No. 22O155, Original

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.

REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION AND TEMPORARY RESTRAINING ORDER OR, ALTERNATIVELY, FOR STAY AND ADMINISTRATIVE STAY

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REPLY IN SUPPORT OF INTERIM RELIEF

The State of Texas respectfully replies in support of its motion for interim injunctive relief against the States of Georgia, Michigan, and Wisconsin and the Commonwealth of Pennsylvania (collectively, the "Defendant States") and their agents, officers, presidential electors, and others acting in concert.

INTRODUCTION

Defendant States do not seriously address grave issues that Texas raises, choosing to hide behind other court venues and decisions in which Texas could not participate and to mischaracterize both the relief that Texas seeks and the justification for that relief. An injunction should issue because Defendant States have not—and cannot—defend their actions.

First, as a legal matter, neither Texas nor its citizens have an action in any other court for the relief

that Texas seeks here. Moreover, no other court could provide relief as a practical matter. The suggestion that Texas—or anyone else—has an adequate remedy is specious.

Second, Texas does not ask this Court to reelect President Trump, and Texas does not seek to disenfranchise the majority of Defendant States' voters. To both points, Texas asks this Court to recognize the obvious fact that Defendant States' maladministration of the 2020 election makes it impossible to know *which candidate* garnered the majority of *lawful* votes. The Court's role is to strike unconstitutional action and remand to the actors that the Constitution and Congress vest with authority for the next step. U.S. CONST. art. II, § 1, cl. 2; 3 U.S.C. § 2. Inaction would disenfranchise as many voters as taking action allegedly would. Moreover, acting decisively will not only put lower courts but also state and local officials on notice that future elections must conform to State election statutes, requiring legislative ratification of any change prior to the election. Far from condemning this and other courts to perpetual litigation, action here will stanch the flood of election-season litigation.

Third, Defendant States' invocation of laches and standing evinces a cavalier unseriousness about the most cherished right in a democracy—the right to vote. Asserting that Texas does not raise serious issues is telling. Suggesting that Texas should have acted sooner misses the mark—the campaign to eviscerate state statutory ballot integrity provisions took months to plan and carry out yet Texas has had only weeks to detect wrongdoing, look for witnesses

willing to speak, and marshal admissible evidence. Advantage to those who, for whatever reason, sought to destroy ballot integrity protections in the selection of our President.

On top of these threshold issues, Defendant States do precious little to defend the merits of their actions. This Court should issue the requested injunction.

ARGUMENT

I. TEXAS IS LIKELY TO PREVAIL.

In support of leave to file, Texas rebuts Defendant States' arguments that they complied with their State law. Texas Reply in Support of Leave to File. Here, Texas demonstrates that Texas is likely to prevail on the merits.

A. Defendant States violated the Electors Clause by modifying their legislatures' election laws through non-legislative action.

Defendant States do not credibly dispute either that they changed election statutes via non-legislative means or that the Electors Clause preempts such changes. Accordingly, Texas is likely to prevail on the merits.

Pennsylvania improperly conflates the Article I Elections Clause with the Article II Electors Clause. Penn. Br. 21. To state the obvious, these clauses are in separate Articles of the Constitution. The Elections Clause originally applied, by its terms, only to House (and later Senate) elections, whereas the Electors Clause applied to presidential elections. Although the Founders understandably feared the emergence of an all-powerful Executive based on their experience with

King George, they were not fearful of expanded legislative representation, which King George had denied them. As a result, the congressional proviso in Article I is broad—"Congress may at any time by Law make or alter" state determination of the times, places, and manner of federal elections. In Article II, however, congressional authority is limited to one modality—"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." This binary is textually significant and reflective of distinctive policy choices made by the Founders in Article I versus Article II.

As a corollary, state law can constrain legislatures' Article I powers but not their Article II authority. *Compare* Penn. Br. 21 (Elections "[C]lause does not relieve state legislatures of the obligation to comply with their state constitutions") (citing *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 818 (2015) ("*AIRC*")) *with McPherson v. Blacker*, 146 U.S. 1, 35 (1892) (Electors Clause "power … cannot be taken from [legislatures] or modified by their State constitutions") (internal quotations omitted); *cf. Smiley v. Holm*, 285 U.S. 355, 367-68 (1932) (Elections Clause); *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565, 568-69 (1916) (same). State legislatures get the authority to appoint presidential electors from the federal Constitution, not *vice versa*. Texas Mot. at 11-12. Therefore, state limits on the state legislature exercising this federal constitutional function cannot stand because the federal Constitution "transcends any limitations sought to be

imposed by the people of a State" under this Court's precedents. *Leser v. Garnett*, 258 U.S. 130, 137 (1922); *see also Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70, 77 (2000); *United States Term Limits v. Thornton*, 514 U.S. 779, 805 (1995) ("the power to regulate the incidents of the federal system is not a reserved power of the States, but rather is delegated by the Constitution").

The parties argue against last-minute injunctions in election cases under *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006), but that "*Purcell* principle" concerns voter confusion in advance of an election. A variant of that principle is that unconstitutional elections cannot stand.

B. State and local administrator's systemic failure to follow State election law qualifies as an unlawful amendment of State law.

Defendant States do not dispute that *policy decisions* to ignore State election law can violate the Electors Clause every bit as much as non-legislative amendments to State election law. Indeed, the due process decisions that both sides cite make that distinction between intentional misadministration and inadvertent error.

C. Defendant States' invocation of other litigation does not affect this action, either substantively or jurisdictionally.

Defendant States' arguments against the Fourteenth Amendment lack merit. Texas cited Defendant States' violations of the Fourteenth Amendment as a basis for granting leave to file, but Texas cited only the Electors Clause to justify interim

relief. There are sufficient indicia of fraud or intentional irregularities to trigger review under substantive due process, but Texas relies on the *appearance* of fraud under intentionally relaxed ballot-integrity measures to press the seriousness of the Electors Clause issues that Texas presents.[1]

Although Defendant States cite election litigation involving other parties, those cases are irrelevant for many reasons. First, they certainly do not *bind* Texas. *Baker v. General Motors Corp.*, 522 U.S. 222, 237-38 & n.11 (1998) ("[i]n no event … can issue preclusion be invoked against one who did not participate in the prior adjudication"). Second, even for parties bound, a court that did not reach a citizen's Electors Clause claim because the citizen lacked standing for the claim would not be binding on the merits: "lack of subject matter jurisdiction goes to the very power of a court to hear a controversy; ... [the] earlier case can be accorded no weight either as precedent or as law of the case." *United States v. Troup,* 821 F.2d 194, 197 (3d Cir. 1987) (quoting *Ala. Hosp. Ass'n v. U.S.,* 228 Ct.Cl.

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[1] Although Michigan argues that "Texas … would constitutionalize any claimed violation of state election law—no matter how minor, fleeting, or inconsequential," Mich. Br. 29, that is not so. Garden-variety irregularities do not rise to the constitutional cognizance, but intentional ones do. *See*, *e.g.*, *Minn. Voters All. v. Ritchie*, 720 F.3d 1029, 1032 (8th Cir. 2013); *Bodine v. Elkhart Cty. Election Bd.*, 788 F.2d 1270, 1272 (7th Cir. 1986). Although Michigan claims that Wayne County's maladministration gave no group preference, Mich. Br. 33, that is not true. *See* Compl. ¶¶ 91-101. The Wayne County process (*e.g.*, running ballots through multiple times, harassing party workers and poll challengers) were not applied statewide. Compl. ¶¶ 94, 98 (citing declarations).

176, 656 F.2d 606 (1981)) (alterations in original). Finally, lower-court decisions obviously do not bind this Court. *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 428 (2011). In short, Defendant States' raft of third-party litigation is largely irrelevant.

Nor does the possible litigation against Defendant States in other fora preclude or undermine the action here under original jurisdiction. This Court "carried over its exercise" of discretion to hear original-jurisdiction cases "to actions between two States, where our jurisdiction is exclusive." *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992). Finding an adequate remedy to displace an original action typically requires that *the plaintiff* State have the alternate remedy, *Maryland v. Louisiana*, 451 U.S. 725, 744 (1981), but the Court has extended its adequate-remedy inquiry to instances where a third party with the same interest as the State (*e.g.*, as customers charged a tax by a utility) because that third-party litigation could reach this Court on appeal from the lower courts. *Arizona v. New Mexico*, 425 U.S. 794, 797 (1976). By contrast, no private party shares Texas's sovereign interest in the Senate, and no court anywhere would have jurisdiction—as a practical matter—over enough states to affect the outcome of the election. Simply put, there is no adequate remedy outside this Court.

D. Texas has standing to sue.

Voting rights are fundamental, *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886), and the Senate is a body in which Defendant States' actions threaten Texas's voting rights. U.S. CONST. art. V, cl. 3 (States' "equal suffrage in the Senate"). With that standing in

its own right, Texas can assert *parens patriae* standing for its citizens.[2]

Although Pennsylvania characterizes this action as a "seditious abuse of the judicial process," Penn. Br. 2, and 'uniquely unserious," *id.* at 11, Texas seeks to enforce the right that preserves all others in a democratic republic: suffrage. *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964). Whatever Pennsylvania's definition of sedition, moving this Court to cure grave threats to Texas's right of suffrage in the Senate and its citizens' rights of suffrage in presidential elections *upholds* the Constitution, which is the very opposite of sedition.

The potential loss of suffrage rights meets the serious-magnitude test that Pennsylvania poses, Penn. Br. 13, and the purely legal nature of Defendant States' violations meets its clear-and-convincing test. *Id.* Michigan suggests that remand to legislatures to reconsider the result of the election would not redress Texas's injury, Mich. Br. 34-35, but that is not the law. *FEC v. Akins*, 524 U.S. 11, 25 (1998). Michigan also argues that the remedy would disenfranchise millions of voters, *id.*, but Michigan officials disenfranchised those Michigan voters. Specifically, Michigan admits it cannot segregate the illegal ballots from the legal ones, *id.* 9, which *admits* the impossibility of a lawful recount on remand to the Michigan executive. *Lutwak v. United States*, 344 U.S. 604, 617-18 (1953) ("admissions … are admissible … [as] statements of a

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[2] Texas does not "disclaim" injury based on Equal Protection or Due Process by noting that the one-person, one-vote principle arises from the Constitution's structure. *Compare* Penn. Br. 14 *with Wesberry v. Sanders*, 376 U.S. 1, 7-8 & n.10 (1964).

party"). Remand to the legislature is the only viable option. Whether the legislature sets a new election or provides some other mechanism to allocate Michigan's electoral votes is up to the legislature.

E. Neither laches nor mootness bar injunctive relief.

Texas's action is timely. Under Article III ripeness and standing requirements, Texas could not sue until after the election and, arguably, even after Defendant States certified their obviously flawed election results. Whereas Defendant States had months to plan, Texas had less than four weeks to detect violations, find witnesses willing to testify—notwithstanding threats—and develop evidence and build a case.

Against Texas's massive effort in minimal time, Pennsylvania cites *Benisek v. Lamone*—where the plaintiff waited "six years, and three general elections"—for the proposition that a "party requesting a preliminary injunction must generally show reasonable diligence." 138 S.Ct. 1942, 1944 (2018). Post-election laches are factually preposterous given Texas's diligence and pre-election laches are legally barred given Texas's lack of a ripe claim.

This action would be moot only if it were "impossible for a court to grant" relief. *Knox v. SEIU, Local 1000*, 567 U.S. 298, 307 (2012). The electors have not yet voted, and the statutory deadlines may be amended or stayed. Indeed, Congress did so for a similarly flawed election in 1876-77. *See* Ch. 37, 19 Stat. 227 (1877). This action is not moot.

II. THE OTHER *WINTER-HOLLINGSWORTH* FACTORS WARRANT INTERIM RELIEF.

While Texas's likelihood of prevailing qualifies for injunctive relief, the remaining *Winter-Hollingsworth* factors also favor Texas.

A. Plaintiff State will suffer irreparable harm if the Defendant States' unconstitutional presidential electors vote in the Electoral College.

Texas's rights to political association and voting are fundamental, and their loss for even a short time constitutes irreparable harm. *Elrod v. Burns,* 427 U.S. 347, 373 (1976). Michigan argues that "[i]rregularities not tending to affect results are not to defeat the will of the majority." *Gracey v. Grosse Pointe Farms Clerk*, 182 Mich. App. 193, 208, 452 N.W.2d 471, 478 (Ct. App. 1989). But Michigan's election results do not clearly demonstrate the will of the majority of lawful votes: there are too many questionable ballots from Wayne County and systemic violation of ballot-integrity protections for absentee ballots. Evidence suggests that Mr. Biden did not win legally, and Michigan admits that it can neither confirm nor deny the lawful winner. The same is true for all Defendant States because the ballots are commingled.

B. The balance of equities tips to the Plaintiff State.

Defendant States first *assume* that Mr. Biden won their States legitimately, then use that *assumption* to criticize Texas's arguments for disenfranchising voters. If the flawed 2020 results stand, that result would disenfranchise voters. At best for Defendant States, the balance of equities could be neutral. But

because Defendant States cannot—or at least do not—seriously defend the merits or show that Mr. Biden actually prevailed, the equities tip in favor of Texas and of the lawful process for resolving contested elections.

C. The public interest favors interim relief.

Defendant States accept that the public-interest factor collapses into the merits and do not seriously dispute the merits. *See* Section I, *supra*. Instead, they warn this Court about super-intending a national election and future challenges to *every* election. Although the merits should drive the public interest, neither States nor the public have a cognizable interest in unconstitutional results. And Defendant States are wrong about the impact of acting versus not acting:

- *Not acting* incentivizes further lawlessness and will drive honest voters from the polls: why should anyone vote if a few urban centers will manufacture an unlawful and insuperable vote margin?
- *Acting* now, once, removes any incentive for future lawlessness. Injunctions and/or acts of executive fiat that undermine the lawful election process will cease if the Court acts now. Chastened by this Court's mandate, future non-legislative actors will know they must seek legislative ratification before an election for any changes to election procedures that they believe to be necessary or compelling.

The public interest demands ending the abusive conduct that produced this dilemma.

CONCLUSION

The motion for interim relief enjoining Defendant States from certifying Presidential Electors and from having such electors vote in the electoral college until further order of this Court should be granted. Alternatively, this Court should summarily vacate Defendant States' certification of presidential electors and remand to Defendant States' legislatures pursuant to 3 U.S.C. § 2 and the Electors Clause.

December 11, 2020 Respectfully submitted,

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