

No. 155, Original

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IN THE  
**Supreme Court of the United States**

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STATE OF TEXAS,  
*Plaintiff,*

v.

COMMONWEALTH OF PENNSYLVANIA,  
*ET AL., Defendants.*

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On Motion for Leave to File a Bill of Complaint

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**Brief *Amicus Curiae* of  
Citizens United,  
Citizens United Foundation, and  
The Presidential Coalition, LLC  
in Support of Plaintiff**

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December 11, 2020

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**Motion for Leave to File Brief *Amicus Curiae***

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Pursuant to subparagraph 2(b) of Rule 37, U.S. Supreme Court Rules, Citizens United, Citizens United Foundation, and The Presidential Coalition, LLC hereby move the Court for leave to file an *amicus curiae* brief in support of the Plaintiff's Motion for Leave to File a Bill of Complaint and Motion for a Temporary Injunction. In support of their motion, these *amici* state:

**Identity and Experience of *Amici Curiae***

Citizens United is a nonprofit corporation and is exempt from federal income taxation under Internal Revenue Code section 501(c)(4). Citizens United Foundation is a nonprofit corporation and is exempt from federal income taxation under Internal Revenue Code section 501(c)(3). The Presidential Coalition, LLC is an IRC section 527 political organization.

These organizations have filed many amicus briefs in this Court, including on matters relating to campaigns, elections, and constitutional law.

### **Relevance of *Amicus* Brief to Plaintiff's Pending Motions**

It is believed that *amicus* briefs filed by these *amici* in prior cases have been useful to the Court. These *amici* recently filed an *amicus* brief in support of the petition filed in Republican Party of Pennsylvania v. Boockvar (No. 20-254) on November 25, 2020.

In this case, the brief submitted by *amici* provides authorities and makes argument on the important issues presented which are not addressed fully by Plaintiff.

### **The Positions of the Parties**

Due to the press of time to file this *amicus* brief in time for this Court's consideration, the position of the parties on this motion is unknown.

### **Conclusion**

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

Respectfully submitted,

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## INTEREST OF THE *AMICI CURIAE*<sup>1</sup>

Citizens United is a nonprofit social welfare organization, exempt from federal income tax under Internal Revenue Code (“IRC”) section 501(c)(4). Citizens United Foundation is a nonprofit educational and legal organization, exempt from federal income tax under IRC section 501(c)(3). The Presidential Coalition, LLC is an IRC section 527 political organization.

*Amici* organizations were established, *inter alia*, for the purpose of participating in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law.

## SUMMARY OF ARGUMENT

Texas, now joined by a sizeable number of other States seeking to intervene, has brought this original action in this Court, seeking to reestablish constitutional order in the selection of electors who will select the next President and Vice President of the United States. Texas’ basic claim is that the Constitution requires that in all states, the manner of selecting electors must be determined by the state legislatures. The defendant states have selected electors based on a manner established by governors,

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<sup>1</sup> 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*, their members, or their counsel made a monetary contribution to its preparation or submission.

judges, secretaries of state, elections officials, and private parties, usurping the authority of state legislatures.

This is no small matter. The Framers of the Constitution vested the exclusive authority to determine the manner of selecting electors to the state legislatures because that was the body that they believed could be best trusted to avoid corruption and foreign interference in the selection of our nation's Chief Executive. Texas has demonstrated that the election process changes made in the defendant states have not only usurped state legislative authority, but also have generated completely unreliable results — exactly what the Framers feared.

The defendant states may bristle at Texas and the intervening states objecting to defendant states' internal election procedures, but they would be wrong. It is the defendant states that have broken the constitutional bargain that has existed since the beginning of our Republic. If individual states are allowed to disregard the constraints posed on them by the Constitution, they do great violence to the bonds that bind together the states. This nation depends on each state operating not independently, but interdependently, as part of a Union. The persons chosen as electors by a process which violates the Constitution are wholly unqualified to serve in that role. Their selection must be vacated, and the matter returned to state legislatures to appoint electors who will select our next president of the United States. If this Court does not now act to restore constitutional order, the trust and cohesion on which our Republic is



grounded will be torn asunder. This Court is the only institution that can provide a multi-state remedial platform to restore trust into our Presidential selection process.

## ARGUMENT

### **I. TEXAS HAS SUFFERED SERIOUS INJURY AS A RESULT OF DEFENDANT STATES' BREACH OF THE CONSTITUTIONAL METHOD FOR DETERMINING THE MEANS OF CHOOSING ELECTORS.**

In order to obtain injunctive relief from this Court, it is necessary for the State of Texas to demonstrate that it has suffered a real, particularized, concrete injury that can be redressed by the relief sought, which is within the authority of this Court to grant. This standard requires an analysis of exactly how Texas has been harmed as a result of certain decisions about voting procedures for Presidential Electors that were utilized within sister states. The process by which Electors are chosen is developed internally to each state, so why would Texas really care how a sister state developed its own procedures? Moreover, once the election officials of that sister state have certified its election results for Presidential Electors, why would Texas have the right to question the procedures by which those results were reached? And, why should Texas be heard in this Court to bring an original action against four sister states to obtain an invalidation of the reported election results in those states? These *amici* endeavor to address those reasonable threshold questions, demonstrating that by their actions the

defendant states have breached the fundamental and reciprocal terms of the nation's compact — the U.S. Constitution.

### **A. The Office of the President.**

From the Nation's founding, the U.S. Constitution created only one office to be filled with a person who represents all the people of the nation — the President of the United States. In that one person, the Constitution vests all Executive power, including the power to administer programs, to prosecute crimes, to serve as commander-in-chief, and to exercise vast discretionary power to lead the nation in times of peace and in times of war. *See* Article II, §§ 2-3. The significance of that office extends beyond the nation's borders, as whoever occupies that office is often described as the Leader of the Free World.

### **B. The Electoral College.**

Based on the singular significance of that office, the Framers went to great care to establish how the President would be chosen. The Framers rejected the direct election of the President. In the election of a President, the several states participate in the singular event in which states act simultaneously and formally on a national matter. The Framers created a transient body, an Electoral College, where each state would have a minimum of three votes, with additional representation roughly proportional to its population. And the Framers clearly specified that the Manner of selecting those Presidential Electors from each state

would be exclusively vested in the legislatures of the several states:

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...  
[Article II, § 1, cl. 2.]

The Texas Complaint established with remarkable detail and clarity that, after the state legislatures in each of the defendant states had adopted election procedures, changes were made to those procedures. Thus, the procedures established by the state legislatures in defendant states certainly were not the procedures by which the November 3, 2020 election was conducted. Rather, the recent election in the defendant states was conducted in accord with procedures that had been dramatically altered by a combination of state courts, secretaries of state, election officials, and even private organizations, as detailed by Texas in its Complaint.

The Texas Complaint also establishes that these changed procedures had the cumulative effect of dramatically increasing the risk of election fraud.<sup>2</sup>

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<sup>2</sup> Millions more Americans voted via a process — absentee ballots, including mail-in ballots — that the bipartisan Jimmy Carter-James Baker commission identified as “the largest source of potential voter fraud” in the wake of the contested 2000 election. Building Confidence in U.S. Elections: Report of the Commission on Federal Election Reform at 46 (Sept. 2005).

Had the exact same election procedures been established by state legislatures in defendant states, would Texas have been able to file an actionable Complaint in this Court? Clearly, it would not be possible for Texas to make the same claim based on a usurpation of the authority of state legislatures to establish the Manner by which Presidential Electors are appointed. However, if the election process was so corrupted as to disregard the votes of lawful voters and count the votes of unlawful voters, then the Texas claim would be based on Fourteenth Amendment Due Process and Equal Protection grounds<sup>3</sup> — but not based on the Electors Clause. Texas has made a strong case that both of these constitutional provisions were breached, but they are not the focus of this *amicus* brief. In fact, Texas should not be required to allege and provide violations of these Fourteenth Amendment protections, as defendant states clearly have breached Article II, § 1, cl. 2.

### **C. The Singular Role of State Legislatures.**

A claim based on a violation of the Electors Clause still requires an understanding of exactly why it was and is so important to all Americans that only the state legislature establish “the Manner” of choosing Presidential Electors. Is that constitutional provision sufficiently important for this Court to invalidate certifications of votes for electors that already have been made by the four defendant states, and to order the matter returned to state legislatures to exercise

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<sup>3</sup> See Bush v. Gore, 531 U.S. 98, 110 (2001).

their constitutional power to appoint Electors based on an exercise of their own judgment?<sup>4</sup>

Federalist Paper No. 68 reveals the deep concerns based on corruption and foreign intrigue that were weighed by the Framers in fashioning the Electors Clause.

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, The Federalist No. 68 (Alexander Hamilton) (Liberty Fund: 2001) (emphasis added).]

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<sup>4</sup> Insofar as these state legislatures are acting pursuant to a direct grant of power from the U.S. Constitution, they are not exercising legislative power, and thus need not follow any procedure established under state constitutions or state law to convene a “session” of the legislature. See W. Olson & P. McSweeney, “State legislatures have absolute authority to select electors,” *Washington Times*, Dec. 7, 2020.

Thus, it was the conviction of the Framers that, to guard against these threats to the Republic, the authority to determine the Means of an Election must be vested exclusively in state legislatures, subject to no constraint other than the Constitution.<sup>5</sup>

There are many voices today who fail to understand the purpose and virtues of the Electoral College. Efforts have been made by political factions to circumvent its operation without going to the trouble of amending the Constitution in accordance with the procedures set out in Article V. Those who would undermine the Electoral College certainly would see no significance in what they would view as a “technical” requirement, that the Manner of those elections be vested exclusively in the state legislature. What is special about a state legislature?

The Framers had long experience with legislative bodies during the colonial period. They knew the strengths of such bodies and their weaknesses. They knew that state legislatures can be frustrating in causing delay and even gridlock, but they knew that state legislatures conducted open debate with the transparency that deliberation requires. State legislators would likely include persons from all walks of life — farmers, merchants, persons with military background, physicians, and even lawyers. They would come from rural portions of each state and more

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<sup>5</sup> See Leser v. Garnett, 258 U.S. 130, 137 (1922) (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”).

densely populated areas. They would be of different ages and different temperaments. They would likely be drawn from different religious backgrounds. And they would regularly stand for election within a House or Senate district sufficiently small that the person would be reasonably well known and respected by the electorate. When this mix of persons who exhibited leadership skills would assemble, the result would likely reflect the will of the people. Such a deliberative body could only rarely be captured by narrow factional interests, and if it were to occur, likely would not last long.

#### **D. The Inadequacy of Any Other Body.**

Thus, the citizens of each of the original 13 colonies (including Pennsylvania and Georgia) were willing only to have their President elected by an electoral college chosen by procedures developed by state legislatures and rejected all other available options. The Framers did not entrust this responsibility to governors, secretaries of state, judges, election officials, or anyone else — and neither should Texas, and neither can this Court. Thereafter, each state that came into the Union on an “equal footing” (such as Michigan and Wisconsin) accepted the constitutional process by which Presidential Electors would be selected in every state. *See* Coyle v. Smith, 221 U.S. 559 (1911).

While the passions of assisting one’s own political party could cloud the judgment of a governor or other individual to skew the system and invite fraud that helps his personal ambitions and those of his friends,

a deliberative body is highly unlikely to be controlled by a majority of both chambers who are dominated by the same impulses. Although that certainly could happen, political power must be vested somewhere, and the state legislatures were deemed by the Framers to be the most reliable.

### **E. Doing Violence to the Union.**

What happens in Las Vegas may stay in Las Vegas. But what happens in Pennsylvania, Georgia, Michigan, and Wisconsin can affect the people of Texas and all other states. This is not a small matter. A corruption in the process in Pennsylvania, Georgia, Michigan, and Wisconsin could lead to the election of a person for President who was not elected in accordance with constitutionally-prescribed rules. It would be difficult to envision a more divisive act than to have violated these rules.

When one state allows the Manner in which Presidential Electors be chosen to be determined by anyone other than the state legislature, that state acts in breach of the presuppositions on which the Union is based. Each state is not isolated from the rest — rather, all states are interdependent. Our nation's operational principle is *E pluribus unum*. Each state has a duty to other states to abide by this and other reciprocal obligations built into our Constitution. While defendant states may view this suit as an infringement of its sovereignty, it is not, as the defendant states surrendered their sovereignty when they agreed to abide by Article II, § 1. Each state depends on other states to adhere to minimum



constitutional standards in areas where it ceded its sovereignty to the union — and if those standards are not met, then the responsibility to enforce those standards falls upon this Court.

The very fact that Texas would file this original action in this Court demonstrates how serious this matter is. Texas has no adequate remedy in any other forum to restore the nation’s compact between the states by seeking specific enforcement from this Court. Properly understood, it is not simply about who is to be elected President of the United States. The question truly is whether the process established in the U.S. Constitution to select our President is binding on all states, or just a suggestion, to be breached at will?

If each state cannot trust its sister states to follow these minimum standards, that breach of constitutional processes will lead to a breach among states. If there cannot be mutual trust between states, there can be no union. This is exactly why many consider the matter before this Court to be the most significant inter-state dispute since the Civil War.

#### **F. The Duty of this Court.**

The Texas Complaint presents exactly the type of dispute between states for which the original jurisdiction of this Court was designed. Although the Rules of this Court require a State to file a motion for leave to file a bill of complaint, Justice Marshall made it clear that: “It is emphatically the province **and duty** of the judicial department to say what the law is” and to resolve this dispute among states. Marbury v.

Madison, 5 U.S. 137, 177 (1803) (emphasis added). This Court simply cannot allow persons to be certified as electors by the defendant states now that it has been demonstrated that the process of election of those electors was fashioned by persons usurping the authority of state legislatures in violation of express constitutional processes and protections. It is not within this Court's power to select the electors from any state, but it is within this Court's power to determine that the electors chosen were chosen unlawfully.

The membrane that holds the Union together is the willingness of each State to subordinate its interests and sovereignty to the constitutional duties imposed on it as part of our Union. The federal arrangement cannot survive if any State can ignore the reciprocal obligation to abide by the terms of the Constitution, particularly the provisions governing how the President — the most important official in the Nation — is chosen.

Thus, the matter must be returned to state legislatures to determine which electors will be selected in the wake of a corrupted election process. That is the solution to the problem created by the defendant states that the Constitution provides, and this Court has the responsibility to set in motion that solution. This Court is the only institution that can provide a multi-state remedial platform to restore trust into our Presidential selection process.

**CONCLUSION**

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

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