed in March 2020 that considered the pandemic but declined to change the election day deadline for receiving ballots sent by mail. *Republican Party v.*

Boockvar, 208 L. Ed. 2d 266, 266-267, 2020 U.S. LEXIS 5188 (2020). The state court ruling blatantly defied the constitutional scheme that grants such power solely to state *legislatures*, which do not act "solely under the authority given [them] by the people of the State, but by virtue of a direct grant of authority made under Art. II, § 1, cl. 2, of the United States Constitution." *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70, 76 (2000).

Plaintiff State's votes in the Electoral College would effectively be cancelled by the unlawful, constitutionally tainted electoral votes of Defendant States. The same is true for the 17 states that filed an amicus brief supporting Plaintiff State. All of these states have a compelling interest in preserving the separation of powers among state actors—legislature, judicial, and executive.

III. THE CORONAVIRUS PANDEMIC DOES NOT JUSTIFY DEFENDANT STATES' FLAGRANT DEPARTURES FROM THE CONSTITUTION.

"Government is not free to disregard the [Constitution] in times of crisis. … Yet recently, during the COVID pandemic, certain States seem to have ignored these long-settled principles." *Roman Catholic Diocese of Brooklyn, New York v. Cuomo*, 592 U.S. ____, 208 L. Ed. 2d 206, 211 (2020) (Gorsuch, J., concurring). As a federal district court in North Carolina held, several months before the election, "[t]here is no pandemic exception to the Constitution of the United States." *Berean Baptist Church v. Cooper*, 460 F. Supp. 3d 651, 654 (E.D. N.C. 2020). The law may not "sleep

through" a pandemic even though it may "take periodic naps." *Roberts v. Neace*, 958 F.3d 409, 414-415 (6th Cir. 2020). That is true with respect to First Amendment liberties and equally true in this case of radical departures from the constitutional requirements for federal elections.

The states have had many months to consider the impact of the pandemic and respond in an orderly manner. As noted above, that is exactly what the Pennsylvania legislature did in March—nearly eight months before the election. Rather than mailing out thousands of unsolicited ballots with no safeguards to ensure integrity, states could have expanded early voting and opportunities for absentee voting with appropriate safeguards, including signature verification, witnesses, and postmarks, to protect the integrity of the process. Absentee voting is not a new concept, but an established process in many states. Covid-19 does not grant states carte blanche to disregard the Constitution. Voters are entitled to "at least some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied. *Bush v.* Gore, 531 U.S. at 109.

IV. DEFENDANT STATES' ACTIONS VIOLATE EQUAL PROTECTION, HARMING ALL OTHER STATES AND THEIR VOTERS.

The unconstitutional actions of Defendant States harm *all* voters in *all* states who cast lawful ballots. The integrity of the election process is at stake, not only for the 2020 election, but for all future elections. "A citizen's right to a vote free of arbitrary impairment by state action has been judicially recognized as a right

secured by the Constitution, when such impairment resulted from dilution by a false tally." *Baker v. Carr*, 369 U.S. 186, 208 (1952). Defendant States have unquestionably created a "false tally" of individual votes that will result in an equally false tally of electoral votes unless this Court intervenes. Their unconstitutional conduct diminishes the votes cast in other states, such as the Plaintiff State of Texas and the 17 *amici* states, that properly followed the Constitution and state election law.

In *Bush v. Gore*, there was an equal protection violation because "each of the counties used varying standards to determine what was a legal vote." *Bush v.* Gore, 531 U.S. at 107. This case is similar—the unilateral election law changes by non-legislative actors in Defendant States violated Equal Protection by creating differential voting standards. Counting a multitude of unlawful votes—including persons deceased, non-residents, underage—disenfranchises the many people who voted lawfully. "[T]he idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government." *Bush v.* Gore, 531 U.S. at 107, quoting *Moore* v. *Ogilvie,* 394 U.S. 814, 819 (1969). The resulting "debasement or dilution of the weight of a citizen's vote" violates the right of suffrage "just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds* v. *Sims*, 377 U.S. 533, 555 (1964). The Complaint describes the many unlawful actions showing that the process of counting was not uniform.

"History has now favored the voter" although the Constitution does not grant individual citizens the right to vote for electors for President of the United States. *Bush v. Gore*, 531 U.S. at 104. But while legislatures have chosen to use state elections as a means of implementing their constitutional power to appoint electors, the legislatures of Defendant States may take back the power to appoint their electors. "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. at 35 (quoting S. Rep. No. 395, 43d Cong., 1st Sess.). The time pressure "does not diminish the constitutional" or create an "excuse for ignoring equal protection guarantees." *Bush v.* Gore, 531 U.S. at 108. The Defendant States *must* resume their powers—otherwise, the election will be irreparably tainted and the people of the United States can have no confidence in.

CONCLUSION

Plaintiff State does not ask this Court to determine the outcome of the 2020 presidential election. Amicus curiae urges the Court to remand to Defendant States' legislatures with instructions to select their electors and certify the results in compliance with the Constitution and enjoin reliance on the result of the recent unconstitutional election process.

Respectfully submitted,

James L. Hirsen
Counsel of Record
505 S. Villa Real Drive
Suite 101
Anaheim Hills, CA 92807
(714) 283-8880
james@jameshirsen.com

Deborah J. Dewart
620 E. Sabiston Drive
Swansboro, NC 28584-9674
(910) 326-4554
debcpalaw@earthlink.net

Counsel for Amicus Curiae