[redacted] (ODAG)

From: [redacted] (ODAG)
Sent: Monday, December 28, 2020 2:17 PM
To: Engel, Steven A. (OLC)
Cc: Moore, Marchelle (OLC); Mitchell, Dyone (OLC)
Subject: Meeting with Acting Attorney General Rosen:

Sir Engel:

General Rosen would like to meet with you today at 3:15pm. Please let me know if your schedule permits?

Thanks in advance,

[redacted]
U.S. Department of Justice
Office of the Deputy Attorney General
[redacted]

Engel, Steven A. (OLC)

From:	Engel, Steven A. (OLC)
Sent:	Monday, December 28, 2020 11:45 PM
To:	Donoghue, Richard (ODAG)
Subject:	Re: Tomorrow

Sure. Will swing by.

Sent from my iPad

> On Dec 28, 2020, at 11:41 PM, Donoghue, Richard (ODAG) <ricdonoghue@jmd.usdoj.gov> wrote:
>
> Steve,
>
> I think you'll be at the 0900 meeting tomorrow. If you can make it there about 10 minutes early, please come by my office so I can read you into some antics that could potentially end up on your radar. If you're not in by then, no big deal, we can just talk after the meeting.
>
> Thanks,
>
> Rich

Engel, Steven A. (OLC)

From:	Engel, Steven A. (OLC)
Sent:	Tuesday, December 29, 2020 8:49 AM
To:	Donoghue, Richard (ODAG)
Subject:	RE: Tomorrow

Just tried you. around for a drop by?

-----Original Message-----
From: Donoghue, Richard (ODAG) <ricdonoghue@jmd.usdoj.gov>
Sent: Monday, December 28, 2020 11:41 PM
To: Engel, Steven A. (OLC) [redacted] (b) (6)
Subject: Tomorrow

Steve,

I think you'll be at the 0900 meeting tomorrow. If you can make it there about 10 minutes early, please come by my office so I can read you into some antics that could potentially end up on your radar. If you're not in by then, no big deal, we can just talk after the meeting.

Thanks,

Rich

Engel, Steven A. (OLC)

From:	Engel, Steven A. (OLC)
Sent:	Thursday, December 31, 2020 6:21 PM
To:	Donoghue, Richard (ODAG)
Subject:	Re: any update?

Ok.

Sent from my iPhone

On Dec 31, 2020, at 6:18 PM, Donoghue, Richard (ODAG) <ricdonoghue@jmd.usdoj.gov> wrote:

Just left WH. Will call in a bit.

> On Dec 31, 2020, at 4:20 PM, Engel, Steven A. (OLC) [redacted] wrote:
>
> I'm going to have to head out of the office soon, sinc [redacted]. But I'll be available by ce [redacted], and could obviously come back to the office if need be.
>
> **Steven A. Engel**
> Assistant Attorney General
> Office of Legal Counsel
> U.S. Department of Justice
> 950 Pennsylvania Ave., N.W.
> Washington, D.C. 20530
> Offic [redacted]

Donoghue, Richard (ODAG)

From:	Donoghue, Richard (ODAG)
Sent:	Saturday, January 2, 2021 8:39 PM
To:	Engel, Steven A. (OLC)
Subject:	Re: Call

(b) (6)

> On Jan 2, 2021, at 8:09 PM, Engel, Steven A. (OLC) (b) (6) wrote:
>
> Sure. What's your cell?
>
> Sent from my iPhone
>
> On Jan 2, 2021, at 8:08 PM, Donoghue, Richard (ODAG) <ricdonoghue@jmd.usdoj.gov> wrote:
>
> Steve,
>
> Not urgent, but give me a call when you have 5 minutes free tonight. I want to update you on today's events.
>
> Thanks,
>
> Rich

Engel, Steven A. (OLC)

From:	Engel, Steven A. (OLC)
Sent:	Sunday, January 3, 2021 4:27 PM
To:	Newman, Ryan D. (OAG)
Subject:	Call when you get a moment?

(b) (6)

Ps. At least we don't have to watch the redskins game.

Sent from my iPhone

Hovakimian, Patrick (ODAG)

From:	Hovakimian, Patrick (ODAG)
Sent:	Sunday, January 3, 2021 4:28 PM
To:	Murray, Claire M. (OASG); Wall, Jeffrey B. (OSG); Delrahim, Makan (ATR); Engel, Steven A. (OLC); Demers, John C. (NSD); Burns, David P. (NSD); Burns, David (CRM)
Cc:	Donoghue, Richard (ODAG)
Subject:	Call this afternoon

Apologies for the Sunday reach-out. Please join Rich and me for a call at 4:45 p.m. Dial-in below.

(b) (6) participant passcod (b) (6)

Patrick Hovakimian
Associate Deputy Attorney General
United States Department of Justice
(b) (6)

Wall, Jeffrey B. (OSG)

From: Wall, Jeffrey B. (OSG)
Sent: Sunday, January 3, 2021 5:08 PM
To: Engel, Steven A. (OLC)

I'm going to call you as soon as we're off.

Horning, Liz A. EOP/WHO

From:	Horning, Liz A. EOP/WHO
Sent:	Sunday, January 3, 2021 5:45 PM
To:	Engel, Steven A. (OLC)
Subject:	Re: Cell number

Thanks! We were thinking we would have to wave you in but then I remembered you have a badge. Cassidy Hutchinson may call you from the COS office to provide further details.

Liz

Sent from my iPhone

> On Jan 3, 2021, at 5:43 PM, Engel, Steven A. (OLC) (b) (6) wrote:
>
(b) (6)
>
> Sent from my iPhone
>
> On Jan 3, 2021, at 5:31 PM, Horning, Liz A. EOP/WH (b) (6) > wrote:
>
> Sorry to bother— but could I have your cell ASAP? For some reason it's not popping up > In my phone.
>
> Sent from my iPhone

Delrahim, Makan (ATR)

From:	Delrahim, Makan (ATR)
Sent:	Sunday, January 3, 2021 6:09 PM
To:	Hovakimian, Patrick (ODAG)
Cc:	Murray, Claire M. (OASG); Wall, Jeffrey B. (OSG); Engel, Steven A. (OLC); Demers, John C. (NSD); Burns, David P. (NSD); Burns, David (CRM); Donoghue, Richard (ODAG)
Subject:	Re: Call this afternoon

I am sorry I missed this. I am just getting this as I didn't have my work phone w m (b) (6) . I have Both phones w me.

Makan Delrahim
Assistant Attorney General
Antitrust Division

On Jan 3, 2021, at 4:28 PM, Hovakimian, Patrick (ODAG (b) (6) wrote:

Apologies for the Sunday reach-out. Please join Rich and me for a call at 4:45 p.m. Dial-in below.

(b) (6) , participant passcod (b) (6)

Patrick Hovakimian
Associate Deputy Attorney General
United States Department of Justice
(b) (6)

Engel, Steven A. (OLC)

From:	Engel, Steven A. (OLC)
Sent:	Sunday, January 3, 2021 9:28 PM
To:	Hovakimian, Patrick (ODAG)
Cc:	Murray, Claire M. (OASG); Wall, Jeffrey B. (OSG); Delrahim, Makan (ATR); Demers, John C. (NSD); Burns, David P. (NSD); Burns, David (CRM); Dreiband, Eric (CRT); Donoghue, Richard (ODAG)
Subject:	Re: Call this afternoon

Still at WH. But that is correct.

Sent from my iPhone

On Jan 3, 2021, at 9:07 PM, Hovakimian, Patrick (ODAG) [redacted] wrote:

I have only limited visibility into this, but it sounds like Rosen and the cause of justice won. We will convene a call when Jeff is back in the building (hopefully shortly). Thanks.

From: Hovakimian, Patrick (ODAG)
Sent: Sunday, January 3, 2021 4:28 PM
To: Murray, Claire M. (OASG) [redacted]; Wall, Jeffrey B. (OS [redacted] Delrahim, Makan (ATR) [redacted]; Engel, Steven A. (OLC) [redacted] Demers, John C. (NS [redacted]; Burns, David P. (NS [redacted]; Burns, David (CRM [redacted]
Cc: Donoghue, Richard (ODAG) <ricdonoghue@jmd.usdoj.gov>
Subject: Call this afternoon

Apologies for the Sunday reach-out. Please join Rich and me for a call at 4:45 p.m. Dial-in below.

[redacted], participant passcod [redacted]

Patrick Hovakimian
Associate Deputy Attorney General
United States Department of Justice
[redacted]

Donoghue, Richard (ODAG)

From:	Donoghue, Richard (ODAG)
Sent:	Sunday, January 3, 2021 9:47 PM
To:	Hovakimian, Patrick (ODAG)
Cc:	Murray, Claire M. (OASG); Wall, Jeffrey B. (OSG); Delrahim, Makan (ATR); Engel, Steven A. (OLC); Demers, John C. (NSD); Burns, David P. (NSD); Burns, David (CRM); Dreiband, Eric (CRT)
Subject:	Re: Call this afternoon

Please call in at 10:00 if you can. Thanks

> On Jan 3, 2021, at 4:28 PM, Hovakimian, Patrick (ODAG) (b) (6) wrote:
>
> Apologies for the Sunday reach-out. Please join Rich and me for a call at 4:45 p.m. Dial-in below.
>
> (b) (6), participant passcod (b) (6)
>
> Patrick Hovakimian
> Associate Deputy Attorney General
> United States Department of Justice
> (b) (6)

Pak, BJay (USAGAN)

From:	Pak, BJay (USAGAN)
Sent:	Monday, January 4, 2021 10:56 AM
To:	Engel, Steven A. (OLC)
Subject:	RE: thanks for your service

Thanks Steve. And thanks for your service as well. I'll be splitting time in DC. Would love to catch up next time I am in your neck of the woods. Meanwhile, please let me know if there is anything I can help you with

Regards
BJP

(b) (6)
(b) (6)

From: Engel, Steven A. (OLC) (b) (6)
Sent: Monday, January 4, 2021 10:53 AM
To: Pak, BJay (USAGAN (b) (6)
Subject: thanks for your service

Bjay: I heard about your resignation this morning. Many thanks for all of your service to the Department, and I hope that our paths do cross again. Best, Steve

Steven A. Engel
Assistant Attorney General
Office of Legal Counsel
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530
Offic (b) (6)
(b) (6)

Donoghue, Richard (ODAG)

From:	Donoghue, Richard (ODAG)
Sent:	Tuesday, December 29, 2020 11:49 AM
To:	Engel, Steven A. (OLC)
Subject:	FW: USA v. Pennsylvania draft complaint Dec 28 2 pm.docx
Attachments:	USA v. Pennsylvania draft complaint Dec 28 2 pm.docx

JFYI

From: Michael, Molly A. EOP/WHO [redacted (b) (6)]
Sent: Tuesday, December 29, 2020 11:17 AM
To: Donoghue, Richard (ODAG) <ricdonoghue@jmd.usdoj.gov>; Wall, Jeffrey B. (OSG [redacted (b) (6)]
Rosen, Jeffrey A. (ODAG) <jarosen@jmd.usdoj.gov>
Subject: USA v. Pennsylvania draft complaint Dec 28 2 pm.docx

Good morning,

The President asked me to send the attached draft document for your review. I have also shared with Mark Meadows and Pat Cipollone. If you'd like to discuss with POTUS, the best way to reach him in the next few days is through the operators: 202-456-1414

Thanks and Happy New Year!

Molly

Sent from my iPhone

No. _____, Original

In the Supreme Court of the United States

THE UNITED STATES OF AMERICA

Plaintiff,

v.

COMMONWEALTH OF PENNSYLVANIA, STATE OF STATE OF GEORGIA, STATE OF MICHIGAN, STATE OF WISCONSIN, STATE OF ARIZONA, AND STATE OF NEVADA

Defendants.

BILL OF COMPLAINT

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BILL OF COMPLAINT

Our Country is deeply divided in a manner not seen in well over a century. More than 77% of Republican voters believe that "widespread fraud" occurred in the 2020 general election while 97% of Democrats say there was not.[1] On December 7, 2020, the State of Texas filed an action with this Court, *Texas v. Pennsylvania, et al.*, alleging the same constitutional violations in connection with the 2020 general election pled herein. Within three days *eighteen* other states sought to intervene in that action or filed supporting briefs. On December 11, 2020, the Court summarily dismissed that action stating that Texas lacked standing under Article III of the Constitution. The United States therefore brings this action to ensure that the U.S. Constitution does not become simply a piece of parchment on display at the National Archives.

Two issues regarding this election are not in dispute. First, about eight months ago, a few non-legislative officials in the states of Georgia, Michigan, Wisconsin, Arizona, Nevada and the Commonwealth of Pennsylvania (collectively, "Defendant States") began using the COVID-19 pandemic as an excuse to unconstitutionally revise or violate their states' election laws. Their actions all had one effect: they uniformly weakened security measures put in place *by legislators* to protect the integrity of the vote. These

[1]https://www.courant.com/politics/hc-pol-q-poll-republicans-believe-fraud-20201210-pcie3uqqvrhyvnt7geohhsyepe-story.html

changes squarely violated the Electors Clause of Article II, Section 1, Clause 2 vesting state legislatures with plenary authority to make election law. These same government officials then flooded the Defendant States with millions of ballots to be sent through the mails, or placed in drop boxes, with little or no chain of custody.[2] Second, the evidence of illegal or fraudulent votes, with outcome changing results, is clear—and growing daily.

Since *Marbury v. Madison* this Court has, on significant occasions, had to step into the breach in a time of tumult, declare what the law is, and right the ship. This is just such an occasion. In fact, it is situations precisely like the present—when the Constitution has been cast aside unchecked—that leads us to the current precipice. As one of the Country's Founding Fathers, John Adams, once said, "You will never know how much it has cost my generation to preserve your freedom. I hope you will make a good use of it." In times such as this, it is the duty of Court duty to act as a "faithful guardian[] of the Constitution." THE FEDERALIST NO. 78, at 470 (C. Rossiter, ed. 1961) (A. Hamilton).

Against that background, the United States of America brings this action against Defendant States based on the following allegations:

NATURE OF THE ACTION

1. The United States challenges Defendant States' administration of the 2020 election under the

[2] https://georgiastarnews.com/2020/12/05/dekalb-county-cannot-find-chain-of-custody-records-for-absentee-ballots-deposited-in-drop-boxes-it-has-not-been-determined-if-responsive-records-to-your-request-exist/

Electors Clause of Article II, Section 1, Clause 2, and the Fourteenth Amendment of the U.S. Constitution.

2. This case presents a question of law: Did Defendant States violate the Electors Clause (or, in the alternative, the Fourteenth Amendment) by taking—or allowing—non-legislative actions to change the election rules that would govern the appointment of presidential electors?

3. Those unconstitutional changes opened the door to election irregularities in various forms. The United States alleges that each of the Defendant States flagrantly violated constitutional rules governing the appointment of presidential electors. In doing so, seeds of deep distrust have been sown across the country. In *Marbury v. Madison*, 5 U.S. 137 (1803), Chief Justice Marshall described "the duty of the Judicial Department to say what the law is" because "every right, when withheld, must have a remedy, and every injury its proper redress."

4. In the spirit of *Marbury v. Madison*, this Court's attention is profoundly needed to declare what the law is and to restore public trust in this election.

5. As Justice Gorsuch observed recently, "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. ____ (2020) (Gorsuch, J., concurring). This case is no different.

6. Each of Defendant States acted in a common pattern. State officials, sometimes through pending litigation (*e.g.*, settling "friendly" suits) and sometimes unilaterally by executive fiat, announced

new rules for the conduct of the 2020 election that were inconsistent with existing state statutes defining what constitutes a lawful vote.

7. Defendant States also failed to segregate ballots in a manner that would permit accurate analysis to determine which ballots were cast in conformity with the legislatively set rules and which were not. This is especially true of the mail-in ballots in these States. By waiving, lowering, and otherwise failing to follow the state statutory requirements for signature validation and other processes for ballot security, the entire body of such ballots is now constitutionally suspect and may not be legitimately used to determine allocation of the Defendant States' presidential electors.

8. The rampant lawlessness arising out of Defendant States' unconstitutional acts is described in a number of currently pending lawsuits in Defendant States or in public view including:

- *Dozens of witnesses testifying under oath about*: the physical blocking and kicking out of Republican poll challengers; thousands of the same ballots run multiple times through tabulators; mysterious late night dumps of thousands of ballots at tabulation centers; illegally backdating thousands of ballots; signature verification procedures ignored;[3]
- *Videos of*: poll workers erupting in cheers as poll challengers are removed from vote counting centers; poll watchers being blocked from entering

[3]Complaint (Doc. No. 1), *Donald J. Trump for President, Inc. v. Benson*, 1:20-cv-1083 (W.D. Mich. Nov. 11, 2020) at ¶¶ 26-55 & Doc. Nos. 1-2, 1-4.

vote counting centers—despite even having a court order to enter; suitcases full of ballots being pulled out from underneath tables after poll watchers were told to leave.

- *Facts for which no independently verified reasonable explanation yet exists*: On October 1, 2020, in Pennsylvania a laptop and several USB drives, used to program Pennsylvania's Dominion voting machines, were mysteriously stolen from a warehouse in Philadelphia. The laptop and the USB drives were the *only* items taken, and potentially could be used to alter vote tallies; In Michigan, which also employed the same Dominion voting system, on November 4, 2020, Michigan election officials have admitted that a purported "glitch" caused 6,000 votes for President Trump to be wrongly switched to Democrat Candidate Biden. A flash drive containing tens of thousands of votes was left unattended in the Milwaukee tabulations center in the early morning hours of Nov. 4, 2020, without anyone aware it was not in a proper chain of custody.

9. Nor was this Court immune from the blatant disregard for the rule of law. Pennsylvania itself played fast and loose with its promise to this Court. In a classic bait and switch, Pennsylvania used guidance from its Secretary of State to argue that this Court should not expedite review because the State would segregate potentially unlawful ballots. A court of law would reasonably rely on such a representation. Remarkably, before the ink was dry on the Court's 4-4 decision, Pennsylvania changed that guidance, breaking the State's promise to this Court. *Compare Republican Party of Pa. v. Boockvar*, No. 20-542, 2020

U.S. LEXIS 5188, at *5-6 (Oct. 28, 2020) ("we have been informed by the Pennsylvania Attorney General that the Secretary of the Commonwealth issued guidance today directing county boards of elections to segregate [late-arriving] ballots") (Alito, J., concurring) *with Republican Party v. Boockvar*, No. 20A84, 2020 U.S. LEXIS 5345, at *1 (Nov. 6, 2020) ("this Court was not informed that the guidance issued on October 28, which had an important bearing on the question whether to order special treatment of the ballots in question, had been modified") (Alito, J., Circuit Justice).

10. Expert analysis using a commonly accepted statistical test further raises serious questions as to the integrity of this election.

11. The probability of former Vice President Biden winning the popular vote in four of the Defendant States—Georgia, Michigan, Pennsylvania, and Wisconsin—independently given President Trump's early lead in those States as of 3 a.m. on November 4, 2020, is less than one in a quadrillion, or 1 in 1,000,000,000,000,000. For former Vice President Biden to win these four States collectively, the odds of that event happening decrease to less than one in a quadrillion to the fourth power (*i.e.*, 1 in 1,000,000,000,000,000[4]). *See* Decl. of Charles J. Cicchetti, Ph.D. ("Cicchetti Decl.") at ¶¶ 14-21, 30-31. *See* App. __a-__a.[4]

12. Mr. Biden's *underperformance* in the Top-50 urban areas in the Country relative to former Secretary Clinton's performance in the 2016 election reinforces the unusual statistical improbability of Mr.

---

[4] All exhibits cited in this Complaint are in the Appendix to the United States' forthcoming motion to expedite ("App. 1a_____").

Biden's vote totals in the five urban areas in these four Defendant States, where he overperformed Secretary Clinton in all but one of the five urban areas. *See* Supp. Cicchetti Decl. at ¶¶ 4-12, 20-21. (App. __a-__a).

13. The same less than one in a quadrillion statistical improbability of Mr. Biden winning the popular vote in these four Defendant States—Georgia, Michigan, Pennsylvania, and Wisconsin—independently exists when Mr. Biden's performance in each of those Defendant States is compared to former Secretary of State Hilary Clinton's performance in the 2016 general election and President Trump's performance in the 2016 and 2020 general elections. Again, the statistical improbability of Mr. Biden winning the popular vote in these four States collectively is 1 in 1,000,000,000,000,000[5]. *Id.* 10-13, 17-21, 30-31.

14. Put simply, there is substantial reason to doubt the voting results in the Defendant States.

15. By purporting to waive or otherwise modify the existing state law in a manner that was wholly *ultra vires* and not adopted by each state's legislature, Defendant States violated not only the Electors Clause, U.S. CONST. art. II, § 1, cl. 2, but also the Elections Clause, *id.* art. I, § 4 (to the extent that the Article I Elections Clause textually applies to the Article II process of selecting presidential electors).

16. Voters who cast lawful ballots cannot have their votes diminished by states that administered their 2020 presidential elections in a manner where it is impossible to distinguish a lawful ballot from an unlawful ballot.

17. The number of absentee and mail-in ballots that have been handled unconstitutionally in

Defendant States greatly exceeds the difference between the vote totals of the two candidates for President of the United States in each Defendant State.

18. In December 2018, the Caltech/MIT Voting Technology Project and MIT Election Data & Science Lab issued a comprehensive report addressing election integrity issues.[5] The fundamental question they sought to address was: "How do we know that the election outcomes announced by election officials are correct?"

19. The Caltech/MIT Report concluded: "Ultimately, the only way to answer a question like this is to rely on procedures that independently review the outcomes of elections, to detect and correct material mistakes that are discovered. In other words, elections need to be audited." *Id*. at iii. The Caltech/MIT Report then set forth a detailed analysis of why and how such audits should be done for the same reasons that exist today—a lack of trust in our voting systems.

20. In addition to injunctive relief sought for this election, the United States seeks declaratory relief for all presidential elections in the future. This problem is clearly capable of repetition yet evading review. The integrity of our constitutional democracy requires that states conduct presidential elections in accordance with the rule of law and federal constitutional guarantees.

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[5]Summary Report, Election Auditing, Key Issues and Perspectives attached at _____ (the "Caltech/MIT Report") (App. __a -- __a).

JURISDICTION AND VENUE

21. This Court has original and exclusive jurisdiction over this action because it is a "controvers[y] between the United States and [Defendant] State[s]" under Article III, § 2, cl. 2 of the U.S. Constitution and 28 U.S.C. § 1251(b)(2) (2018).

22. In a presidential election, "the impact of the votes cast in each State is affected by the votes cast for the various candidates in other States." *Anderson v. Celebrezze*, 460 U.S. 780, 795 (1983). The constitutional failures of Defendant States injure the United States as *parens patriae* for all citizens because "'the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.'" *Bush v. Gore*, 531 U.S. 98, 105 (2000) (quoting *Reynolds v. Sims*, 377 U. S. 533, 555 (1964)) (*Bush II*). In other words, United States is acting to protect the interests of *all* citizens—including not only the citizens of Defendant States but also the citizens of their sister States—in the fair and constitutional conduct of elections used to appoint presidential electors.

23. Although the several States may lack "a judicially cognizable interest in the manner in which another State conducts its elections," *Texas v. Pennsylvania*, No. 22O155 (U.S. Dec. 11, 2020), the same is not true for the United States, which has *parens patriae* for the citizens of each State against the government apparatus of each State. *Alfred L. Snapp & Son v. Puerto Rico,* 458 U.S. 592, 610 n.16 (1982) ("it is the United States, and not the State, which represents them as *parens patriae*") (interior quotation omitted). For *Bush II*-type violations, the

United States can press this action against the Defendant States for violations of the voting rights of Defendant States' own citizens.

24. This Court's Article III decisions limit the ability of citizens to press claims under the Electors Clause. *Lance v. Coffman*, 549 U.S. 437, 442 (2007) (distinguishing citizen plaintiffs from citizen relators who sued in the name of a state); *cf. Massachusetts v. EPA,* 549 U.S. 497, 520 (2007) (courts owe states "special solicitude in standing analysis"). Moreover, redressability likely would undermine a suit against a single state officer or State because no one State's electoral votes will make a difference in the election outcome. This action against multiple State defendants is the only adequate remedy to cure the Defendant States' violations, and this Court is the only court that can accommodate such a suit.

25. As federal sovereign under the Voting Rights Act, 52 U.S.C. §§10301-10314 ("VRA"), the United States has standing to enforce its laws against, *inter alia*, giving false information as to his name, address or period of residence in the voting district for the purpose of establishing the eligibility to register or vote, conspiring for the purpose of encouraging false registration to vote or illegal voting, falsifying or concealing a material fact in any matter within the jurisdiction of an examiner or hearing officer related to an election, or voting more than once. 52 U.S.C. § 10307(c)-(e). Although the VRA channels enforcement of some VRA sections—namely, 52 U.S.C. § 10303-10304—to the U.S. District Court for the District of Columbia, the VRA does not channel actions under § 10307.

26. Individual state courts or U.S. district courts do not—and under the circumstance of contested elections in multiple states, *cannot*—offer an adequate remedy to resolve election disputes within the timeframe set by the Constitution to resolve such disputes and to appoint a President via the electoral college. No court—other than this Court—can redress constitutional injuries spanning multiple States with the sufficient number of states joined as defendants or respondents to make a difference in the Electoral College.

27. This Court is the sole forum in which to exercise the jurisdictional basis for this action.

PARTIES

28. Plaintiff is the United States of America, which is the federal sovereign.

29. Defendants are the Commonwealth of Pennsylvania and the States of Georgia, Michigan, Arizona, Nevada, and Wisconsin, which are sovereign States of the United States.

LEGAL BACKGROUND

30. Under the Supremacy Clause, the "Constitution, and the laws of the United States which shall be made in pursuance thereof … shall be the supreme law of the land." U.S. CONST. Art. VI, cl. 2.

31. "The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the electoral college." *Bush II*, 531 U.S. at 104 (citing U.S. CONST. art. II, § 1).

32. State legislatures have plenary power to set the process for appointing presidential electors: "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors." U.S. CONST. art. II, §1, cl. 2; *see also Bush II*, 531 U.S. at 104 ("[T]he state legislature's power to select the manner for appointing electors is *plenary*." (emphasis added)).

33. At the time of the Founding, most States did not appoint electors through popular statewide elections. In the first presidential election, six of the ten States that appointed electors did so by direct legislative appointment. *McPherson v. Blacker*, 146 U.S. 1, 29-30 (1892).

34. In the second presidential election, nine of the fifteen States that appointed electors did so by direct legislative appointment. *Id.* at 30.

35. In the third presidential election, nine of sixteen States that appointed electors did so by direct legislative appointment. *Id.* at 31. This practice persisted in lesser degrees through the Election of 1860. *Id.* at 32.

36. Though "[h]istory has now favored the voter," *Bush II*, 531 U.S. at 104, "there is no doubt of the right of the legislature to resume the power [of appointing presidential electors] at any time, for *it can neither be taken away nor abdicated*." *McPherson*, 146 U.S. at 35 (emphasis added); *cf.* 3 U.S.C. § 2 ("Whenever any State has held an election for the purpose of choosing electors, and 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.").

37. Given the State legislatures' constitutional primacy in selecting presidential electors, the ability to set rules governing the casting of ballots and counting of votes cannot be usurped by other branches of state government.

38. The Framers of the Constitution decided to select the President through the Electoral College "to afford as little opportunity as possible to tumult and disorder" and to place "every practicable obstacle [to] cabal, intrigue, and corruption," including "foreign powers" that might try to insinuate themselves into our elections. THE FEDERALIST NO. 68, at 410-11 (C. Rossiter, ed. 1961) (Madison, J.).

39. Defendant States' applicable laws are set out under the facts for each Defendant State.

FACTS

40. The use of absentee and mail-in ballots skyrocketed in 2020, not only as a public-health response to the COVID-19 pandemic but also at the urging of mail-in voting's proponents, and most especially executive branch officials in Defendant States. According to the Pew Research Center, in the 2020 general election, a record number of votes—about 65 million—were cast via mail compared to 33.5 million mail-in ballots cast in the 2016 general election—an increase of more than 94 percent.

41. In the wake of the contested 2000 election, the bipartisan Jimmy Carter-James Baker commission identified absentee ballots as "the largest source of potential voter fraud." BUILDING CONFIDENCE IN U.S. ELECTIONS: REPORT OF THE COMMISSION ON FEDERAL ELECTION REFORM, at 46 (Sept. 2005).

42. Concern over the use of mail-in ballots is not novel to the modern era, Dustin Waters, *Mail-in Ballots Were Part of a Plot to Deny Lincoln Reelection in 1864*, WASH. POST (Aug. 22, 2020),[6] but it remains a *current* concern. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 194-96 & n.11 (2008); *see also* Texas Office of the Attorney General, *AG Paxton Announces Joint Prosecution of Gregg County Organized Election Fraud in Mail-In Balloting Scheme* (Sept. 24, 2020); Harriet Alexander & Ariel Zilber, *Minneapolis police opens investigation into reports that Ilhan Omar's supporters illegally harvested Democrat ballots in Minnesota*, DAILY MAIL, Sept. 28, 2020.

43. Absentee and mail-in voting are the primary opportunities for unlawful ballots to be cast. As a result of expanded absentee and mail-in voting in Defendant States, combined with Defendant States' unconstitutional modification of statutory protections designed to ensure ballot integrity, Defendant States created a massive opportunity for fraud. In addition, the Defendant States have made it difficult or impossible to separate the constitutionally tainted mail-in ballots from all mail-in ballots.

44. Rather than augment safeguards against illegal voting in anticipation of the millions of additional mail-in ballots flooding their States, Defendant States *all* materially weakened, or did away with, security measures, such as witness or signature verification procedures, required by their respective legislatures. Their legislatures established those commonsense safeguards to prevent—or at least reduce—fraudulent mail-in ballots.

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[6]https://www.washingtonpost.com/history/2020/08/22/mail-in-voting-civil-war-election-conspiracy-lincoln/

45. Significantly, in Defendant States, Democrat voters voted by mail at two to three times the rate of Republicans. Former Vice President Biden thus greatly benefited from this unconstitutional usurpation of legislative authority, and the weakening of legislatively mandated ballot security measures.

46. The outcome of the Electoral College vote is directly affected by the constitutional violations committed by Defendant States. Those violations proximately caused the appointment of presidential electors for former Vice President Biden. The United States as a sovereign and as *parens patriae* for all its citizens will therefore be injured if Defendant States' unlawfully certify these presidential electors and those electors' votes are recognized.

47. In addition to the unconstitutional acts associated with mail-in and absentee voting, there are grave questions surrounding the vulnerability of electronic voting machines—especially those machines provided by Dominion Voting Systems, Inc. ("Dominion") which were in use in all of the Defendant States (and other states as well) during the 2020 general election.

48. As initially reported on December 13, 2020, the U.S. Government is scrambling to ascertain the extent of broad-based hack into multiple agencies through a third-party software supplied by vendor known as SolarWinds. That software product is used throughout the U.S. Government, and the private sector including, apparently, Dominion.

49. As reported by CNN, what little we know has cybersecurity experts extremely worried.[7] CNN also quoted Theresa Payton, who served as White House Chief Information Officer under President George W. Bush stating: "I woke up in the middle of the night last night just sick to my stomach. . . . On a scale of 1 to 10, I'm at a 9 — and it's not because of what I know; it's because of what we still don't know."

50. Disturbingly, though the Dominion's CEO denied that Dominion uses SolarWinds software, a screenshot captured from Dominion's webpage shows that Dominion does use SolarWinds technology.[8] Further, Dominion apparently later altered that page to remove any reference to SolarWinds, but the SolarWinds website is still in the Dominion page's source code. *Id*.

Commonwealth of Pennsylvania

51. Pennsylvania has 20 electoral votes, with a statewide vote tally currently estimated at 3,363,951 for President Trump and 3,445,548 for former Vice President Biden, a margin of 81,597 votes.

52. On December 14, 2020, the Pennsylvania Republican slate of Presidential Electors, met at the State Capital and cast their votes for President

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[7] https://www.cnn.com/2020/12/16/tech/solarwinds-orion-hack-explained/index.html

[8] https://www.theepochtimes.com/dominion-voting-systems-ceo-says-company-has-never-used-solarwinds-orion-platform_3619895.html

Donald J. Trump and Vice President Michael R. Pence.[9]

53. The number of votes affected by the various constitutional violations exceeds the margin of votes separating the candidates.

54. Pennsylvania's Secretary of State, Kathy Boockvar, without legislative approval, unilaterally abrogated several Pennsylvania statutes requiring signature verification for absentee or mail-in ballots. Pennsylvania's legislature has not ratified these changes, and the legislation did not include a severability clause.

55. On August 7, 2020, the League of Women Voters of Pennsylvania and others filed a complaint against Secretary Boockvar and other local election officials, seeking "a declaratory judgment that Pennsylvania existing signature verification procedures for mail-in voting" were unlawful for a number of reasons. *League of Women Voters of Pennsylvania v. Boockvar*, No. 2:20-cv-03850-PBT, (E.D. Pa. Aug. 7, 2020).

56. The Pennsylvania Department of State quickly settled with the plaintiffs, issuing revised guidance on September 11, 2020, stating in relevant part: "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."

57. This guidance is contrary to Pennsylvania law. First, Pennsylvania Election Code mandates that, for non-disabled and non-military

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[9] https://www.foxnews.com/politics/republican-electors-pennsylvania-georgia-vote-for-trump

voters, all applications for an absentee or mail-in ballot "shall be signed by the applicant." 25 PA. STAT. §§ 3146.2(d) & 3150.12(c). Second, Pennsylvania's voter signature verification requirements are expressly set forth at 25 PA. STAT. 350(a.3)(1)-(2) and § 3146.8(g)(3)-(7).

58. The Pennsylvania Department of State's guidance unconstitutionally did away with Pennsylvania's statutory signature verification requirements. Approximately 70 percent of the requests for absentee ballots were from Democrats and 25 percent from Republicans. Thus, this unconstitutional abrogation of state election law greatly inured to former Vice President Biden's benefit.

59. In addition, in 2019, Pennsylvania's legislature enacted bipartisan election reforms, 2019 Pa. Legis. Serv. Act 2019-77, that set *inter alia* a deadline of 8:00 p.m. on election day for a county board of elections to receive a mail-in ballot. 25 PA. STAT. §§ 3146.6(c), 3150.16(c). Acting under a generally worded clause that "Elections shall be free and equal," PA. CONST. art. I, § 5, cl. 1, a 4-3 majority of Pennsylvania's Supreme Court in *Pa. Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020), extended that deadline to three days after Election Day and adopted a presumption that even *non-postmarked ballots* were presumptively timely.

60. Pennsylvania's election law also requires that poll-watchers be granted access to the opening, counting, and recording of absentee ballots: "Watchers shall be permitted to be present when the envelopes containing official absentee ballots and mail-in ballots are opened and when such ballots are counted and

recorded." 25 PA. STAT. § 3146.8(b). 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.

61. Prior to the election, Secretary Boockvar sent an email to local election officials urging them to provide opportunities for various persons—including political parties—to contact voters to "cure" defective mail-in ballots. This process clearly violated several provisions of the state election code.

- Section 3146.8(a) requires: "The county boards of election, upon receipt of official absentee ballots in sealed official absentee ballot envelopes as provided under this article and mail-in ballots as in sealed official mail-in ballot envelopes as provided under Article XIII-D,1 shall safely keep the ballots in sealed or locked containers until they are to be canvassed by the county board of elections."
- Section 3146.8(g)(1)(ii) provides that mail-in ballots shall be canvassed (if they are received by eight o'clock p.m. on election day) in the manner prescribed by this subsection.
- Section 3146.8(g)(1.1) provides that the first look at the ballots shall be "no earlier than seven o'clock a.m. on election day." And the hour for this "pre-canvas" must be publicly announced at least 48 hours in advance. Then the votes are counted on election day.

62. By removing the ballots for examination prior to seven o'clock a.m. on election day, Secretary Boockvar created a system whereby local officials could review ballots without the proper

announcements, observation, and security. This entire scheme, which was only followed in Democrat majority counties, was blatantly illegal in that it permitted the illegal removal of ballots from their locked containers prematurely.

63. Statewide election officials and local election officials in Philadelphia and Allegheny Counties, aware of the historical Democrat advantage in those counties, violated Pennsylvania's election code and adopted the differential standards favoring voters in Philadelphia and Allegheny Counties with the intent to favor former Vice President Biden. *See* Verified Complaint (Doc. No. 1), *Donald J. Trump for President, Inc. v. Boockvar*, 4:20-cv-02078-MWB (M.D. Pa. Nov. 18, 2020) at ¶¶ 3-6, 9, 11, 100-143.

64. Absentee and mail-in ballots in Pennsylvania were thus evaluated under an illegal standard regarding signature verification. It is now impossible to determine which ballots were properly cast and which ballots were not.

65. The changed process allowing the curing of absentee and mail-in ballots in Allegheny and Philadelphia counties is a separate basis resulting in an unknown number of ballots being treated in an unconstitutional manner inconsistent with Pennsylvania statute. *Id.*

66. In addition, a great number of ballots were received after the statutory deadline and yet were counted by virtue of the fact that Pennsylvania did not segregate all ballots received after 8:00 pm on November 3, 2020. Boockvar's claim that only about 10,000 ballots were received after this deadline has no way of being proven since Pennsylvania broke its promise to the Court to segregate ballots and co-

mingled perhaps tens, or even hundreds of thousands, of illegal late ballots.

67. On December 4, 2020, fifteen members of the Pennsylvania House of Representatives led by Rep. Francis X. Ryan issued a report to Congressman Scott Perry (the "Ryan Report," App. 139a-144a) stating that "[t]he general election of 2020 in Pennsylvania was fraught with inconsistencies, documented irregularities and improprieties associated with mail-in balloting, pre-canvassing, and canvassing that the reliability of the mail-in votes in the Commonwealth of Pennsylvania is impossible to rely upon."

68. The Ryan Report's findings are startling, including:

- Ballots with NO MAILED date. That total is 9,005.
- Ballots Returned on or BEFORE the Mailed Date. That total is 58,221.
- Ballots Returned one day after Mailed Date. That total is 51,200.

Id. 143a.

69. These nonsensical numbers alone total 118,426 ballots and exceed Mr. Biden's margin of 81,660 votes over President Trump. But these discrepancies pale in comparison to the discrepancies in Pennsylvania's reported data concerning the number of mail-in ballots distributed to the populace—now with no longer subject to legislated mandated signature verification requirements.

70. The Ryan Report also stated as follows:

> [I]n a data file received on November 4, 2020, the Commonwealth's PA Open Data sites reported over 3.1 million mail in ballots sent out. The CSV file from the state on November 4 depicts 3.1 million mail in ballots sent out but on November 2, the information was provided that only 2.7 million ballots had been sent out. ***This discrepancy of approximately 400,000 ballots from November 2 to November 4 has not been explained***.

Id. at 143a-44a. (Emphasis added).

71. The Ryan Report stated further: "This apparent [400,000 ballot] discrepancy can only be evaluated by reviewing all transaction logs into the SURE system [the Statewide Uniform Registry Electors]."[10]

72. In its opposition brief to Texas's motion to for leave file a bill of complaint, Pennsylvania said nothing about the 118,426 ballots that had no mail date, were nonsensically returned *before* the mailed date, or were improbably returned one day after the mail date discussed above.[11]

73. With respect to the 400,000 discrepancy in mail-in ballots Pennsylvania sent out as reported on November 2, 2020 compared to November 4, 2020 (one day after the election), Pennsylvania asserted

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[10] Ryan Report at App. __a [p.5].

[11] Pennsylvania Opposition To Motion For Leave To File Bill of Complaint and Motion For Preliminary Injunction, Temporary Restraining Order, or Stay ("Pennsylvania Opp. Br.") filed December 10, 2020, Case No. 220155.

that the discrepancy is purportedly due to the fact that "[o]f the 3.1 million ballots sent out, 2.7 million were mail-in ballots and 400,000 were absentee ballots." Pennsylvania offered *no support* for its conclusory assertion. *Id.* at 6. Nor did Pennsylvania rebut the assertion in the Ryan Report that the "discrepancy can only be evaluated by reviewing all transaction logs into the SURE system."

74. These stunning figures illustrate the out-of-control nature of Pennsylvania's mail-in balloting scheme. Democrats submitted mail-in ballots at more than two times the rate of Republicans. This number of constitutionally tainted ballots far exceeds the approximately 81,660 votes separating the candidates.

75. This blatant disregard of statutory law renders all mail-in ballots constitutionally tainted and cannot form the basis for appointing or certifying Pennsylvania's presidential electors to the Electoral College.

76. According to the U.S. Election Assistance Commission's report to Congress *Election Administration and Voting Survey: 2016 Comprehensive Report*, in 2016 Pennsylvania received 266,208 mail-in ballots; 2,534 of them were rejected (.95%). *Id.* at p. 24. However, in 2020, Pennsylvania received more than 10 times the number of mail-in ballots compared to 2016. As explained *supra*, this much larger volume of mail-in ballots was treated in an unconstitutionally modified manner that included: (1) doing away with the Pennsylvania's signature verification requirements; (2) extending that deadline to three days after Election Day and adopting a presumption that even *non-postmarked ballots* were

presumptively timely; and (3) blocking poll watchers in Philadelphia and Allegheny Counties in violation of State law.

77. These non-legislative modifications to Pennsylvania's election rules appear to have generated an outcome-determinative number of unlawful ballots that were cast in Pennsylvania. Regardless of the number of such ballots, the non-legislative changes to the election rules violated the Electors Clause.

State of Georgia

78. Georgia has 16 electoral votes, with a statewide vote tally currently estimated at 2,458,121 for President Trump and 2,472,098 for former Vice President Biden, a margin of approximately 12,670 votes.

79. On December 14, 2020, the Georgia Republican slate of Presidential Electors, including Petitioner Electors, met at the State Capital and cast their votes for President Donald J. Trump and Vice President Michael R. Pence.[12]

80. The number of votes affected by the various constitutional violations far exceeds the margin of votes dividing the candidates.

81. Georgia's Secretary of State, Brad Raffensperger, without legislative approval, unilaterally abrogated Georgia's statutes governing the date a ballot may be opened, and the signature verification process for absentee ballots.

82. O.C.G.A. § 21-2-386(a)(2) prohibits the opening of absentee ballots until after the polls open

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[12] https://www.foxnews.com/politics/republican-electors-pennsylvania-georgia-vote-for-trump

on Election Day: In April 2020, however, the State Election Board adopted Secretary of State Rule 183-1-14-0.9-.15, Processing Ballots Prior to Election Day. That rule purports to authorize county election officials to begin processing absentee ballots up to *three weeks* before Election Day. Outside parties were then given early and illegal access to purportedly defective ballots to "cure" them in violation of O.C.G.A. §§ 21-2-386(a)(1)(C), 21-2-419(c)(2).

83. Specifically, Georgia law authorizes and requires a single registrar or clerk—after reviewing the outer envelope—to reject an absentee ballot if the voter failed to sign the required oath or to provide the required information, the signature appears invalid, or the required information does not conform with the information on file, or if the voter is otherwise found ineligible to vote. O.C.G.A. § 21-2-386(a)(1)(B)-(C).

84. Georgia law provides absentee voters the chance to "cure a failure to sign the oath, an invalid signature, or missing information" on a ballot's outer envelope by the deadline for verifying provisional ballots (*i.e.*, three days after the election). O.C.G.A. §§ 21-2-386(a)(1)(C), 21-2-419(c)(2). To facilitate cures, Georgia law requires the relevant election official to notify the voter in writing: "The board of registrars or absentee ballot clerk shall promptly notify the elector of such rejection, a copy of which notification shall be retained in the files of the board of registrars or absentee ballot clerk for at least two years." O.C.G.A. § 21-2-386(a)(1)(B).

85. There were 284,817 early ballots corrected and accepted in Georgia out of 4,018,064 early ballots used to vote in Georgia. Former Vice President Biden received nearly twice the number of

mail-in votes as President Trump and thus materially benefited from this unconstitutional change in Georgia's election laws.

86. In addition, on March 6, 2020, in *Democratic Party of Georgia v. Raffensperger*, No. 1:19-cv-5028-WMR (N.D. Ga.), Georgia's Secretary of State entered a Compromise Settlement Agreement and Release with the Democratic Party of Georgia (the "Settlement") 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).

87. Among other things, before a ballot could be rejected, the Settlement required a registrar who found a defective signature to now seek a review by two other registrars, and only if a majority of the registrars agreed that the signature was defective could the ballot be rejected but not before all three registrars' names were written on the ballot envelope along with the reason for the rejection. These cumbersome procedures are in direct conflict with Georgia's statutory requirements, as is the Settlement's requirement that notice be provided by telephone (*i.e.*, not in writing) if a telephone number is available. Finally, the Settlement purports to require State election officials to consider issuing guidance and training materials drafted by an expert retained by the Democratic Party of Georgia.

88. Georgia's legislature has not ratified these material changes to statutory law mandated by the Compromise Settlement Agreement and Release, including altered signature verification requirements

and early opening of ballots. The relevant legislation that was violated by Compromise Settlement Agreement and Release did not include a severability clause.

89. This unconstitutional change in Georgia law materially benefitted former Vice President Biden. According to the Georgia Secretary of State's office, former Vice President Biden had almost double the number of absentee votes (65.32%) as President Trump (34.68%). *See* Cicchetti Decl. at ¶ 25, App. 7a-8a.

90. The effect of this unconstitutional change in Georgia election law, which made it more likely that ballots without matching signatures would be counted, had a material impact on the outcome of the election.

91. Specifically, there were 1,305,659 absentee mail-in ballots submitted in Georgia in 2020. There were 4,786 absentee ballots rejected in 2020. This is a rejection rate of .37%. In contrast, in 2016, the 2016 rejection rate was 6.42% with 13,677 absentee mail-in ballots being rejected out of 213,033 submitted, which more than *seventeen times greater* than in 2020. *See* Cicchetti Decl. at ¶ 24, App. 7a.

92. If the rejection rate of mailed-in absentee ballots remained the same in 2020 as it was in 2016, there would be 83,517 less tabulated ballots in 2020. The statewide split of absentee ballots was 34.68% for Trump and 65.2% for Biden. Rejecting at the higher 2016 rate with the 2020 split between Trump and Biden would decrease Trump votes by 28,965 and Biden votes by 54,552, which would be a net gain for Trump of 25,587 votes. This would be more than needed to overcome the Biden advantage of 12,670

votes, and Trump would win by 12,917 votes. *Id*. Regardless of the number of ballots affected, however, the non-legislative changes to the election rules violated the Electors Clause.

93. In addition, Georgia uses Dominion's voting machines throughout the State. Less than a month before the election, the United States District Court for the Northern District of Georgia ruled on a motion brought by a citizen advocate group and others seeking a preliminary injunction to stop Georgia from using Dominion's voting systems due to their known vulnerabilities to hacking and other irregularities. *See Curling v. Raffensperger*, 2020 U.S. Dist. LEXIS 188508, No. 1:17-cv-2989-AT (N.D. GA Oct.11, 2020).

94. Though the district court found that it was bound by Eleventh Circuit law to deny plaintiffs' motion, it issued a prophetic warning stating:

> The Court's Order has delved deep into the true risks posed by the new BMD voting system as well as its manner of implementation. These risks are neither hypothetical nor remote under the current circumstances. ***The insularity of the Defendants' and Dominion's stance here in evaluation and management of the security and vulnerability of the BMD system does not benefit the public or citizens' confident exercise of the franchise.*** The stealth vote alteration or operational interference risks posed by malware that can be effectively invisible to detection, whether intentionally seeded or not, are high once implanted, if equipment and software systems are not properly protected, implemented, and audited.

Id. at *176 (Emphasis added).

95. One of those material risks manifested three weeks later as shown by the November 4, 2020 video interview of a Fulton County, Georgia Director

of Elections, Richard Barron. In that interview, Barron stated that the tallied vote of over 93% of ballots were based on a "review panel['s]" determination of the voter's "intent"—not what the voter actually voted. Specifically, he stated that "so far we've scanned 113,130 ballots, we've adjudicated over 106,000. . . . The only ballots that are adjudicated are if we have a ballot with a contest on it in which there's some question as to how the computer reads it so that the vote review panel then determines voter intent."[13]

96. This astounding figure demonstrates the unreliability of Dominion's voting machines. These figures, in and of themselves in this one sample, far exceeds the margin of votes separating the two candidates.

97. Lastly, on December 17, 2020, the Chairman of the Election Law Study Subcommittee of the Georgia Standing Senate Judiciary Committee issued a detailed report discussing a myriad of voting irregularities and potential fraud in the Georgia 2020 general election (the "Report").[14] The Executive Summary states that "[t]he November 3, 2020 General Election (the 'Election') was chaotic and any reported results must be viewed as untrustworthy". After detailing over a dozen issues showing irregularities and potential fraud, the Report concluded:

> The Legislature should carefully consider its obligations under the U.S. Constitution. If a

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[13] https://www.c-span.org/video/?477819-1/fulton-county-georgia-election-update at beginning at 20 seconds through 1:21.

[14] (App. __a -- __a)

majority of the General Assembly concurs with the findings of this report, the certification of the Election should be rescinded and the General Assembly should act to determine the proper Electors to be certified to the Electoral College in the 2020 presidential race. Since time is of the essence, the Chairman and Senators who concur with this report recommend that the leadership of the General Assembly and the Governor immediately convene to allow further consideration by the entire General Assembly.

State of Michigan

98. Michigan has 16 electoral votes, with a statewide vote tally currently estimated at 2,650,695 for President Trump and 2,796,702 for former Vice President Biden, a margin of 146,007 votes. In Wayne County, Mr. Biden's margin (322,925 votes) significantly exceeds his statewide lead.

99. On December 14, 2020, the Michigan Republican slate of Presidential Electors *attempted* to meet and cast their votes for President Donald J. Trump and Vice President Michael R. Pence but were denied entry to the State Capital by law enforcement. Their tender of their votes was refused. They instead met on the grounds of the State Capital and cast their votes for President Donald J. Trump and Vice President Michael R. Pence.[15]

100. The number of votes affected by the various constitutional violations exceeds the margin of votes dividing the candidates.

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[15]https://thepalmierireport.com/michigan-state-police-block-gop-electors-from-entering-capitol/

101. Michigan's Secretary of State, Jocelyn Benson, without legislative approval, unilaterally abrogated Michigan election statutes related to absentee ballot applications and signature verification. Michigan's legislature has not ratified these changes, and its election laws do not include a severability clause.

102. As amended in 2018, the Michigan Constitution provides all registered voters the right to request and vote by an absentee ballot without giving a reason. MICH. CONST. art. 2, § 4.

103. On May 19, 2020, however, Secretary Benson announced that her office would send unsolicited absentee-voter ballot applications by mail to all 7.7 million registered Michigan voters prior to the primary and general elections. Although her office repeatedly encouraged voters to vote absentee because of the COVID-19 pandemic, it did not ensure that Michigan's election systems and procedures were adequate to ensure the accuracy and legality of the historic flood of mail-in votes. In fact, it did the opposite and did away with protections designed to deter voter fraud.

104. Secretary Benson's flooding of Michigan with millions of absentee ballot applications prior to the 2020 general election violated M.C.L. § 168.759(3). That statute limits the procedures for requesting an absentee ballot to three specified ways:

> An application for an absent voter ballot under this section may be made in *any of the following ways*:
>
> (a) By a written request signed by the voter.
>
> (b) On an absent voter ballot application form provided for that purpose by the clerk of the city or township.

(c) On a federal postcard application.

M.C.L. § 168.759(3) (emphasis added).

105. The Michigan Legislature thus declined to include the Secretary of State as a means for distributing absentee ballot applications. *Id*. § 168.759(3)(b). Under the statute's plain language, the Legislature explicitly gave *only local clerks* the power to distribute absentee voter ballot applications. *Id*.

106. Because the Legislature declined to explicitly include the Secretary of State as a vehicle for distributing absentee ballots applications, Secretary Benson lacked authority to distribute even a single absentee voter ballot application—much less the *millions* of absentee ballot applications Secretary Benson chose to flood across Michigan.

107. Secretary Benson also violated Michigan law when she launched a program in June 2020 allowing absentee ballots to be requested online, *without* signature verification as expressly required under Michigan law. The Michigan Legislature did not approve or authorize Secretary Benson's unilateral actions.

108. MCL § 168.759(4) states in relevant part: "An applicant for an absent voter ballot shall sign the application. Subject to section 761(2), a clerk or assistant clerk shall not deliver an absent voter ballot to an applicant who does not sign the application."

109. Further, MCL § 168.761(2) states in relevant part: "The qualified voter file must be used to determine the genuineness of a signature on an application for an absent voter ballot", and if "the signatures do not agree sufficiently or [if] the signature is missing" the ballot must be rejected.

110. In 2016 only 587,618 Michigan voters requested absentee ballots. In stark contrast, in 2020, 3.2 million votes were cast by absentee ballot, about 57% of total votes cast – and more than *five times* the number of ballots *even requested* in 2016.

111. Secretary Benson's unconstitutional modifications of Michigan's election rules resulted in the distribution of millions of absentee ballot applications without verifying voter signatures as required by MCL §§ 168.759(4) and 168.761(2). This means that *millions* of absentee ballots were disseminated in violation of Michigan's statutory signature-verification requirements. Democrats in Michigan voted by mail at a ratio of approximately two to one compared to Republican voters. Thus, former Vice President Biden materially benefited from these unconstitutional changes to Michigan's election law.

112. Michigan also requires that poll watchers and inspectors have access to vote counting and canvassing. M.C.L. §§ 168.674-.675.

113. Local election officials in Wayne County made a conscious and express policy decision not to follow M.C.L. §§ 168.674-.675 for the opening, counting, and recording of absentee ballots.

114. Michigan also has strict signature verification requirements for absentee ballots, including that the Elections Department place a written statement or stamp on each ballot envelope where the voter signature is placed, indicating that the voter signature was in fact checked and verified with the signature on file with the State. *See* MCL § 168.765a(6).

115. However, Wayne County made the policy decision to ignore Michigan's statutory signature-verification requirements for absentee ballots. Former Vice President Biden received approximately 587,074, or 68%, of the votes cast there compared to President Trump's receiving approximate 264,149, or 30.59%, of the total vote. Thus, Mr. Biden materially benefited from these unconstitutional changes to Michigan's election law.

116. Numerous poll challengers and an Election Department employee whistleblower have testified that the signature verification requirement was ignored in Wayne County in a case currently pending in the Michigan Supreme Court.[16] For example, Jesse Jacob, a decades-long City of Detroit employee assigned to work in the Elections Department for the 2020 election testified that:

> Absentee ballots that were received in the mail would have the voter's signature on the envelope. While I was at the TCF Center, I was instructed not to look at any of the signatures on the absentee ballots, and I was instructed not to compare the signature on the absentee ballot with the signature on file.[17]

117. In fact, a poll challenger, Lisa Gage, testified that not a single one of the several hundred to a thousand ballot envelopes she observed had a written statement or stamp indicating the voter

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[16] *Johnson v. Benson*, Petition for Extraordinary Writs & Declaratory Relief filed Nov. 26, 2020 (Mich. Sup. Ct.) at ¶¶ 71, 138-39, App. 25a-51a.

[17] *Id.*, Affidavit of Jessy Jacob, Appendix 14 at ¶15, attached at App. 34a-36a.

signature had been verified at the TCF Center in accordance with MCL § 168.765a(6).[18]

118. The TCF was the only facility within Wayne County authorized to count ballots for the City of Detroit.

119. Additional public information confirms the material adverse impact on the integrity of the vote in Wayne County caused by these unconstitutional changes to Michigan's election law. For example, the Wayne County Statement of Votes Report lists 174,384 absentee ballots out of 566,694 absentee ballots tabulated (about 30.8%) as counted without a registration number for precincts in the City of Detroit. *See* Cicchetti Decl. at ¶ 27, App. ___a. The number of votes not tied to a registered voter by itself exceeds Vice President Biden's margin of margin of 146,007 votes by more than 28,377 votes.

120. The extra ballots cast most likely resulted from the phenomenon of Wayne County election workers running the same ballots through a tabulator multiple times, with Republican poll watchers obstructed or denied access, and election officials ignoring poll watchers' challenges, as documented by numerous declarations. App. 25a-51a.

121. In addition, a member of the Wayne County Board of Canvassers ("Canvassers Board"), William Hartman, determined that 71% of Detroit's Absent Voter Counting Boards ("AVCBs") were unbalanced—*i.e.*, the number of people who checked in did not match the number of ballots cast—without explanation. *Id*. at ¶ 29.

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[18] Affidavit of Lisa Gage ¶ 17 (App. ___a).

122. On November 17, 2020, the Canvassers Board deadlocked 2-2 over whether to certify the results of the presidential election based on numerous reports of fraud and unanswered material discrepancies in the county-wide election results. A few hours later, the Republican Board members reversed their decision and voted to certify the results after severe harassment, including threats of violence.

123. The following day, the two Republican members of the Board *rescinded their votes* to certify the vote and signed affidavits alleging they were bullied and misled into approving election results and do not believe the votes should be certified until serious irregularities in Detroit votes are resolved. *See* Cicchetti Decl. at ¶ 29, App. ___a.

124. Michigan admitted in a filing with this Court that it "is at a loss to explain the[] allegations" showing that Wayne County lists 174,384 absentee ballots that do not tie to a registered voter. *See* State of Michigan's Brief In Opposition To Motions For Leave To File Bill of Complaint and For Injunctive Relief at 15 (filed Dec. 10, 2020), Case No. 220155.

125. Lastly, on November 4, 2020, Michigan election officials in Antrim County admitted that a purported "glitch" in Dominion voting machines caused 6,000 votes for President Trump to be wrongly switched to Democrat Candidate Biden in just one county. Local officials discovered the so-called "glitch" after reportedly questioning Mr. Biden's win in the heavily Republican area and manually checked the vote tabulation.

126. The Dominion voting tabulators used in Antrim County were recently subjected to a forensic

audit.[19] Though Michigan's Secretary of State tried to keep the Allied Report from being released to the public, the court overseeing the audit refused and allowed the Allied Report to made public.[20] The Allied Report concluded that "the vote flip occurred because of machine error built into the voting software designed to create error."[21] In addition, the Allied report revealed that "all server security logs prior to 11:03 pm on November 4, 2020 are missing and that there was other "tampering with data." *See* Allied Report at ¶¶ B.16-17 (App. ___a).

127. Further, the Allied Report determined that the Dominion voting system in Antrim County was designed to generate an error rate as high as 81.96% thereby sending ballots for "adjudication" to determine the voter's intent. *See* Allied report at ¶¶ B.2, 8-22 (App. __a--__a).

128. Notably, the extraordinarily high error rate described here is consistent with the same situation that took place in Fulton County, Georgia with an enormous 93% error rate that required "adjudication" of over 106,000 ballots.

129. These non-legislative modifications to Michigan's election statutes resulted in a number of constitutionally tainted votes that far exceeds the margin of voters separating the candidates in

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[19] Antrim Michigan Forensics Report by Allied Security Operations Group dated December 13, 2020 (the "Allied Report") (App. __a -- __a);

[20] https://themichiganstar.com/2020/12/15/after-examining-antrim-county-voting-machines-asog-concludes-dominion-intentionally-designed-to-create-systemic-fraud/

[21] Allied Report at ¶¶ B.4-9 (App. __a).

Michigan. Regardless of the number of votes that were affected by the unconstitutional modification of Michigan's election rules, the non-legislative changes to the election rules violated the Electors Clause.

State of Wisconsin

130. Wisconsin has 10 electoral votes, with a statewide vote tally currently estimated at 1,610,151 for President Trump and 1,630,716 for former Vice President Biden (*i.e.*, a margin of 20,565 votes). In two counties, Milwaukee and Dane, Mr. Biden's margin (364,298 votes) significantly exceeds his statewide lead.

131. On December 14, 2020, the Wisconsin Republican slate of Presidential Electors met at the State Capital and cast their votes for President Donald J. Trump and Vice President Michael R. Pence.[22]

132. In the 2016 general election some 146,932 mail-in ballots were returned in Wisconsin out of more than 3 million votes cast.[23] In stark contrast, 1,275,019 mail-in ballots, nearly a 900 percent increase over 2016, were returned in the November 3, 2020 election.[24]

133. Wisconsin statutes guard against fraud in absentee ballots: "[V]oting 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

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[22] https://wisgop.org/republican-electors-2020/.

[23] Source: U.S. Elections Project, *available at*: http://www.electproject.org/early_2016.

[24] Source: U.S. Elections Project, *available at*: https://electproject.github.io/Early-Vote-2020G/WI.html.

carefully regulated to prevent the potential for fraud or abuse[.]" WISC. STAT. § 6.84(1).

134. In direct contravention of Wisconsin law, leading up to the 2020 general election, the Wisconsin Elections Commission ("WEC") and other local officials unconstitutionally modified Wisconsin election laws—each time taking steps that weakened, or did away with, established security procedures put in place by the Wisconsin legislature to ensure absentee ballot integrity.

135. For example, the WEC undertook a campaign to position hundreds of drop boxes to collect absentee ballots—including the use of unmanned drop boxes.[25]

136. The mayors of Wisconsin's five largest cities—Green Bay, Kenosha, Madison, Milwaukee, and Racine, which all have Democrat majorities—joined in this effort, and together, developed a plan use purportedly "secure drop-boxes to facilitate return of absentee ballots." Wisconsin Safe Voting Plan 2020, at 4 (June 15, 2020).[26]

137. It is alleged in an action recently filed in the United States District Court for the Eastern District of Wisconsin that over five hundred

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[25] Wisconsin Elections Commission Memoranda, To: All Wisconsin Election Officials, Aug. 19, 2020, *available at*: https://elections.wi.gov/sites/elections.wi.gov/files/2020-08/Drop%20Box%20Final.pdf. at p. 3 of 4.

[26] 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 *available at*: https://www.techandciviclife.org/wp-content/uploads/2020/07/Approved-Wisconsin-Safe-Voting-Plan-2020.pdf.

unmanned, illegal, absentee ballot drop boxes were used in the Presidential election in Wisconsin.[27]

138. However, the use of *any* drop box, manned or unmanned, is directly prohibited by Wisconsin statute. The Wisconsin legislature specifically described in the Election Code "Alternate absentee ballot site[s]" and detailed the procedure by which the governing body of a municipality may designate a site or sites for the delivery of absentee ballots "other than the office of the municipal clerk or board of election commissioners as the location from which electors of the municipality may request and vote absentee ballots and to which voted absentee ballots shall be returned by electors for any election." Wis. Stat. 6.855(1).

139. Any alternate absentee ballot site "shall be staffed by the municipal clerk or the executive director of the board of election commissioners, or employees of the clerk or the board of election commissioners." Wis. Stat. 6.855(3). Likewise, Wis. Stat. 7.15(2m) provides, "[i]n a municipality in which the governing body has elected to an establish an alternate absentee ballot sit under s. 6.855, 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."

140. Thus, the unmanned absentee ballot drop-off sites are prohibited by the Wisconsin Legislature as they do not comply with Wisconsin law

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[27] *See* Complaint (Doc. No. 1), *Donald J. Trump, Candidate for President of the United States of America v. The Wisconsin Election Commission*, Case 2:20-cv-01785-BHL (E.D. Wisc. Dec. 2, 2020) (Wisconsin Trump Campaign Complaint") at ¶¶ 188-89.

expressly defining "[a]lternate absentee ballot site[s]". Wis. Stat. 6.855(1), (3).

141. In addition, the use of drop boxes for the collection of absentee ballots, positioned predominantly in Wisconsin's largest cities, is directly contrary to Wisconsin law providing that absentee ballots may only 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 (emphasis added).

142. The fact that other methods of delivering absentee ballots, such as through unmanned drop boxes, are *not* permitted is underscored by Wis. Stat. § 6.87(6) which mandates that, "[a]ny ballot not mailed or delivered as provided in this subsection may not be counted." Likewise, Wis. Stat. § 6.84(2) underscores this point, providing that Wis. Stat. § 6.87(6) "shall be construed as mandatory." The provision continues—"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) (emphasis added).

143. These were not the only Wisconsin election laws that the WEC violated in the 2020 general election. The WEC and local election officials also took it upon themselves to encourage voters to unlawfully declare themselves "indefinitely confined"—which under Wisconsin law allows the voter to avoid security measures like signature verification and photo ID requirements.

144. Specifically, registering to vote by absentee ballot requires photo identification, except for those who register as "indefinitely confined" or

"hospitalized." WISC. STAT. § 6.86(2)(a), (3)(a). Registering for indefinite confinement requires certifying confinement "because of age, physical illness or infirmity or [because the voter] is disabled for an indefinite period." *Id.* § 6.86(2)(a). Should indefinite confinement cease, the voter must notify the county clerk, *id.*, who must remove the voter from indefinite-confinement status. *Id.* § 6.86(2)(b).

145. Wisconsin election procedures for voting absentee based on indefinite confinement enable the voter to avoid the photo ID requirement and signature requirement. *Id.* § 6.86(1)(ag)/(3)(a)(2).

146. On March 25, 2020, in clear violation of Wisconsin law, Dane County Clerk Scott McDonnell and Milwaukee County Clerk George Christensen both issued guidance indicating that all voters should mark themselves as "indefinitely confined" because of the COVID-19 pandemic.

147. Believing this to be an attempt to circumvent Wisconsin's strict voter ID laws, the Republican Party of Wisconsin petitioned the Wisconsin Supreme Court to intervene. On March 31, 2020, the Wisconsin Supreme Court unanimously confirmed that the clerks' "advice was legally incorrect" and potentially dangerous because "voters may be misled to exercise their right to vote in ways that are inconsistent with WISC. STAT. § 6.86(2)."

148. On May 13, 2020, the Administrator of WEC issued a directive to the Wisconsin clerks prohibiting removal of voters from the registry for indefinite-confinement status if the voter is no longer "indefinitely confined."

149. The WEC's directive violated Wisconsin law. Specifically, WISC. STAT. § 6.86(2)(a) specifically

provides that "any [indefinitely confined] elector [who] is no longer indefinitely confined … shall so notify the municipal clerk." WISC. STAT. § 6.86(2)(b) further provides that the municipal clerk "shall remove the name of any other elector from the list upon request of the elector or upon receipt of reliable information that an elector no longer qualifies for the service."

150. According to statistics kept by the WEC, nearly 216,000 voters said they were indefinitely confined in the 2020 election, nearly a fourfold increase from nearly 57,000 voters in 2016. In Dane and Milwaukee counties, more than 68,000 voters said they were indefinitely confined in 2020, a fourfold increase from the roughly 17,000 indefinitely confined voters in those counties in 2016.

151. On December 16, 2020, the Wisconsin Supreme Court ruled that Wisconsin officials, including Governor Evers, unlawfully told Wisconsin voters to declare themselves "indefinitely confined"—thereby avoiding signature and photo ID requirements. *See Jefferson v. Dane County*, 2020 Wisc. LEXIS 194 (Wis. Dec. 14, 2020). Given the near fourfold increase in the use of this classification from 2016 to 2020, tens of thousands of these ballots could be illegal. The vast majority of the more than 216,000 voters classified as "indefinitely confined" were from heavily democrat areas, thereby materially and illegally, benefited Mr. Biden.

152. Under Wisconsin law, voting by absentee ballot also requires voters to complete a certification, including their address, and have the envelope witnessed by an adult who also must sign and indicate their address on the envelope. *See* WISC. STAT. § 6.87. The sole remedy to cure an "improperly completed

certificate or [ballot] with no certificate" is for "the clerk [to] return the ballot to the elector[.]" *Id.* § 6.87(9). "If a certificate is missing the address of a witness, the ballot *may not be counted*." *Id.* § 6.87(6d) (emphasis added).

153. However, in a training video issued April 1, 2020, the Administrator of the City of Milwaukee Elections Commission unilaterally declared that a "witness address may be written in red and that is because we were able to locate the witnesses' address for the voter" to add an address missing from the certifications on absentee ballots. The Administrator's instruction violated WISC. STAT. § 6.87(6d). The WEC issued similar guidance on October 19, 2020, in violation of this statute as well.

154. In the Wisconsin Trump Campaign Complaint, it is alleged, supported by the sworn affidavits of poll watchers, that canvas workers carried out this unlawful policy, and acting pursuant to this guidance, in Milwaukee used red-ink pens to alter the certificates on the absentee envelope and then cast and count the absentee ballot. These acts violated WISC. STAT. § 6.87(6d) ("If a certificate is missing the address of a witness, the ballot may not be counted"). *See also* WISC. STAT. § 6.87(9) ("If a municipal clerk receives an absentee ballot with an improperly completed certificate or with no certificate, the clerk may return the ballot to the elector . . . whenever time permits the elector to correct the defect and return the ballot within the period authorized.").

155. Wisconsin's legislature has not ratified these changes, and its election laws do not include a severability clause.

156. In addition, Ethan J. Pease, a box truck delivery driver subcontracted to the U.S. Postal Service ("USPS") to deliver truckloads of mail-in ballots to the sorting center in Madison, WI, testified that USPS employees were backdating ballots received after November 3, 2020. Decl. of Ethan J. Pease at ¶¶ 3-13. Further, Pease testified how a senior USPS employee told him on November 4, 2020 that "[a]n order came down from the Wisconsin/Illinois Chapter of the Postal Service that 100,000 ballots were missing" and how the USPS dispatched employees to "find[] . . . the ballots." *Id*. ¶¶ 8-10. One hundred thousand ballots supposedly "found" after election day would far exceed former Vice President Biden margin of 20,565 votes over President Trump.

State of Arizona

157. Arizona has 11 electoral votes, with a state-wide vote tally currently estimated at 1,661,677 for President Trump and 1,672,054 for former Vice President Biden, a margin of 10,377 votes. In Arizona's most populous county, Maricopa County, Mr. Biden's margin (45,109 votes) significantly exceeds his statewide lead.

158. On December 14, 2020, the Arizona Republican slate of Presidential Electors met at the State Capital and cast their votes for President Donald J. Trump and Vice President Michael R. Pence.[28]

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[28] https://arizonadailyindependent.com/2020/12/14/az-democrat-electors-vote-biden-republicans-join-pennsylvania-georgia-nevada-in-casting-electoral-college-votes-for-trump/

159. Since 1990, Arizona law has required that residents wishing to participate in an election submit their voter registration materials no later than 29 days prior to election day in order to vote in that election. Ariz. Rev. Stat. § 16-120(A). For 2020, that deadline was October 5.

160. In *Mi Familia Vota v. Hobbs*, No. CV-20-01903-PHX-SPL, 2020 U.S. Dist. LEXIS 184397 (D. Ariz. Oct. 5, 2020), however, a federal district court violated the Constitution and enjoined that law, extending the registration deadline to October 23, 2020. The Ninth Circuit stayed that order on October 13, 2020 with a two-day grace period, *Mi Familia Vota v. Hobbs*, 977 F.3d 948, 955 (9th Cir. 2020).

161. However, the Ninth Circuit did not apply the stay retroactively because neither the Arizona Secretary of State nor the Arizona Attorney General requested retroactive relief. *Id.* at 954-55. As a net result, the deadline was unconstitutionally extended from the statutory deadline of October 5 to October 15, 2021, thereby allowing potentially thousands of illegal votes to be injected into the state.

162. In addition, on December 15, 2020, the Arizona state Senate served two subpoenas on the Maricopa County Board of Supervisors (the "Maricopa Board") to audit scanned ballots, voting machines, and software due to the significant number of voting irregularities. Indeed, the Arizona Senate Judiciary Chairman stated in a public hearing earlier that day that "[t]here is evidence of tampering, there is evidence of fraud" with vote in Maricopa County. The Board then voted to refuse to comply with those subpoenas necessitating a lawsuit to enforce the

subpoenas filed on December 21, 2020. That litigation is currently ongoing.

State of Nevada

163. Nevada has 6 electoral votes, with a statewide vote tally currently estimated at 669,890 for President Trump and 703,486 for former Vice President Biden, a margin of 33,596 votes. Nevada voters sent in 579,533 mail-in ballots. In Clark County, Mr. Biden's margin (90,922 votes) significantly exceeds his statewide lead.

164. On December 14, 2020 the Republican slate of Presidential Electors met at the State Capital and cast their votes for President Donald J. Trump and Vice President Michael R. Pence.[29]

165. In response to the COVID-19 pandemic, the Nevada Legislature enacted—and the Governor signed into law—Assembly Bill 4, 2020 Nev. Ch. 3, to address voting by mail and to require, for the first time in Nevada's history, the applicable county or city clerk to mail ballots to all registered voters in the state.

166. Under Section 23 of Assembly Bill 4, the applicable city or county clerk's office is required to review the signature on ballots, without permitting a computer system to do so: "The *clerk or employee shall check* the signature used for the mail ballot against all signatures of the voter available in the records of the clerk." *Id.* § 23(1)(a) (codified at NEV. REV. STAT. § 293.8874(1)(a)) (emphasis add). Moreover, the system requires that two or more employees be included: "If at least two employees in the office of the clerk believe there is a reasonable question of fact as to whether the

[29] https://nevadagop.org/42221-2/

signature used for the mail ballot matches the signature of the voter, the clerk shall contact the voter and ask the voter to confirm whether the signature used for the mail ballot belongs to the voter." *Id.* § 23(1)(b) (codified at NEV. REV. STAT. § 293.8874(1)(b)). A signature that differs from on-file signatures in multiple respects is inadequate: "There is a reasonable question of fact as to whether the signature used for the mail ballot matches the signature of the voter if the signature used for the mail ballot differs in multiple, significant and obvious respects from the signatures of the voter available in the records of the clerk." *Id.* § 23(2)(a) (codified at NEV. REV. STAT. § 293.8874(2)(a)). Finally, under Nevada law, "each voter has the right … [t]o have a uniform, statewide standard for counting and recounting all votes accurately." NEV. REV. STAT. § 293.2546(10).

167. Nevada law does not allow computer systems to substitute for review by clerks' employees.

168. However, county election officials in Clark County ignored this requirement of Nevada law. Clark County, Nevada, processed all its mail-in ballots through a ballot sorting machine known as the Agilis Ballot Sorting System ("Agilis"). The Agilis system purported to match voters' ballot envelope signatures to exemplars maintained by the Clark County Registrar of Voters.

169. Anecdotal evidence suggests that the Agilis system was prone to false positives (*i.e.*, accepting as valid an invalid signature). Victor Joecks, *Clark County Election Officials Accepted My Signature—on 8 Ballot Envelopes*, LAS VEGAS REV.-J. (Nov. 12, 2020) (Agilis system accepted 8 of 9 false signatures).

170. Even after adjusting the Agilis system's tolerances outside the settings that the manufacturer recommends, the Agilis system nonetheless rejected approximately 70% of the approximately 453,248 mail-in ballots.

171. More than 450,000 mail-in ballots from Clark County either were processed under weakened signature-verification criteria in violation of the statutory criteria for validating mail-in ballots. The number of contested votes exceeds the margin of votes dividing the parties.

172. With respect to approximately 130,000 ballots that the Agilis system approved, Clark County did not subject those signatures to review by two or more employees, as Assembly Bill 4 requires. To count those 130,000 ballots without review not only violated the election law adopted by the legislature but also subjected those votes to a different standard of review than other voters statewide.

173. With respect to approximately 323,000 ballots that the Agilis system rejected, Clark County decided to count ballots if a signature matched at least one letter between the ballot envelope signature and the maintained exemplar signature. This guidance does not match the statutory standard "differ[ing] in multiple, significant and obvious respects from the signatures of the voter available in the records of the clerk."

174. Out of the nearly 580,000 mail-in ballots, registered Democrats returned almost twice as many mail-in ballots as registered Republicans. Thus, this violation of Nevada law appeared to materially benefited former Vice President Biden's vote tally. Regardless of the number of votes that were affected

by the unconstitutional modification of Nevada's election rules, the non-legislative changes to the election rules violated the Electors Clause.

COUNT I: ELECTORS CLAUSE

175. The United States repeats and re-alleges the allegations above, as if fully set forth herein.

176. The Electors Clause of Article II, Section 1, Clause 2, of the Constitution makes clear that only the legislatures of the States are permitted to determine the rules for appointing presidential electors. The pertinent rules here are the state election statutes, specifically those relevant to the presidential election.

177. Non-legislative actors lack authority to amend or nullify election statutes. *Bush II*, 531 U.S. at 104 (quoted *supra*).

178. Under *Heckler v. Chaney*, 470 U.S. 821, 833 n.4 (1985), conscious and express executive policies—even if unwritten—to nullify statutes or to abdicate statutory responsibilities are reviewable to the same extent as if the policies had been written or adopted. Thus, conscious and express actions by State or local election officials to nullify or ignore requirements of election statutes violate the Electors Clause to the same extent as formal modifications by judicial officers or State executive officers.

179. The actions set out in Paragraphs 41-128 constitute non-legislative changes to State election law by executive-branch State election officials, or by judicial officials, in Defendant States Pennsylvania, Georgia, Michigan, Wisconsin, Arizona, and Nevada in violation of the Electors Clause.

180. Electors appointed to Electoral College in violation of the Electors Clause cannot cast constitutionally valid votes for the office of President.

COUNT II: EQUAL PROTECTION

181. The United States repeats and re-alleges the allegations above, as if fully set forth herein.

182. The Equal Protection Clause prohibits the use of differential standards in the treatment and tabulation of ballots within a State. *Bush II*, 531 U.S. at 107.

183. The one-person, one-vote principle requires counting valid votes and not counting invalid votes. *Reynolds*, 377 U.S. at 554-55; *Bush II*, 531 U.S. at 103 ("the votes eligible for inclusion in the certification are the votes meeting the properly established legal requirements").

184. The actions set out in Paragraphs ____(Georgia), ____(Michigan), ___(Pennsylvania), ___ (Wisconsin), ____ (Arizona), and ____ (Nevada) created differential voting standards in Defendant States Pennsylvania, Georgia, Michigan, Wisconsin, [Arizona (maybe not)], and Nevada in violation of the Equal Protection Clause.

185. The actions set out in Paragraphs ____ (Georgia), _____ (Michigan), _____(Pennsylvania), _____ (Wisconsin), ____ (Arizona). And _____ (Nevada) violated the one-person, one-vote principle in Defendant States Pennsylvania, Georgia, Michigan, Wisconsin, Arizona, and Nevada.

186. By the shared enterprise of the entire nation electing the President and Vice President, equal protection violations in one State can and do adversely affect and diminish the weight of votes cast in other States that lawfully abide by the election

structure set forth in the Constitution. The United States is therefore harmed by this unconstitutional conduct in violation of the Equal Protection or Due Process Clauses.

COUNT III: DUE PROCESS

187. The United States repeats and re-alleges the allegations above, as if fully set forth herein.

188. When election practices reach "the point of patent and fundamental unfairness," the integrity of the election itself violates substantive due process. *Griffin v. Burns*, 570 F.2d 1065, 1077 (1st Cir. 1978); *Duncan v. Poythress*, 657 F.2d 691, 702 (5th Cir. 1981); *Florida State Conference of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1183-84 (11th Cir. 2008); *Roe v. State of Ala. By & Through Evans*, 43 F.3d 574, 580-82 (11th Cir. 1995); *Roe v. State of Ala.*, 68 F.3d 404, 407 (11th Cir. 1995); *Marks v. Stinson*, 19 F. 3d 873, 878 (3rd Cir. 1994).

189. Under this Court's precedents on procedural due process, not only intentional failure to follow election law as enacted by a State's legislature but also random and unauthorized acts by state election officials and their designees in local government can violate the Due Process Clause. *Parratt v. Taylor*, 451 U.S. 527, 537-41 (1981), *overruled in part on other grounds by Daniels v. Williams*, 474 U.S. 327, 330-31 (1986); *Hudson v. Palmer*, 468 U.S. 517, 532 (1984). The difference between intentional acts and random and unauthorized acts is the degree of pre-deprivation review.

190. Defendant States acted unconstitutionally to lower their election standards—including to allow invalid ballots to be counted and valid ballots to not be counted—with the express

intent to favor their candidate for President and to alter the outcome of the 2020 election. In many instances these actions occurred in areas having a history of election fraud.

191. The actions set out in Paragraphs ____ (Georgia), _____ (Michigan), _____ (Pennsylvania), _____ (Wisconsin), ____ (Arizona), and _____ (Nevada) constitute intentional violations of State election law by State election officials and their designees in Defendant States Pennsylvania, Georgia, Michigan, Wisconsin, and Arizona, and Nevada in violation of the Due Process Clause.

PRAYER FOR RELIEF

WHEREFORE, the United States respectfully request that this Court issue the following relief:

A. Declare that Defendant States Pennsylvania, Georgia, Michigan, Wisconsin, Arizona, and Nevada administered the 2020 presidential election in violation of the Electors Clause and the Fourteenth Amendment of the U.S. Constitution.

B. Declare that the electoral college votes cast by such presidential electors appointed in Defendant States Pennsylvania, Georgia, Michigan, Wisconsin, Arizona, and Nevada are in violation of the Electors Clause and the Fourteenth Amendment of the U.S. Constitution and cannot be counted.

C. Enjoin Defendant States' use of the 2020 election results for the Office of President to appoint presidential electors to the Electoral College.

D. Enjoin Defendant States' use of the 2020 election results for the Office of President to appoint presidential electors to the Electoral College and authorize, pursuant to the Court's remedial authority,

the Defendant States to conduct a special election to appoint presidential electors.

E. Enjoin Defendant States' use of the 2020 election results for the Office of President to appoint presidential electors to the Electoral College and authorize, pursuant to the Court's remedial authority, the Defendant States to conduct an audit of their election results, supervised by a Court-appointed special master, in a manner to be determined separately.

F. Award costs to the United States.

G. Grant such other relief as the Court deems just and proper.

Respectfully submitted,

December ____, 2020

(b) (5)

From (b) (6) - Larry Joseph (b) (6) - Larry Joseph >
Sent: Monday, December 28, 2020 10:40 AM
To: Jacob, Gregory F. EOP/OVP (b) (6) >
Cc: 'Lewis Sessions' (b) (6) >
Subject: [EXTERNAL] Gohmert v. Pence,. No. 6:20-cv-00660 (E.D. Tex.)

Dear Mr. Jacob,
Thank you for your time this morning. Attached are the following:

- Filed complaint and exhibit to complaint;
- Not-yet-filed motion for interim relief (with the "Certificate of Conference" omitted because discussions are still underway).

The complaint includes relief requested, and the motion (at the end of the document) includes a proposed order. These are the essence of what the suit seeks, but we would be willing to discuss a subset.

Rather than draft a new document of stipulations, however, it seemed expedient to send what we have.

At a later juncture, we will ask about waiving service or accepting it via email: this email does not purport to be service.

Thanks for your assistance in this matter. Please contact us with any questions.
Best regards,
Larry

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

LOUIE GOHMERT, TYLER BOWYER, NANCY COTTLE, JAKE HOFFMAN, ANTHONY KERN, JAMES R. LAMON, SAM MOORHEAD, ROBERT MONTGOMERY, LORAINE PELLEGRINO, GREG SAFSTEN, KELLI WARD and MICHAEL WARD, Plaintiffs, v. THE HONORABLE MICHAEL R. PENCE, VICE PRESIDENT OF THE UNITED STATES, in his official capacity, Defendant.	Civil Action No. 6:20-cv-00660 **(Election Matter)**

PLAINTIFFS' EMERGENCY MOTION FOR EXPEDITED DECLARATORY JUDGMENT AND EMERGENCY INJUNCTIVE RELIEF

COME NOW Plaintiffs, U.S. Rep. Louie Gohmert (TX-1), Tyler Bowyer, Nancy Cottle, Jake Hoffman, Anthony Kern, James R. Lamon, Sam Moorhead, Robert Montgomery, Loraine Pellegrino, Greg Safsten, Kelli Ward, and Michael Ward, by and through their undersigned counsel, and file this Motion for Expedited Declaratory Judgment and Emergency Injunctive Relief ("Motion"), and Memorandum of Law In Support Thereof, pursuant to Rules 57 and 65 of the FEDERAL RULES OF CIVIL PROCEDURE to request the following relief.

As explained in the Complaint, Plaintiffs seek an expedited declaratory judgment declaring that Sections 5 and 15 of the Electoral Count Act of 1887, PUB. L. NO. 49–90, 24 Stat. 373 (codified at 3 U.S.C. §§ 5, 15), are unconstitutional because these provisions violate the Electors Clause and the Twelfth Amendment of the U.S. Constitution. U.S. CONST. art. II, § 1, cl. 1 & amend. XII. The Complaint and this Motion address a matter of urgent national concern that involves only issues of law—namely, a determination that Sections 5 and 15 of the Electoral Count Act violate

the Electors Clause and the Twelfth Amendment of the U.S. Constitution—where the relevant facts concerning the Plaintiffs' standing, the justiciability of Plaintiffs' claims by this Court, and this Court's ability to grant the relief requested are not in dispute.

Further, the purpose of this Complaint is a declaratory judgment regarding the rights and legal relations of Plaintiffs and of Defendant, namely, that Vice President Michael R. Pence, acting in his capacity as President of the Senate and Presiding Officer for the ***January 6, 2021 Joint Session of Congress*** to count Arizona and other States' electoral votes for choosing President, is free to exercise his exclusive authority and sole discretion under the Twelfth Amendment to determine which slate of electoral votes to count, or neither, and must disregard any provisions of the Electoral Count Act that conflict with the Twelfth Amendment, U.S. CONST. amend. XII.

Because the requested declaratory judgment will terminate the controversy arising from the conflict between the Twelfth Amendment and the Electoral Count Act, and the facts are not in dispute, it is appropriate for this Court to grant this relief in a summary proceeding without an evidentiary hearing or discovery. *See* FED. R. CIV. P. 57, Advisory Committee Notes. Accordingly, Plaintiffs request an expedited summary proceeding under Rule 57 of the Federal Rules of Civil Procedure to grant the relief requested herein no later than ***Thursday, December 31, 2020***, and for emergency injunctive relief under FED. R. CIV. P. 65 consistent with the declaratory judgment requested herein on that same date. Plaintiffs style their motion as an emergency motion under Local Civil Rule 7(l) because there is not enough time before December 31 to move for an expedited briefing schedule under Local Civil Rule 7(e).

Plaintiffs adopt all allegations contained in their Complaint.

Plaintiffs respectfully request an opportunity for oral argument. A proposed Order is attached.

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INTRODUCTION

Plaintiffs, U.S. Representative Louie Gohmert (TX-1) ("Rep. Gohmert"), Tyler Bowyer, Nancy Cottle, Jake Hoffman, Anthony Kern, James R. Lamon, Sam Moorhead, Robert Montgomery, Loraine Pellegrino, Greg Safsten, Kelli Ward and Michael Ward seek an expedited declaratory judgment declaring that Sections 5 and 15 of the Electoral Count Act of 1887, PUB. L. NO. 49–90, 24 Stat. 373 (codified at 3 U.S.C. §§ 5, 15), are unconstitutional because these provisions violate the Electors Clause and the Twelfth Amendment of the U.S. Constitution. U.S. CONST. art. II, § 1, cl. 1 & Amend. XII.

FACTS

The facts relevant to this motion are set forth in the Complaint and its accompanying exhibit are incorporated herein by reference. Plaintiffs present here only a summary.

The Plaintiffs include Rep. Louie Gohmert—a Member of the U.S. House of Representatives, representing Texas's First Congressional District in both the current and the next Congress—who seeks to enjoin the operation of the Electoral Count Act to prevent a deprivation of his rights—and the rights of those he represents—under the Twelfth Amendment. The Plaintiffs also include the entire slate of Republican Presidential Electors for the State of Arizona, as well as an outgoing and incoming member of the Arizona Legislature. On December 14, 2020, pursuant to the requirements of applicable state laws, the Constitution, and the Electoral Count Act, the Plaintiff Arizona Electors, with the knowledge and permission of the Republican-majority Arizona Legislature, convened at the Arizona State Capitol, and cast Arizona's electoral votes for President Donald J. Trump and Vice President Michael R. Pence. On the same date, the Republican Presidential Electors for the States of Georgia, Pennsylvania, and Wisconsin met at their respective State Capitols to cast their States' electoral votes for President Trump and Vice President Pence

(or in the case of Michigan, attempted to do so but were blocked by the Michigan State Police, and ultimately voted on the grounds of the State Capitol).

There are now competing slates of Republican and Democratic electors in five States with Republican majorities in both houses of their State Legislatures—Arizona, Georgia, Michigan, Pennsylvania, and Wisconsin (*i.e.*, the Contested States)—that collectively have 73 electoral votes, which are more than sufficient to determine the winner of the 2020 General Election. On December 14, 2020, in Arizona and the other Contested States, the Democratic Party's slate of electors convened in the State Capitol to cast their electoral votes for former Vice President Joseph R. Biden and Senator Kamala Harris. On the same day, Arizona Governor Doug Ducey and Secretary of State Katie Hobbs submitted the Certificate of Ascertainment with the Biden electoral votes to the National Archivist pursuant to the Electoral Count Act.

Republican Senators and Republican Members of the House of Representatives have also expressed their intent to oppose the certified slates of electors from the Contested States due to the substantial evidence of voter fraud in the 2020 General Election. Multiple Senators and House Members have stated that they will object to the Biden electors at the January 6, 2021 Joint Session of Congress. These public statements by legislators, combined with the fact that President Trump has not conceded and has given no indication that he will concede and political pressure from his nearly 75 million voters and other supporters, make it a near certainty that at least one Senator and one House Member will follow through on their commitments and invoke the (unconstitutional) Electoral Count Act's dispute resolution procedures.

Defendant Vice President Pence, in his capacity as President of the Senate and Presiding Officer at the January 6, 2021 Joint Session of Congress to select the next President, will be presented with the following circumstances: (1) competing slates of electors from the State of

Arizona and the other Contested States, (2) that represent sufficient electoral votes (a) if counted, to determine the winner of the 2020 General Election, or (b) if not counted, to deny either President Trump or former Vice President Biden sufficient votes to win outright; and (3) objections from at least one Senator and at least one Member of the House of Representatives to the counting of electoral votes from one or more of the Contested States and thereby invoking the unconstitutional procedures set forth in Section 15 of the Electoral Count Act.

As a result, Defendant Vice President Pence will necessarily have to decide whether to follow the unconstitutional provisions of the Electoral Count Act or the Twelfth Amendment to the U.S. Constitution at the January 6, 2021 Joint Session of Congress. This approaching deadline establishes the urgency for this Court to issue a declaratory judgment that Sections 5 and 15 of the Electoral Count Act are unconstitutional and provide the undisputed factual basis for this Court to do so on an expedited basis, and to enjoin Defendant Vice President Pence from following any Electoral Count Act procedures in 3 U.S.C. §§ 5 and 15 because they are unconstitutional under the Twelfth Amendment.

ARGUMENT

I. THIS COURT HAS JURISDICTION FOR PLAINTIFFS' CLAIMS.

Before entertaining the merits of this action, the Court first must establish its jurisdiction over the subject matter and the parties. This action obviously raises a federal question, 28 U.S.C. § 1331, so Plaintiffs establish below that this action presents a case or controversy for purposes of Article III and their entitlement to seek relief in this Court via this action.

A. Plaintiffs have standing.

Article III standing presents the tripartite test of whether the party invoking a court's jurisdiction raises an "injury in fact" under Article III: (a) a legally cognizable injury (b) that is

both caused by the challenged action, and (c) redressable by a court. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561-62 (1992). The task of establishing standing varies, depending "considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue." *Id* at 561. If so, "there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it." *Id.* at 562. If not, standing may depend on third-party action:

> When … a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed. In that circumstance, causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction – and perhaps on the response of others as well.

Id. (emphasis in original). Here, Plaintiffs can assert both first-party and third-party injuries, with the showing for standing easier for the first-party injuries. Specifically, Vice President Pence's action under the unconstitutional Electoral Count Act would have the effect of ratifying injuries inflicted—in the first instance—by third parties in Arizona.

1. Plaintiffs have suffered an injury in fact.

Plaintiffs have standing as a member of the United States House of Representatives, Members of the Arizona Legislature, and as Presidential Electors for the State of Arizona.

Rep. Louie Gohmert is a Member of the U.S. House of Representatives, representing Texas's First Congressional District in both the current and the next Congress. Rep. Louie Gohmert requests declaratory relief from this Court to prevent action as prescribed by 3 U.S.C. § 5, and 3 U.S.C. §15 and to give the power back to the states to vote for the President in accordance with the Twelfth Amendment. Otherwise he will not be able to vote as a Congressional Representative in accordance with the Twelfth Amendment, and instead, his vote in the House, if there is disagreement, will be eliminated by the current statutory construct under the Electoral

Count Act, or diluted by votes of the Senate and ultimately by passing the final determination to the state Executives.

In the event that objections occur leading to a vote in the House of Representatives, then under the Twelfth Amendment, on January 6, in the new House of Representatives, there will be twenty-seven states led by Republican majorities, and twenty states led by Democrat majorities, and three states that are tied. Twenty-six seats are required for a victor under the Twelfth Amendment, and further that, under the Twelfth Amendment, in the event neither candidate wins twenty-six seats by March 4, then the then-current Vice President would be declared the President. However, if the Electoral Count Act is followed, this one vote on a state-by-state basis in the House of Representatives for President simply would not occur and would deprive this Member of his constitutional right as a sitting member of a Republican delegation, where his vote matters.

The Twelfth Amendment specifically states that "if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote." The authority to vote with this authority is taken from the House of Representatives, of which Mr. Gohmert is a member, and usurped by statutory construct set forth in 3 U.S.C. § 5 and 3 U.S.C. §15. Therein the authority is given back to the state's executive branch in the process of counting and in the event of disagreement – while also giving the Senate concurrent authority with the House to vote for President. As a result, the application of 3 U.S.C. § 5 and 3 U.S.C. §15 would prevent Rep. Gohmert from exercising his constitutional duty to vote pursuant for President to the Twelfth Amendment.

Prior to December 14, 2020, Plaintiff Arizona Electors had standing under the Electors Clause as candidates for the office of Presidential Elector because, under Arizona law, a vote cast for the Republican Party's President and Vice President is cast for the Republican Presidential Electors. *See* ARIZ. REV. STAT. § 16-212. Accordingly, Plaintiff Arizona Electors, like other candidates for office, "have a cognizable interest in ensuring that the final vote tally reflects the legally valid votes cast," as "[a]n inaccurate vote tally is a concrete and particularized injury to candidates such as the Electors." *Carson v. Simon*, 978 F.3d 1051, 1057 (8th Cir. 2020) (affirming that Presidential Electors have Article III and prudential standing under Electors Clause); *see also Wood v. Raffensperger*, No. 20-14418, 2020 WL 7094866, *10 (11th Cir. Dec. 5, 2020) (affirming that if Plaintiff voter had been a candidate for office "he could assert a personal, distinct injury" required for standing); *Trump v. Wis. Elections Comm'n*, No. 20-cv-1785, 2020 U.S. Dist. LEXIS 233765 at *26 (E.D. Wis. Dec. 12, 2020) (President Trump, "as candidate for election, has a concrete particularized interest in the actual results of the election."). Plaintiffs suffer a "debasement" of their votes, which "state[s] a justiciable cause of action on which relief could be granted" *Wesberry v. Sanders*, 376 U.S. 1, 5-6 (1964) (citing *Baker v. Carr*, 369 U.S. 186 (1962)).

The Twelfth Amendment provides as follows:

> *The electors shall meet in their respective states and vote by ballot for President and Vice President*, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they *shall make distinct lists of all persons voted for as President*, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate.

U.S. CONST. amend. XII (emphasis added).

2. Plaintiffs' injuries are traceable to Defendant.

Rep. Gohmert faces imminent threat of injury that the Defendant will follow the unlawful Electoral Count Act and, in so doing, eviscerate Rep. Gohmert's constitutional right and duty to vote for President under the Twelfth Amendment. With injuries directly caused by a defendant, plaintiffs can show an injury in fact with "little question" of causation or redressability. *Defenders of Wildlife,* 504 U.S. at 561-62. Although the Defendant did not cause the underlying election fraud, the Defendant nonetheless will directly cause Rep. Gohmert's injury, which is causation—and redressability—under *Defenders of Wild*.

By contrast, the Arizona Electors suffer indirect injury *vis-à-vis* this Defendant. But for the alleged wrongful conduct of Arizona executive branch officials under color of law, the Plaintiff Arizona Electors would have been certified as the presidential electors for Arizona, and Arizona's Governor and Secretary of State would have transmitted uncontested votes for Donald J. Trump and Michael R. Pence to the Electoral College. The certification and transmission of a competing slate of Biden electors has resulted in a unique injury that only Plaintiff Arizona Electors could suffer, namely, having a competing slate of electors take their place and their votes in the Electoral College. While the Vice President did not cause Plaintiffs' initial injury—that happened in Arizona—the Vice President stands in the position at the Joint Session on January 6 to ratify and purport to make lawful the unlawful injuries that Plaintiffs suffered in Arizona. That is causation enough for Article III:

> According to the USDA, the injury suffered by Sierra Club is caused by the independent actions (*i.e.*, pumping decisions) of third party farmers, over whom the USDA has no coercive control. Although we recognize that causation is not proven if the injury complained of is the result of the *independent* action of some third party not before the court, this does not mean that causation can be proven only if the governmental agency has coercive control over those third parties. Rather, the relevant inquiry in this case is whether the USDA has the ability through various programs to affect the

> pumping decisions of those third party farmers to such an extent that the plaintiff's injury could be relieved.

Sierra Club v. Glickman, 156 F.3d 606, 614 (5th Cir. 1998) (interior quotation marks, citations, and alterations omitted, emphasis in original); *Tel. & Data Sys. v. FCC*, 19 F.3d 42, 47 (D.C. Cir. 1994); *Synthetic Organic Chem. Mfrs. Ass'n v. Sec'y, Dep't of Health & Human Servs.*, 720 F.Supp. 1244, 1248 n.2 (W.D. La. 1989) ("any traceable injury will provide a basis for standing, even where it occurs through the acts of a third party").

When third parties inflict injury—even private third parties—that injury is traceable to government action if the injurious conduct "would have been illegal without that [governmental] action." *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 45 n.25 (1976). As explained below, Vice President Pence stands ready to ratify Plaintiffs' injuries via the unconstitutional Electoral Count Act, which is causation enough to enjoin his actions. Alternatively, "plaintiff's injury could be relieved" within the meaning of *Sierra Club v. Glickman* if the Vice President rejected the Electoral Count Act as unconstitutional.

A procedural-rights plaintiff must also show that "fixing the alleged procedural violation could cause the agency to 'change its position' on the substantive action," *Ctr. for Biological Diversity v. United States EPA*, 937 F.3d 533, 543 (5th Cir. 2019), which is easy enough here/ Under the Electoral Count Act, the "Blue" or "Biden" states have a bare House majority in the Congress that will vote on January 6. Under the Twelfth Amendment, however, the "Red" or "Trump" states have a 27-20-3 majority where each state delegation gets one vote in the House's election of the President. That distinction satisfies both third-party causation and procedural-rights tests for Article III standing.

The Twelfth Amendment gives Defendant exclusive authority and sole discretion as to which set of electors to count, or not to count any set of electors. If no candidate receives a majority

of electoral votes, then the President is to be chosen by the House, where "the votes shall be taken by States, the representation from each state having one vote." U.S. CONST. amend. XII. If Defendant Pence instead follows the procedures in Section 15 of the Electoral Count Act, Plaintiffs' electoral votes will not be counted because (a) the Democratic majority House of Representatives will not "decide" to count the electoral votes of Plaintiff Republican electors; and (b) either the Senate will concur with the House not to count their votes, or the Senate will not concur, in which case, the electoral votes cast by Biden's electors shall be counted because the Biden slate of electors was certified by Arizona's executive. Under the Constitution, by contrast, the Vice President counts the votes and—if the count is indeterminate—the vote proceeds immediately to the House for President and to the Senate for Vice President. *See* U.S. CONST. amend. XII.[1]

3. <u>This Court can redress Plaintiffs' injuries.</u>

Even if this Court would lack jurisdiction to *enjoin* the Vice President, *but see* Sections I.B-I.C, *infra* (immunity does not bar this action), this Court's authoritative declaration would provide redress enough. *See Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992) ("we may assume it is substantially likely that the President and other executive and congressional officials would abide by an authoritative interpretation of the census statute and constitutional provision by the District Court, even though they would not be directly bound by such a determination"). The

[1] This intent that the Vice President count the votes is borne out by a unanimous resolution attached to the final Constitution that described the procedures for electing the first President (*i.e.*, for the one time when there would not already be a sitting Vice President), stating in relevant part "that the Senators should appoint a President of the Senate, for the sole Purpose of receiving, opening and counting the Votes for President." 2 M. Farrand, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 666 (1911). For all subsequent elections, when there would be a Vice President to act as President of the Senate, the Constitution vests the opening and counting in the Vice President.

Electoral Count Act is blatantly unconstitutional in many respects, *see* Section I.A, *infra*, and "it is the province and duty of the judicial department to determine in cases regularly brought before them, whether the powers of any branch of the government, and even those of the legislature in the enactment of laws, have been exercised in conformity to the Constitution." *Powell v. McCormack*, 395 U.S. 486, 506 (1969) (interior quotations omitted).

Even if Plaintiffs do not ultimately prevail under the process that the Twelfth Amendment requires, the relief requested would nonetheless redress their injuries from the unconstitutional Electoral Count Act process in two respects . First, with respect to seeking to follow the Twelfth Amendment procedure over that of 3 U.S.C. § 15, it would redress Rep. Gohmert's procedural injuries enough to proceed under the correct procedure, even if they do not prevail substantively. *FEC v. Akins*, 524 U.S. 11, 25 (1998). Second, with respect to the Arizona Electors, it would redress their unequal-footing injuries to treat all rival elector slates the same, even if the House and not the electors choose the next President. *Heckler v. Mathews,* 465 U.S. 728, 739-40 (1984) ("when the right invoked is that to equal treatment, the appropriate remedy is a *mandate* of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class") (citations and footnotes omitted, emphasis in original). In each respect, Article III does not require that Plaintiffs show that they will prevail in order to show redressability.

The declaratory relief that Plaintiffs request would redress their injuries enough for Article III and in the chart as set forth:

Event/Issue	3 U.S.C. § 15	Twelfth Amendment
One Congress purports to bind future Congresses	Yes	No

Event/Issue	3 U.S.C. § 15	Twelfth Amendment
Rival slates of electors	Bicameral dispute resolution with no presentment; state executive breaks ties	Vice President counts; House and Senate respectively elect President and Vice President if inconclusive
Violates Presentment Clause	Yes	No
Role for state governors	Yes	No
House voters	Each member votes (*e.g.*, CA gets 53 votes, ND gets 1)	Each state delegation votes (*e.g.*, CA and ND get 1 vote)

As is plain from these material—and, here, dispositive—differences between the Twelfth Amendment and 3 U.S.C. § 15, the two provisions cannot be reconciled.

4. Plaintiffs' procedural injuries lower the constitutional bar for immediacy and redressability.

Given that Plaintiffs suffer a concrete injury to their voting rights, Plaintiffs also can press their procedural injuries under the Electoral Count Act. For procedural injuries, Article III's redressability and immediacy requirements apply to the *procedural violation* that will (or someday might) injure a concrete interest, rather than to the concrete future injury. *Defenders of Wildlife,* 504 U.S. at 571-72 & n.7. Specifically, the injuries that Plaintiffs assert affect the procedure by which the status of their votes will be considered, which lowers the thresholds for immediacy and redressability under this Circuit's and the Supreme Court's precedents. *Id.*; *Glickman*, 156 F.3d at 613 ("in a procedural rights case, … the plaintiff is not held to the normal standards for [redressability] and immediacy"); *accord Nat'l Treasury Employees Union v. U.S.,* 101 F.3d 1423, 1428-29 (D.C. Cir. 1996). Similarly, a plaintiff with concrete injury can invoke Constitution's structural protections of liberty. *Bond v. United States*, 564 U.S. 211, 222-23 (2011).

Finally, voters from smaller states like Arizona suffer an equal-footing injury and a procedural injury *vis-à-vis* larger states like California because the Electoral Count Act purports to replace the process provided in the Twelfth Amendment. Under the Electoral Count Act,

California has five times the votes that Arizona has, but under the Twelfth Amendment California and Arizona each have one vote. *Compare* 3 U.S.C. § 15 *with* U.S. CONST. amend. XII. That analysis applies in third-party injury cases. *See Clinton v. New York*, 524 U.S. 417, 433 & n.22 (1998) (unequal-footing analysis applies to indirect-injury plaintiffs); *cf. id.* at 456-57 (that analysis should apply only to equal-protection cases) (Scalia, J., dissenting). Nullification of a procedural protection and any related bargaining power is injury enough, even in third-party cases. *Clinton*, 524 U.S. at 433 & n.22.

B. The Speech or Debate Clause does not insulate the Vice President.

The Speech or Debate Clause provides that "Senators and Representatives" "shall not be questioned in any other Place" "for any Speech or Debate in either House":

> The Senators and Representatives … for any speech or debate in either House, … shall not be questioned in any other place.

U.S. CONST. art I, § 6, cl. 1. "Not everything a Member of Congress may regularly do is a legislative act within the protection of the Speech or Debate Clause," *Minton v. St. Bernard Par. Sch. Bd.*, 803 F.2d 129, 134-35 (5th Cir. 1986) (interior quotations omitted), because the "clause has been interpreted to protect only purely legislative activities," *Williams v. Brooks*, 945 F.2d 1322, 1326 (5th Cir. 1991) (internal quotation marks omitted), which renders it inapposite here. Where it applies, the Clause poses a jurisdictional bar not only to a court reaching the merits but also to putting the defendant to the burden of putting up a defense. *Powell*, 395 U.S. at 502-03. But "Legislative immunity does not, of course, bar all judicial review of legislative acts," *Powell*, 395 U.S. at 503, and the Speech or Debate Clause does not even apply—by its terms—to the Vice President in his role as President of the Senate or to the Joint Session on January 6.

First, the Clause does not protect the Vice President acting in his role as President of the Senate. *See* U.S. CONST. art I, § 6, cl. 1; *cf. Common Cause v. Biden*, 748 F.3d 1280, 1284 (D.C.

Cir. 2014) (declining to decide whether or not the Speech or Debate Clause protects the Vice President). At best for the Vice President, the question is an open one, but Plaintiffs respectfully submit that the Constitution's plain language should govern: The Clause does not apply to the Vice President. Instead, as here, where an unprotected officer of the House or Senate implements an unconstitutional action of the House or Senate, the judiciary has the power to enjoin the officer, even if it would lack the power to enjoin the House, the Senate, or their Members. *Powell*, 395 U.S. at 505. In short, the Speech or Debate Clause does not protect Vice President Pence at all.

Second, even if the Speech or Debate Clause did protect the Vice President acting as President of the Senate for legislative activity in the Senate, the Joint Session on January 6 is no such action. *See* U.S. CONST. art I, § 6, cl. 1. This is an election, and the Vice President has no more authority to disenfranchise voters via unconstitutional means as any other person.

C. Sovereign immunity does not bar this action.

The Defendant is Vice President Pence named as a defendant in his official capacity as the Vice President of the United States. With respect to injunctive or declaratory relief, it is a historical fact that at the time that the states ratified the federal Constitution, the equitable, judge-made, common-law doctrine that allows use of the sovereign's courts in the name of the sovereign to order the sovereign's officers to account for their unlawful conduct (*i.e.*, the rule of law) was as least as firmly established and as much a part of the legal system as the judge-made, common-law doctrine of federal sovereign immunity. Louis L. Jaffee, *The Right to Judicial Review I,* 71 HARV. L. REV. 401, 433 (1958); A.B.A. Section of Admin. Law & Regulatory Practice, *A Blackletter Statement of Federal Administrative Law*, 54 ADMIN. L. REV. 1, 46 (2002) (it is blackletter law that "suits against government officers seeking prospective equitable relief are not barred by the doctrine of sovereign immunity").

In determining whether the doctrine of *Ex parte Young* avoids immunity, a court need only conduct a "straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md. Inc. v. Pub. Serv. Comm'n of Maryland*, 535 U.S. 635, 645 (2002) (citations omitted). That is enough to survive a motion to dismiss on jurisdictional grounds: "The inquiry into whether suit lies under *Ex parte Young* does not include an analysis of the merits of the claim[.]" *Id.* at 638. Sovereign immunity poses no bar to jurisdiction here.[2]

The prayer for injunctive relief—that the Vice President be restrained from enforcing 3 U.S.C. §5 and §15 in contravention of the Twelfth Amendment of the Constitution—to instead follow the Twelfth Amendment, clearly satisfies the "straightforward inquiry." Plaintiffs request declaratory relief to prevent unconstitutional action under 3 U.S.C. § 5 and § 15 and to give the power back to the states to vote for the President in accordance with the Twelfth Amendment. Therefore, the Defendant should be enjoined from proceeding to certify or count dueling electoral votes under the unconstitutional dispute resolution procedures in 3 U.S.C. § 5 and § 15, and instead to follow the constitutional process as set forth in the Twelfth Amendment of the Constitution.

D. <u>The political-question doctrine does not bar this suit.</u>

The "political questions doctrine" can bar review of certain issues that the Constitution delegates to one of the other branches, but that bar does not apply to constitutional claims related to voting (other than claims brought under the Guaranty Clause of Article IV, §4):

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[2] Indeed, the sovereign immunity afforded a Member of Congress is co-extensive with the protections afforded by the Speech or Debate Clause. In all other respects, Members of Congress are bound by the law to the same extent as other persons. *Davis v. Passman*, 442 U.S. 228, 246 (1979) ("although a suit against a Congressman for putatively unconstitutional actions taken in the course of his official conduct does raise special concerns counseling hesitation, we hold that these concerns are coextensive with the protections afforded by the Speech or Debate Clause").

> We hold that this challenge to an apportionment presents no nonjusticiable "political question." The mere fact that the suit seeks protection of a political right does not mean it presents a political question. Such an objection "is little more than a play upon words."

Baker, 369 U.S. at 209. As in *Baker*, litigation over political rights is not the same as a political question.

E. <u>This case presents a federal question, and abstention principles do not apply.</u>

Article III, § 2, of the Federal Constitution provides that, "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority[.]" It is clear that the cause of action is one which "arises under" the Federal Constitution. *Baker*, 369 U.S. at 199. In *Baker*, the Plaintiffs alleged that, by means of a 1901 Tennessee statute that arbitrarily and capriciously apportioned the seats in the General Assembly among the State's 95 counties and failed to reapportion them subsequently notwithstanding substantial growth and redistribution of the State's population, they suffered a "debasement of their votes" and were thereby denied the equal protection of the laws guaranteed them by the Fourteenth Amendment. They sought, *inter alia*, a declaratory judgment that the 1901 statute is unconstitutional and an injunction restraining certain state officers from conducting any further elections under it. *Id.* The *Baker* line of cases recognizes that "that voters who allege facts showing disadvantage to themselves as individuals have standing to sue.'

The federal and constitutional nature of these controversies deprives abstention doctrines of any relevance whatsoever. First, state laws for the appointment of presidential electors are federalized by the operation of The Electoral Count Act of 1887. *McPherson v. Blacker*, 146 U.S. 1, 27 (1892); *Bush v. Gore*, 531 U.S. 98, 113 (2000) (Rehnquist, C.J., concurring) ("A significant departure from the legislative scheme for appointing Presidential electors presents a federal

constitutional question."). Second, "[i]t is no original prerogative of State power to appoint a representative, a senator, or President for the Union." J. Story, 1 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 627 (3d ed. 1858). Logically, "any state authority to regulate election to [federal] offices could not precede their very creation by the Constitution," meaning that any "such power had to be delegated to, rather than reserved by, the States." *Cook v. Gralike*, 531 U.S. 510, 522 (2001) (internal quotations omitted).

A more quintessentially federal question than which slate of electors will be counted under the 12th Amendment and 3 U.S.C. § 15 to elect the President and Vice President can scarcely be imagined.

F. Plaintiffs are entitled to an expedited declaratory judgment.

Under Rule 57, an expedited declaratory judgment is appropriate where, as here, it would "terminate the controversy" based on undisputed or relatively undisputed facts. *See* FED. R. CIV. P. 57, Advisory Committee Notes. The facts relevant to this controversy are not in dispute, namely: (1) there are competing slates of electors for Arizona and the other Contested States that have been or will be submitted to the Electoral College; (2) the Contested States collectively have sufficient (contested) electoral votes to determine the winner of the 2020 General Election—President Trump or former Vice President Biden; (3) legislators in Arizona and other Contested States have contested the certification of their State's electoral votes by State executives, due to substantial evidence of voter fraud that is the subject of ongoing litigation and investigations; and (4) Senators and Members of the House of Representatives have expressed their intent to challenge the electors and electoral votes certified by State executives in the Contested States.

As a result, Defendant Vice President Pence, in his capacity as President of the Senate and as the Presiding Officer for the January 6, 2021 Joint Session of Congress will be have to decide between (a) following the requirements of the Twelfth Amendment, and exercising his exclusive

authority and sole discretion in deciding which slate of electors and electoral votes to count for Arizona, or neither, or (b) following the distinct and inconsistent procedures set forth in Section 15 of the Electoral Count Act. The expedited declaratory judgment requested, namely, declaring that Section 5 and 15 of the Electoral Count Act are unconstitutional to the extent they conflict with the Twelfth Amendment and the Electors Clause, and that Defendant Pence may not follow these unconstitutional procedures, will terminate the controversy. Further, as discussed below, the requested declaratory judgment would also establish that Plaintiffs meet all of the requirements for any additional injunctive relief required to effectuate the declaratory judgment by enjoining Defendant Pence from violating the Twelfth Amendment.

II. PLAINTIFFS ARE ENTITLED TO EMERGENCY INJUNCTIVE RELIEF.

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 21 (2008). If this Court grants the requested declaratory judgment, then all elements required for injunctive relief will have been met.

A. Plaintiffs have a substantial likelihood of success.

The first—and most important—*Winter* factor is the likelihood of movants' prevailing. *Winter,* 555 U.S. at 20. Plaintiffs are likely to prevail because this Court has jurisdiction for this action, *see* Section I, *supra*, and because the Electoral Count Act is blatantly unconstitutional.

1. Unconstitutional laws are nullities.

At the outset, if the Electoral Count Act violates the Constitution, the Electoral Count Act is a nullity:

> [I]t is the province and duty of the judicial department to determine in cases regularly brought before them, whether the powers of any branch of the government, and even those of the legislature in the

> enactment of laws, have been exercised in conformity to the Constitution; and if they have not, to treat their acts as *null and void.*

Powell, 395 U.S. at 506 (interior quotations omitted, emphasis added). "Due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds." *United States v. Morrison*, 529 U.S. 598, 607 (2000) (finding Congress exceeded its authority under the Commerce Clause in regulating an area of the law left to the States. "Constitutional deprivations may not be justified by some remote administrative benefit to the State." *Harman v. Forssenius*, 380 U.S. 528, 542-43 (1965). Put simply, "that which is not supreme must yield to that which is supreme." *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 448 (1827). Although *Brown* arose in a federal-versus-state context, the same simple truth applies in a constitution-versus-statute context: the supreme enactment controls the lesser enactment.

2. <u>The Electoral Count Act violates the Electors Clause and the Twelfth Amendment.</u>

The requested expedited summary proceeding granting declaratory judgment will address the merits of Plaintiffs' claims, which raise only legal issues as to whether the provisions of Sections 5 and 15 of the Electoral Count Act addressing the counting of electoral votes from competing slates of electors for a given state are in conflict with the Twelfth Amendment and the Electors Clause and are therefore unconstitutional. In other words, if the Court grants the requested relief, that holding and relief will be granted because the Court has found that these provisions of the Electoral Count Act are unconstitutional and that Plaintiffs have in fact succeeded on the merits.

Under 3 USC § 5, the Presidential electors of a state and their appointment by the State shall be conclusive:

> If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned.

3 USCS § 5.

This statutory provision takes away the authority given to the Vice-President under the Twelfth Amendment in determining which electoral votes are conclusive. 3 U.S.C. §15 in relevant part states that both Houses, referencing the House of Representatives and the Senate, may concurrently reject certified votes, and further that if there is a disagreement, then, in that case, the votes of the electors who have been certified by the Executive of the State shall be determinative:

> …When all objections so made to any vote or paper from a State shall have been received and read, the Senate shall thereupon withdraw, and such objections shall be submitted to the Senate for its decision; and the Speaker of the House of Representatives shall, in like manner, submit such objections to the House of Representatives for its decision; and no electoral vote or votes from any State which shall have been regularly given by electors whose appointment has been lawfully certified to according to section 6 of this title [3 USCS § 6] from which but one return has been received shall be rejected, but the two Houses concurrently may reject the vote or votes when they agree that such vote or votes have not been so regularly given by electors whose appointment has been so certified. If more than one return or paper purporting to be a return from a State shall have been received by the President of the Senate, those votes, and those only, shall be counted which shall have been regularly given by the electors who are shown by the determination mentioned in section 5 [3 USCS § 5] of this title to have been appointed, if the determination in said section provided for shall have been made, or by such successors or substitutes, in case of a vacancy in the board of electors so ascertained, as have been appointed to fill such vacancy in the mode provided by the laws of the State; but in case there shall arise the question which of two or

> more of such State authorities determining what electors have been appointed, as mentioned in section 5 of this title [3 USCS § 5], is the lawful tribunal of such State, the votes regularly given of those electors, and those only, of such State shall be counted whose title as electors the two Houses, acting separately, shall concurrently decide is supported by the decision of such State so authorized by its law; and in such case of more than one return or paper purporting to be a return from a State, if there shall have been no such determination of the question in the State aforesaid, then those votes, and those only, shall be counted which the two Houses shall concurrently decide were cast by lawful electors appointed in accordance with the laws of the State, unless the two Houses, acting separately, shall concurrently decide such votes not to be the lawful votes of the legally appointed electors of such State. But if the two Houses shall disagree in respect of the counting of such votes, then, and in that case, the votes of the electors whose appointment shall have been certified by the executive of the State, under the seal thereof, shall be counted. When the two Houses have voted, they shall immediately again meet, and the presiding officer shall then announce the decision of the questions submitted. No votes or papers from any other State shall be acted upon until the objections previously made to the votes or papers from any State shall have been finally disposed of.

3 U.S.C. § 15.

This expressly conflicts with the Twelfth Amendment which has already set what role the House and the Senate play in addressing the votes of electors:

> The electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;--The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;--the person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately,

> by ballot, the President. *But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice*. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President. The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

U.S. CONST. amend. XII. (emphasis added).

The Constitution is unambiguously clear that: "The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted" "… and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives [who] shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote." Whereas 3 U.S.C. §15 and the incorporated referenced to 3 U.S.C. §5 delegate the authority to the Executive of the State in the event of disagreement, in direct conflict with the Twelfth Amendment and directly taking the opportunity of Presidential Electors' competing slates from being counted.[3]

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[3] Similarly, 3 U.S.C. § 6 is inconsistent with the Electors Clause—which provides that electors "shall sign and certify, and transmit sealed to the seat of the government of the Unit-ed States" the results of their vote, U.S. Const. art. II, § 1, cl. 2-3—because § 6 relies on state executives to forward the results of the electors' vote to the Archivist for delivery to Congress. 3 U.S.C. § 6. Although the means of delivery are arguably inconsequential, the Constitution vests state

(Footnote cont'd on next page)

3. The Electoral Count Act violates the Constitution's structural protections of liberty.

The Electoral Count Act exceeds the power of Congress to enact because "one legislature may not bind the legislative authority of its successors," *United States v. Winstar Corp.*, 518 U.S. 839, 872 (1996), which is a foundational and "centuries-old concept," *id.*, that traces to Blackstone's maxim that "Acts of parliament derogatory from the power of subsequent parliaments bind not." *Id.* (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *90). "There is no constitutionally prescribed method by which one Congress may require a future Congress to interpret or discharge a constitutional responsibility in any particular way." Laurence H. Tribe, *Erog v. Hsub and Its Disguises: Freeing* Bush v. Gore *from Its Hall of Mirrors*, 115 HARV. L. REV. 170, 267 n.388 (2001). Thus, the Electoral Count Act is a nullity because it exceeded the power of Congress to enact.

The Electoral Count Act also violates the Presentment Clause by purporting to create a type of bicameral order, resolution, or vote that is not presented to the President:

> *Every Order, Resolution, or Vote*, to Which the Concurrence of the Senate and House of Representatives may be necessary (*except on a question of Adjournment*) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

U.S. CONST. art. I, § 7, cl. 3 (emphasis added). The House and Senate cannot resolve the issues that the Electoral Count Act asks them to resolve without either a supermajority in both houses or presentment.

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executives with no role whatsoever in the process of electing a President. A state executive lends no official imprimatur to a given slate of electors under the Constitution.

The Electoral Count Act similarly improperly restricts the authority of the House of Representatives and the Senate to control their internal discretion and procedures pursuant to Article I, Section 5 which provides that "[e]ach House may determine the Rules of its Proceedings …" U.S. CONST. art. I, § 5, cl. 2. The Electoral Count Act also delegates tie-breaking authority to State executives (who have no agency under the Electors Clause or election amendments) when a State presents competing slates that Congress cannot resolve. As such, the Electoral Count Act also violates the non-delegation doctrine, the separation-of-powers and anti-entrenchment doctrines. *See generally* Chris Land & David Schultz, *On the Unenforceability of the Electoral Count Act*, 13 Rutgers J.L. & Pub. Policy 340, 364-377 (2016).

As indicated, Plaintiffs have standing to press these structural protections of liberty because Plaintiffs also suffer concrete injury through the debasement of their votes. *See* Section I.A.4, *supra*.

B. Plaintiffs will suffer irreparable injury.

Plaintiffs' votes will be counted or not counted at the January 6 joint session. The failure to count a lawful vote is an irreparable injury. *See*, *e.g.*, *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) ("A restriction on the fundamental right to vote . . . constitutes irreparable injury."). Indeed, the deprivation of any fundamental right constitutes irreparable injury, *Murphree v. Winter*, 589 F. Supp. 374, 381 (S.D. Miss. 1984) (citing *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976)), and voting rights are "a fundamental political right, because preservative of all rights." *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964) (internal quotations omitted). Moreover, if the counting of votes proceeds under the Electoral Count Act, Plaintiffs' votes will be adjudicated via an unconstitutional procedure, which also qualifies as irreparable harm: there will be no opportunity to revisit the issue. As with standing for procedural injuries, irreparable harm from a procedural violation requires an underlying concrete injury or due-process interest, which

Plaintiffs have and which will be irretrievably lost if the Vice President proceeds under the Electoral Count Act. Under the circumstances, Plaintiffs' procedural harms also are irreparable. *Commissioner v. Shapiro*, 424 U.S. 614, 629-30 (1976).

C. Plaintiffs need not demonstrate irreparable harm for declaratory relief.

"The traditional prerequisite for the granting of injunctive relief, demonstration of irreparable injury, is not a prerequisite to the granting of a declaratory relief" because the Declaratory Judgments Act "provides an adequate remedy and at law, and hence a showing of irreparable injury is unnecessary." 10 FED. PROC., L. ED. §23 :4 (citing 28 U.S.C. § 2201 and *Steffel v. Thompson*, 415 U.S. 452 (1974)). "The existence of another adequate remedy does not preclude a declaratory judgment that is otherwise appropriate." FED. R. CIV. P. 57. In fact, the central purpose of the Declaratory Judgments Act is to enable parties to adjudicate their rights without waiting until after the injury has occurred or damages have accrued. *See, e.g., Russian Standard Vodka (USA), Inc. v. Allied Domecq Spirits & Wine USA, Inc.,* 523 F.Supp.2d 376, 381 (S.D.N.Y. 2007) (citing *In re Combustion*, 838 F.2d 35, 36 (2d Cir. 1988)).

In any event, the irreparable-harm requirement for injunctive relief does not apply to declaratory relief. The fact that another remedy would be equally effective affords no ground for declining declaratory relief: "Rule 57 … expressly states that the availability of an alternative remedy does not prevent the district court from granting a declaratory judgment." *Marine Chance Shipping v. Sebastian*, 143 F.3d 216, 218-19 (5th Cir. 1998); *see also* 28 U.S.C. §2201; *Hurley v. Reed,* 288 F.2d 844, 848 (D.C. Cir. 1961); *Tierney v. Schweiker,* 718 F.2d 449, 457 (D.C. Cir. 1983). A prior formal or informal demand to the defendant is not a prerequisite to seeking declaratory relief, *Rowan Cos. v. Griffin*, 876 F.2d 26, 28 (5th Cir. 1989), and showing "irreparable injury… is not necessary for the issuance of a declaratory judgment." *Tierney,* 718 F.2d at 457

(*citing Steffel v. Thompson,* 415 U.S. 452, 471-72 (1974)). Thus, even if not entitled to injunctive relief, Plaintiffs still would be entitled to declaratory relief.

The requested declaratory judgment would terminate the controversy, offer relief from uncertainty, and eliminate the need for Plaintiffs to suffer the irreparable harm from the certainty that their electoral votes would be disregarded that would occur if Defendant Vice President Pence were to count electoral votes, and resolve disputes regarding competing slates of electors, under the unconstitutional provisions of the Electoral Count Act, rather than the procedures set forth in the Twelfth Amendment.

D. The balance of equities favors Plaintiffs.

"Traditional equitable principles requiring the balancing of public and private interests control the grant of declaratory or injunctive relief in the federal courts." *Webster v. Doe*, 486 U.S. 592, 604-05 (1988). The scope of requested injunctive relief—directing Defendant Pence to carry out his duties as President of the Senate and as Presiding Officer for the January 6, 2021 Joint Session of Congress in compliance with the U.S. Constitution—is drawn as narrowly as possible and does not require Defendant Pence to take any affirmative action apart from those he is authorized to take under the Twelfth Amendment. Moreover, it is difficult to imagine how the relief requested, which ***expands rather than restricts*** Defendant's discretion and authority, by eliminating facially unconstitutional restrictions on the same could cause any hardship to Defendant.

E. The public interest favors Plaintiffs.

The last stay criterion is the public interest. Where the parties dispute the lawfulness of government actions, the public interest collapses into the merits: "It is always in the public interest to prevent the violation of a party's constitutional rights." *Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 458 n.9 (5th Cir. 2014) (alterations omitted); *cf. Tex. Democratic Party v.*

Benkiser, 459 F.3d 582, 595 (5th Cir. 2006) ("injunction serves the public interest in that it enforces the correct and constitutional application of Texas's duly-enacted election laws") *League of Women Voters of the United States v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016) ("no public interest in the perpetuation of unlawful [government] action"); *accord ACLU v. Ashcroft*, 322 F.3d 240, 247 (3d Cir. 2003) ("the public interest [is] not served by the enforcement of an unconstitutional law") (interior quotation omitted); *Washington v. Reno*, 35 F.3d 1093, 1103 (6th Cir. 1994) (recognizing "greater public interest in having governmental agencies abide by the federal laws"); *Pac. Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1237 (10th Cir. 2005).

Here the declaratory and injunctive relief sought vindicates both Defendant Vice President's plenary authority as President of the Senate and Presiding Officer to count electoral votes, as well as the constitutional rights of the Plaintiffs to have their electoral votes counted in the manner that the Constitution provides, the rights of the Arizona legislative Plaintiffs under the Electors Clause to appoint Presidential Electors for the State of Arizona, and the right of Rep Gohmert and those he represents to have their vote counted in the manner that the Twelfth Amendment provides.

CONCLUSION

Therefore, it is respectfully requested that the Court grant Plaintiffs' Motion and the Court grant a declaratory judgment declaring 3 U.S.C. §5 - §15 unconstitutional on its face for violating the specific delegated authorities of the Twelfth Amendment of the Constitution.

Dated: December 28, 2020

Respectfully submitted,

_____

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CERTIFICATE OF SERVICE

I hereby certify that on the date specified below, I electronically filed the foregoing motion (together with its accompanying proposed order) with the Clerk of the Court using the CM/ECF system. In addition, because counsel for the defendant has not yet filed an appearance, I served one true and correct copy via Federal Express, next-day delivery, on the defendant and on the United States Attorney for the Eastern District of Texas at the following addresses, with a courtesy copy via facsimile and/or email to the addresses specified:

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

LOUIE GOHMERT, TYLER BOWYER, NANCY COTTLE, JAKE HOFFMAN, ANTHONY KERN, JAMES R. LAMON, SAM MOORHEAD, ROBERT MONTGOMERY, LORAINE PELLEGRINO, GREG SAFSTEN, KELLI WARD and MICHAEL WARD, Plaintiffs, v. THE HONORABLE MICHAEL R. PENCE, VICE PRESIDENT OF THE UNITED STATES, in his official capacity, Defendant.	Civil Action No. 6:20-cv-00660 **(Election Matter)**

[PROPOSED] ORDER GRANTING EMERGENCY INJUNCTIVE RELIEF

The Court has before it Plaintiffs' Emergency Motion for Expedited Declaratory Judgment and Emergency Motion for Injunctive Relief filed December 28, 2020 ("Motion") and the Plaintiffs' December 27, 2020 Complaint for Expedited Declaratory Judgment and Emergency Injunctive Relief ("Complaint") seeking:

1. A declaratory judgment finding that:
    a. Sections 5 and 15 of the Electoral Count Act, 3 U.S.C. §§ 5 and 15, are unconstitutional insofar as they conflict with and violate the Electors Clause and the Twelfth Amendment, U.S. CONST. art. II, § 1, cl. 1 & amend. XII;
    b. That Defendant Vice-President Michael R. Pence, in his capacity as President of Senate and Presiding Officer of the January 6, 2021 Joint Session of Congress under the Twelfth Amendment, is subject solely to

the requirements of the Twelfth Amendment and may exercise the exclusive authority and sole discretion in determining which electoral votes to count for a given State, and must ignore and may not rely on any provisions of the Electoral Count Act that would limit his exclusive authority and at his sole discretion to determine which of two or more competing slates of electors' votes are to be counted for President;

c. That, with respect to competing slates of electors the State of Arizona or other Contested States, the Twelfth Amendment contains the exclusive dispute resolution mechanisms, namely, that (i) Vice-President Pence determines which slate of electors' votes shall be counted, or neither, for that State and (ii) if no person has a majority, then the House of Representatives (and only the House of Representatives) shall chose the President where "the votes [in the House of Representatives] shall be taken by states, the representation from each state having one vote," U.S. CONST. amend. XII;

d. That, also with respect to competing slates of electors, the alternative dispute resolution procedure or priority rule in 3 U.S.C. § 15, is null and void insofar as it nullifies and replaces the Twelfth Amendment rules above by with an entirely different procedure in which the House and Senate each separately "decide" which slate is to be counted, and in the event of a disagreement, then only "the votes of the electors whose appointment shall have been certified by the executive of the State … shall be counted," 3 U.S.C. § 15; and

2. An order granting any other declaratory or injunctive relief necessary to support or effectuate the foregoing declaratory judgments.

The Court has reviewed the terms and conditions of the December 28, 2020 Motion and Complaint, and the Court's Declaratory Judgment issued December 31, 2020, granting the requested expedited declaratory judgments in Paragraphs 1(a)-1(d) above and for good cause shown IT IS HEREBY ORDERED THAT:

1. Defendant Vice President Michael R. Pence shall, in his capacity as President of the Senate and as Presiding Officer for the January 6, 2021 Joint Session of Congress ("Joint Session"), solely follow the terms of the Twelfth Amendment in counting the electoral votes at the Joint Session and any other proceedings addressing the counting of electoral votes for choosing the next President in connection with the 2020 General Election;
2. Defendant Vice President Pence shall not follow the provisions of Sections 5 or 15 of the Electoral Count Act that this Court has found to be unconstitutional and in conflict with the Twelfth Amendment, and in particular, Defendant Vice President Pence
    a. Shall not "call for objections" from Senators or House Members following the reading of any certificate or paper from electors for a given State, and instead shall exercise his exclusive authority and sole discretion under the Twelfth Amendment to "count" the electoral votes for a given state, including the decision as to which of the competing slates of electors' electoral votes to count, or not to count, for that State;

b. Shall not give any preference or priority in counting electors certified by the State's executive over any other slate of electors, and shall instead give effect to the provisions of the Electors Clause for electors appointed by the State Legislature in whatever manner indicated by that State's legislatures;

c. Shall not submit any disputes between competing slates of electors to be resolved under the procedures set forth in Section 15 of the Electoral Count Act, nor as Presiding Officer shall he permit any such objections or disputes to interrupt the counting of electoral votes at the Joint Session or delegate his exclusive authority under the Twelfth Amendment to Congress to determine which electoral votes are to be counted; and

d. If and only if neither President Trump nor former Vice President Biden fails to receive a majority of electoral votes at the Joint Session, is he relieved is his exclusive authority to count electoral votes for choosing the President, at which point he shall direct the House of Representatives to "choose immediately by ballot" the President where "the votes shall be taken by states, the representation from each state having one vote," as required under the Twelfth Amendment.

SO ORDERED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

LOUIE GOHMERT, TYLER BOWYER, NANCY COTTLE, JAKE HOFFMAN, ANTHONY KERN, JAMES R. LAMON, SAM MOORHEAD, ROBERT MONTGOMERY, LORAINE PELLEGRINO, GREG SAFSTEN, KELLI WARD and MICHAEL WARD, Plaintiffs, v. THE HONORABLE MICHAEL R. PENCE, VICE PRESIDENT OF THE UNITED STATES, in his official capacity. Defendant.	Case No. COMPLAINT FOR EXPEDITED DECLARATORY AND EMERGENCY INJUNCTIVE RELIEF (Election Matter)

NATURE OF THE ACTION

1. This civil action seeks an expedited declaratory judgment finding that the elector dispute resolution provisions in Section 15 of the Electoral Count Act, 3 U.S.C. §§ 5 and 15, are unconstitutional because these provisions violate the Electors Clause and the Twelfth Amendment of the U.S. Constitution. U.S. CONST. art. II, § 1, cl. 1 & Amend. XII. Plaintiffs also request emergency injunctive relief required to effectuate the requested declaratory judgment**.**

2. These provisions of Section 15 of the Electoral Count Act are unconstitutional insofar as they establish procedures for determining which of two or more competing slates of Presidential Electors for a given State are to be counted in the Electoral College, or how objections to a proffered slate are adjudicated, that violate the Twelfth Amendment. This violation occurs because the Electoral Count Act directs the Defendant, Vice President Michael R. Pence, in his capacity as President of the Senate and Presiding Officer over the January 6, 2021 Joint Session

of Congress: (1) to count the electoral votes for a State that have been appointed in violation of the Electors Clause; (2) limits or eliminates his exclusive authority and sole discretion under the Twelfth Amendment to determine which slates of electors for a State, or neither, may be counted; and (3) replaces the Twelfth Amendment's dispute resolution procedure – under which the House of Representatives has sole authority to choose the President.

3. Section 15 of the Electoral Count Act unconstitutionally violates the Electors Clause by usurping the exclusive and plenary authority of State Legislatures to determine the manner of appointing Presidential Electors, and instead gives that authority to the State's Executive. Similarly, 3 USC § 5 makes clear that the Presidential electors of a state and their appointment by the State Executive shall be conclusive.

4. This is not an abstract or hypothetical question, but a live "case or controversy" under Article III that is ripe for a declaratory judgment arising from the events of December 14, 2020, where the State of Arizona (and several others) have appointed two competing slates of electors.

5. Plaintiffs include the United States Representative for Texas' First Congressional District and the entire slate of Republican Presidential Electors for the State of Arizona. The Arizona Electors have cast Arizona's electoral votes for President Donald J. Trump on December 14, 2020, at the Arizona State Capitol with the permission and endorsement of the Arizona Legislature, *i.e.*, at the time, place, and manner required under Arizona state law and the Electoral Count Act. At the same time, Arizona's Governor and Secretary of State appointed a separate and competing slate of electors who cast Arizona's electoral votes for former Vice-President Joseph R. Biden, despite the evidence of massive multi-state electoral fraud committed on Biden's behalf that changed electoral results in Arizona and in other states such as Georgia, Michigan,

Pennsylvania and Wisconsin that have also put forward competing slates of electors (collectively, the "Contested States"). Collectively, these Contested States have enough electoral votes in controversy to determine the outcome of the 2020 General Election.

6. On January 6, 2021, when Congress convenes to count the electoral votes for President and Vice-President, Plaintiff Representative Gohmert will object to the counting of the Arizona slate of electors voting for Biden and to the Biden slates from the remaining Contested States. Rep. Gohmert is entitled to have his objection determined under the Twelve Amendment, and not through the unconstitutional impositions of a prior Congress by 3 U.S.C. §§ 5 and 15.

7. Senators have also stated that they may object to the Biden slate of electors from the Contested States.[1]

8. This Complaint addresses a matter of urgent national concern that involves only issues of law – namely, a determination that Sections 5 and 15 of the Electoral Count Act violate the Electors Clause and/or the Twelfth Amendment of the U.S. Constitution. The relevant facts are not in dispute concerning the existence of a live case or controversy between Plaintiffs and Defendant, ripeness, standing, and other matters related to the justiciability of Plaintiffs' claims.[2]

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[1] *See* https://www.forbes.com/sites/jackbrewster/2020/12/17/here-are-the-gop-senators-who have-hinted-at-defying-mcconnell-by-challenging-election/?sh=506395c34ce3.

[2] The facts relevant to the justiciability of Plaintiffs' claims are laid out below and demonstrate the certainty or near certainty that the unconstitutional provisions in Section 15 of the Electoral Count Act will be invoked at the January 6, 2021 Joint Session of Congress to choose the next President, namely: (1) there are competing slates of electors for Arizona and the other Contested States that have been or will be submitted to the Electoral College; (2) the Contested States collectively have sufficient (contested) electoral votes to determine the winner of the 2020 General Election – President Trump or former Vice President Biden; (3) legislators in Arizona and other Contested States have contested the certification of their State's electoral votes by State executives, due to substantial evidence of election fraud that is the subject of ongoing litigation and investigations; and (4) Senators and Members of the House of Representatives have expressed their intent to challenge the electors and electoral votes certified by State executives in the Contested States.

9. Because the requested declaratory judgment will terminate the controversy arising from the conflict between the Twelfth Amendment and the Electoral Count Act, and the facts are not in dispute, it is appropriate for this Court to grant this relief in a summary proceeding without an evidentiary hearing or discovery. *See* Notes of Advisory Committee on Federal Rules of Civil Procedure, Fed. R. Civ. P. 57.

10. Accordingly, Plaintiffs have concurrently submitted a motion for a speedy summary proceeding under Rule 57 of the Federal Rules of Civil Procedure ("FRCP") to grant the relief requested herein as soon as possible, and for emergency injunctive relief under Rule 65 thereof consistent with the declaratory judgment requested herein on that same date.

11. Accordingly, Plaintiffs respectfully request this Court to issue a declaratory judgment finding that:

A. Sections 5 and 15 of the Electoral Count Act, 3 U.S.C. §§ 5 and 15, are unconstitutional because they violate the Twelfth Amendment, U.S. CONST. art. II, § 1, cl. 1 & amend. XII on the face of it; and further violate the Electors Clause;

B. That Vice-President Pence, in his capacity as President of Senate and Presiding Officer of the January 6, 2021 Joint Session of Congress under the Twelfth Amendment, is subject solely to the requirements of the Twelfth Amendment and may exercise the exclusive authority and sole discretion in determining which electoral votes to count for a given State, and must ignore and may not rely on any provisions of the Electoral Count Act that would limit his exclusive authority and his sole discretion to determine the count, which could include votes from the slates of Republican electors from the Contested States;

C. That, with respect to competing slates of electors from the State of Arizona or other Contested States, the Twelfth Amendment contains the exclusive dispute resolution mechanisms, namely, that (i) Vice-President Pence determines which slate of electors' votes count, or neither, for that State; (ii) how objections from members of Congress to any proffered slate of electors is adjudicated; and (iii) if no candidate has a majority of 270 elector votes, then the House of Representatives (and only the House of Representatives) shall choose the President where "the votes [in the House of Representatives] shall be taken by states, the representation from each state having one vote," U.S. CONST. amend. XII;

D. That with respect to the counting of competing slates of electors, the alternative dispute resolution procedure or priority rule in 3 U.S.C. § 15, together with its incorporation of 3 U.S.C. § 5, shall have no force or effect because it nullifies and replaces the Twelfth Amendment rules above with an entirely different procedure; and

E. Issue any other declaratory judgments or findings or injunctive relief necessary to support or effectuate the foregoing declaratory judgments.

JURISDICTION AND VENUE

12. This Court has subject matter jurisdiction under 28 U.S.C. § 1331 which provides, "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

13. This Court also has subject matter jurisdiction under 28 U.S.C. § 1343 because this action involves a federal election for President of the United States. "A significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional

question." *Bush v. Gore*, 531 U.S. 98, 113 (2000) (Rehnquist, C.J., concurring); *Smiley v. Holm*, 285 U.S. 355, 365 (1932).

14. The jurisdiction of the Court to grant declaratory relief is conferred by 28 U.S.C. §§ 2201 and 2202 and by Rule 57, Fed. R. Civ. P., and emergency injunctive relief by Rule 65, Fed. R. Civ. P.

15. Venue is proper because Plaintiff Gohmert resides in Tyler, Texas, he maintains his primary congressional office in Tyler, and no real property is involved in the action. 28 U.S.C. § 1391(e)(1).

THE PARTIES

16. Plaintiff Louie Gohmert is a duly elected member of the United States House of Representatives for the First Congressional District of Texas. On November 3, 2020 he won re-election of this Congressional seat and plans to attend the January 6, 2021 session of Congress. He resides in the city of Tyler, in Smith County, Texas.

17. Each of the following Plaintiffs is a resident of Arizona, a registered Arizona voter and a Republican Party Presidential Elector on behalf of the State of Arizona, who voted their competing slate for President and Vice President on December 14, 2020: a) Tyler Bowyer, a resident of Maricopa County and a Republican National Committeeman; b) Nancy Cottle, a resident of Maricopa County and Second Vice-Chairman of the Maricopa County Republican Committee; c) Jake Hoffman, a resident of Maricopa County and member-elect of the Arizona House of Representatives; d) Anthony Kern, a resident of Maricopa County and an outgoing member of the Arizona House of Representatives; e) James R. Lamon, a resident of Maricopa County; f) Samuel Moorhead, a resident of Gila County; g) Robert Montgomery, a resident of Cochise County and Republican Party Chairman for Cochise County; h) Loraine Pellegrino, a

resident of Maricopa County; i) Greg Safsten, a resident of Maricopa County and Executive Director of the Republican Party of Arizona; j) Kelli Ward, a resident of Mohave County and Chair of the Arizona Republican Party; and k) Michael Ward, a resident of Mohave County.

18. The above eleven plaintiffs constitute the full slate of the Arizona Republican party's nominees for presidential electors (the "Arizona Electors").

19. The Defendant is Vice President Michael R. Pence named in his official capacity as the Vice President of the United States. The declaratory and injunctive relief requested herein applies to his duties as President of the Senate and Presiding Officer at the January 6, 2021 Joint Session of Congress carried out pursuant to the Electoral Count Act and the Twelfth Amendment.

STATEMENT OF FACTS

20. The Plaintiffs include a United States Representative from Texas, the entire slate of Republican Presidential Electors for the State of Arizona as well as an outgoing and incoming member of the Arizona Legislature. On December 14, 2020, pursuant to the requirements of applicable state laws and the Electoral Count Act, the Arizona Electors, with the knowledge and permission of the Republican-majority Arizona Legislature, convened at the Arizona State Capitol, and cast Arizona's electoral votes for President Donald J. Trump and Vice President Michael R. Pence.[3] On the same date, the Republican Presidential Electors for the States of Georgia,[4]

[3] *See GOP Elector Nominees cast votes for Trump in Arizona, Georgia, Pennsylvania*, by Dave Boyer, The Washington Times, December 14, 2020. https://www.washingtontimes.com/news/2020/dec/14/gop-electors-cast-votes-trump-georgia-pennsylvania/.

[4] *See id.*

Pennsylvania[5] and Wisconsin[6] met at their respective State Capitols to cast their States' electoral votes for President Trump and Vice President Pence.

21. Michigan's Republican electors attempted to vote at their State Capitol on December 14th but were denied entrance by the Michigan State Police. Instead, they met on the grounds of the State Capitol and cast their votes for President Trump and Vice President Pence vote.[7]

22. On December 14, 2020, in Arizona and the other States listed above, the Democratic Party's slate of electors convened in their respective State Capitols to cast their electoral votes for former Vice President Joseph R. Biden and Senator Kamala Harris. On the same day, Arizona Governor Doug Ducey and Arizona Secretary of State Katie Hobbs submitted the Certificate of Ascertainment with the Biden electoral votes pursuant to the National Archivist pursuant to the Electoral Count Act.[8]

23. Accordingly, there are now competing slates of Republican and Democratic electors in five States with Republican majorities in both houses of their State Legislatures – Arizona, Georgia, Michigan, Pennsylvania, and Wisconsin (*i.e.*, the Contested States) – that

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[5] *See id.*

[6] *See Wisconsin GOP Electors Meet to Cast their own Votes Too Just in Case,* by Nick Viviani, WMTV, NBC15.com, December 14, 2020, https://www.nbc15.com/2020/12/14/wisconsin-gop-electors-meet-to-cast-their-own-votes-too-just-in-case/ last visited December 14, 2020.

[7] *See Michigan Police Block GOP Electors from Entering Capitol*, by Jacob Palmieri, the Palmieri Report, December 14, 2020, https://thepalmierireport.com/michigan-state-police-block-gop-electors-from-entering-capitol/.

[8] *See Democratic Electors Cast Ballots in Arizona for First Time Since 1996*, by Nicole Valdes, ABC15.com, December 14, 2020, *available at*: https://www.abc15.com/news/election-2020/democratic-electors-cast-ballots-in-arizona-for-first-time-since-1996.

collectively have 73 electoral votes, which are more than sufficient to determine the winner of the 2020 General Election.[9]

24. The Arizona Electors, along with Republican Presidential Electors in Georgia, Michigan, Pennsylvania, and Wisconsin, took this step as a result of the extraordinary events and substantial evidence of election fraud and other illegal conduct before, during and after the 2020 General Election in these States. The Arizona Legislature has conducted legislative hearings into these voting fraud allegations, and is actively investigating these matters, including issuing subpoenas of Maricopa County, Arizona (which accounts for over 60% of Arizona's population and voters) voting machines for forensic audits.[10]

25. On December 14, 2020, members of the Arizona Legislature passed a Joint Resolution in which they: (1) found that the 2020 General Election "was marred by irregularities so significant as to render it highly doubtful whether the certified result accurately represents the will of the voters;" (2) invoked the Arizona Legislature's authority under the Electors Clause and 5 U.S.C. § 2 to declare the 2020 General Election a failed election and to directly appoint Arizona's electors; (3) resolved that the Plaintiff Arizona Electors' "11 electoral votes be accepted for … Donald J. Trump or to have all electoral votes nullified completely until a full forensic audit can be conducted;" and (4) further resolved "that the United States Congress is not to consider a slate

[9] Republican Presidential Electors in the States of Nevada and New Mexico, which have Democrat majority state legislature, also met on December 14, 2020, at their State Capitols to cast their votes for President Trump and Vice President Pence.

[10] Maricopa County election officials have refused to comply with these subpoenas or to turn over voting machines or voting records and have sued to quash the subpoena. Plaintiff Arizona Electors have moved to intervene in this Arizona state proceeding. *See generally Maricopa Cty. v. Fann*, Case No. CV2020-016840 (Az. Sup. Ct. Dec. 18, 2020).

of electors from the State of Arizona until the Legislature deems the election to be final and all irregularities resolved."[11]

26. Public reports have also highlighted wide-spread election fraud in the other Contested States that prompted competing Electors' slates. [12]

27. Republican Senators and Republican Members of the House of Representatives have also expressed their intent to oppose the certified slates of electors from the Contested States due to the substantial evidence of election fraud in the 2020 General Election. Multiple Senators and House Members have stated that they will object to the Biden electors at the January 6, 2021 Joint Session of Congress.[13] Plaintiff Gohmert will object to the counting of the Arizona electors voting for Biden, as well as to the Biden electors from the remaining Contested States.

28. Based on the foregoing facts, Defendant Vice President Pence, in his capacity as President of the Senate and Presiding Officer at the January 6, 2021 Joint Session of Congress to select the next President, will be presented with the following circumstances: (1) competing slates of electors from the State of Arizona and the other Contested States (namely, Georgia, Michigan, Pennsylvania, and Wisconsin) (2) that represent sufficient electoral votes (a) if counted, to determine the winner of the 2020 General Election, or (b) if not counted, to deny either President Trump or former Vice President Biden sufficient votes to win outright; and (3) objections from at

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[11] *See* **Ex. A**, "A Joint Resolution of the 54th Legislature, State of Arizona, To The 116th Congress, Office of the President of the Senate Presiding," December 14, 2020 ("December 14, 2020 Joint Resolution").

[12] *See The Immaculate Deception*, *Six Key Dimensions of Election Irregularities, The Navarro Report*. https://bannonswarroom.com/wp-content/uploads/2020/12/The-Immaculate-Deception-12.15.20-1.pdf

[13] *See, e.g., Dueling Electors and the Upcoming Joint Session of Congress*, by Zachary Steiber, Epoch Times, Dec. 17, 2020, *available at:* https://www.theepochtimes.com/explainer-dueling-electors-and-the-upcoming-joint-session-of-congress_3622992.html.

least one Senator and at least one Member of the House of Representatives to the counting of electoral votes from one or more of the Contested States.

29. The choice between the Twelfth Amendment and 3 U.S.C. § 15 raises important procedural differences. In the incoming 117th Congress, the Republican Party has a majority in 27 of the House delegations that would vote under the Twelfth Amendment. The Democrat Party has a majority in 20 of those House delegations, and the two parties are evenly divided in three of those delegations. By contrast, under 3 U.S.C. § 15, Democrats have a ten- or eleven-seat majority in the House, depending on the final outcome of the election in New York's 22nd District.

30. Accordingly, it is the foregoing conflict between the Twelfth Amendment of the U.S. Constitution and Section 15 of the Electoral Count Act that establish the urgency for this Court to issue a declaratory judgment that Section 15 of the Electoral Count Act is unconstitutional.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

31. **Presidential Electors Clause.** The U.S. Constitution grants State Legislatures the exclusive authority to appoint 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 no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector. U.S. CONST. art. II, § 1 ("Electors Clause").

32. The Supreme Court has affirmed that the "power and jurisdiction of the state [legislature]" to select electors "is exclusive," *McPherson v. Blacker*, 146 U.S. 1, 11 (1892); this power "cannot be taken from them or modified" by statute or even the state constitution," and "there is no doubt of the right of the legislature to resume the power at any time." *Id.* at 10 (citations omitted). In *Bush v. Gore*, 531 U.S. 98 (2000), the Supreme Court reaffirmed *McPherson's* holding that "the state legislature's power to select the manner for appointing

electors is plenary," *Bush*, 531 U.S. at 104 (*citing McPherson*, 146 U.S. at 35), noting that the state legislature "may, if it so chooses, select the electors itself," and that even after deciding to select electors through a statewide election, "can take back the power to appoint electors." *Id.* (citation omitted).

33. **The Twelfth Amendment.** The Twelfth Amendment sets forth the procedures for counting electoral votes and for resolving disputes over whether and which electoral votes may be counted for a State. The first section describes the meeting of the Electoral College and the procedures up to the casting of the electoral votes by the Presidential Electors in their respective states, which occurred on December 14, 2020, with respect to the 2020 General Election:

> The electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate.

U.S. CONST. amend. XII.

34. The second section describes how Defendant Vice President Pence, in his role as President of the Senate and Presiding Officer for the January 6, 2021 Joint Session of Congress, shall "count" the electoral votes.

> The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted[.]

U.S. CONST. amend. XII.

35. Under the Twelfth Amendment, Defendant Pence alone has the exclusive authority and sole discretion to open and permit the counting of the electoral votes for a given state, and where there are competing slates of electors, or where there is objection to any single slate of electors, to determine which electors' votes, or whether none, shall be counted. Notably, neither

the Twelfth Amendment nor the Electoral Count Act, provides any mechanism for judicial review of the Presiding Officer's determinations.[14] Instead, the Twelfth Amendment and the Electoral Count Act adopt different procedures for the President of the Senate (Twelfth Amendment) or both Houses of Congress (Electoral Count Act) to resolve any such disputes and the authority for the final determinations, in the event of disagreement, to different parties; namely, the Electoral Count Act gives it to the Executive of the State; while the Twelfth Amendment vests sole authority with the Vice President.

36. The third section of the Twelfth Amendment sets forth the procedures for selecting the President (solely) by the House of Representatives, in the event that no candidate has received a majority of electoral votes counted by the President of the Senate.

> The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of electors appointed; *and if no person have such majority, then* from the persons having the highest numbers not exceeding three on the list of those voted for as President**,** *the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote*; a quorum for this purpose shall consist of a member or members from two-thirds of the states, *and a majority of all the states shall be necessary to a choice*. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.

U.S. CONST. amend. XII (emphasis added).

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[14] *See, e.g.,* Nathan L. Colvin & Edward B. Foley, *The Twelfth Amendment: A Constitutional Ticking Time Bomb*, U. of Miami L. Rev. 64:475, 526 (2010) (discussing reviews of the Electoral Count Act's ("ECA") legislative history and concluding that, "[o]ne of the more thorough reviews of the legislative history of the ECA reveals that Congress considered giving the Court some role in the process but rejected the idea every time, and it was clear that Congress did not think the Court had a constitutional role nor did it believe that the Court should have any jurisdiction at all." Plaintiffs agree that resolution of disputes before Congress, arising on January 6, 2021, over competing slates of electors, or objections to any slate of electors, are matters outside the purview of federal courts; but the federal courts must determine whether the ECA is unconstitutional. This position is fully consistent with the declaratory judgment requested herein.

37. There are four key features of this Twelfth Amendment procedure that should be noted when comparing it with the Electoral Count Act's procedures: (1) the President is to be chosen solely by the House of Representatives, with no role for the Senate; (2) votes are taken by State (with one vote per State), rather than by individual House members; (3) the President is deemed the candidate that receives the majority of States' votes, rather than a majority of individual House members' votes; and (4) there are no other restrictions on this majority rule provision; in particular, no "tie breaker" or priority rules based on the manner or State authority that originally appointed the electors on December 14, 2020 as is the case under the Electoral Count Act (which gives priority to electors' certified by the State's executive).

38. **The Electoral Count Act.** The Electoral Count Act of 1887, as subsequently amended, includes a number of provisions that are in direct conflict with the text of the Electors Clause and the Twelfth Amendment.

39. Sections 5 and 15 of the Electoral Count Act adopt an entirely different set of procedures for the counting of electoral votes, for addressing situations where one candidate does not receive a majority, and for resolving disputes. Sections 16 to 18 of the Electoral Count Act provide additional procedural rules governing the Joint Session of Congress (to be held January 6, 2021 for the 2020 General Election).

40. The first part of Section 15 is consistent with the Twelfth Amendment insofar as it provides that "the President of the Senate shall be their presiding officer" and that "all the certificates and papers purporting to be certificates of the electoral votes" are to be "opened by the President of the Senate." 3 U.S.C. § 15. However, Section 15 diverges from the Twelfth Amendment by adopting procedures for the President of the Senate to "call for objections," and if there are objections made in writing by one Senator and one Member of the House of

Representatives, then this shall trigger a dispute-resolution procedure found nowhere in the Twelfth Amendment.

41. The Section 15's dispute resolution procedures are lengthy and reproduced in their entirety below:

> When all objections so made to any vote or paper from a State shall have been received and read, the Senate shall thereupon withdraw, and such objections shall be submitted to the Senate for its decision; and the Speaker of the House of Representatives shall, in like manner, submit such objections to the House of Representatives for its decision; and no electoral vote or votes from any State which shall have been regularly given by electors whose appointment has been lawfully certified to according to section 6 of this title [3 USCS § 6][15] from which but one return has been received shall be rejected, *but the two Houses concurrently may reject the vote or votes when they agree that such vote or votes have not been so regularly given by electors whose appointment has been so certified*. If more than one return or paper purporting to be a return from a State shall have been received by the President of the Senate, those votes, and those only, shall be counted which shall have been regularly given by the electors who are shown by the determination mentioned in section 5 [3 USCS § 5] of this title to have been appointed, if the determination in said section provided for shall have been made, or by such successors or substitutes, in case of a vacancy in the board of electors so ascertained, as have been appointed to fill such vacancy in the mode provided by the laws of the State; but in case there shall arise the question which of two or more of such State authorities determining what electors have been appointed, as mentioned in section 5 of this title [3 USCS § 5], *is the lawful tribunal of such State, the votes regularly given of those electors, and those only*, of such State shall be counted whose title as electors the two Houses, acting separately, shall concurrently decide is supported by the decision of such State so authorized by its law; and in such case of more than one return or paper purporting to be a return from a State, if there shall have been no such determination of the question in the State aforesaid, then those votes, and those only, shall be counted which the two Houses shall concurrently decide were cast by lawful electors appointed in accordance with the laws of the State, unless the two Houses, acting separately, shall concurrently decide such votes not to be the lawful votes of the legally appointed electors of such

[15] 3 U.S.C. § 6 is inconsistent with the Electors Clause—which provides that electors "shall sign and certify, and transmit sealed to the seat of the government of the United States" the results of their vote, U.S. Const. art. II, § 1, cl. 2-3—because § 6 relies on state executives to forward the results of the electors' vote to the Archivist for delivery to Congress. 3 U.S.C. § 6. Although the means of delivery are arguably inconsequential, the Constitution vests state executives with no role whatsoever in the process of electing a President. A state executive lends no official imprimatur to a given slate of electors under the Constitution.

> State. *But if the two Houses shall disagree in respect of the counting of such votes, then, and in that case, the votes of the electors whose appointment shall have been certified by the executive of the State, under the seal thereof, shall be counted.* When the two Houses have voted, they shall immediately again meet, and the presiding officer shall then announce the decision of the questions submitted. No votes or papers from any other State shall be acted upon until the objections previously made to the votes or papers from any State shall have been finally disposed of.

3 U.S.C. § 15 (emphasis added).

42. First, the Electoral Count Act submits disputes over the "count" of electoral votes to both the House of Representatives and to the Senate. The Twelfth Amendment envisages no such role for both Houses of Congress. The President of the Senate, and the President of the Senate alone, shall "count" the electoral votes. This intent is borne out by a unanimous resolution attached to the final Constitution that described the procedures for electing the first President (*i.e.*, for a time when there would not already be a Vice President), stating in relevant part "that the Senators should appoint a President of the Senate, for the sole Purpose of receiving, opening and counting the Votes for President." 2 M. Farrand, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 666 (1911). For all subsequent elections, when there would be a Vice President to act as President of the Senate, the Constitution vests the opening and counting in the Vice President.

43. Second, the Electoral Count Act gives both the House of Representatives and the Senate the power to vote, or "decide," which of two or more competing slates of electors shall be counted, and it requires the concurrence of both to "count" the electoral votes for one of the competing slates of electors.

44. Under the Twelfth Amendment, the President of the Senate has the sole authority to count votes in the first instance, and then the House may do so *only* in the event that no candidate receives a majority counted by the President of the Senate. There is no role for the Senate to participate in choosing the President.

45. Third, the Electoral Count Act eliminates entirely the unique mechanism by which the House of Representatives under the Twelve Amendment is to choose the President, namely, where "the votes shall be taken by states, the representation for each state having one vote." U.S. CONST. amend. XII. The Electoral Count Act is silent on how the House of Representatives is to "decide" which electoral votes were cast by lawful electors.

46. Fourth, the Electoral Count Act adopts a priority rule, or "tie breaker," "if the two Houses shall disagree in respect of counting of such votes," in which case "the votes of the electors whose appointment shall have been certified by the executive of the State … shall be counted." This provision not only conflicts with the President of the Senate's exclusive authority and sole discretion under the Twelfth Amendment to decide which electoral votes to count, but also with the State Legislature's exclusive and plenary authority under the Electors Clause to appoint the Presidential Electors for their State.

47. The Electoral Count Act is unconstitutional because it exceeds the power of Congress to enact. It is well settled that "one legislature may not bind the legislative authority of its successors," United *States v. Winstar Corp.*, 518 U.S. 839, 872 (1996), which is a foundational and "centuries-old concept," *id.*, that traces to Blackstone's maxim that "Acts of parliament derogatory from the power of subsequent parliaments bind not." *Id.* (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *90). "There is no constitutionally prescribed method by which one Congress may require a future Congress to interpret or discharge a constitutional responsibility in any particular way." Laurence H. Tribe, *Erog v. Hsub and Its Disguises: Freeing* Bush v. Gore *from Its Hall of Mirrors*, 115 HARV. L. REV. 170, 267 n.388 (2001).

48. The Electoral Count Act also violates the Presentment Clause by purporting to create a type of bicameral order, resolution, or vote that is not presented to the President. *See* U.S.

CONST. art. I, § 7, cl. 3 ("Every Order, Resolution, or Vote, to Which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.")

49. The House and Senate cannot resolve the issues that the Electoral Count Act asks them to resolve without either a supermajority in both houses or presentment. The Electoral Count Act similarly restricts the authority of the House of Representatives and the Senate to control their internal discretion and procedures pursuant to Article I, Section 5 which provides that "[e]ach House may determine the Rules of its Proceedings …" U.S. CONST. art. I, § 5, cl. 2.

50. Further, the Electoral Count Act improperly delegates tie-breaking authority to State executives (who have no agency under the Electors Clause or election amendments) when a State presents competing slates that Congress cannot resolve, or when an objection is presented to a particular slate of electors.

51. The Electoral Count Act also violates the non-delegation doctrine, the separation-of-powers and anti-entrenchment doctrines. *See generally* Chris Land & David Schultz, *On the Unenforceability of the Electoral Count Act*, 13 Rutgers J.L. & Pub. Policy 340, 364-377 (2016).

JUSTICIABILITY AND JURISDICTION

52. **This Court Can Grant Declaratory Judgment in a Summary Proceeding.** This Court has the authority to enter a declaratory judgment and to provide injunctive relief pursuant to Rules 57 and 65 of the Federal Rules of Civil Procedure and 28 U.S.C. §§ 2201 and 2202. The court may order a speedy hearing of a declaratory judgment action. Fed. Rules Civ. Proc. R. 57,

Advisory Committee Notes. A declaratory judgment is appropriate when it will "terminate the controversy" giving rise to the proceeding. *Id.* Inasmuch as it often involves only an issue of law on undisputed or relatively undisputed facts, it operates frequently as a summary proceeding, justifying docketing the case for early hearing as on a motion. *Id.*

53. As described above, Plaintiffs' claims involve legal issues only – specifically, whether the Electoral Count Act violates the Twelfth Amendment of the U.S. Constitution – that do not require this court to resolve any disputed factual issues.

54. Moreover, the factual issues related to the justiciability of Plaintiffs' claims are not in dispute. To assist this Court to grant the relief on the expedited basis requested herein, Plaintiffs address a number of likely objections to this Court's jurisdiction and the justiciability of Plaintiffs' claims that may be raised by Defendant.

55. **Plaintiffs Have Standing.** Plaintiffs have standing as including a Member of the House of Representatives, Members of the Arizona Legislature, and as Presidential Electors for the State of Arizona.

56. Prior to December 14, 2020, Plaintiff Arizona Electors had standing under the Electors Clause as candidates for the office of Presidential Elector because, under Arizona law, a vote cast for the Republican Party's President and Vice President is cast for the Republican Presidential Electors. *See* ARS § 16-212. Accordingly, Plaintiff Arizona Electors, like other candidates for office, "have a cognizable interest in ensuring that the final vote tally reflects the legally valid votes cast," as "[a]n inaccurate vote tally is a concrete and particularized injury to candidates such as the Electors." *Carson v. Simon*, 978 F.3d 1051, 1057 (8th Cir. 2020) (affirming that Presidential Electors have Article III and prudential standing under Electors Clause). *See also Wood v. Raffensperger*, No. 20-14418, 2020 WL 7094866, *10 (11th Cir. Dec. 5, 2020) (affirming

that if Plaintiff voter had been a candidate for office "he could assert a personal, distinct injury" required for standing); *Trump v. Wis. Elections Comm'n*, No. 20-cv-1785, 2020 U.S. Dist. LEXIS 233765 at *26 (E.D. Wis. Dec. 12, 2020) (President Trump, "as candidate for election, has a concrete particularized interest in the actual results of the election.").

57. But for the alleged wrongful conduct of Arizona executive branch and Maricopa County officials under color of law, by certifying a fraudulently produced election result in Mr. Biden's favor, the Plaintiff Arizona Electors would have been certified as the presidential electors for Arizona, and Arizona's Governor and Secretary of State would have transmitted uncontested votes for Donald J. Trump and Michael R. Pence to the Electoral College. The certification and transmission of a competing slate of Biden electors has resulted in a unique injury that only Plaintiff Arizona Electors could suffer, namely, having a competing slate of electors take their place and their votes in the Electoral College.

58. The upcoming January 6, 2021 Joint Session of Congress provides further grounds of standing for the requested declaratory judgment that the Electoral Count Act is unconstitutional. Then, Plaintiffs are certain or nearly certain to suffer an injury-in-fact caused by Defendant Vice President Pence, acting as Presiding Officer, if Defendant ignores the Twelfth Amendment and instead follows the procedures in Section 15 of the Electoral Count Act to resolve the dispute over which slate of Arizona electors is to be counted.

59. The Twelfth Amendment gives Defendant exclusive authority and sole discretion as to which set of electors to count, or not to count any set of electors; if no candidate receives a majority of electoral votes, then the President is to be chosen by the House, where "the votes shall be taken by States, the representation from each state having one vote." U.S. CONST. amend. XII. If Defendant Pence instead follows the procedures in Section 15 of the Electoral Count Act,

Plaintiffs' electoral votes will not be counted because (a) the Democratic majority House of Representatives will not "decide" to count the electoral votes of Plaintiff Republican electors; and (b) either the Senate will concur with the House not to count their votes, or the Senate will not concur, in which case, the electoral votes cast by Biden's electors will be counted because the Biden slate of electors was certified by Arizona's executive.

60. It is sufficient for the purposes of declaratory judgment that the injury is threatened. The declaratory and injunctive relief requested by Plaintiffs "may be made before actual completion of the injury-in-fact required for Article III standing," namely, the application of Section 15 of the Electoral Count Act, rather than the Twelfth Amendment to resolve disputes over which of two competing slates of electors to count "if the plaintiff can show an actual present harm or significant possibility of future harm to demonstrate the need for pre-enforcement review." 10 FED. PROC. L. ED. § 23.26 ("Standing to Seek Declaratory Judgment") (citations omitted).

61. Plaintiffs have demonstrated above that this injury-in-fact is to occur at the January 6, 2021 Joint Session of Congress, and they seek the requested declaratory and injunctive relief "only in the last resort, and as a necessity in the determination of a vital controversy." *Id.*

62. **Plaintiffs Present a Live "Case or Controversy."** Plaintiffs' claims present a live "case or controversy" with the Defendant, rather than hypothetical or abstract dispute, that can be litigated and decided by this Court through the requested declaratory and injunctive relief. Here there is a clear threat of the application of an unconstitutional statute, Section 15 of the Electoral Count Act, which is sufficient to establish the requisite case or controversy. *See, e.g., Navegar, Inc. v. U.S.*, 103 F.3d 994, 998 (D.C. Cir. 1997) ("the threat of prosecution provides the foundation of justiciability as a constitutional and prudential matter, and the Declaratory Judgments Act provides the mechanism for seeking pre-enforcement review in federal court.").

63. First, the events of December 14, 2020, gave rise to two competing slates of electors for the State of Arizona: the Plaintiff Arizona Electors, supported by Arizona State legislators (as evidenced by the December 14, 2020 Joint Resolution and the participation of Arizona legislator Plaintiffs), who cast their electoral votes for President Trump and Vice President Pence, and one certified by the Arizona state executives who cast their votes for former Vice President Biden and Senator Harris. Second, the text of the Twelfth Amendment of the Constitution expressly commits to the Defendant Vice President Pence, acting as the President of the Senate and Presiding Officer for the January 6, 2021 Joint Session of Congress, the authority and discretion to "count" electoral votes, *i.e.*, deciding in his sole discretion as to which one of the two, or neither, set of electoral votes shall be counted. The Electoral Count Act similarly designates Defendant as the Presiding Officer responsible for opening and counting electoral votes, but sets forth a different set of procedures, inconsistent with the Twelfth Amendment, for deciding which of two or more competing slates of electors and electoral votes, or neither, shall be counted.

64. Accordingly, a controversy presently exists due to: (1) the existence of competing slates of electors for Arizona and the other Contested States, and (2) distinct and inconsistent procedures under the Twelfth Amendment and the Electoral Count Act to determine which slate of electors and their electoral votes, or neither, shall be counted in choosing the next President. Further, this controversy must be resolved at the January 6, 2021 Joint Session of Congress. Finally, the Constitution expressly designates Defendant Pence as the individual who decides which set of electoral votes, or neither, to count, and the requested declaratory judgment that the procedures under Electoral Count Act are unconstitutional is necessary to ensure that Defendant Pence counts electoral votes in a manner consistent with the Twelfth Amendment of the U.S. Constitution.

65. The injuries that Plaintiffs assert affect the procedure by which the status of their votes will be considered, which lowers the thresholds for immediacy and redressability under this Circuit's and the Supreme Court's precedents. *Nat'l Treasury Employees Union v. U.S.,* 101 F.3d 1423, 1428-29 (D.C. Cir. 1996); *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 571-72 & n.7 (1992). Similarly, a plaintiff with concrete injury can invoke Constitution's structural protections of liberty. *Bond v. United States*, 564 U.S. 211, 222-23 (2011).

66. **Plaintiffs' Claims Are Ripe for Adjudication.** Plaintiffs' claims are ripe for the same reasons that they present a live "case or controversy" within the meaning of Article III. "[T]he ripeness doctrine seeks to separate matters that are premature for review because the injury is speculative and may never occur from those cases that are appropriate for federal court action." *Roark v. Hardee LP v. City of Austin*, 522 F.3d 533, 544 n.12 (5th Cir. 2008) (*quoting* ERWIN CHEMERINSEY, FEDERAL JURISDICTION § 2.4.18 (5th Ed. 2007)). As explained above, the facts underlying the justiciability of Plaintiffs' claims are not in dispute. Further, it is certain or nearly certain that Plaintiffs will suffer an injury-in-fact at the January 6, 2021 Joint Session of Congress, if Defendant Pence disregards the exclusive authority and sole discretion granted to him under the Twelfth Amendment to "count" electoral votes, and instead follows the conflicting and unconstitutional procedures in Section 15 of the Electoral Count Act, pursuant to which Plaintiffs' electoral votes will be disregarded in favor of the competing electors for the State of Arizona.

67. **Plaintiffs' Claims Are Not Moot.** Plaintiffs seek prospective declaratory judgment that portions of the Electoral Count Act are unconstitutional and injunctive relief prohibiting Defendant from following the procedures in Section 15 thereof that authorize the House and Senate jointly to resolve disputes regarding competing slates of electors. This prospective relief would apply to Defendants' future actions at the January 6, 2021 Joint Session

of Congress. The requested relief thus is not moot because it is prospective and because it addresses an unconstitutional "ongoing policy" embodied in the Electoral Count Act that is likely to be repeated and will evade review if the requested relief is not granted. *Del Monte Fresh Produce v. U.S.*, 570 F.3d 316, 321-22 (D.C. Cir. 2009).

COUNT I

DEFENDANT WILL NECESSARILY VIOLATE THE TWELFTH AMENDMENT AND THE ELECTORS CLAUSE OF THE UNITED STATES CONSTITUTION IF HE FOLLOWS THE ELECTORAL COUNT ACT.

68. Plaintiffs reallege all preceding paragraphs as if fully set forth herein.

69. The Electors Clause states that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors" for President and Vice President. U.S. Const. art. II, §1, cl. 2 (emphasis added).

70. The Twelfth Amendment of the U.S. Constitution gives Defendant Vice President, as President of the Senate and the Presiding Officer of January 6, 2021 Joint Session of Congress, the exclusive authority and sole discretion to "count" the electoral votes for President, as well as the authority to determine which of two or more competing slates of electors for a State, or neither, may be counted, or how objections to any single slate of electors is resolved. In the event no candidate receives a majority of the electoral votes, then the House of Representatives shall have sole authority to choose the President where "the votes shall be taken by states, the representation from each state having one vote." U.S. CONST. amend. XII.

71. Section 15 of the Electoral Count Act replaces the procedures set forth in the Twelfth Amendment with a different and inconsistent set of decision making and dispute resolution procedures. As detailed above, these provisions of Section 15 of the Electoral Count Act are unconstitutional insofar as they require Defendant: (1) to count the electoral votes for a

State that have been appointed in violation of the Electors Clause; (2) limits or eliminates his exclusive authority and sole discretion under the Twelfth Amendment to determine which slates of electors for a State, or neither, may be counted; and (3) replaces the Twelfth Amendment's dispute resolution procedure which provides for the House of Representatives to choose the President under a procedure where "the votes shall be taken by states, the representation from each state having one vote" – with an entirely different procedure in which the House and Senate each separately "decide" which slate is to be counted, and in the event of a disagreement, then only "the votes of the electors whose appointment shall have been certified by the executive of the State … shall be counted." 3 U.S.C. § 15.

72. Section 15 of the Electoral Count Act also violates the Electors Clause by usurping the exclusive and plenary authority of State Legislatures to determine the manner of appointing Presidential Electors and gives that authority instead to the State's Executive.

PRAYER FOR RELIEF

73. Accordingly, Plaintiffs respectfully request that this Court issue a judgment that:

A. Declares that Section 15 of the Electoral Count Act, 3 U.S.C. §§5 and 15, is unconstitutional because it violates the Twelfth Amendment on its face, Amend. XII, Constitution;

B. Declares that Section 15 of the Electoral Count Act, 3 U.S.C. §§5 and 15, is unconstitutional because it violates the Electors Clause. U.S. CONST. art. II, § 1, cl. 1;

C. Declares that Vice-President Pence, in his capacity as President of Senate and Presiding Officer of the January 6, 2021 Joint Session of Congress, is subject solely to the requirements of the Twelfth Amendment and may exercise the

exclusive authority and sole discretion in determining which electoral votes to count for a given State;

D. Enjoins reliance on any provisions of the Electoral Count Act that would limit Defendant's exclusive authority and his sole discretion to determine which of two or more competing slates of electors' votes are to be counted for President;

E. Declares that, with respect to competing slates of electors from the State of Arizona or other Contested States, or with respect to objection to any single slate of electors, the Twelfth Amendment contains the exclusive dispute resolution mechanisms, namely, that (i) Vice-President Pence determines which slate of electors' votes shall be counted, or if none be counted, for that State and (ii) if no person has a majority, then the House of Representatives (and only the House of Representatives) shall choose the President where "the votes [in the House of Representatives] shall be taken by states, the representation from each state having one vote," U.S. CONST. amend. XII;

F. Declares that, also with respect to competing slates of electors, the alternative dispute resolution procedure or priority rule in 3 U.S.C. § 15, is null and void insofar as it contradicts and replaces the Twelfth Amendment rules above by with an entirely different procedure in which the House and Senate each separately "decide" which slate is to be counted, and in the event of a disagreement, then only "the votes of the electors whose appointment shall have been certified by the executive of the State … shall be counted," 3 U.S.C. § 15;

G. Enjoins the Defendant from executing his duties on January 6th during the Joint Session of Congress in any manner that is insistent with the declaratory relief set forth herein, and

H. Issue any other declaratory judgments or findings or injunctions necessary to support or effectuate the foregoing declaratory judgment.

74. Plaintiffs have concurrently submitted a motion for a speedy summary proceeding under FRCP Rule 57 to grant the relief requested herein ***as soon as practicable***, and for emergency injunctive relief under FRCP Rule 65 thereof consistent with the declaratory judgment requested herein on that same date.

Dated: December 27, 2020

Respectfully submitted,

/s/ William Lewis Sessions

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A JOINT RESOLUTION OF THE 54TH LEGISLATURE,

STATE OF ARIZONA

TO

THE 116TH CONGRESS, OFFICE OF THE PRESIDENT OF THE SENATE, PRESIDING.

WHEREAS, it is the constitutional and legal obligation of the Legislature of the State of Arizona to ensure that the state's presidential electors truly represent the will of the voters of Arizona; and

WHEREAS, pursuant to the direction of Congress as set forth in United States Code, title 3, section 1 as authorized by Article II, section 1, clause 4 of the Constitution of the United States, and state law adopted pursuant thereto, Arizona conducted an election for presidential electors on the Tuesday next after the first Monday in November of 2020—that is, on November 3, 2020; and

WHEREAS, that election was marred by irregularities so significant as to render it highly doubtful whether the certified results accurately represent the will of the voters; and

WHEREAS, Congress has further directed in U.S. Code, title 3, section 2 that when a state "has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day in such manner as the legislature of such State may direct"; and

EXHIBIT A

WHEREAS, that provision implicitly recognizes that Article II, Section 1, Clause 2 of the U.S. Constitution grants to each state legislature, with stated limitations, the sole authority to prescribe the manner of appointing electors for that state; and

WHEREAS, the United States Supreme Court and other courts have explained that when a state legislature directs the manner of appointing electors, it does so pursuant to a grant of authority from the U.S. Constitution rather than by reason of any state constitutional or other legal provision; that this authority may be exercised by the legislature alone without other aspects of the normal lawmaking process; and that the state legislature's authority over the appointment of presidential electors is plenary and may be resumed at any time; and

WHEREAS, because U.S. Code, title 3, section 7 mandates that all presidential electors vote for President and Vice President of the United States on December 14, 2020, it is impossible to pursue the Legislature's preferred course of action, which would be for Arizona's voters to participate in a new and fair and free presidential election before that date; and

WHEREAS, in view of the facts heretofore recited, the Legislature is required to exercise its best judgment as to which slate of electors the voters prefer; and

WHEREAS, legal precedent exists where in 1960 the State of Hawaii sent an alternate slate of electors while the Presidential election was still in question in order to meet the deadline of selecting electors, and upon recount the alternate slate of electors' ballots were ultimately counted; and

WHEREAS, the undersigned have an obligation to find the truth. For this reason, on several occasions since November 3, we state lawmakers have requested fact-finding hearings to include a comprehensive and independent forensic audit. At this time, no such audit has been authorized. This leaves the uncertainty of the election results in a state that requires further investigation and resolution; and

WHEREAS, the Senate Judiciary standing committee today called for a forensic audit of various election irregularities, ongoing litigation is currently active, and there are unresolved disputes by both the Legislature and at least one Presidential campaign, rendering the election inconclusive as of date of signing of this letter,

THEREFORE,

Be it resolved by the undersigned Legislators, members of the Arizona House and Senate, request that the alternate 11 electoral votes be accepted for to Donald J. Trump or to have all electoral votes nullified completely until a full forensic audit can be conducted. Be it further resolved that the United States Congress is not to consider a slate of electors from the State of Arizona until the Legislature deems the election to be final and all irregularities resolved

Signed this day, 14 December, 2020.

Senator Elect Kelly Townsend
Legislative District 16

Representative Bret Roberts
Legislative District 11

Senator Paul Boyer
Legislative District 20

Representative Kevin Payne
Legislative District 21

Representative Mark Finchem
Legislative District 11

Senator David Farnsworth
Legislative District 16

Senator Sonny Borrelli
Legislative District 5

Representative Leo Biasiucci
Legislative District 5

Representative Anthony Kern
Legislative District 20

Representative David Cook
Legislative District 8

Senator Sylvia Allen
Legislative District 15

Representative John Fillmore
Legislative District 16

Senator Elect Nancy Barto
Legislative District 15

Representative Travis Grantham
Legislative District 12

Majority Leader Warren Petersen
Legislative District 12

Representative Walter Blackman
Legislative District 6

Representative Steve Pierce
Legislative District 1

Representative Shawnna Bolick
Legislative District 20

Representative Tony Rivero

Representative Noel Campbell

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Case No. _____

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PENNSYLVANIA VOTERS ALLIANCE
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GEORGIA VOTERS ALLIANCE
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ELECTION INTEGRITY FUND
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REPRESENTATIVE JEFF L. MURSAU
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SENATOR WILLIAM T. LIGON
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SENATOR BRANDON BEACH
3100 Brierfield Road
Alpharetta, GA 30004

Plaintiffs,

v.

VICE PRESIDENT MICHAEL RICHARD PENCE,
in his official capacity as President of the United States Senate,
Office of the Vice President
1600 Pennsylvania Avenue, N.W.
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U.S HOUSE OF REPRESENTATIVES,
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Washington, DC 20004;

U.S. SENATE,
U.S. Capitol
First St SE
Washington, DC 20004;

ELECTORAL COLLEGE,
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First St SE
Washington, DC 20004;

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SENATE MAJORITY LEADER JAKE CORMAN
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SPEAKER LEE CHATFIELD OF THE MICHIGAN
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SPEAKER DAVID RALSTON OF THE GEORGIA HOUSE
OF REPRESENTATIVES,
in his official capacity,
332 State Capitol
Atlanta, Georgia 30334;

PRESIDENT PRO TEMPORE BUTCH MILLER OF THE
GEORGIA SENATE,
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321 State Capitol
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GOVERNOR DOUG DUCEY OF ARIZONA,
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Phoenix, Arizona 85007;

SPEAKER RUSSELL BOWERS OF THE
ARIZONA HOUSE OF REPRESENTATIVES,
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Room 223
Phoenix, Arizona 85007; and

SENATE MAJORITY LEADER RICK GRAY
OF THE ARIZONA SENATE,
in his official capacity,
1700 West Washington
Room 301
Phoenix, Arizona 85007,

Defendants.

COMPLAINT

The above-named Plaintiffs Wisconsin Voters Alliance, Pennsylvania Voters Alliance, Georgia Voters Alliance, Election Integrity Fund, Arizona Election Integrity Alliance, Lynie Stone, Baron Benham, Debi Haas, Brenda Savage, Matthew Dadich, Leah Hoopes, Ron Heuer, Richard W. Kucksdorf, Debbie Jacques, John Wood, Sonny Borrelli, Warren Peterson, Matthew Maddock,

Daire Rendon, David Steffen, Jeff L. Mursau, William T. Ligon and Brandon Beach, for their complaint allege as follows:

INTRODUCTION

A. State Legislatures are Prohibited from Fulfilling Their Constitutional Responsibility.

This lawsuit seeks protection of voters' rights in Presidential elections. Voters in Presidential elections have a constitutional right to have their respective state legislatures meet after the election and certify their votes and, based on the votes, certify the Presidential electors whose votes are counted in Congress to elect the President and Vice President.

In drafting Article II, the Framers of the Constitution reasoned state legislatures should select Presidential electors so as "to afford as little opportunity as possible to tumult and disorder" and to place "every practicable obstacle [to] cabal, intrigue, and corruption," including "foreign powers" that might try to insinuate themselves into our elections.[1]

Article II limited Congress's role in selecting the President and provided no constitutional role for Governors. Yet, at present state legislatures are unable to meet. This inability to meet has existed from election day and continues through various congressionally set deadlines for the appointment of presidential electors and the counting of presidential elector votes. The states legislatures of Pennsylvania, Michigan, Wisconsin, Georgia and Arizona ("Defendant States") are unable to review the manner in which the election was conducted, are prevented from exercising their investigative powers and are unable to vote, debate or as a body speak to the conduct of the election. In sum, State legislatures are impotent to respond to what happened in the November 3, 2020 election.

[1] Hamilton, Alexander. Federalist No. 68, at 410-11 (C. Rossiter, ed. 1961).

This impotency is caused by the ministerial functions of Congress and the Vice President regarding the counting of the Presidential Elector's votes and also by state law prohibiting the legislative body from meeting without a supermajority or governor or leadership agreement during a time they can respond to what happened in the election. Accordingly, even if the state legislatures were aware of clear fraud by the executive branch – the state legislatures could not meet unless a supermajority, or a governor, or legislative leadership agreed they should meet.

This wholesale delegation of legislative authority operates contrary to the Constitution by inviting "cabal, intrigue and corruption" rather than operating to prevent the same. State legislative bodies have been relegated to observing the ministerial functions of a small group of executive officials who have refused various requests by legislators to be called into special session. Consequently, the legislative bodies as a whole of Defendant States have not engaged in any open discussion, review, investigation, or debate regarding the 2020 general election.

B. A Cabal of Public-Private Partnerships Directed the Manner of the Election Contrary to State Law Creating Disorder the State Legislatures were Unable to Address.

The management of elections is a core government function of Congress and state legislatures whose responsibilities are constitutionally defined.[2] "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."[3]

This is especially so when state legislatures have abrogated their responsibilities through the improper delegation of their authority and when a cabal of state and local executives have partnered with private interests to undermine state statutes and plans designed to protect the integrity of the election.

[2] U.S. Const. Art. II, Section 1, Cl. 1; U.S. Const. Art. 4, Section 1, Cl. 1.
[3] *Johnson v. FCC*, 829 F.2d 157, 163 (D.C. Cir. 1987).

"Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy"[4] and due to the wholesale delegation of legislative responsibility only judicial action restoring legislative authority can check unlawful conduct by the involved state executives.

C. Unprecedented Private Monies Purchased Local Election Offices and Dictated Election Management Encouraging the Evasion of State Laws and Government Partisan Involvement.

On March 27, 2020 President Trump signed into law the Coronavirus Aid, Relief, and Economic Security Act (CARES) which provided $400 million to states to manage the 2020 elections during the pandemic.[5] This funding joined previous monies provided by the Help America Vote Act (HAVA) to afford states sufficient federal funding to assist in managing the election.

The CARES Act funding, however, was exceeded by one individual who passed $400 million to local and state executives through a private charity that dictated how the recipient local government officials would manage the election.[6]

These dictates included the unprecedented use of drop boxes, mobile ballot retrieval, the location and number of polling places or satellite locations, and the consolidation of urban counting centers. Election judges, inspectors and poll workers were paid by these private funds and the tabulating machines purchased with private monies.[7]

The private funds flowed through the Center for Tech and Civic Life (CTCL) and were targeted to facilitate voter turnout of certain demographics in geographic areas dominated by one political

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[4] *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006).
[5] Coronavirus Aid, Relief & Econ. Security Act, Pub. L. 116-136, §15003, 134 Stat. 281, 531.
[6] *Mark Zuckerberg donated $400M to help local election offices during pandemic*, INDEPENDENT, Nov. 11, 2020. https://www.independent.co.uk/news/world/americas/mark-zuckerberg-donation-election-facebook-covid-b1721007.html.
[7] *Id.*

party.[8] CTCL recruited specific cities to apply for the grants and provided grants to select cities to assist those cities in their grant applications.[9]

The funding to local election officials in Democratic strongholds was provided simultaneously with executive decisions to close in-person voting locations in areas not receiving CTCL grants. The CTCL funding and local executive official acceptance created a two-tier election system in which geographic areas benefitting one political party were flush with cash used to increase voter opportunities and turnout, including one city's no-bid purchase of a $250,000 Winnebago for local voter turnout efforts. The geographic areas dominated by the other party, however, experienced greater difficulty voting due to COVID emergency orders.[10]

For example, CTCL provided funds to 100% of the Pennsylvania counties carried by Hillary Clinton in 2016, including over $10 million to Philadelphia County.[11] The charity required the heavily Democratic county to establish 800 "satellite" voting locations and implement the drop box collection of ballots. In neighboring Democratic Delaware County, Pennsylvania one drop box was available for every 4,000 voters and one drop box was placed for every four-square-miles.

On the other hand, President Trump carried 59 of 67 Pennsylvania counties in 2016. CTCL contributed to 22% of those counties providing much smaller grants. There was one drop box for every 72,000 voters and every 1,159 square-miles in those counties.

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[8] *See, e.g.,* (city of Philadelphia grant communications), *Unconstitutional? Wisconsin city election officials sought private money to register voters,* https://justthenews.com/politics-policy/elections/documents-show-wi-municipal-authorities-sought-use-grant-money-voter; City of Green Bay – Center for Tech and Civic Life grant agreement (July 24, 2020).

[9] *See* Approval by Center for Tech and Civic Life of grant request for City of Racine, App. 247-48; *see also* Petition for Permanent Injunction and Declaratory Judgment on behalf of the State of Louisiana, App. 1504-1536.

[10] *See* Grant Spending Approval by City of Racine for Purchase of Winnebago, App. 1492; *see also* Carlson Report, App. 31-38.

[11] *See* Approval by Center for Tech and Civic Life of grant request for City of Philadelphia, App. 1493-1503.

CTCL funding produced similar results in the other Defendant States. Moreover, the use of drop boxes materially breached the chain of custody of ballots. For example, ballot transfer forms in Cobb County, Georgia show 78% of the 89,000 absentee ballots were not transported as Georgia election rules require.[12] Additionally, the use of drop boxes and changes in the signature comparison requirements for absentee ballots were approved by the Georgia Secretary of State without legislative approval.[13]

The presence of CTCL funds in other states facilitated conduct contrary to state law as well. In Wisconsin, at CTCL's request, five cities used CTCL seed monies to draft the "Wisconsin Safe Voting Plan 2020," so named despite the failure of the city leaders to include any other Wisconsin election officials. The plan, and communications relating to the plan, provided for extensive voter turnout efforts, considered state voter identification laws an obstacle and required the use of drop boxes, curbside voting and salaries for additional staffing."[14]

CTCL funding was used to "dramatically expand voter and community education and outreach, particularly to historically disenfranchised residents."[15]

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[12] *Ballot Transfer Forms Show 78 Percent of 89,000 Absentee Ballots from Drop Boxes in Cobb County, Georgia Were Not Transported to the Registrar 'Immediately' As the Election Code Requires – The Georgia Star News, https://georgiastarnews.com/2020/12/11/ballot-transfer-forms-show-78-percent-of-89000-absentee-ballots-from-drop-boxes-in-cobb-county-were-not-transported-to-registrar-immediately-as-election-code-rule-requires/*.

[13] *Georgia Secretary of State and State Election Board Changed Absentee Ballot Signature Verification and Added Drop Boxes Without State Legislature's Approval," https://georgiastarnews.com/2020/12/16/georgia-secretary-of-state-and-state-election-board-changed-absentee-ballot-signature-verification-and-added-drop-boxes-without-state-legislatures-approval/*.

[14] *Wisconsin Safe Voting Plan 2020, at 4* (submitted to the Center for Tech and Civic Life by the cities of Green Bay, Kenosha, Madison, Milwaukee and Racine)(June 15, 2020). The report states "[v]oting absentee by mail has been complicated by a fairly recent imposition of state law requiring voters to provide an image of their valid photo ID prior to first requesting an absentee ballot." *Id.*, at 6. The CTCL funding provided "voter navigators" and professional" witnesses to increase turnout and $2.5 million to "overcome these particular barriers." *Id.* at 8-11. The cities received over $2 million for additional staffing, including pay for poll workers, election "chief inspectors." *Id.*, at 11-12 and 18-19. An additional $216,500 was provided for drop boxes. *Id.*, at 10-11.

[15] *Id.*, at 13.

CTCL funding enabled urban areas in defendant states to consolidate counting facilities. This consolidation precipitated the exclusion of Republican officials from the ability to view the management, handling and counting of absentee and mail-in ballots.

Election transparency is a prophylactic to fraud. Each defendant state has laws requiring members of both major political parties be present in the location of the receipt, management and counting of ballots. Such common-sense policy is necessary due to the significant afforded election officials.

Local election officials determine the ballots to be received, the ballots eligible to be counted and supervise the count of the ballots. Legislatures have wisely determined the best way to bring accountability to such decisions is to require the participation, or at least the observation, of both political parties.

Yet, these laws were not followed. In Wayne County, Michigan, CTCL paid poll workers boarded up the windows to the counting facility to prevent observation.[16] Inside Detroit's *TCF Center*, election inspectors were receiving, counting and "curing" absentee ballots. The "curing" process involves discerning the voting intent of an absent voter and reflecting that intent on a newly ballot which is then cast and counted.

Michigan law requires representatives of both major political parties to view the process and then sign a form stating the "curing" was completed consistent with voter intent.[17] Yet, Republican inspectors were not appointed in Wayne County. Moreover, Republican poll watchers were kept at such a distance in the cavernous TCF Center they were unable to view the conduct of the inspectors

[16] *There's a Simple Reason Workers Covered Windows at a Detroit Vote-Counting Site,* THE NEW YORK TIMES (Nov. 5, 2020)(https://www.nytimes.com/2020/11/05/technology/michigan-election-ballot-counting.html, retrieved Dec. 20,2020)(windows covered to prevent "photographs").
[17] *See Mich. Comp. Laws* §168.674(2)(Thomson/West 2006).

at the 134 counting tables operating in the center.[18] City election officials later argued that allowing republicans in the "place" of the counting satisfied state law despite the "place" these poll watchers were required to stand was so remote they could not observe the activity of the democrat party officials.

Urban election officials in other Defendant States which received CTCL funding also restricted or prohibited Republican poll watchers from viewing the receipt, management, curing and counting of ballots.[19] Local election officials in each state represented here received significant funds from CTCL and each also engaged in election improprieties with local officials acting contrary to state law.

State hostility to Republican participation in reviewing the management of the 2020 general election manifested in threats to Republican officeholders and their counsel in Michigan. On December 14, 2020 Governor Gretchen Whitmer mobilized the state police to secure the state capitol to prevent Republican legislators entry to the building while allowing Democrat legislators to enter.[20]

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[18] *See, e.g., Watch, Detroit Absentee Ballot Counting Chaos As Workers Block Windows, Bar Observers*, BREITBART (Nov. 4, 2020)(https://www.breitbart.com/politics/2020/11/04/watch-detroit-absentee-ballot-counting-chaos-as-workers-block-windows-bar-observers/, retrieved Dec. 12, 2020); *Chaos erupts at TCF Center as Republican vote challengers cry foul in Detroit*, DETROIT FREE PRESS (Nov. 4, 2020)(https://www.freep.com/story/news/politics/elections/2020/11/04/tcf-center-challengers-detroit-michigan/6164715002/, retrieved Dec. 20, 2020).

[19] *See, e.g.,* Affidavit of Gregory Stenstrom (date); 'The Steal is On' in Pennsylvania: Poll Watchers Denied Access, Illegal Campaigning at Polling Locations, Breitbart (Nov. 3, 2020)(https://www.breitbart.com/politics/2020/11/03/the-steal-is-on-in-pennsylvania-poll-watchers-denied-access-illegal-campaigning-at-polling-locations/, retrieved Dec. 20, 2020);

[20] Michigan governor Gretchen Whitmer and legislative leadership initially claimed COVID-19 necessitated the closing of the Michigan capitol building on December 14, 2020, the congressional deadline for the certification of the presidential electors. *Shirkey: 'Bad Judgment' to keep Michigan Capitol closed during electors meeting, https://www.detroitnews.com/story/news/politics/2020/12/14/shirkey-bad-judgment-capitol-closed-during-elector-meeting/6536863002/*. Later, Governor Whitmer claimed the closing occurred due to a security threat. *Michigan State House, Senate close over 'threats of violence' during Electoral College Meeting,* December 14, 2020, https://www.usatoday.com/story/news/politics/2020/12/14/michigan-legislative-buildings-

Moreover, Democrat Michigan Attorney General Dana Nessel announced she was criminally investigating Republican legislators who voiced concerns regarding the election outcome and threatened those officials with criminal prosecution for "bribery, perjury, and conspiracy."[21]

General Nessel also tweeted a claim "GOP efforts to overturn President Trump's electoral defeat…and [t]hreats against election officials are domestic terrorism. My message to them is 'We are looking for you. We will find you. You will be held accountable."[22] The Michigan State Police whom the Governor ordered to bar Republicans from entering the capitol on the fourteenth[23], however, announced they "did not recommend the closure of legislative offices ahead of the Electoral College meeting and they were not aware of 'any credible threats of violence related to Michigan…."[24]

General Nessel continued her threats with calls for ethics investigations of Republican attorneys. She also chilled free speech during the election by issuing "cease-and-desist letters" to political organizations engaged in political speech.[25]

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closed-security-concerns-covid-19/6536919002/, see also https://www.npr.org/sections/biden-transition-updates/2020/12/14/946243439/michigan-gov-whitmer-addresses-security-threat-to-electoral-college-vote. Despite both claims, Democrats were allowed in the state capitol on December 14, 2020 while republican legislators were prohibited from entering. https://www.prnewswire.com/news-releases/got-freedom-video-shows-police-preventing-gop-electors-in-michigan-from-performing-lawful-duties-301192474.html. The Michigan State Police, however, revealed that they acted on the Governor's orders and that the state police were not aware of any credible threat to the capitol or its occupants. https://nbc25news.com/news/local/michigan-house-and-senate-offices-closed-tomorrow-because-of-safety-concerns.

[21] *Michigan attorney general ponders criminal probes of state and local officials who bend to Trump's will on overturning election results, https://www.washingtonpost.com/politics/michigan-attorney-general-canvassing-board-lawmakers/2020/11/20/87d19ce6-2b65-11eb-8fa2-06e7cbb145c0_story.html.*

[22] https://twitter.com/dananessel/status/1338494176883847170.

[23] *Live Update: Denied to Perform Constitutional Duty in Michigan*, GOT FREEDOM? (December 14, 2020)(https://www.youtube.com/watch?v=6nH6ZvfAD2w, (video of entry denial)).

[24] *State Police say there were not aware of any credible threats to the capitol on Monday, https://nbc25news.com/news/local/michigan-house-and-senate-offices-closed-tomorrow-because-of-safety-concerns.*

[25] *Nessel issues cease-desist letters to those spreading misinformation during election, https://www.wxyz.com/news/election-2020/nessel-issues-cease-and-desist-letters-to-those-spreading-misinformation-during-election.*

Accordingly, the Plaintiffs who are voter groups, voters and state legislators in Pennsylvania, Michigan, Wisconsin, Georgia and Arizona file this complaint seeking to restore the constitutional authority and duty of the legislative bodies of their respective states in the selection of presidential electors to correct "the tumult and disorder"[26] and lawlessness

The federal laws regarding the Presidential electors, codified at 3 U.S.C. §§ 5, 6 and 15 are constitutionally unauthorized and violate Presidential voters' rights to state legislative post-election certification. Article II of the Constitution establishes a non-delegable process where at least state legislative post-election certification of the state's Presidential electors is constitutionally required for Presidential elector votes to be counted in the election of the President and Vice President. In contradiction, the federal laws, particularly 3 U.S.C. §§ 5 and 6, establish a different process where Presidential electors are designated by the Governor of each Defendant State without state legislative post-election certification. Then, 3 U.S.C. § 15 authorizes the Vice President and Congress to count those votes in contradiction of the constitutional obligation to only count votes of Presidential electors who have state legislative post-election certification.

Further, the Defendant States have legally acquiesced to the federal laws by enacting statutes transferring post-election certification from the state legislatures to state executive branch officials: Ariz. Rev. Stat. § 16-212 (B) (Arizona Secretary of State), Ga. Code Ann. § 21-2-499 (B) (Georgia Secretary of State and Governor), Mich. Comp. Laws Ann. § 168.46 (Michigan State Board of Canvassers and Governor), Wis. Stat. § 7.70 (5) (b) (Wisconsin Elections Commission); and 25 Pa. Cons. Stat. § 3166 (Secretary of Commonwealth and Governor). These state laws also violate Article II which establishes the state legislative prerogative to post-election certification of Presidential votes and of Presidential electors.

[26] Federalist No. 68, at 410-11.

Plaintiffs hope a constitutional crisis can be avoided. There is time before the January 20, 2021 inaugural of the President and Vice President for the Court to require the state legislatures to meet and consider post-election certification of the Presidential electors. The people's representatives comprising the state legislatures of the respective states must be afforded the opportunity to act as a whole to fulfill their constitutional responsibilities and to restore faith in the election process.

Moreover, this Court has continuing jurisdiction, after this Presidential election, because the federal laws and state laws violating Article II have continuing force applied to future Presidential elections.

JURISDICTION

1. The Court has jurisdiction under 28 U.S.C § 1331 (federal question), 28 U.S.C. § 1343 (civil rights and elective franchise), 28 U.S.C. § 2201 (declaratory judgment), 28 U.S.C. § 1651 ("All Writs Act"), 42 U.S.C. § 1983 (civil rights) and D.C. Code § 16-3501, et seq (ouster of national officials).

2. The Court has venue under 28 U.S.C. § 1391 because many of the Defendants reside or are located in the District of Columbia and a substantial part of the events or omissions giving rise to the claim occurred or will occur there.

PARTIES

A. Plaintiffs

3. Plaintiffs Wisconsin Voters Alliance, Pennsylvania Voters Alliance, Georgia Voters Alliance, Election Integrity Forum and Arizona Election Integrity Alliance are election integrity entities and associations which have a purpose of promoting election integrity in Pennsylvania,

Wisconsin, Georgia, Michigan and Arizona, respectively. They do not support any particular candidate for any public office.

4. Plaintiffs Lynie Stone and Baron Benham are residents, voters and taxpayers of Arizona. They are members of the Arizona Election Integrity Alliance.

5. Plaintiffs Debi Haas and Brenda Savage are residents, voters and taxpayers of Michigan. They are members of the Election Integrity Forum.

6. Plaintiffs Matthew Dadich and Leah Hoopes are residents, voters and taxpayers of Pennsylvania. They are members of the Pennsylvania Voters Alliance.

7. Plaintiffs Ron Hueur, Richard W. Kucksdorf and Debbie Jacques are residents, voters and taxpayers of Wisconsin. They are members of the Wisconsin Voters Alliance.

8. Plaintiff John Wood is a resident, voter and taxpayer of Georgia. He is a member of the Georgia Voters Alliance.

9. Plaintiff Senator Sonny Borrelli member of the Arizona Senate.

10. Plaintiff Representative Warren Peterson is a member of the Arizona House of Representatives.

11. Plaintiff Representative Matthew Maddock is a member of the Michigan House of Representatives.

12. Plaintiff Representative Daire Rendon is a member of the Michigan House of Representatives.

13. Plaintiff Representative David Steffen is a member of the Wisconsin State Assembly.

14. Plaintiff Representative Jeff L. Mursau is a member of the Wisconsin State Assembly.

15. Plaintiff Senator William T. Ligon is a member of the Georgia Senate.

16. Plaintiff Senator Brandon Beach is a member of the Georgia Senate.

17. All of the individual Plaintiffs are residents, voters and taxpayers of their respective states.

18. All of the individual Plaintiffs voted in the November 3, 2020 election for President and Vice President and plan to vote in future Presidential elections.

B. Defendants

19. Vice President Michael Richard Pence is a Defendant sued in his official capacity as President of the United States Senate. As such, Pence is identified as having legal obligations under the Constitution and federal law regarding opening and counting the ballots of Presidential electors for President and Vice President.

20. The U.S House of Representatives, U.S. Senate, and Electoral College are Defendants. They are constituted under the Constitution and federal law.

21. Governor Tom Wolf of Pennsylvania is a Defendant sued in his official capacity. He has legal responsibilities under federal and state law in post-election certification of Presidential electors.

22. Speaker Bryan Carter of the Pennsylvania House of Representatives and Senate Majority Leader Jake Corman of the Pennsylvania Senate, are sued in their official capacities. They and their respective houses of their state legislature have legal responsibilities under federal and state law in post-election certification of Presidential electors.

23. Governor Gretchen Whitmer of Michigan is a Defendant sued in her official capacity. She has legal responsibilities under federal and state law in post-election certification of Presidential electors.

24. Speaker Lee Chatfield of the Michigan House of Representatives and Senate Majority Leader Mike Shirkey of the Michigan Senate are sued in their official capacities. They and their

respective houses of their state legislature have legal responsibilities under federal and state law in post-election certification of Presidential electors.

25. Governor Tony Evers of Wisconsin is a Defendant sued in his official capacity. He has legal responsibilities under federal and state law in post-election certification of Presidential electors.

26. Speaker Robin Vos of the Wisconsin State Assembly and Senate Majority Leader Howard Marklein of the Wisconsin Senate are sued in their official capacities. They and their respective houses of their state legislature have legal responsibilities under federal and state law in post-election certification of Presidential electors.

27. Governor Brian Kemp of Georgia is a Defendant sued in his official capacity. He has legal responsibilities under federal and state law in post-election certification of Presidential electors.

28. Speaker David Ralston of the Georgia House of Representatives and President Pro Tempore Butch Miller of the Georgia Senate are sued in their official capacities. They and their respective houses of their state legislature have legal responsibilities under federal and state law in post-election certification of Presidential electors.

29. Governor Doug Ducey of Arizona is a Defendant sued in his official capacity. He has legal responsibilities under federal and state law in post-election certification of Presidential electors.

30. Speaker Russell Bowers of the Arizona House of Representative and Senate Majority Leader Rick Gray of the Arizona Senate are sued in their official capacities. They and their respective houses of their state legislature have legal responsibilities under federal and state law in post-election certification of Presidential electors.

STANDING

31. As voters, the Plaintiffs have legal standing to bring these constitutional claims to ensure that Presidential elections are constitutionally conducted by Defendants.[27]

32. The Plaintiffs claim that Article II of the U.S. Constitution provides a voter a constitutional right to the voter's Presidential vote being certified as part of the state legislature's post-election certification of Presidential electors. Absence such certification, the Presidential electors' votes from that state cannot be counted by the federal Defendants toward the election of President and Vice President. Because the Plaintiffs' votes are not counted as part of the constitutionally-required state legislative post-election certification of Presidential electors, the Defendants are causing the Plaintiffs to be disenfranchised. *See Baten v. McMaster*, 967 F.3d 345, 352–53 (4th Cir. 2020) (voters who vote in Presidential elections have standing on claims of government causing disenfranchisement).

33. When Defendants violate the Constitution as it relates to Presidential elections in the Defendant, all voters in Presidential elections suffer an injury-in-fact caused by the Defendants. Voters in a Presidential election, in this instance, have an injury-in-fact different than the public because when they voted and they had an interest that the election in which they voted is constitutionally-conducted. The same is true of future elections. Finally, the Court can redress the Plaintiffs' injuries by issuing a declaratory judgment and accompanying injunction to enjoin the Defendants' unconstitutional conduct.

34. As voters, each Plaintiff has a fundamental right to vote.[28] Thus, each Plaintiff has a recognized protectable interest. As the U.S. Supreme Court has long recognized, a person's right to

[27] *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (U.S. 1992).
[28] *Reynolds v. Sims,* 377 U.S. 533, 554–55, 562 (1964).

vote is "individual and personal in nature."[29] Thus, "voters who allege facts showing disadvantage to themselves as individuals have standing to sue" to remedy that disadvantage.[30] "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."[31] "Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy."[32]

35. 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 process.[33] 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.'[34] 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."[35]

36. 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.[36] Social contract theory provided the background against which the Constitution was adopted. "Because of this social contract theory, the Framers and the public at the time of the

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[29] *Id.* 377 U.S. at 561.
[30] *Gill v. Whitford,* 138 S. Ct. 1916, 1929 (2018).
[31] *Johnson v. FCC*, 829 F.2d 157, 163 (D.C. Cir. 1987).
[32] *Purcell v. Gonzalez,* 549 U.S. 1, 4 (2006).
[33] *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.").
[34] *Burdick v. Takushi,* 504 U.S. 428, 441 (1992) *quoting Wesberry v. Sanders,* 376 U.S. 1, 17 (1964).
[35] *Id.* (citations omitted).
[36] *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).

revolution and framing conceived governments as resulting from an agreement among people to provide a means for enforcing existing rights."[37] "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.'"[38]

37. 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.[39] Here, the Defendant States' election irregularities and improprieties so exceed the razor-thin margins to cast doubt on the razor-thin margins of victory and, thus, threaten the social contract itself.

38. The same will happen in future elections too if it is not stopped.

39. 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—as a core government function—the state legislatures, required by federal law, delegated

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

[38] *Contemporary Approaches to the Social Contract,* https://plto.stanford.edu/entries/contractarianism-contemporary/ (last visited Dec. 21, 2020).

[39] "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).

post-election certification to state executive branch officials when Article II requires the state legislatures to conduct post-election certification of every voter's vote.

40. This social contract is what is personally at risk for the Plaintiffs in the outcome of the controversy. [40] 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 and local election officials violating the election laws in favor of a pre-determined result.

41. Furthermore, the voter has a compelling interest in the maintenance of a democratic system of government under the 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 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 and local election officials engaging in election irregularities and improprieties in favor of a pre-determined outcome.

42. The voters 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

[40] *Gill,* 138 S.Ct. at 1923.

Amendment,[41] those rights are infringed when the state legislatures abdicate the constitutionally-required role of post-election certification of Presidential electors.[42]

43. For federal elections, state legislatures under Article II have no authority to delegate post-election certification of Presidential electors to state executive branch officials. 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 executive branch officials.

44. 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—causing injury to the voter.

BACKGROUND

A. Legal background

45. Under the Supremacy Clause, the "Constitution, and the laws of the United States which shall be made in pursuance thereof … shall be the supreme law of the land."[43]

46. "The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the electoral college."[44]

[41] *Anderson v. Celebrezze,* 460 U.S. 780, 788–89 (1983).
[42] *Id.*
[43] U.S. Const. Art. VI, cl. 2.
[44] *Bush v. Gore*, 531 U.S. 98, 104 (citing U.S. CONST. art. II, § 1).

47. State legislatures have plenary power to set the process for appointing presidential electors: "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors."[45]

48. At the time of the Founding, most States did not appoint electors through popular statewide elections. In the first presidential election, six of the ten States that appointed electors did so by direct legislative appointment.[46]

49. In the second presidential election, nine of the fifteen States that appointed electors did so by direct legislative appointment.[47]

50. In the third presidential election, nine of sixteen States that appointed electors did so by direct legislative appointment. *Id.* at 31. This practice persisted in lesser degrees through the Election of 1860.

51. Though "[h]istory has now favored the voter," *Bush*, 531 U.S. at 104, "there is no doubt of the right of the legislature to resume the power [of appointing presidential electors] at any time, for *it can neither be taken away nor abdicated*."[48]

52. Given the State legislatures' constitutional primacy in selecting presidential electors, the ability to set rules governing the casting of ballots and counting of votes cannot be usurped by other branches of state government—nor the federal government.

53. The Framers of the Constitution decided to select the President through the Electoral College "to afford as little opportunity as possible to tumult and disorder" and to place

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[45] U.S. Const. Art. II, §1, cl. 2; *see also Bush v. Gore,* 531 U.S. at 104 ("[T]he state legislature's power to select the manner for appointing electors is plenary." (emphasis added)).
[46] *McPherson v. Blacker*, 146 U.S. 1, 29-30 (1892).
[47] *Id.* at 32.
[48] *McPherson*, 146 U.S. at 35 (emphasis added); *cf.* 3 U.S.C. § 2 ("Whenever any State has held an election for the purpose of choosing electors, and 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.").

"every practicable obstacle [to] cabal, intrigue, and corruption," including "foreign powers" that might try to insinuate themselves into our elections.[49] Federalist No. 68, at 410-11 (C. Rossiter, ed. 1961) (Madison, J.).

54. The Plaintiffs constitutional claims in this lawsuit are principally based on one sentence in Article II of the U.S. Constitution. The sentence has eighty-five words. The constitutional sentence provides:

> He shall hold his office during the term of four years, and, together with the Vice President, chosen for the same term, be elected, as follows: 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 no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

55. The Plaintiffs' claims, based on this constitutional, imperative, sentence, are that post-election certification of Presidential votes and post-election certification of Presidential electors are exclusively state legislative decisions; accordingly, Governors, federal courts and state courts have no constitutionally-permitted role in post-election certifications of Presidential votes and of Presidential electors.

56. Accordingly, the Plaintiffs claim that 3 U.S.C. § 5, 6 and 15 and state laws (such as Ariz. Rev. Stat. § 16-212 (B), Ga. Code Ann. § 21-2-499 (B), Mich. Comp. Laws § 168.46, Wis. Stat. § 7.70 (5) (b) and 25 Pa. Cons. Stat. § 3166) eviscerating these state legislative prerogatives, every four years, are unconstitutional.

57. Under Article II, Congress lacks legal authority to enact laws interfering with the state-by-state state legislative post-election certifications of Presidential votes and of Presidential electors as it has done with 3 U.S.C. §§ 5, 6 and 15. There are textual and structural arguments for

[49] *See, supra,* Note 14.

these federal statutes being unconstitutional.[50] The Plaintiffs claim that 3 U.S.C. §§ 5, 6 and 15 are unconstitutional interferences with the state legislative prerogatives guaranteed by the Constitution.

58. Analogously, under Article II, the state legislatures lack legal authority to enact state laws which are a perpetual and wholesale delegation of post-election certifications of Presidential votes and of Presidential electors to state executive branch officials—as they have done in Ariz. Rev. Stat. § 16-212 (B) (Arizona Secretary of State), Ga. Code Ann. § 21-2-499 (B) (Georgia Secretary of State and Governor), Mich. Comp. Laws Ann. § 168.46 (Michigan State Board of Canvassers and Governor), Wis. Stat. § 7.70 (5) (b) (Wisconsin Elections Commission); and 25 Pa. Cons. Stat. § 3166 (Secretary of Commonwealth and Governor).

59. Article II, and its non-delegation doctrine, left it to the state legislatures to "direct" post-election certification of Presidential electors—not to "delegate" post-election certifications, perpetually and in a wholesale fashion, to state executive branch officials as a ministerial duty. There are textual and structural arguments for these state statutes being unconstitutional. Plaintiffs claim that Ariz. Rev. Stat. § 16-212 (B), Ga. Code Ann. § 21-2-499 (B), Mich. Comp. Laws Ann. § 168.46, Wis. Stat. § 7.70 (5) (b), 25 Pa. Cons. Stat. § 3166 are unconstitutional delegation of the state legislative prerogatives of post-election certifications of Presidential votes and of Presidential electors.

60. Further, the state constitutions of the Defendant States do not require the state legislature to meet for post-election certification of the Presidential electors. Arizona's, Georgia's and Pennsylvania's Constitutions have the state legislature adjourned until January 2021.[51] Michigan's

[50] Vasan Kesavan, *Is the Electoral Count Act Unconstitutional*, 80 N.C. L. Rev. 1653, 1696-1793 (2002).
[51] Ariz. Const. Art. IV, Part 2, Sec. 3; Ga. Const. Art. III, § IV, ¶ 1(a). Pa. Const. Art. II, § 4.

and Wisconsin's Constitutions permit the state legislature to be in session, but do not require a joint session of the state legislature to affirmatively vote for Presidential post-election certifications.[52]

61. Based on this legal background, Plaintiffs claim, under the Article II, that if there is no state legislative post-election certifications of Presidential votes and of Presidential electors in the Defendant States, then those Defendant States' Presidential electors votes, not so certified, cannot be counted by the federal Defendants for President and Vice President under Article II.

B. The Defendants, except state legislatures, are involved in post-election certifications of Presidential votes and of Presidential electors or counting their ballots to elect the President and Vice President.

62. Under 3 U.S.C. §§ 5, 6 and 12, each of the Defendants, except the state legislatures, have a role to play in state post-election certifications of Presidential votes and of a state's Presidential electors or counting of the Presidential Electors' votes.

63. Under 3 U.S.C. § 15, "Congress shall be in session on the sixth day of January succeeding every meeting of electors. The Senate and House of Representatives shall meet in the Hall of the House of Representatives at the hour of 1 o'clock in the afternoon on that day."

64. Under 3 U.S.C. § 15, Vice President Michael Richard Pence is the presiding officer on January 6, 2021: "and the President of the Senate shall be their presiding officer."

65. Vice President Pence, the U.S. Senate and the U.S. House of Representatives are Defendants presume under 3 U.S.C. §§ 5 and 6, that each state's Presidential elector votes because they are designated by the Governor of each Defendant State can be counted without state legislative post-election certification.

66. 3 U.S.C. § 5 provides:

> If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or

[52] Mich. Const. Art. IV, § 13; Wis. Const. Art. IV, § 11.

> other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned.

67. 3 U.S.C. § 6 provides:

> It shall be the duty of the executive of each State, as soon as practicable after the conclusion of the appointment of the electors in such State by the final ascertainment, under and in pursuance of the laws of such State providing for such ascertainment, to communicate by registered mail under the seal of the State to the Archivist of the United States a certificate of such ascertainment of the electors appointed, setting forth the names of such electors and the canvass or other ascertainment under the laws of such State of the number of votes given or cast for each person for whose appointment any and all votes have been given or cast; and it shall also thereupon be the duty of the executive of each State to deliver to the electors of such State, on or before the day on which they are required by section 7 of this title to meet, six duplicate-originals of the same certificate under the seal of the State; and if there shall have been any final determination in a State in the manner provided for by law of a controversy or contest concerning the appointment of all or any of the electors of such State, it shall be the duty of the executive of such State, as soon as practicable after such determination, to communicate under the seal of the State to the Archivist of the United States a certificate of such determination in form and manner as the same shall have been made; and the certificate or certificates so received by the Archivist of the United States shall be preserved by him for one year and shall be a part of the public records of his office and shall be open to public inspection; and the Archivist of the United States at the first meeting of Congress thereafter shall transmit to the two Houses of Congress copies in full of each and every such certificate so received at the National Archives and Records Administration.

68. The Plaintiffs claim that the presumption is constitutionally incorrect; under Article II, Defendants Vice President Pence, the U.S. House of Representatives and the United States Senate can only open up and count Presidential elector ballots if the state legislature has affirmatively voted to certify the Presidential electors; otherwise, the votes of the Presidential electors cannot be counted. The Plaintiffs claim that the Vice President and U.S. Congress act unconstitutionally in this election and future elections when they count votes of Presidential electors where the respective state legislature has not affirmatively voted in favor of post-election certification.

69. Similarly, the Defendant States' executives, Governor Tom Wolf of Pennsylvania, Governor Gretchen Whitmer of Michigan, Governor Tony Evers of Wisconsin, Governor Brian Kemp of Georgia, and Governor Doug Ducey of Arizona under 3 U.S.C. § 6 and their respective state's laws, have designated the Presidential electors under the assumption that state executive branch certification is all that is required.[53]

70. But, Governor Tom Wolf of Pennsylvania, Governor Gretchen Whitmer of Michigan, Governor Tony Evers of Wisconsin, Governor Brian Kemp of Georgia, and Governor Doug Ducey of Arizona are constitutionally mistaken because the designated by the Governor of each Defendant State cannot cure that the Presidential electors are without state legislative post-election certification. Until the state legislature certifies the Presidential electors, the respective Governor's designation under 3 U.S.C. § 6 and their respective state's laws have no legal effect.

71. Absent the state legislative post-election certification required by Article II, the Governor's designation of Presidential electors has no legal effect because their votes cannot be counted by the Vice President, U.S. Senate and U.S. House of Representatives.

72. Finally, Article II requires the Defendants' state legislative leaders to act to vote on post-election certification of the Presidential electors. But, instead, the state legislatures violate this constitutional duty because of their state laws which are a perpetual and wholesale delegation of post-election certifications to state executive branch officials—as they have done in Ariz. Rev. Stat. § 16-212 (B) (Arizona Secretary of State), Ga. Code Ann. § 21-2-499 (B) (Georgia Secretary of State and Governor), Mich. Comp. Laws Ann. § 168.46 (Michigan State Board of Canvassers and Governor), Wis. Stat. § 7.70 (5) (b) (Wisconsin Elections Commission); and 25 Pa. Cons. Stat. § 3166 (Secretary of Commonwealth and Governor).

[53] *See* 25 Pa. Cons. Stat. § 3166; Mich. Comp. Laws Ann. § 168.46; W.S.A. § 7.70; Ga. Code Ann., § 21-2-499(b); Ariz. Rev. Stat. § 16-212.

73. The Plaintiffs claim that Article II, and its non-delegation doctrine, permanently left it to the state legislatures to "direct" post-election certifications of Presidential votes and of Presidential electors, not to delegate post-election certifications, perpetually and in a wholesale fashion, to state executive branch officials as a ministerial duty.

74. In this way, the Defendant States' legislative leaders, including Speaker Bryan Carter of the Pennsylvania House of Representatives, Senate Majority Leader Jake Corman of the Pennsylvania Senate, Speaker Lee Chatfield of the Michigan House of Representatives, Senate Majority Leader Mike Shirkey of the Michigan Senate, Speaker Robin Vos of the Wisconsin State Assembly, Senate Majority Leader Howard Marklein of the Wisconsin Senate, Speaker David Ralston of the Georgia House of Representatives, Senate President Pro Tempore Butch Miller of the Georgia Senate, Speaker Russell Bowers of the Arizona House of Representatives, and Senate Majority Leader Rick Gray of the Arizona Senate are violating their duties under Article II by not voting on post-election certification of the Presidential electors so their votes can constitutionally count.

75. State legislative post-election certifications of Presidential votes and of Presidential electors are part of constitutionally-protected voting rights. Everyone who votes—distinguishable from those who don't—have a constitutionally-protected interest in state legislative post-election certification of Presidential electors. The Defendants violate those voting rights by counting ballots of Presidential electors without the constitutionally-required state legislative post-election certification.

C. Presidential post-election court proceedings—like the 2000 *Bush v. Gore* litigation, the 2020 Texas original action and the 2020 thirty post-election lawsuits in Defendant States—are in constitutional error and unnecessarily politicize the federal and state courts in a national way.

76. The Presidential post-election court proceedings—like the 2000 *Bush v. Gore* litigation, the 2020 Texas original action and the 2020 thirty post-election lawsuits in Defendant

States—are in constitutional error and unnecessarily politicize the federal and state courts—and in a nationwide way. Under Article II, all of those Presidential post-election cases should have been dismissed for lack of jurisdiction—and the plaintiffs should have been instructed to file their Presidential election contests with their respective state legislatures.

77. The Defendant States have election contest or recount laws, which apply to Presidential elections, but unconstitutionally preclude state legislative post-election certifications of Presidential votes and Presidential electors: Ariz. Rev. Stat. § 16-672; Ga. Code Ann.§ 21-2-521; Mich. Comp. Laws § 168.862; Wis. Stat. § 9.01; and 25 Pa. Cons. Stat. § 3351.

78. Interestingly, the Pennsylvania laws have a state legislative post-election certification process for its Governor and Lieutenant Governor elections—but not for President and Vice President. 25 Pa. Cons. Stat. § 3312, et seq.

D. In 2000, the U.S. Supreme Court engaged in a Presidential post-election litigation in Florida.

79. In 2000, the U.S. Supreme Court engaged in Presidential post-election litigation in Florida. *Bush v. Gore*, 531 U.S. 98 (2000).

80. Plaintiffs claim, under Article II, that this post-election case in 2000 likely should have been dismissed for lack of jurisdiction with instructions for the Plaintiffs to file their election claims with the Florida state legislature.

E. In 2020, approximately thirty post-election lawsuits are filed in Defendants States regarding election official errors and improprieties.

81. Approximately thirty post-election lawsuits regarding Pennsylvania, Michigan, Wisconsin, Georgia and Arizona election official errors and improprieties were filed.[54]

[54] *See* "Postelection lawsuits related to the 2020 United States presidential election," found at *https://en.wikipedia.org/wiki/Postelection_lawsuits_related_to_the_2020_United_States_presidential_election#Wood_v._Raffensperger* (last visited: Dec. 15, 2020). This complaint's citations to the appendix, principally, detail lawsuit allegations found in these Pennsylvania, Michigan, Wisconsin, Georgia and

82. Plaintiffs claim, under Article II, that these post-election cases should have been dismissed for lack of jurisdiction with instructions that the Plaintiffs should file such claims with their respective state legislatures in Pennsylvania, Michigan, Wisconsin, Georgia and Arizona.

F. In 2020, Texas sued Pennsylvania, Michigan, Wisconsin and Georgia in the U.S. Supreme Court to adjudicate election irregularities and improprieties.

83. On December 7, 2020, Texas filed an original action in the U.S. Supreme Court, Case No. 20O155, against Pennsylvania, Michigan, Wisconsin and Georgia for election irregularities and improprieties. On December 9, Missouri and 16 other states filed a motion for leave to file an amicus curiae brief in support of Texas. On December 10, U.S. Representative Mike Johnson and 105 other members submitted a motion for leave to file amicus brief in support of Texas. On December 11, the U.S. Supreme Court dismissed the original action in a text order:

> The State of Texas's motion for leave to file a bill of complaint is denied for lack of standing under Article III of the Constitution. Texas has not demonstrated a judicially cognizable interest in the manner in which another State conducts its elections. All other pending motions are dismissed as moot. Statement of Justice Alito, with whom Justice Thomas joins: In my view, we do not have discretion to deny the filing of a bill of complaint in a case that falls within our original jurisdiction. See *Arizona* v. *California*, 589 U. S. ___ (Feb. 24, 2020) (Thomas, J., dissenting). I would therefore grant the motion to file the bill of complaint but would not grant other relief, and I express no view on any other issue.[55]

84. Plaintiffs claim, under Article II, that this post-election case filed in the U.S. Supreme Court should have been dismissed for lack of jurisdiction with instructions that voter in each state could file their respective claims with their respective state legislatures in Pennsylvania, Michigan, Wisconsin and Georgia.

Arizona lawsuits alleging election official errors and improprieties. In Defendants' states, voter allegations exist which allege that the election officials' errors and improprieties exceed the razor-thin margins of Presidential contests—as further herein.

[55] Plaintiffs agree that the State of Texas lacked standing, but the original action itself begs the question, "Is the U.S. Supreme Court the final adjudicator for certification of Presidential electors?" The Plaintiffs' answer is no; the respective state legislatures are the final determiner of post-election certifications of Presidential votes and of Presidential electors—and, in a non-delegable way.

G. The Presidential electors for Biden and Trump in the Defendant States voted on December 14, but none of the Presidential Electors received state legislative post-election certification.

85. Under 3 U.S.C. §§ 5 and 6, the Presidential electors for Biden and Trump met and voted in their Defendant States on December 14.

86. The Presidential electors for Biden in the Defendant States were certified by state executive branch officials in the Defendant States under 3 U.S.C. §§ 5 and 6 and the respective state laws.

87. Neither the Presidential electors for Biden nor the Presidential electors for Trump in the Defendant States received a state legislative post-election affirmative vote for certification.

88. The Presidential electors for Biden in the Defendant States voted for Biden as President and Harris as Vice President.

89. The Presidential electors for Trump in the Defendant States voted for Trump as President and Pence as Vice President.[56]

90. Plaintiffs claim that none of these Presidential electors' votes should be counted by federal Defendants in the election of President and Vice President until the Presidential electors receive from their respective state legislatures an affirmative vote for post-election certification.

H. Under federal and state law, in the Defendant States, the respective state legislatures do not vote on post-election certification of Presidential electors.

91. Congress has enacted 3 U.S.C. §§ 5, 6 and 15 which significantly restrict state legislatures' constitutional prerogative to post-election certification of Presidential electors.

92. In turn, the state legislatures in the Defendant States have enacted state laws which are a perpetual and wholesale delegation of post-election certification to state executive branch officials—as they have done in Ariz. Rev. Stat. § 16-212 (B) (Arizona Secretary of State), Ga. Code

[56] *See* Michigan Trump Electors Certificate, *Appendix* 1471.

Ann. § 21-2-499 (B) (Georgia Secretary of State and Governor), Mich. Comp. Laws Ann. § 168.46 (Michigan State Board of Canvassers and Governor), Wis. Stat. § 7.70 (5) (b) (Wisconsin Elections Commission); and 25 Pa. Cons. Stat. § 3166 (Secretary of Commonwealth and Governor).

93. Further, the state constitutions of the Defendant States fail to require the state legislature to meet for post-election certification of the Presidential electors in violation of state legislative constitutional duties under Article II of the U.S. Constitution. Arizona's, Georgia's and Pennsylvania's Constitutions have the state legislature adjourned until January 2021.[57] Michigan's and Wisconsin's Constitutions permit the state legislature to be in session, but do not require a joint session of the state legislature to affirmatively vote for post-election certification of Presidential electors.[58]

I. Voters' allegations in each of the Defendant States—alleging election officials' absentee ballot errors and improprieties exceed Presidential vote margins—are constitutionally resolved by state legislative post-certifications of Presidential votes and Presidential electors—not in this Court or any other court.

94. Plaintiffs allege that voters allege in each of the Defendant States that election officials' absentee ballot errors and improprieties exceed Presidential vote margins.

95. The Defendant States' voters' claims should be constitutionally resolved by state legislative post-certifications of Presidential votes and Presidential electors—as Article II requires.

96. None of the voters' allegations in each of the Defendant States—that is the allegations stated further below—should be adjudicated in this Court or any other Court, because it is the exclusive constitutional prerogative of the state legislatures to determine post-election certifications of Presidential votes and of Presidential electors.

[57] Ariz. Const. Art. IV, Part 2, Sec. 3; Ga. Const. Art. III, § IV, ¶ 1(a). Pa. Const. Art. II, § 4.
[58] Mich. Const. Art. IV, § 13; Wis. Const. Art. IV, § 11.

J. Defendant States' voters allege Zuckerberg moneys gifted to urban election officials in Defendant States who violated absentee ballot security measures.

97. Defendant States' voters have alleged, in 2020, a systematic effort was launched in Defendant States, using $350,000,000 in private money sourced to Mark Zuckerberg, the Facebook billionaire, to illegally circumvent absentee voting laws to cast tens of thousands of illegal absentee ballots.[59]

98. Defendants States' votes have alleged that the Zuckerberg-funded private organization, the Center for Technology and Civic Life (CTCL), gifted millions of dollars to election officials in Democratic Party urban strongholds in Georgia, Wisconsin, Pennsylvania, Michigan and Arizona in order for those cities to facilitate the use of absentee voting: Fulton County (GA), Milwaukee (WI), Madison (WI), Philadelphia (PA), Wayne County (MI) and Maricopa County (AZ).[60]

99. Defendant States' voters have alleged that in these counties and cities receiving CTCL funds, election officials adopted various respective policies and customs eviscerating state law absentee ballot security measures such as witness address, name and signature requirements and voter address, name and signature requirements.[61]

100. Defendant States' voters have alleged that these urban election officials also used the CTCL funds for absentee ballot drop boxes treating urban voters preferentially to small-town and rural voters.[62]

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[59] *See* App. 21-30; 31-38; and 1079-1112.
[60] *Id.*
[61] *Id.*
[62] *Id.*

K. The government's pre-election certification error rate of voting system's software and hardware is 0.0008%.

101. The federal government has a pre-election standard for state voting system's software and hardware.[63]

102. Under federal law, this maximum-acceptable error rate is one in 500,000 ballot positions, or, alternatively one in 125,000 ballots—0.0008 %.[64]

103. Section 3.2.1 of the voting systems standards issued by the Federal Elections Commission (FEC) which were in effect on the date of the enactment of the Help America Vote Act (HAVA) provides that the voting system shall achieve a maximum acceptable error rate in the test process of one in 500,000 ballot positions.[65]

104. A ballot position is every possible selection on the ballot, to include empty spaces. As stated in the voting systems standards (VSS), "[t]his rate is set at a sufficiently stringent level such that the likelihood of voting system errors affecting the outcome of an election is exceptionally remote even in the closest of elections."[66]

105. An update to the FEC VSS was made by the Election Assistance Commission (EAC) to enhance the FEC VSS standards, which each state has adopted by law.[67]

106. The FEC VSS standard provides for an error rate of one in 125,000 ballots (0.0008%) as an alternative to the one in 500,000 ballot positions to make it easier to calculate the error rate.[68]

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[63] *See* Expert Report of Dennis Nathan Cain (I), App. 52-59; 1411-1418.
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *Id.*
[68] *Id.*

107. The FEC standards, which are incorporated into the Help America Vote Act § 301(a)(5), require that all systems be tested in order to certify that they meet the maximum-acceptable error rate set by federal law.[69]

L. Voters' allegations in each of the Defendant States support that election officials' absentee ballot errors and improprieties exceed Presidential vote margins.

108. The use of absentee and mail-in ballots skyrocketed in 2020, not only as a public-health response to the COVID-19 pandemic but also at the urging of mail-in voting's proponents, and most especially executive branch officials in Defendant States. According to the Pew Research Center, in the 2020 general election, a record number of votes—about 65 million—were cast via mail compared to 33.5 million mail-in ballots cast in the 2016 general election—an increase of more than 94 percent.[70]

109. In the wake of the contested 2000 election, the bipartisan Jimmy Carter-James Baker commission identified absentee ballots as "the largest source of potential voter fraud."[71]

110. Concern over the use of mail-in ballots is not novel to the modern era,[72] but it remains a *current* concern.[73]

111. Absentee and mail-in voting are the primary opportunities for unlawful ballots to be cast.

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[69] *Id.*

[70] Desilver, Drew. Most mail and provisional ballots got counted in past U.S. elections – but many did not. Pew Research Center. 10 November 2020. https://www.pewresearch.org/fact-tank/2020/11/10/most-mail-and-provisional-ballots-got-counted-in-past-u-s-elections-but-many-did-not/ Accessed 12.18.20.

[71] *Building Confidence in U.S. Elections: Report of the Commission on Federal Elections*, at 46 (Sept. 2005).

[72] Dustin Waters, *Mail-in Ballots Were Part of a Plot to Deny Lincoln Reelection in 1864*, Wash. Post (Aug. 22, 2020)

[73] *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 194-96 & n.11 (2008); *see also* Texas Office of the Attorney General, *AG Paxton Announces Joint Prosecution of Gregg County Organized Election Fraud in Mail-In Balloting Scheme* (Sept. 24, 2020); Harriet Alexander & Ariel Zilber, *Minneapolis police opens investigation into reports that Ilhan Omar's supporters illegally harvested Democrat ballots in Minnesota*, Daily Mail, Sept. 28, 2020.

112. Defendant States voters allege that as a result of expanded absentee and mail-in voting in Defendant States, combined with Defendant States' unconstitutional modification of statutory protections designed to ensure ballot integrity, Defendant States created a massive opportunity for fraud.

113. Defendant States voters allege that the Defendant States have made it difficult or impossible to separate the constitutionally tainted mail-in ballots from all mail-in ballots.

114. Defendant States voters allege that tather than augment safeguards against illegal voting in anticipation of the millions of additional mail-in ballots flooding their States, Defendant States materially weakened, or did away with, security measures, such as witness or signature verification procedures, required by their respective legislatures. Their legislatures established those commonsense safeguards to prevent—or at least reduce—fraudulent mail-in ballots.

115. Defendant States voters allege, in Defendant States, that Democrat voters voted by mail at two to three times the rate of Republicans. Thus, the Democratic candidate for President thus greatly benefited from this unconstitutional usurpation of legislative authority, and the weakening of legislative mandated ballot security measures.

116. Defendant States voters allege that the outcome of the Electoral College vote is directly affected by the constitutional violations committed by Defendant States. Defendant States violated the Constitution in the process of appointing presidential electors by unlawfully abrogating state election laws designed to protect the integrity of the ballots and the electoral process, and those violations proximately caused the unconstitutional appointment of presidential electors.

117. Plaintiffs will therefore be injured if Defendant States' unlawful certification of these Presidential electors, because the Presidential electors have not received state legislative post-election certification, is allowed to stand.

1. Commonwealth of Pennsylvania voters allege election official errors and improprieties which exceed the Presidential vote margin.[74]

118. Commonwealth of Pennsylvania voters allege election official errors and improprieties which exceed the Presidential vote margin.

119. Pennsylvania has 20 electoral votes, with a statewide vote tally currently estimated at 3,363,951 for President Trump and 3,445,548 for former Vice President Biden, a margin of 81,597 votes.[75]

120. Pennsylvania voters have alleged the number of votes affected by the various constitutional violations exceeds the margin of votes separating the candidates.

121. By letter dated December 13, 2019, the Auditor General of the Commonwealth of Pennsylvania, Eugene A. DePasquale, issued to the Governor of the Commonwealth of Pennsylvania a Performance Audit Report of the Pennsylvania Department of State's Statewide Uniform Registry of Electors.[76]

122. The Performance Audit Report was conducted pursuant to an Interagency Agreement between the Pennsylvania Department of State and the Pennsylvania Department of the Auditor General.

123. The Performance Audit Report contained seven Findings, to wit:

i. Finding One: As a result of the Department of State's denial of access to critical documents and excessive redaction of documentation, the Department of the Auditor General was severely restricted from meeting its audit objectives in an audit which the Department of State itself had requested.

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[74] *See* Timeline of Electoral Policy Activities, Issues, and Litigation Pennsylvania, Michigan, Wisconsin, Georgia, Arizona, and Nevada August 2003 to November 2020, App. 1-20 (demonstrating full extent of inappropriate activities).
[75] WNWP 2020 Pennsylvania Election Results. https://www.wnep.com/elections (last visited Dec. 18, 2020).
[76] *See* Auditor General's Performance Audit Report, App. 413-604; *see also* App. 397-412.

ii. Finding Two: Data analysis identified tens of thousands of potential duplicate and inaccurate voter records, as well as voter records for nearly three thousand potentially deceased voters that had not been removed from the SURE system.

iii. Finding Three: The Department of State much implement leading information technology security practices and information technology general controls to protect the SURE system and ensure the reliability of voter registration.

iv. Finding Four: Voter record information is inaccurate due to weakness in the voter registration application process and the maintenance of voter records in the SURE system.

v. Finding Five: Incorporating edit checks and other improvements into the design of the replacement system for SURE will reduce data errors and improve accuracy.

vi. Finding Six: A combination of a lack of cooperation by certain county election offices and PennDOT, as well as source documents not being available for seventy percent of our test sample, resulted in our inability to form any conclusions as to the accuracy of the entire population of voter records maintained in the SURE system.

vii. Finding Seven: The Department of State should update current job aids and develop additional job aids and guidance to address issues such as duplicate voter records, records of potentially deceased voters on the voter rolls, pending applications, and records retention. See Auditor General's Performance Audit Report.[77]

124. In addition to the Findings, the Performance Audit Report contained specific detailed Recommendations to correct the significant deficiencies identified in the Findings of the Performance Audit Report.

125. In 2018, Secretary Boockvar was quoted as stating "Rock the Vote's web tool was connected to our system, making the process of registering through their online programs, and those of their partners, seamless for voters across Pennsylvania."[78]

[77] *Supra.*
[78] *Rock the Vote, 2018 Annual Report,* pg. 12. https://www.rockthevote.org/wp-content/uploads/Rock-the-Vote-2018-Annual-Report.pdf. (last visited Dec. 18, 2020).

126. In addition, Plaintiffs have obtained a sworn Affidavit from Jesse Richard Morgan, who was contracted to haul mail for the United States Postal Service within the Commonwealth of Pennsylvania. Mr. Morgan's Affidavit alleges that he was directed to transport from New York to Pennsylvania what he believes to be completed Pennsylvania ballots in the 2020 General Election.[79]

127. Plaintiffs based on Pennsylvania voters' allegations that this matter is currently under investigation by various entities and that such investigation is essential to the determination of whether or not approximately 200,000 ballots were delivered into the Pennsylvania System improperly or illegally. Pending such determination, there is no possible way that the validity of Pennsylvania's Presidential Election could possibly be certified by anyone.

128. Based on Pennsylvania voters' allegations, there is evidence of possible back-dating of ballots in the United States Postal facility at Erie, Pennsylvania. And, further, Francis X. Ryan's Report, discussed in detail below, evidences thousands of questionable or improper ballots cast in the 2020 Presidential Election in Pennsylvania.[80]

129. In addition, Plaintiffs have obtained a Declaration from Ingmar Njus in support of Mr. Morgan's Affidavit.[81]

130. Based on Pennsylvania voters' allegations, in the run-up to the election, the Pennsylvania Supreme Court usurped the powers of the General Assembly when it permitted county boards of election to accept hand-delivered mail-in ballots at locations other than the respective offices of the boards of election, including through the use of drop-boxes arbitrarily located

[79] *See* Jesse Richard Morgan Declaration, App. 152-179; 605-632; *see also* Declaration of Leslie J. Brabandt, App. 187-189; *see also* Expert Declaration of Roland Smith, App. 190-200.
[80] *See* Francis X. Ryan Declaration, App. 660-666. For additional evidence, see App. 667-834.
[81] *See* Ingmar Njus Declaration, App. 183-186; 633-636.

throughout the county; and, when it extended the deadline for receipt of absentee and mail-in ballots by three days from 8:00 p.m. on Election Day to 5:00 p.m. on November 6, 2020.[82]

131. In the same Opinion, the Court held that "although the Election Code provides the procedure for casting and counting a vote by mail, it does not provide for the 'notice and opportunity to cure' …"[83]

132. The Court went on to state "… we agree that the decision to provide a 'notice and opportunity to cure' procedure … is one best suited for the Legislature."[84]

133. Of note, Secretary Boockvar agreed with the Court that Pennsylvania's Election Code does not provide a notice and opportunity to cure procedure.

134. Based on Pennsylvania voters' allegations, despite the lack of any statutory authorization or legal authority, county boards of elections in democratic counties, such as, Montgomery County, routinely helped identify, facilitate and permitted electors to alter their defective absentee and mail-in ballots in violation of Pennsylvania's Election Code.[85]

135. In an October 31, 2020, e-mail, Frank Dean, Director of Mail-in Elections of Montgomery County emailed the latest list of confidential elector information to two other Montgomery County election officials, Lee Soltysiak and Josh Stein, and wrote:

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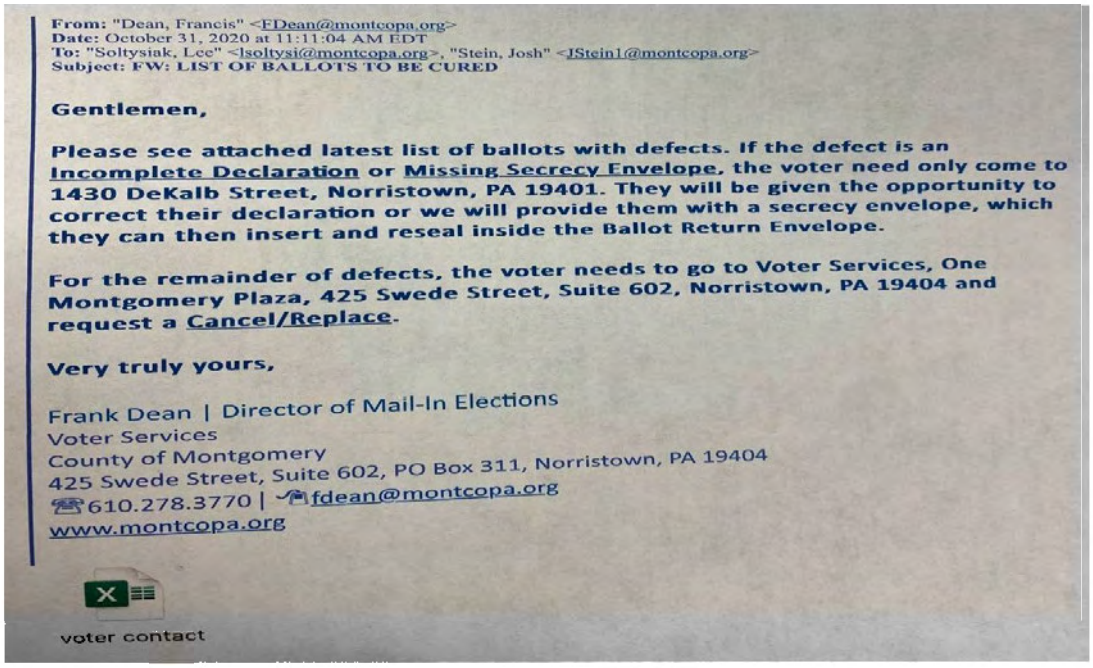
[82] *Pennsylvania Democratic Party v. Boockvar,* No. 133 MM 2020, 2020 WL 5554644, at *20 (Pa. Sept. 17, 2020); *see also In re: November 3, 2020 General Election,* 2020 WL 6252803, at *7 (Pa. Oct. 23, 2020).
[83] *Id.* at 20.
[84] *Id.* at 20.
[85] *See* Carlson Report on Voter Suppression through Executive and Administrative Actions, App. 31-38.



From: "Dean, Francis" <FDean@montcopa.org>
Date: October 31, 2020 at 11:11:04 AM EDT
To: "Soltysiak, Lee" <lsoltysi@montcopa.org>, "Stein, Josh" <JStein1@montcopa.org>
Subject: FW: LIST OF BALLOTS TO BE CURED

Gentlemen,

Please see attached latest list of ballots with defects. If the defect is an Incomplete Declaration or Missing Secrecy Envelope, the voter need only come to 1430 DeKalb Street, Norristown, PA 19401. They will be given the opportunity to correct their declaration or we will provide them with a secrecy envelope, which they can then insert and reseal inside the Ballot Return Envelope.

For the remainder of defects, the voter needs to go to Voter Services, One Montgomery Plaza, 425 Swede Street, Suite 602, Norristown, PA 19404 and request a Cancel/Replace.

Very truly yours,

Frank Dean | Director of Mail-In Elections
Voter Services
County of Montgomery
425 Swede Street, Suite 602, PO Box 311, Norristown, PA 19404
☎610.278.3770 | fdean@montcopa.org
www.montcopa.org

voter contact

136. Based on Pennsylvania voters' allegations, there is no authority within Pennsylvania's Election Code that authorizes election officials to manually alter the information contained within the SURE system for the purposes described by Director Dean.

137. In order to cancel or replace an elector's absentee or mail-in ballot, election officials would be required to manually alter or override the information contained in the Commonwealth's Statewide Uniform Registry of Electors ("SURE").

138. Based on Pennsylvania voters' allegations, there is no authority within Pennsylvania's Election Code that authorizes election officials to cancel and/or replace an elector's absentee or mail-in ballot as described by Director Dean.

139. Further, based on Pennsylvania voters' allegations, in violation of electors' right to secrecy in their ballots, election officials in democratic counties, such as Montgomery County, used the information gathered through their inspection of the ballot envelopes to identify the names of electors who had cast defective absentee or mail-in ballot envelopes.[86]

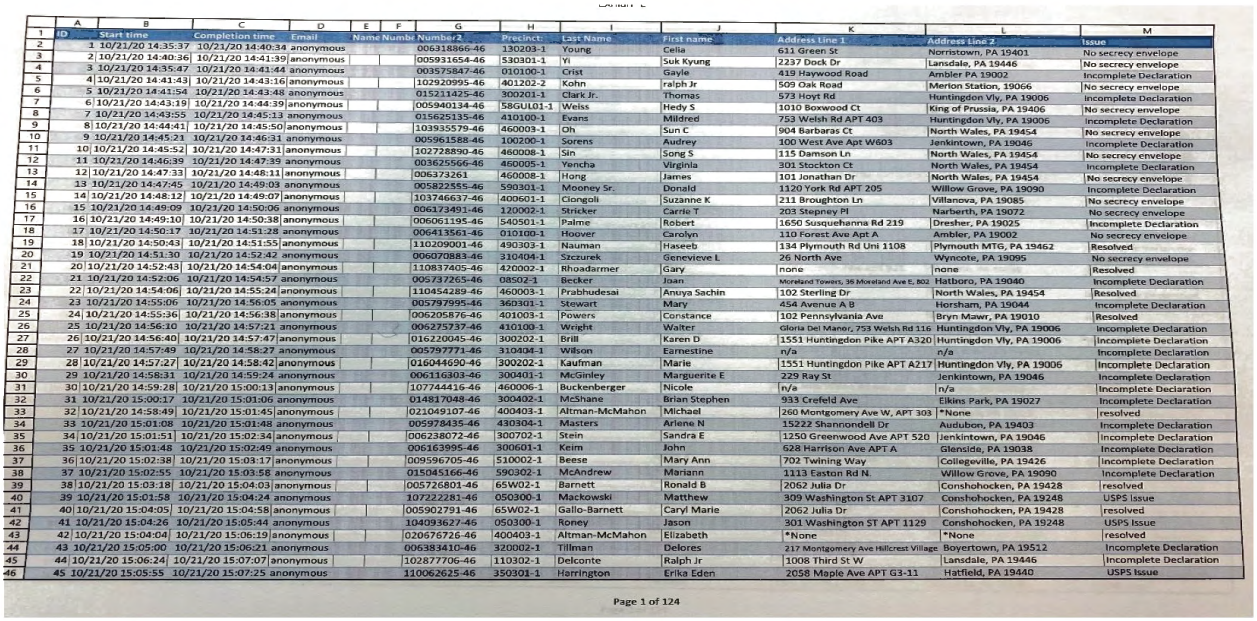
[86] *Art. VII,* ***Error! Main Document Only.****§4 PA Const.*

140. Based on Pennsylvania voters' allegations, the Excel spreadsheet attached to Director Dean's October 31, 2020, e-mail notes that when mail-in or absentee ballot envelopes were found to be defective, some electors were provided with the opportunity to alter their ballot envelopes.

141. Based on Pennsylvania voters' allegations, the photograph below shows some of the thousands of absentee and mail-in ballots pre-canvassed by the Montgomery County Board of Elections in violation of the Election Code.[87] These defective ballots were not secured in any way and were easily accessible to the public.[88]

142. Further, based on Pennsylvania voters' allegations, the next picture shows page 1 or 124 pages that include thousands of defective ballot envelopes that Montgomery County elections officials were trying to "cure" in violation of Pennsylvania's Election Code and Constitution.

[87] This "Ballots for Sale" photo was taken on 11/01/2020 by Robert Gillies during a tour of the Montgomery County mail-in ballot storage and canvass facility.
[88] *See* Expert Declaration of Gregory Moulthrop, App. 48-51.



	A	B	C	D	E	F	G	H	I	J	K	L	M
1	ID	Start time	Completion time	Email	Name Numbe		Number2	Precinct	Last Name	First name	Address Line 1	Address Line 2	Issue
2	1	10/21/20 14:35:37	10/21/20 14:40:34	anonymous			006318866-46	130203-1	Young	Celia	611 Green St	Norristown, PA 19401	No secrecy envelope
3	2	10/21/20 14:40:36	10/21/20 14:41:39	anonymous			005931654-46	530301-1	Yi	Suk Kyung	2237 Dock Dr	Lansdale, PA 19446	No secrecy envelope
4	3	10/21/20 14:35:47	10/21/20 14:41:44	anonymous			003575847-46	010100-1	Crist	Gayle	419 Haywood Road	Ambler PA 19002	Incomplete Declaration
5	4	10/21/20 14:41:43	10/21/20 14:43:16	anonymous			102920995-46	401202-2	Kohn	ralph Jr	509 Oak Road	Merion Station, 19066	No secrecy envelope
6	5	10/21/20 14:41:54	10/21/20 14:43:48	anonymous			015211425-46	300201-1	Clark Jr.	Thomas	573 Hoyt Rd	Huntingdon Vly, PA 19006	Incomplete Declaration
7	6	10/21/20 14:43:19	10/21/20 14:44:39	anonymous			005940134-46	58GU101-1	Weiss	Hedy S	1010 Boxwood Ct	King of Prussia, PA 19406	No secrecy envelope
8	7	10/21/20 14:43:55	10/21/20 14:45:13	anonymous			015625135-46	410100-1	Evans	Mildred	753 Welsh Rd APT 403	Huntingdon Vly, PA 19006	Incomplete Declaration
9	8	10/21/20 14:44:41	10/21/20 14:45:50	anonymous			103935579-46	460003-1	Oh	Sun C	904 Barbaras Ct	North Wales, PA 19454	No secrecy envelope
10	9	10/21/20 14:45:21	10/21/20 14:46:31	anonymous			005961588-46	100200-1	Sorens	Audrey	100 West Ave Apt W603	Jenkintown, PA 19046	Incomplete Declaration
11	10	10/21/20 14:45:52	10/21/20 14:47:31	anonymous			102728890-46	460008-1	Sin	Song S	115 Damson Ln	North Wales, PA 19454	No secrecy envelope
12	11	10/21/20 14:46:39	10/21/20 14:47:39	anonymous			003625566-46	460005-1	Yencha	Virginia	301 Stockton Ct	North Wales, PA 19454	Incomplete Declaration
13	12	10/21/20 14:47:33	10/21/20 14:48:11	anonymous			006373261	460008-1	Hong	James	101 Jonathan Dr	North Wales, PA 19454	No secrecy envelope
14	13	10/21/20 14:47:45	10/21/20 14:49:03	anonymous			005822555-46	590301-1	Mooney Sr.	Donald	1320 York Rd APT 205	Willow Grove, PA 19090	Incomplete Declaration
15	14	10/21/20 14:48:12	10/21/20 14:49:07	anonymous			103746637-46	400601-1	Ciongoli	Suzanne K	211 Broughton Ln	Villanova, PA 19085	No secrecy envelope
16	15	10/21/20 14:49:09	10/21/20 14:50:06	anonymous			006173491-46	120002-1	Stricker	Carrie T	203 Stepney Pl	Narberth, PA 19072	No secrecy envelope
17	16	10/21/20 14:49:10	10/21/20 14:50:38	anonymous			006061195-46	540501-1	Palme	Robert	1650 Susquehanna Rd 219	Dresher, PA 19025	Incomplete Declaration
18	17	10/21/20 14:50:17	10/21/20 14:51:28	anonymous			006413561-46	010100-1	Hoover	Carolyn	110 Forest Ave Apt A	Ambler, PA 19002	No secrecy envelope
19	18	10/21/20 14:50:43	10/21/20 14:51:55	anonymous			110209001-46	490303-1	Nauman	Haseeb	134 Plymouth Rd Uni 1108	Plymouth MTG, PA 19462	Resolved
20	19	10/21/20 14:51:30	10/21/20 14:52:42	anonymous			006070883-46	310404-1	Szczurek	Genevieve L	26 North Ave	Wyncote, PA 19095	No secrecy envelope
21	20	10/21/20 14:52:43	10/21/20 14:54:04	anonymous			110837405-46	420002-1	Rhoadarmer	Gary	none	none	Resolved
22	21	10/21/20 14:52:06	10/21/20 14:54:57	anonymous			005737265-46	08502-1	Becker	Joan	Moreland Towers, 36 Moreland Ave E, 802	Hatboro, PA 19040	Incomplete Declaration
23	22	10/21/20 14:54:06	10/21/20 14:55:24	anonymous			110454289-46	460003-1	Prabhudesai	Anuya Sachin	102 Sterling Dr	North Wales, PA 19454	Resolved
24	23	10/21/20 14:55:06	10/21/20 14:56:05	anonymous			005797995-46	360301-1	Stewart	Mary	454 Avenue A B	Horsham, PA 19044	Incomplete Declaration
25	24	10/21/20 14:55:36	10/21/20 14:56:38	anonymous			006205876-46	401003-1	Powers	Constance	102 Pennsylvania Ave	Bryn Mawr, PA 19010	Resolved
26	25	10/21/20 14:56:10	10/21/20 14:57:21	anonymous			006275737-46	410103-1	Wright	Walter	Gloria Dei Manor, 753 Welsh Rd 116	Huntingdon Vly, PA 19006	Incomplete Declaration
27	26	10/21/20 14:56:40	10/21/20 14:57:47	anonymous			016220045-46	300202-1	Brill	Karen D	1551 Huntingdon Pike APT A320	Huntingdon Vly, PA 19006	Incomplete Declaration
28	27	10/21/20 14:57:49	10/21/20 14:58:27	anonymous			005797771-46	310404-1	Wilson	Earnestine	n/a	n/a	Incomplete Declaration
29	28	10/21/20 14:57:27	10/21/20 14:58:42	anonymous			016044690-46	300202-1	Kaufman	Marie	1551 Huntingdon Pike APT A217	Huntingdon Vly, PA 19006	Incomplete Declaration
30	29	10/21/20 14:58:31	10/21/20 14:59:24	anonymous			006116303-46	300401-1	McGinley	Marguerite E	229 Ray St	Jenkintown, PA 19046	Incomplete Declaration
31	30	10/21/20 14:59:28	10/21/20 15:00:13	anonymous			107744416-46	460006-1	Buckenberger	Nicole	n/a	n/a	Incomplete Declaration
32	31	10/21/20 15:00:17	10/21/20 15:01:06	anonymous			014817048-46	300402-1	McShane	Brian Stephen	933 Crefeld Ave	Elkins Park, PA 19027	Incomplete Declaration
33	32	10/21/20 14:58:49	10/21/20 15:01:45	anonymous			021049107-46	400403-1	Altman-McMahon	Michael	260 Montgomery Ave W, APT 303	*None	resolved
34	33	10/21/20 15:01:08	10/21/20 15:01:48	anonymous			005978435-46	430304-1	Masters	Arlene N	15222 Shannondell Dr	Audubon, PA 19403	Incomplete Declaration
35	34	10/21/20 15:01:51	10/21/20 15:02:34	anonymous			006238072-46	300702-1	Stein	Sandra E	1250 Greenwood Ave APT 520	Jenkintown, PA 19046	Incomplete Declaration
36	35	10/21/20 15:01:48	10/21/20 15:02:49	anonymous			006163995-46	300601-1	Keim	John	628 Harrison Ave APT A	Glenside, PA 19038	Incomplete Declaration
37	36	10/21/20 15:02:38	10/21/20 15:03:17	anonymous			009596705-46	510002-1	Beese	Mary Ann	702 Twining Way	Collegeville, PA 19426	Incomplete Declaration
38	37	10/21/20 15:02:55	10/21/20 15:03:58	anonymous			015045166-46	590302-1	McAndrew	Mariann	1113 Easton Rd N.	Willow Grove, PA 19090	Incomplete Declaration
39	38	10/21/20 15:03:18	10/21/20 15:04:03	anonymous			005726801-46	65W02-1	Barnett	Ronald B	2062 Julia Dr	Conshohocken, PA 19428	resolved
40	39	10/21/20 15:01:58	10/21/20 15:04:24	anonymous			107222281-46	050300-1	Mackowski	Matthew	309 Washington St APT 3107	Conshohocken, PA 19248	USPS Issue
41	40	10/21/20 15:04:05	10/21/20 15:04:58	anonymous			005902791-46	65W02-1	Gallo-Barnett	Caryl Marie	2062 Julia Dr	Conshohocken, PA 19428	resolved
42	41	10/21/20 15:04:26	10/21/20 15:05:44	anonymous			104093627-46	050300-1	Roney	Jason	301 Washington ST APT 1129	Conshohocken, PA 19248	USPS Issue
43	42	10/21/20 15:04:04	10/21/20 15:06:19	anonymous			020676726-46	400403-1	Altman-McMahon	Elizabeth	*None	*None	resolved
44	43	10/21/20 15:05:00	10/21/20 15:06:21	anonymous			006383410-46	320002-1	Tillman	Delores	217 Montgomery Ave Hillcrest Village	Boyertown, PA 19512	Incomplete Declaration
45	44	10/21/20 15:06:24	10/21/20 15:07:07	anonymous			102877706-46	110302-1	Delconte	Ralph Jr	1008 Third St W	Lansdale, PA 19446	Incomplete Declaration
46	45	10/21/20 15:05:55	10/21/20 15:07:25	anonymous			110062625-46	350301-1	Herrington	Erika Eden	2058 Maple Ave APT G3-11	Hatfield, PA 19440	USPS Issue

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143. Based on Pennsylvania voters' allegations, in a further effort to circumvent Pennsylvania's Election Code and the prohibition against efforts to "cure" absentee and mail-in ballot envelopes, Secretary Boockvar, issued guidance, through Jonathan Marks, the Deputy Secretary of Elections and Commissions, just hours before Election Day directing county boards of elections to provide electors who have cast defective absentee or mail-in ballots with provisional ballots and to promptly update the SURE system.

144. The Deputy Secretary for Elections and Commissions issued an email which stated:

Sent: Monday, November 2, 2020 8:38 PM
To: Marks, Jonathan
Subject: Important DOS Email - Clarification regarding Ballots Set Aside During Pre-canvass

*** This is an external email. Please use caution when clicking on links and downloading attachments ***

Dear County Election Directors,

The Department of State has been asked whether county boards of elections can provide information to authorized representatives and representatives of political parties during the pre-canvass about voters whose absentee and mail-in ballots have been rejected. The Department issued provisional ballot guidance on October 21, 2020, that explains that voters whose completed absentee or mail-in ballots are rejected by the county board for reasons unrelated to voter qualifications may be issued a provisional ballot. To facilitate communication with these voters, the county boards of elections should provide information to party and candidate representatives during the pre-canvass that identifies the voters whose ballots have been rejected and should promptly update the SURE system.

Kind regards,

Jonathan M. Marks
Deputy Secretary for Elections & Commissions
Pennsylvania Department of State
302 North Office Building | Harrisburg, PA 17120
☎ 717.783.2035 🖷 717.787.1734
✉ jmarks@pa.gov

DEPARTMENT OF STATE

145. Based on Pennsylvania voters' allegations, in order to obtain a provisional ballot on Election Day, an elector who previously requested an absentee or mail-in ballot must sign an affidavit stating "I do solemnly swear or affirm that my name is … and that this is the only ballot that I cast in this election."[89]

146. Based on Pennsylvania voters' allegations, if an elector has already submitted an absentee or mail-in ballot and that ballot was received by his or her county board of elections, the elector cannot truthfully affirm that the provisional ballot is the only ballot cast by them in the election. The provisional ballot would in fact be a second ballot cast by the elector.

[89] 25 Pa. Cons. Stat. §3146.8; 25 Pa. Cons. Stat. §3050.

147. Based on Pennsylvania voters' allegations, Secretary Boockvar's actions appear conveniently timed with the actions of the Democratic Party who apparently considered the matter to be URGENT.

148. Based on Pennsylvania voters' allegations, Deputy Secretary Marks issued his email at 8:38 p.m. on November 2, 2020, on the eve of Election Day. Under the Election Code, provisional ballots are only used on Election Day. Less than twelve hours after Deputy Secretary Marks' email, the Democratic Party had printed handbills telling electors "Public records show that your ballot had errors and was not accepted." and to "Go in person to vote at your polling place today by 8:00 EST and ask for a provisional ballot."

149. Based on Pennsylvania voters' allegations, the effect to utilize provisional ballots to "cure" defective absentee and mail-in ballots is in clear violation of Pennsylvania's Election Code. The number of provisional ballots cast in Pennsylvania is approximately 90,000 which is significantly higher than previous General Elections.

150. Further, based on Pennsylvania voters' allegations, it is not clear what Deputy Secretary Marks intended when he stated "To facilitate communication with these voters, the county boards of elections should provide information to party and candidate representatives during the pre-canvassing that identifies the voters whose ballots have been rejected and should promptly update the SURE system."

151. Based on Pennsylvania voters' allegations, Pennsylvania's Election Code makes no provision for the acceptance or rejection of ballots during the pre-canvassing process, nor does the Election Code provide boards of elections with the authority to "update the SURE system" so that an electors who previously submitted an absentee or mail-in ballot may vote with a provisional ballot.

152. The Pennsylvania Supreme Court ruled that county boards of elections are prohibited from using signature comparison to challenge and reject absentee or mail-in ballots.[90]

153. Based on Pennsylvania voters' allegations, the Court's decision is contrary to the applicable provisions of Pennsylvania's Election Code.

154. In addition, the Pennsylvania Supreme Court ruled that county boards of elections could prevent and exclude designated representatives of the candidates and political parties, who are authorized by the Election Code to observe the pre-canvassing and canvassing of ballots, from being in the room during pre-canvassing and canvassing of ballots.[91]

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[90] *In Re: November 3, 2020, General Election,* 149 MM 2020 (Oct. 23, 2020).
[91] *See In Re: Canvassing Observation,* 30 EAP 2020 (Nov. 17, 2020).

155. Based on Pennsylvania voters' allegations, in predominantly Democratic counties, such as Philadelphia, Delaware and Montgomery Counties, authorized representative of the candidates and the Republican Party attempted to observe the actions of election officials; however, the authorized representatives were routinely denied the access necessary to properly observe the handling of ballot envelopes and ballots during the pre-canvassing and canvassing process.

156. Plaintiffs have obtained a sworn Affidavit from Gregory Stenstrom, who was appointed by the Delaware County Republican Party to observe the election process within Delaware County. Mr. Stenstrom attests to numerous election code violations by the Delaware County Board of Elections. Plaintiffs have numerous other Declarations regarding similar election code violations in other predominantly Democratic counties.[92]

157. Based on Pennsylvania voters' allegations, absentee and mail-in ballots are required to be canvassed in accordance with subsection (g) of Section 3146.8 - Canvassing of official absentee and mail-in ballots.[93]

158. Based on Pennsylvania voters' allegations, Pennsylvania's Election Code defines the term "pre-canvass" to mean "the inspection and opening of all envelopes containing official absentee ballots or mail-in ballots, the removal of such ballots from the envelopes and the counting, computing and tallying of the votes reflected on the ballots. The term does not include the recording or publishing of the votes reflected on the ballots."[94]

[92] *See* Gregory Stenstrom Declaration, Appendix pgs. 129-151; 637-659; *see* Expert Opinion of Anthony J. Couchenor, App. 42-47; *see also* expert opinion of Jovan Hutton Pulitizer, App. 90-118.
[93] 25 Pa. Cons. Stat. §3146.8(g) (1)(i-ii) & (1.1).
[94] 25 Pa. Cons. Stat. § 2602(q.1).

159. Prior to any pre-canvassing meeting, county boards of elections are required to provide at least forty-eight hours' notice by publicly posting a notice of a pre-canvass meeting on its publicly accessible Internet website.[95]

160. Each candidate and political party is entitled to have one designated and authorized representative in the room any time absentee and mail-in ballots are being canvassed by a board of elections.[96]

161. The candidates' watchers or other representatives are permitted to be present any time the envelopes containing absentee and mail-in ballots are opened.[97]

162. The candidates and political parties are entitled to have watchers present any time there is canvassing of returns.[98]

163. Based on Pennsylvania voters' allegations, in predominantly Democratic counties, such as Montgomery, election would weigh absentee and mail-in ballot envelopes to determine whether secrecy envelopes were contained within the outer envelopes. Election officials would also review and inspect the absentee and mail-in ballot envelopes to determine whether they complied with the requirements of the Election Code.

164. Based on Pennsylvania voters' allegations, this pre-canvassing of ballot envelopes is in direct violation of Pennsylvania's Election Code.

165. Based on Pennsylvania voters' allegations, under the Election Code, county boards of elections are required, upon receipt of sealed official absentee and mail-in ballot envelopes, to

[95] 25 Pa. Cons. Stat. § 3146.8(g)(1.1.).
[96] 25 Pa. Cons. Stat. §3146.8(g)(2).
[97] 25 Pa. Cons. Stat. §3146.8.
[98] 25 Pa. Cons. Stat. §2650(a).

"safely keep the ballots in sealed or locked containers until they are to be canvassed by the county board of elections."[99]

166. County boards of elections are prohibited from pre-canvassing absentee and mail-in ballots prior to 7:00 a.m. of Election Day.[100]

167. As such, from the time ballot envelopes are received by county boards of elections through 7:00 a.m. on Election Day, the ballot envelopes are to be safely kept in sealed or locked containers.[101] Stated in a different way, county boards of elections are not permitted to remove absentee and mail-in ballot envelopes from their sealed or locked containers until the ballots are pre-canvassed at 7:00 a.m. on Election Day.

168. Based on Pennsylvania voters' allegations, the Pennsylvania Supreme Court ruled that county boards of elections were not required to enforce or follow Pennsylvania's Election Code requirements for absentee and mail-in ballot envelopes, including the requirements related to elector signatures, addresses, dates, and signed declarations.[102]

169. During pre-canvasing, county boards of elections are required to examine each ballot cast to determine if the declaration envelope is properly completed and to compare the information with the information contained in the Registered Absentee and Mail-in Voters File.[103]

170. Only then are county boards of elections authorized to open the outer envelope of every unchallenged absentee or mail-in envelope in such a manner so as not to destroy the declaration executed thereon.[104]

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[99] *25* Pa. Cons. Stat. *§3146.8(a).*
[100] *25* Pa. Cons. Stat. *§ 3146.8(g)(1.1.)*
[101] *25* Pa. Cons. Stat. *§3146.8(a).*
[102] *In Re: Canvass of Absentee and Mail-in Ballots of November 3, 2020 General Election, 31 EAP 2020 (Nov. 23, 2020).*
[103] *25* Pa. Cons. Stat. *§ 3146.8(g)(3).*
[104] *25* Pa. Cons. Stat. *§ 3146.8(g)(4)(i).*

171. Based on Pennsylvania voters' allegations, in predominantly Democratic counties, such as Allegheny County, election officials disregarded the requirements of the Election Code and counted absentee and mail-in ballot ballots with defective elector signatures, addresses, dates, and signed declarations.[105] In other counties, such as Westmoreland, such ballots were not counted by the county board of elections.

172. In addition to substantial evidence of the violations of Pennsylvania's Election Code, as set forth above, Plaintiffs have produced an expert report authored by Francis X. Ryan who could testify and identify significant and dispositive discrepancies and errors which call into questions the results of the Presidential Election in Pennsylvania.[106]

173. Based on Pennsylvania voters' allegations, as described above, the 2020 General Election in Pennsylvania was fraught with numerous violations of Pennsylvania's Election Code perpetrated by predominantly Democratic county election officials. In addition, there are countless documented election irregularities and improprieties that prevent an accurate accounting of the election results in the Presidential election.

174. Based on Pennsylvania voters' allegations, many of the irregularities directly relate to the county boards of elections' handing of absentee and mail-in ballots; the pre-canvassing and canvassing of ballots; the failure to permit legally appropriate and adequate oversight and transparency of the process; and, the failure to maintain and secure ballot integrity and security throughout the election process.

175. Based on Pennsylvania voters' allegations, as such, the 2020 General Election results are so severely flawed that it is impossible to certify the accuracy of the purported results.

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[105] *In Re: Canvass of Absentee and Mail-in Ballots of November 3, 2020 General Election, 31 EAP 2020 (Nov. 23, 2020).*

[106] *See* Francis X. Ryan Declaration, App. 660-666. For additional evidence see App. 667-834.

176. Based on analysis by data analyst Matthew Braynard and Professor Steven J. Miller, in Pennsylvania, the government data shows election officials' absentee ballot errors of 121,297 far exceed the margin of victory of 81,749.[107]

177. According to the Braynard-Miller analysis, the government data shows election officials' absentee ballot error rate of at least 1.43% which far exceeds federal law's pre-election certification error rate for voting systems' hardware and software of 0.0008%.[108]

Pennsylvania Voter Election Contest
Margin +81,749

Type of error*	Description	Margin
1) Unlawful Ballots	Estimate of ballots requested in the name of a registered Republican by someone other than that person[109]	53,909
2) Legal Votes Not Counted	Estimate of Republican ballots that the requester returned but were not counted[110]	44,892
Total Votes: 98,801	Error Rate (Compared to Total Vote)	1.43%
3) Illegal Votes Counted	Electors voted where they did not reside[111]	14,328
4) Illegal Votes Counted	Out of State Residents Voting in State[112]	7,426
5) Illegal Votes Counted	Double Votes[113]	742
TOTAL	Of total votes cast 6,924,006	121,297

*May overlap.

[107] *See* Chart and Pennsylvania Declaration of Matthew Braynard, App. 1331-1340 ¶3.
[108] *See* Expert Report of Dennis Nathan Cain (III), App. 1433-1445.
[109] *See* Declaration of Steven J. Miller, App. 1325-1330.
[110] *Id.*
[111] *See* Pennsylvania Declaration of Matthew Braynard, App. 1331-1340 ¶3.
[112] *See* Pennsylvania Declaration of Matthew Braynard, App. 1331-1340.
[113] *See* Pennsylvania Declaration of Matthew Braynard, App. 1331-1340 ¶4.

2. State of Georgia voters allege election official errors and improprieties which exceed the Presidential vote margin.[114]

178. State of Georgia voters allege election official errors and improprieties which exceed the Presidential vote margin.

179. Georgia has 16 electoral votes, with a statewide vote tally currently estimated at 2,458,121 for President Trump and 2,472,098 for former Vice President Biden, a margin of approximately 12,670 votes.

180. The number of votes affected by the various constitutional violations exceeds the margin of votes dividing the candidates.

181. Based on Georgia voters' allegations, Georgia's Secretary of State, Brad Raffensperger, without legislative approval, unilaterally abrogated Georgia's statute governing the signature verification process for absentee ballots.[115]

182. O.C.G.A. § 21-2-386(a)(2) prohibits the opening of absentee ballots until after the polls open on Election Day: In April 2020, however, the State Election Board adopted Secretary of State Rule 183-1-14-0.9-.15, Processing Ballots Prior to Election Day.

183. Based on Georgia voters' allegations, that rule purports to authorize county election officials to begin processing absentee ballots up to three weeks before Election Day.

184. Based on Georgia voters' allegations, Georgia law authorizes and requires a single registrar or clerk—after reviewing the outer envelope—to reject an absentee ballot if the voter failed to sign the required oath or to provide the required information, the signature appears invalid, or the

[114] For full extent of inappropriate activities, *see* Timeline of Electoral Policy Activities, Issues, and Litigation Pennsylvania, Michigan, Wisconsin, Georgia, Arizona, and Nevada August 2003 to November 2020, *Appendix* 1-20.
[115] *See* Expert Declaration of Harry Haury, *Appendix* 69-89.

required information does not conform with the information on file, or if the voter is otherwise found ineligible to vote.[116]

185. Georgia law provides absentee voters the chance to "cure a failure to sign the oath, an invalid signature, or missing information" on a ballot's outer envelope by the deadline for verifying provisional ballots (*i.e.*, three days after the election).[117] To facilitate cures, Georgia law requires the relevant election official to notify the voter in writing: "The board of registrars or absentee ballot clerk shall promptly notify the elector of such rejection, a copy of which notification shall be retained in the files of the board of registrars or absentee ballot clerk for at least two years."[118]

186. Based on Georgia voters' allegations, on March 6, 2020, in *Democratic Party of Georgia v. Raffensperger*, No. 1:19-cv-5028-WMR (N.D. Ga.), Georgia's Secretary of State entered a Compromise Settlement Agreement and Release with the Democratic Party of Georgia (the "Settlement") 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[119] beyond the express mandatory procedures.[120]

187. Based on Georgia voters' allegations, among other things, before a ballot could be rejected, the Settlement required a registrar who found a defective signature to now seek a review by two other registrars, and only if a majority of the registrars agreed that the signature was defective could the ballot be rejected but not before all three registrars' names were written on the ballot envelope along with the reason for the rejection. These cumbersome procedures are in direct

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[116] O.C.G.A. § 21-2-386(a)(1)(B)-(C).
[117] O.C.G.A. §§ 21-2-386(a)(1)(C), 21-2-419(c)(2).
[118] O.C.G.A. § 21-2-386(a)(1)(B).
[119] *See* Expert Report of A.J. Jaghori, *Appendix* 39-41. See Settlement Agreement, *Appendix* 1222-1229.
[120] O.C.G.A. § 21-2-386(a)(1)(B).

conflict with Georgia's statutory requirements, as is the Settlement's requirement that notice be provided by telephone (*i.e.*, not in writing) if a telephone number is available. Finally, the Settlement purports to require election officials to consider issuing guidance and training materials drafted by an expert retained by the Democratic Party of Georgia.

188. Based on Georgia voters' allegations, Georgia's legislature has not ratified these material changes to statutory law mandated by the Compromise Settlement Agreement and Release, including altered signature verification requirements and early opening of ballots. The relevant legislation that was violated by Compromise Settlement Agreement and Release did not include a severability clause.

189. Based on Georgia voters' allegations, this unconstitutional change in Georgia law materially benefitted former Vice President Biden. According to the Georgia Secretary of State's office, former Vice President Biden had almost double the number of absentee votes (65.32%) as President Trump (34.68%).

190. Based on Georgia voters' allegations, specifically, there were 1,305,659 absentee mail-in ballots submitted in Georgia in 2020. There were 4,786 absentee ballots rejected in 2020. This is a rejection rate of .37%. In contrast, in 2016, the 2016 rejection rate was 6.42% with 13,677 absentee mail-in ballots being rejected out of 213,033 submitted, which more than *seventeen times greater* than in 2020.[121]

191. Based on Georgia voters' allegations, if the rejection rate of mailed-in absentee ballots remained the same in 2020 as it was in 2016, there would be 83,517 less tabulated ballots in 2020. The statewide split of absentee ballots was 34.68% for Trump and 65.2% for Biden. Rejecting at the higher 2016 rate with the 2020 split between Trump and Biden would decrease Trump votes

[121] *See* Charles J. Cicchetti Declaration at ¶ 24, *Appendix* pgs. 1315-1324.

by 28,965 and Biden votes by 54,552, which would be a net gain for Trump of 25,587 votes. This would be more than needed to overcome the Biden advantage of 12,670 votes, and Trump would win by 12,917 votes. Regardless of the number of ballots affected, however, the non-legislative changes to the election rules violated Article II.

192. Further, based on Georgia voters' allegations, the Zuckerberg-funded absentee drop boxes caused a disparate impact in Georgia.[122]

193. Georgia is comprised of 159 counties. In 2016, Hillary Clinton garnered 1,877,963 votes in the state of Georgia.[123] Clinton won four counties in major population centers, Fulton (297,051), Cobb (160,121), Gwinnett (166,153), and Dekalb Counties (251,370).[124] These four counties represented 874,695 votes for Hillary Clinton.[125]

194. Georgia has 300 total drop boxes for electors to submit absentee ballots.[126]

195. In 2020, Georgia counties utilized CTCL funding to install additional drop boxes in areas that would make it easier for voters to cast their absentee ballot. The four counties won by the Clinton campaign contain a plurality of the drop boxes.

196. Fulton County was home to 39 drop boxes[127], Cobb County provided 16 drop boxes,[128] 23 drop boxes in Gwinnett County[129], and Dekalb County has 34 boxes.[130]

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[122] *See* App. 1168-1234; 1477-1491.
[123] Georgia Election Results 2016 – The New York Times (nytimes.com)
[124] Georgia Election Results 2016 – The New York Times (nytimes.com)
[125] Georgia Election Results 2016 – The New York Times (nytimes.com)
[126] https://georgiapeanutgallery.org/2020/09/28/drop-box-locations-for-november-3-2020-election/
[127] Fulton County nearly doubles number of ballot drop off boxes (fox5atlanta.com)
[128] https://www.cobbcounty.org/elections/news/6-additional-absentee-ballot-drop-boxes-available-september-23rd
[129]https://www.gwinnettcounty.com/static/departments/elections/2020_Election/pdf/BallotDropBoxMap_2020.pdf
[130]https://www.dekalbcountyga.gov/sites/default/files/users/user304/DeKalb%20Dropbox%20Locations%20103120%20V7.pdf

197. These four localities account for 112 drop boxes, spread out over 1,587 square miles.[131] Meaning, voters in these four Clinton strongholds have one drop box for every 14 square miles. Meanwhile, in the remaining 155 counties, spread out over 55,926 square miles, a republican voter will find one drop box for every 294 square miles.

198. Based on Georgia voters' allegations, the effect of this unconstitutional change in Georgia election law, which made it more likely that ballots without matching signatures would be counted, had a material impact on the outcome of the election.[132]

199. Finally, in Georgia, analysis of government data by data analyst Matthew Braynard and Professor Qianying (Jennie) Zhang shows election officials' absentee ballot errors of 204,143 far exceed the margin of victory of 12,670.[133]

200. And, the Braynard-Zhang analysis of the government data shows election officials' absentee ballot error rate of at least 1.28% which far exceeds federal law's pre-election certification error rate for voting systems' hardware and software of 0.0008%.[134]

Georgia Voter Election Contest
Margin +12,670

Type of error*	Description	Margin
1) Unlawful Ballots	Estimate of the minimum number of absentee ballots requested which were not requested by the person identified in the state's database[135]	20,431
		43,688

[131] The areas for the respective counties are: Fulton 534 square miles; Cobb 345 square miles; Gwinnett 437 square miles; and DeKalb 271 square miles.
[132] *See* Appendix 1235-1311.
[133] *See* Chart and Georgia Expert Report of Matthew Braynard, *Appendix* pgs. 1350-1374.
[134] *See* Expert Report of Dennis Nathan Cain (III), *Appendix* 1433-1445.
[135] *See* Georgia Expert Report of Qianying (Jennie) Zhang, Appendix pgs. 1341-1349 ¶ 1.

2) Legal Votes Not Counted	Estimate of the minimum number of absentee ballots that the requester returned but were not counted[136]	
Category 1 & 2 Total Votes: 64,119	Error Rate (Compared to Total Vote)	1.28%
3) Illegal Votes Counted	Electors voted where they did not reside[137]	138,221
4) Illegal Votes Counted	Out of state residents voting in Georgia[138]	20,312
5) Illegal Votes Counted	Double Votes[139]	395
TOTAL		204,143
	of total votes cast 4,998,482	

*May overlap.

3. State of Michigan voters allege election official errors and improprieties which exceed the Presidential vote margin. [140]

201. State of Michigan voters allege election official errors and improprieties which exceed the Presidential vote margin.

[136] *See* Georgia Expert Report of Qianying (Jennie) Zhang, Appendix pgs. 1341-1349.
[137] *See* Georgia Expert Report of Matthew Braynard, *Appendix* pgs. 1350-1374. ¶3.
[138] *See* Georgia Expert Report of Matthew Braynard, *Appendix* pgs. 1350-1374.
[139] *See* Georgia Expert Report of Matthew Braynard, *Appendix* pgs. 1350-1374. ¶4.
[140] For full extent of inappropriate activities See Timeline of Electoral Policy Activities, Issues, and Litigation Pennsylvania, Michigan, Wisconsin, Georgia, Arizona, and Nevada August 2003 to November 2020, *Appendix* 1-20.

202. Michigan has 16 electoral votes, with a statewide vote tally currently estimated at 2,650,695 for President Trump and 2,796,702 for former Vice President Biden, a margin of 146,007 votes. In Wayne County, Mr. Biden's margin (322,925 votes) significantly exceeds his statewide lead.

203. Based on Michigan voters' allegations, the number of votes affected by the various constitutional violations exceeds the margin of votes dividing the candidates.

204. Michigan law generally allows the public the right to observe the counting of ballots. See MCL 168.765a(12)("At all times, at least 1 election inspector from each major political party must be present at the absent voter counting place and the policies and procedures adopted by the secretary of state regarding the counting of absent voter ballots must be followed.").

205. The Michigan Constitution provides all lawful voters with "[t]he right to have the results of statewide elections audited, in such a manner as prescribed by law, to ensure the accuracy and integrity of elections."[141]

206. Indeed, "[a]ll rights set forth in this subsection shall be self-executing. This subsection shall be liberally construed in favor of voters' rights in order to effectuate its purposes."[142]

207. The public's right to observe applies to counting both in-person and absentee ballots.[143]

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[141] Mich. Const. 1963, art 2, § 4(1)(h).
[142] *Id.* (emphasis added).
[143] Regrettably, Defendants and their agents have exclusive possession of the ballots, ballot boxes, and other indicia of voting irregularities so a meaningful audit cannot timely occur. Normally, "[a] person requesting access to voted ballots is entitled to a response from the public body within 5 to 10 business days; however, the public body in possession of the ballots may not provide access for inspection or copying until 30 days after certification of the election by the relevant board of canvassers." Op.Atty.Gen.2010, No. 7247, 2010 WL 2710362.

208. Based on Michigan voters' allegations, Michigan's election officials failed to grant meaningful observation opportunities to the public over the absentee ballots.[144]

209. Wayne County is the most populous county in Michigan.

210. Detroit is the largest city in Wayne County.

211. Based on Michigan voters' allegations, the City of Detroit's observation procedures, for example, failed to ensure transparency and integrity as it did not allow the public to see election officials during key points of absentee ballot processing in the AVCBs at TCF Arena (f/k/a Cobo Hall). *Id.*

212. Based on Michigan voters' allegations, these irregularities were repeated elsewhere in Wayne County, including in Canton Township, and throughout the State.[145]

213. Based on Michigan voters' allegations, for instance, when absentee ballots arrived, the ballots should have been in an envelope, signed, sealed (and delivered) by the actual voter. Often it was not.

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[144] *See* Michigan Petitioners Appendix, Appendix 835; Affidavit of Andrew John Miller, *Appendix* 1313-1314 at ¶12. Affidavit of Angelic Johnson, *Appendix* 860-861 at ¶12; Affidavit of Zachary C. Larsen, *Appendix* 836-845 at ¶¶37-55; Affidavit of G Kline Preston IV, *Appendix* 886-889 at ¶8; Affidavit of Articia Boomer, *Appendix* 897-900 at ¶21; Affidavit of Phillip O'Halloran, *Appendix* 901-910 at ¶¶18-19; Affidavit of Robert Cushman, Appendix 928-930 at ¶3; Affidavit of Jennifer Seidl, Appendix 931-938 at ¶6; Affidavit of Andrew Sitto, Appendix 890-893 at ¶¶23; Affidavit of Kristina Karamo, Appendix 894-896 at ¶5; Affidavit of Jennifer Seidl, Appendix 931-938 at ¶35, 932 at ¶42; Affidavit of Cassandra Brown Appendix 939-944 at ¶33; Affidavit of Adam di Angeli, Appendix 951-967 at ¶30; Affidavit of Kayla Toma Appendix 977-983 at ¶¶14-15, 978 at ¶21, 979 at ¶¶31-32; Affidavit of Matthew Mikolajczak, Appendix 985-991; Affidavit of Braden Giacobazzi, Appendix 995-1000 at ¶¶3, 5, 996 at ¶8; Affidavit of Kristy Klamer Appendix 1006-1009 at ¶¶4-5, 1007 at ¶¶6-9.

[145] *See,* generally, Affidavits of Cassandra Brown Appendix 939-944 at ¶34; Lucille Ann Huizinga, Appendix 1016-1020 at ¶31; Laurie Ann Knott, Appendix 1010-1015 at ¶¶34-35; Marilyn Jean Nowak Appendix 1021-1023 at ¶17; Marlene K. Hager, Appendix 1024-1027 at ¶¶19-23; and Sandra Sue Workman Appendix 1028-1032 at ¶33 (allegedly sending ballots from Grand Rapids to TCF Center to be processed and counted).

214. Based on Michigan voters' allegations, ballots were taken from their envelopes and inspected to determine whether any deficiencies would obstruct the ballot from being fed through a tabulation machine. If any deficiencies existed (or were created by tampering), the ballot was hand duplicated.

215. Based on Michigan voters' allegations, Democrat officials and election workers repeatedly scanned ballots in high-speed scanners, often counting the same ballot more than once.[146]

216. Based on Michigan voters' allegations, the evidence will also show that these hand duplication efforts ignored the legislative mandate to have one person from each major party sign every duplicated vote (*i.e.*, one Republican and one Democrat had to sign each "duplicated" ballot and record it in the official poll book).

217. Based on Michigan voters' allegations, several poll watchers, inspectors, and other whistleblowers witnessed the surge of unlawful practices described above.[147]

218. Based on Michigan voters' allegations, these unlawful practices provided cover for careless or unscrupulous officials or workers to mark choices for any unfilled elections or questions on the ballot, potentially and substantially affecting down ballot races where there are often significant undervotes, or causing the ballots to be discarded due to overvotes.

a. Michigan Voters Allege Election Malfeasance at the TCF Center Shows Widespread Problems.[148]

219. Based on Michigan voters' allegations, there were many issues of mistake, fraud, and other malfeasance at the TCF Center during the Election and during the counting process

[146] Affidavit of Articia Boomer, Appendix 897-899 at ¶¶10-11, 13; Affidavit of William Carzon, Appendix 973-976 at ¶8; Affidavit of Matthew Mikolajczak Appendix 985-991; Affidavit of Melissa Carone, Appendix 992-994 at ¶¶3-4.
[147] Affidavit of Melissa Carone, Appendix 992-994 at ¶9.
[148] *See* Expert Declaration of Dennis Nathan Cain (II), *Appendix* 60-68.

thereafter.[149]

220. Based on Michigan voters' allegations, on election day, election officials at the TCF Center systematically processed and counted ballots from voters whose names failed to appear in either the Qualified Voter File ("QVF") or in the supplemental sheets. When a voter's name could not be found, the election worker assigned the ballot to a random name already in the QVF to a person who had not voted.[150]

221. Based on Michigan voters' allegations, on election day, election officials at the TCF Center instructed election workers to not verify signatures on absentee ballots, to backdate absentee ballots, and to process such ballots regardless of their validity.[151]

222. Based on Michigan voters' allegations, after the statutory deadlines passed and local officials had announced the last absentee ballots had been received, another batch of unsecured and unsealed ballots, without envelopes, arrived in unsecure trays at the TCF Center.

223. Based on Michigan voters' allegations, there were tens of thousands of these late-arriving absentee ballots, and apparently every ballot was counted and attributed only to Democratic candidates.[152]

224. Based on Michigan voters' allegations, election officials at the TCF Center instructed election workers to process ballots that appeared after the election deadline and to inaccurately report or backdate those ballots as having been received before the November 3, 2020, deadline.[153]

225. Based on Michigan voters' allegations, election officials at the TCF Center

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[149] *See* Affidavit of Senator Ruth Johnson, *Appendix* at 849-850.
[150] *See* Affidavit of Zachary C. Larsen, Appendix 836-845 at ¶33; Affidavit of Robert Cushman, Appendix 928-930 at ¶7.
[151] *See* Affidavit of Jessy Jacobs, Appendix 846-848 at ¶15.
[152] *See* Affidavit of John McGrath Appendix 968-972 at ¶8.
[153] *See* Affidavit of Jessy Jacobs, Appendix 846-848 at ¶17.

systematically used inaccurate information to process ballots.[154]

226. Based on Michigan voters' allegations, many times, the election workers overrode the software by inserting new names into the QVF after the election deadline or recording these new voters as having a birthdate of "1/1/1900," which is the "default" birthday.[155]

227. Based on Michigan voters' allegations, each day before the election, City of Detroit election workers and employees coached voters to vote for Joe Biden and the Democratic Party candidates.[156]

228. Based on Michigan voters' allegations, these workers, employees, and so-called consultants encouraged voters to vote a straight Democratic Party ticket. These election workers went over to the voting booths with voters to watch them vote and to coach them as to which candidates they should vote for.[157]

229. Based on Michigan voters' allegations, before and after the statutory deadline, unsecured ballots arrived at the TCF Center loading garage, loose on the floor not in sealed ballot boxes—with no chain of custody and often with no secrecy envelopes.[158]

230. Based on Michigan voters' allegations, election officials and workers at the TCF Center duplicated ballots by hand without allowing poll challengers to check if the duplication was accurate.[159]

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[154] Affidavit of Cassandra Brown, Appendix 939-944 at ¶33.
[155] *See* Affidavit of John McGrath Appendix 968-972 at ¶8; Affidavit of Kristina Karamo Appendix 894-896 at ¶6; Affidavit of Robert Cushman, Appendix 928-930 at ¶¶10-12, 929 at ¶16; Affidavit of Jennifer Seidl, Appendix 931-938 at ¶¶52-53; Affidavit of Braden Giacobazzi Appendix 995-1000 at ¶10; Affidavit of Kristy Klamer Appendix 1006-1009 at ¶13.
[156] *See* Affidavit of Jessy Jacobs, Appendix 846-848 at ¶8.
[157] *See* Affidavit of Jessy Jacobs, Appendix 846-848 at ¶8.
[158] Affidavit of Articia Boomer, Appendix 897-900 at ¶8, 898 at ¶¶9, 18.
[159] *See* Affidavit Andrew Sitto, Appendix 890-893 at ¶9; Affidavit of Phillip O'Halloran Appendix 901-910 at ¶22; Affidavit of Cynthia O'Halloran Appendix 911-914; Affidavit of Eugene Dixon, Appendix 947-948 at ¶5; Affidavit of Jason Humes Appendix 918-922.

231. Based on Michigan voters' allegations, election officials repeatedly obstructed poll challengers from observing.[160]

232. Based on Michigan voters' allegations, election officials violated the plain language of the law MCL 168.765a by permitting thousands of ballots to be filled out by hand and duplicated on site without oversight from bipartisan poll challengers.

233. Based on Michigan voters' allegations, after poll challengers started uncovering the statutory violations at the TCF Center, election officials and workers locked credentialed challengers out of the counting room so they could not observe the process, during which time tens of thousands of ballots, if not more, were improperly processed.[161]

b. Michigan voters Allege Suspicious Funding and Training of Election Workers

234. Based on Michigan voters' allegations, in September, the Detroit City council approved a $1 million contract for the staffing firm P.I.E. Management, LLC to hire up to 2,000 workers to work the polls and to staff the ballot counting machines at the TCF Center. P.I.E. Management, LLC is owned and controlled by a Democratic Party operative.

235. Based on Michigan voters' allegations, a week after approval, P.I.E. Management, LLC began advertising for workers, stating, "Candidates must be 16 years or older. Candidates are required to attend a 3-hour training session before the General Election. The position offers two shifts and pay-rates: 1) From 7 am to 7 pm at $600.00; and 2) From 10 pm to 6 am at $650."

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[160] *See* Affidavit of Zachary C. Larsen, Appendix 836-845 at ¶¶37-55; Affidavit of Janice Hermann, Appendix 915-917 at ¶5; Affidavit of Jennifer Seidl, Appendix 931-938 at ¶29, 932 at ¶42; Affidavit of Cassandra Brown, Appendix 939-944 at ¶33.

[161] *See* Affidavit of Zachary C. Larsen, Appendix 836-845 at ¶¶37-55; Affidavit of Janice Hermann, Appendix 915-917 at ¶5; Affidavit of Jennifer Seidl, Appendix 931-938 at ¶29, 932 at ¶32, 933 at ¶42; Affidavit of Cassandra Brown, Appendix 939-944 at ¶¶33; Affidavit of Anna England, Appendix 949-950 at ¶¶5,7; Affidavit of Matthew Mikolajczak Appendix 985-991; Affidavit of Braden Giacobazzi, Appendix 995-1000 at ¶6.

Consequently, these temporary workers were earning at least $50 per hour—far exceeding prevailing rates at most rural communities.

236. Based on Michigan voters' allegations, the evidence exists to show that this money and much more came from a single private source: Mark Zuckerberg and his spouse, through the charity called Center for Tech and Civic Life (CTCL), which paid over $400 million nationwide to Democrat-favoring election officials and municipalities.[162]

237. Based on Michigan voters' allegations, the improper private funding to Michigan exceeded $9.8 million.[163]

c. Michigan Voter Allege Forging Ballots on the QVF

238. Based on Michigan voters' allegations, whistleblowers observed election officials processing ballots at the TCF Center without confirming that the voter was eligible to vote.[164]

239. Based on Michigan voters' allegations, whistleblowers observed election officials assigning ballots to different voters, causing a ballot being counted for a non-eligible voter by assigning it to a voter in the QVF who had not yet voted.[165]

d. Michigan Voters Allege Changing Dates on Ballots

240. All lawful absentee ballots were supposed to be in the QVF system by 9:00 p.m. on November 3, 2020.

241. This deadline had to bet met to ensure an accurate final list of absentee voters who returned their ballots before the statutory deadline of 8:00 p.m. on November 3, 2020.

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[162] *See*, generally, Expert Report of James Carlson, Appendix pgs. 21-30.
[163] *See* Expert Report of James Carlson, Appendix pgs. 1079-1111.
[164] *See* Affidavit of Zachary C. Larsen, Appendix 836-845 at ¶12.
[165] *See* Affidavit of John McGrath Appendix 968-972 at ¶8; Affidavit of Kristina Karamo Appendix 894-896 at ¶6; Affidavit of Robert Cushman, Appendix 928-930 at ¶¶10-12, 929 at ¶16; Affidavit of Jennifer Seidl, Appendix 931-938 at ¶¶52-53; Affidavit of Braden Giacobazzi Appendix 995-1000 at ¶10; Affidavit of Kristy Klamer Appendix 1006-1009 at ¶13.

242. To have enough time to process the absentee ballots, election officials told polling locations to collect the absentee ballots from the drop-boxes every hour on November 3, 2020.

243. Based on Michigan voters' allegations, on November 4, 2020, a City of Detroit election whistleblower at the TCF Center was told to improperly pre-date the receive date for absentee ballots that were not in the QVF as if they had been received on or before November 3, 2020. The Whistleblower swore she was told to alter the information in the QVF to inaccurately show that the absentee ballots had been timely received. She estimates that this was done to thousands of ballots.[166]

e. Michigan Voters allege Double Voting.

244. Based on Michigan voters' allegations, an election worker in the City of Detroit observed several people who came to the polling place to vote in-person, but they had already applied for an absentee ballot.[167]

245. Based on Michigan voters' allegations, election officials allowed these people to vote in-person, and they did not require them to return the mailed absentee ballot or sign an affidavit that the voter lost or "spoiled" the mailed absentee ballot as required by law and policy.

246. Based on Michigan voters' allegations, this illicit process allowed people to vote in person and to send in an absentee ballot, thereby voting twice. This "double voting" was made possible by the unlawful ways in which election officials were counting and inputting ballots at the TCF Center from across the City's several polling places.

247. Based on Michigan voters' allegations, the Secretary of State's absentee ballot scheme exacerbated this "double voting," as set forth further in this Petition.[168]

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[166] *See* Affidavit of Jessy Jacobs, Appendix 846-848 at ¶17.
[167] *See* Affidavit of Jessy Jacobs, Appendix 846-848 at ¶10; Affidavit of Anna England, Appendix 949-950 at ¶45.
[168] *See*, also, Expert Report of Matthew Braynard, Appendix 1112-1122 at ¶6.

f. Michigan Voters Allege Problems With First Wave of New Ballots at TCF Center.

248. Based on Michigan voters' allegations, early in the morning of November 4, 2020, tens of thousands of ballots were suddenly brought into the counting room at the TCF Center through the back door.[169]

249. Based on Michigan voters' allegations, these new ballots were brought to the TCF Center by vehicles with out-of-state license plates.[170]

250. Based on Michigan voters' allegations, whistleblowers claim that all of these new ballots were cast for Joe Biden.[171]

251. Based on Michigan voters' allegations, these ballots still do not share or have the markings establishing the proper chain of custody from valid precincts and clerks and are among the approximately 70% of unmatched AVCB errors identified by Palmer and Hartmann.

g. Michigan Voters Allege Problems With Second Wave of New Ballots at TCF Center.

252. Based on Michigan voters' allegations, the ballot counters needed to check every ballot to confirm that the name on the ballot matched the name on the electronic poll list—the list of all persons who had registered to vote on or before November 1, 2020 (the QVF).

253. Based on Michigan voters' allegations, the ballot counters were also provided with supplemental sheets which had the names of all persons who had registered to vote on either November 2, 2020 or November 3, 2020.

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[169] *See* Affidavit of John McGrath Appendix 968-972 at ¶4 (around 3:00 a.m.); Affidavit of Articia Boomer, Appendix 897-900 at ¶18 (around 4:00 a.m.); Affidavit of William Carzon, Appendix 973-976 at ¶11 (around 4:00 a.m.); Affidavit Andrew Sitto, Appendix 890-893 at ¶16 (alleges about 4:30 a.m.).

[170] *See* Affidavit of Andrew Sitto, Appendix 890-893 at ¶15.

[171] *See* Affidavit of Andrew Sitto, Appendix 890-893 at ¶¶17-18.

254. Based on Michigan voters' allegations, the validation process for a ballot requires the name on the ballot match with a registered voter on either the QVF or the supplemental sheets.

255. Based on Michigan voters' allegations, at around 9:00 p.m. on Wednesday, November 4, 2020, several more boxes of ballots were brought to the TCF Center. This was a second wave of new ballots.

256. Based on Michigan voters' allegations, election officials instructed the ballot counters to use the "default" date of birth of January 1, 1900, on all of these newly appearing ballots.[172]

257. Based on Michigan voters' allegations, mone of the names on these new ballots corresponded with any registered voter on the QVF or the supplemental sheets.[173]

258. Based on Michigan voters' allegations, despite election rules requiring all absentee ballots to be inputted into the QVF system before 9:00 p.m. the day before, election workers inputted these new ballots into the QVF, manually adding each voter to the list *after* the deadline.

259. Based on Michigan voters' allegations, almost all of these new ballots were entered into the QVF using the "default" date of birth of January 1, 1900.[174]

260. Based on Michigan voters' allegations, these newly received ballots were either fabricated or apparently cast by persons who were not registered to vote before the polls closed at 8:00 p.m. on election day.

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[172] *See* Affidavit of John McGrath Appendix 968-972 at ¶8; Affidavit of Kristina Karamo Appendix 894-896 at ¶6; Affidavit of Robert Cushman, Appendix 928-930 at ¶¶10-12, 929 at ¶16; Affidavit of Jennifer Seidl, Appendix 931-938 at ¶¶52-53; Affidavit of Braden Giacobazzi Appendix 995-1000 at ¶10; Affidavit of Kristy Klamer Appendix 1006-1009 at ¶13.

[173] *See* Affidavit of John McGrath, Appendix 968-972 at ¶¶7, 14, 969 at ¶¶16-18.

[174] *See* Affidavit of John McGrath, Appendix 968-972 at ¶8; Affidavit of Kristina Karamo, Appendix 894-896 at ¶6; Affidavit of Robert Cushman, Appendix 928-930 at ¶¶10-12, 929 at ¶16; Affidavit of Jennifer Seidl, Appendix 931-938 at ¶¶52-53; Affidavit of Braden Giacobazzi, Appendix 995-1000 at ¶10; Affidavit of Kristy Klamer, Appendix 1006-1009 at ¶13.

261. Based on Michigan voters' allegations, these ballots still do not share or have the markings establishing the proper chain of custody from valid precincts and clerks and are among the approximately 70% of unmatched AVCB errors identified by Palmer and Hartmann.[175]

262. Based on Michigan voters' allegations, this means there were more votes tabulated than there were ballots in over 71% of the 134 AVCBs in Detroit. That equates to over 95 AVCB being significantly "off." *Id.*

263. Based on Michigan voters' allegations, according to public testimony before the state canvassers on November 23, City of Detroit Election Consultant Daniel Baxter admitted in some instances the imbalances exceeded 600 votes per AVCB. He did not reveal the total disparity.

h. Michigan Voters Allege a Concealment of the Malfeasance in Violation of Michigan law.

264. Based on Michigan voters' allegations, many election challengers were denied access to observe the counting process by election officials at the TCF Center.[176]

265. Based on Michigan voters' allegations, after denying access to the counting rooms, election officials at the TCF Center used large pieces of cardboard to block the windows to the counting room, thereby preventing anyone from watching the ballot counting process.[177]

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[175] See *generally* Affidavits of Monica Palmer and William Hartman, Appendix 851-859 at ¶6 and 852 at ¶14.

[176] *See* Affidavit of Angelic Johnson, Appendix 860-861 at ¶12; Affidavit of Zachary C. Larsen, Appendix 836-845 at ¶¶37-55; Affidavit of G Kline Preston IV, Appendix 886-889 at ¶8; Affidavit of Articia Boomer, Appendix 897-900 at ¶21; Affidavit of Phillip O'Halloran, Appendix 901-910 at ¶¶18-19; Affidavit of Robert Cushman, Appendix 928-930 at ¶3; Affidavit of Jennifer Seidl, Appendix 931-938 at ¶6; Affidavit of Andrew Sitto, Appendix 890-893 at ¶23; Affidavit of Kristina Karamo, Appendix 894-896 at ¶5; Affidavit of Jennifer Seidl, Appendix 931-938 at ¶35, 932 at ¶42; Affidavit of Cassandra Brown Appendix 939-944 at ¶33; Affidavit of Adam di Angeli Appendix 951-967 at ¶30; Affidavit of Kayla Toma Appendix 977-983 at ¶¶14-15, 979 at ¶21, 980 at ¶¶31-32; Affidavit of Matthew Mikolajczak Appendix 985-991; Affidavit of Braden Giacobazzi Appendix 995-1000 at ¶¶3, 5, 996 at ¶8; Affidavit of Kristy Klamer Appendix 1006-1009 at ¶¶4-5, 1007 at ¶¶6-9.

[177] *See* Affidavit of Zachary C. Larsen, Appendix 836-845 at ¶52; Affidavit of John McGrath Appendix 968-972 at ¶10; Affidavit of Andrew Sitto, Appendix 890-893 at ¶22.

266. Based on Michigan voters' allegations, election officials have continued to conceal their efforts by refusing meaningful bipartisan access to inspect the ballots. Even if Republicans were involved in oversight roles by statute (such as with the Wayne County Canvassing Board), the Republican members have been harassed, threatened, and doxed (including publicly revealing where their children go to school) to pressure them to capitulate and violate their statutory duties. This conduct is beyond the pale and shocking to the conscience.[178]

i. Michigan voters allege unsecured QVF Access further Violating MCL 168.765a, *et seq.*

267. Based on Michigan voters' allegations, whenever an absentee voter application or in-person absentee voter registration was finished, election workers at the TCF Center were instructed to input the voter's name, address, and date of birth into the QVF system.

268. Based on Michigan voters' allegations, the QVF system can be accessed and edited by any election processor with proper credentials in the State of Michigan at any time and from any location with Internet access.

269. Based on Michigan voters' allegations, this access permits anyone with the proper credentials to edit when ballots were sent, received, and processed from any location with Internet access.

270. Based on Michigan voters' allegations, many of the counting computers within the counting room had icons that revealed that they were connected to the Internet.

[178] *See* Affidavit of William Hartman; Appendix 851-856 at ¶8; Affidavit of Monica Palmer, Appendix 857-859 at ¶¶18-22, and 24; Affidavit of Dr. Phillip O'Halloran, Appendix 901-910 at ¶24-25; Affidavit of Jennifer Seidl, Appendix 931-938 at ¶23, 932 at ¶¶27, 30-31, 933 at ¶¶36-37; Affidavit of Eugene Dixon, Appendix 947-48 at ¶9; Affidavit of Matthew Mikolajczak, Appendix 985-991; Affidavit of Mellissa Carone Appendix 992-994 at ¶12; Affidavit of Braden Giacobazzi, Appendix 995-1000 at ¶3, 996 at ¶7, 997 at 12, 998 at ¶¶12-14; Affidavit of Kaya Toma Appendix 977-983 at ¶15; Affidavit of Kristy Klamer Appendix 1009-1009 at ¶¶4-5, 1010 at ¶¶6-9.

271. Based on Michigan voters' allegations, Secretary of State Benson executed a contract to give a private partisan group, Rock the Vote, unfettered real-time access to Michigan's QVF.[179]

272. Based on Michigan voters' allegations, Benson sold or gave Michigan citizens' private voter information to private groups in furtherance of her own partisan goals.

273. Based on Michigan voters' allegations, Benson and the State repeatedly concealed this unlawful contract and have refused to tender a copy despite several lawful requests for the government contract under FOIA.

274. Based on Michigan voters' allegations, improper access to the QVF was one of the chief categories of serious concern identified by the Michigan Auditor General's Report.[180]

275. Based on Michigan voters' allegations, a poll challenger witnessed tens of thousands of ballots, and possibly more, being delivered to the TCF Center that were not in any approved, sealed, or tamper-proof container.

276. Based on Michigan voters' allegations, large quantities of ballots were delivered to the TCF Center in what appeared to be mail bins with open tops.[181] See the photo of the TCF Center below:

[179] *See* Rock the Vote Agreement, Appendix 1152-1167.
[180] *See* Appendix pgs. 1039-1078 at material finding #2
[181] *See* Affidavit of Daniel Gustafson, Appendix 945-946 at ¶¶4-6.

277. Based on Michigan voters' allegations, these ballot bins and containers did not have lids, were unsealed, and could not have a metal seal.[182]

278. Based on Michigan voters' allegations, some ballots were found unsecured on the public sidewalk outside the Department of Elections in the City of Detroit, reinforcing the claim that boxes of ballots arrived at the TCF Center unsealed, with no chain of custody, and with no official markings. A photograph of ballots found on the sidewalk outside the Department of Elections appears below:

279. Based on Michigan voters' allegations, the City of Detroit held a drive-in ballot drop off where individuals would drive up and drop their ballots into an unsecured tray. No verification

[182] *See* Affidavit of Rhonda Webber, Appendix 877-879 at ¶3.

was done. This was not a secured drop-box with video surveillance. To encourage this practice, free food and beverages were provided to those who dropped off their ballots using this method.[183]

j. Michigan Voters Allege a Breaking of the Seal of Secrecy Undermines Constitutional Liberties under Michigan Constitution Art 2, § 4(1)(a).

280. Based on Michigan voters' allegations, many times, election officials at the TCF Center broke the seal of secrecy for ballots to check which candidates the individual voted for on his or her ballot, thereby violating the voter's expectation of privacy.[184]

281. Based on Michigan voters' allegations, voters in Michigan have a constitutional right to open elections, and the Michigan Legislature provided them the right to vote in secret. The election officials' conduct, together with others, violates both of these hallmark principles.[185]

282. Based on Michigan voters' allegations, in Michigan, it is well-settled that the election process is supposed to be transparent and the voter's ballot secret, not the other way around.

283. Based on Michigan voters' allegations, the election officials' absentee ballot scheme has improperly revealed voters' preferences exposing Petitioners' and similarly-situated voters to dilution or spoliation while simultaneously obfuscating the inner workings of the election process.

284. Based on Michigan voters' allegations, now the Michigan election officials seek to perform an "audit" on themselves.

k. Michigan Voters Allege Statewide Irregularities Over Absentee Ballots Reveal Widespread Mistake or Fraud.

285. When a person requested an absentee ballot either by mail or in-person, that person needed to sign the absentee voter application.

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[183] *See* Affidavit of Cynthia Cassell Appendix 862-876 at ¶3 and 863 ¶¶9-10.
[184] *See* Affidavit of Zachary C. Larsen; Appendix 836-845 at ¶16-18, 20.
[185] *See* Affidavit of Jennifer Seidl, Appendix 931-938 at ¶18.

286. When the voter returned their absentee ballot to be counted, the voter was required to sign the outside of the envelope that contained the ballot.

287. Election officials who process absentee ballots are required to compare the signature on the absentee ballot application with the signature on the absentee ballot envelope.[186]

288. Based on Michigan voters' allegations, election officials at the TCF Center, for example, instructed workers not to validate or compare signatures on absentee ballot applications and absentee ballot envelopes to ensure their authenticity and validity.[187]

289. Michigan law requires absentee votes to be counted by election inspectors in a particular manner. It requires, in relevant part:

> (10) The oaths administered under subsection (9) must be placed in an envelope provided for the purpose and sealed with the red state seal. Following the election, the oaths must be delivered to the city or township clerk. Except as otherwise provided in subsection (12), a person in attendance at the absent voter counting place or combined absent voter counting place shall not leave the counting place after the tallying has begun until the polls close. Subject to this subsection, the clerk of a city or township may allow the election inspectors appointed to an absent voter counting board in that city or township to work in shifts. A second or subsequent shift of election inspectors appointed for an absent voter counting board may begin that shift at any time on election day as provided by the city or township clerk. However, an election inspector shall not leave the absent voter counting place after the tallying has begun until the polls close. If the election inspectors appointed to an absent voter counting board are authorized to work in shifts, at no time shall there be a gap between shifts and the election inspectors must never leave the absent voter ballots unattended. At all times, at least 1 election inspector from each major political party must be present at the absent voter counting place and the policies and procedures adopted by the secretary of state regarding the counting of absent voter ballots must be followed. A person who causes the polls to be closed or who discloses an election result or in any manner characterizes how any ballot being counted has been voted in a voting precinct before the time the polls can be legally closed on election day is guilty of a felony.[188]

290. Under MCL 168.31, the Secretary of State can issue instructions and rules consistent with Michigan statutes and the Constitution that bind local election authorities. Likewise, under

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[186] *See* Affidavit of Jennifer Seidl, Appendix 931-938 at ¶60.
[187] *See* Affidavit of Jessy Jacobs, Appendix 846-848 at ¶15.
[188] MCL 168.765a (10) (emphasis added).

MCL 168.765a(13), the Secretary can develop instructions consistent with the law for the conduct of Absent Voter Counting Boards ("AVCB") or combined AVCBs. "The instructions developed under [] subsection [13] are binding upon the operation of an absent voter counting board or combined absent voter counting board used in an election conducted by a county, city, or township."[189]

291. Benson also promulgated an election manual that requires bipartisan oversight:

> Each ballot rejected by the tabulator must be visually inspected by an election inspector to verify the reason for the rejection. If the rejection is due to a false read the ballot must be duplicated by two election inspectors who have expressed a preference for different political parties. Duplications may not be made until after 8 p.m. in the precinct (place the ballot requiring duplication in the auxiliary bin). At an AV counting board duplications can be completed throughout the day. NOTE: The Bureau of Elections has developed a video training series that summarizes key election day management issues, including a video on Duplicating Ballots. These videos can be accessed at the Bureau of Elections web site at www.michigan.gov/elections; under "Information for Election Administrators"; Election Day Management Training Videos. Election Officials Manual, Michigan Bureau of Elections, Chapter 8, last revised October 2020.[190]

292. Based on Michigan voters' allegations, election officials at the TCF Center flouted § 168.765a because there were not, at all times, at least one inspector from each political party at the absentee voter counting place. Rather, the many tables assigned to precincts under the authority of the AVCB were staffed by inspectors for only one party. Those inspectors alone were deciding on the processing and counting of ballots.[191]

293. Based on Michigan voters' allegations, this processing included the filling out of brand new "cure" or "duplicate" ballots. The process the election officials sanctioned worked in this way. When an absentee ballot was processed and approved for counting, it was fed into a counting machine. Some ballots were rejected—that is, they were a "false read"—because of tears, staining

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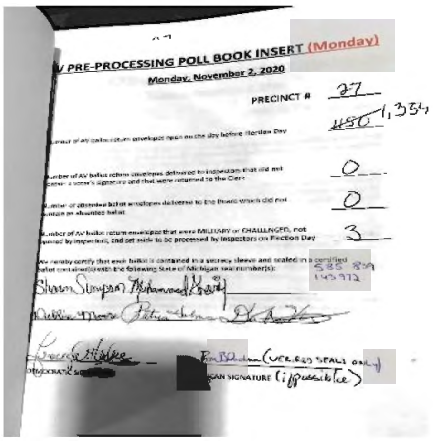
[189] MCL 168.765a(13).
[190] https://www.michigan.gov/documents/sos/VIII_Absent_Voter_County_Boards_265998_7.pdf (emphasis added).
[191] *See* Affidavit of Jennifer Seidl, Appendix 931-938 at ¶9; Affidavit of Eugene Dixon, Appendix 947-948 at ¶5; Affidavit of Mellissa Carone, Appendix 992-994 at ¶5.

(such as coffee spills), over-votes, and other errors. In some of these cases, inspectors could visually inspect the rejected ballot and determine what was causing the machine to find a "false read." When this happened, the inspectors could duplicate the ballot, expressing the voter's intent in a new ballot that could then be fed into the machine and counted.

294. Under § 168.765a and the Secretary of State's controlling manual, as cited above, an inspector from each major party must be present and must sign to show that they approve of the duplication.

295. Based on Michigan voters' allegations, rather than following this controlling mandate, the AVCB was allowing a Democratic Party inspector only to fill out a duplicate. Republicans would sign only "if possible."[192] A photograph evidencing this illicit process appears below:



296. Based on Michigan voters' allegations, the TCF Center election officials allowed hundreds or thousands of ballots to be "duplicated" solely by the Democratic Party inspectors and then counted in violation of Michigan election law.[193]

[192] *See* Affidavit of Patricia Blackmer, Appendix 923-927 at ¶11.
[193] *See* Affidavit of Zachary C. Larsen, Appendix 836-845 at ¶¶37-55; Affidavit of Janice Hermann, Appendix 915-917 at ¶¶4-5; Affidavit of Jennifer Seidl, Appendix 931-938 at ¶29, 933 at ¶42; Affidavit of Cassandra Brown, Appendix 939-944 at ¶¶33; Affidavit of Phillip O'Halloran, Appendix 901-910 at ¶22; Affidavit of Anna England, Appendix 949-950 at ¶8.

297. Based on Michigan voters' allegations, according to eyewitness accounts, election officials at the TCF Center habitually and systematically disallowed election inspectors from the Republican Party to be present in the voter counting place and refused access to election inspectors from the Republican party to be within a close enough distance from the absentee voter ballots to see for whom the ballots were cast.

298. Based on Michigan voters' allegations, election officials at the TCF Center refused entry to official election inspectors from the Republican Party into the counting place to observe the counting of absentee voter ballots. Election officials even physically blocked and obstructed election inspectors from the Republican party by adhering large pieces of cardboard to the transparent glass doors so the counting of absent voter ballots was not viewable.[194]

299. Based on Michigan voters' allegations, absentee ballots from military members, who tend to vote Republican in the general elections, were counted separately at the TCF Center. All (100%) of the military absentee ballots had to be duplicated by hand because the form of the ballot was such that election workers could not run them through the tabulation machines used at the TCF Center.[195]

300. Based on Michigan voters' allegations, these military ballots were supposed to be the last ones counted, but there was another large drop of ballots that occurred during the counting of the military absentee ballots.[196]

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[194] *See* Affidavit of Zachary C. Larsen, Appendix 836-845 at ¶¶37-55; Affidavit of Janice Hermann, Appendix 915-917 at ¶5; Affidavit of Jennifer Seidl, Appendix 931-938 at ¶29, 932 at ¶32, 933 at ¶42; Affidavit of Cassandra Brown, Appendix 939-944 at ¶¶33; Affidavit of Anna England, Appendix 949-950 at ¶¶5,7; Affidavit of Matthew Mikolajczak, Appendix 985-991; Affidavit of Braden Giacobazzi, Appendix 995-1000 at ¶6.

[195] *See* Affidavit of Janice Hermann, Appendix 915-917 at ¶16.

[196] *Id.* see also, Affidavit of Robert Cushman, Appendix 928-930 at ¶¶4-5.

301. Based on Michigan voters' allegations, the military absentee ballot count at the TCF Center occurred after the Republican challengers and poll watchers were kicked out of the counting room.[197]

302. The Michigan Legislature also requires City Clerks to post the following absentee voting information anytime an election is conducted that involves a state or federal office:

a. The clerk must post before 8:00 a.m. on Election Day: 1) the number of absent voter ballots distributed to absent voters 2) the number of absent voter ballots returned before Election Day and 3) the number of absent voter ballots delivered for processing.

b. The clerk must post before 9:00 p.m. on Election Day: 1) the number of absent voter ballots returned on Election Day 2) the number of absent voter ballots returned on Election Day which were delivered for processing 3) the total number of absent voter ballots returned both before and on Election Day and 4) the total number of absent voter ballots returned both before and on Election Day which were delivered for processing.

c. The clerk must post immediately after all precinct returns are complete: 1) the total number of absent voter ballots returned by voters and 2) the total number of absent voter ballots received for processing.[198]

303. Based on Michigan voters' allegations, the clerk for the City of Detroit failed to post by 8:00 a.m. on "Election Day" the number of absentee ballots distributed to absent voters and failed to post before 9:00 p.m. the number of absent voter ballots returned both before and on "Election Day."

304. According to Michigan Election law, all absentee voter ballots must be returned to the clerk before polls close at 8 p.m.[199] Any absentee voter ballots received by the clerk after the close of the polls on election day should not be counted.

305. The Michigan Legislature allows for early counting of absentee votes before the closings of the polls for large jurisdictions, such as the City of Detroit and Wayne County.

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[197] *Id.* Affidavit of Jennifer Seidl, Appendix 931-938 at ¶42.
[198] *See* MCL 168.765(5).
[199] MCL 168.764a.

306. Based on Michigan voters' allegations, receiving tens of thousands more absentee ballots in the early morning hours after Election Day and after the counting of the absentee ballots had already concluded, without proper oversight, with tens of thousands of ballots attributed to just one candidate, Joe Biden, confirms that election officials failed to follow proper election protocols and established Michigan election law.[200]

307. Based on Michigan voters' allegations, missing the statutory deadline proscribed by the Michigan Legislature for turning in the absentee ballot or timely updating the QVF invalidates the vote under Michigan Election Law and the United States Constitution.

308. Based on Michigan voters' allegations, poll challengers observed election workers and supervisors writing on ballots themselves to alter them, apparently manipulating spoiled ballots by hand and then counting the ballots as valid, counting the same ballot more than once, adding information to incomplete affidavits accompanying absentee ballots, counting absentee ballots returned late, counting unvalidated and unreliable ballots, and counting the ballots of "voters" who had no recorded birthdates and were not registered in the QVF or on any supplemental sheets.[201]

l. Michigan Voters Allege that Flooding the Election with Absentee Ballots was Improper.

309. Michigan does not permit "mail-in" ballots *per se*, and for good reason: mail-in ballots facilitate fraud and dishonest elections.[202]

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[200] See Affidavit of John McGrath Appendix 968-972 at ¶4; Affidavit of Robert Cushman, Appendix 928-930 at ¶14.

[201] See Affidavit of Angelic Johnson Appendix 860-861 at ¶7; Affidavit of Adam di Angeli Appendix 951-967 at ¶61; see also, Affidavit of John McGrath, *supra*; Affidavit of Kristina Karamo, *supra*; Affidavit of Robert Cushman, *supra*; Affidavit of Jennifer Seidl, *supra*; Affidavit of Braden Giacobazzi, *supra*; Affidavit of Kristy Klamer, *supra*.

[202] *See, e.g., Veasey v Abbott*, 830 F3d 216, 256, 263 (5th Cir. 2016) (observing that "mail-in ballot fraud is a significant threat—unlike in-person voter fraud," and comparing "in-person voting—a form of

310. Based on Michigan voters' allegations, Secretary of State Benson's absentee ballot scheme, as explained above, achieved the same purpose as mail-in ballots—contrary to Michigan law. In the most charitable light, this was profoundly naïve and cut against the plain language and clear intent of the Michigan Legislature to limit fraud. More cynically, this was an intentional effort to favor her preferred candidates.

311. Based on Michigan voters' allegations, Benson put this scheme in place because it is generally understood that Republican voters were more likely to vote in-person. This trend has been true for decades and proved true with this Election too.[203]

312. Based on Michigan voters' allegations, to counter this (*i.e.,* the fact that Republicans are more likely than Democrats to vote in-person), Benson implemented a scheme to permit mail-in voting, leading to this dispute and the absentee ballot scheme that unfairly favored Democrats over Republicans.

313. Based on Michigan voters' allegations, in her letter accompanying her absentee ballot scheme, Benson misstated, "You have the right to vote by mail in every election." Playing on the fears created by the current pandemic, Benson encouraged voting "by email," stating, "During the outbreak of COVID-19, it also enables you to stay home and stay safe while still making your voice heard in our elections."[204]

314. Based on Michigan voters' allegations, prior to Election Day, the Democratic Party's propaganda was to push voters to vote by mail and to vote early. Democratic candidates used the fear of the current pandemic to promote this agenda—an agenda that would benefit Democratic

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voting with little proven incidence of fraud" with "mail-in voting, which the record shows is far more vulnerable to fraud").

[203] *See* Expert Report of John McLaughlin, Appendix 1135-1146.

[204] Affidavit of Christine Muise, Appendix 880-886 at ¶2, Ex A.

Party candidates. For example, on September 14, 2020, the Democratic National Committee announced the following:

> Today Biden for President and the Democratic National Committee are announcing new features on IWillVote.com—the DNC's voter participation website—that will help voters easily request and return their ballot by mail, as well as learn important information about the voting process in their state as they make their plan to vote.
>
> Previously, an individual could use the site to check or update their registration and find voting locations. Now the new user experience will also guide a voter through their best voting-by-mail option . . . .[205]
>
> According to the Associated Press:
>
> "We have to make it easier for everybody to be able to vote, particularly if we are still basically in the kind of lockdown circumstances we are in now," Biden told about 650 donors. "But that takes a lot of money, and it's going to require us to provide money for states and insist they provide mail-in ballots."[206]

315. Based on Michigan voters' allegations, similar statements were repeatedly publicly on the Secretary of State's website:

> Voters are encouraged to vote at home with an absentee ballot and to return their ballot as early as possible by drop box, in person at their city or township clerk's office, or well in advance of the election by mail.[207]

316. The Michigan Legislature set forth detailed requirements for absentee ballots, and these requirements are necessary to prevent voter fraud because it is far easier to commit fraud via an absentee ballot than when voting in person.[208] Michigan law plainly limits the ways you may get an absentee ballot:

> (1) Subject to section 761(3), at any time during the 75 days before a primary or special primary, but not later than 8 p.m. on the day of a primary or special primary, *an elector may apply for an absent voter ballot. The elector shall apply in person or by mail* with the clerk of

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[205] (available at https://democrats.org/news/biden-for-president-dnc-announce-new-vote-by-mail-features-on-iwillvote-com/ (last visited Dec. 21, 2020)).
[206] (available at https://apnews.com/article/6cf3ca7d5a174f2f381636cb4706f505 (last visited Nov. 17, 2020)).
207 https://www.michigan.gov/sos/0,4670,7-127-1633_101996---,00.html (emphasis added).
[208] See, e.g., *Griffin v Roupas*, 385 F3d 1128, 1130-31 (CA7, 2004) ("Voting fraud is a serious problem in U.S. elections generally . . . and it is facilitated by absentee voting").

the township or city in which the elector is registered. The clerk of a city or township shall not send by first-class mail an absent voter ballot to an elector after 5 p.m. on the Friday immediately before the election. Except as otherwise provided in section 761(2), the clerk of a city or township shall not issue an absent voter ballot to a registered elector in that city or township after 4 p.m. on the day before the election. An application received before a primary or special primary may be for either that primary only, or for that primary and the election that follows. An individual may submit a voter registration application and an absent voter ballot application at the same time if applying in person with the clerk or deputy clerk of the city or township in which the individual resides. Immediately after his or her voter registration application and absent voter ballot application are approved by the clerk or deputy clerk, the individual may, subject to the identification requirement in section 761(6), complete an absent voter ballot at the clerk's office.

(2) Except as otherwise provided in subsection (1) and subject to section 761(3), at any time during the 75 days before an election, but not later than 8 p.m. on the day of an election, an elector may apply for an absent voter ballot. *The elector shall apply in person or by mail with the clerk of the township, city, or village in which the voter is registered*. The clerk of a city or township shall not send by first-class mail an absent voter ballot to an elector after 5 p.m. on the Friday immediately before the election. Except as otherwise provided in section 761(2), the clerk of a city or township shall not issue an absent voter ballot to a registered elector in that city or township after 4 p.m. on the day before the election. An individual may submit a voter registration application and an absent voter ballot application at the same time if applying in person with the clerk or deputy clerk of the city or township in which the individual resides. Immediately after his or her voter registration application and absent voter ballot application are approved by the clerk, the individual may, subject to the identification requirement in section 761(6), complete an absent voter ballot at the clerk's office.
(3) An application for an absent voter ballot under this section may be made in any of the following ways:

(a) By a written request signed by the voter.

(b) On an absent voter ballot application form provided for that purpose by the clerk of the city or township.

(c) On a federal postcard application.

(4) An applicant for an absent voter ballot shall sign the application. Subject to section 761(2), a clerk or assistant clerk shall not deliver an absent voter ballot to an applicant who does not sign the application. A person shall not be in possession of a signed absent voter ballot application except for the applicant; a member of the applicant's immediate family; a person residing in the applicant's household; a person whose job normally includes the handling of mail, but only during the course of his or her employment; a registered elector requested by the applicant to return the application; or a clerk, assistant of the clerk, or other authorized election official. A registered elector who is requested by the applicant to return his or her absent voter ballot application shall sign the certificate on the absent voter ballot application.

> (5) The clerk of a city or township shall have absent voter ballot application forms *available in the clerk's office* at all times and shall furnish an absent voter ballot application form to anyone *upon a verbal or written request*.[209]

317. Based on Michigan voters' allegations, the Secretary of State sent *unsolicited* absentee ballot applications to every household in Michigan with a registered voter, no matter if the voter was still alive or lived at that address.

318. Based on Michigan voters' allegations, the Secretary of State also sent absentee ballot requests to non-residents who were temporarily living in Michigan, such as out-of-state students who are unregistered to vote in Michigan.

319. Based on Michigan voters' allegations, in many instances, the Secretary of State's absentee ballot scheme led to the Secretary of State sending ballot requests to individuals who did *not* request them.[210]

m. Michigan Voters Allege that Expert Analysis of these Statutory Violations Reveals Widespread Inaccuracies and Loss of Election Integrity.

320. Data analyst Matthew Braynard analyzed the State's database for the Election and related data sets, including its own call center results.[211]

321. Dr. Zhang, a statistician, analyzed the data to extrapolate the datasets statewide.[212]

n. Unlawful unsolicited ballots cast in General Election

322. Braynard opined to a reasonable degree of scientific certainty that out of the 3,507,410 individuals who the State's database identifies as applying for and the State sending an

[209] MCL 168.759 (emphasis added).
[210] *See* Affidavit of Christine Muise, Appendix 880-885 at ¶3. Affidavit of Rena M. Lindevaldesen, Appendix 1001-1005 at ¶¶1,3 and 1002 ¶5.
[211] *See, generally,* Expert Report of Matthew Braynard, Appendix 1112-1122.
[212] *See, generally,* Expert Report of Dr. Quanying "Jennie" Zhang, Appendix 1123-1134.

absentee ballot, that in his sample of this universe, 12.23% of those absentee voters that did not request an absentee ballot to the clerk's office.[213]

323. These data extrapolate with 99% confidence interval that between 326,460 and 531,467 of the absentee ballots the State issued that were counted were not requested by an eligible State voter (unsolicited).[214]

o. Unsolicited ballots not cast in General Election

324. Out of the 139,190 individuals who the State's database identifies as having not requested (unsolicited) and not returned an absentee ballot, 24.14% of these absentee voters in the State did not request an absentee ballot.[215]

325. These data extrapolate with 99% confidence interval that between 28,932 and 38,409 of the absentee ballots the State issued were not requested by an eligible State voter (unsolicited).[216]

326. Using the most conservative boundary, taken together, these data suggest Michigan election officials violated Michigan Lection Law by sending unsolicited ballots to at least 355,392 people.[217]

p. Absentee ballots were also cast but not properly counted (improperly destroyed or spoiled)

327. Out of the 139,190 individuals who the State's database identifies as having not returned an absentee ballot, 22.95% of those absentee voters did in fact mail back an absentee ballot to the clerk's office.[218]

328. This suggests many ballots were destroyed or not counted.

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[213] *See* Expert Report of Matthew Braynard, Appendix 1112-1122 at ¶1.
[214] Expert Report of Dr. Quanying "Jennie" Zhang, Appendix 1123-1134 at ¶1.
[215] *See* Expert Report of Matthew Braynard, Appendix 1112-1122 at ¶2.
[216] Expert Report of Dr. Quanying "Jennie" Zhang, Appendix 1123-1134 at ¶2.
[217] *Id.* See also, Affidavit of Sandra Sue Workman, Appendix 1028-1032 at ¶28.
[218] *See* Expert Report of Matthew Braynard, Appendix 1112-1122 at ¶3.

329. These data extrapolate with 99% confidence interval that between 29,682 and 39,048 of absentee ballots that voters returned but were not counted in the State's official records.[219]

330. Out of the 51,302 individuals that had changed their address before the election who the State's database shows as having voted, 1.38% of those individuals denied casting a ballot.[220]

331. This suggests that bad actors exploited election officials' unlawful practice of sending unsolicited ballots and improperly harvested ballots on a widespread scale.

332. Indeed, by not following the anti-fraud measures mandated by the Michigan Legislature, the Secretary of State's absentee ballot scheme invited the improper use of absentee ballots and promoted such unlawful practices as ballot harvesting.[221]

333. Using the State's databases, the databases of the several states, and the NCOA database, at least 13,248 absentee or early voters were not residents of Michigan when they voted.[222]

334. Of absentee voters surveyed and when comparing databases of the several states, at least 317 individuals in Michigan voted in more than one state.[223]

q. Election officials ignored other statutory signature requirements

335. The Secretary of State also sent ballots to people who requested ballots online, but failed to sign the request.[224]

336. As of October 7, 2020, Brater admits sending at least 74,000 absentee ballots without a signed request as mandated by the Michigan Legislature.[225]

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[219] Expert Report of Dr. Quanying "Jennie" Zhang, Appendix 1123-1134 at ¶3.
[220] *Id.* at ¶4.
[221] *See* Affidavit of Rhonda Weber, Appendix 877-879 at ¶7.
[222] *See* Expert Report of Matthew Braynard, Appendix 1112-1122 at ¶5.
[223] *See* Expert Report of Matthew Braynard, Appendix 1112-1122 at ¶6.
[224] *See* adverse Affidavit of Jonathan Brater, Head of Elections Appendix 1147-1151 at ¶10.
[225] *Id.*

337. By the Election, we must infer that the actual number of illegal ballots sent was much higher.

338. According to state records, another 35,109 absentee votes counted by Benson listed no address.[226]

339. As a result of the absentee ballot scheme, the Secretary of State improperly flooded the election process with absentee ballots, many of which were fraudulent.

340. The Secretary of State's absentee ballot scheme violated the checks and balances put in place by the Michigan Legislature to ensure the integrity and purity of the absentee ballot process and thus the integrity and purity of the 2020 general election.[227]

341. Without limitation, according to state records, 3,373 votes counted in Michigan were ostensibly from voters 100 years old or older.[228]

342. According to census data, however, there are only about 1,747 centenarians in Michigan,[229] and of those, we cannot assume a 100% voting rate.[230]

343. According to state records, at least 259 absentee ballots counted listed their official address as "email" or "accessible by email," which are unlawful *per se* and suggests improper ballot harvesting.[231]

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[226] *See* Braynard Report, *supra.*
[227] *See, generally,* Affidavits of Lucille Ann Huizinga, Appendix 1016-1020 at ¶31; Laurie Ann Knott, Appendix 1010-1015 at ¶¶34-35; Marilyn Jean Nowak Appendix 1021-1023 at ¶17; Marlene K. Hager, Appendix 1024-1027 at ¶¶19-23; and Sandra Sue Workman Appendix 1028-1032 at ¶33.
[228] *See* Braynard, *supra.*
[229] Based on the US Census, 0.0175 percent of Michigan's population is 100 years or older (1,729 centenarians of the total of 9,883,640 people in Michigan in 2010). Census officials estimated Michigan's population at 9,986,857 as of July 2019, which puts the total centenarians at 1,747 or fewer. Source: https://www.census.gov/content/dam/Census/library/publications/2012/dec/c2010sr-03.pdf
[230] *See* McLaughlin, *supra.*
[231] *See* Braynard, *supra.*

344. According to state records, at least 109 people voted absentee from the Center for Forensic Psychiatry at 8303 PLATT RD, SALINE, MI 48176 (not necessarily ineligible felons, but the State does house the criminally insane at this location), which implies improper ballot harvesting.

345. According to state records, at least 63 people voted absentee at PO BOX 48531, OAK PARK, MI 48237, which is registered to a professional guardian and implies improper ballot harvesting.

346. When compared against the national social security and deceased databases, at least 9 absentee voters in Michigan are confirmed dead as of Election Day, which invalidates those unlawful votes.[232]

347. Taken together, these irregularities far exceed common sense requirements for ensuring accuracy and integrity.

r. Election officials did not fix other recent errors or serious irregularities either.

348. These are the same types of serious concerns raised by the Michigan Auditor General in December 2019.[233]

349. The Auditor General specifically found several violations of MCL 168.492:

i. 2,212 Electors voted more than once;

ii. 230 voters were over 122 years old;[234] *Id.*

iii. Unauthorized users had access to QVF; *Id.*; and

iv. Clerk and Elected Officials had not completed required training.[235]

[232] *See* Braynard, *supra*.
[233] Appendix 1039-1078.
[234] The oldest living person confirmed by the *Guinness Book of World Records* is 117 years old and she lives in Japan, not Michigan.
[235] *Id.*

350. The Auditor General found election officials had not completed required training to obtain or retain accreditation in 14% of counties, 14% of cities, and 23% of townships.[236]

351. The Auditor General found 32 counties, 83 cities, and 426 townships where the clerk had not completed initial accreditation training or, if already accredited, all continuing education training as required by law.[237]

352. The Auditor General found 12 counties, 38 cities, and 290 townships where the clerk had not completed the initial accreditation or continuing education training requirements and no other local election official had achieved full accreditation.[238]

353. Not only were the Auditor General's red flags ignored by Benson, but she arguably made them worse through her absentee ballot scheme.

354. This not only suggests malfeasance, but the scheme precipitated and revealed manifest fraud and exploitation at a level Michigan has never before encountered in its elections.

355. The abuses permitted by the Secretary of State's ballot scheme were on display at the TCF Center, and elsewhere throughout the State.

356. Because this absentee ballot scheme applied statewide, it undermined the integrity and purity of the general election statewide, and it dilutes the lawful votes of millions of Michigan voters.

s. Michigan Voters Allege Flooding Local Election Officials with Private Money

357. Based on Michigan voters' allegations, inappropriate secrecy and lack of transparency began months before Election Day with an unprecedented and orchestrated infusion of hundreds of millions of dollars into local governments nationwide.

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[236] *Id.*
[237] *Id.*
[238] *Id.*

358. Based on Michigan voters' allegations, more than $9.8 million in private money was poured into Michigan to create an unfair, two-tier election system in Michigan.[239]

359. Based on Michigan voters' allegations, the 2020 election saw the evisceration of state statutes designed to treat voters equally, thereby causing disparate treatment of voters and thus violating the constitutional rights of millions of Michiganders and Americans citizens.

360. Based on Michigan voters' allegations, to date, investigations have uncovered more than $400 million funneled through a collection of non-profits directly to local government coffers nationwide dictating to these local governments how they should manage the election, often contrary to state law.[240]

361. Based on Michigan voters' allegations, these funds were mainly used to: 1) pay "ballot harvesters" bounties, 2) fund mobile ballot pick up units, 3) deputize and pay political activists to manage ballots; 4) pay poll workers and election judges (a/k/a inspectors or adjudicators); 5) establish drop-boxes and satellite offices; 6) pay local election officials and agents "hazard pay" to recruit cities recognized as Democratic Party strongholds to recruit other cities to apply for grants from non-profits; 7) consolidate AVCBs and counting centers to facilitate the movement of hundreds of thousands of questionable ballots in secrecy without legally required bi-partisan observation; 8) implement a two-tier ballot "curing" plan that unlawfully counted ballots in Democrat Party strongholds and spoiled similarly situated ballots in Republican Party areas; and 9) subsidized and designed a scheme to remove the poll watchers from one political party so that the critical responsibility of determining the accuracy of the ballot and the integrity of the count could be done without oversight.

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[239] *See* Carlson Report, *supra.*
[240] *See* Carlson Report, *supra.*

362. The Help America Vote Act of 2002 (HAVA) controls how money is spent under federal law. See 42 USC 15301, *et seq*; see also, MCL 168.18. In turn, Congress used HAVA to create the non-regulatory Election Assistance Commission (EAC), which was delegated the responsibility of providing information, training standards, and funding management to states. The mechanism for administrating HAVA is legislatively adopted state HAVA Plans.

363. Michigan's HAVA Plan is undisputed.[241]

364. Based on Michigan voters' allegations, these private funds exceeded the federal government's March 2020 appropriation under HAVA and CARES Acts to help local governments manage the general election during the pandemic.

365. Based on Michigan voters' allegations, as these unmonitored funds flowed through the pipeline directly to hand-picked cities, the outlines of two-tiered treatment of the American voter began to take place. Local governments in Democrat Party strongholds were flush with cash to launch public-private coordinated voter registration drives allowing private access directly to government voter registration files, access to early voting opportunities, the provision of incentives such as food, entertainment, and gifts for early voters, and the off-site collection of ballots. Outside the urban core and immediate suburbs, unbiased election officials were unable to start such efforts for lack of funding.

366. Based on Michigan voters' allegations, difficult to trace private firms funded this scheme through private grants, which dictated methods and procedures to local election officials and where the grantors retained the right to "claw-back" all funds if election officials failed to reach privately set benchmarks—thus entangling the private-public partnership in ways that demand transparency—yet none has been given.

[241] See Certified Michigan HAVA State Plan of 2003, Terri Lynn Land Secretary, FR Vol. 69. No. 57 March 24 2004.

367. Based on Michigan voters' allegations, the state officials implicated, and the private interests involved, have refused repeated demands for the release of communications outlining the rationale and plan behind spending more than $400 million provided directly to various election officials before the 2020 general election.

368. Based on Michigan voters' allegations, these funds greased the skids of Democrat-heavy areas violating mandates of the Michigan Legislature, the Michigan HAVA Plan, the dictates of Congress under HAVA, and equal protection and Separation of Powers demanded under the United States Constitution.

369. Based on Michigan voters' allegations, in Michigan specifically, CTCL had awarded eleven grants as of the time of this survey. CTCL funded cities were:

i. Detroit ($3,512,000);

ii. Lansing ($443,742);

iii. East Lansing ($43,850);

iv. Flint ($475,625);

v. Ann Arbor ($417,000);

vi. Muskegon ($433,580);

vii. Pontiac ($405,564);

viii. Romulus ($16,645);

ix. Kalamazoo ($218,869); and

x. Saginaw ($402,878).[242]

370. In the 2016 election, then candidate Donald Trump only won Saginaw; then candidate Hillary Clinton won the remaining cities.

[242] *See* Expert Report of James Carlson, Appendix 1079-1111. (last updated November 25, 2020).

371. Based on Michigan voters' allegations, in 2020, CTCL funneled $9,451,235 (95.7%) to the ten jurisdictions where candidate Clinton won and only $402,878 (4.3%) to where candidate Trump won.[243]

t. Michigan Voters Allege Unacceptable Antrim County Machine Error Rate.

372. Based on Michigan voters' allegations, Antrim County, Michigan, reported errors arising from the November 3, 2020 election.

373. Based on Michigan voters' allegations, a report regarding Antrim County, Michigan, alleges that Dominion Voting Systems, the election technology used by Antrim County and elsewhere, "is intentionally and purposefully designed with inherent errors to create systemic fraud and influence election results." It's unclear how Allied Security Operations Group (ASOG) reached this conclusion, however.[244]

374. Based on Michigan voters' allegations, likewise, the report, authored by Russell James Ramsland, Jr., who is part of ASOG's management team, says the group found an "error rate" of 68% when examining "the tabulation log" of the server for Antrim County. It's also unclear what the "error rate" data refers to specifically and how it impacts the results.[245]

375. Based on Michigan voters' allegations, "The results of the Antrim County 2020 election are not certifiable," Ramsland wrote. "This is a result of machine and/or software error, not human error."[246]

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[243] *Id.*
[244] *See* Expert Report of Russell J. Ramsland, Jr., *Appendix* 1146-1168. See Expert Opinion of Anthony J. Couchenor, *Appendix* 42-47. See Expert Opinion of Dr. Navid Keshavarz-Nia, *Appendix 119-128*.
[245] *Id.*
[246] See Ramsland Report, Appendix pg. 2 ¶ 7.

u. Michigan Voters Allege Absentee Ballot Errors.

376. As mentioned above, the Braynard-Zhang analysis, in Michigan, based on the government data shows election officials' absentee ballot errors of 548,016 far exceed the margin of victory of 148,152.

377. The Braynard-Zhang analysis of the government data shows election officials' absentee ballot error rate of at least 6.05% which far exceeds federal law's pre-election certification error rate for voting systems' hardware and software of 0.0008%.[247]

Michigan Voter Election Contest Michigan Margin +148,152		
Type*	Description	Margin
1) Unlawful Ballots	Unsolicited Ballots[248]	355,392
Category 1	Error Rate (Based on Total Votes)	6.05%
2) Illegal Votes Counted	Estimate of ballots requested in the name of a registered voter. Registered Voter did not request ballot	27,825
3) Legal Votes Not Counted	Estimate of ballots that the requester returned but were not counted[249]	29,682
Category 2 and 3[250] Total Votes: 53,968	Error Rate (Based on Total Votes)	0.97%
4) Illegal Votes Counted	Electors with no address.[251]	35,109
5) Illegal Votes Counted		259

[247] *See* Expert Report of Dennis Nathan Cain (III), *Appendix* 1433-1445.
[248] The number of unsolicited ballots come from the combination of 326,460 absentee ballots issued by the State but not requested by an eligible State voter and the 28,932 absentee ballots the State claims were not returned but who claim they in fact mailed their absentee ballot back. Both of these numbers are the conservative end of Dr. Zhang's 99% confidence interval. Expert Report of Dr. Quanying "Jennie" Zhang, Appendix 1123-1134 at ¶2-3.
[249] Expert Report of Dr. Quanying "Jennie" Zhang, Appendix 1123-1134 at ¶3.
[250] Categories 2 and 3 are mutually exclusive.
[251] *See* Expert Report of Matthew Braynard, Appendix 1112-1122.

	Electors voted listing email only[252]	
6) Unlawful Ballots	No signature required to obtain ballot[253]	74,000
7) Illegal Votes Counted	Absentee or Early Voters Not Residents when they voted[254]	13,248
8) Illegal Votes Counted	Double Votes (Voted in multiple states)[255]	317
TOTAL		548,016
	Of total votes cast in MI: 5,547,053	

4. State of Wisconsin voters allege election official errors and improprieties which exceed the Presidential vote margin. [256]

378. State of Wisconsin voters allege election official errors and improprieties which exceed the Presidential vote margin.

376. Wisconsin has 10 electoral votes, with a statewide vote tally currently estimated at 1,610,151 for President Trump and 1,630,716 for former Vice President Biden (*i.e.*, a margin of 20,565 votes). In two counties, Milwaukee and Dane, Mr. Biden's margin (364,298 votes) significantly exceeds his statewide lead.

379. In the 2016 general election some 146,932 mail-in ballots were returned in Wisconsin out of more than 3 million votes cast. In stark contrast, 1,275,019 mail-in ballots, nearly a 900 percent increase over 2016, were returned in the November 3, 2020 election.

380. Based on Wisconsin voters' allegations, on November 30, 2020, Governor Tony Evers certified Joe Biden's victory in Wisconsin in a Certificate of Ascertainment, soon after he received a certification from Ann Jacobs, chairwoman of the Wisconsin Election Commission.

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[252] *See* Expert Report of Matthew Braynard, Appendix 1112-1122.
[253] *See* Declaration of Jonathan Brater, Appendix 1147-1151 at ¶ 10.
[254] *See* Expert Report of Matthew Braynard, Appendix 1112-1122 at ¶ 5.
[255] *See* Expert Report of Matthew Braynard, Appendix 1112-1122 at ¶ 6.
[256] For full extent of inappropriate activities See Timeline of Electoral Policy Activities, Issues, and Litigation Pennsylvania, Michigan, Wisconsin, Georgia, Arizona, and Nevada August 2003 to November 2020, *Appendix* 1-20.

Jacobs signed a statement of canvass to confirm who won the election. The Wisconsin Election Commission was due to meet on Tuesday, December 1, 2020. Republican Commissioners Dean Knudson had requested that Jacobs wait until Tuesday, when the Commission was to meet, to determine the results, the statutory deadline.[257]

381. Based on Wisconsin voters' allegations, by certifying the election on her own, Jacobs usurped power that belongs to the Wisconsin Election Commission. Wisconsin Statutes § 7.70 sets forth the proper procedure for certifying Wisconsin's election results. The chairperson is required to examine the certified statements of the county board of canvassers, and obtain input from the county boards if it appears material mistakes have been made. Thereafter, under § 7.70(3)(d), the chairperson is to "examine and make a statement of the total number of votes cast at any election for the offices involved in the election for president and vice president…" Under § 7.70(3)(f), these statements are to show the "persons' names receiving votes" and "the whole number of votes given to each…." § 7.70(3)(g) states that following "each other election [other than a primary election] the chairperson of the commission or the chairperson's designee shall prepare a statement certifying the results of the election and shall attach to the statement a certificate of determination which shall indicate the names of persons who have been elected to any state or national office .... The chairperson of the commission or the chairperson's designee shall deliver each statement and determination to the commission."[258]

382. Based on Wisconsin voters' allegations, Wisconsin Statutes § 7.70(5)(b) states what is supposed to come next in a presidential election. "For presidential electors, *the commission* shall prepare a certificate showing the determination of the results of the canvass and the names of the

[257] *See* Supplement to Emergency Petition, *Appendix* 384-396. See Also Wisconsin Elections Committee Letter, Appendix 1469-1470.
[258] *See* Wisconsin Finance Committee E-mails and Wisconsin Republican Presidential Elector Signatures, Appendix 1473-1476.

persons elected, and the governor shall sign, affix the great seal of the state, and transmit the certificate by registered mail to the U.S. administrator of general services. The governor shall also prepare 6 duplicate originals of such certificate and deliver them to one of the presidential electors on or before the first Monday after the 2nd Wednesday in December." (emphasis supplied).

383. Based on Wisconsin voters' allegations, as set forth clearly in the statute, Wisconsin law requires the chairperson of the commission to prepare a certificate of the votes received by each candidate in the presidential election, and transmit these results to the commission. Thereafter, the commission is required to prepare a certificate showing the names of the persons elected, and transmit this certificate to the governor. Only then is the governor authorized to transmit this certificate to the U.S. administrator of general services.

384. Based on Wisconsin voters' allegations, Chairwoman Jacobs certified these results, without authority, before the Wisconsin Election Commission meeting, in an attempt to bypass the Wisconsin Election Commission, who had a lawful duty to examine and certify the results for themselves. Chairwoman Jacobs' certification is a usurpation of the statutory authority of the Wisconsin Election Commission. Furthermore, the Governor's Certificate of Ascertainment, based on Chairwoman Jacobs' certification, rather than the lawful certification of the Commission, is a usurpation of authority, and is legally null and void.

385. Further, based on Wisconsin voters' allegations, Wisconsin statutes guard against fraud in absentee ballots: "[V]oting 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[.]"[259]

[259] Wis. Stat. § 6.84(1).

386. Based on Wisconsin voters' allegations, in direct contravention of Wisconsin law, leading up to the 2020 general election, the Wisconsin Elections Commission ("WEC") and other local officials unconstitutionally modified Wisconsin election laws—each time taking steps that weakened, or did away with, established security procedures put in place by the Wisconsin legislature to ensure absentee ballot integrity.[260]

387. Based on Wisconsin voters' allegations, for example, the WEC undertook a campaign to position hundreds of drop boxes to collect absentee ballots—including the use of unmanned drop boxes.

388. Based on Wisconsin voters' allegations, the mayors of Wisconsin's five largest cities—Green Bay, Kenosha, Madison, Milwaukee, and Racine, which all have Democrat majorities—joined in this effort, and together, developed a plan use purportedly "secure drop-boxes to facilitate return of absentee ballots." Wisconsin Safe Voting Plan 2020, at 4 (June 15, 2020).[261]

389. Based on Wisconsin voters' allegations, it was alleged in an action filed in United States District Court for the Eastern District of Wisconsin that over five hundred unmanned, illegal, absentee ballot drop boxes were used in the Presidential election in Wisconsin.

390. Based on Wisconsin voters' allegations, however, the use of any drop box, manned or unmanned, is directly prohibited by Wisconsin statute. The Wisconsin legislature specifically described in the Election Code "Alternate absentee ballot site[s]" and detailed the procedure by which the governing body of a municipality may designate a site or sites for the delivery of absentee ballots "other than the office of the municipal clerk or board of election commissioners as the

[260] *See Appendix* 201-269; 378-383.
[261] *See* Appendix pgs. 270-290; 291-346.

location from which electors of the municipality may request and vote absentee ballots and to which voted absentee ballots shall be returned by electors for any election."[262]

391. Based on Wisconsin voters' allegations, any alternate absentee ballot site "shall be staffed by the municipal clerk or the executive director of the board of election commissioners, or employees of the clerk or the board of election commissioners."[263] Likewise, Wis.Stat. 7.15(2m) provides, "[i]n a municipality in which the governing body has elected to an establish an alternate absentee ballot sit under s. 6.855, 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."

392. Based on Wisconsin voters' allegations, thus, the unmanned absentee ballot drop-off sites are prohibited by the Wisconsin Legislature as they do not comply with Wisconsin law expressly defining "[a]lternate absentee ballot site[s]."[264]

393. Based on Wisconsin voters' allegations, in addition, the use of drop boxes for the collection of absentee ballots, positioned predominantly in Wisconsin's largest cities, is directly contrary to Wisconsin law providing that absentee ballots may only be "mailed by the elector, or delivered *in person* to the municipal clerk issuing the ballot or ballots."[265]

394. Based on Wisconsin voters' allegations, The fact that other methods of delivering absentee ballots, such as through unmanned drop boxes, are *not* permitted is underscored by Wis. Stat. § 6.87(6) which mandates that, "[a]ny ballot not mailed or delivered as provided in this subsection may not be counted." Likewise, Wis. Stat. § 6.84(2) underscores this point, providing that Wis. Stat. § 6.87(6) "shall be construed as mandatory." The provision continues—"Ballots cast in contravention of the procedures specified in those provisions may not be counted. *Ballots counted in*

[262] Wis. Stat. 6.855(1).
[263] Wis. Stat. 6.855(3).
[264] Wis. Stat. 6.855(1), (3).
[265] Wis. Stat. § 6.87(4)(b)1 (emphasis added).

contravention of the procedures specified in those provisions may not be included in the certified result of any election."[266]

395. Based on Wisconsin voters' allegations, as a result of the Zuckerberg-funded absentee drop boxes, the Milwaukee County and Dane County had 1 drop box for every 30.7 square miles. But, the rest of Wisconsin had 1 drop box for every 145 square miles. Wisconsin localities provided approximately 514 ballot drop boxes leading up to the 2020 election.[267]

396. In 2016, Hillary Clinton received 1,382,536 votes in Wisconsin.[268] Of those 1.3M votes, Milwaukee and Dane Counties accounted for 506,519[269] of Clinton's votes.[270]

397. Wisconsin is a total of 65,498 square miles. Milwaukee and Dane Counties represent a combined 2,427 square miles. These two counties received about one-sixth of the total number of ballot drop boxes with 79 boxes. Milwaukee received 25 drop boxes, while Dane County (Madison) had 54 drop boxes.[271] This left the rest of the state with 435 ballot drop boxes.[272]

398. Voters in Hillary Clinton's two largest counties: Milwaukee and Dane, where she received 506,519 votes, received 79 drop boxes spread out over a combined 2,427 square miles, or 1 drop box for every 30.7 square miles. Meanwhile, voters in the rest of the state received 435 drop

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[266] Wis. Stat. § 6.84(2) (emphasis added).
[267] https://www.wisconsinwatch.org/2020/10/wisconsin-absentee-ballot-drop-box-search/. See Expert Declaration of Dennis Nathan Cain (II), *Appendix* 60-68. See Also *Appendix* 353-377.
[268] https://www.nytimes.com/elections/2016/results/wisconsin-president-clinton-trump
[269] https://www.nytimes.com/elections/2016/results/wisconsin-president-clinton-trump
[270] The next eight largest Wisconsin counties gave Hillary Clinton an additional 346,352 votes. https://www.nytimes.com/elections/2016/results/wisconsin-president-clinton-trump
Waukesha (Milwaukee area) had 5 drop boxes, Brown County (Green Bay) had 13 drop boxes, 13 in Racine, Outagamie 5, Winnebago 5, Kenosha 8, Rock 26, Marathon 10.[270]
Wisconsin has sixteen counties with over 100k residents: Milwaukee, Dane (Madison), Waukesha, Brown (Green Bay), Racine, Outagamie, Winnebago, Kenosha, Rock, Washington, Marathon, La Crosse, Sheboygan, Eau Claire, Walworth, Fond du Lac.[270]
[271] https://www.wisconsinwatch.org/2020/10/wisconsin-absentee-ballot-drop-box-search/
[272] 514-79 = 435

boxes to cover 63,071 square miles, meaning that the rest of Wisconsin had a single drop box for every 145 square miles.

399. Based on Wisconsin voters' allegations, these were not the only Wisconsin election laws that the WEC violated in the 2020 general election. The WEC and local election officials also took it upon themselves to encourage voters to unlawfully declare themselves "indefinitely confined"—which under Wisconsin law allows the voter to avoid security measures like signature verification and photo ID requirements.

400. Specifically, registering to vote by absentee ballot requires photo identification, except for those who register as "indefinitely confined" or "hospitalized."[273] Registering for indefinite confinement requires certifying confinement "because of age, physical illness or infirmity or [because the voter] is disabled for an indefinite period."[274] Should indefinite confinement cease, the voter must notify the county clerk,[275] who must remove the voter from indefinite-confinement status.[276]

401. Wisconsin election procedures for voting absentee based on indefinite confinement enable the voter to avoid the photo ID requirement and signature requirement.[277]

402. Based on Wisconsin voters' allegations, on March 25, 2020, in clear violation of Wisconsin law, Dane County Clerk Scott McDonnell and Milwaukee County Clerk George Christensen both issued guidance indicating that all voters should mark themselves as "indefinitely confined" because of the COVID-19 pandemic.[278]

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[273] Wis. Stat. § 6.86(2)(a), (3)(a).
[274] *Id.* § 6.86(2)(a).
[275] *Id.*
[276] *Id.* § 6.86(2)(b).
[277] *Id.* § 6.86(1)(ag)/(3)(a)(2).
[278] See Appendix pgs. 347-349.

403. Based on Wisconsin voters' allegations, believing this to be an attempt to circumvent Wisconsin's strict voter ID laws, the Republican Party of Wisconsin petitioned the Wisconsin Supreme Court to intervene. On March 31, 2020, the Wisconsin Supreme Court unanimously confirmed that the clerks' "advice was legally incorrect" and potentially dangerous because "voters may be misled to exercise their right to vote in ways that are inconsistent with WISC. STAT. § 6.86(2)."

404. Based on Wisconsin voters' allegations, on May 13, 2020, the Administrator of WEC issued a directive to the Wisconsin clerks prohibiting removal of voters from the registry for indefinite-confinement status if the voter is no longer "indefinitely confined."

405. Based on Wisconsin voters' allegations, the WEC's directive violated Wisconsin law. Specifically, WISC. STAT. § 6.86(2)(a) specifically provides that "any [indefinitely confined] elector [who] is no longer indefinitely confined … shall so notify the municipal clerk." WISC. STAT. § 6.86(2)(b) further provides that the municipal clerk "shall remove the name of any other elector from the list upon request of the elector or upon receipt of reliable information that an elector no longer qualifies for the service."

406. Based on Wisconsin voters' allegations, according to statistics kept by the WEC, nearly 216,000 voters said they were indefinitely confined in the 2020 election, nearly a fourfold increase from nearly 57,000 voters in 2016. In Dane and Milwaukee counties, more than 68,000 voters said they were indefinitely confined in 2020, a fourfold increase from the roughly 17,000 indefinitely confined voters in those counties in 2016.

407. Under Wisconsin law, voting by absentee ballot also requires voters to complete a certification, including their address, and have the envelope witnessed by an adult who also must

sign and indicate their address on the envelope.[279] The sole remedy to cure an "improperly completed certificate or [ballot] with no certificate" is for "the clerk [to] return the ballot to the elector[.]"[280] "If a certificate is missing the address of a witness, the ballot *may not be counted*."[281]

408. Based on Wisconsin voters' allegations, however, in a training video issued April 1, 2020, the Administrator of the City of Milwaukee Elections Commission unilaterally declared that a "witness address may be written in red and that is because we were able to locate the witnesses' address for the voter" to add an address missing from the certifications on absentee ballots. The Administrator's instruction violated WISC. STAT. § 6.87(6d). The WEC issued similar guidance on October 19, 2020, in violation of this statute as well.[282]

409. Based on Wisconsin voters' allegations, in the Wisconsin Trump Campaign Complaint, it is alleged, supported by the sworn affidavits of poll watchers, that canvas workers carried out this unlawful policy, and acting pursuant to this guidance, in Milwaukee used red-ink pens to alter the certificates on the absentee envelope and then cast and count the absentee ballot. These acts violated WISC. STAT. § 6.87(6d) ("If a certificate is missing the address of a witness, the ballot may not be counted").[283]

410. Wisconsin's legislature has not ratified these changes, and its election laws do not include a severability clause.

411. Based on Wisconsin voters' allegations, in addition, Ethan J. Pease, a box truck delivery driver subcontracted to the U.S. Postal Service ("USPS") to deliver truckloads of mail-in

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[279] *See* Wis. Stat. § 6.87.
[280] *Id.* § 6.87(9).
[281] *Id.* § 6.87(6d) (emphasis added).
[282] *See* Appendix pgs. 350-352.
[283] *See also* Wis. Stat. § 6.87(9) ("If a municipal clerk receives an absentee ballot with an improperly completed certificate or with no certificate, the clerk may return the ballot to the elector . . . whenever time permits the elector to correct the defect and return the ballot within the period authorized.").

ballots to the sorting center in Madison, WI, testified that USPS employees were backdating ballots received after November 3, 2020.[284] Further, Pease testified how a senior USPS employee told him on November 4, 2020 that "[a]n order came down from the Wisconsin/Illinois Chapter of the Postal Service that 100,000 ballots were missing" and how the USPS dispatched employees to "find[] . . . the ballots."[285] One hundred thousand ballots supposedly "found" after election day would far exceed former Vice President Biden margin of 20,565 votes over President Trump.

412. Finally, in Wisconsin, the Braynard-Zhang analysis of government data shows election officials' absentee ballot errors of 159,559 far exceed the margin of victory of 20,608.[286]

413. The Braynard-Zhange analysis of government data shows election officials' absentee ballot error rate of at least 0.89% which far exceeds federal law's pre-election certification error rate for voting systems' hardware and software of 0.0008%.[287]

Wisconsin Voter Election Contest
Margin +20,608 votes

Type of error*	Description	Votes
1) Unlawful Ballots	Estimate of the minimum number of absentee ballots requested which were not requested by the person identified in the state's database[288]	15,423
2) Legal Votes Not Counted	Estimate of ballots that the requester returned but were not counted[289]	13,826
Category 1 & 2 Total Votes: 29,249	Error Rate (Compared to Total Vote)	0.89%

[284] Declaration of Ethan J. Pease, Appendix pgs. 180-182 at ¶¶ 3-13.
[285] *Id.* ¶¶ 8-10.
[286] *See* Chart and WI Declaration of Matthew Braynard, Appendix pgs. 1384-1395.
[287] *See* Expert Report of Dennis Nathan Cain (III), *Appendix* 1433-1445.
[288] *See* WI Zhang Declaration Appendix pgs. 1375-1383 ¶ 1.
[289] *See* WI Zhang Declaration Appendix pgs. 1375-1383 ¶ 2.

3) Illegal Votes Counted	Electors voted where they did not reside[290]	26,673
4) Illegal Votes Counted	Electors who avoided Wisconsin Voter ID laws by voting absentee as an "indefinitely confined" elector and were not indefinitely confined[291]	96,437
5) Illegal Votes Counted	Out of State Residents Voting in State[292]	6,848
6) Illegal Votes Counted	Double Votes[293]	234
TOTAL		159,559
	Of total votes cast 3,289,946	

*May overlap.

5. State of Arizona voters allege election official errors and improprieties which exceed the Presidential vote margin. [294]

414. State of Michigan voters allege election official errors and improprieties which exceed the Presidential vote margin.

415. Arizona has 11 electoral votes, with a statewide vote tally currently estimated at 1,661,686 for President Trump and 1,672,143 for former Vice President Biden (*i.e.*, a margin of 10,457 votes).

416. Based on Arizona voters' allegations, there was a disparate impact caused by absentee drop boxes.

417. Arizona is composed of fifteen counties.

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[290] *See* WI Declaration of Matthew Braynard, Appendix pgs. 1384-1395.
[291] *See* WI Declaration of Matthew Braynard Appendix pgs. 1384-1395 ¶ 5. This number is derived from .4523 * 213,215
[292] *See* WI Declaration of Matthew Braynard Appendix pgs. 1384-1395 ¶ 4.
[293] *See* WI Declaration of Matthew Braynard Appendix pgs. 1384-1395 ¶ 6.
[294] For full extent of inappropriate activities See Timeline of Electoral Policy Activities, Issues, and Litigation Pennsylvania, Michigan, Wisconsin, Georgia, Arizona, and Nevada August 2003 to November 2020, *Appendix* 1-20.

418. The state of Arizona is 113,998 square miles.

419. In 2016, Hillary Clinton received 1,161,167 votes from Arizona.[295] Over half of these votes came from Maricopa County with 702,907 votes in 2016.[296]

420. Based on Wisconsin voters' allegations, this vote-rich area of only 9,224 square miles, was given more drop boxes and early voting centers than the rest of Arizona's 104,764 square miles combined.

421. Maricopa County, only 9,224 square miles, has over 125 vote-by-mail drop boxes available to its citizens, leaving one drop box for every 73 square miles.[297] Conversely, the other fourteen counties had a total of 119 drop boxes and early voting sites combined, meaning every other non-Arizona county combined had one vote-by-mail drop box for every 880 square miles.[298]

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[295] https://www.nytimes.com/elections/2016/results/arizona
[296] https://www.nytimes.com/elections/2016/results/arizona
[297] https://www.google.com/maps/d/u/0/viewer?ll=33.361088282128144%2C-112.03699115344182&z=11&mid=1MksFw9pIMM80lE-3WVkXAr9a2BBizir7
[298] Coconino Co., 8 drop boxes - https://www.coconino.az.gov/DocumentCenter/View/36811/Coconino-County-Ballot-Drop-Box-Locations-2020-Primary?bidId=

- Pinal Co., 7 drop boxes - https://www.pinalcountyaz.gov/Recorder/Pages/EarlyVoteRegister.aspx
- Gila Co., 8 drop boxes - https://www.gilacountyaz.gov/government/recorder/drop_off_boxes.php
- Pima Co., 14 dropbox/early voting sites - https://www.recorder.pima.gov/EarlyVotingSites
- Cochise Co., 5 drop boxes - https://www.cochise.az.gov/recorder/ballot-box-locations
- La Paz Co. 1 early voting site - https://www.parkerpioneer.net/news/article_1a2fd0ee-1d4c-11eb-af74-5f2cf0d805cb.html
- Maricopa Co., 125+ drop boxes - https://www.google.com/maps/d/u/0/viewer?ll=33.361088282128144%2C-112.03699115344182&z=11&mid=1MksFw9pIMM80lE-3WVkXAr9a2BBizir7
- Mohave Co., 3 early voting sites - https://mohavedailynews.com/news/11214/early-voting-begins-in-arizona/
- Graham Co., 5 drop boxes - https://www.graham.az.gov/314/How-To-Return-Your-Early-Ballot
- Navajo Co., 16 drop boxes - https://www.navajocountyaz.gov/Departments/Elections/Voter-Information/Early-Voting-Sites

422. This strategy worked to benefit Democratic voters at a greater rate than republican voters.

423. In the 2020 November, election Vice-President Biden increased his vote total by almost more than 300,000 votes over Hillary Clinton's 2016 numbers in Maricopa with 1,040,774 votes.

424. Alternatively, President Trump gained only about 150,000 votes.[299]

425. This type of disparate impact by government officials in Maricopa County clearly favored Democratic voters, to the detriment of Republican voters

426. Additionally, in Arizona, the Braynard-Zhang analysis of the government data shows election officials' absentee ballot errors of 371,498 far exceed the margin of victory of 10,457.[300]

427. The Braynard-Zhang government data shows election officials' absentee ballot error rate of at least 10.2% which far exceeds federal law's pre-election certification error rate for voting systems' hardware and software of 0.0008%.[301]

Arizona Voter Election Contest
Margin +10,457

Type of error*	Description	Margin
1) Unlawful Ballots	Estimate of the minimum number of absentee ballots requested which were not requested by the person identified in the state's database[302]	214,526
2) Legal	Estimate of ballots that the	

- Maricopa Co. - https://www.12news.com/article/news/politics/elections/map-ballot-drop-box-maricopa-county-for-november-2020-general-election-list/75-81c64546-9092-4f8e-9531-f9f10e6d1aa8
- Yavapai Co., 19 drop boxes - https://www.yavapai.us/electionsvr/early-voting

[299] https://www.politico.com/2020-election/results/arizona/
[300] *See* Chart and AZ Declaration of Matthew Braynard, Appendix pgs. 1419-1428
[301] *See* Expert Report of Dennis Nathan Cain (III), *Appendix* 1433-1445.
[302] *See* AZ Zhang Declaration Appendix pgs. 1396-1405 ¶ 1.

Votes Not Counted	requester returned but were not counted[303]	131,092
Category 1 & 2 Total Votes: 346,618	**Error Rate (Compared to Total Vote)**	**10.2%**
3) Illegal Votes Counted*	Electors voted where they did not reside[304]	19,997
4) Illegal Votes Counted*	Out of State Residents Voting in State[305]	5,726
5) Illegal Votes Counted*	Double Votes[306]	157
TOTAL		371,498
	of total votes cast 3,397,388	

*May overlap

M. The government data, state-by-state, shows election officials' absentee ballot errors far exceed the margin of victory—and they far exceed the pre-election certification error rate of 0.0008%.

428. The federal government has a pre-election standard for state voting system's software and hardware.

429. As explained above, this maximum-acceptable error rate is one in 500,000 ballot positions, or, alternatively one in 125,000 ballots—0.0008 %.[307]

430. Based on the Defendant States' voters' allegations, the government data shows Wisconsin, Pennsylvania, Michigan, Georgia and Arizona election officials' absentee ballot errors[308] far exceed the Presidential margins of victory.

[303] *See* AZ Zhang Declaration Appendix pgs. 1396-1405 ¶ 2.
[304] *See* AZ Declaration of Matthew Braynard, Appendix pgs. 1419-1428 ¶3.
[305] *See* AZ Declaration of Matthew Braynard, Appendix pgs. 1419-1428 ¶4.
[306] *See* AZ Declaration of Matthew Braynard, Appendix pgs. 1419-1428 ¶5.
[307] *See* Expert Report of Dennis Nathan Cain (III), Appendix 1433-1445.
[308] According to Plaintiffs' analysis, it is possible to have more than one type of error per ballot (e.g., double voting and voting while resident of another state).

431. Based on the Defendant States' voters' allegations, the government data in each of the states shows election officials' absentee ballot errors far exceed the federal law's pre-election certification error rate for voting systems' hardware and software.

COUNT 1:
ARTICLE II

432. Plaintiffs repeat and re-allege the allegations above, as if fully set forth herein.

433. The Plaintiffs as voters file this complaint against federal and state officials in Arizona, Georgia, Michigan, Pennsylvania and Wisconsin seeking a declaratory judgment, and related injunction, for a constitutionally-compliant process for state-by-state post-election certification of Presidential votes and of Presidential electors and for counting of their votes for the November 3, 2020 Presidential election and future elections.

434. Under Article II, if a state has authorized a Presidential election in that state, voters have voting rights to state legislative post-election certifications of Presidential votes and of Presidential electors.

435. Since Defendant States have authorized Presidential elections, voters in the Defendant States, including Plaintiffs, have voting rights under Article II to state legislative post-election certification of their Presidential votes and of Presidential electors.

436. Part of Plaintiffs' voting rights in Defendant States under Article II is the right that their Presidential votes be counted by in their respective state legislatures' post-election certifications of Presidential votes and Presidential electors in the 20020 and future elections.

437. Under Article II, Congress lacks legal authority to enact laws interfering with the state-by-state state legislative post-election certification of Presidential electors as it has done with 3 U.S.C. §§ 5, 6 and 15.

438. The text and structure of the Constitution—as evidenced in Article II and the rest of the Constitution—preempts 3 U.S.C. §§ 5, 6 and 15 as unconstitutional interference with the state

legislative prerogative to post-election Presidential elector certification guaranteed by the Constitution.[309]

439. Therefore, Article II renders 3 U.S.C. §§ 5, 6 and 15, in the 2020 and future Presidential elections, as unconstitutional interference with the state legislative prerogative to post-election Presidential elector certification guaranteed by the Constitution—and a violation of voters' rights.[310]

440. Analogously, under Article II, the Defendant States lack legal authority to enact state laws which are a perpetual and wholesale delegation of post-election certifications to state executive branch officials—as they have done in Ariz. Rev. Stat.§ 16-212 (B) (Arizona Secretary of State), Ga. Code Ann. § 21-2-499 (B) (Georgia Secretary of State and Governor), Mich. Comp. Laws Ann. § 168.46 (Michigan State Board of Canvassers and Governor), Wis. Stat. § 7.70 (5) (b) (Wisconsin Elections Commission); and 25 Pa. Cons. Stat. § 3166 (Secretary of Commonwealth and Governor).

441. Article II, and its non-delegation doctrine, left it exclusively to the state legislatures to "direct" post-election certifications of Presidential voters and of Presidential electors—not to Defendant States to "delegate" post-election certifications, perpetually and in a wholesale fashion, to state executive branch officials as a ministerial duty.

442. The text of Article II preempts Ariz. Rev. Stat. § 16-212 (B), Ga. Code Ann. § 21-2-499 (B), Mich. Comp. Laws Ann. § 168.46, Wis. Stat. § 7.70 (5) (b), 25 Pa. Cons. Stat. § 3166 and similar state laws which delegate Presidential post-election certifications to state executive branch officials when it is constitutionally-required for state legislatures to conduct post-election Presidential election certifications.

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[309] Vasan Kesavan, *Is the Electoral Count Act Unconstitutional*, 80 N.C. L. Rev. 1653, 1759-1793 (2002).
[310] *Id.* at 1696-1759 (2002).

443. The structure of the Constitution, as evidenced in Article II and the rest of the Constitution, preempts Ariz. Rev. Stat. § 16-212 (B), Ga. Code Ann. § 21-2-499 (B), Mich. Comp. Laws Ann. § 168.46, Wis. Stat. § 7.70 (5) (b), 25 Pa. Cons. Stat. § 3166 and similar state laws which delegate Presidential post-election certifications to state executive branch officials when it is constitutionally-required for state legislatures to conduct post-election Presidential election certifications.

444. Therefore, the Court should hold Ariz. Rev. Stat. § 16-212 (B), Ga. Code Ann. § 21-2-499 (B), Mich. Comp. Laws Ann. § 168.46, Wis. Stat. § 7.70 (5) (b), 25 Pa. Cons. Stat. § 3166 and similar laws unconstitutional as they apply to Presidential state legislative post-election certifications.

445. The Defendant States' lack of state legislative post-election certifications of Presidential votes and Presidential electors in the 2020 and future Presidential elections violate the Plaintiffs' voting rights under Article II.

446. The Defendant States, in violation of Article II, have failed to provide state legislative post-election certifications of Presidential votes and of the Presidential Electors; so, voters' votes in the Defendant States do not count in the current and future elections—a disenfranchisement.

447. A declaratory judgment should issue, applicable to the current and future elections, declaring that Article II requires state legislative post-election certifications of Presidential votes and of Presidential electors for Presidential elector votes to count in the U.S. Congress for the election of the President and Vice President.

448. Further, any count of Presidential electors in the November 3, 2020 or future elections should be declared invalid if based on votes of Presidential electors who have not received state legislative post-election certification.

449. The Vice President and U.S. Congress should be enjoined from counting Presidential elector votes from any states in the current and future elections unless their respective state legislatures have voted affirmatively in a post-election vote to certify Presidential votes and their Presidential electors for the current and future Presidential elections.

COUNT 2:
EQUAL PROTECTION CLAUSE

450. Plaintiffs repeat and re-allege the allegations above, as if fully set forth herein.

451. Plaintiffs are entitled to state legislative post-election certification of their Presidential votes and of Presidential electors so their votes count equally with other states' citizens' votes.

452. The Equal Protection Clause prohibits the use of differential standards in the treatment and tabulation of ballots within a State. *Bush*, 531 U.S. at 107.

453. The one-person, one-vote principle requires counting valid votes and not counting invalid votes. *Reynolds*, 377 U.S. at 554-55; *Bush*, 531 U.S. at 103 ("the votes eligible for inclusion in the certification are the votes meeting the properly established legal requirements").

454. The Defendant States, in violation of the Equal Protection Clause, have failed to provide state legislative post-election certifications of Presidential votes and of the Presidential Electors as they do in other states; so, voters' votes in the Defendant States will not count—a disenfranchisement of that state's voters.

455. Absent the state legislative post-election certification of Presidential electors and of the Presidential Electors in the Defendant States, the Defendant States violate the one-person, one-vote principle because their Presidential votes and their state's Presidential electors' votes will not count toward the election of President and Vice President.

456. Plaintiffs are therefore harmed by Defendants' unconstitutional conduct in violation of the Equal Protection Clause.

457. A declaratory judgment should issue, applicable to the current and future elections, declaring that the Equal Protection Clause requires state legislative post-election certification of Presidential votes and of Presidential electors for Presidential elector votes to count in the U.S. Congress for the election of the President and Vice President.

458. Further, any count of Presidential electors in the November 3, 2020 or future elections should be declared invalid if based on votes of Presidential electors who have not received state legislative post-election certification.

459. The Vice President and U.S. Congress should be enjoined from counting Presidential elector votes from states in the current election and future elections unless the respective state legislatures has voted affirmatively in a post-election vote to certify Presidential votes and their Presidential electors.

COUNT 3:
DUE PROCESS CLAUSE

460. Plaintiff repeats and re-alleges the allegations above, as if fully set forth herein.

461. Plaintiffs as voters are entitled to state legislative post-election certifications of Presidential votes and of Presidential electors so their votes are subjected to the same due process as other citizens' votes.

462. When election practices reach "the point of patent and fundamental unfairness," the integrity of the election itself violates substantive due process. *Griffin v. Burns*, 570 F.2d 1065, 1077 (1st Cir. 1978); *Duncan v. Poythress*, 657 F.2d 691, 702 (5th Cir. 1981); F*lorida State Conference of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1183-84 (11th Cir. 2008); R*oe v. State of Ala. By & Through Evans*, 43 F.3d 574, 580-82 (11th Cir. 1995); R*oe v. State of Ala.*, 68 F.3d 404, 407 (11th Cir. 1995); *Marks v. Stinson*, 19 F. 3d 873, 878 (3rd Cir. 1994).

463. Under this Court's precedents on procedural due process, not only intentional failure to follow election law as enacted by a State's legislature but also random and unauthorized acts by state election officials and their designees in local government can violate the Due Process Clause. *Parratt v. Taylor*, 451 U.S. 527, 537-41 (1981), overruled in part on other grounds by *Daniels v. Williams*, 474 U.S. 327, 330-31 (1986); *Hudson v. Palmer*, 468 U.S. 517, 532 (1984).

464. The difference between intentional acts and random and unauthorized acts is the degree of pre-deprivation review.

465. Defendants acted unconstitutionally by certifying Presidential electors and counting their votes without prior state legislative post-election certifications of Presidential votes and of Presidential electors.

466. Defendant States acted unconstitutionally by their state legislatures not voting for post-election certifications of Presidential votes and Presidential electors.

467. Federal Defendants acted unconstitutionally under federal laws requiring counting votes of Presidential electors who have not received state legislative post-election certification.

468. The actions set out in the paragraphs above constitute intentional violations of the law by Defendants in violation of the Due Process Clause.

469. The Defendants, in violation of the Due Process Clause, prohibit state legislative post-election certifications of Presidential votes and of the Presidential Electors.

470. Plaintiffs' voting rights are disenfranchised by Defendants' unconstitutional conduct in violation of the Due Process Clause.

471. A declaratory judgment should issue, applicable to current and future elections, declaring that the Due Process Clause requires state legislative post-election certification of Presidential votes and of Presidential electors for Presidential elector votes to count in the U.S. Congress for the election of the President and Vice President.

472. Further, any count of Presidential electors in the current and future elections should be declared invalid if based on votes of Presidential electors who have not received state legislative post-election certification.

473. The Vice President and U.S. Congress should be enjoined from counting Presidential elector votes, in the current and future elections, unless their respective state legislature has voted affirmatively in a post-election vote to certify Presidential votes and their Presidential electors.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court issue the following relief for the 2020 and future Presidential elections:

A. Issue a declaratory judgment, applying to the current and future elections, declaring that 3 U.S.C. §§ 5, 6 and 15 were and are unconstitutional deprivations of the state legislatures' constitutional prerogative to post-election certification of the Presidential electors;

B. Issue a declaratory judgment, applying to current and future elections, declaring that Ariz. Rev. Stat. § 16-212 (B), Ga. Code Ann. § 21-2-499 (B), Mich. Comp. Laws Ann. § 168.46, Wis. Stat. § 7.70 (5) (b), 25 Pa. Cons. Stat. § 3166 and similar state laws are unconstitutional delegations by the respective states of post-election Presidential election certification duties to their respective executive branch officers when Article II requires such certifications to be made by the respective state legislatures;

C. Issue a declaratory judgment, applying to current and future elections, that the Plaintiff-voters' constitutionally-protected voting rights in Presidential elections are being violated by Defendants;

D. Issue a declaratory judgment, applying to current and future elections, that the Plaintiffs' voting rights were violated under Article II, the Equal Protection Clause and the Due Process Clause;

E. Enjoin the Vice President and U.S. Congress, in the current and future elections, from counting Presidential elector votes from states unless their respective state legislatures vote affirmatively in a post-election vote to certify their Presidential electors;

F. Alternatively, enjoin, in the current and future elections, the State Defendants' state legislatures to meet in their respective States to consider post-election certification of their respective Presidential electors;

G. Award attorney's fees and costs under 42 U.S.C. § 1988 to Plaintiffs against State Defendants; and

H. Grant such other relief as the Court deems just and proper.

DATED: December 22,, 2020

/s/Erick G. Kaardal

Erick G. Kaardal (WI0031)
Special Counsel for Amistad Project of
Thomas More Society
Mohrman, Kaardal & Erickson, P.A.
150 South Fifth Street, Suite 3100
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Email: kaardal@mklaw.com

Attorney for Plaintiffs

CIVIL COVER SHEET

JS-44 (Rev. 6/17 DC)

I. (a) PLAINTIFFS

Wisconsin Voters Alliance, et al.

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF _____
(EXCEPT IN U.S. PLAINTIFF CASES)

DEFENDANTS

Vice President Michael Richard Pence, et al.

COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT _____
(IN U.S. PLAINTIFF CASES ONLY)
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED

(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)

Erick G. Kaardal, Mohrman, Kaardal & Erickson, P.A.
150 South Fifth Street, Suite 3100
Minneapolis, Minnesota 55402
Telephone: (612) 341-1074

ATTORNEYS (IF KNOWN)

Not Known.

II. BASIS OF JURISDICTION
(PLACE AN x IN ONE BOX ONLY)

- ○ 1 U.S. Government Plaintiff
- ◉ 3 Federal Question (U.S. Government Not a Party)
- ○ 2 U.S. Government Defendant
- ○ 4 Diversity (Indicate Citizenship of Parties in item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (PLACE AN x IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT) **FOR DIVERSITY CASES ONLY!**

	PTF	DFT		PTF	DFT
Citizen of this State	○ 1	○ 1	Incorporated or Principal Place of Business in This State	○ 4	○ 4
Citizen of Another State	○ 2	○ 2	Incorporated and Principal Place of Business in Another State	○ 5	○ 5
Citizen or Subject of a Foreign Country	○ 3	○ 3	Foreign Nation	○ 6	○ 6

IV. CASE ASSIGNMENT AND NATURE OF SUIT

(Place an X in one category, A-N, that best represents your Cause of Action and one in a corresponding Nature of Suit)

○ **A.** ***Antitrust***

- ☐ 410 Antitrust

○ **B.** ***Personal Injury/ Malpractice***

- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury
- ☐ 362 Medical Malpractice
- ☐ 365 Product Liability
- ☐ 367 Health Care/Pharmaceutical Personal Injury Product Liability
- ☐ 368 Asbestos Product Liability

○ **C.** ***Administrative Agency Review***

- ☐ 151 Medicare Act

Social Security
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

Other Statutes
- ☐ 891 Agricultural Acts
- ☐ 893 Environmental Matters
- ☐ 890 Other Statutory Actions (If Administrative Agency is Involved)

○ **D.** ***Temporary Restraining Order/Preliminary Injunction***

Any nature of suit from any category may be selected for this category of case assignment.

(If Antitrust, then A governs)

○ **E.** ***General Civil (Other)*** **OR** ○ **F.** ***Pro Se General Civil***

Real Property
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent, Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

Personal Property
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

Bankruptcy
- ☐ 422 Appeal 27 USC 158
- ☐ 423 Withdrawal 28 USC 157

Prisoner Petitions
- ☐ 535 Death Penalty
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Conditions
- ☐ 560 Civil Detainee – Conditions of Confinement

Property Rights
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 835 Patent – Abbreviated New Drug Application
- ☐ 840 Trademark

Federal Tax Suits
- ☐ 870 Taxes (US plaintiff or defendant)
- ☐ 871 IRS-Third Party 26 USC 7609

Forfeiture/Penalty
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 690 Other

Other Statutes
- ☐ 375 False Claims Act
- ☐ 376 Qui Tam (31 USC 3729(a))
- ☐ 400 State Reapportionment
- ☐ 430 Banks & Banking
- ☐ 450 Commerce/ICC Rates/etc.
- ☐ 460 Deportation

- ☐ 462 Naturalization Application
- ☐ 465 Other Immigration Actions
- ☐ 470 Racketeer Influenced & Corrupt Organization
- ☐ 480 Consumer Credit
- ☐ 490 Cable/Satellite TV
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 896 Arbitration
- ☐ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
- ☐ 950 Constitutionality of State Statutes
- ☐ 890 Other Statutory Actions (if not administrative agency review or Privacy Act)

○ G. *Habeas Corpus/ 2255* ☐ 530 Habeas Corpus – General ☐ 510 Motion/Vacate Sentence ☐ 463 Habeas Corpus – Alien Detainee	○ H. *Employment Discrimination* ☐ 442 Civil Rights – Employment (criteria: race, gender/sex, national origin, discrimination, disability, age, religion, retaliation) *(If pro se, select this deck)*	○ I. *FOIA/Privacy Act* ☐ 895 Freedom of Information Act ☐ 890 Other Statutory Actions (if Privacy Act) *(If pro se, select this deck)*	○ J. *Student Loan* ☐ 152 Recovery of Defaulted Student Loan (excluding veterans)
○ K. *Labor/ERISA (non-employment)* ☐ 710 Fair Labor Standards Act ☐ 720 Labor/Mgmt. Relations ☐ 740 Labor Railway Act ☐ 751 Family and Medical Leave Act ☐ 790 Other Labor Litigation ☐ 791 Empl. Ret. Inc. Security Act	◉ L. *Other Civil Rights (non-employment)* ☒ 441 Voting (if not Voting Rights Act) ☐ 443 Housing/Accommodations ☐ 440 Other Civil Rights ☐ 445 Americans w/Disabilities – Employment ☐ 446 Americans w/Disabilities – Other ☐ 448 Education	○ M. *Contract* ☐ 110 Insurance ☐ 120 Marine ☐ 130 Miller Act ☐ 140 Negotiable Instrument ☐ 150 Recovery of Overpayment & Enforcement of Judgment ☐ 153 Recovery of Overpayment of Veteran's Benefits ☐ 160 Stockholder's Suits ☐ 190 Other Contracts ☐ 195 Contract Product Liability ☐ 196 Franchise	○ N. *Three-Judge Court* ☐ 441 Civil Rights – Voting (if Voting Rights Act)

V. ORIGIN

○ 1 Original Proceeding ○ 2 Removed from State Court ○ 3 Remanded from Appellate Court ○ 4 Reinstated or Reopened ○ 5 Transferred from another district (specify) ○ 6 Multi-district Litigation ○ 7 Appeal to District Judge from Mag. Judge ○ 8 Multi-district Litigation – Direct File

VI. CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE.)

3 USC 1-21; Elector's Clause; Twelfth Amendment to Constitution; Federal Statutes are unconstitutional interferences with

VII. REQUESTED IN COMPLAINT CHECK IF THIS IS A **CLASS ACTION** UNDER F.R.C.P. 23 **DEMAND $** **JURY DEMAND:** Check YES only if demanded in complaint YES ☐ NO ☒ 8

VIII. RELATED CASE(S) IF ANY (See instruction) YES ☐ NO ☒ 8 If yes, please complete related case form

DATE: 12/22/2020 **SIGNATURE OF ATTORNEY OF RECORD** /s/Erick G. Kaardal

INSTRUCTIONS FOR COMPLETING CIVIL COVER SHEET JS-44
Authority for Civil Cover Sheet

The JS-44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and services of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. Listed below are tips for completing the civil cover sheet. These tips coincide with the Roman Numerals on the cover sheet.

I. COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF/DEFENDANT (b) County of residence: Use 11001 to indicate plaintiff if resident of Washington, DC, 88888 if plaintiff is resident of United States but not Washington, DC, and 99999 if plaintiff is outside the United States.

III. CITIZENSHIP OF PRINCIPAL PARTIES: This section is completed only if diversity of citizenship was selected as the Basis of Jurisdiction under Section II.

IV. CASE ASSIGNMENT AND NATURE OF SUIT: The assignment of a judge to your case will depend on the category you select that best represents the primary cause of action found in your complaint. You may select only one category. You must also select one corresponding nature of suit found under the category of the case.

VI. CAUSE OF ACTION: Cite the U.S. Civil Statute under which you are filing and write a brief statement of the primary cause.

VIII. RELATED CASE(S), IF ANY: If you indicated that there is a related case, you must complete a related case form, which may be obtained from the Clerk's Office.

Because of the need for accurate and complete information, you should ensure the accuracy of the information provided prior to signing the form.

AO 440 (Rev. 06/12; DC 3/15) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of Columbia

Wisconsin Voters Alliance, et al.,

Plaintiff(s)

v.

Vice President Michael Richard Pence, et al.,

Defendant(s)

Civil Action No.

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* Vice President Michael Richard Pence,
in his official capacity as President of
the United States Senate,
Office of the Vice President
1600 Pennsylvania Avenue, N.W.
Washington, DC 20500

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Erick G. Kaardal
Special Counsel for Amistad Project of Thomas More Society
Mohrman, Kaardal & Erickson, P.A.
150 South Fifth Street, Suite 3100
Minneapolis, Minnesota 55402
(612) 465-0927 kaardal@mklaw.com

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

ANGELA D. CAESAR, CLERK OF COURT

Date: _____

_____
Signature of Clerk or Deputy Clerk

Civil Action No.

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____

was received by me on *(date)* _____ .

❒ I personally served the summons on the individual at *(place)* _____

_____ on *(date)* _____ ; or

❒ I left the summons at the individual's residence or usual place of abode with *(name)* _____

_____ , a person of suitable age and discretion who resides there,

on *(date)* _____ , and mailed a copy to the individual's last known address; or

❒ I served the summons on *(name of individual)* _____ , who is

designated by law to accept service of process on behalf of *(name of organization)* _____

_____ on *(date)* _____ ; or

❒ I returned the summons unexecuted because _____ ; or

❒ Other *(specify)*:

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____

Server's signature

_____

Printed name and title

_____

Server's address

Additional information regarding attempted service, etc:

AO 440 (Rev. 06/12; DC 3/15) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of Columbia

Wisconsin Voters Alliance, et al.,

Plaintiff(s)

v.

Vice President Michael Richard Pence, et al.,

Defendant(s)

Civil Action No.

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* U.S HOUSE OF REPRESENTATIVES,
U.S. Capitol
First St SE
Washington, DC 20004

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Erick G. Kaardal
Special Counsel for Amistad Project of Thomas More Society
Mohrman, Kaardal & Erickson, P.A.
150 South Fifth Street, Suite 3100
Minneapolis, Minnesota 55402
(612) 465-0927 kaardal@mklaw.com

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

ANGELA D. CAESAR, CLERK OF COURT

Date: _____

_____
Signature of Clerk or Deputy Clerk

Civil Action No.

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____

was received by me on *(date)* _____ .

❒ I personally served the summons on the individual at *(place)* _____

_____ on *(date)* _____ ; or

❒ I left the summons at the individual's residence or usual place of abode with *(name)* _____

_____ , a person of suitable age and discretion who resides there,

on *(date)* _____ , and mailed a copy to the individual's last known address; or

❒ I served the summons on *(name of individual)* _____ , who is

designated by law to accept service of process on behalf of *(name of organization)* _____

_____ on *(date)* _____ ; or

❒ I returned the summons unexecuted because _____ ; or

❒ Other *(specify)*:

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____

Server's signature

_____

Printed name and title

_____

Server's address

Additional information regarding attempted service, etc:

AO 440 (Rev. 06/12; DC 3/15) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of Columbia

Wisconsin Voters Alliance, et al.,

Plaintiff(s)

v.

Vice President Michael Richard Pence, et al.,

Defendant(s)

Civil Action No.

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* U.S. SENATE,
U.S. Capitol
First St SE
Washington, DC 20004

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Erick G. Kaardal
Special Counsel for Amistad Project of Thomas More Society
Mohrman, Kaardal & Erickson, P.A.
150 South Fifth Street, Suite 3100
Minneapolis, Minnesota 55402
(612) 465-0927 kaardal@mklaw.com

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ANGELA D. CAESAR, CLERK OF COURT

Date: _____

_____
Signature of Clerk or Deputy Clerk

Civil Action No.

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on *(date)* _____ , and mailed a copy to the individual's last known address; or

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designated by law to accept service of process on behalf of *(name of organization)* _____

_____ on *(date)* _____ ; or

❒ I returned the summons unexecuted because _____ ; or

❒ Other *(specify)*:

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I declare under penalty of perjury that this information is true.

Date: _____

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Server's signature

_____

Printed name and title

_____

Server's address

Additional information regarding attempted service, etc:

AO 440 (Rev. 06/12; DC 3/15) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of Columbia

Wisconsin Voters Alliance, et al.,

Plaintiff(s)

v.

Vice President Michael Richard Pence, et al.,

Defendant(s)

Civil Action No.

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* ELECTORAL COLLEGE,
U.S. Capitol
First St SE
Washington, DC 20004

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Erick G. Kaardal
Special Counsel for Amistad Project of Thomas More Society
Mohrman, Kaardal & Erickson, P.A.
150 South Fifth Street, Suite 3100
Minneapolis, Minnesota 55402
(612) 465-0927 kaardal@mklaw.com

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ANGELA D. CAESAR, CLERK OF COURT

Date: _____

_____
Signature of Clerk or Deputy Clerk

Civil Action No.

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_____ , a person of suitable age and discretion who resides there,

on *(date)* _____ , and mailed a copy to the individual's last known address; or

❒ I served the summons on *(name of individual)* _____ , who is

designated by law to accept service of process on behalf of *(name of organization)* _____

_____ on *(date)* _____ ; or

❒ I returned the summons unexecuted because _____ ; or

❒ Other *(specify)*:

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____

Server's signature

_____

Printed name and title

_____

Server's address

Additional information regarding attempted service, etc:

AO 440 (Rev. 06/12; DC 3/15) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of Columbia

Wisconsin Voters Alliance, et al.,

Plaintiff(s)

v.

Vice President Michael Richard Pence, et al.,

Defendant(s)

Civil Action No.

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* Governor Tom Wolf of Pennsylvania, in his official capacity,
508 Main Capitol Building
Harrisburg, PA 17120

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Erick G. Kaardal
Special Counsel for Amistad Project of Thomas More Society
Mohrman, Kaardal & Erickson, P.A.
150 South Fifth Street, Suite 3100
Minneapolis, Minnesota 55402
(612) 465-0927 kaardal@mklaw.com

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ANGELA D. CAESAR, CLERK OF COURT

Date: _____

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Signature of Clerk or Deputy Clerk

Civil Action No.

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❒ I personally served the summons on the individual at *(place)* _____

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_____ , a person of suitable age and discretion who resides there,

on *(date)* _____ , and mailed a copy to the individual's last known address; or

❒ I served the summons on *(name of individual)* _____ , who is

designated by law to accept service of process on behalf of *(name of organization)* _____

_____ on *(date)* _____ ; or

❒ I returned the summons unexecuted because _____ ; or

❒ Other *(specify)*:

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____

Server's signature

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Printed name and title

_____

Server's address

Additional information regarding attempted service, etc:

AO 440 (Rev. 06/12; DC 3/15) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of Columbia

Wisconsin Voters Alliance, et al.,

Plaintiff(s)

v.

Vice President Michael Richard Pence, et al.,

Defendant(s)

Civil Action No.

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* Speaker Bryan Carter of the Pennsylvania House of Representatives, in his official capacity
139 Main Capitol Building
PO Box 202100
Harrisburg, PA 17120-2100

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Erick G. Kaardal
Special Counsel for Amistad Project of Thomas More Society
Mohrman, Kaardal & Erickson, P.A.
150 South Fifth Street, Suite 3100
Minneapolis, Minnesota 55402
(612) 465-0927 kaardal@mklaw.com

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ANGELA D. CAESAR, CLERK OF COURT

Date: _____

_____
Signature of Clerk or Deputy Clerk

Civil Action No.

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_____ on *(date)* _____ ; or

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_____ , a person of suitable age and discretion who resides there,

on *(date)* _____ , and mailed a copy to the individual's last known address; or

❒ I served the summons on *(name of individual)* _____ , who is

designated by law to accept service of process on behalf of *(name of organization)* _____

_____ on *(date)* _____ ; or

❒ I returned the summons unexecuted because _____ ; or

❒ Other *(specify)*:

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____

Server's signature

_____

Printed name and title

_____

Server's address

Additional information regarding attempted service, etc:

AO 440 (Rev. 06/12; DC 3/15) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of Columbia

Wisconsin Voters Alliance, et al.,

Plaintiff(s)

v.

Vice President Michael Richard Pence, et al.,

Defendant(s)

Civil Action No.

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* Senate Majority Leader Jake Corman of
the Pennsylvania Senate, in his official capacity,
Senate Box 203034
Harrisburg, PA 17120-3034

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Erick G. Kaardal
Special Counsel for Amistad Project of Thomas More Society
Mohrman, Kaardal & Erickson, P.A.
150 South Fifth Street, Suite 3100
Minneapolis, Minnesota 55402
(612) 465-0927 kaardal@mklaw.com

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ANGELA D. CAESAR, CLERK OF COURT

Date: _____

_____
Signature of Clerk or Deputy Clerk

Civil Action No.

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❒ I personally served the summons on the individual at *(place)* _____

_____ on *(date)* _____ ; or

❒ I left the summons at the individual's residence or usual place of abode with *(name)* _____

_____ , a person of suitable age and discretion who resides there,

on *(date)* _____ , and mailed a copy to the individual's last known address; or

❒ I served the summons on *(name of individual)* _____ , who is

designated by law to accept service of process on behalf of *(name of organization)* _____

_____ on *(date)* _____ ; or

❒ I returned the summons unexecuted because _____ ; or

❒ Other *(specify)*:

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____

Server's signature

_____

Printed name and title

_____

Server's address

Additional information regarding attempted service, etc:

AO 440 (Rev. 06/12; DC 3/15) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of Columbia

Wisconsin Voters Alliance, et al.,

Plaintiff(s)

v.

Vice President Michael Richard Pence, et al.,

Defendant(s)

Civil Action No.

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* Governor Gretchen Whitmer
of Michigan, in her official capacity
111 S Capitol Avenue
Lansing, Michigan 48933

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Erick G. Kaardal
Special Counsel for Amistad Project of Thomas More Society
Mohrman, Kaardal & Erickson, P.A.
150 South Fifth Street, Suite 3100
Minneapolis, Minnesota 55402
(612) 465-0927 kaardal@mklaw.com

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ANGELA D. CAESAR, CLERK OF COURT

Date: _____

_____
Signature of Clerk or Deputy Clerk

Civil Action No.

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This summons for *(name of individual and title, if any)* _____

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❒ I personally served the summons on the individual at *(place)* _____

_____ on *(date)* _____ ; or

❒ I left the summons at the individual's residence or usual place of abode with *(name)* _____

_____ , a person of suitable age and discretion who resides there,

on *(date)* _____ , and mailed a copy to the individual's last known address; or

❒ I served the summons on *(name of individual)* _____ , who is

designated by law to accept service of process on behalf of *(name of organization)* _____

_____ on *(date)* _____ ; or

❒ I returned the summons unexecuted because _____ ; or

❒ Other *(specify)*:

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____

Server's signature

_____

Printed name and title

_____

Server's address

Additional information regarding attempted service, etc:

AO 440 (Rev. 06/12; DC 3/15) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of Columbia

Wisconsin Voters Alliance, et al.,

Plaintiff(s)

v.

Vice President Michael Richard Pence, et al.,

Defendant(s)

Civil Action No.

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* Speaker Lee Chatfield of the Michigan
House of Representatives, in his official capacity
124 N Capitol Avenue
Lansing, Michigan 48933

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Erick G. Kaardal
Special Counsel for Amistad Project of Thomas More Society
Mohrman, Kaardal & Erickson, P.A.
150 South Fifth Street, Suite 3100
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ANGELA D. CAESAR, CLERK OF COURT

Date: _____

_____
Signature of Clerk or Deputy Clerk

Civil Action No.

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_____ , a person of suitable age and discretion who resides there,

on *(date)* _____ , and mailed a copy to the individual's last known address; or

❒ I served the summons on *(name of individual)* _____ , who is

designated by law to accept service of process on behalf of *(name of organization)* _____

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❒ Other *(specify)*:

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I declare under penalty of perjury that this information is true.

Date: _____

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Server's signature

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Printed name and title

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Server's address

Additional information regarding attempted service, etc:

AO 440 (Rev. 06/12; DC 3/15) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of Columbia

Wisconsin Voters Alliance, et al. *Plaintiff(s)* v. Vice President Michael Richard Pence, et al., *Defendant(s)*	)	Civil Action No.

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* Senate Majority Leader Mike Shirkey of the Michigan Senate, in his official capacity,
S-102 Capitol Building
Lansing, Michigan 48933

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Erick G. Kaardal
Special Counsel for Amistad Project of Thomas More Society
Mohrman, Kaardal & Erickson, P.A.
150 South Fifth Street, Suite 3100
Minneapolis, Minnesota 55402
(612) 465-0927 kaardal@mklaw.com

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ANGELA D. CAESAR, CLERK OF COURT

Date: _____

_____
Signature of Clerk or Deputy Clerk

Civil Action No.

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on *(date)* _____ , and mailed a copy to the individual's last known address; or

❒ I served the summons on *(name of individual)* _____ , who is

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❒ I returned the summons unexecuted because _____ ; or

❒ Other *(specify)*:

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I declare under penalty of perjury that this information is true.

Date: _____

_____

Server's signature

_____

Printed name and title

_____

Server's address

Additional information regarding attempted service, etc:

AO 440 (Rev. 06/12; DC 3/15) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of Columbia

Wisconsin Voters Alliance, et al.,

Plaintiff(s)

v.

Vice President Michael Richard Pence, et al.,

Defendant(s)

Civil Action No.

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* Governor Tony Evers of Wisconsin, in his official capacity,
P.O. Box 7863
Madison, Wisconsin 53707

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Erick G. Kaardal
Special Counsel for Amistad Project of Thomas More Society
Mohrman, Kaardal & Erickson, P.A.
150 South Fifth Street, Suite 3100
Minneapolis, Minnesota 55402
(612) 465-0927 kaardal@mklaw.com

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ANGELA D. CAESAR, CLERK OF COURT

Date: _____

_____
Signature of Clerk or Deputy Clerk

Civil Action No.

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❒ Other *(specify)*:

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Date: _____

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Server's signature

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Printed name and title

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Server's address

Additional information regarding attempted service, etc:

AO 440 (Rev. 06/12; DC 3/15) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of Columbia

Wisconsin Voters Alliance, et al.,

Plaintiff(s)

v.

Vice President Michael Richard Pence, et al.,

Defendant(s)

Civil Action No.

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* Speaker Robin Vos of the Wisconsin State Assembly,
in his official capacity,
960 Rock Ridge Road
Burlington, Wisconsin 53105

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Erick G. Kaardal
Special Counsel for Amistad Project of Thomas More Society
Mohrman, Kaardal & Erickson, P.A.
150 South Fifth Street, Suite 3100
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(612) 465-0927 kaardal@mklaw.com

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ANGELA D. CAESAR, CLERK OF COURT

Date: _____

_____
Signature of Clerk or Deputy Clerk

Civil Action No.

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Date: _____

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Server's signature

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_____

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Additional information regarding attempted service, etc:

AO 440 (Rev. 06/12; DC 3/15) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of Columbia

Wisconsin Voters Alliance, et al.,

Plaintiff(s)

v.

Vice President Michael Richard Pence, et al.,

Defendant(s)

Civil Action No.

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* Senate Majority Leader Howard Marklein of the Wisconsin Senate, in his official capacity,
PO Box 7882
Madison, Wisconsin 53707

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Erick G. Kaardal
Special Counsel for Amistad Project of Thomas More Society
Mohrman, Kaardal & Erickson, P.A.
150 South Fifth Street, Suite 3100
Minneapolis, Minnesota 55402
(612) 465-0927 kaardal@mklaw.com

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

ANGELA D. CAESAR, CLERK OF COURT

Date: _____

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Additional information regarding attempted service, etc:

AO 440 (Rev. 06/12; DC 3/15) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of Columbia

Wisconsin Voters Alliance, et al.,

Plaintiff(s)

v.

Vice President Michael Richard Pence, et al.,

Defendant(s)

Civil Action No.

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* Governor Brian Kemp of Georgia,
in his original capacity,
111 State Capitol
Atlanta, Georgia 30334

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Erick G. Kaardal
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Plaintiff(s)

v.

Vice President Michael Richard Pence, et al.,

Defendant(s)

Civil Action No.

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* Speaker David Ralston of the Georgia House of Representatives, in his official capacity,
332 State Capitol
Atlanta, Georgia 30334

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Erick G. Kaardal
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Wisconsin Voters Alliance, et al.,

Plaintiff(s)

v.

Vice President Michael Richard Pence, et al.,

Defendant(s)

Civil Action No.

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* President Pro Tem of the Senate Butch Miller, in his official capacity
321 State Capitol
Atlanta, Georgia 30334

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Erick G. Kaardal
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Wisconsin Voters Alliance, et al.,

Plaintiff(s)

v.

Vice President Michael Richard Pence, et al.,

Defendant(s)

Civil Action No.

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* Governor Doug Ducey of Arizona, in his official Capacity,
1700 W. Washington Street
Phoenix, Arizona 85007

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Erick G. Kaardal
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Wisconsin Voters Alliance, et al.,

Plaintiff(s)

v.

Vice President Michael Richard Pence, et al.,

Defendant(s)

Civil Action No.

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* Speaker Russell Bowers of the Arizona House of Representatives, in his official capacity,
1700 West Washington, Room 223
Phoenix, Arizona 85007

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Erick G. Kaardal
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District of Columbia

Wisconsin Voters Alliance, et al.,

Plaintiff(s)

v.

Vice President Michael Richard Pence, et al.,

Defendant(s)

Civil Action No.

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* Senate Majority Leader Rick Gray of the Arizona Senate, in his official capacity,
1700 West Washington, Room 301
Phoenix, Arizona 85007

A lawsuit has been filed against you.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Wisconsin Voters Alliance, et al., Case No. _____

Plaintiffs,

v.

Vice President Michael Richard Pence, et al.,

Defendants.

Plaintiffs' Memorandum in Support of Motion for Preliminary Injunctive Relief

TABLE OF CONTENTS

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Cases

Constitutional Provisions

Statutes

INTRODUCTION

The Plaintiffs move for a preliminary injunction enjoining the federal Defendants and state Defendants from Pennsylvania, Michigan, Wisconsin, Georgia and Arizona (Defendant States) from certifying Presidential electors and counting their votes where the Presidential electors did not receive state legislative post-election certification as required by Article II.

Article II contains an imperative sentence regarding Presidential elections that state legislatures, every four years, may direct the manner of state appointment of Presidential electors:

> He shall hold his office during the term of four years, and, together with the Vice President, chosen for the same term, be elected, as follows: 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 no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

Specifically, the challenged federal and state laws[1] requiring Governor post-election certification of Presidential electors, currently considered as having full legal force and effect, have the legal consequence that the state legislatures, every four years, "may" NOT "direct" the "manner" of "appointing" the Presidential electors. Under this one constitutional imperative sentence, the state legislatures, not the Governors, have the constitutional prerogative to post-election certification. Absent the state legislative post-election certification of the Presidential electors, the federal Defendants cannot constitutionally count the votes of the Presidential electors from the Defendant States.

The Plaintiffs are voters who have constitutionally-protected voting rights to state legislative post-election certification regarding their votes for Presidential electors and constitutionally-protected voting rights that only the votes of Presidential electors who have received state legislative

[1] 3 U.S.C. § 5, 6 and 15 and Ariz. Rev. Stat. § 16-212 (B), Ga. Code Ann.§ 21-2-499 (B), Mich. Comp. Laws § 168.46, Wis. Stat. § 7.70 (5) (b) and 25 Pa. Cons. Stat. § 3166.

post-election certification be counted by the federal Defendants to elect the President and Vice President.

A preliminary injunction is necessary to avoid a constitutional crisis. The constitutional crisis may be caused, after the January 20, 2021 inauguration of the President and Vice President, by a Presidential candidate or Presidential electors filing a post-inaugural civil action for writ of quo warranto to oust the President and Vice President.[2] The U.S. District Court has jurisdiction over a post-inaugural ouster of the United States President and Vice President. Specifically, D.C. Code § 16-3501, et seq., authorizes the U.S. District Court for the District of Columbia, in proper cases, instituted by proper officers or persons, to post-inaugural ouster of national officers of the United States including the President and Vice President of the United States. *Newman v. U.S. of America ex rel Frizzell*, 238 U.S. 537 (1915).

The Presidential candidate or Presidential electors could make two constitutional arguments against the votes the federal Defendants counted in the election of President and Vice President. First, U.S.C. § 5, 6 and 15 are unconstitutional because Congress does not have constitutional authority to assign post-election certification to the Governors as executives of the Defendant States and to direct Congress and the Vice President to count votes of Presidential electors who have not received state legislative post-election certification. Second, the Defendant States' state legislatures have unconstitutionally acquiesced to the federal laws by enacting state laws transferring post-election certification from the state legislatures to state executive branch officials: Ariz. Rev. Stat. § 16-212 (B) (Arizona Secretary of State), Ga. Code Ann.§ 21-2-499 (B) (Georgia Secretary of State and Governor), Mich. Comp. Laws § 168.46 (Michigan State Board of Canvassers and Governor),

[2] The Epoch Times, "Electors in 7 states cast dueling votes for Trump" at https://www.theepochtimes.com/mkt_app/electors-in-7-states-cast-dueling-votes-for-trump_3620059.html (last visited: Dec. 18, 2020).

Wis. Stat. § 7.70 (5) (b) (Wisconsin Elections Commission); and 25 Pa. Cons. Stat. § 3166 (Secretary of Commonwealth and Governor).

The Plaintiffs agree with these constitutional arguments, but disagree about the wisdom of using the post-inaugural ouster procedure to litigate them. Waiting for the post-inaugural ouster creates an unnecessary constitutional crisis. Instead, the post-inaugural ouster should be the option of last resort.

Plaintiffs' motion for preliminary injunction is a better vehicle for this Court to adjudicate these constitutional claims in a timely way so that the constitutional provisions of the U.S. Constitution regarding Presidential electors, Article II and the Twelfth Amendment, are followed and a President and a Vice President are lawfully inaugurated on January 20, 2021.

BACKGROUND

A. Defendants, except the constitutionally-required state legislatures, are involved in post-election certification of Presidential votes and of Presidential electors or counting of their ballots to elect the President and Vice President.

Under 3 U.S.C. §§ 5, 6 and 15, each of the Defendants, except the state legislative leaders and their state legislatures, have a role to play in state post-election certification of Presidential votes, state post-election certification of a state's Presidential electors or counting of the Presidential Electors' votes. Under 3 U.S.C. § 15, "Congress shall be in session on the sixth day of January succeeding every meeting of electors. The Senate and House of Representatives shall meet in the Hall of the House of Representatives at the hour of 1 o'clock in the afternoon on that day." Under 3 U.S.C. § 15, Vice President Michael Richard Pence is the presiding officer on January 6, 2021: "and the President of the Senate shall be their presiding officer."

Vice President Pence, the U.S. Senate and the U.S. House of Representatives are Defendants who presume under 3 U.S.C. §§ 5 and 6, that each state's Presidential elector votes can be counted

because they are designated by the Governor of each Defendant State —even without state legislative post-election certification. 3 U.S.C. § 5 provides:

> If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned.

3 U.S.C. § 6 provides:

> It shall be the duty of the executive of each State, as soon as practicable after the conclusion of the appointment of the electors in such State by the final ascertainment, under and in pursuance of the laws of such State providing for such ascertainment, to communicate by registered mail under the seal of the State to the Archivist of the United States a certificate of such ascertainment of the electors appointed, setting forth the names of such electors and the canvass or other ascertainment under the laws of such State of the number of votes given or cast for each person for whose appointment any and all votes have been given or cast; and it shall also thereupon be the duty of the executive of each State to deliver to the electors of such State, on or before the day on which they are required by section 7 of this title to meet, six duplicate-originals of the same certificate under the seal of the State; and if there shall have been any final determination in a State in the manner provided for by law of a controversy or contest concerning the appointment of all or any of the electors of such State, it shall be the duty of the executive of such State, as soon as practicable after such determination, to communicate under the seal of the State to the Archivist of the United States a certificate of such determination in form and manner as the same shall have been made; and the certificate or certificates so received by the Archivist of the United States shall be preserved by him for one year and shall be a part of the public records of his office and shall be open to public inspection; and the Archivist of the United States at the first meeting of Congress thereafter shall transmit to the two Houses of Congress copies in full of each and every such certificate so received at the National Archives and Records Administration.

The Plaintiffs claim that the Federal Defendants' presumption is constitutionally incorrect; under Article II's imperative sentence regarding Presidential elections, Defendants Vice President Pence, the U.S. House of Representatives and the United States Senate can only open up and count Presidential elector ballots if the state legislature has affirmatively voted post-election to certify the Presidential electors; otherwise, the votes of the Presidential electors cannot be counted. The

Plaintiffs claim that the Vice President and U.S. Congress act unconstitutionally in this Presidential election and future Presidential elections when they count votes of Presidential electors where the respective state legislature has not affirmatively voted in favor of post-election certification.

Similarly, the Defendant States' executives, Governor Tom Wolf of Pennsylvania, Governor Gretchen Whitmer of Michigan, Governor Tony Evers of Wisconsin, Governor Brian Kemp of Georgia, and Governor Doug Ducey of Arizona under 3 U.S.C. § 6 and their respective state's laws, have designated the Presidential electors based on the assumption that state executive branch certification is all that is required.

But, Governor Tom Wolf of Pennsylvania, Governor Gretchen Whitmer of Michigan, Governor Tony Evers of Wisconsin, Governor Brian Kemp of Georgia, and Governor Doug of Arizona are constitutionally mistaken because the designation by the Governor of each Defendant State cannot cure that the Presidential electors are without state legislative post-election certification. Until the state legislature certifies the Presidential votes and the Presidential electors, the respective Governor's designation under 3 U.S.C. § 6 and their respective state's laws have no legal effect. Absent the state legislative post-election certification required by Article II's imperative sentence regarding Presidential elections, the Governor's designation of Presidential electors has no legal effect because their votes cannot be counted by the Vice President, U.S. Senate and U.S. House of Representatives.

Finally, Article II's imperative sentence regarding Presidential elections requires the Defendants' state legislative leaders to act to vote on post-election certification of the Presidential electors. But, instead, the state legislatures unconstitutionally defer because of their respective state laws which are a perpetual and wholesale delegation of post-election certification to state executive branch officials—as has been done in Ariz. Rev. Stat. § 16-212 (B) (Arizona Secretary of State), Ga. Code Ann.§ 21-2-499 (B) (Georgia Secretary of State and Governor), Mich. Comp. Laws § 168.46

(Michigan State Board of Canvassers and Governor), Wis. Stat. § 7.70 (5) (b) (Wisconsin Elections Commission); and 25 Pa. Cons. Stat. § 3166 (Secretary of Commonwealth and Governor).

The Plaintiffs claim that Article II's imperative sentence regarding Presidential elections, and its non-delegation doctrine, permanently left it to the state legislatures to "direct" post-election certification of Presidential electors, not to delegate post-election certification, perpetually and in a wholesale fashion, to state executive branch officials as a ministerial duty.

In this way, the Defendant States' legislative leaders, including Speaker Bryan Carter of the Pennsylvania House of Representatives, Senate Majority Leader Jake Corman of the Pennsylvania Senate, Speaker Lee Chatfield of the Michigan House of Representatives, Senate Majority Leader Mike Shirkey of the Michigan Senate, Speaker Robin Vos of the Wisconsin State Assembly, Senate Majority Leader Howard Marklein of the Wisconsin Senate, Speaker David Ralston of the Georgia House of Representatives, Senate President Pro Tempore Butch Miller of the Georgia Senate, Speaker Russell Bowers of the Arizona House of Representatives, and Senate Majority Leader Rick Gray of the Arizona Senate are violating their duties under the federal Constitution by not voting on post-election certification of the Presidential electors so their votes can constitutionally count.

State legislative post-election certification of Presidential electors is a part of federally-guaranteed voting rights.

Further, the state constitutions of the Defendant States fail to require the state legislature to meet for post-election certification of the Presidential electors in violation of state legislative constitutional duties under Article II's imperative sentence regarding Presidential elections of the U.S. Constitution. Arizona's, Georgia's and Pennsylvania's Constitutions have the state legislature adjourned until January 2021 subject to special sessions called by the Governor or state legislature. Arizona Const.; Georgia Const.; Pennsylvania Const. Michigan's and Wisconsin's Constitutions permit the state legislature to be in session, but do not require a joint session of the state legislature

to affirmatively vote for post-election certification of Presidential electors. Michigan Const.; Wisconsin Const. By contrast, for example, the Georgia Constitution of 1798, Article IV, section 2, subsequently repealed, had clear procedures for state legislative certification of Presidential electors:

> Sec. 2. All elections by the general assembly shall be by joint ballot of both branches of the legislature; and when the senate and house of representatives unite for the purpose of electing, they shall meet in the representative chamber, and the president of the senate shall in such cases preside, receive the ballots, and declare the person or persons elected. In all elections by the people the electors shall vote viva voce until the legislature shall otherwise direct.[3]

Each voter who votes—distinguishable from those who don't—has a constitutionally-protected interest in state legislative post-election certification of their vote and of their state's Presidential electors. The federal Defendants violate those voting rights by counting ballots of Presidential electors without the constitutionally-required state legislative post-election certifications. The state Defendants violate those voting rights by not complying with constitutionally-required state legislative post-election certifications of Presidential votes and of Presidential electors.

B. None of the Presidential Electors certified by the Governors of the Defendant States received state legislative post-election certification; their votes should not be counted by Congress and the Vice President on January 6, 2021.

On December 14, the Presidential electors for Biden and Trump met and voted in their Defendant States. The Presidential electors for Biden in the Defendant States are certified by state executive branch officials under 3 U.S.C. § 6 and the respective states' election certification laws. Ariz. Rev. Stat. § 16-212 (B) (Arizona Secretary of State), Ga. Code Ann.§ 21-2-499 (B) (Georgia Secretary of State and Governor), Mich. Comp. Laws § 168.46 (Michigan State Board of Canvassers and Governor), Wis. Stat. § 7.70 (5) (b) (Wisconsin Elections Commission); and 25 Pa. Cons. Stat. § 3166 (Secretary of Commonwealth and Governor). The Presidential electors for Trump are not

[3] Georgia Constitution of 1798 (http://founding.com/founders-library/government-documents/american-state-and-local-government-documents/state-constitutions/georgia-constitution-of-1798/) (last visited: December 18, 2020).

certified in this way. But, neither the Presidential electors for Biden nor the Presidential electors for Trump in the Defendant States received a state legislative post-election affirmative vote for certification. The Presidential electors for Biden in the Defendant States voted for Biden as President and Harris as Vice President.[4] The Presidential electors for Trump in the Defendant States voted for Trump as President and Pence as Vice President. But, under Article II, none of these votes count because no Presidential electors have received state legislative post-election certification.

C. Federal and state court post-election Presidential election contests and recounts preclude state legislative post-election certification of Presidential votes and Presidential electors.

Federal and state court post-election Presidential election contests and recounts preclude the state legislatures' post-election certifications of Presidential votes and of Presidential electors. Under the Plaintiffs' interpretation of Article II, pre-election judicial proceedings are not a constitutional problem, but judicial post-election Presidential election contests and recounts conflict with the state legislatures' post-election certifications under Article II.

1. The U.S. Supreme Court and Florida Supreme Court decisions in *Bush v. Gore* are examples of federal court and state court interference conflicting with a state legislature's Article II post-election certification prerogatives.

The court decisions in *Bush v. Gore* reflect examples of federal court and state court proceedings conflicting with a state legislature's Article II post-election certification prerogatives. On December 12, 2000, the U.S. Supreme Court issued a decision in *Bush v. Gore*, 531 U.S. 98 (2000), settling a state court recount dispute in Florida's 2000 presidential election between George W. Bush and Al Gore. The U.S. Supreme Court decision allowed the previous vote certification made by Florida Secretary of State Katherine Harris to stand for George W. Bush, who thereby won

[4]The Epoch Times, "Electors in 7 states cast dueling votes for Trump" at https://www.theepochtimes.com/mkt_app/electors-in-7-states-cast-dueling-votes-for-trump_3620059.html (last visited: Dec. 18, 2020).

Florida's 25 electoral votes—and the Presidential election. Neither the court decisions, nor Florida law, included the Florida state legislature conducting post-election certifications of the Presidential vote and of the Presidential electors.

2. The Defendant States have election contest or recount laws, which apply to Presidential elections.

Similarly, the Defendant States have election contest or recount laws, which apply to Presidential elections—like Florida's laws did in 2000: Ariz. Rev. Stat. § 16-672; Ga. Code Ann.§ 21-2-521; Mich. Comp. Laws § 168.862; Wis. Stat. § 9.01; and 25 Pa. Cons. Stat. § 3351. The Defendant States' laws do not provide for the state legislatures to engage in post-election certifications. Interestingly, the Pennsylvania laws have a state legislative post-election certification process for its Governor and Lieutenant Governor elections. 25 Pa. Cons. Stat. § 3312, et seq.

3. In 2020, approximately thirty post-election lawsuits are filed in Defendants States regarding election official errors and improprieties.

Approximately thirty post-election lawsuits regarding Pennsylvania, Michigan, Wisconsin, Georgia and Arizona election official errors and improprieties were filed.[5] The Complaint and its citations to the appendix detail allegations of Pennsylvania, Michigan, Wisconsin, Georgia and Arizona election official errors and improprieties. In Defendants' states, voter allegations exists which are the election officials' errors and improprieties exceed the razor-thin margins of Presidential contests.

4. In 2020, Texas sued Pennsylvania, Michigan, Wisconsin and Georgia in the U.S. Supreme Court to adjudicate election irregularities and improprieties.

On December 7, 2020, Texas filed an original action in the U.S. Supreme Court, Case No. 22O155, against Pennsylvania, Michigan, Wisconsin and Georgia for election irregularities and

[5] *See* "Postelection lawsuits related to the 2020 United States presidential election," found at *https://en.wikipedia.org/wiki/Postelection_lawsuits_related_to_the_2020_United_States_presidential_election#Wood_v._Raffensperger* (last visited: Dec. 15, 2020).

improprieties. On December 9, Missouri and 16 other states filed a motion for leave to file an amicus curiae brief in support of Texas. On December 10, U.S. Representative Mike Johnson and 105 other members submitted a motion for leave to file amicus brief in support of Texas. On December 11, the U.S. Supreme Court dismissed the original action in a text order:

> The State of Texas's motion for leave to file a bill of complaint is denied for lack of standing under Article III of the Constitution. Texas has not demonstrated a judicially cognizable interest in the manner in which another State conducts its elections. All other pending motions are dismissed as moot. Statement of Justice Alito, with whom Justice Thomas joins: In my view, we do not have discretion to deny the filing of a bill of complaint in a case that falls within our original jurisdiction. See *Arizona* v. *California*, 589 U. S. ___ (Feb. 24, 2020) (Thomas, J., dissenting). I would therefore grant the motion to file the bill of complaint but would not grant other relief, and I express no view on any other issue.[6]

D. The Defendants violate the Plaintiffs' constitutionally-protected voting rights by certifying Presidential electors who have not received state legislative post-election certification and by counting their votes.

The Defendants violate the Plaintiffs' constitutionally-protected voting rights by recognizing Presidential electors who have not received state legislative post-election certification and by counting their votes. Under Article II's imperative sentence regarding Presidential elections, Defendants can only certify Presidential electors and count their votes if they have received state legislative post-election certification—which none have.

The federal laws regarding the Presidential electors, 3 U.S.C. §§ 5, 6 and 15, are constitutionally unauthorized. Article II and the Twelfth Amendment of the Constitution establish a non-delegable process where at least state legislative post-election certification of the state's Presidential electors is constitutionally required for Presidential elector votes to be counted in the election of the President and Vice President. In contradiction, the federal laws, 3 U.S.C. §§ 5, 6 and

[6] Plaintiffs agree that the State of Texas lacked standing, but the original action itself begs the question, "Is the U.S. Supreme Court the final adjudicator for certification of Presidential electors?" The Plaintiffs' answer is no; the respective state legislatures are the final determiner of certification of Presidential electors—and, in a non-delegable way.

15, establish a different process where Presidential electors are designated by the Governor of each Defendant State without state legislative post-election certification—and, then, their votes are counted to elect the President and Vice President.

The Defendant States have legally acquiesced to the federal laws by enacting statutes transferring post-election certification from the state legislatures to state executive branch officials: Ariz. Rev. Stat. § 16-212 (B) (Arizona Secretary of State), Ga. Code Ann.§ 21-2-499 (B) (Georgia Secretary of State and Governor), Mich. Comp. Laws § 168.46 (Michigan State Board of Canvassers and Governor), Wis. Stat. § 7.70 (5) (b) (Wisconsin Elections Commission); and 25 Pa. Cons. Stat. § 3166 (Secretary of Commonwealth and Governor). These state laws also violate Article II which establishes the state legislative prerogative to post-election certification of Presidential electors.

E. This motion for preliminary injunction is filed to avoid a constitutional crisis.

The Plaintiffs file this complaint to avoid a constitutional crisis that would be involved in a post-inaugural ouster of the United States President and Vice President under D.C. Code § 16-3501, et seq., which authorizes the U.S. District Court for the District of Columbia, in proper cases, instituted by proper officers or persons, to oust national officers of the United States post-election, including the President and Vice President of the United States. *Newman v. U.S. of America ex rel. Frizzell*, 238 U.S. 537 (1915).

Instead, to avoid that post-inaugural constitutional crisis, the Plaintiffs as voters file this preliminary injunction motion against federal officials in the District of Columbia and Governors and state legislative leaders in Arizona, Georgia, Michigan, Pennsylvania and Wisconsin ("Defendant States") requiring a constitutionally-compliant process for state-by-state post-election certification of Presidential electors and counting of their votes for the November 3, 2020 Presidential election and future elections.

ARGUMENT

The Plaintiffs as voters file this motion for preliminary injunction against federal officials in the District of Columbia and Governors and state legislative leaders in Arizona, Georgia, Michigan, Pennsylvania and Wisconsin ("Defendant States") seeking a constitutionally-compliant process for state legislative post-election certification of Presidential electors and counting of their votes prior to the Presidential and Vice Presidential inaugural on January 20, 2021.

Under Article II's imperative sentence regarding Presidential elections, Congress lacks legal authority to enact laws interfering with the state-by-state state legislative post-election certification of Presidential electors as it has done with 3 U.S.C. §§ 5, 6 and 15. Analogously, under Article II's imperative sentence regarding Presidential elections, the state legislatures lack legal authority to enact state laws which are a perpetual and wholesale delegation of post-election certification to state executive branch officials—as they have done in Ariz. Rev. Stat. § 16-212 (B) (Arizona Secretary of State), Ga. Code Ann.§ 21-2-499 (B) (Georgia Secretary of State and Governor), Mich. Comp. Laws § 168.46 (Michigan State Board of Canvassers and Governor), Wis. Stat. § 7.70 (5) (b) (Wisconsin Elections Commission); and 25 Pa. Cons. Stat. § 3166 (Secretary of Commonwealth and Governor). Article II's imperative sentence regarding Presidential elections, and its non-delegation doctrine, left it to the state legislatures to "direct" post-election certification of Presidential electors, not to delegate post-election certification, perpetually and in a wholesale fashion, to state executive branch officials as a ministerial duty. Under Article II's imperative sentence regarding Presidential elections, if there is no state legislative post-election certification of Presidential electors in the Defendant States, then those Defendant States' Presidential electors' votes, not so certified, cannot

be counted by the federal Defendants for the election of President and Vice President. So, the preliminary injunction should issue to require constitutional compliance.[7]

I. The D.C. Circuit applies a four-part test for granting a preliminary injunction.

A party seeking a preliminary injunction must establish (1) that he is likely to succeed on the merits, (2) that he is likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in his favor, and (4) that an injunction is in the public interest." *Aamer v. Obama*, 742 F.3d 1023, 1038 (D.C.Cir.2014) (*quoting Sherley v. Sebelius*, 644 F.3d 388, 392 (D.C.Cir.2011)) (emphasis in text deleted). A preliminary injunction "is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (*quoting* 11A C. Wright, A. Miller, & M. Kane, Federal Practice And Procedure § 2948 (2d ed.1995)) (emphasis in original).

II. The Plaintiffs are likely to succeed on the merits.

The Plaintiffs are likely to succeed on the merits. The D.C. Circuit has, in the past, followed the "sliding scale" approach to success on the merits, where "a court, when confronted with a case in which the other three factors strongly favor interim relief may exercise its discretion to grant a stay if the movant has made a substantial case on the merits." *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.,* 559 F.2d 841, 843 (D.C.Cir.1977). Under the sliding scale approach, "if the movant makes a very strong showing of irreparable harm and there is no substantial harm to the nonmovant, then a correspondingly lower standard can be applied for likelihood of success." *Davis v. Pension Ben. Guar. Corp.,* 571 F.3d 1288, 1292 (D.C.Cir.2009).

[7] For a review of the constitutional convention's deliberations on selecting the president, see Neal R. Peirce and Lawrence D. Longley, *The People's President: The Electoral College in American History and the Direct Vote Alternative* (1968; New Haven, 1981) at 10-30.

A. Federal law—3 U.S.C. §§ 5, 6, 15—and the state laws—Ariz. Rev. Stat. § 16-212 (B), Ga. Code Ann. § 21-2-499 (B), Mich. Comp. Laws. § 168.46, Wis. Stat. § 7.70 (5) (b) and 25 Pa. Cons. Stat. § 3166—are constitutionally unauthorized and they violate voters' rights to state legislative post-election certifications.

The plaintiffs have voting rights under Article II guaranteeing state legislative post-election certification of their votes and of Presidential electors. *See Baten v. McMaster*, 967 F.3d 345, 352–53 (4th Cir. 2020) (voters who vote in Presidential elections have standing on claims of government causing disenfranchisement). 3 U.S.C. §§ 5, 6, 15, Ariz. Rev. Stat. § 16-212 (B), Ga. Code Ann.§ 21-2-499 (B), Mich. Comp. Laws § 168.46, Wis. Stat. § 7.70 (5) (b) and 25 Pa. Cons. Stat. § 3166 are constitutionally unauthorized. The federal and state laws violate voters' rights by preempting state legislative post-election certification of their Presidential votes and post-election certification of the Presidential electors. 3 U.S.C. §§ 5, 6, 15 also unconstitutionally allow counting of votes of Presidential electors who have not received the constitutionally-required state legislative post-election certification.

1. Voter rights are guaranteed under Article II to the state legislatures' post-election certifications of their votes and of Presidential electors.

Article II guarantees to voters that the state legislature will vote on post-election certification of votes and post-election certification of Presidential electors and that only ballots of legislatively-certified Presidential electors will be counted for the election of President and Vice President. *See Baten v. McMaster*, 967 F.3d at 352–53 (4th Cir. 2020). It is part of the social contract embedded in the Constitution.

Specifically, Article II provides that the state legislature—not Congress, nor the Governors—shall be the deciding body for Presidential electors:

> He shall hold his office during the term of four years, and, together with the Vice President, chosen for the same term, be elected, as follows: 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 no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

Under Article II and the Tenth Amendment, the state legislatures' power to determine the manner of appointment of Presidential electors includes the power of post-election certification. Moreover, the state legislatures' choice for elections as the manner to appoint Presidential electors does not abrogate nor diminish the state legislatures' constitutional obligations to conduct post-election certification of their respective Presidential electors.

2. Article II's imperative sentence regarding Presidential elections requires that only the votes of Presidential electors who have received state legislative post-election certification count toward election of President and Vice President.

The purpose of Article II's imperative sentence regarding Presidential elections is for state legislatures to certify voters' Presidential votes in order to certify Presidential electors who cast ballots for President and Vice President—which are opened and counted by the federal Defendants. The voters in the Presidential elections are constitutionally-guaranteed that the state legislature, after the election, will certify their vote and, based on the Presidential vote returns, certify the Presidential electors. All Presidential election contests are to be heard by the state legislatures—not the federal courts nor the state courts. The constitutional protection of the state legislatures' constitutional prerogatives over selection of Presidential electors is that the Federal Defendants can only count the votes of the Presidential electors who have state legislative post-election certification; otherwise, constitutionally, the votes of Presidential electors without state legislative post-election certification do not count.

3 U.S.C. §§ 5, 6, 15, Ariz. Rev. Stat. § 16-212 (B), Ga. Code Ann.§ 21-2-499 (B), Mich. Comp. Laws § 168.46, Wis. Stat. § 7.70 (5) (b) and 25 Pa. Cons. Stat. § 3166 are also constitutionally unauthorized because the Federal Defendants count votes of Presidential electors who do not have state legislative post-election certification. The federal laws and state laws authorize

an unconstitutional method for electing the President and Vice President. Because the federal laws are not constitutionally authorized, the threat of a post-inaugural ouster under D.C. Code 16-3501, et seq., is legally imminent.

3. 3 U.S.C. §§ 5, 6 and 15 fail to constitutionally guarantee state legislative post-election certifications of votes and of Presidential electors.

3 U.S.C. §§ 5, 6 and 15 constitute significant federal regulation of the state appointment of Presidential electors and counting their votes for President and Vice President. Meanwhile, these federal laws fail to guarantee state legislative certifications of votes and of Presidential electors. Sections 5 and 6 set a deadline for the state executive branch officials and judges of December 8, 2020, to determine election controversies as to appointment of electors and designates the Governor of each state to communicate the appointment of the Presidential electors to the federal government. Section 5 sets the deadline as six days before the Electors meet to vote which was December 14, 2020:

> If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned.

Section 6 designates the Governors, the executives of the states, to be the public officials to exclusively communicate the list of Presidential electors and their votes to the federal government:

> It shall be the duty of the executive of each State, as soon as practicable after the conclusion of the appointment of the electors in such State by the final ascertainment, under and in pursuance of the laws of such State providing for such ascertainment, to communicate by registered mail under the seal of the State to the Archivist of the United States a certificate of such ascertainment of the electors appointed, setting forth the names of such electors and the canvass or other ascertainment under the laws of such State of the number of votes given or cast for each person for whose appointment any and all votes have been given or cast; and it shall also thereupon be the duty of the

> executive of each State to deliver to the electors of such State, on or before the day on which they are required by section 7 of this title to meet, six duplicate-originals of the same certificate under the seal of the State; and if there shall have been any final determination in a State in the manner provided for by law of a controversy or contest concerning the appointment of all or any of the electors of such State, it shall be the duty of the executive of such State, as soon as practicable after such determination, to communicate under the seal of the State to the Archivist of the United States a certificate of such determination in form and manner as the same shall have been made; and the certificate or certificates so received by the Archivist of the United States shall be preserved by him for one year and shall be a part of the public records of his office and shall be open to public inspection; and the Archivist of the United States at the first meeting of Congress thereafter shall transmit to the two Houses of Congress copies in full of each and every such certificate so received at the National Archives and Records Administration.

Section 15 contains procedures for the Vice President of the United States as President of the Senate, the U.S. Senate and the U.S. House of Representatives to meet on January 6 following the Presidential election and for counting the Presidential electors' votes from the respective states. There is nothing in section 15 stating that only the ballots of Presidential electors who have received state legislative post-election certification will be counted:

> Congress shall be in session on the sixth day of January succeeding every meeting of the electors. The Senate and House of Representatives shall meet in the Hall of the House of Representatives at the hour of 1 o'clock in the afternoon on that day, and the President of the Senate shall be their presiding officer. Two tellers shall be previously appointed on the part of the Senate and two on the part of the House of Representatives, to whom shall be handed, as they are opened by the President of the Senate, all the certificates and papers purporting to be certificates of the electoral votes, which certificates and papers shall be opened, presented, and acted upon in the alphabetical order of the States, beginning with the letter A; and said tellers, having then read the same in the presence and hearing of the two Houses, shall make a list of the votes as they shall appear from the said certificates; and the votes having been ascertained and counted according to the rules in this subchapter provided, the result of the same shall be delivered to the President of the Senate, who shall thereupon announce the state of the vote, which announcement shall be deemed a sufficient declaration of the persons, if any, elected President and Vice President of the United States, and, together with a list of the votes, be entered on the Journals of the two Houses.

Thus, none of these federal laws—3 U.S.C. §§ 5, 6 and 15—guarantee state legislative post-election certification of Presidential electors before their votes are counted.

4. Congress lacks Congressional authority to enact 3 U.S.C. §§ 5, 6 and 15 which preempt constitutionally-mandated state legislative post-election certification of Presidential electors, violating voting rights related thereto.

Two legal standards cover cases challenging Congress's constitutional authority to enact statutes. The first legal standard applies when the party claims an Act of Congress is not authorized by one of the powers delegated to Congress in Article I of the Constitution. See, *e.g., Perez v. United States,* 402 U.S. 146 (1971); *McCulloch v. Maryland,* 17 U.S. 316 (1819).

The second legal standard applies when the party claims an Act of Congress invades the province of state sovereignty granted by an express constitutional provision or reserved by the Tenth Amendment. See, *e.g., Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528 (1985); *Lane County v. Oregon,* 74 U.S. 71 (1869). "If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress." *New York v. U.S.,* 505 U.S. 144, 156 (1992) (citations omitted). It is in this sense that the Tenth Amendment "states but a truism that all is retained which has not been surrendered." *United States v. Darby,* 312 U.S. 100, 124 (1941).

The Plaintiffs here assert that the 3 U.S.C. §§ 5, 6, 15 is both constitutionally unauthorized and 3 U.S.C. §§ 5, 6, 15 invades the state legislature's power to post-election certifications of Presidential votes and Presidential electors granted by Article II and reserved by the Tenth Amendment. So, both legal standards apply.

a. The textualist argument supports that the state legislatures, not Governors must conduct post-election certifications of Presidential votes and of Presidential electors.

One Congressional researcher has defined judicial textualism:

> Textualism is a mode of interpretation that focuses on the plain meaning of the text of a legal document. Textualism usually emphasizes how the terms in the Constitution would be understood by people at the time they were ratified, as well as the context in

> which those terms appear. Textualists usually believe there is an objective meaning of the text, and they do not typically inquire into questions regarding the intent of the drafters, adopters, or ratifiers of the Constitution and its amendments when deriving meaning from the text.[8]

The textualist argument supports that the state legislatures, not Governors, must conduct post-election certification of Presidential votes and post-election certification of Presidential electors.

The textualist argument in this memorandum is based on one sentence in Article II of the U.S. Constitution. The sentence has eighty-five words. The constitutional sentence provides:

> He shall hold his office during the term of four years, and, together with the Vice President, chosen for the same term, be elected, as follows: 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 no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

The Plaintiffs claim, based on this sentence, that post-election certification of Presidential votes and post-election certification of Presidential electors are state legislative decisions. In turn, the Plaintiffs claim that 3 U.S.C. § 5, 6 and 15 and state laws (such as Ariz. Rev. Stat. § 16-212 (B), Ga. Code Ann.§ 21-2-499 (B), Mich. Comp. Laws § 168.46, Wis. Stat. § 7.70 (5) (b) and 25 Pa. Cons. Stat. § 3166) eviscerating these state legislative prerogatives, every four years, are unconstitutional.

Several textualist interpretative keys open up the relevant meanings of the constitutional text as interpreted by Plaintiffs. First, the constitutional sentence is an imperative sentence. Second, the imperative sentence requires the election of President and Vice President every "four years." Third, every four years, the "state" appoints the Presidential electors. Fourth, every four years, "the legislature may "direct" the "manner" of appointing.

The constitutional sentence is an imperative sentence requiring that the President and Vice President "be elected" "every four years." The sentence phrase "as follows" provides specific

[8]Brandon J. Murrill, "Modes of Constitutional Interpretation" at 2, Congressional Research Service (Mar. 15, 2018).

directions on how the Presidential election is to occur. This imperative sentence is an instruction to all constitutional actors identified—President, Vice President, U.S Congress, Presidential electors, states and state legislatures—and those not identified—Governors, federal judiciary and state judiciaries.

The Plaintiffs focus on the imperative nature of the constitutional sentence to make their texualist interpretation. To begin, the imperative sentence, in relevant part, requires that the all the constitutionally-identified actors—President, Vice President, U.S Congress, Presidential electors, states and state legislatures— conduct an election of President and Vice President every "four years." This interpretation can hardly be disputed since that is what the text says. And, ever since its adoption, the United States has conducted, every four years, an election for President and Vice President. Consistently, the challenged federal and state laws—3 U.S.C. § 5, 6 and 15 and Ariz. Rev. Stat. § 16-212 (B), Ga. Code Ann.§ 21-2-499 (B), Mich. Comp. Laws § 168.46, Wis. Stat. § 7.70 (5) (b) and 25 Pa. Cons. Stat. § 3166)—all presume a Presidential election every four years.

Next, the imperative constitutional section requires that, every four years, the "state" appoints the Presidential electors. This interpretation also can also hardly be disputed since that is what the text says. And, ever since its adoption, the states, every four years, have appointed Presidential electors for the purpose of electing a President and Vice President. Consistently, the challenged federal and state laws--3 U.S.C. § 5, 6 and 15 and Ariz. Rev. Stat. § 16-212 (B), Ga. Code Ann.§ 21-2-499 (B), Mich. Comp. Laws § 168.46, Wis. Stat. § 7.70 (5) (b) and 25 Pa. Cons. Stat. § 3166)—presume that the states, every four years, appoint Presidential electors for the purpose of electing a President and Vice President.

Finally, the imperative constitutional section requires that, every four years, "the legislature" may "direct" the "manner" of appointing of the Presidential electors. Plaintiffs claim that it is this aspect of the constitutional imperative sentence that is violated when the challenged federal and

state laws--3 U.S.C. § 5, 6 and 15 and Ariz. Rev. Stat. § 16-212 (B), Ga. Code Ann.§ 21-2-499 (B), Mich. Comp. Laws § 168.46, Wis. Stat. § 7.70 (5) (b) and 25 Pa. Cons. Stat. § 3166)—legally preclude state legislative post-election certification of Presidential votes and post-election certification of Presidential electors. Plaintiffs claim that, every four years, "the legislature must be involved in such post-election certification so that it may "direct" the "manner" of "appoint[ing]" of the Presidential electors—as the constitutional imperative sentence requires.

To be sure, in the previous sentence of this memorandum, the "-ing" at the end of "appoint[ing]" is in brackets because the word "appoint" is in the constitutional text not the word "appointing." To explain, please engage in a thought experiment sympathetic to Plaintiffs' position. Substitute "engage in appointing" for "appoint" in the constitutional sentence. Such substitution does not change the meaning of that part of the constitutional sentence. The phrase "every four years, the state shall appoint" has the same meaning as "every four years, the state shall engage in appointing." However, such a substitution does confirm Plaintiffs' constitutional argument. The substitution does not contradict any other part of the constitutional imperative sentence. The state legislature, every four years, may direct the manner of the state engaging in appointing the Presidential electors. So, the state legislatures, every four years, applies their respective parliamentary rules to the state appointments of Presidential electors. The federal laws and state laws which contradict with the state legislatures' quadrennial prerogatives are constitutionally unauthorized.

To be balanced, a similar thought experiment sympathetic to the opposition should be tried. Now, substitute the phrase "have laws regarding appointment" for "appointment" in the constitutional sentence. Quickly, two contradictions arise. First, the first part of sentence "[The President] shall hold his office during the term of four years, and, together with the Vice President, chosen for the same term, be elected, as follows." So, state laws contradict with the phrase that the

states "have laws regarding appointment." The contradiction is that the constitutional imperative sentence is the exclusive law requiring that every four years the Presidential elections shall occur "as follows"; so, state laws "directing" the "manner" of "appointing" the Presidential electors are constitutionally unauthorized. Second, the later part of the sentence "in such manner as the Legislature thereof may direct" contradicts "have laws regarding appointment." The contradiction is that the constitutional imperative sentence is the exclusive law requiring that every four years the Presidential elections shall occur "as follows" including the state legislature "may" "direct" the "manner" of "appointing" the Presidential electors. So, state laws "directing" the "manner" of "appointing" the Presidential electors are constitutionally unauthorized. Specifically, the challenged federal laws and state laws requiring Governor post-election certification of Presidential electors, currently considered as having full legal force and effect, have the legal consequence that the state legislatures, every four years, "may" NOT "direct" the "manner" of "appointing" the Presidential electors. Again, the state legislatures, not the Governors, have the constitutional prerogatives for post-election certification.

b. The textual argument supports that 3 U.S.C. §§ 5, 6 and 15 are unconstitutional.

The textual argument for unconstitutionality of 3 U.S.C. §§ 5, 6 and 15 is straightforward.[9] Under textualism, the Constitution's text supports that the unconstitutionality of 3 U.S.C. §§ 5, 6 and 15 because they fail to guarantee voter's rights to the state legislature's post-election certifications of Presidential votes and of Presidential electors to vote for President and Vice President.

Congress neither has express constitutional authority nor implied constitutional authority to enact 3 U.S.C. §§ 5, 6 and 15. Further, the federal laws violate voter's rights in Presidential elections

[9] *See, generally,* Vasan Kesavan, *Is the Electoral Count Act Unconstitutional*, 80 N.C. L. Rev. 1653, 1696-1759 (2002).

because they interfere with state legislative post-election certifications of Presidential votes and Presidential electors and that only the votes of such certified Presidential electors may be counted in the election of President and Vice President.

First, Congress has no express constitutional authority to enact 3 U.S.C. §§ 5, 6 and 15 which regulate state appointment of Presidential electors and regulate counting Presidential elector votes to elect a President and Vice President. Article II puts state appointment of Presidential electors in the exclusive hands of the state legislatures every four years, "Each state shall appoint, in such manner as the Legislature thereof may direct." By contrast, Article II lacks the express grant of authority to Congress in Article I's Elections Clause for Congressional elections:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

There, the Constitution provides a power to Congress "to make or alter such [state] Regulations" by state in Article I. But, that Constitutionally-conferred power is absent in Article II.

Lacking express constitutional authority in Article II's imperative sentence regarding Presidential elections, the only alternative for Congressional authority is an implied constitutional authority. The only candidates for the government's implied constitutional authority would be Article I's the Necessary and Proper Clause and Article II itself.

The first candidate for implied Congressional authority is the Necessary and Proper Clause. The Necessary and Proper Clause provides that Congress shall have power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." A careful parsing of the Necessary and Proper Clause reveals that there are three prongs of power. Under the Clause, Congress has power for carrying into execution (1) "the foregoing Powers," (2) "all other Powers vested by this Constitution in the Government of the

United States," and (3) "all other Powers vested by this Constitution... in any Department or Officer thereof." None of these prongs support the constitutionality of 3 U.S.C. §§ 5, 6 and 15.

First, the phrase "foregoing Powers" refers to the enumerated powers of Article I. None of the enumerated Congressional powers in Article I cover the appointment of and voting by Presidential electors—which is covered by Article II. So, the "foregoing powers" requirement is not satisfied.

Second, the phrase "all other Powers vested by this Constitution... in any Department or Officer thereof" does not include Congress or Congressional members. Congress is not a Department. Members of Congress are not Officers. In fact, Congressional members are subject to impeachment by the House of Representatives and conviction by the Senate because they are not "civil Officers of the United States." *See* U.S. Const., art. II, § 4 ("The President, Vice President, and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."). Furthermore, the Ineligibility Clause of Article I, Section 6 provides that "no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office." So the phrase "all other Powers vested by this Constitution... in any Department or Officer thereof" is not satisfied.

Third, the phrase "all other Powers vested by this Constitution... in any Department or Officer thereof" does not apply because the U.S. Congress is not a Department or Officer. The text of Article II's imperative sentence regarding Presidential elections does not employ the word "power" referencing to Congress. Article II's imperative sentence regarding Presidential elections does not vest "power" in Congress over state legislatures' express power to determine the manner of appointment of Presidential electors every four years, including the post-election certification of

Presidential electors. Therefore, the phrase "all other Powers vested by this Constitution... in any Department or Officer thereof" is not satisfied.

The second candidate for implied constitutional authority is Article II itself. But, similarly, Article II supports that it is the state legislatures' exclusive constitutional prerogative to determine the state's appointment of Presidential electors, including post-certification of the Presidential electors to vote for President and Vice President. Article II's imperative sentence regarding Presidential elections and the Twelfth Amendment do not grant Congress any "power" over the state legislatures' constitutional prerogatives over Presidential electors. Instead, these constitutional texts define a very limited and specific role for the Vice President, U.S. Senate and U.S. House of Representatives.

Congress's enactment of 3 U.S.C. §§ 5, 6 and 15 goes far beyond the constitutionally-prescribed roles for Vice President, U.S. Senate and the U.S. House of Representatives in Article II's imperative sentence regarding Presidential elections and the Twelfth Amendment. So, Article II's imperative sentence regarding Presidential elections and the Twelfth Amendment do not provide an implied constitutional authority for 3 U.S.C. §§ 5, 6 and 15.

Additionally, there is a textualist argument based on the negative implication. When the Constitution provides Congressional power regarding the Presidency, it says so—twice. First, Article II, Section 1, Clause 4 which provides that "[t]he 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." Second, the Presidential Succession Clause of Article II provides that:

> [i]n Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

In both of these instances, the Constitution provides Congress with express authority over a limited, narrowly-prescribed aspect of Presidential elections. By negative implication, then, Article II's imperative sentence regarding Presidential elections and selection of Presidential electors every four years does not provide implied constitutional authority for Congress to regulate the state legislatures' post-election certifications of Presidential votes and of Presidential electors.

Finally, the constitutional text also provides an intertextual argument. When the Constitution provides a Congressional role in election, the Constitution says so. First, Article I's Elections Clause provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." Second, The House Judging Clause provides that "[e]ach House shall be the Judge of the Elections, Returns and Qualifications of its own Members." In both instances, the Constitution provides Congress with express constitutional authority regarding elections involving Congress. However, regarding Presidential electors, there is constitutional silence—no express power is granted to Congress—because Article II empowers the state legislatures, exclusively, to govern the states' appointments of Presidential electors.

c. Structuralist arguments also support that 3 U.S.C. §§ 5, 6 and 15 are unconstitutional.

The interpretivist's structuralist arguments[10] also support the unconstitutionality of 3 U.S.C. §§ 5, 6 and 15.[11] One Congressional researcher has defined judicial structuralism:

> Another mode of constitutional interpretation draws inferences from the design of the Constitution: the relationships among the three branches of the federal government (commonly called separation of powers); the relationship between the federal and state

[10] *See, generally,* Charles L. Black, Jr., Structure And Relationship In Constitutional Law (1969); Philip Bobbit, Constitutional Fate: Theory Of The Constitution 74-92 (1982).
[11] *See, generally,* Vasan Kesavan, *Is the Electoral Count Act Unconstitutional*, 80 N.C. L. Rev. 1653, 1759-1793 (2002).

governments (known as federalism); and the relationship between the government and the people.[12]

The structure of Article II is to empower the state legislatures, not Congress or the state's Governors, to appoint the Presidential electors. 3 U.S.C. §§ 5, 6 and 15 violate Article II's structure because they empower Congress and the state's Governors in the Presidential elector process—excluding the state legislatures from the Presidential elector certification process.

The structure of the Article II for Presidential elections is anti-Congress, anti-Governors and pro-state legislatures. Article II's imperative sentence regarding Presidential elections puts the state legislatures in exclusive control of a state's appointment of Presidential electors. The state legislatures, who enact the state elections law applicable to federal elections, are identified to choose the manner of appointment of the Presidential electors. Congress and the Governors are to have no substantive role in the procedures of certifying Presidential electors to vote for President and Vice President. The Federal Defendants are just there to count the Presidential electors' votes of the Presidential electors who have received state legislative post-election certification.

Article II contains an anti-Congress principle, anti-Governors principle and a pro-state legislatures principle. These principles should be brought to bear on any interpretation of Article II and 3 U.S.C. §§ 5, 6 and 15. If these principles are applied, 3 U.S.C. §§ 5, 6 and 15 is constitutionally unauthorized.

1) The Anti-Congress Principle

The Constitution mistrusts Congress in Presidential elections. This is the anti-Congress principle of Article II. Congress is to have a limited, narrowly-prescribed role in Presidential

[12] Brandon J. Murrill, "Modes of Constitutional Interpretation" at 2, Congressional Research Service (Mar. 15, 2018).

elections. Congress is not to interfere with the state legislature directing the appointment of Presidential electors. Congress is not trusted in Article II.

First, Article II's electoral college method of selecting a President and Vice President is a rejection of Congressional decision-making. The Constitution replaced the Articles of Confederation which authorized Congress to elect a President of the United States in Congress assembled—parliamentary style. Under the Articles of Confederation, John Hanson was the first President of the United States in Congress Assembled and served from November 5, 1781 to November 4, 1782. The Constitution replaced that parliamentary system with the Electoral College based on the anti-Congress principle of Article II. Article II prohibits Congress selecting the President.

Second, Article II's Elector Incompatibility Clause, stating that "no Senator or Representative, or Person holding an Office or Trust of Profit under the United States, shall be appointed as an Elector," is a rejection of Congressional decision-making. The relevant purpose of the Elector Incompatibility Clause is to absolutely separate the Presidential electors from Congress. The Presidential electors are to be independent from Congress.

2) The Anti-Governors Principle

The Constitution mistrusts Governors in Presidential elections. This is the anti-Governors principle of Article II. The Governors are to have no role in Presidential selection. The states' Governors are not trusted in Article II. Article II's electoral college method of selecting a President and Vice President empowers the state legislatures, not the Governors.

First, Article II's imperative sentence regarding Presidential elections specifies "state legislatures"—not Governors nor "state executives'—to have the power over the appointment of 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…

So, one of the purposes of Article II's imperative sentence regarding Presidential elections was to exclude the states' Governors from having a role in Presidential elections.

Second, the Electors Clause specifies that the Presidential electors are to vote in their states and the Vice President and Congress, not the State's Governors, would open and count the Presidential electors' ballots for President and Vice President:

> The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted.

One of the purposes of the Electors Clause was also to exclude the states' Governors from having a role in opening and counting the Presidential electors' ballots.

3) The Pro-State Legislatures Principle

The Constitution trusts state legislatures in Presidential elections. This is the pro-state legislatures principle of Article II. The state legislatures, not Congress nor the states' Governors, are to direct the selection of Presidential electors. Article II trusts state legislatures to choose Presidential electors—even trusting them to directly elect them as was done by some state in the 1800's.[13]

First, Article II's imperative sentence regarding Presidential elections empowers "state legislatures"—not Congress, nor the State's Governors—to have the power over the appointment of Presidential electors:

> He shall hold his office during the term of four years, and, together with the Vice President, chosen for the same term, be elected, as follows: Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to

[13] *See, e.g.,* Georgia Constitution of 1798, Art. IV, sec. 2 (http://founding.com/founders-library/government-documents/american-state-and-local-government-documents/state-constitutions/georgia-constitution-of-1798/) (last visited: Dec. 18, 2020).

> the whole Number of Senators and Representatives to which the State may be entitled in the Congress…

So, one of the purposes of Article II's imperative sentence regarding Presidential elections was to empower state legislatures to appoint the Presidential electors.

Second, the Electors Clause specifies that the Presidential electors are to vote in their states and specifies the Vice President and Congress will have limited, defined roles of opening and counting the Presidential electors' ballots for the election of President and Vice President:

> The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted.

One of the purposes of the Electors Clause was to limit and define the Vice President's and Congress's role in the Electoral College process to ensure that the state legislature would have the exclusive power to appoint the Presidential electors.

4) Conclusion

Structuralist arguments based on Article II support the unconstitutionality of 3 U.S.C. §§ 5, 6 and 15. Article II contains an anti-Congress principle, an anti-Governors principle and a pro-state legislatures principle. The structure of Article II is to empower the state legislatures, not Congress or the Governors, to appoint the Presidential electors. 3 U.S.C. §§ 5, 6 and 15 violate Article II's structure because they empower Congress and the state's Governors in the Presidential elector certification and counting process—cancelling the state legislatures out of the Presidential certification and subsequent counting process.

5. The Defendant States violate Article II by their respective constitution and their respective state laws—Ariz. Rev. Stat. § 16-212 (B), Ga. Code Ann. § 21-2-499 (B), Mich. Comp. Laws. § 168.46, Wis. Stat. § 7.70 (5) (b) and 25 Pa. Cons. Stat. § 3166—by cancelling state legislatures out of post-election certifications of Presidential votes and of Presidential electors.

Under Article II's imperative sentence regarding Presidential elections, the Defendant States lack congressional authority to enact state laws which cancel their respective state legislatures out of post-election certifications of Presidential votes and of Presidential electors—as they have done. Arizona in Ariz. Rev. Stat. § 16-212 (B) has delegated post-election certifications to the Arizona Secretary of State. Georgia in Ga. Code Ann.§ 21-2-499 (B) has delegated post-election certifications to the Georgia Secretary of State and Governor. Michigan in Mich. Comp. Laws § 168.46 has delegated post-election certifications to the Michigan State Board of Canvassers and the Governor. Wisconsin in Wis. Stat. § 7.70 (5) (b) has delegated post-election certifications to the Wisconsin Elections Commission. Pennsylvania in 25 Pa. Cons. Stat. § 3166 has delegated post-election certifications to the Secretary of Commonwealth and the Governor.

But, Article II's imperative sentence regarding Presidential elections, and its non-delegation doctrine, empowers the state legislatures, every four years, to "direct" post-election certification of Presidential electors, not to delegate post-election certification, perpetually and in a wholesale fashion, to state executive branch officials as a ministerial duty. As detailed above, there are textual and structural arguments for these state statutes being unconstitutional. Therefore, the Court should hold Ariz. Rev. Stat. § 16-212 (B), Ga. Code Ann.§ 21-2-499 (B), Mich. Comp. Laws § 168.46, Wis. Stat. § 7.70 (5) (b), 25 Pa. Cons. Stat. § 3166 as an unconstitutional delegation of the state legislative prerogative of post-election certification of Presidential voters.

Notably, even the current state constitutions of the Defendant States fail to require the state legislature to meet for post-election certification of the Presidential electors in violation of state legislative constitutional duties under Article II's imperative sentence regarding Presidential

elections. Arizona's, Georgia's and Pennsylvania's Constitutions have the state legislature adjourned until January 2021. Arizona Const.; Georgia Const.; Pennsylvania Const. Michigan's and Wisconsin's Constitutions permit the state legislature to be in session, but do not require a joint session of the state legislature to affirmatively vote for post-election certification of Presidential electors. Michigan Const.; Wisconsin Const.

a. The Arizona Constitution and laws do not require state legislative post-election certification of Presidential electors so their votes can be constitutionally counted by the federal Defendants—violating voters' rights.

The Arizona Constitution and laws do not require state legislative post-election certification of Presidential electors so their votes can be constitutionally counted by the federal Defendants—violating voters' rights. Under Article II's imperative sentence regarding Presidential elections, Arizona lacks legal authority to enact laws which are a perpetual and wholesale delegation of post-election certification to state executive branch officials—as it has done. Arizona in Ariz. Rev. Stat. § 16-212 (B) has delegated certification of Presidential electors to the Arizona Secretary of State—and has deferred to the Arizona Governor's certification of Presidential electors under 3 U.S.C. § 6.

But, Article II's imperative sentence regarding Presidential elections, and its non-delegation doctrine, empowers the Arizona state legislature to "direct" post-election certification of Presidential electors, not to delegate post-election certification, perpetually and in a wholesale fashion, to state executive branch officials as a ministerial duty. As detailed above, there are textual and structural arguments for these state statutes being unconstitutional. Therefore, the Court should find that the Arizona Constitution and Arizona laws, including Ariz. Rev. Stat. § 16-212 (B), are an unconstitutional delegation of the Article II state legislative prerogatives of post-election certification of Presidential votes and post-election certification of Presidential electors.

b. The Georgia Constitution and laws do not require state legislative post-election certification of Presidential electors so their votes can be constitutionally counted by the federal Defendants—violating voters' rights.

The Georgia Constitution and laws do not require state legislative post-election certification of Presidential electors so their votes can be constitutionally counted by the federal Defendants—violating voters' rights. Under Article II's imperative sentence regarding Presidential elections, Georgia lacks legal authority to enact state laws which are a perpetual and wholesale delegation of post-election certification to state executive branch officials—as it has done. Georgia in Ga. Code Ann.§ 21-2-499 (B), has delegated certification of Presidential electors to the Georgia Secretary of State and the Georgia Governor—consistent with the Georgia Governor's certification of Presidential electors under 3 U.S.C. § 6.

But, Article II's imperative sentence regarding Presidential elections, and its non-delegation doctrine, empowers the Georgia state legislature to "direct" post-election certification of Presidential electors, not to delegate post-election certification, perpetually and in a wholesale fashion, to state executive branch officials as a ministerial duty. As detailed above, there are textual and structural arguments for these state statutes being unconstitutional. Therefore, the Court should find that the Georgia Constitution and Georgia laws, including Ga. Code Ann.§ 21-2-499 (B), are an unconstitutional delegation of the Article II state legislative prerogatives of post-election certification of Presidential votes and post-election certification of Presidential electors.

c. The Michigan Constitution and laws do not require state legislative post-election certification of Presidential electors so their votes can be constitutionally counted by the federal Defendants—violating voters' rights.

The Michigan Constitution and laws do not require state legislative post-election certification of Presidential electors so their votes can be constitutionally counted by the federal Defendants—violating voters' rights. Under Article II's imperative sentence regarding Presidential elections, Michigan lacks legal authority to enact state laws which are a perpetual and wholesale delegation of

post-election certification to state executive branch officials—as it has done. Michigan in Mich. Comp. Laws § 168.46 has delegated certification of Presidential electors to Michigan State Board of Canvassers and Michigan Governor—consistent with the Michigan Governor's certification of Presidential electors under 3 U.S.C. § 6.

But, Article II's imperative sentence regarding Presidential elections, and its non-delegation doctrine, empowers the Michigan state legislature to "direct" post-election certification of Presidential electors, not to delegate post-election certification, perpetually and in a wholesale fashion, to state executive branch officials as a ministerial duty. As detailed above, there are textual and structural arguments for these state statutes being unconstitutional. Therefore, the Court should find that the Michigan Constitution and Michigan laws, including Mich. Comp. Laws § 168.46, are an unconstitutional delegation of the Article II state legislative prerogatives of post-election certification of Presidential votes and post-election certification of Presidential electors.

d. The Pennsylvania Constitution and laws do not require state legislative post-election certification of Presidential electors so their votes can be constitutionally counted by the federal Defendants—violating voters' rights.

The Pennsylvania Constitution and laws do not require state legislative post-election certification of Presidential electors so their votes can be constitutionally counted by the federal Defendants—violating voters' rights. Under Article II's imperative sentence regarding Presidential elections, Pennsylvania lacks legal authority to enact state laws which are a perpetual and wholesale delegation of post-election certification to state executive branch officials—as it has done. Pennsylvania in 25 Pa. Cons. Stat. § 3166 has delegated certification of Presidential electors to the Secretary of Commonwealth and the Pennsylvania Governor—consistent with the Pennsylvania Governor's certification of Presidential electors under 3 U.S.C. § 6.

But, Article II's imperative sentence regarding Presidential elections, and its non-delegation doctrine, empowers the Pennsylvania state legislature to "direct" post-election certification of

Presidential electors, not to delegate post-election certification, perpetually and in a wholesale fashion, to state executive branch officials as a ministerial duty. As detailed above, there are textual and structural arguments for these state statutes being unconstitutional. Therefore, the Court should find that the Pennsylvania Constitution and Pennsylvania laws, including 25 Pa. Cons. Stat. § 3166, are an unconstitutional delegation of the Article II state legislative prerogatives of post-election certification of Presidential votes and post-election certification of Presidential electors.

e. The Wisconsin Constitution and laws do not require state legislative post-election certification of Presidential electors so their votes can be constitutionally counted by the federal Defendants—violating voters' rights.

The Wisconsin Constitution and laws do not require state legislative post-election certification of Presidential electors so their votes can be constitutionally counted by the federal Defendants—violating voters' rights. Under Article II's imperative sentence regarding Presidential elections, Wisconsin lacks legal authority to enact state laws which are a perpetual and wholesale delegation of post-election certification to state executive branch officials—as it has done. Wisconsin in Wis. Stat. § 7.70 (5) (b) has delegated certification of Presidential electors to the Wisconsin Elections Commission—and has deferred to the Arizona Governor's certification of Presidential electors under 3 U.S.C. § 6.

But, Article II's imperative sentence regarding Presidential elections, and its non-delegation doctrine, empowers the Wisconsin state legislature to "direct" post-election certification of Presidential electors, not to delegate post-election certification, perpetually and in a wholesale fashion, to state executive branch officials as a ministerial duty. As detailed above, there are textual and structural arguments for these state statutes being unconstitutional. Therefore, the Court should find that the Wisconsin Constitution and Wisconsin laws, including Wis. Stat. § 7.70 (5) (b), are an unconstitutional delegation of the Article II state legislative prerogatives of post-election certification of Presidential votes and post-election certification of Presidential electors.

6. The Presidential post-election court proceedings—like *Bush v. Gore,* the Texas original action and the thirty post-election lawsuits in Defendant States—are in constitutional error and unnecessarily politicize the federal and state courts.

The Presidential post-election court proceedings—like *Bush v. Gore,* the Texas original action and the thirty post-election lawsuits in Defendant States—are in constitutional error and unnecessarily politicize the federal and state courts. Under Article II, all of those cases should be dismissed for lack of jurisdiction—and the plaintiffs should be instructed to file their election contests with their respective state legislatures. The Defendant States have election contest or recount laws, which apply to Presidential elections, but preclude state legislative certifications: Ariz. Rev. Stat. § 16-672; Ga. Code Ann.§ 21-2-521; Mich. Comp. Laws § 168.862; Wis. Stat. § 9.01; and 25 Pa. Cons. Stat. § 3351. Interestingly, the Pennsylvania laws have a state legislative post-election certification process for its Governor and Lieutenant Governor elections—but not for President and Vice President. 25 Pa. Cons. Stat. § 3312, et seq. The Defendant States' laws precluding state legislative post-election certification in Presidential election contests and recounts violates Article II.

III. The Plaintiffs have standing as voters because the Defendants are violating their voting rights to state legislative post-election certifications of their votes and of Presidential electors and to only the votes of Presidential electors so certified being counted toward the election of President and Vice President.

As voters, the Plaintiffs have legal standing to bring these constitutional claims to ensure that Presidential elections are constitutionally conducted by Defendants. Article III of the Constitution limits the jurisdiction of federal courts to "Cases" and "Controversies." U.S. Const., Art. III, § 2. The doctrine of standing gives meaning to these constitutional limits by "identify[ing] those disputes which are appropriately resolved through the judicial process."[5] *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992). "The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches." *Clapper v. Amnesty Int'l USA,* 568 U.S. 398, 408 (2013). To establish Article III standing, a

plaintiff must show (1) an "injury in fact," (2) a sufficient "causal connection between the injury and the conduct complained of," and (3) a "likel[ihood]" that the injury "will be redressed by a favorable decision." *Lujan, supra,* at 560–561 (internal quotation marks omitted). Pre-enforcement constitutional challenges must meet the same standing requirements. *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157–58 (2014).

The U.S. Court of Appeals for the Fourth Circuit recognized standing in *Baten v. McMaster*, 967 F.3d 345, 352–53 (4th Cir. 2020) for Plaintiffs alleging their votes for Democratic presidential candidates were, in effect, discarded under South Carolina's winner-take-all process. *Id, citing Gill v. Whitford*, —— U.S. ——, 138 S. Ct. 1916, 1920–21 (2018) (citing *Baker v. Carr*, 369 U.S. 186, 206 (1962)) (contrasting the individual harm felt by a voter who casts his ballot in a gerrymandered district with the "generalized grievance" of one who disapproves of gerrymandering in his state but does not live in a gerrymandered district). The Fourth Circuit held this type of disenfranchisement "is the type of concrete, particularized injury that Article III contemplates." *Id.* at 353.

Similarly, the Plaintiffs claim they have been disenfranchised. The Plaintiffs claim that Article II of the U.S. Constitution provides a voter a constitutional right to the voter's Presidential vote being certified as part of the state legislature's post-election certification of Presidential electors. Absence such certification, the Presidential electors' votes from that state cannot be counted by the federal Defendants toward the election of President and Vice President. Because the Plaintiffs' votes are not counted as part of the constitutionally-required state legislative post-election certification of Presidential electors, the Plaintiffs are disenfranchised.

The Defendants' disenfranchisement of the Plaintiffs' voting rights is that the Plaintiffs' votes are never properly certified by the state legislature, which based on that certification, certifies the Presidential electors whose votes are counted by the federal Defendants to elect the President and Vice President. The Defendants' disenfranchisement of the Plaintiffs' voting rights is caused by

3 U.S.C. §§ 5, 6, 15, and the Defendants' state constitutions and state laws including Ariz. Rev. Stat. § 16-212 (B), Ga. Code Ann.§ 21-2-499 (B), Mich. Comp. Laws § 168.46, Wis. Stat. § 7.70 (5) (b) and 25 Pa. Cons. Stat. § 3166.

When Defendants violate the Constitution as it relates to Presidential elections in the Defendant States, all voters in Presidential elections suffer an injury-in-fact caused by the Defendants. Voters in a Presidential election, in this instance, have an injury-in-fact different than the public because they voted and they thus had an interest that the election in which they voted is constitutionally-conducted. The same is true of future elections. Finally, the Court can redress the Plaintiffs' injuries by issuing a declaratory judgment and accompanying injunction to enjoin the Defendants' unconstitutional conduct.

Furthermore, as voters, each Plaintiff has a fundamental right to vote.[14] Thus, each Plaintiff has a recognized protectable interest in voting. As the U.S. Supreme Court has long recognized, a person's right to vote is "individual and personal in nature."[15] Thus, "voters who allege facts showing disadvantage to themselves as individuals have standing to sue" to remedy that disadvantage.[16] "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."[17] "Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy."[18]

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

[14] *Reynolds v. Sims,* 377 U.S. 533, 554–55, 562 (1964).
[15] *Id.* 377 U.S. at 561.
[16] *Gill v. Whitford,* 138 S. Ct. 1916, 1929 (2018).
[17] *Johnson v. FCC*, 829 F.2d 157, 163 (D.C. Cir. 1987).
[18] *Purcell v. Gonzalez,* 549 U.S. 1, 4 (2006).

unbiased to maintain the structure of the democratic process.[19] The voters, in turn, agree to accept the government's announcement of the winner of an election contest, including Presidential 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.'[20] 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."[21]

This constitutional 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.[22] Social contract theory provided the background against which the Constitution was adopted. "Because of this social contract 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."[23] "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 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.'"[24]

State legislative post-election certifications of Presidential votes and of Presidential electors is part of the social contract to protect the right to vote. Hence, the right to vote is intertwined with

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[19] *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.
[20] *Burdick v. Takushi,* 504 U.S. 428, 441 (1992) *quoting Wesberry v. Sanders,* 376 U.S. 1, 17 (1964).
[21] *Id.* (citations omitted). *See also, e.g.* Plts Amended Compl. ¶¶46–49.
[22] *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.
[23] Greg Serienko, *Social Contract Neutrality and the Religion Clauses of the Federal Constitution*, 57 Ohio St. L. J. 1263, 1269.
[24] *Contemporary Approaches to the Social Contract,* https://plto.stanford.edu/entries/contractarianism-contemporary/ (last visited Dec. 8, 2020).

the integrity of an election process. The loss of the integrity of the election process renders the right to vote meaningless.[25] Here, the Defendant States' election irregularities and improprieties, including no state legislative post-election certification of Presidential votes and of Presidential electors, so exceed the razor-thin margins in the Defendant States to cast doubt 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 legislatures voting, based on voters' Presidential votes in that state, 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 Defendant States enacting constitutions and state laws cancelling state legislatures out of post-election certifications of Presidential votes and of Presidential electors, the Defendant states have breached the social contract of Article II.

This social contract, protecting the individual right to vote, is what is personally at risk for the Plaintiffs in the outcome of this controversy. [26] 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 against state and local election officials violating the election laws in favor of a pre-determined result. Under the social contract, state legislative post-election certification of the Presidential vote is the voters' remedy against state and local election officials' shenanigans. The Defendant States have unconstitutionally deprived their voters of that remedy in their respective state legislatures.

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[25] "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).
[26] *Gill,* 138 S.Ct. at 1923.

Furthermore, the voter has a compelling interest in the maintenance of a democratic system of government under the 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 social contract with the Governors and the state and local election officials to give them discretion for state election irregularities and improprieties—and to cancel post-election certifications by the state legislatures—regardless of how benign the public officials might be.

Instead, the voters' social contract is with the state legislatures—which must under Article II conduct post-election certification of all Presidential votes and of the Presidential electors. The Article II requirement of the state legislature casting post-election certification votes is the voters' constitutional "insurance policy" against the risk of Governors and state and local election officials engaging in election irregularities and improprieties in favor of a pre-determined outcome.

The voters have been willing to accept federal and state laws and regulations imposed upon a Presidential election process to serve the government's compelling interest in the integrity of that process. So, while it is fair for the government to create public governmental regulatory schemes to promote the compelling interests to protect the right to vote, and therefore, to protect a voter's right of associational choices under the First Amendment,[27] those rights are infringed when the Defendant States cancel the state legislatures out of post-election certifications of Presidential votes and of the Presidential electors.[28]

For Presidential elections, the Defendant States under Article II have no legal authority to cancel state legislatures out of post-election certifications of Presidential votes and of Presidential electors. Yet, they did. That is the harm for the voters. Article II's imperative sentence regarding Presidential elections that gives voters the right to have their respective state legislatures engage in

[27] *Anderson v. Celebrezze,* 460 U.S. 780, 788–89 (1983).
[28] *Id.*

post-election certifications of Presidential votes and of Presidential electors—not Governors nor state or local election officials.

This lawsuit is not about voter fraud. The harm from the federal law—3 U.S.C. §§ 5, 6, 15—and the state laws—including Ariz. Rev. Stat. § 16-212 (B), Ga. Code Ann.§ 21-2-499 (B), Mich. Comp. Laws § 168.46, Wis. Stat. § 7.70 (5) (b) and 25 Pa. Cons. Stat. § 3166—is the loss of a voter remedy of state legislative post-election certifications required as a core *governmental* function under Article II.

In turn, the Federal Defendants' acceptance of the Presidential electors' votes without state legislative post-election certification of Presidential electors breaches the social contract between the voter and the government—causing more injury to the voter.

Finally, these injuries to the voters are redressable by the Court. For example, the Court could grant the requested preliminary injunction requiring that the federal Defendants on January 6, 2021, only count the votes of Presidential electors if they have received state legislative post-election certification. Otherwise, the votes don't count toward the election of President and Vice President.

IV. The Plaintiffs are likely to suffer irreparable harm in the absence of preliminary relief.

"Plaintiffs here must at least 'demonstrate that irreparable injury is likely in the absence of an injunction.'" *Guttenberg v. Emery*, 26 F.Supp.3d 88, 101 (D.D.C. 2014)(quoting *Winter v. NRDC, Inc.*, 555 U.S. 7, 22 (2008)). "Under *Winter*, even a 'strong likelihood of prevailing on the merits' cannot make up for a deficient showing of irreparable injury." *Id.* (quoting *Winter*, 555 U.S. at 21–22). "Regardless of how the other three factors are analyzed, it is required that the movant demonstrate an irreparable injury." *Mdewakanton Sioux Indians of Minn. v. Zinke*, 255 F.Supp.3d 48, 51, n.3 (D.D.C. 2017).

The Plaintiffs' irreparable injury here is the disenfranchisement of Plaintiffs' vote when the Presidential electors' votes are counted without constitutionally-required state legislative post-

election certifications of the Plaintiffs' votes and of the Presidential electors. The federal and state constitutions and laws are a violation of Article II's imperative sentence regarding Presidential elections. Further, without state legislative post-election certification, Plaintiffs will never have their votes counted in the state legislature.

Further, the Plaintiffs will never have the same opportunity to challenge in their state legislatures the election officials' irregularities and illegalities associated with the November 3, 2020 election. Allegedly, the election officials' irregularities and illegalities exceed the razor-thin margins in the Defendant States. Absent the injunction, the Plaintiffs will never have their proverbial "day" in the state legislature to challenge the Presidential election results.

In turn, the Plaintiffs will be subjected to an unlawfully-elected President because none of the Presidential electors received a state legislative post-election certification—as Article II requires.

In the absence of the preliminary injunction, the Plaintiffs and the nation will be subjected to a post-inaugural ouster of the sitting President and Vice President under D.C. Code § 16-3501, et seq. That proceeding and subsequent ouster will cause irreparable injury to the Plaintiffs—and the nation.

V. The balance of equities and the public interest tips in the Plaintiffs' favor.

The final two factors that the Court must consider are the balance of equities and the public's interest in the issuance of an injunction. *See Arkansas Dairy Co-op Ass'n, Inc. v. U.S. Dep't of Agric.*, 573 F.3d 815, 821 (D.C. Cir. 2009). When "balanc[ing] the competing claims of injury," the Court must "consider the effect on each party of the granting or withholding of the requested relief." *Winter*, 555 U.S. at 24, 129 S.Ct. 365 (citations omitted). Additionally, "courts of equity should [have] particular regard for the public consequences in employing the extraordinary remedy of injunction." *Id.* (internal quotation marks and citations omitted).

The Plaintiffs file this preliminary injunction motion to avoid a constitutional crisis that would be involved in a post-inaugural ouster of the United States President and Vice President. D.C. Code § 16-3501, et seq., authorizes this Court, in proper cases, instituted by proper officers or persons, to post-election ouster of national officers of the United States including the President and Vice President of the United States. *Newman v. U.S. of America ex rel Frizzell*, 238 U.S. 537 (U.S. 1915).

Instead, to avoid that post-inaugural constitutional crisis, the Plaintiffs as voters file this preliminary injunction motion against federal officials in the District of Columbia and Governors and state legislative leaders in Arizona, Georgia, Michigan, Pennsylvania and Wisconsin requiring a constitutionally-compliant process for state-by-state post-election certification of Presidential electors and counting of their votes for the November 3, 2020 Presidential election and future elections.

The balancing of equities favors the Plaintiffs. Granting a preliminary injunction in this proceeding is better for everyone than a post-inaugural ouster. If the preliminary injunction is denied, the Plaintiffs lose something real and concrete: their voting rights are disenfranchised by an unconstitutional post-election certification process. The Plaintiffs also lose their post-election opportunity in their respective state legislatures to seek election integrity and protect their vote. On the other hand, the Defendants lose nothing by doing what the law requires: following Article II's imperative sentence regarding Presidential elections and obtaining state legislative post-election certifications prior to counting the Presidential electors' votes for President and Vice President on January 6, 2021.

The public interest favors granting the preliminary injunction too. The constitutional crisis of post-inaugural ouster should be avoided. The United States, the federal government and the states, should operate in every subject area in a constitutional way. State legislative post-election

certifications of Presidential votes and Presidential electors is constitutionally-required. So, the federal government and the states are legally obligated to honor that constitutional authority.

State legislative post-election certification of Presidential electors is an important way to develop public acceptance of close Presidential election results. State legislative post-election certification would help build public confidence in the states' voting systems too. Every four years, the state legislatures would be authorized to examine Presidential voters and voters' complaints as part of their post-election certifications—and would make electoral reforms accordingly. Consequently, the state legislatures' direct involvement in election integrity would build public confidence in the voting system reducing the amount of Presidential election litigation which now seems to be occurring in a cycle of every four years. It is far better to have the state legislatures hear election disputes state-by-state, as intended in Article II, then the United States Supreme Court hear all the states' election disputes as proposed in the Texas original action against Pennsylvania, Michigan, Wisconsin and Georgia—which was supported by Missouri and sixteen other states and U.S. Representative Mike Johnson and 105 other Congressional members.

CONCLUSION

The Court should issue the preliminary injunction prior to January 6, 2021, when federal Defendants meet to count the Presidential electors to elect a President and Vice President, because the Plaintiffs have met the factors required.

Dated: December 22, 2020

/s/ Erick G. Kaardal

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Wisconsin Voters Alliance, et al.,

Plaintiffs,

v.

Vice President Michael Richard Pence, et al.,

Defendants.

Case No. _____

Motion for Preliminary Injunction

MOTION

Plaintiffs Wisconsin Voters Alliance, et al., by and through undersigned counsel, hereby move this Court to issue a preliminary injunction enjoining Defendants from certifying Presidential electors who have not received state legislative post-election certification and from counting Presidential elector votes from Presidential electors who have not received state legislative post-election certification for the election of President and Vice President.

Under Local Rule 47(f), Plaintiffs request oral argument for this motion.

Dated: December 22, 2020

/s/Erick G. Kaardal

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

LOUIE GOHMERT, TYLER BOWYER, NANCY COTTLE, JAKE HOFFMAN, ANTHONY KERN, JAMES R. LAMON, SAM MOORHEAD, ROBERT MONTGOMERY, LORAINE PELLEGRINO, GREG SAFSTEN, KELLI WARD and MICHAEL WARD, Plaintiffs, v. THE HONORABLE MICHAEL R. PENCE, VICE PRESIDENT OF THE UNITED STATES, in his official capacity. Defendant.	Case No. COMPLAINT FOR EXPEDITED DECLARATORY AND EMERGENCY INJUNCTIVE RELIEF (Election Matter)

NATURE OF THE ACTION

1. This civil action seeks an expedited declaratory judgment finding that the elector dispute resolution provisions in Section 15 of the Electoral Count Act, 3 U.S.C. §§ 5 and 15, are unconstitutional because these provisions violate the Electors Clause and the Twelfth Amendment of the U.S. Constitution. U.S. CONST. art. II, § 1, cl. 1 & Amend. XII. Plaintiffs also request emergency injunctive relief required to effectuate the requested declaratory judgment**.**

2. These provisions of Section 15 of the Electoral Count Act are unconstitutional insofar as they establish procedures for determining which of two or more competing slates of Presidential Electors for a given State are to be counted in the Electoral College, or how objections to a proffered slate are adjudicated, that violate the Twelfth Amendment. This violation occurs because the Electoral Count Act directs the Defendant, Vice President Michael R. Pence, in his capacity as President of the Senate and Presiding Officer over the January 6, 2021 Joint Session

of Congress: (1) to count the electoral votes for a State that have been appointed in violation of the Electors Clause; (2) limits or eliminates his exclusive authority and sole discretion under the Twelfth Amendment to determine which slates of electors for a State, or neither, may be counted; and (3) replaces the Twelfth Amendment's dispute resolution procedure – under which the House of Representatives has sole authority to choose the President.

3. Section 15 of the Electoral Count Act unconstitutionally violates the Electors Clause by usurping the exclusive and plenary authority of State Legislatures to determine the manner of appointing Presidential Electors, and instead gives that authority to the State's Executive. Similarly, 3 USC § 5 makes clear that the Presidential electors of a state and their appointment by the State Executive shall be conclusive.

4. This is not an abstract or hypothetical question, but a live "case or controversy" under Article III that is ripe for a declaratory judgment arising from the events of December 14, 2020, where the State of Arizona (and several others) have appointed two competing slates of electors.

5. Plaintiffs include the United States Representative for Texas' First Congressional District and the entire slate of Republican Presidential Electors for the State of Arizona. The Arizona Electors have cast Arizona's electoral votes for President Donald J. Trump on December 14, 2020, at the Arizona State Capitol with the permission and endorsement of the Arizona Legislature, *i.e.*, at the time, place, and manner required under Arizona state law and the Electoral Count Act. At the same time, Arizona's Governor and Secretary of State appointed a separate and competing slate of electors who cast Arizona's electoral votes for former Vice-President Joseph R. Biden, despite the evidence of massive multi-state electoral fraud committed on Biden's behalf that changed electoral results in Arizona and in other states such as Georgia, Michigan,

Pennsylvania and Wisconsin that have also put forward competing slates of electors (collectively, the "Contested States"). Collectively, these Contested States have enough electoral votes in controversy to determine the outcome of the 2020 General Election.

6. On January 6, 2021, when Congress convenes to count the electoral votes for President and Vice-President, Plaintiff Representative Gohmert will object to the counting of the Arizona slate of electors voting for Biden and to the Biden slates from the remaining Contested States. Rep. Gohmert is entitled to have his objection determined under the Twelve Amendment, and not through the unconstitutional impositions of a prior Congress by 3 U.S.C. §§ 5 and 15.

7. Senators have also stated that they may object to the Biden slate of electors from the Contested States.[1]

8. This Complaint addresses a matter of urgent national concern that involves only issues of law – namely, a determination that Sections 5 and 15 of the Electoral Count Act violate the Electors Clause and/or the Twelfth Amendment of the U.S. Constitution. The relevant facts are not in dispute concerning the existence of a live case or controversy between Plaintiffs and Defendant, ripeness, standing, and other matters related to the justiciability of Plaintiffs' claims.[2]

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[1] *See* https://www.forbes.com/sites/jackbrewster/2020/12/17/here-are-the-gop-senators-who have-hinted-at-defying-mcconnell-by-challenging-election/?sh=506395c34ce3.

[2] The facts relevant to the justiciability of Plaintiffs' claims are laid out below and demonstrate the certainty or near certainty that the unconstitutional provisions in Section 15 of the Electoral Count Act will be invoked at the January 6, 2021 Joint Session of Congress to choose the next President, namely: (1) there are competing slates of electors for Arizona and the other Contested States that have been or will be submitted to the Electoral College; (2) the Contested States collectively have sufficient (contested) electoral votes to determine the winner of the 2020 General Election – President Trump or former Vice President Biden; (3) legislators in Arizona and other Contested States have contested the certification of their State's electoral votes by State executives, due to substantial evidence of election fraud that is the subject of ongoing litigation and investigations; and (4) Senators and Members of the House of Representatives have expressed their intent to challenge the electors and electoral votes certified by State executives in the Contested States.

9. Because the requested declaratory judgment will terminate the controversy arising from the conflict between the Twelfth Amendment and the Electoral Count Act, and the facts are not in dispute, it is appropriate for this Court to grant this relief in a summary proceeding without an evidentiary hearing or discovery. *See* Notes of Advisory Committee on Federal Rules of Civil Procedure, Fed. R. Civ. P. 57.

10. Accordingly, Plaintiffs have concurrently submitted a motion for a speedy summary proceeding under Rule 57 of the Federal Rules of Civil Procedure ("FRCP") to grant the relief requested herein as soon as possible, and for emergency injunctive relief under Rule 65 thereof consistent with the declaratory judgment requested herein on that same date.

11. Accordingly, Plaintiffs respectfully request this Court to issue a declaratory judgment finding that:

A. Sections 5 and 15 of the Electoral Count Act, 3 U.S.C. §§ 5 and 15, are unconstitutional because they violate the Twelfth Amendment, U.S. CONST. art. II, § 1, cl. 1 & amend. XII on the face of it; and further violate the Electors Clause;

B. That Vice-President Pence, in his capacity as President of Senate and Presiding Officer of the January 6, 2021 Joint Session of Congress under the Twelfth Amendment, is subject solely to the requirements of the Twelfth Amendment and may exercise the exclusive authority and sole discretion in determining which electoral votes to count for a given State, and must ignore and may not rely on any provisions of the Electoral Count Act that would limit his exclusive authority and his sole discretion to determine the count, which could include votes from the slates of Republican electors from the Contested States;

C. That, with respect to competing slates of electors from the State of Arizona or other Contested States, the Twelfth Amendment contains the exclusive dispute resolution mechanisms, namely, that (i) Vice-President Pence determines which slate of electors' votes count, or neither, for that State; (ii) how objections from members of Congress to any proffered slate of electors is adjudicated; and (iii) if no candidate has a majority of 270 elector votes, then the House of Representatives (and only the House of Representatives) shall choose the President where "the votes [in the House of Representatives] shall be taken by states, the representation from each state having one vote," U.S. CONST. amend. XII;

D. That with respect to the counting of competing slates of electors, the alternative dispute resolution procedure or priority rule in 3 U.S.C. § 15, together with its incorporation of 3 U.S.C. § 5, shall have no force or effect because it nullifies and replaces the Twelfth Amendment rules above with an entirely different procedure; and

E. Issue any other declaratory judgments or findings or injunctive relief necessary to support or effectuate the foregoing declaratory judgments.

JURISDICTION AND VENUE

12. This Court has subject matter jurisdiction under 28 U.S.C. § 1331 which provides, "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

13. This Court also has subject matter jurisdiction under 28 U.S.C. § 1343 because this action involves a federal election for President of the United States. "A significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional

question." *Bush v. Gore*, 531 U.S. 98, 113 (2000) (Rehnquist, C.J., concurring); *Smiley v. Holm*, 285 U.S. 355, 365 (1932).

14. The jurisdiction of the Court to grant declaratory relief is conferred by 28 U.S.C. §§ 2201 and 2202 and by Rule 57, Fed. R. Civ. P., and emergency injunctive relief by Rule 65, Fed. R. Civ. P.

15. Venue is proper because Plaintiff Gohmert resides in Tyler, Texas, he maintains his primary congressional office in Tyler, and no real property is involved in the action. 28 U.S.C. § 1391(e)(1).

THE PARTIES

16. Plaintiff Louie Gohmert is a duly elected member of the United States House of Representatives for the First Congressional District of Texas. On November 3, 2020 he won re-election of this Congressional seat and plans to attend the January 6, 2021 session of Congress. He resides in the city of Tyler, in Smith County, Texas.

17. Each of the following Plaintiffs is a resident of Arizona, a registered Arizona voter and a Republican Party Presidential Elector on behalf of the State of Arizona, who voted their competing slate for President and Vice President on December 14, 2020: a) Tyler Bowyer, a resident of Maricopa County and a Republican National Committeeman; b) Nancy Cottle, a resident of Maricopa County and Second Vice-Chairman of the Maricopa County Republican Committee; c) Jake Hoffman, a resident of Maricopa County and member-elect of the Arizona House of Representatives; d) Anthony Kern, a resident of Maricopa County and an outgoing member of the Arizona House of Representatives; e) James R. Lamon, a resident of Maricopa County; f) Samuel Moorhead, a resident of Gila County; g) Robert Montgomery, a resident of Cochise County and Republican Party Chairman for Cochise County; h) Loraine Pellegrino, a

resident of Maricopa County; i) Greg Safsten, a resident of Maricopa County and Executive Director of the Republican Party of Arizona; j) Kelli Ward, a resident of Mohave County and Chair of the Arizona Republican Party; and k) Michael Ward, a resident of Mohave County.

18. The above eleven plaintiffs constitute the full slate of the Arizona Republican party's nominees for presidential electors (the "Arizona Electors").

19. The Defendant is Vice President Michael R. Pence named in his official capacity as the Vice President of the United States. The declaratory and injunctive relief requested herein applies to his duties as President of the Senate and Presiding Officer at the January 6, 2021 Joint Session of Congress carried out pursuant to the Electoral Count Act and the Twelfth Amendment.

STATEMENT OF FACTS

20. The Plaintiffs include a United States Representative from Texas, the entire slate of Republican Presidential Electors for the State of Arizona as well as an outgoing and incoming member of the Arizona Legislature. On December 14, 2020, pursuant to the requirements of applicable state laws and the Electoral Count Act, the Arizona Electors, with the knowledge and permission of the Republican-majority Arizona Legislature, convened at the Arizona State Capitol, and cast Arizona's electoral votes for President Donald J. Trump and Vice President Michael R. Pence.[3] On the same date, the Republican Presidential Electors for the States of Georgia,[4]

[3] *See GOP Elector Nominees cast votes for Trump in Arizona, Georgia, Pennsylvania*, by Dave Boyer, The Washington Times, December 14, 2020. https://www.washingtontimes.com/news/2020/dec/14/gop-electors-cast-votes-trump-georgia-pennsylvania/.

[4] *See id.*

Pennsylvania[5] and Wisconsin[6] met at their respective State Capitols to cast their States' electoral votes for President Trump and Vice President Pence.

21. Michigan's Republican electors attempted to vote at their State Capitol on December 14th but were denied entrance by the Michigan State Police. Instead, they met on the grounds of the State Capitol and cast their votes for President Trump and Vice President Pence vote.[7]

22. On December 14, 2020, in Arizona and the other States listed above, the Democratic Party's slate of electors convened in their respective State Capitols to cast their electoral votes for former Vice President Joseph R. Biden and Senator Kamala Harris. On the same day, Arizona Governor Doug Ducey and Arizona Secretary of State Katie Hobbs submitted the Certificate of Ascertainment with the Biden electoral votes pursuant to the National Archivist pursuant to the Electoral Count Act.[8]

23. Accordingly, there are now competing slates of Republican and Democratic electors in five States with Republican majorities in both houses of their State Legislatures – Arizona, Georgia, Michigan, Pennsylvania, and Wisconsin (*i.e.*, the Contested States) – that

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[5] *See id.*

[6] *See Wisconsin GOP Electors Meet to Cast their own Votes Too Just in Case,* by Nick Viviani, WMTV, NBC15.com, December 14, 2020, https://www.nbc15.com/2020/12/14/wisconsin-gop-electors-meet-to-cast-their-own-votes-too-just-in-case/ last visited December 14, 2020.

[7] *See Michigan Police Block GOP Electors from Entering Capitol*, by Jacob Palmieri, the Palmieri Report, December 14, 2020, https://thepalmierireport.com/michigan-state-police-block-gop-electors-from-entering-capitol/.

[8] *See Democratic Electors Cast Ballots in Arizona for First Time Since 1996*, by Nicole Valdes, ABC15.com, December 14, 2020, *available at*: https://www.abc15.com/news/election-2020/democratic-electors-cast-ballots-in-arizona-for-first-time-since-1996.

collectively have 73 electoral votes, which are more than sufficient to determine the winner of the 2020 General Election.[9]

24. The Arizona Electors, along with Republican Presidential Electors in Georgia, Michigan, Pennsylvania, and Wisconsin, took this step as a result of the extraordinary events and substantial evidence of election fraud and other illegal conduct before, during and after the 2020 General Election in these States. The Arizona Legislature has conducted legislative hearings into these voting fraud allegations, and is actively investigating these matters, including issuing subpoenas of Maricopa County, Arizona (which accounts for over 60% of Arizona's population and voters) voting machines for forensic audits.[10]

25. On December 14, 2020, members of the Arizona Legislature passed a Joint Resolution in which they: (1) found that the 2020 General Election "was marred by irregularities so significant as to render it highly doubtful whether the certified result accurately represents the will of the voters;" (2) invoked the Arizona Legislature's authority under the Electors Clause and 5 U.S.C. § 2 to declare the 2020 General Election a failed election and to directly appoint Arizona's electors; (3) resolved that the Plaintiff Arizona Electors' "11 electoral votes be accepted for … Donald J. Trump or to have all electoral votes nullified completely until a full forensic audit can be conducted;" and (4) further resolved "that the United States Congress is not to consider a slate

[9] Republican Presidential Electors in the States of Nevada and New Mexico, which have Democrat majority state legislature, also met on December 14, 2020, at their State Capitols to cast their votes for President Trump and Vice President Pence.

[10] Maricopa County election officials have refused to comply with these subpoenas or to turn over voting machines or voting records and have sued to quash the subpoena. Plaintiff Arizona Electors have moved to intervene in this Arizona state proceeding. *See generally Maricopa Cty. v. Fann*, Case No. CV2020-016840 (Az. Sup. Ct. Dec. 18, 2020).

of electors from the State of Arizona until the Legislature deems the election to be final and all irregularities resolved."[11]

26. Public reports have also highlighted wide-spread election fraud in the other Contested States that prompted competing Electors' slates. [12]

27. Republican Senators and Republican Members of the House of Representatives have also expressed their intent to oppose the certified slates of electors from the Contested States due to the substantial evidence of election fraud in the 2020 General Election. Multiple Senators and House Members have stated that they will object to the Biden electors at the January 6, 2021 Joint Session of Congress.[13] Plaintiff Gohmert will object to the counting of the Arizona electors voting for Biden, as well as to the Biden electors from the remaining Contested States.

28. Based on the foregoing facts, Defendant Vice President Pence, in his capacity as President of the Senate and Presiding Officer at the January 6, 2021 Joint Session of Congress to select the next President, will be presented with the following circumstances: (1) competing slates of electors from the State of Arizona and the other Contested States (namely, Georgia, Michigan, Pennsylvania, and Wisconsin) (2) that represent sufficient electoral votes (a) if counted, to determine the winner of the 2020 General Election, or (b) if not counted, to deny either President Trump or former Vice President Biden sufficient votes to win outright; and (3) objections from at

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[11] *See* **Ex. A**, "A Joint Resolution of the 54th Legislature, State of Arizona, To The 116th Congress, Office of the President of the Senate Presiding," December 14, 2020 ("December 14, 2020 Joint Resolution").

[12] *See The Immaculate Deception*, *Six Key Dimensions of Election Irregularities, The Navarro Report*. https://bannonswarroom.com/wp-content/uploads/2020/12/The-Immaculate-Deception-12.15.20-1.pdf

[13] *See, e.g., Dueling Electors and the Upcoming Joint Session of Congress*, by Zachary Steiber, Epoch Times, Dec. 17, 2020, *available at:* https://www.theepochtimes.com/explainer-dueling-electors-and-the-upcoming-joint-session-of-congress_3622992.html.

least one Senator and at least one Member of the House of Representatives to the counting of electoral votes from one or more of the Contested States.

29. The choice between the Twelfth Amendment and 3 U.S.C. § 15 raises important procedural differences. In the incoming 117th Congress, the Republican Party has a majority in 27 of the House delegations that would vote under the Twelfth Amendment. The Democrat Party has a majority in 20 of those House delegations, and the two parties are evenly divided in three of those delegations. By contrast, under 3 U.S.C. § 15, Democrats have a ten- or eleven-seat majority in the House, depending on the final outcome of the election in New York's 22nd District.

30. Accordingly, it is the foregoing conflict between the Twelfth Amendment of the U.S. Constitution and Section 15 of the Electoral Count Act that establish the urgency for this Court to issue a declaratory judgment that Section 15 of the Electoral Count Act is unconstitutional.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

31. **Presidential Electors Clause.** The U.S. Constitution grants State Legislatures the exclusive authority to appoint 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 no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector. U.S. CONST. art. II, § 1 ("Electors Clause").

32. The Supreme Court has affirmed that the "power and jurisdiction of the state [legislature]" to select electors "is exclusive," *McPherson v. Blacker*, 146 U.S. 1, 11 (1892); this power "cannot be taken from them or modified" by statute or even the state constitution," and "there is no doubt of the right of the legislature to resume the power at any time." *Id.* at 10 (citations omitted). In *Bush v. Gore*, 531 U.S. 98 (2000), the Supreme Court reaffirmed *McPherson's* holding that "the state legislature's power to select the manner for appointing

electors is plenary," *Bush*, 531 U.S. at 104 (*citing McPherson*, 146 U.S. at 35), noting that the state legislature "may, if it so chooses, select the electors itself," and that even after deciding to select electors through a statewide election, "can take back the power to appoint electors." *Id.* (citation omitted).

33. **The Twelfth Amendment.** The Twelfth Amendment sets forth the procedures for counting electoral votes and for resolving disputes over whether and which electoral votes may be counted for a State. The first section describes the meeting of the Electoral College and the procedures up to the casting of the electoral votes by the Presidential Electors in their respective states, which occurred on December 14, 2020, with respect to the 2020 General Election:

> The electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate.

U.S. CONST. amend. XII.

34. The second section describes how Defendant Vice President Pence, in his role as President of the Senate and Presiding Officer for the January 6, 2021 Joint Session of Congress, shall "count" the electoral votes.

> The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted[.]

U.S. CONST. amend. XII.

35. Under the Twelfth Amendment, Defendant Pence alone has the exclusive authority and sole discretion to open and permit the counting of the electoral votes for a given state, and where there are competing slates of electors, or where there is objection to any single slate of electors, to determine which electors' votes, or whether none, shall be counted. Notably, neither

the Twelfth Amendment nor the Electoral Count Act, provides any mechanism for judicial review of the Presiding Officer's determinations.[14] Instead, the Twelfth Amendment and the Electoral Count Act adopt different procedures for the President of the Senate (Twelfth Amendment) or both Houses of Congress (Electoral Count Act) to resolve any such disputes and the authority for the final determinations, in the event of disagreement, to different parties; namely, the Electoral Count Act gives it to the Executive of the State; while the Twelfth Amendment vests sole authority with the Vice President.

36. The third section of the Twelfth Amendment sets forth the procedures for selecting the President (solely) by the House of Representatives, in the event that no candidate has received a majority of electoral votes counted by the President of the Senate.

> The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of electors appointed; *and if no person have such majority, then* from the persons having the highest numbers not exceeding three on the list of those voted for as President**,** *the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote*; a quorum for this purpose shall consist of a member or members from two-thirds of the states, *and a majority of all the states shall be necessary to a choice*. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.

U.S. CONST. amend. XII (emphasis added).

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[14] *See, e.g.,* Nathan L. Colvin & Edward B. Foley, *The Twelfth Amendment: A Constitutional Ticking Time Bomb*, U. of Miami L. Rev. 64:475, 526 (2010) (discussing reviews of the Electoral Count Act's ("ECA") legislative history and concluding that, "[o]ne of the more thorough reviews of the legislative history of the ECA reveals that Congress considered giving the Court some role in the process but rejected the idea every time, and it was clear that Congress did not think the Court had a constitutional role nor did it believe that the Court should have any jurisdiction at all." Plaintiffs agree that resolution of disputes before Congress, arising on January 6, 2021, over competing slates of electors, or objections to any slate of electors, are matters outside the purview of federal courts; but the federal courts must determine whether the ECA is unconstitutional. This position is fully consistent with the declaratory judgment requested herein.

37. There are four key features of this Twelfth Amendment procedure that should be noted when comparing it with the Electoral Count Act's procedures: (1) the President is to be chosen solely by the House of Representatives, with no role for the Senate; (2) votes are taken by State (with one vote per State), rather than by individual House members; (3) the President is deemed the candidate that receives the majority of States' votes, rather than a majority of individual House members' votes; and (4) there are no other restrictions on this majority rule provision; in particular, no "tie breaker" or priority rules based on the manner or State authority that originally appointed the electors on December 14, 2020 as is the case under the Electoral Count Act (which gives priority to electors' certified by the State's executive).

38. **The Electoral Count Act.** The Electoral Count Act of 1887, as subsequently amended, includes a number of provisions that are in direct conflict with the text of the Electors Clause and the Twelfth Amendment.

39. Sections 5 and 15 of the Electoral Count Act adopt an entirely different set of procedures for the counting of electoral votes, for addressing situations where one candidate does not receive a majority, and for resolving disputes. Sections 16 to 18 of the Electoral Count Act provide additional procedural rules governing the Joint Session of Congress (to be held January 6, 2021 for the 2020 General Election).

40. The first part of Section 15 is consistent with the Twelfth Amendment insofar as it provides that "the President of the Senate shall be their presiding officer" and that "all the certificates and papers purporting to be certificates of the electoral votes" are to be "opened by the President of the Senate." 3 U.S.C. § 15. However, Section 15 diverges from the Twelfth Amendment by adopting procedures for the President of the Senate to "call for objections," and if there are objections made in writing by one Senator and one Member of the House of

Representatives, then this shall trigger a dispute-resolution procedure found nowhere in the Twelfth Amendment.

41. The Section 15's dispute resolution procedures are lengthy and reproduced in their entirety below:

> When all objections so made to any vote or paper from a State shall have been received and read, the Senate shall thereupon withdraw, and such objections shall be submitted to the Senate for its decision; and the Speaker of the House of Representatives shall, in like manner, submit such objections to the House of Representatives for its decision; and no electoral vote or votes from any State which shall have been regularly given by electors whose appointment has been lawfully certified to according to section 6 of this title [3 USCS § 6][15] from which but one return has been received shall be rejected, *but the two Houses concurrently may reject the vote or votes when they agree that such vote or votes have not been so regularly given by electors whose appointment has been so certified*. If more than one return or paper purporting to be a return from a State shall have been received by the President of the Senate, those votes, and those only, shall be counted which shall have been regularly given by the electors who are shown by the determination mentioned in section 5 [3 USCS § 5] of this title to have been appointed, if the determination in said section provided for shall have been made, or by such successors or substitutes, in case of a vacancy in the board of electors so ascertained, as have been appointed to fill such vacancy in the mode provided by the laws of the State; but in case there shall arise the question which of two or more of such State authorities determining what electors have been appointed, as mentioned in section 5 of this title [3 USCS § 5], *is the lawful tribunal of such State, the votes regularly given of those electors, and those only*, of such State shall be counted whose title as electors the two Houses, acting separately, shall concurrently decide is supported by the decision of such State so authorized by its law; and in such case of more than one return or paper purporting to be a return from a State, if there shall have been no such determination of the question in the State aforesaid, then those votes, and those only, shall be counted which the two Houses shall concurrently decide were cast by lawful electors appointed in accordance with the laws of the State, unless the two Houses, acting separately, shall concurrently decide such votes not to be the lawful votes of the legally appointed electors of such

[15] 3 U.S.C. § 6 is inconsistent with the Electors Clause—which provides that electors "shall sign and certify, and transmit sealed to the seat of the government of the United States" the results of their vote, U.S. Const. art. II, § 1, cl. 2-3—because § 6 relies on state executives to forward the results of the electors' vote to the Archivist for delivery to Congress. 3 U.S.C. § 6. Although the means of delivery are arguably inconsequential, the Constitution vests state executives with no role whatsoever in the process of electing a President. A state executive lends no official imprimatur to a given slate of electors under the Constitution.

> State. *But if the two Houses shall disagree in respect of the counting of such votes, then, and in that case, the votes of the electors whose appointment shall have been certified by the executive of the State, under the seal thereof, shall be counted.* When the two Houses have voted, they shall immediately again meet, and the presiding officer shall then announce the decision of the questions submitted. No votes or papers from any other State shall be acted upon until the objections previously made to the votes or papers from any State shall have been finally disposed of.

3 U.S.C. § 15 (emphasis added).

42. First, the Electoral Count Act submits disputes over the "count" of electoral votes to both the House of Representatives and to the Senate. The Twelfth Amendment envisages no such role for both Houses of Congress. The President of the Senate, and the President of the Senate alone, shall "count" the electoral votes. This intent is borne out by a unanimous resolution attached to the final Constitution that described the procedures for electing the first President (*i.e.*, for a time when there would not already be a Vice President), stating in relevant part "that the Senators should appoint a President of the Senate, for the sole Purpose of receiving, opening and counting the Votes for President." 2 M. Farrand, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 666 (1911). For all subsequent elections, when there would be a Vice President to act as President of the Senate, the Constitution vests the opening and counting in the Vice President.

43. Second, the Electoral Count Act gives both the House of Representatives and the Senate the power to vote, or "decide," which of two or more competing slates of electors shall be counted, and it requires the concurrence of both to "count" the electoral votes for one of the competing slates of electors.

44. Under the Twelfth Amendment, the President of the Senate has the sole authority to count votes in the first instance, and then the House may do so *only* in the event that no candidate receives a majority counted by the President of the Senate. There is no role for the Senate to participate in choosing the President.

45. Third, the Electoral Count Act eliminates entirely the unique mechanism by which the House of Representatives under the Twelve Amendment is to choose the President, namely, where "the votes shall be taken by states, the representation for each state having one vote." U.S. CONST. amend. XII. The Electoral Count Act is silent on how the House of Representatives is to "decide" which electoral votes were cast by lawful electors.

46. Fourth, the Electoral Count Act adopts a priority rule, or "tie breaker," "if the two Houses shall disagree in respect of counting of such votes," in which case "the votes of the electors whose appointment shall have been certified by the executive of the State … shall be counted." This provision not only conflicts with the President of the Senate's exclusive authority and sole discretion under the Twelfth Amendment to decide which electoral votes to count, but also with the State Legislature's exclusive and plenary authority under the Electors Clause to appoint the Presidential Electors for their State.

47. The Electoral Count Act is unconstitutional because it exceeds the power of Congress to enact. It is well settled that "one legislature may not bind the legislative authority of its successors," United *States v. Winstar Corp.*, 518 U.S. 839, 872 (1996), which is a foundational and "centuries-old concept," *id.*, that traces to Blackstone's maxim that "Acts of parliament derogatory from the power of subsequent parliaments bind not." *Id.* (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *90). "There is no constitutionally prescribed method by which one Congress may require a future Congress to interpret or discharge a constitutional responsibility in any particular way." Laurence H. Tribe, *Erog v. Hsub and Its Disguises: Freeing* Bush v. Gore *from Its Hall of Mirrors*, 115 HARV. L. REV. 170, 267 n.388 (2001).

48. The Electoral Count Act also violates the Presentment Clause by purporting to create a type of bicameral order, resolution, or vote that is not presented to the President. *See* U.S.

CONST. art. I, § 7, cl. 3 ("Every Order, Resolution, or Vote, to Which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.")

49. The House and Senate cannot resolve the issues that the Electoral Count Act asks them to resolve without either a supermajority in both houses or presentment. The Electoral Count Act similarly restricts the authority of the House of Representatives and the Senate to control their internal discretion and procedures pursuant to Article I, Section 5 which provides that "[e]ach House may determine the Rules of its Proceedings …" U.S. CONST. art. I, § 5, cl. 2.

50. Further, the Electoral Count Act improperly delegates tie-breaking authority to State executives (who have no agency under the Electors Clause or election amendments) when a State presents competing slates that Congress cannot resolve, or when an objection is presented to a particular slate of electors.

51. The Electoral Count Act also violates the non-delegation doctrine, the separation-of-powers and anti-entrenchment doctrines. *See generally* Chris Land & David Schultz, *On the Unenforceability of the Electoral Count Act*, 13 Rutgers J.L. & Pub. Policy 340, 364-377 (2016).

JUSTICIABILITY AND JURISDICTION

52. **This Court Can Grant Declaratory Judgment in a Summary Proceeding.** This Court has the authority to enter a declaratory judgment and to provide injunctive relief pursuant to Rules 57 and 65 of the Federal Rules of Civil Procedure and 28 U.S.C. §§ 2201 and 2202. The court may order a speedy hearing of a declaratory judgment action. Fed. Rules Civ. Proc. R. 57,

Advisory Committee Notes. A declaratory judgment is appropriate when it will "terminate the controversy" giving rise to the proceeding. *Id.* Inasmuch as it often involves only an issue of law on undisputed or relatively undisputed facts, it operates frequently as a summary proceeding, justifying docketing the case for early hearing as on a motion. *Id.*

53. As described above, Plaintiffs' claims involve legal issues only – specifically, whether the Electoral Count Act violates the Twelfth Amendment of the U.S. Constitution – that do not require this court to resolve any disputed factual issues.

54. Moreover, the factual issues related to the justiciability of Plaintiffs' claims are not in dispute. To assist this Court to grant the relief on the expedited basis requested herein, Plaintiffs address a number of likely objections to this Court's jurisdiction and the justiciability of Plaintiffs' claims that may be raised by Defendant.

55. **Plaintiffs Have Standing.** Plaintiffs have standing as including a Member of the House of Representatives, Members of the Arizona Legislature, and as Presidential Electors for the State of Arizona.

56. Prior to December 14, 2020, Plaintiff Arizona Electors had standing under the Electors Clause as candidates for the office of Presidential Elector because, under Arizona law, a vote cast for the Republican Party's President and Vice President is cast for the Republican Presidential Electors. *See* ARS § 16-212. Accordingly, Plaintiff Arizona Electors, like other candidates for office, "have a cognizable interest in ensuring that the final vote tally reflects the legally valid votes cast," as "[a]n inaccurate vote tally is a concrete and particularized injury to candidates such as the Electors." *Carson v. Simon*, 978 F.3d 1051, 1057 (8th Cir. 2020) (affirming that Presidential Electors have Article III and prudential standing under Electors Clause). *See also Wood v. Raffensperger*, No. 20-14418, 2020 WL 7094866, *10 (11th Cir. Dec. 5, 2020) (affirming

that if Plaintiff voter had been a candidate for office "he could assert a personal, distinct injury" required for standing); *Trump v. Wis. Elections Comm'n*, No. 20-cv-1785, 2020 U.S. Dist. LEXIS 233765 at *26 (E.D. Wis. Dec. 12, 2020) (President Trump, "as candidate for election, has a concrete particularized interest in the actual results of the election.").

57. But for the alleged wrongful conduct of Arizona executive branch and Maricopa County officials under color of law, by certifying a fraudulently produced election result in Mr. Biden's favor, the Plaintiff Arizona Electors would have been certified as the presidential electors for Arizona, and Arizona's Governor and Secretary of State would have transmitted uncontested votes for Donald J. Trump and Michael R. Pence to the Electoral College. The certification and transmission of a competing slate of Biden electors has resulted in a unique injury that only Plaintiff Arizona Electors could suffer, namely, having a competing slate of electors take their place and their votes in the Electoral College.

58. The upcoming January 6, 2021 Joint Session of Congress provides further grounds of standing for the requested declaratory judgment that the Electoral Count Act is unconstitutional. Then, Plaintiffs are certain or nearly certain to suffer an injury-in-fact caused by Defendant Vice President Pence, acting as Presiding Officer, if Defendant ignores the Twelfth Amendment and instead follows the procedures in Section 15 of the Electoral Count Act to resolve the dispute over which slate of Arizona electors is to be counted.

59. The Twelfth Amendment gives Defendant exclusive authority and sole discretion as to which set of electors to count, or not to count any set of electors; if no candidate receives a majority of electoral votes, then the President is to be chosen by the House, where "the votes shall be taken by States, the representation from each state having one vote." U.S. CONST. amend. XII. If Defendant Pence instead follows the procedures in Section 15 of the Electoral Count Act,

Plaintiffs' electoral votes will not be counted because (a) the Democratic majority House of Representatives will not "decide" to count the electoral votes of Plaintiff Republican electors; and (b) either the Senate will concur with the House not to count their votes, or the Senate will not concur, in which case, the electoral votes cast by Biden's electors will be counted because the Biden slate of electors was certified by Arizona's executive.

60. It is sufficient for the purposes of declaratory judgment that the injury is threatened. The declaratory and injunctive relief requested by Plaintiffs "may be made before actual completion of the injury-in-fact required for Article III standing," namely, the application of Section 15 of the Electoral Count Act, rather than the Twelfth Amendment to resolve disputes over which of two competing slates of electors to count "if the plaintiff can show an actual present harm or significant possibility of future harm to demonstrate the need for pre-enforcement review." 10 FED. PROC. L. ED. § 23.26 ("Standing to Seek Declaratory Judgment") (citations omitted).

61. Plaintiffs have demonstrated above that this injury-in-fact is to occur at the January 6, 2021 Joint Session of Congress, and they seek the requested declaratory and injunctive relief "only in the last resort, and as a necessity in the determination of a vital controversy." *Id.*

62. **Plaintiffs Present a Live "Case or Controversy."** Plaintiffs' claims present a live "case or controversy" with the Defendant, rather than hypothetical or abstract dispute, that can be litigated and decided by this Court through the requested declaratory and injunctive relief. Here there is a clear threat of the application of an unconstitutional statute, Section 15 of the Electoral Count Act, which is sufficient to establish the requisite case or controversy. *See, e.g., Navegar, Inc. v. U.S.*, 103 F.3d 994, 998 (D.C. Cir. 1997) ("the threat of prosecution provides the foundation of justiciability as a constitutional and prudential matter, and the Declaratory Judgments Act provides the mechanism for seeking pre-enforcement review in federal court.").

63. First, the events of December 14, 2020, gave rise to two competing slates of electors for the State of Arizona: the Plaintiff Arizona Electors, supported by Arizona State legislators (as evidenced by the December 14, 2020 Joint Resolution and the participation of Arizona legislator Plaintiffs), who cast their electoral votes for President Trump and Vice President Pence, and one certified by the Arizona state executives who cast their votes for former Vice President Biden and Senator Harris. Second, the text of the Twelfth Amendment of the Constitution expressly commits to the Defendant Vice President Pence, acting as the President of the Senate and Presiding Officer for the January 6, 2021 Joint Session of Congress, the authority and discretion to "count" electoral votes, *i.e.*, deciding in his sole discretion as to which one of the two, or neither, set of electoral votes shall be counted. The Electoral Count Act similarly designates Defendant as the Presiding Officer responsible for opening and counting electoral votes, but sets forth a different set of procedures, inconsistent with the Twelfth Amendment, for deciding which of two or more competing slates of electors and electoral votes, or neither, shall be counted.

64. Accordingly, a controversy presently exists due to: (1) the existence of competing slates of electors for Arizona and the other Contested States, and (2) distinct and inconsistent procedures under the Twelfth Amendment and the Electoral Count Act to determine which slate of electors and their electoral votes, or neither, shall be counted in choosing the next President. Further, this controversy must be resolved at the January 6, 2021 Joint Session of Congress. Finally, the Constitution expressly designates Defendant Pence as the individual who decides which set of electoral votes, or neither, to count, and the requested declaratory judgment that the procedures under Electoral Count Act are unconstitutional is necessary to ensure that Defendant Pence counts electoral votes in a manner consistent with the Twelfth Amendment of the U.S. Constitution.

65. The injuries that Plaintiffs assert affect the procedure by which the status of their votes will be considered, which lowers the thresholds for immediacy and redressability under this Circuit's and the Supreme Court's precedents. *Nat'l Treasury Employees Union v. U.S.,* 101 F.3d 1423, 1428-29 (D.C. Cir. 1996); *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 571-72 & n.7 (1992). Similarly, a plaintiff with concrete injury can invoke Constitution's structural protections of liberty. *Bond v. United States*, 564 U.S. 211, 222-23 (2011).

66. **Plaintiffs' Claims Are Ripe for Adjudication.** Plaintiffs' claims are ripe for the same reasons that they present a live "case or controversy" within the meaning of Article III. "[T]he ripeness doctrine seeks to separate matters that are premature for review because the injury is speculative and may never occur from those cases that are appropriate for federal court action." *Roark v. Hardee LP v. City of Austin*, 522 F.3d 533, 544 n.12 (5th Cir. 2008) (*quoting* ERWIN CHEMERINSEY, FEDERAL JURISDICTION § 2.4.18 (5th Ed. 2007)). As explained above, the facts underlying the justiciability of Plaintiffs' claims are not in dispute. Further, it is certain or nearly certain that Plaintiffs will suffer an injury-in-fact at the January 6, 2021 Joint Session of Congress, if Defendant Pence disregards the exclusive authority and sole discretion granted to him under the Twelfth Amendment to "count" electoral votes, and instead follows the conflicting and unconstitutional procedures in Section 15 of the Electoral Count Act, pursuant to which Plaintiffs' electoral votes will be disregarded in favor of the competing electors for the State of Arizona.

67. **Plaintiffs' Claims Are Not Moot.** Plaintiffs seek prospective declaratory judgment that portions of the Electoral Count Act are unconstitutional and injunctive relief prohibiting Defendant from following the procedures in Section 15 thereof that authorize the House and Senate jointly to resolve disputes regarding competing slates of electors. This prospective relief would apply to Defendants' future actions at the January 6, 2021 Joint Session

of Congress. The requested relief thus is not moot because it is prospective and because it addresses an unconstitutional "ongoing policy" embodied in the Electoral Count Act that is likely to be repeated and will evade review if the requested relief is not granted. *Del Monte Fresh Produce v. U.S.*, 570 F.3d 316, 321-22 (D.C. Cir. 2009).

COUNT I

DEFENDANT WILL NECESSARILY VIOLATE THE TWELFTH AMENDMENT AND THE ELECTORS CLAUSE OF THE UNITED STATES CONSTITUTION IF HE FOLLOWS THE ELECTORAL COUNT ACT.

68. Plaintiffs reallege all preceding paragraphs as if fully set forth herein.

69. The Electors Clause states that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors" for President and Vice President. U.S. Const. art. II, §1, cl. 2 (emphasis added).

70. The Twelfth Amendment of the U.S. Constitution gives Defendant Vice President, as President of the Senate and the Presiding Officer of January 6, 2021 Joint Session of Congress, the exclusive authority and sole discretion to "count" the electoral votes for President, as well as the authority to determine which of two or more competing slates of electors for a State, or neither, may be counted, or how objections to any single slate of electors is resolved. In the event no candidate receives a majority of the electoral votes, then the House of Representatives shall have sole authority to choose the President where "the votes shall be taken by states, the representation from each state having one vote." U.S. CONST. amend. XII.

71. Section 15 of the Electoral Count Act replaces the procedures set forth in the Twelfth Amendment with a different and inconsistent set of decision making and dispute resolution procedures. As detailed above, these provisions of Section 15 of the Electoral Count Act are unconstitutional insofar as they require Defendant: (1) to count the electoral votes for a

State that have been appointed in violation of the Electors Clause; (2) limits or eliminates his exclusive authority and sole discretion under the Twelfth Amendment to determine which slates of electors for a State, or neither, may be counted; and (3) replaces the Twelfth Amendment's dispute resolution procedure which provides for the House of Representatives to choose the President under a procedure where "the votes shall be taken by states, the representation from each state having one vote" – with an entirely different procedure in which the House and Senate each separately "decide" which slate is to be counted, and in the event of a disagreement, then only "the votes of the electors whose appointment shall have been certified by the executive of the State … shall be counted." 3 U.S.C. § 15.

72. Section 15 of the Electoral Count Act also violates the Electors Clause by usurping the exclusive and plenary authority of State Legislatures to determine the manner of appointing Presidential Electors and gives that authority instead to the State's Executive.

PRAYER FOR RELIEF

73. Accordingly, Plaintiffs respectfully request that this Court issue a judgment that:

A. Declares that Section 15 of the Electoral Count Act, 3 U.S.C. §§5 and 15, is unconstitutional because it violates the Twelfth Amendment on its face, Amend. XII, Constitution;

B. Declares that Section 15 of the Electoral Count Act, 3 U.S.C. §§5 and 15, is unconstitutional because it violates the Electors Clause. U.S. CONST. art. II, § 1, cl. 1;

C. Declares that Vice-President Pence, in his capacity as President of Senate and Presiding Officer of the January 6, 2021 Joint Session of Congress, is subject solely to the requirements of the Twelfth Amendment and may exercise the

exclusive authority and sole discretion in determining which electoral votes to count for a given State;

D. Enjoins reliance on any provisions of the Electoral Count Act that would limit Defendant's exclusive authority and his sole discretion to determine which of two or more competing slates of electors' votes are to be counted for President;

E. Declares that, with respect to competing slates of electors from the State of Arizona or other Contested States, or with respect to objection to any single slate of electors, the Twelfth Amendment contains the exclusive dispute resolution mechanisms, namely, that (i) Vice-President Pence determines which slate of electors' votes shall be counted, or if none be counted, for that State and (ii) if no person has a majority, then the House of Representatives (and only the House of Representatives) shall choose the President where "the votes [in the House of Representatives] shall be taken by states, the representation from each state having one vote," U.S. CONST. amend. XII;

F. Declares that, also with respect to competing slates of electors, the alternative dispute resolution procedure or priority rule in 3 U.S.C. § 15, is null and void insofar as it contradicts and replaces the Twelfth Amendment rules above by with an entirely different procedure in which the House and Senate each separately "decide" which slate is to be counted, and in the event of a disagreement, then only "the votes of the electors whose appointment shall have been certified by the executive of the State … shall be counted," 3 U.S.C. § 15;

G. Enjoins the Defendant from executing his duties on January 6th during the Joint Session of Congress in any manner that is insistent with the declaratory relief set forth herein, and

H. Issue any other declaratory judgments or findings or injunctions necessary to support or effectuate the foregoing declaratory judgment.

74. Plaintiffs have concurrently submitted a motion for a speedy summary proceeding under FRCP Rule 57 to grant the relief requested herein ***as soon as practicable***, and for emergency injunctive relief under FRCP Rule 65 thereof consistent with the declaratory judgment requested herein on that same date.

Dated: December 27, 2020

Respectfully submitted,

/s/ William Lewis Sessions

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United States Senate

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December 28, 2020

By E-mail

The Honorable Jeffrey Bossert Clark
Acting Assistant Attorney General
Civil Division, Department of Justice
Washington, D.C. 20530

Re: *Wisconsin Voters Alliance, et al. v. Vice President Michael Richard Pence, et al.*, Civil Action No. 1:20-cv-03791-JEB (D.D.C.)

Dear Mr. Clark:

We are writing to request that the Department of Justice represent Vice President Michael R. Pence, in his capacity as President of the Senate, and the United States Senate (collectively the "Senate defendants"), in the above-referenced lawsuit. Also named as defendants are the United States House of Representatives, the Electoral College, and governors and state legislative leaders from Pennsylvania, Michigan, Wisconsin, Georgia, and Arizona. All defendants are named in their official capacities only. We have already been in contact with John Griffiths, Brad Rosenberg, and Christopher Healy of the Federal Programs Branch, who are handling this matter.

Plaintiffs are four organizations that claim to promote election integrity, ten individual voters from the five above-listed states, and eight state legislators (two each from Michigan, Wisconsin, Georgia, and Arizona). Plaintiffs' complaint alleges that it is unconstitutional to count electoral votes from their states because the selection of presidential electors was not certified by the state legislature. They argue that the Constitution's Electoral Clause, U.S. Const. art. II, § 1, cl. 2, mandates that state legislatures certify each state's selection of electors, and that the votes of a state's electors cannot be counted until such certification takes place. Plaintiffs assert that 3 U.S.C. §§ 5, 6, and 15 and state laws that provide for or permit certification of presidential electors by other state officials are unconstitutional. In addition, plaintiffs claim that the failure to require such state legislature certification violates their rights under the Equal Protection Clause and the Due Process Clause.

For relief, plaintiffs request a declaration that state legislature certification of the selection of presidential electors is required by the Constitution and that federal and state laws allowing for electors to be certified by other state officials are unconstitutional. Plaintiffs also request that the Vice President, the Senate, and the House be enjoined from counting electoral votes from states whose electors have not been certified by the state legislature. Concurrent with their complaint, plaintiffs filed a motion for preliminary injunction requesting that the court enjoin the state defendants from certifying Presidential electors who have not received state legislative certification and enjoin the Senate and House defendants from counting electoral votes from electors who have not received such certification.

While we have not received confirmation from the Vice President's counsel as to arguments to be made on the Vice President's behalf, we believe, as explained below, that the claims against the Senate are subject to dismissal for lack of standing, Speech or Debate Clause immunity, non-justiciability, and failure to state a claim as a matter of law. In addition, plaintiffs' motion for a preliminary injunction should be opposed for lacking any likelihood of success on the merits on those same grounds.

First, plaintiffs lack Article III standing because they have not alleged any concrete and particularized injury to themselves, but rather assert only they are injured by government officials not complying with the purported requirement of state legislature certification of presidential electors. Such alleged harm to their – and every other voter's – interest in the government's administration of electoral voting constitutes nothing more than a generalized grievance that is insufficient to demonstrate a cognizable injury for Article III standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-74 (1992) (Supreme Court has "consistently held that a plaintiff . . . claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large [] does not state an Article III case or controversy."); *Bognet v. Sec'y of the Commonwealth of Pa.*, 980 F.3d 336, 349 (3d Cir. 2020) ("When the alleged injury is undifferentiated and common to all members of the public, courts routinely dismiss such cases as 'generalized grievances' that cannot support standing. Such is the case here insofar as Plaintiffs . . . theorize their harm as the right to have government administered in compliance with the Elections Clause and Electors Clause.").

Second, plaintiffs' claims against the Senate are barred by the Speech or Debate Clause, U.S. Const. art. I, § 6, cl. 1. That Clause affords Members of Congress an absolute immunity from all suits for damages, injunctions, or declaratory judgments arising out of actions regarding all "matters which the Constitution places within the jurisdiction of either House." *Gravel v. United States*, 408 U.S. 606, 625 (1972); *Doe v. McMillan*, 412 U.S. 306, 311 (1973) (Clause protects "anything generally done in a session of the House by one of its members in relation to the business before it") (internal quotation marks and citation omitted); *Eastland v. U.S Servicemen's Fund*, 421 U.S. 491, 501 (1975). The Twelfth Amendment to the Constitution expressly commits to the Vice President (as President of the Senate), the Senate, and the House the responsibility to open the votes of presidential electors and tally those votes. The Senate's participation in such activity plainly constitutes a "matter[] which the Constitution places within the jurisdiction of either House," *Gravel*, 408 U.S. at 625, and thus falls within the protection of the Clause.

Third, plaintiffs' challenge to the tallying of electoral votes by the Senate and House, presided over by the Vice President, raises a non-justiciable political question as it involves a matter textually committed by the Constitution to another branch. The Constitution assigns to the Senate and House the responsibility to tally electoral votes, and the courts may not intercede into that process.

Fourth, plaintiffs' constitutional claim – that the Electoral Clause requires the state legislature of each state to certify the selection of electors – fails to state a claim as a matter of

law. The Constitution specifically provides that "[e]ach 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[.]" U.S. Const. art. II, § 1, cl. 2. In providing discretion to state legislatures to determine the "manner" of appointment of their state's presidential electors, the Constitution imposed no requirement that the legislature certify the selection of the electors. As the Supreme Court recently explained,

> Article II includes only the instruction to each State to appoint, *in whatever way it likes*, as many electors as it has Senators and Representatives (except that the State may not appoint members of the Federal Government). The Twelfth Amendment then tells electors to meet in their States, to vote for President and Vice President separately, and to transmit lists of all their votes to the President of the United States Senate for counting. Appointments and procedures and . . . *that is all*.

Chiafalo v. Washington, 140 S. Ct. 2316, 2324-25 (2019) (emphasis added). The Electors Clause imposes no requirement for state legislature certification of the selection of electors, and, therefore, plaintiffs' complaint fails to state a claim as a matter of law.

We appreciate the assistance of the Department in this case. Please keep us apprised of its status, including providing us with drafts of any papers to be filed on the Senate defendants' behalf, and let us know if there is anything we can do to assist in the defense.

Sincerely,

/s/ Thomas E. Caballero

Thomas E. Caballero

cc (by e-mail): The Honorable Michael R. Pence
The Honorable Mitch McConnell
The Honorable Charles Schumer
John Griffiths, Director, Federal Programs Branch, USDOJ
Brad Rosenberg, Assistant Director, Federal Programs Branch, USDOJ
Christopher Healy, Trial Attorney, Federal Programs Branch, USDOJ

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

LOUIE GOHMERT, TYLER BOWYER, NANCY COTTLE, JAKE HOFFMAN, ANTHONY KERN, JAMES R. LAMON, SAM MOORHEAD, ROBERT MONTGOMERY, LORAINE PELLEGRINO, GREG SAFSTEN, KELLI WARD and MICHAEL WARD, Plaintiffs, v. THE HONORABLE MICHAEL R. PENCE, VICE PRESIDENT OF THE UNITED STATES, in his official capacity, Defendant.	Civil Action No. 6:20-cv-00660-JDK **(Election Matter)**

PLAINTIFFS' EMERGENCY MOTION FOR EXPEDITED DECLARATORY JUDGMENT AND EMERGENCY INJUNCTIVE RELIEF

COME NOW Plaintiffs, U.S. Rep. Louie Gohmert (TX-1), Tyler Bowyer, Nancy Cottle, Jake Hoffman, Anthony Kern, James R. Lamon, Sam Moorhead, Robert Montgomery, Loraine Pellegrino, Greg Safsten, Kelli Ward, and Michael Ward, by and through their undersigned counsel, and file this Motion for Expedited Declaratory Judgment and Emergency Injunctive Relief ("Motion"), and Memorandum of Law In Support Thereof, pursuant to Rules 57 and 65 of the FEDERAL RULES OF CIVIL PROCEDURE to request the following relief.

As explained in the Complaint, Plaintiffs seek an expedited declaratory judgment declaring that Sections 5 and 15 of the Electoral Count Act of 1887, PUB. L. NO. 49–90, 24 Stat. 373 (codified at 3 U.S.C. §§ 5, 15), are unconstitutional because these provisions violate the Electors Clause and the Twelfth Amendment of the U.S. Constitution. U.S. CONST. art. II, § 1, cl. 1 & amend. XII. The Complaint and this Motion address a matter of urgent national concern that involves only issues of law—namely, a determination that Sections 5 and 15 of the Electoral Count Act violate

the Electors Clause and the Twelfth Amendment of the U.S. Constitution—where the relevant facts concerning the Plaintiffs' standing, the justiciability of Plaintiffs' claims by this Court, and this Court's ability to grant the relief requested are not in dispute.

Further, the purpose of this Complaint is a declaratory judgment regarding the rights and legal relations of Plaintiffs and of Defendant, namely, that Vice President Michael R. Pence, acting in his capacity as President of the Senate and Presiding Officer for the ***January 6, 2021 Joint Session of Congress*** to count Arizona and other States' electoral votes for choosing President, is free to exercise his exclusive authority and sole discretion under the Twelfth Amendment to determine which slate of electoral votes to count, or neither, and must disregard any provisions of the Electoral Count Act that conflict with the Twelfth Amendment, U.S. CONST. amend. XII.

Because the requested declaratory judgment will terminate the controversy arising from the conflict between the Twelfth Amendment and the Electoral Count Act, and the facts are not in dispute, it is appropriate for this Court to grant this relief in a summary proceeding without an evidentiary hearing or discovery. *See* FED. R. CIV. P. 57, Advisory Committee Notes. Accordingly, Plaintiffs request an expedited summary proceeding under Rule 57 of the Federal Rules of Civil Procedure to grant the relief requested herein no later than ***Thursday, December 31, 2020***, and for emergency injunctive relief under FED. R. CIV. P. 65 consistent with the declaratory judgment requested herein on that same date. Plaintiffs style their motion as an emergency motion under Local Civil Rule 7(l) because there is not enough time before December 31 to move for an expedited briefing schedule under Local Civil Rule 7(e).

Plaintiffs adopt all allegations contained in their Complaint.

Plaintiffs respectfully request an opportunity for oral argument. A proposed Order is attached.

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INTRODUCTION

Plaintiffs, U.S. Representative Louie Gohmert (TX-1) ("Rep. Gohmert"), Tyler Bowyer, Nancy Cottle, Jake Hoffman, Anthony Kern, James R. Lamon, Sam Moorhead, Robert Montgomery, Loraine Pellegrino, Greg Safsten, Kelli Ward and Michael Ward seek an expedited declaratory judgment declaring that Sections 5 and 15 of the Electoral Count Act of 1887, PUB. L. NO. 49–90, 24 Stat. 373 (codified at 3 U.S.C. §§ 5, 15), are unconstitutional because these provisions violate the Electors Clause and the Twelfth Amendment of the U.S. Constitution. U.S. CONST. art. II, § 1, cl. 1 & Amend. XII.

FACTS

The facts relevant to this motion are set forth in the Complaint and its accompanying exhibit are incorporated herein by reference. Plaintiffs present here only a summary.

The Plaintiffs include Rep. Louie Gohmert—a Member of the U.S. House of Representatives, representing Texas's First Congressional District in both the current and the next Congress—who seeks to enjoin the operation of the Electoral Count Act to prevent a deprivation of his rights—and the rights of those he represents—under the Twelfth Amendment. The Plaintiffs also include the entire slate of Republican Presidential Electors for the State of Arizona, as well as an outgoing and incoming member of the Arizona Legislature. On December 14, 2020, pursuant to the requirements of applicable state laws, the Constitution, and the Electoral Count Act, the Plaintiff Arizona Electors, with the knowledge and permission of the Republican-majority Arizona Legislature, convened at the Arizona State Capitol, and cast Arizona's electoral votes for President Donald J. Trump and Vice President Michael R. Pence. On the same date, the Republican Presidential Electors for the States of Georgia, Pennsylvania, and Wisconsin met at their respective State Capitols to cast their States' electoral votes for President Trump and Vice President Pence

(or in the case of Michigan, attempted to do so but were blocked by the Michigan State Police, and ultimately voted on the grounds of the State Capitol).

There are now competing slates of Republican and Democratic electors in five States with Republican majorities in both houses of their State Legislatures—Arizona, Georgia, Michigan, Pennsylvania, and Wisconsin (*i.e.*, the Contested States)—that collectively have 73 electoral votes, which are more than sufficient to determine the winner of the 2020 General Election. On December 14, 2020, in Arizona and the other Contested States, the Democratic Party's slate of electors convened in the State Capitol to cast their electoral votes for former Vice President Joseph R. Biden and Senator Kamala Harris. On the same day, Arizona Governor Doug Ducey and Secretary of State Katie Hobbs submitted the Certificate of Ascertainment with the Biden electoral votes to the National Archivist pursuant to the Electoral Count Act.

Republican Senators and Republican Members of the House of Representatives have also expressed their intent to oppose the certified slates of electors from the Contested States due to the substantial evidence of voter fraud in the 2020 General Election. Multiple Senators and House Members have stated that they will object to the Biden electors at the January 6, 2021 Joint Session of Congress. These public statements by legislators, combined with the fact that President Trump has not conceded and has given no indication that he will concede and political pressure from his nearly 75 million voters and other supporters, make it a near certainty that at least one Senator and one House Member will follow through on their commitments and invoke the (unconstitutional) Electoral Count Act's dispute resolution procedures.

Defendant Vice President Pence, in his capacity as President of the Senate and Presiding Officer at the January 6, 2021 Joint Session of Congress to select the next President, will be presented with the following circumstances: (1) competing slates of electors from the State of

Arizona and the other Contested States, (2) that represent sufficient electoral votes (a) if counted, to determine the winner of the 2020 General Election, or (b) if not counted, to deny either President Trump or former Vice President Biden sufficient votes to win outright; and (3) objections from at least one Senator and at least one Member of the House of Representatives to the counting of electoral votes from one or more of the Contested States and thereby invoking the unconstitutional procedures set forth in Section 15 of the Electoral Count Act.

As a result, Defendant Vice President Pence will necessarily have to decide whether to follow the unconstitutional provisions of the Electoral Count Act or the Twelfth Amendment to the U.S. Constitution at the January 6, 2021 Joint Session of Congress. This approaching deadline establishes the urgency for this Court to issue a declaratory judgment that Sections 5 and 15 of the Electoral Count Act are unconstitutional and provide the undisputed factual basis for this Court to do so on an expedited basis, and to enjoin Defendant Vice President Pence from following any Electoral Count Act procedures in 3 U.S.C. §§ 5 and 15 because they are unconstitutional under the Twelfth Amendment.

ARGUMENT

I. THIS COURT HAS JURISDICTION FOR PLAINTIFFS' CLAIMS.

Before entertaining the merits of this action, the Court first must establish its jurisdiction over the subject matter and the parties. This action obviously raises a federal question, 28 U.S.C. § 1331, so Plaintiffs establish below that this action presents a case or controversy for purposes of Article III and their entitlement to seek relief in this Court via this action.

A. Plaintiffs have standing.

Article III standing presents the tripartite test of whether the party invoking a court's jurisdiction raises an "injury in fact" under Article III: (a) a legally cognizable injury (b) that is

both caused by the challenged action, and (c) redressable by a court. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561-62 (1992). The task of establishing standing varies, depending "considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue." *Id* at 561. If so, "there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it." *Id.* at 562. If not, standing may depend on third-party action:

> When … a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed. In that circumstance, causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction – and perhaps on the response of others as well.

Id. (emphasis in original). Here, Plaintiffs can assert both first-party and third-party injuries, with the showing for standing easier for the first-party injuries. Specifically, Vice President Pence's action under the unconstitutional Electoral Count Act would have the effect of ratifying injuries inflicted—in the first instance—by third parties in Arizona.

1. Plaintiffs have suffered an injury in fact.

Plaintiffs have standing as a member of the United States House of Representatives, Members of the Arizona Legislature, and as Presidential Electors for the State of Arizona.

Rep. Louie Gohmert is a Member of the U.S. House of Representatives, representing Texas's First Congressional District in both the current and the next Congress. Rep. Louie Gohmert requests declaratory relief from this Court to prevent action as prescribed by 3 U.S.C. § 5, and 3 U.S.C. §15 and to give the power back to the states to vote for the President in accordance with the Twelfth Amendment. Otherwise he will not be able to vote as a Congressional Representative in accordance with the Twelfth Amendment, and instead, his vote in the House, if there is disagreement, will be eliminated by the current statutory construct under the Electoral

Count Act, or diluted by votes of the Senate and ultimately by passing the final determination to the state Executives.

In the event that objections occur leading to a vote in the House of Representatives, then under the Twelfth Amendment, on January 6, in the new House of Representatives, there will be twenty-seven states led by Republican majorities, and twenty states led by Democrat majorities, and three states that are tied. Twenty-six seats are required for a victor under the Twelfth Amendment, and further that, under the Twelfth Amendment, in the event neither candidate wins twenty-six seats by March 4, then the then-current Vice President would be declared the President. However, if the Electoral Count Act is followed, this one vote on a state-by-state basis in the House of Representatives for President simply would not occur and would deprive this Member of his constitutional right as a sitting member of a Republican delegation, where his vote matters.

The Twelfth Amendment specifically states that "if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote." The authority to vote with this authority is taken from the House of Representatives, of which Mr. Gohmert is a member, and usurped by statutory construct set forth in 3 U.S.C. § 5 and 3 U.S.C. §15. Therein the authority is given back to the state's executive branch in the process of counting and in the event of disagreement – while also giving the Senate concurrent authority with the House to vote for President. As a result, the application of 3 U.S.C. § 5 and 3 U.S.C. §15 would prevent Rep. Gohmert from exercising his constitutional duty to vote pursuant for President to the Twelfth Amendment.

Prior to December 14, 2020, Plaintiff Arizona Electors had standing under the Electors Clause as candidates for the office of Presidential Elector because, under Arizona law, a vote cast for the Republican Party's President and Vice President is cast for the Republican Presidential Electors. *See* ARIZ. REV. STAT. § 16-212. Accordingly, Plaintiff Arizona Electors, like other candidates for office, "have a cognizable interest in ensuring that the final vote tally reflects the legally valid votes cast," as "[a]n inaccurate vote tally is a concrete and particularized injury to candidates such as the Electors." *Carson v. Simon*, 978 F.3d 1051, 1057 (8th Cir. 2020) (affirming that Presidential Electors have Article III and prudential standing under Electors Clause); *see also Wood v. Raffensperger*, No. 20-14418, 2020 WL 7094866, *10 (11th Cir. Dec. 5, 2020) (affirming that if Plaintiff voter had been a candidate for office "he could assert a personal, distinct injury" required for standing); *Trump v. Wis. Elections Comm'n*, No. 20-cv-1785, 2020 U.S. Dist. LEXIS 233765 at *26 (E.D. Wis. Dec. 12, 2020) (President Trump, "as candidate for election, has a concrete particularized interest in the actual results of the election."). Plaintiffs suffer a "debasement" of their votes, which "state[s] a justiciable cause of action on which relief could be granted" *Wesberry v. Sanders*, 376 U.S. 1, 5-6 (1964) (citing *Baker v. Carr*, 369 U.S. 186 (1962)).

The Twelfth Amendment provides as follows:

> *The electors shall meet in their respective states and vote by ballot for President and Vice President*, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they *shall make distinct lists of all persons voted for as President*, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate.

U.S. CONST. amend. XII (emphasis added).

2. Plaintiffs' injuries are traceable to Defendant.

Rep. Gohmert faces imminent threat of injury that the Defendant will follow the unlawful Electoral Count Act and, in so doing, eviscerate Rep. Gohmert's constitutional right and duty to vote for President under the Twelfth Amendment. With injuries directly caused by a defendant, plaintiffs can show an injury in fact with "little question" of causation or redressability. *Defenders of Wildlife,* 504 U.S. at 561-62. Although the Defendant did not cause the underlying election fraud, the Defendant nonetheless will directly cause Rep. Gohmert's injury, which is causation—and redressability—under *Defenders of Wild*.

By contrast, the Arizona Electors suffer indirect injury *vis-à-vis* this Defendant. But for the alleged wrongful conduct of Arizona executive branch officials under color of law, the Plaintiff Arizona Electors would have been certified as the presidential electors for Arizona, and Arizona's Governor and Secretary of State would have transmitted uncontested votes for Donald J. Trump and Michael R. Pence to the Electoral College. The certification and transmission of a competing slate of Biden electors has resulted in a unique injury that only Plaintiff Arizona Electors could suffer, namely, having a competing slate of electors take their place and their votes in the Electoral College. While the Vice President did not cause Plaintiffs' initial injury—that happened in Arizona—the Vice President stands in the position at the Joint Session on January 6 to ratify and purport to make lawful the unlawful injuries that Plaintiffs suffered in Arizona. That is causation enough for Article III:

> According to the USDA, the injury suffered by Sierra Club is caused by the independent actions (*i.e.*, pumping decisions) of third party farmers, over whom the USDA has no coercive control. Although we recognize that causation is not proven if the injury complained of is the result of the *independent* action of some third party not before the court, this does not mean that causation can be proven only if the governmental agency has coercive control over those third parties. Rather, the relevant inquiry in this case is whether the USDA has the ability through various programs to affect the

> pumping decisions of those third party farmers to such an extent that the plaintiff's injury could be relieved.

Sierra Club v. Glickman, 156 F.3d 606, 614 (5th Cir. 1998) (interior quotation marks, citations, and alterations omitted, emphasis in original); *Tel. & Data Sys. v. FCC*, 19 F.3d 42, 47 (D.C. Cir. 1994); *Synthetic Organic Chem. Mfrs. Ass'n v. Sec'y, Dep't of Health & Human Servs.*, 720 F.Supp. 1244, 1248 n.2 (W.D. La. 1989) ("any traceable injury will provide a basis for standing, even where it occurs through the acts of a third party").

When third parties inflict injury—even private third parties—that injury is traceable to government action if the injurious conduct "would have been illegal without that [governmental] action." *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 45 n.25 (1976). As explained below, Vice President Pence stands ready to ratify Plaintiffs' injuries via the unconstitutional Electoral Count Act, which is causation enough to enjoin his actions. Alternatively, "plaintiff's injury could be relieved" within the meaning of *Sierra Club v. Glickman* if the Vice President rejected the Electoral Count Act as unconstitutional.

A procedural-rights plaintiff must also show that "fixing the alleged procedural violation could cause the agency to 'change its position' on the substantive action," *Ctr. for Biological Diversity v. United States EPA*, 937 F.3d 533, 543 (5th Cir. 2019), which is easy enough here/ Under the Electoral Count Act, the "Blue" or "Biden" states have a bare House majority in the Congress that will vote on January 6. Under the Twelfth Amendment, however, the "Red" or "Trump" states have a 27-20-3 majority where each state delegation gets one vote in the House's election of the President. That distinction satisfies both third-party causation and procedural-rights tests for Article III standing.

The Twelfth Amendment gives Defendant exclusive authority and sole discretion as to which set of electors to count, or not to count any set of electors. If no candidate receives a majority

of electoral votes, then the President is to be chosen by the House, where "the votes shall be taken by States, the representation from each state having one vote." U.S. CONST. amend. XII. If Defendant Pence instead follows the procedures in Section 15 of the Electoral Count Act, Plaintiffs' electoral votes will not be counted because (a) the Democratic majority House of Representatives will not "decide" to count the electoral votes of Plaintiff Republican electors; and (b) either the Senate will concur with the House not to count their votes, or the Senate will not concur, in which case, the electoral votes cast by Biden's electors shall be counted because the Biden slate of electors was certified by Arizona's executive. Under the Constitution, by contrast, the Vice President counts the votes and—if the count is indeterminate—the vote proceeds immediately to the House for President and to the Senate for Vice President. *See* U.S. CONST. amend. XII.[1]

3. <u>This Court can redress Plaintiffs' injuries.</u>

Even if this Court would lack jurisdiction to *enjoin* the Vice President, *but see* Sections I.B-I.C, *infra* (immunity does not bar this action), this Court's authoritative declaration would provide redress enough. *See Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992) ("we may assume it is substantially likely that the President and other executive and congressional officials would abide by an authoritative interpretation of the census statute and constitutional provision by the District Court, even though they would not be directly bound by such a determination"). The

[1] This intent that the Vice President count the votes is borne out by a unanimous resolution attached to the final Constitution that described the procedures for electing the first President (*i.e.*, for the one time when there would not already be a sitting Vice President), stating in relevant part "that the Senators should appoint a President of the Senate, for the sole Purpose of receiving, opening and counting the Votes for President." 2 M. Farrand, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 666 (1911). For all subsequent elections, when there would be a Vice President to act as President of the Senate, the Constitution vests the opening and counting in the Vice President.

Electoral Count Act is blatantly unconstitutional in many respects, *see* Section I.A, *infra*, and "it is the province and duty of the judicial department to determine in cases regularly brought before them, whether the powers of any branch of the government, and even those of the legislature in the enactment of laws, have been exercised in conformity to the Constitution." *Powell v. McCormack*, 395 U.S. 486, 506 (1969) (interior quotations omitted).

Even if Plaintiffs do not ultimately prevail under the process that the Twelfth Amendment requires, the relief requested would nonetheless redress their injuries from the unconstitutional Electoral Count Act process in two respects . First, with respect to seeking to follow the Twelfth Amendment procedure over that of 3 U.S.C. § 15, it would redress Rep. Gohmert's procedural injuries enough to proceed under the correct procedure, even if they do not prevail substantively. *FEC v. Akins*, 524 U.S. 11, 25 (1998). Second, with respect to the Arizona Electors, it would redress their unequal-footing injuries to treat all rival elector slates the same, even if the House and not the electors choose the next President. *Heckler v. Mathews,* 465 U.S. 728, 739-40 (1984) ("when the right invoked is that to equal treatment, the appropriate remedy is a *mandate* of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class") (citations and footnotes omitted, emphasis in original). In each respect, Article III does not require that Plaintiffs show that they will prevail in order to show redressability.

The declaratory relief that Plaintiffs request would redress their injuries enough for Article III and in the chart as set forth:

Event/Issue	3 U.S.C. § 15	Twelfth Amendment
One Congress purports to bind future Congresses	Yes	No
Rival slates of electors	Bicameral dispute resolution with no presentment; state executive breaks ties	Vice President counts; House and Senate respectively elect President and Vice President if inconclusive
Violates Presentment Clause	Yes	No
Role for state governors	Yes	No
House voters	Each member votes (*e.g.*, CA gets 53 votes, ND gets 1)	Each state delegation votes (*e.g.*, CA and ND get 1 vote)

As is plain from these material—and, here, dispositive—differences between the Twelfth Amendment and 3 U.S.C. § 15, the two provisions cannot be reconciled.

4. Plaintiffs' procedural injuries lower the constitutional bar for immediacy and redressability.

Given that Plaintiffs suffer a concrete injury to their voting rights, Plaintiffs also can press their procedural injuries under the Electoral Count Act. For procedural injuries, Article III's redressability and immediacy requirements apply to the *procedural violation* that will (or someday might) injure a concrete interest, rather than to the concrete future injury. *Defenders of Wildlife,* 504 U.S. at 571-72 & n.7. Specifically, the injuries that Plaintiffs assert affect the procedure by which the status of their votes will be considered, which lowers the thresholds for immediacy and redressability under this Circuit's and the Supreme Court's precedents. *Id.*; *Glickman*, 156 F.3d at 613 ("in a procedural rights case, … the plaintiff is not held to the normal standards for [redressability] and immediacy"); *accord Nat'l Treasury Employees Union v. U.S.,* 101 F.3d 1423, 1428-29 (D.C. Cir. 1996). Similarly, a plaintiff with concrete injury can invoke Constitution's structural protections of liberty. *Bond v. United States*, 564 U.S. 211, 222-23 (2011).

Finally, voters from smaller states like Arizona suffer an equal-footing injury and a procedural injury *vis-à-vis* larger states like California because the Electoral Count Act purports

to replace the process provided in the Twelfth Amendment. Under the Electoral Count Act, California has five times the votes that Arizona has, but under the Twelfth Amendment California and Arizona each have one vote. *Compare* 3 U.S.C. § 15 *with* U.S. CONST. amend. XII. That analysis applies in third-party injury cases. *See Clinton v. New York*, 524 U.S. 417, 433 & n.22 (1998) (unequal-footing analysis applies to indirect-injury plaintiffs); *cf. id.* at 456-57 (that analysis should apply only to equal-protection cases) (Scalia, J., dissenting). Nullification of a procedural protection and any related bargaining power is injury enough, even in third-party cases. *Clinton*, 524 U.S. at 433 & n.22.

B. The Speech or Debate Clause does not insulate the Vice President.

The Speech or Debate Clause provides that "Senators and Representatives" "shall not be questioned in any other Place" "for any Speech or Debate in either House":

> The Senators and Representatives … for any speech or debate in either House, … shall not be questioned in any other place.

U.S. CONST. art I, § 6, cl. 1. "Not everything a Member of Congress may regularly do is a legislative act within the protection of the Speech or Debate Clause," *Minton v. St. Bernard Par. Sch. Bd.*, 803 F.2d 129, 134-35 (5th Cir. 1986) (interior quotations omitted), because the "clause has been interpreted to protect only purely legislative activities," *Williams v. Brooks*, 945 F.2d 1322, 1326 (5th Cir. 1991) (internal quotation marks omitted), which renders it inapposite here. Where it applies, the Clause poses a jurisdictional bar not only to a court reaching the merits but also to putting the defendant to the burden of putting up a defense. *Powell*, 395 U.S. at 502-03. But "Legislative immunity does not, of course, bar all judicial review of legislative acts," *Powell*, 395 U.S. at 503, and the Speech or Debate Clause does not even apply—by its terms—to the Vice President in his role as President of the Senate or to the Joint Session on January 6.

First, the Clause does not protect the Vice President acting in his role as President of the Senate. *See* U.S. CONST. art I, § 6, cl. 1; *cf. Common Cause v. Biden*, 748 F.3d 1280, 1284 (D.C. Cir. 2014) (declining to decide whether or not the Speech or Debate Clause protects the Vice President). At best for the Vice President, the question is an open one, but Plaintiffs respectfully submit that the Constitution's plain language should govern: The Clause does not apply to the Vice President. Instead, as here, where an unprotected officer of the House or Senate implements an unconstitutional action of the House or Senate, the judiciary has the power to enjoin the officer, even if it would lack the power to enjoin the House, the Senate, or their Members. *Powell*, 395 U.S. at 505. In short, the Speech or Debate Clause does not protect Vice President Pence at all.

Second, even if the Speech or Debate Clause did protect the Vice President acting as President of the Senate for legislative activity in the Senate, the Joint Session on January 6 is no such action. *See* U.S. CONST. art I, § 6, cl. 1. This is an election, and the Vice President has no more authority to disenfranchise voters via unconstitutional means as any other person.

C. Sovereign immunity does not bar this action.

The Defendant is Vice President Pence named as a defendant in his official capacity as the Vice President of the United States. With respect to injunctive or declaratory relief, it is a historical fact that at the time that the states ratified the federal Constitution, the equitable, judge-made, common-law doctrine that allows use of the sovereign's courts in the name of the sovereign to order the sovereign's officers to account for their unlawful conduct (*i.e.*, the rule of law) was as least as firmly established and as much a part of the legal system as the judge-made, common-law doctrine of federal sovereign immunity. Louis L. Jaffee, *The Right to Judicial Review I,* 71 HARV. L. REV. 401, 433 (1958); A.B.A. Section of Admin. Law & Regulatory Practice, *A Blackletter Statement of Federal Administrative Law*, 54 ADMIN. L. REV. 1, 46 (2002) (it is blackletter law

that "suits against government officers seeking prospective equitable relief are not barred by the doctrine of sovereign immunity").

In determining whether the doctrine of *Ex parte Young* avoids immunity, a court need only conduct a "straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md. Inc. v. Pub. Serv. Comm'n of Maryland*, 535 U.S. 635, 645 (2002) (citations omitted). That is enough to survive a motion to dismiss on jurisdictional grounds: "The inquiry into whether suit lies under *Ex parte Young* does not include an analysis of the merits of the claim[.]" *Id.* at 638. Sovereign immunity poses no bar to jurisdiction here.[2]

The prayer for injunctive relief—that the Vice President be restrained from enforcing 3 U.S.C. §5 and §15 in contravention of the Twelfth Amendment of the Constitution—to instead follow the Twelfth Amendment, clearly satisfies the "straightforward inquiry." Plaintiffs request declaratory relief to prevent unconstitutional action under 3 U.S.C. § 5 and § 15 and to give the power back to the states to vote for the President in accordance with the Twelfth Amendment. Therefore, the Defendant should be enjoined from proceeding to certify or count dueling electoral votes under the unconstitutional dispute resolution procedures in 3 U.S.C. § 5 and § 15, and instead to follow the constitutional process as set forth in the Twelfth Amendment of the Constitution.

[2] Indeed, the sovereign immunity afforded a Member of Congress is co-extensive with the protections afforded by the Speech or Debate Clause. In all other respects, Members of Congress are bound by the law to the same extent as other persons. *Davis v. Passman*, 442 U.S. 228, 246 (1979) ("although a suit against a Congressman for putatively unconstitutional actions taken in the course of his official conduct does raise special concerns counseling hesitation, we hold that these concerns are coextensive with the protections afforded by the Speech or Debate Clause").

D. The political-question doctrine does not bar this suit.

The "political questions doctrine" can bar review of certain issues that the Constitution delegates to one of the other branches, but that bar does not apply to constitutional claims related to voting (other than claims brought under the Guaranty Clause of Article IV, §4):

> We hold that this challenge to an apportionment presents no nonjusticiable "political question." The mere fact that the suit seeks protection of a political right does not mean it presents a political question. Such an objection "is little more than a play upon words."

Baker, 369 U.S. at 209. As in *Baker*, litigation over political rights is not the same as a political question.

E. This case presents a federal question, and abstention principles do not apply.

Article III, § 2, of the Federal Constitution provides that, "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority[.]" It is clear that the cause of action is one which "arises under" the Federal Constitution. *Baker*, 369 U.S. at 199. In *Baker*, the Plaintiffs alleged that, by means of a 1901 Tennessee statute that arbitrarily and capriciously apportioned the seats in the General Assembly among the State's 95 counties and failed to reapportion them subsequently notwithstanding substantial growth and redistribution of the State's population, they suffered a "debasement of their votes" and were thereby denied the equal protection of the laws guaranteed them by the Fourteenth Amendment. They sought, *inter alia*, a declaratory judgment that the 1901 statute is unconstitutional and an injunction restraining certain state officers from conducting any further elections under it. *Id.* The *Baker* line of cases recognizes that "that voters who allege facts showing disadvantage to themselves as individuals have standing to sue.'

The federal and constitutional nature of these controversies deprives abstention doctrines of any relevance whatsoever. First, state laws for the appointment of presidential electors are federalized by the operation of The Electoral Count Act of 1887. *McPherson v. Blacker*, 146 U.S. 1, 27 (1892); *Bush v. Gore*, 531 U.S. 98, 113 (2000) (Rehnquist, C.J., concurring) ("A significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question."). Second, "[i]t is no original prerogative of State power to appoint a representative, a senator, or President for the Union." J. Story, 1 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 627 (3d ed. 1858). Logically, "any state authority to regulate election to [federal] offices could not precede their very creation by the Constitution," meaning that any "such power had to be delegated to, rather than reserved by, the States." *Cook v. Gralike*, 531 U.S. 510, 522 (2001) (internal quotations omitted).

A more quintessentially federal question than which slate of electors will be counted under the 12th Amendment and 3 U.S.C. § 15 to elect the President and Vice President can scarcely be imagined.

F. Plaintiffs are entitled to an expedited declaratory judgment.

Under Rule 57, an expedited declaratory judgment is appropriate where, as here, it would "terminate the controversy" based on undisputed or relatively undisputed facts. *See* FED. R. CIV. P. 57, Advisory Committee Notes. The facts relevant to this controversy are not in dispute, namely: (1) there are competing slates of electors for Arizona and the other Contested States that have been or will be submitted to the Electoral College; (2) the Contested States collectively have sufficient (contested) electoral votes to determine the winner of the 2020 General Election—President Trump or former Vice President Biden; (3) legislators in Arizona and other Contested States have contested the certification of their State's electoral votes by State executives, due to substantial evidence of voter fraud that is the subject of ongoing litigation and investigations; and

(4) Senators and Members of the House of Representatives have expressed their intent to challenge the electors and electoral votes certified by State executives in the Contested States.

As a result, Defendant Vice President Pence, in his capacity as President of the Senate and as the Presiding Officer for the January 6, 2021 Joint Session of Congress will be have to decide between (a) following the requirements of the Twelfth Amendment, and exercising his exclusive authority and sole discretion in deciding which slate of electors and electoral votes to count for Arizona, or neither, or (b) following the distinct and inconsistent procedures set forth in Section 15 of the Electoral Count Act. The expedited declaratory judgment requested, namely, declaring that Section 5 and 15 of the Electoral Count Act are unconstitutional to the extent they conflict with the Twelfth Amendment and the Electors Clause, and that Defendant Pence may not follow these unconstitutional procedures, will terminate the controversy. Further, as discussed below, the requested declaratory judgment would also establish that Plaintiffs meet all of the requirements for any additional injunctive relief required to effectuate the declaratory judgment by enjoining Defendant Pence from violating the Twelfth Amendment.

II. PLAINTIFFS ARE ENTITLED TO EMERGENCY INJUNCTIVE RELIEF.

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 21 (2008). If this Court grants the requested declaratory judgment, then all elements required for injunctive relief will have been met.

A. Plaintiffs have a substantial likelihood of success.

The first—and most important—*Winter* factor is the likelihood of movants' prevailing. *Winter,* 555 U.S. at 20. Plaintiffs are likely to prevail because this Court has jurisdiction for this action, *see* Section I, *supra*, and because the Electoral Count Act is blatantly unconstitutional.

1. Unconstitutional laws are nullities.

At the outset, if the Electoral Count Act violates the Constitution, the Electoral Count Act is a nullity:

> [I]t is the province and duty of the judicial department to determine in cases regularly brought before them, whether the powers of any branch of the government, and even those of the legislature in the enactment of laws, have been exercised in conformity to the Constitution; and if they have not, to treat their acts as *null and void*.

Powell, 395 U.S. at 506 (interior quotations omitted, emphasis added). "Due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds." *United States v. Morrison*, 529 U.S. 598, 607 (2000) (finding Congress exceeded its authority under the Commerce Clause in regulating an area of the law left to the States. "Constitutional deprivations may not be justified by some remote administrative benefit to the State." *Harman v. Forssenius*, 380 U.S. 528, 542-43 (1965). Put simply, "that which is not supreme must yield to that which is supreme." *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 448 (1827). Although *Brown* arose in a federal-versus-state context, the same simple truth applies in a constitution-versus-statute context: the supreme enactment controls the lesser enactment.

2. The Electoral Count Act violates the Electors Clause and the Twelfth Amendment.

The requested expedited summary proceeding granting declaratory judgment will address the merits of Plaintiffs' claims, which raise only legal issues as to whether the provisions of Sections 5 and 15 of the Electoral Count Act addressing the counting of electoral votes from competing slates of electors for a given state are in conflict with the Twelfth Amendment and the Electors Clause and are therefore unconstitutional. In other words, if the Court grants the requested relief, that holding and relief will be granted because the Court has found that these provisions of

the Electoral Count Act are unconstitutional and that Plaintiffs have in fact succeeded on the merits.

Under 3 USC § 5, the Presidential electors of a state and their appointment by the State shall be conclusive:

> If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned.

3 USCS § 5.

This statutory provision takes away the authority given to the Vice-President under the Twelfth Amendment in determining which electoral votes are conclusive. 3 U.S.C. §15 in relevant part states that both Houses, referencing the House of Representatives and the Senate, may concurrently reject certified votes, and further that if there is a disagreement, then, in that case, the votes of the electors who have been certified by the Executive of the State shall be determinative:

> …When all objections so made to any vote or paper from a State shall have been received and read, the Senate shall thereupon withdraw, and such objections shall be submitted to the Senate for its decision; and the Speaker of the House of Representatives shall, in like manner, submit such objections to the House of Representatives for its decision; and no electoral vote or votes from any State which shall have been regularly given by electors whose appointment has been lawfully certified to according to section 6 of this title [3 USCS § 6] from which but one return has been received shall be rejected, but the two Houses concurrently may reject the vote or votes when they agree that such vote or votes have not been so regularly given by electors whose appointment has been so certified. If more than one return or paper purporting to be a return from a State shall have been received by the President of the Senate,

> those votes, and those only, shall be counted which shall have been regularly given by the electors who are shown by the determination mentioned in section 5 [3 USCS § 5] of this title to have been appointed, if the determination in said section provided for shall have been made, or by such successors or substitutes, in case of a vacancy in the board of electors so ascertained, as have been appointed to fill such vacancy in the mode provided by the laws of the State; but in case there shall arise the question which of two or more of such State authorities determining what electors have been appointed, as mentioned in section 5 of this title [3 USCS § 5], is the lawful tribunal of such State, the votes regularly given of those electors, and those only, of such State shall be counted whose title as electors the two Houses, acting separately, shall concurrently decide is supported by the decision of such State so authorized by its law; and in such case of more than one return or paper purporting to be a return from a State, if there shall have been no such determination of the question in the State aforesaid, then those votes, and those only, shall be counted which the two Houses shall concurrently decide were cast by lawful electors appointed in accordance with the laws of the State, unless the two Houses, acting separately, shall concurrently decide such votes not to be the lawful votes of the legally appointed electors of such State. But if the two Houses shall disagree in respect of the counting of such votes, then, and in that case, the votes of the electors whose appointment shall have been certified by the executive of the State, under the seal thereof, shall be counted. When the two Houses have voted, they shall immediately again meet, and the presiding officer shall then announce the decision of the questions submitted. No votes or papers from any other State shall be acted upon until the objections previously made to the votes or papers from any State shall have been finally disposed of.

3 U.S.C. § 15.

This expressly conflicts with the Twelfth Amendment which has already set what role the House and the Senate play in addressing the votes of electors:

> The electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the

> Senate;--The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;--the person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. *But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice*. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President. The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

U.S. CONST. amend. XII. (emphasis added).

The Constitution is unambiguously clear that: "The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted" "… and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives [who] shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote." Whereas 3 U.S.C. §15 and the incorporated referenced to 3 U.S.C. §5 delegate the authority to the

Executive of the State in the event of disagreement, in direct conflict with the Twelfth Amendment and directly taking the opportunity of Presidential Electors' competing slates from being counted.[3]

3. The Electoral Count Act violates the Constitution's structural protections of liberty.

The Electoral Count Act exceeds the power of Congress to enact because "one legislature may not bind the legislative authority of its successors," *United States v. Winstar Corp.*, 518 U.S. 839, 872 (1996), which is a foundational and "centuries-old concept," *id.*, that traces to Blackstone's maxim that "Acts of parliament derogatory from the power of subsequent parliaments bind not." *Id.* (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *90). "There is no constitutionally prescribed method by which one Congress may require a future Congress to interpret or discharge a constitutional responsibility in any particular way." Laurence H. Tribe, *Erog v. Hsub and Its Disguises: Freeing* Bush v. Gore *from Its Hall of Mirrors*, 115 HARV. L. REV. 170, 267 n.388 (2001). Thus, the Electoral Count Act is a nullity because it exceeded the power of Congress to enact.

The Electoral Count Act also violates the Presentment Clause by purporting to create a type of bicameral order, resolution, or vote that is not presented to the President:

> *Every Order, Resolution, or Vote*, to Which the Concurrence of the Senate and House of Representatives may be necessary (*except on a question of Adjournment*) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by

[3] Similarly, 3 U.S.C. § 6 is inconsistent with the Electors Clause—which provides that electors "shall sign and certify, and transmit sealed to the seat of the government of the Unit-ed States" the results of their vote, U.S. Const. art. II, § 1, cl. 2-3—because § 6 relies on state executives to forward the results of the electors' vote to the Archivist for delivery to Congress. 3 U.S.C. § 6. Although the means of delivery are arguably inconsequential, the Constitution vests state executives with no role whatsoever in the process of electing a President. A state executive lends no official imprimatur to a given slate of electors under the Constitution.

> two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

U.S. CONST. art. I, § 7, cl. 3 (emphasis added). The House and Senate cannot resolve the issues that the Electoral Count Act asks them to resolve without either a supermajority in both houses or presentment.

The Electoral Count Act similarly improperly restricts the authority of the House of Representatives and the Senate to control their internal discretion and procedures pursuant to Article I, Section 5 which provides that "[e]ach House may determine the Rules of its Proceedings …" U.S. CONST. art. I, § 5, cl. 2. The Electoral Count Act also delegates tie-breaking authority to State executives (who have no agency under the Electors Clause or election amendments) when a State presents competing slates that Congress cannot resolve. As such, the Electoral Count Act also violates the non-delegation doctrine, the separation-of-powers and anti-entrenchment doctrines. *See generally* Chris Land & David Schultz, *On the Unenforceability of the Electoral Count Act*, 13 Rutgers J.L. & Pub. Policy 340, 364-377 (2016).

As indicated, Plaintiffs have standing to press these structural protections of liberty because Plaintiffs also suffer concrete injury through the debasement of their votes. *See* Section I.A.4, *supra*.

B. Plaintiffs will suffer irreparable injury.

Plaintiffs' votes will be counted or not counted at the January 6 joint session. The failure to count a lawful vote is an irreparable injury. *See*, *e.g.*, *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) ("A restriction on the fundamental right to vote . . . constitutes irreparable injury."). Indeed, the deprivation of any fundamental right constitutes irreparable injury, *Murphree v. Winter*, 589 F. Supp. 374, 381 (S.D. Miss. 1984) (citing *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976)), and voting rights are "a fundamental political right, because preservative of all

rights." *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964) (internal quotations omitted). Moreover, if the counting of votes proceeds under the Electoral Count Act, Plaintiffs' votes will be adjudicated via an unconstitutional procedure, which also qualifies as irreparable harm: there will be no opportunity to revisit the issue. As with standing for procedural injuries, irreparable harm from a procedural violation requires an underlying concrete injury or due-process interest, which Plaintiffs have and which will be irretrievably lost if the Vice President proceeds under the Electoral Count Act. Under the circumstances, Plaintiffs' procedural harms also are irreparable. *Commissioner v. Shapiro*, 424 U.S. 614, 629-30 (1976).

C. Plaintiffs need not demonstrate irreparable harm for declaratory relief.

"The traditional prerequisite for the granting of injunctive relief, demonstration of irreparable injury, is not a prerequisite to the granting of a declaratory relief" because the Declaratory Judgments Act "provides an adequate remedy and at law, and hence a showing of irreparable injury is unnecessary." 10 FED. PROC., L. ED. §23 :4 (citing 28 U.S.C. § 2201 and *Steffel v. Thompson*, 415 U.S. 452 (1974)). "The existence of another adequate remedy does not preclude a declaratory judgment that is otherwise appropriate." FED. R. CIV. P. 57. In fact, the central purpose of the Declaratory Judgments Act is to enable parties to adjudicate their rights without waiting until after the injury has occurred or damages have accrued. *See, e.g., Russian Standard Vodka (USA), Inc. v. Allied Domecq Spirits & Wine USA, Inc.,* 523 F.Supp.2d 376, 381 (S.D.N.Y. 2007) (citing *In re Combustion*, 838 F.2d 35, 36 (2d Cir. 1988)).

In any event, the irreparable-harm requirement for injunctive relief does not apply to declaratory relief. The fact that another remedy would be equally effective affords no ground for declining declaratory relief: "Rule 57 … expressly states that the availability of an alternative remedy does not prevent the district court from granting a declaratory judgment." *Marine Chance Shipping v. Sebastian*, 143 F.3d 216, 218-19 (5th Cir. 1998); *see also* 28 U.S.C. §2201; *Hurley v.*

Reed, 288 F.2d 844, 848 (D.C. Cir. 1961); *Tierney v. Schweiker,* 718 F.2d 449, 457 (D.C. Cir. 1983). A prior formal or informal demand to the defendant is not a prerequisite to seeking declaratory relief, *Rowan Cos. v. Griffin*, 876 F.2d 26, 28 (5th Cir. 1989), and showing "irreparable injury… is not necessary for the issuance of a declaratory judgment." *Tierney,* 718 F.2d at 457 (*citing Steffel v. Thompson,* 415 U.S. 452, 471-72 (1974)). Thus, even if not entitled to injunctive relief, Plaintiffs still would be entitled to declaratory relief.

The requested declaratory judgment would terminate the controversy, offer relief from uncertainty, and eliminate the need for Plaintiffs to suffer the irreparable harm from the certainty that their electoral votes would be disregarded that would occur if Defendant Vice President Pence were to count electoral votes, and resolve disputes regarding competing slates of electors, under the unconstitutional provisions of the Electoral Count Act, rather than the procedures set forth in the Twelfth Amendment.

D. The balance of equities favors Plaintiffs.

"Traditional equitable principles requiring the balancing of public and private interests control the grant of declaratory or injunctive relief in the federal courts." *Webster v. Doe*, 486 U.S. 592, 604-05 (1988). The scope of requested injunctive relief—directing Defendant Pence to carry out his duties as President of the Senate and as Presiding Officer for the January 6, 2021 Joint Session of Congress in compliance with the U.S. Constitution—is drawn as narrowly as possible and does not require Defendant Pence to take any affirmative action apart from those he is authorized to take under the Twelfth Amendment. Moreover, it is difficult to imagine how the relief requested, which ***expands rather than restricts*** Defendant's discretion and authority, by eliminating facially unconstitutional restrictions on the same could cause any hardship to Defendant.

E. The public interest favors Plaintiffs.

The last stay criterion is the public interest. Where the parties dispute the lawfulness of government actions, the public interest collapses into the merits: "It is always in the public interest to prevent the violation of a party's constitutional rights." *Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 458 n.9 (5th Cir. 2014) (alterations omitted); *cf. Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 595 (5th Cir. 2006) ("injunction serves the public interest in that it enforces the correct and constitutional application of Texas's duly-enacted election laws") *League of Women Voters of the United States v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016) ("no public interest in the perpetuation of unlawful [government] action"); *accord ACLU v. Ashcroft*, 322 F.3d 240, 247 (3d Cir. 2003) ("the public interest [is] not served by the enforcement of an unconstitutional law") (interior quotation omitted); *Washington v. Reno*, 35 F.3d 1093, 1103 (6th Cir. 1994) (recognizing "greater public interest in having governmental agencies abide by the federal laws"); *Pac. Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1237 (10th Cir. 2005).

Here the declaratory and injunctive relief sought vindicates both Defendant Vice President's plenary authority as President of the Senate and Presiding Officer to count electoral votes, as well as the constitutional rights of the Plaintiffs to have their electoral votes counted in the manner that the Constitution provides, the rights of the Arizona legislative Plaintiffs under the Electors Clause to appoint Presidential Electors for the State of Arizona, and the right of Rep Gohmert and those he represents to have their vote counted in the manner that the Twelfth Amendment provides.

CONCLUSION

Therefore, it is respectfully requested that the Court grant Plaintiffs' Motion and the Court grant a declaratory judgment declaring 3 U.S.C. §5 - §15 unconstitutional on its face for violating the specific delegated authorities of the Twelfth Amendment of the Constitution.

Dated: December 28, 2020

Respectfully submitted,

/s/William L. Sessions

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Counsel for Plaintiffs

CERTIFICATE OF CONFERENCE

I hereby certify that as counsel for Plaintiffs, I have complied with the meet and confer requirement in Local Rule CV-7(h) in the following respects: I have personally contacted and spoken this morning with Gregory F. Jacob, Counsel for Vice President Michael R. Pence, the Defendant. I have caused Mr. Jacob to receive a copy of the Complaint for Expedited Declaratory and Emergency Injunctive Relief and a duplicate unfiled copy of Plaintiffs' Emergency Motion for Expedited Declaratory Judgment and Emergency Motion for Injunctive Relief without the certificate of conference or certificate of service. Mr. Jacob, co-counsel Larry Joseph, and I discussed the legal merits of the foregoing motion at length. Mr. Jacob advised that he needed to consult with his client, who was absent from his office and on vacation, and would contact Mr. Joseph and me regarding Vice President Pence's position on the merits of the motion after conferring with his client. Counsel for Defendant Pence stated that he did not presently have authority to agree to or oppose the motion. In light of the emergency nature of this motion and the fact that the parties' counsel could not presently agree on the merits of the motion, undersigned counsel has concluded that the parties are presently at an impasse, leaving an open issue for the court to resolve. Undersigned counsel will immediately advise the Court of any change in the parties' positions.

Dated: December 28, 2020

William Lewis Sessions
Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the date specified below, I electronically filed the foregoing motion (together with its accompanying proposed order) with the Clerk of the Court using the CM/ECF system. In addition, because counsel for the defendant has not yet filed an appearance, I served one true and correct copy via Federal Express, next-day delivery, on the defendant and on the United States Attorney for the Eastern District of Texas at the following addresses, with a courtesy copy via facsimile and/or email to the addresses specified:

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Dated: December 28, 2020

William Lewis Sessions
Counsel for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

LOUIE GOHMERT, TYLER BOWYER, NANCY COTTLE, JAKE HOFFMAN, ANTHONY KERN, JAMES R. LAMON, SAM MOORHEAD, ROBERT MONTGOMERY, LORAINE PELLEGRINO, GREG SAFSTEN, KELLI WARD and MICHAEL WARD, Plaintiffs, v. THE HONORABLE MICHAEL R. PENCE, VICE PRESIDENT OF THE UNITED STATES, in his official capacity, Defendant.	Civil Action No. 6:20-cv-00660 **(Election Matter)**

[PROPOSED] ORDER GRANTING EMERGENCY INJUNCTIVE RELIEF

The Court has before it Plaintiffs' Emergency Motion for Expedited Declaratory Judgment and Emergency Motion for Injunctive Relief filed December 28, 2020 ("Motion") and the Plaintiffs' December 27, 2020 Complaint for Expedited Declaratory Judgment and Emergency Injunctive Relief ("Complaint") seeking:

1. A declaratory judgment finding that:

   a. Sections 5 and 15 of the Electoral Count Act, 3 U.S.C. §§ 5 and 15, are unconstitutional insofar as they conflict with and violate the Electors Clause and the Twelfth Amendment, U.S. CONST. art. II, § 1, cl. 1 & amend. XII;

   b. That Defendant Vice-President Michael R. Pence, in his capacity as President of Senate and Presiding Officer of the January 6, 2021 Joint Session of Congress under the Twelfth Amendment, is subject solely to

the requirements of the Twelfth Amendment and may exercise the exclusive authority and sole discretion in determining which electoral votes to count for a given State, and must ignore and may not rely on any provisions of the Electoral Count Act that would limit his exclusive authority and at his sole discretion to determine which of two or more competing slates of electors' votes are to be counted for President;

c. That, with respect to competing slates of electors the State of Arizona or other Contested States, the Twelfth Amendment contains the exclusive dispute resolution mechanisms, namely, that (i) Vice-President Pence determines which slate of electors' votes shall be counted, or neither, for that State and (ii) if no person has a majority, then the House of Representatives (and only the House of Representatives) shall chose the President where "the votes [in the House of Representatives] shall be taken by states, the representation from each state having one vote," U.S. CONST. amend. XII;

d. That, also with respect to competing slates of electors, the alternative dispute resolution procedure or priority rule in 3 U.S.C. § 15, is null and void insofar as it nullifies and replaces the Twelfth Amendment rules above by with an entirely different procedure in which the House and Senate each separately "decide" which slate is to be counted, and in the event of a disagreement, then only "the votes of the electors whose appointment shall have been certified by the executive of the State … shall be counted," 3 U.S.C. § 15; and

2. An order granting any other declaratory or injunctive relief necessary to support or effectuate the foregoing declaratory judgments.

The Court has reviewed the terms and conditions of the December 28, 2020 Motion and Complaint, and the Court's Declaratory Judgment issued December 31, 2020, granting the requested expedited declaratory judgments in Paragraphs 1(a)-1(d) above and for good cause shown IT IS HEREBY ORDERED THAT:

1. Defendant Vice President Michael R. Pence shall, in his capacity as President of the Senate and as Presiding Officer for the January 6, 2021 Joint Session of Congress ("Joint Session"), solely follow the terms of the Twelfth Amendment in counting the electoral votes at the Joint Session and any other proceedings addressing the counting of electoral votes for choosing the next President in connection with the 2020 General Election;

2. Defendant Vice President Pence shall not follow the provisions of Sections 5 or 15 of the Electoral Count Act that this Court has found to be unconstitutional and in conflict with the Twelfth Amendment, and in particular, Defendant Vice President Pence

    a. Shall not "call for objections" from Senators or House Members following the reading of any certificate or paper from electors for a given State, and instead shall exercise his exclusive authority and sole discretion under the Twelfth Amendment to "count" the electoral votes for a given state, including the decision as to which of the competing slates of electors' electoral votes to count, or not to count, for that State;

b. Shall not give any preference or priority in counting electors certified by the State's executive over any other slate of electors, and shall instead give effect to the provisions of the Electors Clause for electors appointed by the State Legislature in whatever manner indicated by that State's legislatures;

c. Shall not submit any disputes between competing slates of electors to be resolved under the procedures set forth in Section 15 of the Electoral Count Act, nor as Presiding Officer shall he permit any such objections or disputes to interrupt the counting of electoral votes at the Joint Session or delegate his exclusive authority under the Twelfth Amendment to Congress to determine which electoral votes are to be counted; and

d. If and only if neither President Trump nor former Vice President Biden fails to receive a majority of electoral votes at the Joint Session, is he relieved is his exclusive authority to count electoral votes for choosing the President, at which point he shall direct the House of Representatives to "choose immediately by ballot" the President where "the votes shall be taken by states, the representation from each state having one vote," as required under the Twelfth Amendment.

SO ORDERED.

(b) (5)

[redacted]

From: Lewis Sessions <lsessions@sessionslaw.net>
Sent: Tuesday, December 29, 2020 5:21 PM
To: Healy, Christopher (CIV [redacted (b) (6)]; Senanayake, Tanya (CIV) [redacted (b) (6)]>
Subject: FW: Activity in Case 6:20-cv-00660-JDK Gohmert et al v. Pence Order

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U.S. District Court

Eastern District of TEXAS [LIVE]

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Case Name: Gohmert et al v. Pence
Case Number: 6:20-cv-00660-JDK
Filer:
Document Number: No document attached
Docket Text:
MINUTE ORDER: The Court ORDERS that a briefing schedule will be set on Plaintiffs emergency motion (Docket No. 2) after Plaintiffs file proof of service in accordance with Federal Rule of Civil Procedure 4(i). (ksd)

6:20-cv-00660-JDK Notice has been electronically mailed to:

William Lewis Sessions lsessions@sessionslaw.net

Howard Kleinhendler howard@kleinhendler.com [redacted]

Lawrence J Joseph ljoseph@larryjoseph.com, info@larryjoseph.com

Timothy P Dowling [redacted]

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6:20-cv-00660-JDK Notice will not be electronically mailed to:

Rosen, Jeffrey A. (ODAG)

From:	Rosen, Jeffrey A. (ODAG)
Sent:	Wednesday, December 30, 2020 10:22 AM
To:	Engel, Steven A. (OLC); Donoghue, Richard (ODAG)
Subject:	FW: Designation of AAGs Under Olson Historical Use of AAGs Memo
Importance:	High

From: Clark, Jeffrey (CIV [redacted]
Sent: Wednesday, December 30, 2020 9:32 AM
To: Rosen, Jeffrey A. (ODAG) <jarosen@jmd.usdoj.gov>
Cc: Brightbill, Jonathan (ENRD) <JBrightbil@ENRD.USDOJ.GOV>
Subject: Designation of AAGs Under Olson Historical Use of AAGs Memo
Importance: High

Jeff,

I know there are a plethora of matters swirling both inside and outside the Department and that you've only newly took the helm. And this is a relatively small one (though not one that would take much effort to consummate). And for that reason, [redacted] if it did not involve the status o [redacted] (who has honorably served [redacted] for nearly 3.5 years at DOJ), but instead only involved me.

[redacted]

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Please let us know -- thanks!

Jeff

Jeffrey Bossert Clark
Acting Assistant Attorney General
Civil Division
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530
[redacted]

(b) (5)

[redacted]

From: txedCM@txed.uscourts.gov <txedCM@txed.uscourts.gov>
Sent: Thursday, December 31, 2020 5:36 PM
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Eastern District of TEXAS [LIVE]

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Case Name: Gohmert et al v. Pence
Case Number: 6:20-cv-00660-JDK
Filer: Michael R. Pence
Document Number: 18
Docket Text:
RESPONSE in Opposition re [2] Emergency MOTION for Preliminary Injunction *AND EXPEDITED DECLARATORY JUDGMENT filed by Michael R. Pence.* (Coghlan, John)

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Timothy P Dowling [redacted]

Timothy P Dowling [redacted]

William Lewis Sessions lsessions@sessionslaw.net

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

LOUIE GOHMERT, *et al.*, Plaintiffs, v. THE HONORABLE MICHAEL R. PENCE, VICE PRESIDENT OF THE UNITED STATES, in his official capacity, Defendant .	Case No. 6:20-cv-00660

DEFENDANT'S RESPONSE TO PLAINTIFF'S EMERGENCY MOTION FOR EXPEDITED DECLARATORY JUDGMENT AND EMERGENCY INJUNCTIVE RELIEF

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INTRODUCTION

Plaintiffs have presented this Court with an emergency motion raising a host of weighty legal issues about the manner in which the electoral votes for President are to be counted. But these plaintiffs' suit is not a proper vehicle for addressing those issues because plaintiffs have sued the wrong defendant. The Vice President—the only defendant in this case—is ironically the very person whose power they seek to promote. The Senate and the House, not the Vice President, have legal interests that are sufficiently adverse to plaintiffs to ground a case or controversy under Article III. Defendant respectfully request denial of plaintiffs' emergency motion because the relief that plaintiffs request does not properly lie against the Vice President.

BACKGROUND

The Constitution of the United States establishes the process for the election of a President and Vice President of the United States. The Electors Clause of Article II provides, "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 no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector." U.S. Const., Art. II, § 2, cl. 2. The Twelfth Amendment then describes the process by which these Electors cast their ballots for President and those ballots are counted:

> The Electors shall meet in their respective states and vote by ballot for President and Vice-President, . . . they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President . . . ; The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted; The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall

be taken by states, the representation from each state having one vote. . . .

U.S. Const., amend. XII.

Following a century of debate over the appropriate process under the Constitution for counting electoral votes and resolving any objections thereto, Congress enacted the Electoral Control Act of 1887. *See* Stephen A. Siegel, *The Conscientious Congressman's Guide to the Electoral Count Act of 1887*, 56 Fla. L. Rev. 541, 551-56 (2004). That Act sets forth a procedure by which the Senate and the House of Representatives can, jointly, decide upon objections to votes or papers purporting to certify electoral votes submitted by the States. 3 U.S.C. § 15. It further sets forth a procedure for determining a controversy as to the appointment of electors. 3 U.S.C. § 5.

Plaintiffs, who are the U.S. Representative for Texas' First Congressional District, together with the slate of Republican Presidential Electors for the State of Arizona, filed this lawsuit and emergency motion on Sunday, December 27, 2020, challenging the constitutionality of these provisions of the Electoral Count Act. Plaintiffs allege that the procedures violate the Electors Clause of Article II and the Twelfth Amendment because they "take[] away the authority given to the Vice-President under the Twelfth Amendment" Mot. at 19, and "exceeded the power of Congress to enact," Mot. 22. They seek, *inter alia*, a declaratory judgment that "Sections 5 and 15 of the Electoral Count Act, 3 U.S.C. §§ 5 and 15, are unconstitutional insofar as they conflict with and violate the Electors Clause and the Twelfth Amendment" and that Vice President Pence "may exercise the exclusive authority and sole discretion in determining which electoral votes to count for a given State," along with related injunctive relief.

ARGUMENT

The Vice President is not the proper defendant to this lawsuit. "When considering a

declaratory judgment action, a district court must engage in a three-step inquiry. The court must ask (1) whether an actual controversy [of legal interests] exists between the parties in the case; (2) whether it has authority to grant declaratory relief; and (3) whether to exercise its broad discretion to decide or dismiss a declaratory judgment action." *Frye v. Anadarko Petroleum Corp.*, 9553 F.3d 285, 293-94 (5th Cir. 2019) (internal citations and quotation marks omitted). With respect to the first inquiry, the Supreme Court has required that a dispute be "definite and concrete, touching the legal relations of parties having adverse legal interests; and that it be real and substantial and admit of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical set of facts." *MedImmunte, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007) (internal quotation marks and alteration omitted). Plaintiffs' lawsuit against the Vice President does not meet that standard.

Plaintiffs' suit seeks to empower the Vice President to unilaterally and unreviewably decide objections to the validity of electoral votes, notwithstanding the Electoral Count Act. Plaintiffs are thus not sufficiently adverse to the legal interests of the Vice President to ground a case or controversy under Article III. *Cf. Muskrat v. United States*, 219 U.S. 346, 361 (1911) (no case or controversy where "the United States is made a defendant to this action, but it has no interest adverse to the claimants" who are simply seeking "to determine the constitutional validity of this class of legislation"); *Donelon v. Louisiana Div. of Admin. Law ex rel. Wise*, 522 F.3d 564, 568 (5th Cir. 2008) (no case or controversy where the plaintiff head of a state agency created a situation "where the state is essentially suing itself"); *Okpalobi v. Foster*, 244 F.3d 405, 409 (5th Cir. 2001) (en banc) ("Although, in this facial attack on the constitutionality of the statute, consideration of the merits may have strong appeal to some, we are powerless to act except to say that we cannot act: these plaintiffs have no case or controversy with these defendants, the Governor and Attorney General of

Louisiana, and consequently we lack Article III jurisdiction to decide this case."). Indeed, if plaintiffs' suit were to succeed, the result would be to *remove* any constraint the Electoral Count Act places on the Vice President.

To the extent any of these particular plaintiffs have a judicially cognizable claim, it would be against the Senate and the House of Representatives. After all, it is the role prescribed for the Senate and the House of Representatives in the Electoral Count Act to which plaintiffs object, not any actions that Vice President Pence has taken. Specifically, plaintiffs object to the Senate and the House of Representatives asserting a role for themselves in determining which electoral votes may be counted—a role that these plaintiffs assert is constitutionally vested in the Vice President. *Cf. Common Cause v. Biden*, 748 F.3d 1280, 1285 (D.C. Cir. 2014) ("In short, Common Cause's alleged injury was caused not by any of the defendants, but by an 'absent third party'—the Senate itself."); *Castanon v. United States*, 444 F. Supp. 3d 118, 133 (D.D.C. 2020) (three-judge court) (citing *Common Cause* and noting that plaintiffs' injuries were not caused by defendants (including the Vice President) but by "the House and the Senate."). And it would be the Senate and the House of Representatives that are best positioned to defend the Act.[1] Indeed, as a matter of logic, it is those bodies against whom plaintiffs' requested relief must run. The House of Representatives has already expressly recognized those interests by informing the Defendant that it intends to present the Court numerous arguments in response to plaintiffs' motion. By contrast, a suit to establish that the Vice President has discretion over the count, *filed against the Vice President*, is a walking legal contradiction.

[1] The United States disagrees with plaintiffs' unsupported assertion that the Constitution's Speech or Debate Clause does not apply to the Vice President in his official capacity as the President of the Senate. *See* U.S. Const. art. I, § 6, cl. 1("[F]or any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place."); Mot. 12.

Plaintiffs also have not established that they are entitled to the extraordinary relief of an injunction against the Vice President. "According to well-established principles of equity, a plaintiff seeking a permanent injunction . . . must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). A district court properly refuses to issue an injunction when it is anticipated that a defendant will "respect [a] declaratory judgment." *See Robinson v. Hunt County, Texas*, 921 F.3d 440, 450 (5th Cir. 2019) (quoting *Poe v. Gerstein*, 417 U.S. 281, 281 (1974)). Plaintiffs have made no allegation that the Vice President would refuse to respect a declaratory judgment issued against him. The extraordinary remedy of an injunction is accordingly unnecessary and inappropriate in this case. *Cf. Franklin v. Massachusetts*, 505 U.S. 788, 802 (1992).

It is the responsibility of the Department of Justice, on behalf of the United States, to also raise to the Court's attention a number of threshold issues, which plaintiffs themselves anticipate at pp. 4-15 of their opening brief. First, it is well established that Article III standing requires a plaintiff to "have suffered an 'injury in fact' . . . which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical"'; the injury must be "fairly traceable to the challenged action of the defendant, and not . . . the result of the independent action of some third party not before the court"; and "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal citations and quotation marks omitted). Here, Representative Gohmert identifies as his injury the mere possibility that "he will not be able to vote as a Congressional Representative in accordance with the

Twelfth Amendment, and instead, his vote in the House, if there is disagreement, will be eliminated by the current statutory construct under the Electoral Count Act, or diluted by votes of the Senate and ultimately by passing the final determination to the state Executives."[2] Mot. at 4-5. Plaintiff Arizona Electors claim a theoretical injury in the "debasement of their votes." Mot. at 6. But the declaration and injunction these plaintiffs seek would not ensure any particular outcome that favors plaintiffs. They do not seek an order requiring that the presidential election be resolved by the House of Representatives, or that the Republican Electors' votes from Arizona be counted, and even if plaintiffs were granted the relief that they do request, any possibility that those events might occur depends on speculation concerning objections that may or may not be raised in the future, and exercises of discretion concerning those as-yet-unraised objections. Thus, these plaintiffs have not adequately alleged redress for their specifically-asserted conjectural injuries. *See Lujan*, 504 U.S. at 568-69 (finding no standing where plaintiffs had not sued all of the relevant parties needed to provide redress). The Senate and the House of Representatives, by contrast, could take action to redress such injury by amending the Electoral Control Act.

These plaintiffs' claims against the Vice President in his capacity as President of the Senate also fail to address the Constitution's Speech and Debate Clause, which prevents the other Branches of Government from questioning Congress in connection with "legislative acts," which have "consistently been defined as an act generally done in Congress in relation to the business before it." *United States v. Brewster*, 408 U.S. 501, 512 (1972). *See also supra* n.1. Moreover, nothing in *Ex Parte Young*, 209 U.S. 123 (1908), or its progeny supports these particular plaintiffs' novel suit to enjoin the Vice President in the exercise of his constitutional authority as President

[2] Ironically, Representative Gohmert's position, if adopted by the Court, would actually deprive him of his opportunity as a Member of the House under the Electoral Count Act to raise objections to the counting of electoral votes, and then to debate and vote on them.

of the Senate. *See Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320, 327 (2015) (looking to history to understand the scope of equitable suits to enjoin executive action). To the extent the Court is inclined to address these and other issues, the House of Representatives has informed the Defendant that it intends to present this Court with a number of arguments in response to plaintiffs' motion. In light of Congress's comparative legal interests in the Electoral Count Act, Defendant respectfully defers to the Senate and the House of Representatives, as those bodies see fit, to present those arguments.

Finally "[i]t is a well established principle . . . that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case." *Escambia Cty., Fla. v. McMillan*, 466 U.S. 48, 51 (1984); *see also Texas v. United States*, 328 F. Supp. 3d 662, 710 (S.D. Tex. 2018) ("There is no need to rule on the Take Care Clause issue because the Court has reached a conclusion on a non-constitutional basis."). Plaintiffs' motion presents several novel constitutional issues with respect to the Act. But this Court can and should resolve this motion under the well settled requirement of true and not artificial adversity or the other threshold issues outlined above, particularly given the time constraints and expedited briefing necessitated by Plaintiffs' recent filings.

CONCLUSION

The relief requested by plaintiffs does not properly lie against the Vice President, and plaintiffs' suit can be resolved on a number of threshold issues. For the foregoing reasons, the Court should deny plaintiffs' request for expedited declaratory judgment and emergency injunctive relief against the Vice President.

Dated: December 31, 2020

Respectfully submitted,

JEFFREY BOSSERT CLARK
Acting Assistant Attorney General

JENNIFER B. DICKEY
Principal Deputy Assistant Attorney General

/s/ John V. Coghlan
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Attorneys for Defendant

CERTIFICATE OF SERVICE

I certify that on December 31, 2020, this document was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ John V. Coghlan
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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

LOUIE GOHMERT, *et al.*, Plaintiffs, v. THE HONORABLE MICHAEL R. PENCE, VICE PRESIDENT OF THE UNITED STATES, in his official capacity, Defendant .	Case No. 6:20-cv-00660

[PROPOSED] ORDER DENYING EMERGENCY INJUNCTIVE RELIEF

Plaintiffs' Emergency Motion for Expedited Declaratory Judgment and Emergency Motion for Injunctive Relief filed December 28, 2020 is hereby DENIED.

_____
Judge Jeremy D. Kernodle

(b) (5)

[redacted]

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Case Number: 6:20-cv-00660-JDK

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Document Number: 37

Docket Text:

ORDER OF DISMISSAL. The Court dismisses the case without prejudice. Signed by District Judge Jeremy D. Kernodle on 1/1/2021. (efarris,)

6:20-cv-00660-JDK Notice has been electronically mailed to:

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

THE HONORABLE LOUIE GOHMERT, et al.,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	Case No. 6:20-cv-660-JDK
	§	
THE HONORABLE MICHAEL R. PENCE, in his official capacity as Vice President of the United States,	§	
	§	
Defendant.	§	

ORDER OF DISMISSAL

This case challenges the constitutionality of the Electoral Count Act of 1887, as codified at 3 U.S.C. §§ 5, 15. The Court cannot address that question, however, without ensuring that it has jurisdiction. *See, e.g.*, U.S. CONST. art. III, § 2; *Cary v. Curtis*, 44 U.S. 236, 245 (1845). One crucial component of jurisdiction is that the plaintiffs have standing. This requires the plaintiffs to show a personal injury that is fairly traceable to the defendant's allegedly unlawful conduct and is likely to be redressed by the requested relief. *See, e.g.*, U.S. CONST. art. III, § 2; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). Requiring plaintiffs to make this showing helps enforce the limited role of federal courts in our constitutional system.

The problem for Plaintiffs here is that they lack standing. Plaintiff Louie Gohmert, the United States Representative for Texas's First Congressional District, alleges at most an institutional injury to the House of Representatives. Under well-settled Supreme Court authority, that is insufficient to support standing. *Raines v.*

Byrd, 521 U.S. 811, 829 (1997).

The other Plaintiffs, the slate of Republican Presidential Electors for the State of Arizona (the "Nominee-Electors"), allege an injury that is not fairly traceable to the Defendant, the Vice President of the United States, and is unlikely to be redressed by the requested relief.

Accordingly, as explained below, the Court lacks subject matter jurisdiction over this case and must dismiss the action.

I.

A.

The Electors Clause of the U.S. Constitution requires that each state appoint, in the manner directed by the state's legislature, the number of presidential electors to which it is constitutionally entitled. U.S. CONST. art. II, § 1, cl. 2. Under the Twelfth Amendment, each state's electors meet in their respective states and vote for the President and Vice President. U.S. CONST. amend XII. The electors then certify the list of their votes and transmit the sealed lists to the President of the United States Senate—that is, the Vice President of the United States. The Twelfth Amendment then provides that, "[t]he President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted." *Id.* A candidate winning a majority of the electoral votes wins the Presidency. However, if no candidate obtains a majority of the electoral votes, the House of Representatives is to choose the President—with each state delegation having one vote. *Id.*

The Electoral Count Act, informed by the Hayes-Tilden dispute of 1876, sought to standardize the counting of electoral votes in Congress. Stephen A. Siegel, *The Conscientious Congressman's Guide to the Electoral Count Act of 1887*, 56 FLA. L. REV. 541, 547–50 (2004). Section 5 makes states' determinations as to their electors, under certain circumstances, "conclusive" and provides that these determinations govern the counting of electoral votes. 3 U.S.C. § 5. Section 15 requires a joint session of Congress to count the electoral votes on January 6, with the President of the Senate presiding. *Id.* § 15.

During that session, the President of the Senate calls for objections on the electoral votes. Written objections submitted by at least one Senator and at least one Member of the House of Representatives trigger a detailed dispute-resolution procedure. *Id.* Most relevant here, Section 15 requires both the House of Representatives and the Senate—by votes of their full membership rather than by state delegations—to decide any objection. The Electoral Count Act also gives the state governor a role in certifying the state's electors, which Section 15 considers in resolving objections. *Id.* § 6.

It is these dispute-resolution procedures that Plaintiffs challenge in this case.

B.

On December 14, 2020, electors convened in each state to cast their electoral votes. *Id.* § 7; Docket No. 1 ¶ 5. In Arizona, the Democratic Party's slate of eleven electors voted for Joseph R. Biden and Kamala D. Harris. These votes were certified by Arizona Governor Doug Ducey and Arizona Secretary of State Katie Hobbs and submitted as required under the Electoral Count Act. Docket No. 1 ¶ 22. That same

day, the Nominee-Electors state that they also convened in Arizona and voted for Donald J. Trump and Michael R. Pence. *Id.* ¶ 20. Similar actions took place in Georgia, Pennsylvania, Wisconsin, and Michigan (with Arizona, the "Contested States"). *Id.* ¶ 20–21. Combined, the Contested States represent seventy-three electoral votes. *See id.* ¶ 23.

On December 27, Plaintiffs filed this lawsuit, alleging that there are now "competing slates" of electors from the Contested States and asking the Court to declare that the Electoral Count Act is unconstitutional and that the Vice President has the "exclusive authority and sole discretion" to determine which electoral votes should count. *Id.* ¶ 73. They also ask for a declaration that "the Twelfth Amendment contains the exclusive dispute resolution mechanisms" for determining an objection raised by a Member of Congress to any slate of electors and an injunction barring the Vice President from following the Electoral Count Act. *Id.* On December 28, Plaintiffs filed an Emergency Motion for Expedited Declaratory Judgment and Emergency Injunctive Relief ("Emergency Motion"). Docket No. 2. Plaintiffs request "an expedited summary proceeding" under Federal Rule of Civil Procedure 57. *Id.*

On December 31, the Vice President opposed Plaintiffs' motion. Docket No. 18.

II.

As mentioned above, before the Court can address the merits of Plaintiff's Emergency Motion, it must ensure that it has subject matter jurisdiction. *See, e.g.*, *Cary*, 44 U.S. at 245 ("The courts of the United States are all limited in their nature and constitution, and have not the powers inherent in courts existing by prescription or by the common law."); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 340–41 (2006)

("If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so."). Article III of the U.S. Constitution limits federal courts to deciding only "cases" or "controversies," which ensures that the judiciary "respects 'the proper—and properly limited—role of the courts in a democratic society.'" *DaimlerChrysler*, 547 U.S. at 341 (quoting *Allen v. Wright*, 468 U.S. 737, 750 (1984)); *see also Raines*, 521 U.S. at 828 (quoting *United States v. Richardson*, 418 U.S. 166, 192 (1974)) ("Our regime contemplates a more restricted role for Article III courts . . . 'not some amorphous general supervision of the operations of government.'").

"[A]n essential and unchanging part of the case-or-controversy requirement of Article III" is that the plaintiff has standing. *Lujan*, 504 U.S. at 560. The standing requirement is not subject to waiver and requires strict compliance. *E.g.*, *Lewis v. Casey*, 518 U.S. 343, 349 n.1 (1996); *Raines*, 521 U.S. at 819. A standing inquiry is "especially rigorous" where the merits of the dispute would require the Court to determine whether an action taken by one of the other two branches of the Federal Government is unconstitutional. *Raines*, 521 U.S. at 819–20 (citing *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 542 (1986), and *Valley Forge Christian Coll. v. Ams. United for Separation of Church & St., Inc.*, 454 U.S. 464, 473–74 (1982)). This is because "the law of Art. III standing is built on a single basic idea—the idea of separation of powers." *Allen*, 468 U.S. at 752, *abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 (2014). Article III standing "enforces the Constitution's case-or-controversy requirement."

DaimlerChrysler Corp., 547 U.S. at 342 (quoting *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004)). And "[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Raines,* 521 U.S. at 818.

Article III standing requires a plaintiff to show: (1) that he "has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical"; (2) that "the injury is fairly traceable to the challenged action of the defendant"; and (3) that "it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *El Paso Cnty. v. Trump*, 982 F.3d 332, 336 (5th Cir. 2020) (quoting *Friends of the Earth, Inc. v. Laidlaw Env't. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000)). "The party invoking federal jurisdiction bears the burden of establishing these elements," and "each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.,* with the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S. at 561. "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice." *Id.*

III.

Here, Plaintiffs have failed to demonstrate that they have standing to bring the claim alleged in Count I of their complaint.

A.

The first Plaintiff is the Representative for Texas's First Congressional District, the Honorable Louie Gohmert. Congressman Gohmert argues that he will

be injured because "he will not be able to vote as a Congressional Representative in accordance with the Twelfth Amendment." Docket No. 2 at 4. Specifically, Congressman Gohmert argues that on January 6, 2021, when Congress convenes to count the electoral votes for President and Vice President, he "will object to the counting of the Arizona slate of electors voting for Biden and to the Biden slates from the remaining Contested States." Docket No. 1 ¶ 6. If a member of the Senate likewise objects, then under Section 15 of the Electoral Count Act, each member of the House and Senate is entitled to vote to resolve the objections, which Congressman Gohmert argues is inconsistent with the state-by-state voting required under the Twelfth Amendment. Docket No. 2 at 5. Congressmen Gohmert argues that the Vice President's compliance with the procedures of the Electoral Count Act will directly cause his alleged injury. *Id.* at 7. And he argues that a declaration that Sections 5 and 15 of the Electoral Count Act are unconstitutional would redress his alleged injury. *Id.* at 9–10.

Congressman Gohmert's argument is foreclosed by *Raines v. Byrd*, which squarely held that Members of Congress lack standing to bring a claim for an injury suffered "solely because they are Members of Congress." 521 U.S. at 821. And that is all Congressman Gohmert is alleging here. He does not identify any injury to himself as an individual, but rather a "wholly abstract and widely dispersed" institutional injury to the House of Representatives. *Id.* at 829. Congressman Gohmert does not allege that he was "singled out for specially unfavorable treatment as opposed to other Members of their respective bodies," does not claim that he has

"been deprived of something to which [he] *personally* [is] entitled," and does not allege a "loss of any private right, which would make the injury more concrete." *Id.* at 821 (emphasis in original). Congressman Gohmert's alleged injury is "a type of institutional injury (the diminution of legislative power), which necessarily damages all Members of Congress." *Id.* Under these circumstances, the Supreme Court held in *Raines*, a Member of Congress does not have "a sufficient 'personal stake'" in the dispute and lacks "a sufficiently concrete injury to have established Article III standing." *Id.* at 830.

For the first time in their reply brief, Plaintiffs assert that Congressman Gohmert has standing as a Texas voter, relying on *League of United Latin Am. Citizens, Dist. 19 v. City of Boerne*, 659 F.3d 421, 430 (5th Cir. 2011). Docket No. 30 at 30, 33–34. The Court disagrees. In *LULAC*, the Fifth Circuit held that an individual voter had standing to challenge amendments to the City of Boerne's city council election scheme that would allegedly deprive him of a "pre-existing right to vote for certain offices." 659 F.3d at 430. That is not the case here. Congressman Gohmert does not allege that he was denied the right to vote in the 2020 presidential election. Rather, he asserts that under the Electoral Count Act, "he will not be able to vote *as a Congressional Representative* in accordance with the Twelfth Amendment." Docket No. 2 at 4 (emphasis added). Because Congressman Gohmert is asserting an injury in his role as a Member of Congress rather than as an individual voter, *Raines* controls.

Further weighing against Congressman Gohmert's standing here is the speculative nature of the alleged injury. "To establish Article III standing, an injury must be 'concrete, particularized, and actual or imminent.'" *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (quoting *Monsanto Co. v. Geertson Seed Farms,* 561 U.S. 139, 149 (2010)); *see also Lujan*, 504 U.S. at 560 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)) (alleged injury cannot be "conjectural" or "hypothetical"). "Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is *certainly* impending." *Clapper*, 568 U.S. at 409 (quoting *Lujan*, 504 U.S. at 565 n.2).

Here, Congressman Gohmert's alleged injury requires a series of hypothetical—but by no means certain—events. Plaintiffs presuppose what the Vice President will do on January 6, which electoral votes the Vice President will count or reject from contested states, whether a Representative and a Senator will object under Section 15 of the Electoral Count Act, how each member of the House and Senate will vote on any such objections, and how each state delegation in the House would potentially vote under the Twelfth Amendment absent a majority electoral vote. All that makes Congressman Gohmert's alleged injury far too uncertain to support standing under Article III. *Id.* at 414 ("We decline to abandon our usual reluctance to endorse standing theories that rest on speculation about the decisions of independent actors.").

Accordingly, the Court finds that Congressman Gohmert lacks standing to bring the claim alleged here.

B.

The Nominee-Electors argue that they have standing under the Electors Clause "as candidates for the office of Presidential Elector because, under Arizona law, a vote cast for the Republican Party's President and Vice President is cast for the Republican Presidential Electors." Docket No. 2 at 6 (citing ARIZ. REV. STAT. § 16-212). The Nominee-Electors were injured, Plaintiffs contend, when Governor Ducey unlawfully certified and transmitted the "competing slate of Biden electors" to be counted in the Electoral College. *Id*. at 7.

This alleged injury, however, is not fairly traceable to any act of the Vice President. Nor is it an injury likely to be redressed by a favorable decision here. *See Friends of the Earth*, 528 U.S. at 180–81.[1] Plaintiffs do not allege that the Vice President had any involvement in the "certification and transmission of a competing

[1] The Court need not decide whether the Nominee-Electors were "candidates" under Arizona law. Plaintiffs cite *Carson v. Simon*, in which the Eighth Circuit held that prospective presidential electors are "candidates" under Minnesota law and have standing to challenge how votes are tallied in Minnesota. 978 F.3d 1051, 1057 (8th Cir. 2020). But the U.S. District Court for the District of Arizona has distinguished *Carson*, holding that presidential electors in Arizona are ministerial and are "not candidates for office as the term is generally understood" under Arizona law. *Bowyer v. Ducey*, — F. Supp. 3d —, 2020 WL 7238261, at *4 (D. Ariz. Dec. 9, 2020); *see also Feehan v. Wis. Elections Comm'n*, No. 20-CV-1771-PP, 2020 WL 7250219, at *12 (E.D. Wis. Dec. 9, 2020) (nominee-elector is not a candidate under Wisconsin law). "Arizona law makes clear that the duty of an Elector is to fulfill a ministerial function, which is extremely limited in scope and duration, and that they have no discretion to deviate at all from the duties imposed by the statute." *Bowyer*, 2020 WL 7238261, at *4 (citing ARIZ. REV. STAT. § 16-212(c)). Arizona voters, moreover, vote "for their preferred presidential candidate," not any single elector listed next to the presidential candidates' names. *Id*. (citing ARIZ. REV. STAT. § 16-507(b)). The court in *Bowyer* therefore held that nominee-electors in Arizona lacked standing to sue state officials for alleged voting irregularities. *See id*. In any event, even if the Nominee-Electors had standing to sue state officials to redress the injury alleged here, they have not done so. Plaintiffs have named only the Vice President, and they have not shown "a fairly traceable connection between [their] injury and the complained-of conduct of defendant." *E.g.*, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998).

slate of Biden electors." Docket No. 2 at 7. Nor could they. *See* 3 U.S.C. § 6. That act is performed solely by the Arizona Governor, who is a "third party not before the court." *Lujan*, 504 U.S. at 560–61 (quoting *Simon v. Eastern Ky. Welfare Rts. Org.*, 426 U.S. 26, 41–42 (1976)). Indeed, Plaintiffs acknowledge that their injury was caused by Arizona officials in Arizona, the "Vice President did not cause [their] injury," and their "unlawful injuries [were] suffered in Arizona." Docket No. 2 at 7.

The Nominee-Electors argue that their injury is nevertheless fairly traceable to the Vice President because he will "ratify and purport to make lawful the unlawful injuries that Plaintiffs suffered in Arizona." *Id.* For support, Plaintiffs cite *Sierra Club v. Glickman*, in which the Fifth Circuit held that an environmental injury was fairly traceable to the Department of Agriculture, even though the injury was directly caused by third-party farmers, because the Department had "the ability through various programs to affect the pumping decisions of those third party farmers to such an extent that the plaintiff's injury could be relieved." 156 F.3d 606, 614 (5th Cir. 1998). Nothing like that is alleged here. The Vice President's anticipated actions on January 6 will not affect the decision of Governor Ducey regarding the certification of presidential electors—which occurred more than two weeks ago on December 14. Even "ratifying" or "making lawful" the Governor's decision, as Plaintiffs argue will occur here, will not have any "coercive effect" on Arizona's certification of electoral votes. *See Bennett v. Spear*, 520 U.S. 154, 168–69 (1997).

For similar reasons, the Nominee-Electors' claimed injury is not likely to be redressed here. To satisfy redressability, Plaintiffs must show that it is "likely" their

alleged injury will be "redressed by a favorable decision." *Lujan*, 504 U.S. at 561. But here, Plaintiffs seek declaratory and injunctive relief as to the manner of the Vice President's electoral vote *count*. *See* Docket No. 1 ¶ 73. Such relief will not resolve their alleged harm with respect to Governor Ducey's electoral vote *certification*. *See* Docket No. 2 at 7. As the Supreme Court has long held, "a federal court can act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court." *Simon*, 426 U.S. at 41–42; *see also El Paso Cnty.*, 982 F.3d at 343 (plaintiff lacks standing where an order granting the requested relief "would not rescind," and "accordingly would not redress," the allegedly harmful act).

Even if their injury were the loss of the right to vote in the Electoral College, *see* Docket No. 2 at 6, Plaintiffs' requested relief would not redress that injury. Plaintiffs are not asking the Court to order the Vice President to count the Nominee-Electors' votes, but rather that the Vice President "exercise the exclusive authority and sole discretion in determining which electoral votes to count for a given State," or alternatively, to decide that no Arizona electoral votes should count. *See* Docket No. 1 ¶ 73. It is well established that a plaintiff lacks standing where it is "uncertain that granting [the plaintiff] the relief it wants would remedy its injuries." *Inclusive Comtys. Project, Inc. v. Dep't of Treasury*, 946 F.3d 649, 657–58 (5th Cir. 2019).

Accordingly, the Court finds that the Nominee-Electors lack standing.[2]

[2] Plaintiffs Hoffman and Kern claim without supporting argument that they have standing as members of the Arizona legislature. Docket No. 2 at 4. This claim fails for the reasons Congressman Gohmert's standing argument fails. *See supra* Part III.A.

IV.

Because neither Congressman Gohmert nor the Nominee-Electors have standing here, the Court is without subject matter jurisdiction to address Plaintiffs' Emergency Motion or the merits of their claim. *HSBC Bank USA, N.A. as Tr. for Merrill Lynch Mortg. Loan v. Crum*, 907 F.3d 199, 202 (5th Cir. 2018). The Court therefore **DISMISSES** the case without prejudice.

So **ORDERED** and **SIGNED** this **1st** day of **January, 2021.**

JEREMY D. KERNODLE
UNITED STATES DISTRICT JUDGE

United States Court of Appeals for the Fifth Circuit

No. 21-40001

Louie Gohmert; Tyler Bowyer; Nancy Cottle; Jake Hoffman; Anthony Kern; James R. Lamon; Sam Moorhead; Robert Montgomery; Loraine Pellegrino; Greg Safsten; Kelli Ward; Michael Ward,

Plaintiffs—Appellants,

Marian Sheridan; Meshawn Maddock; Mari-Ann Henry; Amy Facchinello; Michele Lundgren,

Movants—Appellants,

versus

Michael R. Pence,

Defendant—Appellee.

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 6:20-CV-660

Before HIGGINBOTHAM, SMITH, and OLDHAM, *Circuit Judges*.

PER CURIAM:*

This administrative panel is presented with an emergency motion for expedited appeal. We have appellate jurisdiction under 28 U.S.C. § 1291. That includes jurisdiction to determine both our and the district court's jurisdiction. We have the benefit of the briefing before the district court and its 13-page opinion styled Order of Dismissal, issued January 1, 2021. That order adopts the position of the Department of Justice, finding that the district court lacks jurisdiction because no plaintiff has the standing demanded by Article III. We need say no more, and we affirm the judgment essentially for the reasons stated by the district court. We express no view on the underlying merits or on what putative party, if any, might have standing. The motion to expedite is dismissed as moot. The mandate shall issue forthwith.

---

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

United States Court of Appeals for the Fifth Circuit

No. 21-40001

LOUIE GOHMERT; TYLER BOWYER; NANCY COTTLE; JAKE HOFFMAN; ANTHONY KERN; JAMES R. LAMON; SAM MOORHEAD; ROBERT MONTGOMERY; LORAINE PELLEGRINO; GREG SAFSTEN; KELLI WARD; MICHAEL WARD,

Plaintiffs—Appellants,

MARIAN SHERIDAN; MESHAWN MADDOCK; MARI-ANN HENRY; AMY FACCHINELLO; MICHELE LUNDGREN,

Movants—Appellants,

versus

MICHAEL R. PENCE,

Defendant—Appellee.

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United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

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January 02, 2021

Mr. David O'Toole
U.S. District Court, Eastern District of Texas
211 W. Ferguson Street
Room 106
Tyler, TX 75702

No. 21-40001 Gohmert v. Pence
USDC No. 6:20-CV-660

Dear Mr. O'Toole,

Enclosed is a copy of the judgment issued as the mandate and a copy of the court's opinion.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Roeshawn A. Johnson, Deputy Clerk
504-310-7998

cc: Mr. William Charles Bundren
Mr. John V. Coghlan
Mr. Lawrence John Joseph

(b) (5)

[redacted]

From: ljoseph@larryjoseph.com <ljoseph@larryjoseph.com>
Sent: Wednesday, January 6, 2021 11:39 AM
To: SupremeCtBriefs (SMO) <Ex_SupremeCtBriefs@jmd.usdo[redacted]v>
Cc: 'Howard Kleinhendler' <howard@kleinhendler.com>; 'Lewis Sessions' <lsessions@sessionslaw.net>; 'Sidney Powell' <sidney@federalappeals.com>; Coghlan, John (CIV) <jcoghlan@civ.usdoj.gov>; (b)(6) - Gregory Jacob Email Address
Subject: Gohmert v. Pence, No. __A_____

Dear counsel,
Attached please find a copy of an emergency application for interim relief against the Vice President of the United States.

To ensure timely notice to the respondent, we also copy the respondent's federal counsel from the Court of Appeals and the Counsel to the Office of the Vice President.

Please do not hesitate to contact me with any questions on this matter, but Sidney Powell (copied here) is the applicants' counsel of record.
Best regards,
Larry

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No. __A_____

In the Supreme Court of the United States

LOUIE GOHMERT, TYLER BOWYER, NANCY COTTLE, JAKE HOFFMAN, ANTHONY KERN, JAMES R. LAMON, SAM MOORHEAD, ROBERT MONTGOMERY, LORAINE PELLEGRINO, GREG SAFSTEN, KELLI WARD AND MICHAEL WARD,
Applicants,

v.

THE HONORABLE MICHAEL R. PENCE, VICE PRESIDENT OF THE UNITED STATES, IN HIS OFFICIAL CAPACITY.
Respondent.

EMERGENCY APPLICATION TO THE HONORABLE SAMUEL A. ALITO AS CIRCUIT JUSTICE FOR THE FIFTH CIRCUIT FOR ADMINISTRATIVE STAY AND INTERIM RELIEF PENDING RESOLUTION OF A TIMELY FILED PETITION FOR A WRIT OF *CERTIORARI*

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Counsel for Applicants

* *Counsel of Record*

PARTIES TO THE PROCEEDING

Applicants (plaintiffs-appellants below) are U.S. Rep. Louie Gohmert (TX-1), Tyler Bowyer, Nancy Cottle, Jake Hoffman, Anthony Kern, James R. Lamon, Sam Moorhead, Robert Montgomery, Loraine Pellegrino, Greg Safsten, Kelli Ward, and Michael Ward.

Respondent (defendant-appellee below) is the Honorable Michael R. Pence, Vice President of the United States, in his official capacity.

CORPORATE DISCLOSURE STATEMENT

The applicants are natural persons with no parent corporation or stock

RELATED PROCEEDINGS

There are related proceedings in the United States District Court for the Eastern District of Texas and the United States Court of Appeals for the Fifth Circuit:

- *Gohmert v. Pence,* No. 6:20-CV-00660-JDK (E.D. Tex.) (dismissed Jan. 1, 2021)
- *Gohmert v. Pence,* No. 21-40001 (5th Cir.) (decided Jan. 2, 2021)

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APPENDIX

To the Honorable Samuel A. Alito as Circuit Justice for the Fifth Circuit:

Pursuant to this Court's Rule 22.2,[1] U.S. Rep. Louie Gohmert (TX-1), Tyler Bowyer, Nancy Cottle, Jake Hoffman, Anthony Kern, James R. Lamon, Sam Moorhead, Robert Montgomery, Loraine Pellegrino, Greg Safsten, Kelli Ward, and Michael Ward—plaintiffs- appellants below—respectfully apply for an order pursuant to the All Writs Act, 28 U.S.C. § 1651(a), directing respondent Vice President of the United States to refrain from invoking the dispute-resolution provisions of the Electoral Count Act of 1887, PUB. L. NO. 49-90, 24 Stat. 373 ("ECA") (codified in pertinent part at 3 U.S.C. §§ 5, 15) for the duration of this Court's consideration of a timely filed petition for a writ of *certiorari*. As set forth in the argument below, the ECA violates the Electors Clause, the Twelfth Amendment, and the Constitution's structural protections of liberty.

By *per curiam* order dated January 2, 2021, the Fifth Circuit *sua sponte* affirmed (App. 16a) the district court's dismissal of Applicants' action for the reasons stated by the district court's order dated January 1, 2021 (App. 16a). Applicants have not yet decided whether to seek rehearing or *en banc* in the Fifth Circuit before petitioning for a writ of *certiorari*. Including the 60-day extension granted by this Court's COVID-pandemic order dated March 19, 2020, a petition for a writ of *certiorari* is currently due by June 1, 2021. Given the exigency of resolving the 2020 presidential election before January 20, 2021, Applicants propose an expedited

---

[1] Alternatively, this Court could treat this application as a motion pursuant to Rule 21.2(c) and require ten copies of the application.

schedule for the filing and resolution of a petition for a writ of *certiorari*. Alternatively, Applicants respectfully submit that the relief requested in this application could resolve this matter.

INTRODUCTION

> *A man dies when he refuses to stand up for that which is right. A man dies when he refuses to stand up for justice. A man dies when he refuses to take a stand for that which is true.*
>
> *Martin Luther King, Jr.*

On January 6th, a joint session of Congress will convene to formally elect the President. The respondent, Vice-President Pence, will preside. Under the Constitution, he has the authority to conduct that proceeding as he sees fit. He may count elector votes certified by a state's executive, or he can prefer a competing slate of duly qualified electors. He may ignore all electors from a certain state. That is the power bestowed upon him by the Constitution.

For over a century, the counting of elector votes and proclaiming the winner was a formality to which the prying eye of the media and those outside the halls of the government paid no attention. But not this time. Our nation stands at the crossroads of a Constitutional crisis fraught by chaos and turmoil brought into play by a viral plague, anti-democratic interference from domestic and foreign sources, and hastily enacted State voting measures ostensibly placed to protect voters from catching the plague. At stake is Americans' confidence in the integrity of their electoral system and mechanisms of government – not to mention the results of the election itself.

Entreaties to the judicial branch to address these pressing electoral issues has proven ineffectual to date, in large measure due to use of legal principles which permit the defeating of consideration of the merits of the claims and procedural barriers that inhibit the introduction of evidence of fraud. The courts of this nation have demurred in the face of mounting evidence of sophisticated vote and voter fraud, prompting the States which experienced these injustices to pursue hastily called investigations. In the meantime, constitutionally mandated deadlines have marched forward, thrusting the issue into the halls of Congress, which has made clear its intent to rely upon a statute that is facially unconstitutional.

Into this fray, Applicant Rep. Gohmert, along with 140 of his Republican House colleagues have announced that they will object to the counting of state certified electors pledged to former Vice-President Biden because of the mounting and convincing evidence of voter fraud in key swing states whose combined electoral count prove determinative of the election results. App. 62a-65a. The contest for President now rides on a conflicted Congress, with one side adamant that the election was "the most secure in this nation's history" and the other just as firm in their conviction that the election was "rigged."

The Court is now asked to rule on a pressing and critical question: which set of rules does Vice-President Pence follow when confronted by these objections and this crisis? The rules set by the Constitution, or those in a simple statute, 3 USC 15, last updated in 1948 by a session of Congress long ago ended. Applicants are not asking this Court to choose a winner of the presidential contest. Nor are they asking

the Court to rule on whether there was pervasive fraud in the swing states that are subject to objection. Those are matters left to the January 6th joint session of Congress. The issue before this Court hinges on an obvious and elementary concept: that a federal statute cannot conflict with or abrogate the United States Constitution.

This case focuses on a clear historical perspective of the role of the Vice President in the electoral process. Below, we set forth a brief study of the background to the Vice-President's weighty and prudential powers afforded under the Constitution – the foundation of American democracy -- which unequivocally entrusts to him all the prerogatives and rights to determine what electoral votes to count or to disregard that are attendant to his role as President of the Senate. We further explain how 3 USC 15 is unconstitutional and why it is of no force or effect whatsoever. Finally, we discuss why the courts below have erred.

We respectfully submit that the courts below did not heed Dr. King's prescient words quoted above. We are looking for this Court's courage and wisdom to prevent the "death" of this country's faith in its electoral process. By applying to this court of last resort, Applicants are confident and hopeful that you will indeed appreciate Dr. King's warning that: *"A man dies when he refuses to take a stand for that which is true*." The application for an administrative stay and interim relief should be granted.

RULE 23.3 POSES NO BAR TO THE RELIEF REQUESTED

Applicants moved for interim relief in the district court, but the Fifth Circuit sua sponte affirmed the district court's dismissal before Applicants could seek interim relief in the Fifth Circuit. Under the circumstances, to the extent that Rule 23 applies,

Applicants respectfully submit that the extraordinary-circumstance exception to this Court's Rule 23.3 applies.

> Except in the *most extraordinary circumstances*, an *application for a stay* will not be entertained unless the relief requested was first sought in the appropriate court or courts below or from a judge or judges thereof.

SUP. CT. R. 23.3 (emphasis added). This rule is inapposite for two reasons: (1) Applicants do not request a stay (*i.e.*, all of Rule 23 does not apply); and (2) even if Applicants were requesting a stay, Rule 23.3's extraordinary-circumstances provision is a matter for judicial determination and plainly applies here.

First, while Applicants seek interim injunctive and declaratory relief, not all injunctive relief qualifies as a "stay." The relevant "definitions indicate that 'stay' is a subset of the broader term 'enjoin'; it is a 'kind of injunction' directed at a judicial case or proceedings within it." *Teshome-Gebreegziabher v. Mukasey*, 528 F.3d 330, 333 (4th Cir. 2008), *abrogated in part on other grounds*, *Nken v. Holder*, 556 U.S. 418, 423 (2009); *id.* ("a suspension of the case or some designated proceedings within it. It is a *kind of injunction* with which a court freezes its proceedings at a particular point.") (emphasis in original, quoting *Black's Law Dictionary* 1413 (6th ed. 1990)). This Court's motions-practice rules last included a reference to injunctive relief before the 1990 amendments to the rules, Stern & Gressman, SUPREME COURT PRACTICE § 17.11 (11th ed. 2013), presumably because the "stay" rule does not include authority for a preliminary injunction. *Id.* Instead, the All Writs Act provides that authority:

> I note first that applicants are seeking not merely a stay of a lower court judgment, but an injunction against the enforcement of a presumptively valid state statute. The All

> Writs Act, 28 U.S.C. § 1651(a) (1994 ed.), is the only source of this Court's authority to issue such an injunction.

Brown v. Gilmore, 533 U.S. 1301, 1303 (2001) (Rehnquist, C.J., in chambers).[2] If Rule 23 does not apply, then Rule 23.3's restrictions do not apply.

But even if Rule 23.3 did apply, the justices of this Court must apply Rule 23.3 because its extraordinary-circumstances provision requires a judicial determination of whether Applicants' case presents an extraordinary circumstance. Under the circumstances, the All Writs Act provides jurisdiction: "The Supreme Court and all courts established by Act of Congress may issue *all writs necessary or appropriate* in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a) (emphasis added). The question whether extraordinary relief is warranted requires a judicial determination..

STANDARD OF REVIEW

Standing and other questions of jurisdiction are reviewed *de novo*. "The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals." *Singleton v. Wulff*, 428 U.S. 106, 121 (1976). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that

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[2] Section I, *infra*, discusses this Court's jurisdiction under the All Writs Act.

an injunction is in the public interest." *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 21 (2008).[3]

CONSTITUTIONAL AND LEGISLATIVE BACKGROUND

The pertinent constitutional and statutory provisions are reproduced in the Appendix ("App."), and their history and context are summarized here.

The Vice Presidents of the Framers' Generation Acted as Presiding Officers and Established Rules of Parliamentary Procedure

While the discussion of the Vice President's role in the Constitutional Convention and Ratification Debates is sparse, two of the most significant Framers of the Declaration of Independence, John Adams and Thomas Jefferson, subsequently served as Vice Presidents. In these roles, they immediately established that the Vice President was not merely a ceremonial position, but rather served in an active and leading role as Presiding Officer of the Senate in establishing rules of parliamentary procedure for the new Congress.

Vice President Adams drew upon his knowledge of British parliamentary procedure in presiding over the Senate. *See* Richard Allan Baker, The Senate of the United States: "*Supreme Executive Council of the Nation*," 1787-1800, in 1 THE

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[3] If Applicants sought a "stay" as distinct from interim relief, a stay pending the timely filing and ultimate resolution of a petition for a writ of *certiorari* is appropriate when there is "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant *certiorari*; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). For "close cases," the Court "will balance the equities and weigh the relative harms to the applicant and to the respondent." *Id.*

CONGRESS OF THE UNITED STATES, 1787-1989, at 135, 148 (Joel H. Silbey ed., 1991). Vice President Jefferson, also on expert on British parliamentary procedure, authored the Senate's first manual of procedure. *See* Thomas Jefferson, *A Manual of Parliamentary Practice: for the Use of the Senate of the United States*, in Jefferson's PARLIAMENTARY WRITINGS: "PARLIAMENTARY POCKET-BOOK" AND A MANUAL OF PARLIAMENTARY PRACTICE (Wilbur Samuel Howell ed., 1988).

Thus, these two most important men who not only contributed to the founding documents of the country, but also established and documented the Senate's first rules as Presiding Officers, did not see their role as clerks or tabulators in counting votes. They were candidates and parliamentarians who also established the rules and processes for deciding the winner of the office of President (*i.e.*, them in both cases). They knew that the role of "President of the Senate" did not mean a toothless, helpless, clerk.

The process for electing the President was one of the most divisive of all issues debated in the Philadelphia Convention, with competing proposals for direct election, federal congressional election and state election argued. *See* 3 Jonathan Elliot, *Debates on the Adoption of the Federal Constitution* at 547 (James McClellan & M.E. Bradford eds., James River Press 1989) (2d ed. 1836). Sixty ballots were taken before the original 1787 Constitution was adopted, pursuant to which electors from each State, appointed by the State Legislature under the Electors Clause, elect the President; or in the event no candidate receives a majority as counted by the Vice

President, the House of Representatives chooses the President by the "one vote per state delegation" rule. *Id.*

U.S. CONST. art II, § 1, cl. 3, amended by U.S. CONST. amend. XII. Article II of the Constitution provides, in relevant part:

> The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. *The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted.*

U.S. Const., art. II, § 1, cl. 3 (amended by U.S. CONST. amend. XII) (emphasis added).

In *The Federalist* No. 68, Alexander Hamilton provides the rationale both for the unique role of Presidential Electors in electing the President of the United States, and the Vice President's role in the Electoral College. Hamilton first explains that the choice of indirect election through electors, rather than direct democracy, because it is preferable for "[a] small number of persons, selected by their fellow-citizens from the general mass, will be most likely to possess the information and discernment requisite to such complicated investigations," and it will "afford as little opportunity as possible to tumult and disorder." Hamilton, Alexander. *The Federalist* No. 68, at 410-11 (C. Rossiter, ed. 1961).

Further, the Electoral College should not meet as a national body in one place, but instead should meet and elect the President in each State:

> And as the electors, chosen in each State, are to assemble and vote in the State in which they are chosen, this detached and divided situation will expose them much less to heats and ferments, which might be communicated from them to the people, than if they were all to be convened at one time, in one place.
>
> 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.

Id.

If no candidate should receive a majority of the Electors' vote, then and only then, should the decision should be made by the national legislature, namely the House of Representatives:

> But as a majority of the votes might not always happen to centre in one man, and as it might be unsafe to permit less than a majority to be conclusive, it is provided that, in such a contingency, the House of Representatives[4] shall select out of the candidates who shall have the five highest number of votes, the man who in their opinion may be best qualified for the office.

Id.

Finally, *The Federalist* No. 68 addresses the role of the Vice President:

> One is, that to secure at all times the possibility of a definite resolution of the body, it is necessary that the President should have only a casting vote. … And to take the senator of any State from his seat as senator, to place

[4] As set forth in the final version of art. II, § 1, cl. 3, the selection by the House of Representatives was through a vote of State Delegations, not a majority of members.

> him in that of President of the Senate, would be to exchange, in regard to the State from which he came, a constant for a contingent vote.

Id.

Presidential Electoral Count Provisions

The presidential electoral count procedures in the original Constitution are largely identical to those in the Twelfth Amendment. These procedures—in particular those regarding the Vice President's role as Presiding Officer in counting electoral votes and the House's "one vote per state delegation" for choosing the President—were carried over into the Twelfth Amendment *verbatim* -- with one important exception.

A critical and near fatal flaw in this process became apparent immediately after the Presidency of George Washington, in the elections of 1796 and 1800, namely, that the while the original Constitutional language gave each elector two votes, "it did not allow the electors to designate one of their votes for President and one for Vice President." Nathan L. Colvin & Edward B. Foley, *The Twelfth Amendment: A Constitutional Ticking Time Bomb*, 65 U. MIAMI L. REV. 475, 489 (2010). As a result, "the vice presidency went to the losing Presidential candidate with the largest number of electoral votes." Richard K. Neumann, *The Revival of Impeachment as a Partisan Political Weapon*, 34 HASTINGS CONST. L.Q. 161, 180 (2002).

The Election of 1800

Thomas Jefferson lost the election of 1796 to John Adams, receiving the second highest number of electoral votes. As a result, he became President Adams' Vice President. Jefferson ran for President again in 1800 for the Democratic-Republican

Party, as the candidate for President and Aaron Burr as candidate for Vice President. As sitting Vice President, Vice President Jefferson was also President of the Senate and Presiding Officer over the Electoral College proceedings. As such, he was responsible for counting electoral votes for himself and competing candidates.

Legislative History and Ratification

In 1803, both Houses approved the text of the Twelfth Amendment, and 13 of 17 States had ratified it by June of 1804. Colvin & Foley at 490. The Amendment provides, in relevant part:

> The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate; -- *The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted*.

U.S. CONST. amend. XII (emphasis added).

Commentators argue that the passive voice in the sentence "and the votes shall then be counted" means that the President of the Senate, the Vice President, has "further powers hidden in the passive voice" which today would be referenced as "discretion." Bruce Ackerman & David Fontana, *Thomas Jefferson Counts Himself into the Presidency*, 90 VA. L. REV. 551, 629 (2004).

This is consistent with the Framers' original intent and their inherent bias that a presiding officer was not merely a ceremonial figure, but one that has authority to render substantive decisions in the face of disputes or other disruptions to the electoral process devolved to his mandate.

The Congress That Enacted 3 U.S.C. § 5 Recognized that It Required a Constitutional Amendment but Adopted the ECA as a Shortcut Because They did not Have the Votes

In Section 2 of the Electoral Count Act of 1887, codified at 3 U.S.C. § 5, Congress sought to require States to resolve any disputes over the appointment of Presidential electors to avoid the necessity for Congress to do so in the 1876 election. "What Congress wanted was for the states to develop, or apply, their existing, more streamlined election laws to Presidential Elections." Stephen A. Siegel, *The Conscientious Congressman's Guide to the Electoral Count Act of 1887*, 56 FLA. L. REV. 541, 585 (2004). Members of Congress recognized at the time that they could not require states to do so "absent a constitutional amendment." Id. at 586 (citations omitted). Because Congress was "[u]nable to agree on any constitutional amendment," it attempted, "to remove, as far as it is possible to be done by legislation . . ., a difficulty which grows out of an imperfection in the Constitution itself.'" *Id*. at 658-59 (*quoting* 17 CONG. REC. 1019 (1886) (statement of Sen. Hoar)).

This was a continuation of Congress' prior debate over the repeal of the Reconstruction-Era Twenty-Second Joint Rule of 1865 ("Joint Rule"), which had authorized either house of Congress to reject a State's electors. Republicans had been dominant in the Reconstruction Era following 1865, but by 1875 it was "anticipated

that the Democrats would control the House of Representatives for the first time in two decades," and "Senate Republicans were no longer willing to allow the House to unilaterally discard electoral votes that could turn the outcome of the election or throw the election to the House." Colvin & Foley at 499.

In the run up to the 1876 election, the Senate debated repeal or modification of the Joint Rule where the "primary disagreement" was whether Congress could adopt a rule permitting one house of Congress to reject a State's electoral votes "without a constitutional amendment," and "[t]he dividing lines were drawn between those who did not believe the Constitution gave Congress a right to say whether votes shall be counted or not be counted and those who did." *Id.* at 500 (internal quotations and citations omitted). Consequently, if Congress itself cannot determine whether to count (or not count votes), then that function must remain with the President of the Senate.

History of Competing State Electoral Slates

Historical precedent for dual electoral slates getting to the President of the Senate arose before the ECA. While the circumstances varied, in the Tilden and Hayes election of 1876 several states submitted two or three slates of electors with at least one each for Tilden and Hayes. There were also serious allegations of violence, voter intimidation, fraud, and corruption.

- **Florida:** Three sets of electors: (1) For Hayes, from Board of State Canvassers and signed by the Governor; (2) For Tilden, alleging violence, voter intimidation, fraud, and discarding Tilden ballots, "the slate of Presidential

electors pledged to Tilden decided to go ahead and meet as if they were the authorized Electoral College delegates from Florida," certified by Florida Attorney General; and (3) For Tilden, when the Florida legislature called for a new canvas, which certified electors for Tilden, and a Florida court ruling that Tilden electors were legitimate, and the newly elected Democratic Governor certified a third slate of electors for Tilden. Colvin & Foley at 503-04.

- **Louisiana:** "The first slate of electors was for Hayes; it came from the canvassing board and was certified by the ostensible governor. The second was for Tilden, with these electors disregarding the work of the canvassing board on the ground that the board was corrupt. This slate was certified by a different individual who purported to be the lawful governor. The third slate was in effect a duplicate of the first." *Id.* at 504.
- **South Carolina:** "South Carolina submitted two slates, one for Hayes from the Board of Canvassers, certified by the governor, and another for Tilden, alleging that the Tilden electors were the rightful voters." *Id.*
- **Oregon:** "In Oregon, the voters had elected a postmaster general as one of Hayes's electors, a possible violation of the constitutional prohibition against federal office holders acting as electors. Because of this, the elector resigned from his office as postmaster, and Oregon law allowed the remaining electors to choose a replacement; they chose the resigned elector. The Democratic Oregon governor refused to certify this slate of electors and instead certified a slate with two Hayes electors and a Tilden elector as a replacement for the

former postmaster. The secretary of state, on the other hand, submitted a certificate that contained the three original Hayes electors and noted that there was no question that the Hayes electors received the most votes on election day." *Id.* at 504-05.

As a result of this tumult, Congress found a quick fix to potential future disruptions through enactment of the Electoral Count Act.

Binding Law, Congressional Rule, or Unreviewable Statement of Principle/Moral Obligation?

"Whether the ECA is a statute or a joint rule enacted in statutory form is ambiguous. In truth, both theories underlay its enactment. The difference between the two theories disappears, however, to the extent that the ECA involves political questions not subject to judicial review. The difference between the two theories also disappears to the extent that Congress self-enforces its own internal rules." Siegel at 565.

Internal Rule: "Many congressmen spoke in opposition to the ECA on the grounds that legislating the matter was an unconstitutional attempt to bind Congress's discretion. It was unconstitutional, they said, because enacting and amending legislation required Presidential approval (or an extraordinary majority in Congress), and thus improperly involved the President in implementing the rules for determining Presidential Elections. In addition, one Congress could never bind another in this matter. Congress could govern itself, they reasoned, by enacting concurrent rules for each vote count, or a continuing joint rule which the houses could amend at any time." Siegel at 560-61.

Binding Legislation: "Many other congressmen believed that electoral vote counting was a proper subject for binding legislation. Congress's rulemaking authority governed its own proceedings, and the ECA was properly legislative because through it the two houses adopted rules to govern each other's actions. Moreover, the power to count electoral votes was a power vested in the national government, and the Sweeping Clause allows Congress to "make all Laws which shall be necessary and proper for carrying into Execution . . . all . . . Powers vested by this Constitution in the Government of the United States, or in any Department . . . thereof." Siegel at 561.

Unreviewable/Unenforceable Statement of Principle/Moral Obligation: "These congressmen assumed that Congress's electoral count decisions were not subject to judicial review. Because they believed that '[n]o power in this Government can or ever will set aside and annul the declaration of who is elected President . . . when that declaration is made in the presence of the two Houses of Congress.'" Siegel at 563.

"Yet, to these congressmen, an unenforceable law was better than no agreement at all. In addition, they believed an unenforceable law was better than a joint rule because of the law's greater ability to bind Congress's conscience and create a moral obligation to abide by its terms. Congress understood that even if the ECA enacted rules of only moral obligation, it nonetheless would constrain behavior both outside and inside Congress." Siegel at 564.

While the concept of non-binding "rulemaking statutes" and "anti-entrenchment clauses" developed during the 20th Century, "a number of Congressmen stated during debate on the ECA that this measure would attempt in vain to entrench procedures that would bind future Congresses." Chris Land & David Schultz, *On The Unenforceability of the Electoral Count Act*, 13 RUTGERS J.L. & PUB. POL'Y 340, 376 (2016) (*citing* 8 CONG. REC. 164 (1878)). As stated by Sen. Augustus Garland in debate on a precursor to the ECA: "*An act passed by a previous Congress assuming to bind ... a succeeding Congress need not be repealed because it is void; and for that I reason I oppose this bill*." *Id.* (Emphasis added).

Applicants could not have stated the principle any clearer. The ECA is void and unconstitutional because a previous Congress cannot bind a succeeding one.

Applicants' Requested Remedy Is Warranted

Some argue that abandoning the ECA will create havoc and cast the upcoming Joint Session on January 6 into turmoil. They offer a "parade of horribles" about making the Vice President a dictator and disenfranchising voters and argue that the assembled House and Senate must serve a role in the counting. These concerns do not justify continuing with a statutory scheme that flies in the face of the Constitution and the Framer's intent.

The first concern ignores the presumption of regularity that this Court must accord to not only the Vice President but also the House and Senate: "The presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." *Merck Sharp & Dohme Corp. v. Albrecht*, 139 S.Ct.

1668, 1684 (2019) (interior quotations omitted). This Court should reject the idea not only that the Vice President might falsely erect barriers to counting a lawful vote but also that—if the Vice President did so—the House and Senate would vote inconsistently with that lawful vote.

The second concern ignores the historical context that, when the Electors Clause and the Twelfth Amendment were ratified *state legislatures* picked electors. Under the Twelfth Amendment, when the vote of the state legislatures' electors is inconclusive—for whatever reason—the national legislature picks the President. While disenfranchising voters did not enter into the constitutional provision, that claim also presupposes that one can determine by January 6 or January 20 who *lawfully* won the election, which is not the case here.

The third concern—that the assembled House and Senate must serve a role—has it entirely backward. In a normal count as in all elections since 1876, their role is ceremonial for a ministerial count. In a contested election like this one, their only role during the Vice President's presiding over the joint session is to be on hand to serve their actual role of being called *immediately* to vote for the President in the House and the Vice President in the Senate. *See* U.S. CONST. amend. XII.

While the ECA's defenders argue that "we know better" than those who framed the Constitution, their scare tactics conflict with the Constitution's built-in protections because the Constitution did not leave matters to chance. It empowered the Vice-President to take control of the proceeding and resolve disputes. *See generally* Vasan Kesavan, *Is the Electoral Count Act Unconstitutional?*, 80 N.C. L.

REV. 1653 (2002) (finding ECA unconstitutional and highlighting Twelfth Amendment's constitutional safeguards). At a minimum, the Twelfth Amendment provided for the House, *voting by state delegation*, to resolve a disputed electoral college count. Therefore, the remedy sought by Applicants is easily crafted. The Court should declare that:

- ECA sections 5 and 15 are unconstitutional.
- When a member of the House objects to a slate of electors or between two slates of competing electors presented for any single state, the Vice President, as President of the Senate, shall determine the dispute as he sees fit. He may choose between competing elector slates or he may choose to disregard electors altogether from any state.
- If after all the states' electors are counted, no single candidate has 270 votes, the House shall vote for President, which each State delegation having one vote.

The Argument section, *infra*, demonstrates Applicants' entitlement to that relief.

FACTUAL AND LITIGATION BACKGROUND

The facts relevant to this motion are set forth in the Complaint (App. 22a) and the exhibits filed below (App. 50a-65a), which are incorporated herein by reference.

Applicants present here only a summary.

1. The Applicants include Rep. Louie Gohmert—a Member of the U.S. House of Representatives, representing Texas's First Congressional District in both the current and the next Congress—who seeks to enjoin the operation of the Electoral

Count Act to prevent a deprivation of his rights and the rights of those he represents under the Twelfth Amendment. The Applicants also include the entire slate of Republican Presidential Electors for the State of Arizona, as well as an outgoing and incoming member of the Arizona Legislature. On December 14, 2020, pursuant to the requirements of applicable state laws, the Constitution, and the Electoral Count Act, the Applicant Arizona Electors, convened at the Arizona State Capitol, and cast Arizona's electoral votes for President Donald J. Trump and Vice President Michael R. Pence. On the same date, the Republican Presidential Electors for the States of Georgia, Pennsylvania, and Wisconsin met at their respective State Capitols to cast their States' electoral votes for President Trump and Vice President Pence (or in the case of Michigan, attempted to do so but were blocked by the Michigan State Police, and ultimately voted on the grounds of the State Capitol).

2. There are now competing slates of Republican and Democratic electors in five States with Republican majorities in both houses of their State Legislatures—Arizona, Georgia, Michigan, Pennsylvania, and Wisconsin (*i.e.*, the Contested States)—that collectively have 73 electoral votes, which are more than sufficient to determine the winner of the 2020 General Election. On December 14, 2020, in Arizona and the other Contested States, the Democratic Party's slate of electors convened in the State Capitol to cast their electoral votes for former Vice President Joseph R. Biden and Senator Kamala Harris. On the same day, Arizona Governor Doug Ducey and Secretary of State Katie Hobbs submitted the Certificate of Ascertainment with

the Biden electoral votes to the National Archivist pursuant to the Electoral Count Act.

3. Republican Senators and Republican Members of the House of Representatives have also expressed their intent to oppose the certified slates of electors from the Contested States due to the substantial evidence of voter fraud in the 2020 General Election. Multiple Senators and House Members have stated that they will object to the Biden electors at the January 6, 2021 Joint Session of Congress. These public statements by legislators make it a near certainty that at least one Senator and one House Member will follow through on their commitments and invoke the (unconstitutional) Electoral Count Act's dispute resolution procedures.

4. Respondent Vice President Pence, in his capacity as President of the Senate and Presiding Officer at the January 6, 2021 Joint Session of Congress to select the next President, will be presented with the following circumstances: (1) competing slates of electors from the State of Arizona and the other Contested States, (2) that represent sufficient electoral votes (a) if counted, to determine the winner of the 2020 General Election, or (b) if not counted, to deny either President Trump or former Vice President Biden sufficient votes to win outright; and (3) objections from at least one Senator and at least one Member of the House of Representatives to the counting of electoral votes from one or more of the Contested States and thereby invoking the unconstitutional procedures set forth in Section 15 of the Electoral Count Act.

5. As a result, Respondent Vice President Pence will necessarily have to decide whether to follow the unconstitutional provisions of the Electoral Count Act or the Twelfth Amendment to the U.S. Constitution at the January 6, 2021 Joint Session of Congress. This approaching deadline establishes the urgency for this Court to issue a declaratory judgment that Sections 5 and 15 of the Electoral Count Act are unconstitutional and provide the undisputed factual basis for this Court to do so on an expedited basis, and to enjoin Respondent Vice President Pence from following any Electoral Count Act procedures in 3 U.S.C. §§ 5 and 15 because they are unconstitutional under the Twelfth Amendment.

6. In the interval between Applicants' filing their motion and reply in district court, Sen. Josh Hawley of Missouri has announced his intent to object to Biden electors (App. 54a-55a, 57a-58a). In the interval since the district court ruled, at least eleven more Senators announced their intent to object, according to the Senate.gov website for Senator Marsha Blackburn of Tennessee.[5] On the House side, in addition to Applicant Louie Gohmert ("Rep. Gohmert"), approximately 140 Republican Members of the House have announced plans to object to the Biden electors (App. 62a-65a).

7. In addition to the opposition (ECF #18) filed by the Respondent, Vice President Michael R. Pence, the Democrat-dominated Bipartisan Legal Advisory Group ("BLAG") of the U.S. House of Representatives filed an *amicus* brief (ECF #22),

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[5] Available at https://www.blackburn.senate.gov/2021/1/blackburn-hagerty-and-colleagues-will-vote-to-oppose-electoral-college-results (last visited Jan. 2, 2021).

with the two Republican BLAG members (the Republican Leader and the Republican Whip) dissenting. In addition, a Texas resident who supports former Vice President Joseph R. Biden's candidacy moved to intervene (ECF #19), also filing a motion to dismiss (ECF #20), and a Colorado elector for Mr. Biden moved to intervene in a unified document (ECF #15) that includes a section opposing the merits of Applicants' claims. For purposes of their Motion, Applicants treated the would-be intervenors' filings as *amicus* briefs opposed to Applicants' Motion. *See*, *e.g.*, *Lelsz v. Kavanagh*, 98 F.R.D. 11, 13 (E.D. Tex. 1982) (denying leave to intervene but allowing movant to file *amicus* brief).

8. Additionally, several Michigan Republican electors moved to intervene as plaintiffs.

9. The district court dismissed for lack of standing, without a hearing. App. 1a-13a.

10. Applicants appealed and filed an emergency motion to set an expedited briefing schedule, which prompted a motions panel of the Fifth Circuit to "affirm the judgment essentially for the reasons stated by the district court," App. 16a, based on the briefing from the district court (*i.e.*, without affording Applicants an opportunity to respond to the district court's order). *Id.* The Fifth Circuit indicated that the mandate would "issue forthwith." *Id.* The Clerk subsequently certified the order as the Fifth Circuit's mandate. *Id.*

ARGUMENT

I. THE ALL WRITS ACT GIVES THIS COURT JURISDICTION TO ENTER INTERIM RELIEF PENDING THE TIMELY FILING OF A PETITION FOR A WRIT OF *CERTIORARI*.

The All Writs Act provides jurisdiction for interim relief to preserve the full range of the controversy *now* for this Court's consideration upon the Applicants' *future* appeal to this Court:

> The All Writs Act empowers the federal courts to issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law. The exercise of this power is in the nature of appellate jurisdiction where directed to an inferior court, and *extends to the potential jurisdiction of the appellate court where an appeal is not then pending but may be later perfected*.

FTC v. Dean Foods Co., 384 U.S. 597, 603 (1966) (interior quotations and citations omitted, emphasis added) (*citing Ex parte Crane*, 5 Pet. 190, 193 (1832) (Marshall, C.J.); *Ex parte Bradstreet*, 7 Pet. 634 (1833) (Marshall, C.J.)). The All Writs Act provides "a limited judicial power to preserve the court's jurisdiction or maintain the *status quo* by injunction pending review of an agency's action through the prescribed statutory channels," and that "power has been deemed merely incidental to the courts' jurisdiction to review" the ultimate merits of the future appeal. *Id.* at 604 (alterations omitted). As explained in this section, that power is appropriate in this case.

Without interim relief, the Vice President will invoke the Electoral Count Act's unconstitutional dispute-resolution process to pick the next President, after which the 2020 election will not be able to right itself: if the wrong winner is picked, even

the impeachment of that winner would not install the correct winner. That is the type of harm that justifies action under the All Writs Act. For example, in *Sampson v. Murray*, 415 U.S. 61, 76-77 (1974), the Court was concerned "that refusal to grant the injunction would result in the practical disappearance of one of the entities whose merger the [applicant] sought to challenge" and that "[t]he disappearance, in turn, would mean that the [applicant] and the court entrusted … to review the … decision, would be incapable of … fashioning effective relief." Under the circumstances, "invocation of the All Writs Act, as a preservative of jurisdiction, was considered appropriate," *id.*, which applies equally here as in *Sampson*.

In another instance where the Court's invoking the All Writs Act shares themes at issue here, *La Buy v. Howes Leather Co.*, 352 U.S. 249, 259 (1957), refused to permit reference of antitrust cases to a master. "In *La Buy,* the District Judge on his own motion referred to a special master two complex, protracted antitrust cases on the eve of trial. … The master, a member of the bar, was to hear and decide the entire case, subject to review by the District Judge under the 'clearly erroneous' test." *Mathews v. Weber*, 423 U.S. 261, 274 (1976). Here, invoking the House and Senate to undertake dispute resolution in a manner not contemplated anywhere in the Constitution would repeat aspects of *La Buy* that justified resort to the All Writs Act.

In addition, this Court also can rely on § 2106 for additional authority to resolve this matter:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct

> the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

28 U.S.C. § 2106. As § 2106 makes clear, this Court can not only alter the judgment from the lower court but also require further proceedings.

II. APPLICANTS HAVE STANDING.

Article III standing presents the tripartite test of whether the party invoking a court's jurisdiction raises an "injury in fact" under Article III: (a) a legally cognizable injury (b) that is both caused by the challenged action, and (c) redressable by a court. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561-62 (1992). The task of establishing standing varies, depending "considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue." *Id* at 561. If so, "there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it." *Id.* at 562. If not, standing may depend on third-party action:

> When … a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed. In that circumstance, causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction—and perhaps on the response of others as well.

Id. (emphasis in original). Here, Applicants can assert both first-party and third-party injuries, with the showing for standing easier for the first-party injuries. Specifically, Vice President Pence's action under the unconstitutional Electoral Count

Act would have the effect of ratifying injuries inflicted—in the first instance—by third parties in Arizona.

A. Applicants have suffered an injury in fact.

Applicants have standing as a member of the United States House of Representatives, Members of the Arizona Legislature, and as Presidential Electors for the State of Arizona.

Rep. Louie Gohmert is a Member of the U.S. House of Representatives, representing Texas's First Congressional District in both the current and the next Congress. Rep. Louie Gohmert requests declaratory and injunctive relief to prevent action as prescribed by 3 U.S.C. § 5, and 3 U.S.C. § 15 and to give the power back to the states to vote for the President in accordance with the Twelfth Amendment. Otherwise he will not be able to vote as a Congressional Representative in accordance with the Twelfth Amendment, and instead, his vote in the House, if there is disagreement, will be eliminated by the current statutory construct under the Electoral Count Act, or diluted by votes of the Senate and ultimately by passing the final determination to the state Executives.

In the event that objections occur leading to a vote in the House of Representatives, then under the Twelfth Amendment, on January 6, in the new House of Representatives, there will be twenty-seven states led by Republican majorities, and twenty states led by Democrat majorities, and three states that are tied. Twenty-six seats are required for a victor under the Twelfth Amendment, and further that, under the Twelfth Amendment, in the event neither candidate wins twenty-six seats by March 4, then the then-current Vice President would be declared

the President. However, if the Electoral Count Act is followed, this one vote on a state-by-state basis in the House of Representatives for President simply would not occur and would deprive this Member of his constitutional right as a sitting member of a Republican delegation, where his vote matters.

The Twelfth Amendment specifically states that "if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote." The authority to vote with this authority is taken from the House of Representatives, of which Mr. Gohmert is a member, and usurped by statutory construct set forth in 3 U.S.C. § 5 and 3 U.S.C. § 15. Therein the authority is given back to the state's executive branch in the process of counting and in the event of disagreement—while also giving the Senate concurrent authority with the House to vote for President. As a result, the application of 3 U.S.C. § 5 and 3 U.S.C. § 15 would prevent Rep. Gohmert from exercising his constitutional duty to vote pursuant for President to the Twelfth Amendment.

Prior to December 14, 2020, Applicant Arizona Electors had standing under the Electors Clause as candidates for the office of Presidential Elector because, under Arizona law, a vote cast for the Republican Party's President and Vice President is cast for the Republican Presidential Electors. *See* ARIZ. REV. STAT. § 16-212. Accordingly, Applicant Arizona Electors, like other candidates for office, "have a

cognizable interest in ensuring that the final vote tally reflects the legally valid votes cast," as "[a]n inaccurate vote tally is a concrete and particularized injury to candidates such as the Electors." *Carson v. Simon*, 978 F.3d 1051, 1057 (8th Cir. 2020) (affirming that Presidential Electors have Article III and prudential standing under Electors Clause); *see also Wood v. Raffensperger*, No. 20-14418, 2020 WL 7094866, *10 (11th Cir. Dec. 5, 2020) (affirming that if Applicant voter had been a candidate for office "he could assert a personal, distinct injury" required for standing); *Trump v. Wis. Elections Comm'n*, No. 20-cv-1785, 2020 U.S. Dist. LEXIS 233765 at *26 (E.D. Wis. Dec. 12, 2020) (President Trump, "as candidate for election, has a concrete particularized interest in the actual results of the election."). Applicants suffer a "debasement" of their votes, which "state[s] a justiciable cause of action on which relief could be granted" *Wesberry v. Sanders*, 376 U.S. 1, 5-6 (1964) (citing *Baker v. Carr*, 369 U.S. 186 (1962)).

Under the Fifth Circuit's and this Court's precedents, Applicants' injuries are not generalized grievances insufficient for Article III. Rep. Gohmert has standing to challenge unconstitutional elector slates and to vote for President under the Twelfth Amendment as opposed to voting for objections under the Electoral Count Act. *See LULAC v. City of Boerne*, 659 F.3d 421, 430 (5th Cir. 2011); *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 845 (5th Cir. 1993) (*en banc*); *see* Section II.D, *infra*. The Arizona-Elector Applicants have standing to be counted or, if the unlawful non-enforcement of Arizona's election statutes by non-legislative actors stands, the Arizona-Elector Applicants have standing to nullify the

unlawful votes of the rival slate of electors. Although the district court thought the dispute speculative (App. 9a), the dispute is already fully extant. What the district judge appears to have meant is that Members of Congress may not object pursuant to the Electoral Count Act. Rep. Gohmert has said that he would, as have 140 other members of the House (App. 62a-65a), and at least two members of the Senate when Applicants were in district court (App. 54a-55a, 57a-61a). Since then, eleven additional Senators have announced plans to object, according to a Senate.gov press release.[6] A train wreck is not speculative when the train is already off the rails. The outcome may be uncertain, but procedural-rights standing does not depend on outcomes.

B. Applicants' injuries are traceable to the Vice President.

Rep. Gohmert faces imminent threat of injury that the Respondent will follow the unlawful Electoral Count Act and, in so doing, eviscerate Rep. Gohmert's constitutional right and duty to vote for President under the Twelfth Amendment. With injuries directly caused by a defendant, plaintiffs can show an injury in fact with "little question" of causation or redressability. *Defenders of Wildlife,* 504 U.S. at 561-62. Although the Respondent did not cause the underlying election fraud, the Respondent nonetheless will directly cause Rep. Gohmert's injury, which is causation—and redressability—under *Defenders of Wildlife*.

By contrast, the Arizona Electors suffer indirect injury *vis-à-vis* this Respondent. But for the alleged wrongful conduct of Arizona executive branch

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[6] *See* note 5, *supra*, and accompanying text.

officials under color of law, the Applicant Arizona Electors would have been certified as the presidential electors for Arizona, and Arizona's Governor and Secretary of State would have transmitted uncontested votes for Donald J. Trump and Michael R. Pence to the Electoral College. The certification and transmission of a competing slate of Biden electors has resulted in a unique injury that only Applicant Arizona Electors could suffer, namely, having a competing slate of electors take their place and their votes in the Electoral College. While the Vice President did not cause Applicants' initial injury—that happened in Arizona—the Vice President stands in the position at the Joint Session on January 6 to ratify and purport to make lawful the unlawful injuries that Applicants suffered in Arizona. That is causation enough for Article III. For example:

> According to the USDA, the injury suffered by Sierra Club is caused by the independent actions (*i.e.*, pumping decisions) of third party farmers, over whom the USDA has no coercive control. Although we recognize that causation is not proven if the injury complained of is the result of the *independent* action of some third party not before the court, this does not mean that causation can be proven only if the governmental agency has coercive control over those third parties. Rather, the relevant inquiry in this case is whether the USDA has the ability through various programs to affect the pumping decisions of those third party farmers to such an extent that the plaintiff's injury could be relieved.

Sierra Club v. Glickman, 156 F.3d 606, 614 (5th Cir. 1998) (interior quotation marks, citations, and alterations omitted, emphasis in original); *Tel. & Data Sys. v. FCC*, 19 F.3d 42, 47 (D.C. Cir. 1994).

When third parties inflict injury that injury is traceable to government action if the injurious conduct "would have been illegal without that [governmental] action." *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 45 n.25 (1976). As explained below, Vice President Pence stands ready to ratify Applicants' injuries via the unconstitutional Electoral Count Act, which is causation enough to enjoin his actions. Alternatively, "plaintiff's injury could be relieved" within the meaning of *Sierra Club v. Glickman* if the Vice President rejected the Electoral Count Act as unconstitutional.

A procedural-rights plaintiff must also show that "fixing the alleged procedural violation could cause the agency to 'change its position' on the substantive action," *Ctr. for Biological Diversity v. United States EPA*, 937 F.3d 533, 543 (5th Cir. 2019), which is easy enough here/ Under the Electoral Count Act, the "Blue" or "Biden" states have a bare House majority in the Congress that will vote on January 6. Under the Twelfth Amendment, however, the "Red" or "Trump" states have a 27-20-3 majority where each state delegation gets one vote in the House's election of the President. That distinction satisfies both third-party causation and procedural-rights tests for Article III standing.

The Twelfth Amendment gives Respondent Vice President exclusive authority and sole discretion as to which set of electors to count or even whether to count no set of electors. If no candidate receives a majority of electoral votes, then the President is to be chosen by the House, where "the votes shall be taken by States, the representation from each state having one vote." U.S. CONST. amend. XII. If

Respondent Pence instead follows the procedures in Section 15 of the Electoral Count Act, Applicants' electoral votes will not be counted because (a) the Democratic majority House of Representatives will not "decide" to count the electoral votes of Applicant Republican electors; and (b) either the Senate will concur with the House not to count their votes, or the Senate will not concur, in which case, the electoral votes cast by Biden's electors shall be counted because the Biden slate of electors was certified by Arizona's executive. Under the Constitution, by contrast, the Vice President counts the votes and—if the count is indeterminate—the vote proceeds immediately to the House for President and to the Senate for Vice President. *See* U.S. CONST. amend. XII.[7]

Through declaratory and injunctive relief, Applicants ask this Court to prevent Respondent from invoking the unconstitutional Electoral Count Act. As in *OCA-Greater Houston v. Texas*, 867 F.3d 604, 613-14 (5th Cir. 2017), Respondent cannot rely on the Fifth Circuit's *en banc* decision in *Okpalobi v. Foster* because—unlike in *Okpalobi*—Applicants have sued someone who implements the statute that Applicants challenge. *Compare OCA-Greater Houston*, 867 F.3d at 613-14 *with*

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[7] This intent that the Vice President count the votes is borne out by a unanimous resolution attached to the final Constitution that described the procedures for electing the first President (*i.e.*, for the one time when there would not already be a sitting Vice President), stating in relevant part "that the Senators should appoint a President of the Senate, for the sole Purpose of receiving, opening and counting the Votes for President." 2 M. Farrand, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 666 (1911). For all subsequent elections, when there would be a Vice President to act as President of the Senate, the Constitution vests the opening and counting in the Vice President.

Okpalobi v. Foster, 244 F.3d 405, 415 (5th Cir. 2001) (*en banc*). (defendants had no "enforcement connection with the challenged statute").[8] Here, Respondent is the presiding officer of the process that Applicants seek to enjoin and declare unconstitutional. Under that circumstance, Applicants have "met [the] burden under *Lujan* to show that [their] injury is fairly traceable to and redressable by the defendant[]." *OCA-Greater Houston*, 867 F.3d at 614.

C. Federal courts can redress Applicants' injuries.

Even if a federal court would lack jurisdiction to *enjoin* the Vice President, *but see* Sections III.C.1-2, *infra* (immunity does not bar this action), this Court's authoritative declaration would provide redress enough. *See Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992) ("we may assume it is substantially likely that the President and other executive and congressional officials would abide by an authoritative interpretation of the census statute and constitutional provision by the District Court, even though they would not be directly bound by such a determination"). The Electoral Count Act is blatantly unconstitutional in many respects, *see* Section I.A, *infra*, and "it is the province and duty of the judicial department to determine in cases regularly brought before them, whether the powers of any branch of the government, and even those of the legislature in the enactment

[8] In *Okpalobi*, the plaintiffs had sued Louisiana's Governor and Attorney General to challenge a statute that empowered private parties and state courts to act. *See* 244 F.3d at 415.

of laws, have been exercised in conformity to the Constitution." *Powell v. McCormack*, 395 U.S. 486, 506 (1969) (interior quotations omitted).

Even if Applicants do not ultimately prevail under the process that the Twelfth Amendment requires, the relief requested would nonetheless redress their injuries from the unconstitutional Electoral Count Act process in two respects . First, with respect to seeking to follow the Twelfth Amendment procedure over that of 3 U.S.C. § 15, it would redress Rep. Gohmert's procedural injuries enough to proceed under the correct procedure, even if they do not prevail substantively. *FEC v. Akins*, 524 U.S. 11, 25 (1998). Second, with respect to the Arizona Electors, it would redress their unequal-footing injuries to treat all rival elector slates the same, even if the House and not the electors choose the next President. *Heckler v. Mathews,* 465 U.S. 728, 739-40 (1984) ("when the right invoked is that to equal treatment, the appropriate remedy is a *mandate* of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class") (citations and footnotes omitted, emphasis in original). In each respect, Article III does not require that Applicants show that they will prevail in order to show redressability.

The declaratory relief that Applicants request would redress their injuries enough for Article III and in the chart as set forth:

Event/Issue	3 U.S.C. § 15	Twelfth Amendment
One Congress purports to bind future Congresses	Yes	No
Rival slates of electors	Bicameral dispute resolution with no presentment; state executive breaks ties	Vice President counts; if inconclusive, House & Senate elect President & Vice President, respectively
Violates Presentment Clause	Yes	No
Role for state governors	Yes	No
House voters	Each member votes (*e.g.*, CA gets 53 votes, ND gets 1)	Each state delegation votes (*e.g.*, CA and ND get 1 vote)

As is plain from these material—and, here, dispositive—differences between the Twelfth Amendment and 3 U.S.C. § 15, the two provisions cannot be reconciled.

D. The procedural nature of Applicants' injuries lowers the Article III bar for immediacy and redressability.

Given that Applicants suffer a concrete injury to their voting rights, Applicants also can press their procedural injuries under the Electoral Count Act. Indeed, the "history of liberty has largely been the history of observance of procedural safeguards," *McNabb v. United States,* 318 U.S. 332, 347 (1943), and "'procedural rights' are special," *Defenders of Wildlife,* 504 U.S. at 572 n.7; *cf. Carey v. Piphus,* 435 U.S. 247, 266-67 (1978) ("right to procedural due process is 'absolute' [and] does not depend upon the merits of a claimant's substantive assertions"). Following the correct procedure is important, even if it might lead to the same undesired substantive result:

> If a reviewing court agrees that the agency misinterpreted the law, it will set aside the agency's action and remand

> the case -- even though the agency … might later, in the exercise of its lawful discretion, reach the same result for a different reason.

FEC v. Akins, 524 U.S. 11, 25 (1998). As such, Applicants can have standing to ensure that the government respects the required procedures.

For procedural injuries, Article III's redressability and immediacy requirements apply to the *procedural violation* that will (or someday might) injure a concrete interest, rather than to the concrete future injury. *Defenders of Wildlife,* 504 U.S. at 571-72 & n.7. Specifically, the injuries that Applicants assert affect the procedure by which the status of their votes will be considered, which lowers the thresholds for immediacy and redressability under this Court's and the Fifth Circuit's precedents. *Id.*; *Glickman*, 156 F.3d at 613 ("in a procedural rights case, … the plaintiff is not held to the normal standards for [redressability] and immediacy"); *accord Nat'l Treasury Employees Union v. U.S.,* 101 F.3d 1423, 1428-29 (D.C. Cir. 1996). Similarly, a plaintiff with concrete injury can invoke Constitution's structural protections of liberty. *Bond v. United States*, 564 U.S. 211, 222-23 (2011).

Voters from smaller states like Arizona suffer an equal-footing injury and a procedural injury *vis-à-vis* larger states like California because the Electoral Count Act purports to replace the process provided in the Twelfth Amendment. Under the ECA, California has five times the votes that Arizona has, but under the Twelfth Amendment California and Arizona each have one vote. *Compare* 3 U.S.C. § 15 *with* U.S. CONST. amend. XII. That analysis applies in third-party injury cases. *See Clinton v. New York*, 524 U.S. 417, 433 & n.22 (1998) (unequal-footing analysis applies to

indirect-injury plaintiffs); *cf. id.* at 456-57 (that analysis should apply only to equal-protection cases) (Scalia, J., dissenting). Nullification of a procedural protection and any related bargaining power is injury enough, even in third-party cases. *Clinton*, 524 U.S. at 433 & n.22. Thus, Applicants can have standing to enforce the original constitutional bargain for electing presidents, without the statutory gloss that Congress attempted to superimpose on that process in 1887.

E. Courts must assume the plaintiff's merits views to assess a plaintiff's standing to sue.

All of the briefs opposed to Applicants in the district court made the mistake of disputing Applicants on the merits to attack Applicants' standing. If that were how it works, every losing plaintiff would lose for lack of standing.

Put simply, that "confuses standing with the merits." *Initiative & Referendum Institute v. Walker,* 450 F.3d 1082, 1092 (10th Cir. 2006); *Adar v. Smith*, 639 F.3d 146, 150 (5th Cir. 2011) (*en banc*) ("standing does not depend upon ultimate success on the merits"); *accord Lac du Flambeau Band of Lake Superior Chippewa Indians v. Norton,* 422 F.3d 490, 501 (7th Cir. 2005); *In re Columbia Gas Systems Inc.,* 33 F.3d 294, 298 (3d Cir. 1994); *cf. Cantrell v. City of Long Beach,* 241 F.3d 674, 682 (9th Cir. 2001). Instead, federal courts have jurisdiction over a case if "the right of [plaintiffs] to recover under [their] complaint will be sustained if the ... laws of the United States are given one construction," even if the plaintiffs' rights "will be defeated if [those federal laws] are given another." *Wheeldin v. Wheeler,* 373 U.S. 647, 649 (1963) (interior quotations omitted). Accordingly, federal courts should assume *the plaintiff's* merits views in evaluating their jurisdiction to hear the plaintiff's claims: "standing

in no way depends on the merits of the plaintiff's contention that particular conduct is illegal." *Warth v. Seldin,* 422 U.S. 490, 500 (1975); *City of Waukesha v. EPA,* 320 F.3d 228, 235 (D.C. Cir. 2003) ("one must assume the validity of a plaintiff's substantive claim at the standing inquiry"); *Adar v. Smith*, *supra* (*en banc*).

With the idea in mind that this Court should assume Applicants' merits views in evaluating standing, the need to contest this election should become apparent. The Constitution's Elections Clause and Electors Clause give state legislatures the plenary power to set election provisions, and yet—citing the COVID pandemic as either a reason or as an excuse—non-legislative actors in all the contested states systematically eroded ballot-integrity measures like signature or witness requirements and registration or mail-in deadlines to the point where Applicants respectfully submit it is impossible to state who won from the mail-in votes because legal ones have been commingled with illegal ones.

Moreover, although ostensibly a question of state election law, these questions are federal the state election laws apply "not only to elections to state offices, but also to the election of Presidential electors," meaning that state law operates, in part, "by virtue of a direct grant of authority made under Art. II, § 1, cl. 2, of the United States Constitution." *Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70, 76 (2000). Logically, "any state authority to regulate election to [federal] offices could not precede their very creation by the Constitution," meaning that any "such power had to be delegated to, rather than reserved by, the States." *Cook v. Gralike*, 531 U.S. 510, 522 (2001) (internal quotations omitted). "It is no original prerogative of State power

to appoint a representative, a senator, or President for the Union." J. Story, 1 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 627 (3d ed. 1858). For these reasons, any "significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question." *Bush v. Gore*, 531 U.S. 98, 113 (2000) (Rehnquist, C.J., concurring) ("*Bush II*").

F. The district court's standing analysis erred in key respects.

With the foregoing background, Applicants respectfully submit that the district court erred in finding that Applicants lack standing. Although only one plaintiff needs standing, both Rep. Gohmert's claims and the Arizona-Elector claims satisfy Article III's requirements for standing.

1. Rep. Gohmert has standing.

Rep. Gohmert's voting injury also answers BLAG's attempt to classify Rep. Gohmert's injuries under the rubric of legislative standing under *Raines v. Byrd*, 521 U.S. 811, 819-20 (1997). Under the legislative-standing decisions, a legislator or legislative body would only have standing for issues within their power (*e.g.*, information to be gotten by subpoena) or if they had a working majority of the relevant number of houses to enact or block legislation. *Va. House of Delegates v. Bethune-Hill*, 139 S.Ct. 1945, 1955 n.6 (2019) (single house in bicameral legislature); *Coleman v. Miller*, 307 U. S. 433, 446 (1939) (working majority of individual legislators). Here, Rep. Gohmert seeks to vote for President under the Twelfth Amendment rather than to vote for rival slates of electors under the Electoral Count Act's dispute-resolution proceedings. Significantly, the states in question have

impossibly commingled their legal and illegal ballots so that it is impossible to know the result. As indicated, under the Fifth Circuit's voting-rights cases, the denial of the opportunity to vote for a candidate is not a generalized grievance. Moreover, because this is a procedural injury: Does the presiding officer invoke the Twelfth Amendment in which each state delegation gets one vote to vote for President or the Electoral Count Act where—contrary to anything in the election-related parts of the Constitution—the states get representation based on population and state governors break ties between the two houses of Congress? As a procedural-injury plaintiff, Rep. Gohmert does not need to show he would prevail, a key distinction that Applicants raised and the lower courts completely ignored.

2. The Arizona-Elector Applicants have standing.

Like Rep. Gohmert, the Arizona-Elector Applicants suffer *procedural* injury, which the lower courts ignored. Similarly, the lower courts ignored Applicants' claim that rejecting *both* sets of Arizona electors would partially redress the Arizona-Elector Applicants' injury and largely ignored that the ECA—as invoked by the Vice President—would have the effect of ratifying the selection of the rival slate, thus providing traceability to the Vice President. Instead, the district judge argues that the Vice President's invoking the ECA lacks any "coercive effect" on Arizona's certification of electoral votes. *See* App. 11a (citing *Bennett v. Spear*, 520 U.S. 154, 168-69 (1997)). That is simply a *non sequitur*. Unless the Arizona legislature decertifies the rival slate of Arizona electors under the legislature's authority under the Electors Clause, the question now is how the Vice President counts votes in Washington, not what effect that has on certifications back in Arizona.

III. JURISDICTION OTHERWISE EXISTS.

The district court dismissed solely on the basis of Applicants' purported lack of standing. To obtain interim relief, Applicants must not only rebut the district court's holding about standing but also establish all other aspects of federal jurisdiction: "Absent an adequate jurisdictional basis for the Court's consideration of the merits, there is *no likelihood* that the Applicant will prevail on the merits." *Herwald v. Schweiker*, 658 F.2d 359, 363 (5th Cir. 1981) (emphasis added). In this section, Applicants establish federal jurisdiction over the entirety of Applicants' claims.

A. Applicants otherwise raise an Article III case or controversy.

While Article III jurisdiction most often involves standing—*i.e.*, a plaintiff's injury in fact, the defendant's causation or traceability, and the court's power to redress, *Defenders of Wildlife,* 504 U.S. at 561-62—the scope of Article III extends to other overlapping issues:

> "All of the doctrines that cluster about Article III—not only standing but mootness, ripeness, political question, and the like—relate in part, and in different though overlapping ways, to … the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government."

Allen v. Wright, 468 U.S. 737, 750 (1984) (quoting *Vander Jagt v. O'Neill,* 699 F.2d 1166, 1178-79 (D.C. Cir. 1983) (Bork, J., concurring)). As explained in the following eight subsections, all of these Article III gate-keeping tests are met here.

1. The parties do not seek the same relief.

In the district court, the Vice President argued that "Applicants' suit seeks to empower the Vice President to unilaterally and unreviewably decide objections to the

validity of electoral votes" such that "Plaintiffs are … not sufficiently adverse to the legal interests of the Vice President." But he seeks dismissal, whereas Applicants seek declaratory and injunctive relief. Moreover, Applicants express no opinion on whether the Vice President's actions would be *unreviewable*. Instead, Applicants merely seek declaratory and injunctive relief against an unconstitutional statute.

Accordingly, this is not an instance where "the parties desire precisely the same result" so that there is no Article III case or controversy. *GTE Sylvania, Inc. v. Consumers Union of the United States, Inc.,* 445 U.S. 375, 383 (1980) (interior quotations omitted); *Moore v. Charlotte-Mecklenburg Bd. of Educ.,* 402 U.S. 47, 47-48 (1971) (*per curiam*). The Respondent seeks the dismissal of this action, and Applicants ask for a judgment in their favor. Even if one Applicant and the Vice President were "friendly" in the sense of wanting the same thing, the other Applicants remain unaffected, because"[o]nly one plaintiff is needed to establish standing for each form of requested relief." *Pool v. City of Houston*, 978 F.3d 307, 312 n.7 (5th Cir. 2020) (citing *Town of Chester v. Laroe Estates, Inc.*, 137 S.Ct. 1645, 1651 (2017)).

2. <u>The political-question doctrine does not bar this action.</u>

The "political questions doctrine" can bar review of certain issues that the Constitution delegates to one of the other branches, but that bar does not apply to constitutional claims related to voting (other than claims brought under the Guaranty Clause of Article IV, § 4):

> We hold that this challenge to an apportionment presents no nonjusticiable "political question." The mere fact that the suit seeks protection of a political right does not mean

> it presents a political question. Such an objection "is little more than a play upon words."

Baker, 369 U.S. at 209. As in *Baker*, litigation over political rights is not the same as a political question.

3. <u>This action is not moot.</u>

"A case becomes moot only when it is *impossible* for a court to grant any effectual relief whatever to the prevailing party." *Knox v. SEIU, Local 1000*, 567 U.S. 298, 307 (2012) (internal quotations omitted, emphasis added). The joint session will not meet until January 6, and Congress could extend its statutory deadlines, as it did in connection with the only other similarly contested election. Ch. 37, 19 Stat. 227 (1877). Indeed, even without a new statute, the January 6 joint session could be extended or continued further into January. It remains possible for this Court to enter a judgment that addresses the constitutionality of the Electoral Count Act and its application to the 2020 election.[9]

4. <u>This action is ripe.</u>

It is undisputed that rival slates of electors have been submitted for an outcome-determinative number of electoral votes. It is indisputable that at least one Representative and one Senator will, or are likely to, object to the slates from these

[9] Indeed, the nearest *constitutional* deadline is January 20, U.S. CONST. amend. XX, and to establish mootness based on a Biden vote on January 6, the Vice President would need to establish that such a vote could not be reconsidered or vacated prior to the swearing in of the next president.

contested states.[10] The timing of future events provides no barrier to justiciability: "Where the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect." *Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp.,* 559 U.S. 662, 670 n.2 (2010). Indeed, even without objecting Representatives and Senators, the presence of an outcome-determinative number of rival slates of electors guarantees the need for the joint session to engage in some form of dispute-resolution process, which squarely presents the question of whether that process lies under the Electoral Count Act that Applicants challenge.

B. Prudential limits on Article III jurisdiction do not apply.

In addition to Article III's jurisdictional limits, the judiciary has adopted prudential limits on standing that bar judicial review even when the plaintiff meets Article III's minimum criteria. *See*, *e.g.*, *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.,* 454 U.S. 464, 475 (1982) (zone-of-interests test); *Secretary of State of Md. v. Joseph H. Munson Co.,* 467 U.S. 947, 955 (1984) (litigants must raise their own rights); *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 12 (2004) (litigants cannot sue over generalized grievances more appropriately addressed in the representative branches). "Unlike constitutional standing,

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[10] The Senate.gov press release and the related news reports about objections next week when Congress convenes in joint session are judicially noticeable. *Concerned Citizens for Equal. v. McDonald*, 863 F. Supp. 393, 394 (E.D. Tex. 1994) (newspapers); *Kitty Hawk Aircargo, Inc. v. Chao*, 418 F.3d 453, 457 (5th Cir. 2005) (government website).

prudential standing arguments may be waived." *Bd. of Miss. Levee Comm'rs v. EPA*, 674 F.3d 409, 417-18 (5th Cir. 2012); *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014); *June Med. Servs. L.L.C. v. Russo*, 140 S.Ct. 2103, 2117 (2020) ("the rule that a party cannot ordinarily rest his claim to relief on the legal rights or interests of third parties … does not involve the Constitution's case-or-controversy requirement … [a]nd so … it can be forfeited or waived") (interior quotations and citations omitted). The Vice President raised only constitutional arguments against Applicants' standing, and he thus waived all non-jurisdictional arguments not raised in his opposition below.

Citing a public statement by one of the Arizona Elector Applicants, the Vice President and his *amici* argued or implied that that this is a "friendly suit" that the district court should dismiss. Any bar against friendly suits is prudential, not *jurisdictional*. *Rescue Army v. Municipal Court of City of Los Angeles*, 331 U.S. 549, 568-69 (1947); *New York City Transit Authority v. Beazer,* 440 U.S. 568, 583 (1979). As indicated in Section III.A.1, *supra*, this action is not "friendly" in the Article III sense. To the extent that the "friendly" remark refers to personal relationships, it would be irrelevant to this official-capacity action: "while friendship is a ground for recusal of a Justice where the personal fortune or the personal freedom of the friend is at issue, it has traditionally not been a ground for recusal where official action is at issue, no matter how important the *official action* was to the ambitions or the reputation of the Government officer." *Cheney v. United States Dist. Court*, 541 U.S.

913, 916 (2004) (Scalia, J., in chambers) (emphasis in original). But Applicants seek relief that Respondent opposes, which is not "friendly" in the prudential sense.

C. This action is otherwise within federal courts' jurisdiction.

In addition to satisfying Article III, Applicants' claims also fall squarely within federal jurisdiction.

1. The Speech or Debate Clause does not insulate the Vice President.

The Speech or Debate Clause provides that "Senators and Representatives" "shall not be questioned in any other Place" "for any Speech or Debate in either House":

> The Senators and Representatives … for any speech or debate in either House, … shall not be questioned in any other place.

U.S. CONST. art I, § 6, cl. 1. "Not everything a Member of Congress may regularly do is a legislative act within the protection of the Speech or Debate Clause," *Minton v. St. Bernard Par. Sch. Bd.*, 803 F.2d 129, 134-35 (5th Cir. 1986) (interior quotations omitted), because the "clause has been interpreted to protect only purely legislative activities," *Williams v. Brooks*, 945 F.2d 1322, 1326 (5th Cir. 1991) (internal quotation marks omitted), which renders it inapposite here. Where it applies, the Clause poses a jurisdictional bar not only to a court reaching the merits but also to putting the defendant to the burden of putting up a defense. *Powell*, 395 U.S. at 502-03. But "Legislative immunity does not, of course, bar all judicial review of legislative acts," *Powell*, 395 U.S. at 503, and the Speech or Debate Clause does not even apply—by its

terms—to the Vice President in his role as President of the Senate or to the Joint Session on January 6.

First, the Clause does not protect the Vice President acting in his role as President of the Senate. *See* U.S. CONST. art I, § 6, cl. 1; *cf. Common Cause v. Biden*, 748 F.3d 1280, 1284 (D.C. Cir. 2014) (declining to decide whether or not the Speech or Debate Clause protects the Vice President). At best for the Vice President, the question is an open one, but Applicants respectfully submit that the Constitution's plain language should govern: The Clause does not apply to the Vice President. Instead, as here, where an unprotected officer of the House or Senate implements an unconstitutional action of the House or Senate, the judiciary has the power to enjoin the officer, even if it would lack the power to enjoin the House, the Senate, or their Members. *Powell*, 395 U.S. at 505. In short, the Speech or Debate Clause does not protect Vice President Pence at all.

Second, even if the Speech or Debate Clause did protect the Vice President acting as President of the Senate for legislative activity in the Senate, the Joint Session on January 6 is no such action. *See* U.S. CONST. art I, § 6, cl. 1. This is an election, and the Vice President has no more authority to disenfranchise voters via unconstitutional means as any other person.

2. Sovereign immunity does not bar this action.

The Respondent is Vice President Pence named as a defendant in his official capacity as the Vice President of the United States. With respect to injunctive or declaratory relief, it is a historical fact that at the time that the states ratified the federal Constitution, the equitable, judge-made, common-law doctrine that allows use

of the sovereign's courts in the name of the sovereign to order the sovereign's officers to account for their unlawful conduct (*i.e.*, the rule of law) was as least as firmly established and as much a part of the legal system as the judge-made, common-law doctrine of federal sovereign immunity. Louis L. Jaffee, *The Right to Judicial Review I,* 71 HARV. L. REV. 401, 433 (1958); A.B.A. Section of Admin. Law & Regulatory Practice, *A Blackletter Statement of Federal Administrative Law*, 54 ADMIN. L. REV. 1, 46 (2002) (it is blackletter law that "suits against government officers seeking prospective equitable relief are not barred by the doctrine of sovereign immunity").

In determining whether the doctrine of *Ex parte Young* avoids immunity, a court need only conduct a "straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md. Inc. v. Pub. Serv. Comm'n of Maryland*, 535 U.S. 635, 645 (2002) (citations omitted). That is enough to survive a motion to dismiss on jurisdictional grounds: "The inquiry into whether suit lies under *Ex parte Young* does not include an analysis of the merits of the claim[.]" *Id.* at 638. Sovereign immunity poses no bar to jurisdiction here.[11]

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[11] Indeed, the sovereign immunity afforded a Member of Congress is co-extensive with the protections afforded by the Speech or Debate Clause. In all other respects, Members of Congress are bound by the law to the same extent as other persons. *Davis v. Passman*, 442 U.S. 228, 246 (1979) ("although a suit against a Congressman for putatively unconstitutional actions taken in the course of his official conduct does raise special concerns counseling hesitation, we hold that these concerns are coextensive with the protections afforded by the Speech or Debate Clause").

The prayer for injunctive relief—that the Vice President be restrained from enforcing 3 U.S.C. § 5 and § 15 in contravention of the Twelfth Amendment of the Constitution—to instead follow the Twelfth Amendment, clearly satisfies the "straightforward inquiry." Applicants request declaratory relief to prevent unconstitutional action under 3 U.S.C. § 5 and § 15 and to give the power back to the states to vote for the President in accordance with the Twelfth Amendment. Therefore, the Respondent should be enjoined from proceeding to certify or count dueling electoral votes under the unconstitutional dispute resolution procedures in 3 U.S.C. § 5 and § 15, and instead to follow the constitutional process as set forth in the Twelfth Amendment of the Constitution.

Amicus BLAG argued in district court that Applicants named the wrong defendant and instead should have named the House and Senate as the parties that injured Applicants. For the reasons set forth above, Applicants respectfully submit that they have properly invoked an *Ex parte Young* officer suit against the Vice President for the unconstitutional application of the Electoral Count Act. To the extent that this Court disagrees, however, denial of relief would be inappropriate. Instead, even on appeal, this Court could allow Applicants to amend their complaint to join alternate officers such as the House and Senate parliamentarians or to name the United States as a defendant. *See Mullaney v. Anderson,* 342 U.S. 415, 416-17 (1952). Relying by analogy on FED. R. CIV. P. 21, *Mullaney* took the admittedly rare step of allowing post-*certiorari* intervention for two primary reasons: (1) earlier joinder would not have changed the course of the litigation (*i.e.,* late joinder did not

prejudice the other party), and (2) requiring the new parties to start over in district court would constitute a "needless waste" of resources:

> To grant the motion merely puts the principal, the real party in interest, in the position of his avowed agent. The addition of these two parties plaintiff can in no wise embarrass the defendant. *Nor would their earlier joinder have in any way affected the course of the litigation. To dismiss the present petition and require the new plaintiffs to start over in the District Court would entail needless waste and runs counter to effective judicial administration*—the more so since, with the silent concurrence of the defendant, the original plaintiffs were deemed proper parties below. Rule 21 will rarely come into play at this stage of a litigation. We grant the motion in view of the special circumstances before us.

Id. (emphasis added). Applicants respectfully submit that adding the United States as a defendant would be justified because this case presents a suitable "special circumstance" for allowing appellate joinder of parties.

Two additional reasons would justify this Court's allowing an amendment to name the United States as a defendant. First, the United States has waived sovereign immunity for suits seeking prospective injunctive or declaratory relief:

> An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States[.]

5 U.S.C. § 702. Second, as Applicants argued below, "[d]efective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts." 28 U.S.C. § 1653. If the Court finds the pleadings inadequate as the Vice President Pence, Applicants could amend their pleadings to include the United States as a defendant. *See also* FED. R. CIV. P. 15(a)(1)(B). In short, this Court either should disregard the non-problem that *amicus* BLAG cited or should allow Applicants to cure it.

3. <u>This case presents a federal question, and abstention principles do not apply.</u>

Article III, § 2, of the Federal Constitution provides that, "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority[.]" It is clear that the cause of action is one which "arises under" the Federal Constitution. *Baker*, 369 U.S. at 199. In *Baker*, the Applicants alleged that, by means of a 1901 Tennessee statute that arbitrarily and capriciously apportioned the seats in the General Assembly among the State's 95 counties and failed to reapportion them subsequently notwithstanding substantial growth and redistribution of the State's population, they suffered a "debasement of their votes" and were thereby denied the equal protection of the laws guaranteed them by the Fourteenth Amendment. They sought, *inter alia*, a declaratory judgment that the 1901 statute is unconstitutional and an injunction restraining certain state officers from conducting any further elections under it. *Id*. The *Baker* line of cases recognizes that "that voters who allege facts showing disadvantage to themselves as individuals have standing to sue."

The federal and constitutional nature of these controversies deprives abstention doctrines of any relevance whatsoever. First, state laws for the appointment of presidential electors are federalized by the operation of The Electoral Count Act of 1887. *McPherson v. Blacker*, 146 U.S. 1, 27 (1892); *Bush II*, 531 U.S. at 113 (Rehnquist, C.J., concurring) ("A significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question."). Second, "[i]t is no original prerogative of State power to appoint a representative, a senator, or President for the Union." J. Story, 1 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 627 (3d ed. 1858). Logically, "any state authority to regulate election to [federal] offices could not precede their very creation by the Constitution," meaning that any "such power had to be delegated to, rather than reserved by, the States." *Gralike*, 531 U.S. at 522 (internal quotations omitted).

A more quintessentially federal question than which slate of electors will be counted under the Twelfth Amendment and 3 U.S.C. § 15 to elect the President and Vice President can scarcely be imagined.

4. Applicants are entitled to an expedited declaratory judgment.

Under Rule 57, an expedited declaratory judgment is appropriate where, as here, it would "terminate the controversy" based on undisputed or relatively undisputed facts. *See* FED. R. CIV. P. 57, Advisory Committee Notes. The facts relevant to this controversy are not in dispute, namely: (1) there are competing slates of electors for Arizona and the other Contested States that have been or will be submitted to the Electoral College; (2) the Contested States collectively have

sufficient (contested) electoral votes to determine the winner of the 2020 General Election—President Trump or former Vice President Biden; (3) legislators in Arizona and other Contested States have contested the certification of their State's electoral votes by State executives, due to substantial evidence of voter fraud that is the subject of ongoing litigation and investigations; and (4) Senators and Members of the House of Representatives have expressed their intent to challenge the electors and electoral votes certified by State executives in the Contested States.

As a result, Respondent Vice President Pence, in his capacity as President of the Senate and as the Presiding Officer for the January 6, 2021 Joint Session of Congress will be have to decide between (a) following the requirements of the Twelfth Amendment, and exercising his exclusive authority and sole discretion in deciding which slate of electors and electoral votes to count for Arizona, or neither, or (b) following the distinct and inconsistent procedures set forth in Section 15 of the Electoral Count Act. The expedited declaratory judgment requested, namely, declaring that Section 5 and 15 of the Electoral Count Act are unconstitutional to the extent they conflict with the Twelfth Amendment and the Electors Clause, and that Respondent Pence may not follow these unconstitutional procedures, will terminate the controversy. Further, as discussed below, the requested declaratory judgment would also establish that Applicants meet all of the requirements for any additional injunctive relief required to effectuate the declaratory judgment by enjoining Respondent Pence from violating the Twelfth Amendment.

With the advent of the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202 ("DJA"), equitable relief in the form of a declaration of the law is even more readily available that traditional equitable relief in the form of injunctions. The federal-question statute, 28 U.S.C. § 1331, provides subject-matter jurisdiction for nonstatutory review of federal agency action. *Califano v. Sanders,* 430 U.S. 99, 105 (1977) (1976 amendments to § 1331 removed the amount-in-controversy threshold for "any [federal-question] action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity") (*quoting* Pub. L. 94-574, 90 Stat. 2721 (1976)), and 28 U.S.C. § 2201(a) authorizes declaratory relief "whether or not further relief … could be sought." *Accord Duke Power Co. v. Carolina Envtl. Study Group, Inc.,* 438 U.S. 59, 70-71 n.15 (1978); *Steffel v. Thompson,* 415 U.S. 452, 471-72 (1974). Since 1976, § 1331 has authorized DJA actions against federal officers, regardless of the amount in controversy. *Sanders,* 430 U.S. at 105 (quoted *supra*). Declaratory relief makes it even easier for parties to obtain pre-enforcement review.[12]

Significantly, the availability of declaratory relief against federal officers predates the Administrative Procedure Act, 5 U.S.C. §§ 551-706 ("APA"), *see* WILLIAM

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[12] In 1980, Congress amended § 1331 to its current form, PUB. L. NO. 96-486, § 2(a), 94 Stat. 2369 (1980), without repealing the 1976 amendment relied on by *Sanders* and its progeny. H.R. REP. NO. 96-1461, at 3-4, *reprinted in* 1980 U.S.C.C.A.N. 5063, 5065; *Bowen v. Massachusetts,* 487 U.S. 879, 891 n.16 (1988); *United States v. Mitchell,* 463 U.S. 206, 227 & n.32 (1983); *cf. Morton v. Mancari,* 417 U.S. 535, 550 (1974) (repeal by implication is disfavored). Indeed, "'repeals by implication are disfavored,' and this canon of construction applies with particular force when the asserted repealer would remove a remedy otherwise available." *Schlesinger v. Councilman,* 420 U.S. 738, 752 (1975).

J. HUGHES, FEDERAL PRACTICE § 25387 (1940 & Supp. 1945); EDWIN BORCHARD, DECLARATORY JUDGMENTS, 787-88, 909-10 (1941), and the APA did not displace such relief, either as enacted in 1946 or as amended in 1976. *See* 5 U.S.C. § 559; *Darby v. Cisneros,* 509 U.S. 137, 153 (1993) (rejecting argument that 1976 APA amendments expanded APA's preclusion of review). Thus, even if APA § 10(c) precludes declaratory relief *under the APA,* 5 U.S.C. § 704, suitable plaintiffs nonetheless can obtain that relief *under the DJA*.

The Fifth Circuit has identified a nonexclusive list of seven factors that a district court must consider when exercising its discretion to hear, stay, or dismiss a case brought under the DJA.

> (1) whether there is a pending state action in which all of the matters in controversy may be fully litigated; (2) whether the plaintiff filed suit in anticipation of a lawsuit filed by the defendant; (3) whether the plaintiff engaged in forum shopping in bringing the suit; (4) whether possible inequities in allowing the declaratory plaintiff to gain precedence in time or to change forums exist; (5) whether the federal court is a convenient forum for the parties and witnesses; (6) whether retaining the lawsuit would serve the purposes of judicial economy; and (7) whether the federal court is being called on to construe a state judicial decree involving the same parties and entered by the court before whom the parallel state suit between the same parties is pending.

Sherwin-Williams Co. v. Holmes Cty., 343 F.3d 383, 388 (5th Cir. 2003); *see also Frye v. Anadarko Petroleum Corp.*, 953 F.3d 285, 293-94 (5th Cir. 2019) (requiring actual controversy, the court's authority for declaratory relief, and the court's discretion).

Applicants met the Fifth Circuit's *Sherwin-Williams* factors for declaratory relief:

- **Pending state action**. There is no pending state action.
- **Anticipatory suit**. The declaratory-judgment Applicants did not race the Respondent to the courthouse; Respondent did not plan to sue Applicants.
- **Forum shopping**. Rep. Gohmert is the lead plaintiff and has brought suit in his home district as Title 28 allows federal plaintiffs to do. Applicant Arizona Electors have no other ties to this forum, but their claims do not materially change the claims.
- **Possible inequities on timing and forum**. Rep. Gohmert is the lead plaintiff and has brought suit in his home district as Title 28 allows federal plaintiffs to do.
- **Federal court's convenience**. Given that Applicants have sued the Vice President of the United States on a question of federal law, a state forum would not be an option.
- **Judicial economy**. There are no concerns about judicial economy because this is the only action between the parties.
- **Federalism concerns from parallel actions**. There are no parallel state-court actions for Rep. Gohmert, and—although the Arizona Elector Applicants have engaged in state-court litigation—the issues here are purely federal.

The Fifth Circuit's primary concern with declaratory-judgment actions is whether, under that the standard of *Brillhart v. Excess Ins. Co. of Am.*, 316 U.S. 491 (1942),

"the questions in controversy between the parties to the federal suit … can be better settled in the proceeding pending in the state court." *Sherwin-Williams*, 343 F.3d at 389 (quoting *Brillhart v. Excess Ins. Co. of Am.*, 316 U.S. at 494). As indicated, this is an entirely federal action that does not raise that concern.

Under the parallel *Anadarko Petroleum* standards, declaratory relief is also appropriate under the exigent circumstances here:

- **An actual controversy is imminent**. The concern with that an actual controversy exists is easily met by the exigent circumstances of a contested election potentially being decided under an unconstitutional process as early as January 6. *See* Section III.A.4, *supra*. That does not trigger the Fifth Circuit's concern that the dispute is "not sufficiently definite and immediate to be justiciable." *Anadarko Petro. Corp.*, 953 F.3d at 293.
- **Jurisdiction**. This Court has jurisdiction for this dispute, *see* Section III, *supra*, and none of the concerns about superior state-court jurisdiction or burdens of factual proof for diversity jurisdiction enter into the analysis. *See id.*
- **Discretion**. Applicants respectfully submit that this Court must address the constitutional concerns presented here: "The power to interpret the Constitution in a case or controversy remains in the Judiciary." *City of Boerne v. Flores*, 521 U.S. 507, 524 (1997).

Provided that this Court finds federal jurisdiction to exist, this Court should not hesitate to declare—for the benefit of the Vice President and Congress—what the Constitution requires.

IV. THE *WINTER* FACTORS FAVOR ENTRY OF INTERIM RELIEF.

Although the Vice President focused on jurisdiction in the district Court, this Court may elect to consider the *Winter* factors on the equity of granting relief.

A. Applicants have a substantial likelihood of success.

The first and most important *Winter* factor is the likelihood of movants' prevailing. *Winter,* 555 U.S. at 20. Applicants are likely to prevail because this Court has jurisdiction for this action, *see* Sections II-III, *supra*, and because the Electoral Count Act is blatantly unconstitutional.

1. Unconstitutional laws are nullities.

At the outset, if the Electoral Count Act violates the Constitution, the Electoral Count Act is a nullity:

> [I]t is the province and duty of the judicial department to determine in cases regularly brought before them, whether the powers of any branch of the government, and even those of the legislature in the enactment of laws, have been exercised in conformity to the Constitution; and if they have not, to treat their acts as *null and void*.

Powell, 395 U.S. at 506 (interior quotations omitted, emphasis added). "Due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds." *United States v. Morrison*, 529 U.S. 598, 607 (2000) (finding Congress exceeded its authority under the Commerce Clause in regulating an area of

the law left to the States. "Constitutional deprivations may not be justified by some remote administrative benefit to the State." *Harman v. Forssenius*, 380 U.S. 528, 542-43 (1965). Put simply, "that which is not supreme must yield to that which is supreme." *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 448 (1827). Although *Brown* arose in a federal-versus-state context, the same simple truth applies in a constitution-versus-statute context: the supreme enactment controls the lesser enactment.

2. The Electoral Count Act violates the Electors Clause and the Twelfth Amendment.

The requested expedited summary proceeding granting declaratory judgment will address the merits of Applicants' claims, which raise only legal issues as to whether the provisions of Sections 5 and 15 of the Electoral Count Act addressing the counting of electoral votes from competing slates of electors for a given state are in conflict with the Twelfth Amendment and the Electors Clause and are therefore unconstitutional. In other words, if the Court grants the requested relief, that holding and relief will be granted because the Court has found that these provisions of the Electoral Count Act are unconstitutional and that Applicants have in fact succeeded on the merits.

By purporting to make States' appointment of Presidential electors conclusive, 3 U.S.C. § 5, the Electoral Count Act takes away the authority given to the Vice-President under the Twelfth Amendment. Sim3 U.S.C. § 15 in relevant part states that both Houses, referencing the House of Representatives and the Senate, may concurrently reject certified votes, and further that if there is a disagreement, then,

in that case, the votes of the electors who have been certified by the Executive of the State shall be determinative.

The Constitution is unambiguously clear that: "The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted" "… and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives [who] shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote." Whereas 3 U.S.C. § 15 and the incorporated referenced to 3 U.S.C. § 5 delegate the authority to the Executive of the State in the event of disagreement, in direct conflict with the Twelfth Amendment and directly taking the opportunity of Presidential Electors' competing slates from being counted.[13]

3. The Electoral Count Act violates the Constitution's structural protections of liberty.

The Electoral Count Act exceeds the power of Congress to enact because "one legislature may not bind the legislative authority of its successors," *United States v.*

[13] Similarly, 3 U.S.C. § 6 is inconsistent with the Electors Clause—which provides that electors "shall sign and certify, and transmit sealed to the seat of the government of the Unit-ed States" the results of their vote, U.S. CONST. art. II, § 1, cl. 2-3—because § 6 relies on state executives to forward the results of the electors' vote to the Archivist for delivery to Congress. 3 U.S.C. § 6. Although the means of delivery are arguably inconsequential, the Constitution vests state executives with no role whatsoever in the process of electing a President. A state executive lends no official imprimatur to a given slate of electors under the Constitution.

Winstar Corp., 518 U.S. 839, 872 (1996), which is a foundational and "centuries-old concept," *id.*, that traces to Blackstone's maxim that "Acts of parliament derogatory from the power of subsequent parliaments bind not." *Id.* (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *90). "There is no constitutionally prescribed method by which one Congress may require a future Congress to interpret or discharge a constitutional responsibility in any particular way." Laurence H. Tribe, *Erog v. Hsub and Its Disguises: Freeing* Bush v. Gore *from Its Hall of Mirrors*, 115 HARV. L. REV. 170, 267 n.388 (2001). Thus, the Electoral Count Act is a nullity because it exceeded the power of Congress to enact.

The ECA also violates the Presentment Clause by purporting to create a type of bicameral order, resolution, or vote that is not presented to the President:

> *Every Order, Resolution, or Vote*, to Which the Concurrence of the Senate and House of Representatives may be necessary (*except on a question of Adjournment*) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

U.S. CONST. art. I, § 7, cl. 3 (emphasis added). The House and Senate cannot resolve the issues that the Electoral Count Act asks them to resolve without either a supermajority in both houses or presentment.

The Electoral Count Act similarly improperly restricts the authority of the House of Representatives and the Senate to control their internal discretion and procedures pursuant to Article I, Section 5 which provides that "[e]ach House may determine the Rules of its Proceedings …" U.S. CONST. art. I, § 5, cl. 2. The Electoral

Count Act also delegates tie-breaking authority to State executives (who have no agency under the Electors Clause or election amendments) when a State presents competing slates that Congress cannot resolve. As such, the Electoral Count Act also violates the non-delegation doctrine, the separation-of-powers and anti-entrenchment doctrines. *See generally* Chris Land & David Schultz, *On the Unenforceability of the Electoral Count Act*, 13 Rutgers J.L. & Pub. Policy 340, 364-377 (2016).

As indicated, Applicants have standing to press these structural protections of liberty because Applicants suffer concrete injury in the debasement of their votes.

4. The Necessary and Proper Clause does not save the Electoral Count Act.

In the district court, *amicus* BLAG argues that the Necessary and Proper Clause authorized Congress to enact the Electoral Count Act.[14] But the Twelfth Amendment is not one of the "foregoing powers" under the Clause, *id.*, and the Twelfth Amendment does not expressly vest any power in the Congress to count votes or to vote, unless and until no candidate achieves a majority of electoral votes. *See* U.S. CONST. amend. XII. To the extent that the Constitution does vest a dispute-resolution power for the vote-counting function, that power could just as easily be assigned to the Vice President as an "officer thereof" as to Congress itself under the

[14] The Clause provides that "Congress shall have power … [t]o make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof." U.S. CONST. art. I, § 8, cl. 18.

express terms of the Necessary and Proper Clause. U.S. CONST. art. I, § 8, cl. 18. Indeed, Vice Presidents Adams and Jefferson undertook such actions in the 1796 and 1800 elections, Bruce Ackerman & David Fontana, *Thomas Jefferson Counts Himself into the Presidency*, 90 VA. L. REV. 551, 585, 571-90 (2004), and the United States adopted the Twelfth Amendment shortly thereafter, without trimming the Vice President's responsibilities.

Indeed, as Justice Story explained, neither the original Constitution nor the Twelfth Amendment included a dispute-resolution provision:

> In the original plan, as well as in the amendment, no provision is made for the discussion or decision of any questions, which may arise, as to the regularity and authenticity of the returns of the electoral votes .... It seems to have been taken for granted, that no question could ever arise on the subject; and that nothing more was necessary, than to open the certificates, which were produced, in the presence of both houses, and to count the names and numbers, as returned.

J. Story, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1464 (Boston, Hilliard, Gray, & Co. 1833). Whatever the Vice President's dispute-resolution powers, the House's theory of dispute resolution by the House and Senate is constitutionally impossible.

Constitutional law recognizes two distinct types of unconstitutionality: "laws for the accomplishment of objects not entrusted to the government" and those "which are prohibited by the constitution." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819). Put another way, "a federal statute, in addition to *being authorized* by Art. I, § 8, must also '*not [be] prohibited*' by the Constitution." *United States v.*

Comstock, 560 U.S. 126, 135 (2010) (*quoting McCulloch*, 17 U.S. (4 Wheat.) at 421) (alterations in *Comstock*, emphasis added). Clearly, "the Constitution does not conflict with itself by conferring, upon the one hand, a … power, and taking the same power away, on the other, by the limitations of the due process clause." *Brushaber v. Union Pac. R. Co.*, 240 U.S. 1, 24 (1916). As applied here, that means that the Necessary and Proper Clause did not authorize the joint session or the two houses, separately, to violate the Presentment Clause. Under the Presentment Clause, all votes, resolutions, and orders—except adjournments—require presentment.

The fact that Congress steadfastly believed in bicameral resolutions steadfastly until this Court resolved the issue, almost 200 years into the Constitution, in *INS v. Chadha,* 462 U.S. 919, 946 (1983), which goes a long way to explaining how the Electoral Count Act survived 133 years:

> A close reading of *Chadha*, unavailable of course to the participants in the Electoral Count Act debates, fortifies the basic argument made by Senator George and casts further doubt upon the constitutionality of the Electoral Count Act. The *Chadha* Court carefully explained why the "one-House veto" provision of the Immigration and Nationality Act was subject to the requirements of bicameralism and presentment in Article I. The Court began by noting that whether actions taken by either House are, in law and fact, an exercise of legislative power depends not on their form but upon whether they contain matter which is properly to be regarded as legislative in its character and effect. The Court then described the one-House veto provision in that case as one that had the purpose and effect of altering the legal rights, duties and relations of persons, including the Attorney General, Executive Branch officials and Chadha, all outside the legislative branch[.]

Vasan Kesavan, *Is the Electoral Count Act Unconstitutional*?, 80 N.C.L. REV. 1653, 1791 (2002). A second factor is that the last election where the Electoral Count Act would have mattered was in 1876 (*i.e.*, more than a decade *prior* to its enactment). It should be no surprise that Applicants bring this suit now, a fortnight after an electoral vote in which the Electoral Count Act matters for the first time. These two factors—the advent of *Chadha* in 1983 and the novelty of this pandemic election in 2020—readily answer balancing the equities: " BLAG's incredulity about "why now?"

5. <u>The action is not barred by laches.</u>

Amicus BLAG cited laches—namely, an "unreasonable, prejudicial delay in commencing suit," *Petrella v. MGM*, 572 U.S. 663, 667 (2014)—as a basis to dismiss this action or deny relief. Because Applicants did not have a ripe claim until December 14, 2020 and filed this action on December 27, 2020, laches presents no question of unreasonable delay. Applicants' timing is measured from their claims' arising, not from the enactment of the Electoral Count Act in 1887:

> It is axiomatic that a claim that has not yet accrued is not ripe for adjudication.

Sid Richardson Carbon & Gasoline Co. v. Interenergy Res., 99 F.3d 746, 756 (5th Cir. 1996). For that reason, Justice Blackmun aptly called laches "precisely the opposite argument" from ripeness. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 915 n.16 (1990) (Blackmun, J., dissenting); *accord What-A-Burger of Va., Inc. v. Whataburger, Inc.*, 357 F.3d 441, 449-50 (4th Cir. 2004) ("'One cannot be guilty of laches until his right ripens into one entitled to protection. For only then can his torpor be deemed inexcusable'") (quoting 5 J. Thomas McCarthy, MCCARTHY ON TRADEMARKS AND

UNFAIR COMPETITION § 31: 19 (4th ed. 2003); *Gasser Chair Co. v. Infanti Chair Mfg. Corp.*, 60 F.3d 770, 777 (Fed. Cir. 1995); *Profitness Physical Therapy Ctr. v. Pro-Fit Orthopedic & Sports Physical Therapy P.C.*, 314 F.3d 62, 70 (2d Cir. 2002). Because Applicants could not have brought this action before the electoral college vote on December 14, 2020., this Court should reject any suggestion of unreasonable delay.

Even if Applicants had delayed bringing suit, the Respondent still would need to show *prejudice* as a prerequisite to obtaining dismissal for laches. *Envtl. Def. Fund, Inc. v. Alexander*, 614 F.2d 474, 479 (5th Cir. 1980). The test for prejudice requires balancing the equities: "Measuring prejudice entails balancing equities." *Id.* The Vice Presidency has not acquired a vested right to violate the Constitution just because 133 years have passed since Congress enacted the Electoral Count Act in 1887. The passage of time does not bar fresh challenges to the application of unconstitutional or *ultra vires* laws or regulations. *Texas v. United States*, 749 F.2d 1144, 1146 (5th Cir. 1985). "Arbitrary [governmental] action becomes no less so by simple dint of repetition." *Judulang v. Holder*, 565 U.S. 42, 61 (2011). In truth, however, the Electoral Count Act has laid dormant since its enactment in 1887, and the only prior elections in which it might have mattered occurred prior to 1887 (*e.g.*, 1800 or 1876). The Respondent cannot claim "prejudice" from a suit that challenges the Electoral Count Act in the first election since that statute's enactment in 1887 where the statute could unconstitutionally affect the outcome.

B. Applicants will suffer irreparable injury.

Applicants' votes will be counted or not counted at the January 6 joint session. The failure to count a lawful vote is an irreparable injury. *See*, *e.g.*, *Obama for Am. v.*

Husted, 697 F.3d 423, 436 (6th Cir. 2012) ("A restriction on the fundamental right to vote … constitutes irreparable injury."). Indeed, the deprivation of any fundamental right constitutes irreparable injury, *Murphree v. Winter*, 589 F. Supp. 374, 381 (S.D. Miss. 1984) (citing *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976)), and voting rights are "a fundamental political right, because [they are] preservative of all rights." *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964) (internal quotations omitted). Moreover, if the counting of votes proceeds under the Electoral Count Act, Applicants' votes will be adjudicated via an unconstitutional procedure, which also qualifies as irreparable harm: there will be no opportunity to revisit the issue. As with standing for procedural injuries, irreparable harm from a procedural violation requires an underlying concrete injury or due-process interest, which Applicants have and which will be irretrievably lost if the Vice President proceeds under the Electoral Count Act. Under the circumstances, Applicants' procedural harms also are irreparable. *Commissioner v. Shapiro*, 424 U.S. 614, 629-30 (1976).

C. Applicants need not demonstrate irreparable harm for declaratory relief.

"The traditional prerequisite for the granting of injunctive relief, demonstration of irreparable injury, is not a prerequisite to the granting of a declaratory relief" because the Declaratory Judgments Act "provides an adequate remedy and at law, and hence a showing of irreparable injury is unnecessary." 10 FED. PROC., L. ED. § 23:4 (citing 28 U.S.C. § 2201 and *Steffel v. Thompson*, 415 U.S. 452 (1974)). "The existence of another adequate remedy does not preclude a declaratory judgment that is otherwise appropriate." FED. R. CIV. P. 57; *accord*

Marine Chance Shipping v. Sebastian, 143 F.3d 216, 218-19 (5th Cir. 1998); *Tierney v. Schweiker,* 718 F.2d 449, 457 (D.C. Cir. 1983); 28 U.S.C. § 2201. Similarly, a prior formal or informal demand to the defendant is not a prerequisite to seeking declaratory relief, *Rowan Cos. v. Griffin*, 876 F.2d 26, 28 (5th Cir. 1989), and showing "irreparable injury… is not necessary for the issuance of a declaratory judgment." *Tierney,* 718 F.2d at 457 (*citing Steffel,* 415 U.S. at 471-72). Thus, even if not entitled to injunctive relief, Applicants still would be entitled to declaratory relief.

D. The balance of equities favors Applicants.

"Traditional equitable principles requiring the balancing of public and private interests control the grant of declaratory or injunctive relief in the federal courts." *Webster v. Doe*, 486 U.S. 592, 604-05 (1988). The scope of requested injunctive relief—directing Respondent Pence to carry out his duties as President of the Senate and as Presiding Officer for the January 6, 2021 Joint Session of Congress in compliance with the U.S. Constitution—is drawn as narrowly as possible and does not require Respondent Pence to take any affirmative action apart from those he is authorized to take under the Twelfth Amendment. Moreover, it is difficult to imagine how the relief requested, which *expands rather than restricts* Respondent's discretion and authority, by eliminating facially unconstitutional restrictions could cause any hardship.

E. The public interest favors Applicants.

The last stay criterion is the public interest. Where the parties dispute the lawfulness of government actions, the public interest collapses into the merits: "It is always in the public interest to prevent the violation of a party's constitutional rights." *Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 458 n.9 (5th Cir. 2014)

(alterations omitted); *ACLU v. Ashcroft*, 322 F.3d 240, 247 (3d Cir. 2003) ("the public interest [is] not served by the enforcement of an unconstitutional law") (interior quotation omitted); *Washington v. Reno*, 35 F.3d 1093, 1103 (6th Cir. 1994) (recognizing "greater public interest in having governmental agencies abide by the federal laws"); *League of Women Voters of the United States v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016) ("no public interest in the perpetuation of unlawful [government] action"); *cf. Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 595 (5th Cir. 2006) ("injunction serves the public interest in that it enforces the correct and constitutional application of Texas's duly-enacted election laws"). Here the declaratory and injunctive relief sought vindicates both Respondent Vice President's plenary authority as President of the Senate and Presiding Officer to count electoral votes, as well as the constitutional rights of the Applicants to have their electoral votes counted in the manner that the Constitution provides, the rights of the Arizona legislative Applicants under the Electors Clause to appoint Presidential Electors for the State of Arizona, and the right of Rep Gohmert and those he represents to have their vote counted in the manner that the Twelfth Amendment provides.

REQUESTED RELIEF

Applicants respectfully request that the Circuit Justice—or the full Court, if referred to the Court—enter an administrative stay against the Vice President's invoking the Electoral Count Act's dispute-resolution process under 3 U.S.C. § 15

until further order of the Circuit Justice or Court, as well as either a briefing schedule for this motion for interim relief or on the merits.[15]

CONCLUSION

For the foregoing reasons, Applicants respectfully submit that the Circuit Justice or this Court should issue the requested administrative and interim relief for the pendency of the Court's resolution of a timely filed petition for a writ of *certiorari*.

Dated: January 6, 2021

Respectfully submitted,

/s/ Sidney Powell

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[15] This Court can treat a stay application as a petition for a writ of *certiorari*. *See Purcell v. Gonzalez*, 549 U.S. 1, 6 (2006) (treating application to stay injunction pending appeal as petition for *certiorari*, granting *certiorari*, and ruling on merits): *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983) (treating application for stay of execution as a petition for writ of *certiorari*).

CERTIFICATE OF SERVICE

The undersigned certifies that, on this date, a true and correct copy of the foregoing application and its appendix was served by U.S. Priority Mail, postage prepaid, on the following counsel for the respondent:

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In addition, the undersigned further certifies that, on this date, he sent a PDF courtesy copy of the foregoing application and its appendix to the above-listed counsel at the email addresses indicated above.

The undersigned further certifies that, on this date, the foregoing application and its appendix were electronically filed with the Court, and an original and ten true and correct copies of the foregoing application and its appendix were dispatched to the Court by messenger for filing.

Dated: January 6, 2021

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No. __A_____

In the Supreme Court of the United States

LOUIE GOHMERT, TYLER BOWYER, NANCY COTTLE, JAKE HOFFMAN, ANTHONY KERN, JAMES R. LAMON, SAM MOORHEAD, ROBERT MONTGOMERY, LORAINE PELLEGRINO, GREG SAFSTEN, KELLI WARD AND MICHAEL WARD,
Applicants,

v.

THE HONORABLE MICHAEL R. PENCE, VICE PRESIDENT OF THE UNITED STATES, IN HIS OFFICIAL CAPACITY.
Respondent.

APPENDIX TO EMERGENCY APPLICATION TO THE HONORABLE SAMUEL A. ALITO AS CIRCUIT JUSTICE FOR THE FIFTH CIRCUIT FOR ADMINISTRATIVE STAY AND INTERIM RELIEF PENDING RESOLUTION OF A TIMELY FILED PETITION FOR A WRIT OF *CERTIORARI*

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APPENDI X

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

THE HONORABLE LOUIE GOHMERT, et al.,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	Case No. 6:20-cv-660-JDK
	§	
THE HONORABLE MICHAEL R. PENCE, in his official capacity as Vice President of the United States,	§	
	§	
Defendant.	§	

ORDER OF DISMISSAL

This case challenges the constitutionality of the Electoral Count Act of 1887, as codified at 3 U.S.C. §§ 5, 15. The Court cannot address that question, however, without ensuring that it has jurisdiction. *See, e.g.*, U.S. CONST. art. III, § 2; *Cary v. Curtis*, 44 U.S. 236, 245 (1845). One crucial component of jurisdiction is that the plaintiffs have standing. This requires the plaintiffs to show a personal injury that is fairly traceable to the defendant's allegedly unlawful conduct and is likely to be redressed by the requested relief. *See, e.g.*, U.S. CONST. art. III, § 2; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). Requiring plaintiffs to make this showing helps enforce the limited role of federal courts in our constitutional system.

The problem for Plaintiffs here is that they lack standing. Plaintiff Louie Gohmert, the United States Representative for Texas's First Congressional District, alleges at most an institutional injury to the House of Representatives. Under well-settled Supreme Court authority, that is insufficient to support standing. *Raines v.*

Byrd, 521 U.S. 811, 829 (1997).

The other Plaintiffs, the slate of Republican Presidential Electors for the State of Arizona (the "Nominee-Electors"), allege an injury that is not fairly traceable to the Defendant, the Vice President of the United States, and is unlikely to be redressed by the requested relief.

Accordingly, as explained below, the Court lacks subject matter jurisdiction over this case and must dismiss the action.

I.

A.

The Electors Clause of the U.S. Constitution requires that each state appoint, in the manner directed by the state's legislature, the number of presidential electors to which it is constitutionally entitled. U.S. CONST. art. II, § 1, cl. 2. Under the Twelfth Amendment, each state's electors meet in their respective states and vote for the President and Vice President. U.S. CONST. amend XII. The electors then certify the list of their votes and transmit the sealed lists to the President of the United States Senate—that is, the Vice President of the United States. The Twelfth Amendment then provides that, "[t]he President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted." *Id.* A candidate winning a majority of the electoral votes wins the Presidency. However, if no candidate obtains a majority of the electoral votes, the House of Representatives is to choose the President—with each state delegation having one vote. *Id.*

The Electoral Count Act, informed by the Hayes-Tilden dispute of 1876, sought to standardize the counting of electoral votes in Congress. Stephen A. Siegel, *The Conscientious Congressman's Guide to the Electoral Count Act of 1887*, 56 FLA. L. REV. 541, 547–50 (2004). Section 5 makes states' determinations as to their electors, under certain circumstances, "conclusive" and provides that these determinations govern the counting of electoral votes. 3 U.S.C. § 5. Section 15 requires a joint session of Congress to count the electoral votes on January 6, with the President of the Senate presiding. *Id.* § 15.

During that session, the President of the Senate calls for objections on the electoral votes. Written objections submitted by at least one Senator and at least one Member of the House of Representatives trigger a detailed dispute-resolution procedure. *Id.* Most relevant here, Section 15 requires both the House of Representatives and the Senate—by votes of their full membership rather than by state delegations—to decide any objection. The Electoral Count Act also gives the state governor a role in certifying the state's electors, which Section 15 considers in resolving objections. *Id.* § 6.

It is these dispute-resolution procedures that Plaintiffs challenge in this case.

B.

On December 14, 2020, electors convened in each state to cast their electoral votes. *Id.* § 7; Docket No. 1 ¶ 5. In Arizona, the Democratic Party's slate of eleven electors voted for Joseph R. Biden and Kamala D. Harris. These votes were certified by Arizona Governor Doug Ducey and Arizona Secretary of State Katie Hobbs and submitted as required under the Electoral Count Act. Docket No. 1 ¶ 22. That same

day, the Nominee-Electors state that they also convened in Arizona and voted for Donald J. Trump and Michael R. Pence. *Id.* ¶ 20. Similar actions took place in Georgia, Pennsylvania, Wisconsin, and Michigan (with Arizona, the "Contested States"). *Id.* ¶ 20–21. Combined, the Contested States represent seventy-three electoral votes. *See id.* ¶ 23.

On December 27, Plaintiffs filed this lawsuit, alleging that there are now "competing slates" of electors from the Contested States and asking the Court to declare that the Electoral Count Act is unconstitutional and that the Vice President has the "exclusive authority and sole discretion" to determine which electoral votes should count. *Id.* ¶ 73. They also ask for a declaration that "the Twelfth Amendment contains the exclusive dispute resolution mechanisms" for determining an objection raised by a Member of Congress to any slate of electors and an injunction barring the Vice President from following the Electoral Count Act. *Id.* On December 28, Plaintiffs filed an Emergency Motion for Expedited Declaratory Judgment and Emergency Injunctive Relief ("Emergency Motion"). Docket No. 2. Plaintiffs request "an expedited summary proceeding" under Federal Rule of Civil Procedure 57. *Id.*

On December 31, the Vice President opposed Plaintiffs' motion. Docket No. 18.

II.

As mentioned above, before the Court can address the merits of Plaintiff's Emergency Motion, it must ensure that it has subject matter jurisdiction. *See, e.g.*, *Cary*, 44 U.S. at 245 ("The courts of the United States are all limited in their nature and constitution, and have not the powers inherent in courts existing by prescription or by the common law."); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 340–41 (2006)

("If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so."). Article III of the U.S. Constitution limits federal courts to deciding only "cases" or "controversies," which ensures that the judiciary "respects 'the proper—and properly limited—role of the courts in a democratic society.'" *DaimlerChrysler*, 547 U.S. at 341 (quoting *Allen v. Wright*, 468 U.S. 737, 750 (1984)); *see also Raines*, 521 U.S. at 828 (quoting *United States v. Richardson*, 418 U.S. 166, 192 (1974)) ("Our regime contemplates a more restricted role for Article III courts . . . 'not some amorphous general supervision of the operations of government.'").

"[A]n essential and unchanging part of the case-or-controversy requirement of Article III" is that the plaintiff has standing. *Lujan*, 504 U.S. at 560. The standing requirement is not subject to waiver and requires strict compliance. *E.g.*, *Lewis v. Casey*, 518 U.S. 343, 349 n.1 (1996); *Raines*, 521 U.S. at 819. A standing inquiry is "especially rigorous" where the merits of the dispute would require the Court to determine whether an action taken by one of the other two branches of the Federal Government is unconstitutional. *Raines*, 521 U.S. at 819–20 (citing *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 542 (1986), and *Valley Forge Christian Coll. v. Ams. United for Separation of Church & St., Inc.*, 454 U.S. 464, 473–74 (1982)). This is because "the law of Art. III standing is built on a single basic idea—the idea of separation of powers." *Allen*, 468 U.S. at 752, *abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 (2014). Article III standing "enforces the Constitution's case-or-controversy requirement."

DaimlerChrysler Corp., 547 U.S. at 342 (quoting *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004)). And "[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Raines,* 521 U.S. at 818.

Article III standing requires a plaintiff to show: (1) that he "has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical"; (2) that "the injury is fairly traceable to the challenged action of the defendant"; and (3) that "it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *El Paso Cnty. v. Trump*, 982 F.3d 332, 336 (5th Cir. 2020) (quoting *Friends of the Earth, Inc. v. Laidlaw Env't. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000)). "The party invoking federal jurisdiction bears the burden of establishing these elements," and "each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.,* with the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S. at 561. "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice." *Id.*

III.

Here, Plaintiffs have failed to demonstrate that they have standing to bring the claim alleged in Count I of their complaint.

A.

The first Plaintiff is the Representative for Texas's First Congressional District, the Honorable Louie Gohmert. Congressman Gohmert argues that he will

be injured because "he will not be able to vote as a Congressional Representative in accordance with the Twelfth Amendment." Docket No. 2 at 4. Specifically, Congressman Gohmert argues that on January 6, 2021, when Congress convenes to count the electoral votes for President and Vice President, he "will object to the counting of the Arizona slate of electors voting for Biden and to the Biden slates from the remaining Contested States." Docket No. 1 ¶ 6. If a member of the Senate likewise objects, then under Section 15 of the Electoral Count Act, each member of the House and Senate is entitled to vote to resolve the objections, which Congressman Gohmert argues is inconsistent with the state-by-state voting required under the Twelfth Amendment. Docket No. 2 at 5. Congressmen Gohmert argues that the Vice President's compliance with the procedures of the Electoral Count Act will directly cause his alleged injury. *Id.* at 7. And he argues that a declaration that Sections 5 and 15 of the Electoral Count Act are unconstitutional would redress his alleged injury. *Id.* at 9–10.

Congressman Gohmert's argument is foreclosed by *Raines v. Byrd*, which squarely held that Members of Congress lack standing to bring a claim for an injury suffered "solely because they are Members of Congress." 521 U.S. at 821. And that is all Congressman Gohmert is alleging here. He does not identify any injury to himself as an individual, but rather a "wholly abstract and widely dispersed" institutional injury to the House of Representatives. *Id.* at 829. Congressman Gohmert does not allege that he was "singled out for specially unfavorable treatment as opposed to other Members of their respective bodies," does not claim that he has

"been deprived of something to which [he] *personally* [is] entitled," and does not allege a "loss of any private right, which would make the injury more concrete." *Id*. at 821 (emphasis in original). Congressman Gohmert's alleged injury is "a type of institutional injury (the diminution of legislative power), which necessarily damages all Members of Congress." *Id*. Under these circumstances, the Supreme Court held in *Raines*, a Member of Congress does not have "a sufficient 'personal stake'" in the dispute and lacks "a sufficiently concrete injury to have established Article III standing." *Id*. at 830.

For the first time in their reply brief, Plaintiffs assert that Congressman Gohmert has standing as a Texas voter, relying on *League of United Latin Am. Citizens, Dist. 19 v. City of Boerne*, 659 F.3d 421, 430 (5th Cir. 2011). Docket No. 30 at 30, 33–34. The Court disagrees. In *LULAC*, the Fifth Circuit held that an individual voter had standing to challenge amendments to the City of Boerne's city council election scheme that would allegedly deprive him of a "pre-existing right to vote for certain offices." 659 F.3d at 430. That is not the case here. Congressman Gohmert does not allege that he was denied the right to vote in the 2020 presidential election. Rather, he asserts that under the Electoral Count Act, "he will not be able to vote *as a Congressional Representative* in accordance with the Twelfth Amendment." Docket No. 2 at 4 (emphasis added). Because Congressman Gohmert is asserting an injury in his role as a Member of Congress rather than as an individual voter, *Raines* controls.

Further weighing against Congressman Gohmert's standing here is the speculative nature of the alleged injury. "To establish Article III standing, an injury must be 'concrete, particularized, and actual or imminent.'" *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (quoting *Monsanto Co. v. Geertson Seed Farms,* 561 U.S. 139, 149 (2010)); *see also Lujan*, 504 U.S. at 560 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)) (alleged injury cannot be "conjectural" or "hypothetical"). "Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is *certainly* impending." *Clapper*, 568 U.S. at 409 (quoting *Lujan*, 504 U.S. at 565 n.2).

Here, Congressman Gohmert's alleged injury requires a series of hypothetical—but by no means certain—events. Plaintiffs presuppose what the Vice President will do on January 6, which electoral votes the Vice President will count or reject from contested states, whether a Representative and a Senator will object under Section 15 of the Electoral Count Act, how each member of the House and Senate will vote on any such objections, and how each state delegation in the House would potentially vote under the Twelfth Amendment absent a majority electoral vote. All that makes Congressman Gohmert's alleged injury far too uncertain to support standing under Article III. *Id.* at 414 ("We decline to abandon our usual reluctance to endorse standing theories that rest on speculation about the decisions of independent actors.").

Accordingly, the Court finds that Congressman Gohmert lacks standing to bring the claim alleged here.

B.

The Nominee-Electors argue that they have standing under the Electors Clause "as candidates for the office of Presidential Elector because, under Arizona law, a vote cast for the Republican Party's President and Vice President is cast for the Republican Presidential Electors." Docket No. 2 at 6 (citing ARIZ. REV. STAT. § 16-212). The Nominee-Electors were injured, Plaintiffs contend, when Governor Ducey unlawfully certified and transmitted the "competing slate of Biden electors" to be counted in the Electoral College. *Id*. at 7.

This alleged injury, however, is not fairly traceable to any act of the Vice President. Nor is it an injury likely to be redressed by a favorable decision here. *See Friends of the Earth*, 528 U.S. at 180–81.[1] Plaintiffs do not allege that the Vice President had any involvement in the "certification and transmission of a competing

[1] The Court need not decide whether the Nominee-Electors were "candidates" under Arizona law. Plaintiffs cite *Carson v. Simon*, in which the Eighth Circuit held that prospective presidential electors are "candidates" under Minnesota law and have standing to challenge how votes are tallied in Minnesota. 978 F.3d 1051, 1057 (8th Cir. 2020). But the U.S. District Court for the District of Arizona has distinguished *Carson*, holding that presidential electors in Arizona are ministerial and are "not candidates for office as the term is generally understood" under Arizona law. *Bowyer v. Ducey*, — F. Supp. 3d —, 2020 WL 7238261, at *4 (D. Ariz. Dec. 9, 2020); *see also Feehan v. Wis. Elections Comm'n*, No. 20-CV-1771-PP, 2020 WL 7250219, at *12 (E.D. Wis. Dec. 9, 2020) (nominee-elector is not a candidate under Wisconsin law). "Arizona law makes clear that the duty of an Elector is to fulfill a ministerial function, which is extremely limited in scope and duration, and that they have no discretion to deviate at all from the duties imposed by the statute." *Bowyer*, 2020 WL 7238261, at *4 (citing ARIZ. REV. STAT. § 16-212(c)). Arizona voters, moreover, vote "for their preferred presidential candidate," not any single elector listed next to the presidential candidates' names. *Id*. (citing ARIZ. REV. STAT. § 16-507(b)). The court in *Bowyer* therefore held that nominee-electors in Arizona lacked standing to sue state officials for alleged voting irregularities. *See id*. In any event, even if the Nominee-Electors had standing to sue state officials to redress the injury alleged here, they have not done so. Plaintiffs have named only the Vice President, and they have not shown "a fairly traceable connection between [their] injury and the complained-of conduct of defendant." *E.g.*, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998).

slate of Biden electors." Docket No. 2 at 7. Nor could they. *See* 3 U.S.C. § 6. That act is performed solely by the Arizona Governor, who is a "third party not before the court." *Lujan*, 504 U.S. at 560–61 (quoting *Simon v. Eastern Ky. Welfare Rts. Org.*, 426 U.S. 26, 41–42 (1976)). Indeed, Plaintiffs acknowledge that their injury was caused by Arizona officials in Arizona, the "Vice President did not cause [their] injury," and their "unlawful injuries [were] suffered in Arizona." Docket No. 2 at 7.

The Nominee-Electors argue that their injury is nevertheless fairly traceable to the Vice President because he will "ratify and purport to make lawful the unlawful injuries that Plaintiffs suffered in Arizona." *Id.* For support, Plaintiffs cite *Sierra Club v. Glickman*, in which the Fifth Circuit held that an environmental injury was fairly traceable to the Department of Agriculture, even though the injury was directly caused by third-party farmers, because the Department had "the ability through various programs to affect the pumping decisions of those third party farmers to such an extent that the plaintiff's injury could be relieved." 156 F.3d 606, 614 (5th Cir. 1998). Nothing like that is alleged here. The Vice President's anticipated actions on January 6 will not affect the decision of Governor Ducey regarding the certification of presidential electors—which occurred more than two weeks ago on December 14. Even "ratifying" or "making lawful" the Governor's decision, as Plaintiffs argue will occur here, will not have any "coercive effect" on Arizona's certification of electoral votes. *See Bennett v. Spear*, 520 U.S. 154, 168–69 (1997).

For similar reasons, the Nominee-Electors' claimed injury is not likely to be redressed here. To satisfy redressability, Plaintiffs must show that it is "likely" their

alleged injury will be "redressed by a favorable decision." *Lujan*, 504 U.S. at 561. But here, Plaintiffs seek declaratory and injunctive relief as to the manner of the Vice President's electoral vote *count*. *See* Docket No. 1 ¶ 73. Such relief will not resolve their alleged harm with respect to Governor Ducey's electoral vote *certification*. *See* Docket No. 2 at 7. As the Supreme Court has long held, "a federal court can act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court." *Simon*, 426 U.S. at 41–42; *see also El Paso Cnty.*, 982 F.3d at 343 (plaintiff lacks standing where an order granting the requested relief "would not rescind," and "accordingly would not redress," the allegedly harmful act).

Even if their injury were the loss of the right to vote in the Electoral College, *see* Docket No. 2 at 6, Plaintiffs' requested relief would not redress that injury. Plaintiffs are not asking the Court to order the Vice President to count the Nominee-Electors' votes, but rather that the Vice President "exercise the exclusive authority and sole discretion in determining which electoral votes to count for a given State," or alternatively, to decide that no Arizona electoral votes should count. *See* Docket No. 1 ¶ 73. It is well established that a plaintiff lacks standing where it is "uncertain that granting [the plaintiff] the relief it wants would remedy its injuries." *Inclusive Comtys. Project, Inc. v. Dep't of Treasury*, 946 F.3d 649, 657–58 (5th Cir. 2019).

Accordingly, the Court finds that the Nominee-Electors lack standing.[2]

[2] Plaintiffs Hoffman and Kern claim without supporting argument that they have standing as members of the Arizona legislature. Docket No. 2 at 4. This claim fails for the reasons Congressman Gohmert's standing argument fails. *See supra* Part III.A.

IV.

Because neither Congressman Gohmert nor the Nominee-Electors have standing here, the Court is without subject matter jurisdiction to address Plaintiffs' Emergency Motion or the merits of their claim. *HSBC Bank USA, N.A. as Tr. for Merrill Lynch Mortg. Loan v. Crum*, 907 F.3d 199, 202 (5th Cir. 2018). The Court therefore **DISMISSES** the case without prejudice.

So **ORDERED** and **SIGNED** this **1st** day of **January, 2021.**

JEREMY D. KERNODLE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

THE HONORABLE LOUIE GOHMERT, et al.,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	Case No. 6:20-cv-660-JDK
	§	
THE HONORABLE MICHAEL R. PENCE, IN HIS OFFICIAL CAPACITY AS VICE PRESIDENT OF THE UNITED STATES,	§	
	§	
Defendant.	§	

FINAL JUDGMENT

The Court, having considered Plaintiffs' case and rendered its decision by opinion issued this same date, hereby enters **FINAL JUDGMENT**.

It is **ORDERED** that Plaintiff's case is **DISMISSED WITHOUT PREJUDICE** for lack of subject matter jurisdiction. All pending motions are **DENIED** as **MOOT**.[1]

The Clerk of the Court is instructed to close this case.

So **ORDERED** and **SIGNED** this **1st** day of **January, 2021.**

JEREMY D. KERNODLE
UNITED STATES DISTRICT JUDGE

[1] The Court notes that there are several pending motions to intervene. *See* Docket Nos. 15, 19, 25, 36. "An existing suit within the court's jurisdiction is a prerequisite of an intervention." *Kendrick v. Kendrick*, 16 F.2d 744, 745 (5th Cir. 1926). Because the Court lacks subject matter jurisdiction over this case, there is no live case or controversy in which the interested parties can intervene.

United States Court of Appeals for the Fifth Circuit

No. 21-40001

LOUIE GOHMERT; TYLER BOWYER; NANCY COTTLE; JAKE HOFFMAN; ANTHONY KERN; JAMES R. LAMON; SAM MOORHEAD; ROBERT MONTGOMERY; LORAINE PELLEGRINO; GREG SAFSTEN; KELLI WARD; MICHAEL WARD,

Plaintiffs—Appellants,

MARIAN SHERIDAN; MESHAWN MADDOCK; MARI-ANN HENRY; AMY FACCHINELLO; MICHELE LUNDGREN,

Movants—Appellants,

versus

MICHAEL R. PENCE,

Defendant—Appellee.

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 6:20-CV-660

Before HIGGINBOTHAM, SMITH, and OLDHAM, *Circuit Judges*.

PER CURIAM:*

This administrative panel is presented with an emergency motion for expedited appeal. We have appellate jurisdiction under 28 U.S.C. § 1291. That includes jurisdiction to determine both our and the district court's jurisdiction. We have the benefit of the briefing before the district court and its 13-page opinion styled Order of Dismissal, issued January 1, 2021. That order adopts the position of the Department of Justice, finding that the district court lacks jurisdiction because no plaintiff has the standing demanded by Article III. We need say no more, and we affirm the judgment essentially for the reasons stated by the district court. We express no view on the underlying merits or on what putative party, if any, might have standing. The motion to expedite is dismissed as moot. The mandate shall issue forthwith.

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* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

Determination of controversy as to appointment of electors

If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned.

3 U.S.C. § 5.

Credentials of electors; transmission to Archivist of the United States and to Congress; public inspection

If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned.

3 U.S.C. § 6.

Counting electoral votes in Congress

Congress shall be in session on the sixth day of January succeeding every meeting of the electors. The Senate and House of Representatives shall meet in the Hall of the House of Representatives at the hour of 1 o'clock in the afternoon on that day, and the President of the Senate shall be their presiding officer. Two tellers shall be previously appointed on the part of the Senate and two on the part of the House of Representatives, to whom shall be handed, as they are opened by the President of the Senate, all the certificates and papers purporting to be certificates of the electoral votes, which certificates and papers shall be opened, presented, and acted upon in the alphabetical order of the States, beginning with the letter A; and said tellers, having then read the same in the presence and hearing of the two Houses, shall make a list of the votes as they shall appear from the said certificates; and the votes having been ascertained and counted according to the rules in this subchapter provided, the result of the same shall be delivered to the President of the Senate, who shall thereupon announce the state of the vote, which announcement shall be deemed a sufficient declaration of the persons, if any, elected President and Vice President of the United States, and, together with a list of the votes, be entered on the Journals of the two Houses. Upon such reading of any such certificate or paper, the President of the Senate shall call for objections, if any. Every objection shall be made in writing, and shall state clearly and concisely, and without argument, the ground thereof, and shall be signed by at least one Senator and one Member of the House of Representatives before the same shall be received. When all objections so made to any vote or paper from a State shall have been received and read, the Senate shall thereupon withdraw, and such objections shall be submitted to the Senate for its decision; and the Speaker of the House of Representatives shall, in like manner, submit such objections to the House of Representatives for its decision; and no electoral vote or votes from any State which shall have been regularly given by electors whose

appointment has been lawfully certified to according to section 6 of this title from which but one return has been received shall be rejected, but the two Houses concurrently may reject the vote or votes when they agree that such vote or votes have not been so regularly given by electors whose appointment has been so certified. If more than one return or paper purporting to be a return from a State shall have been received by the President of the Senate, those votes, and those only, shall be counted which shall have been regularly given by the electors who are shown by the determination mentioned in section 5 of this title to have been appointed, if the determination in said section provided for shall have been made, or by such successors or substitutes, in case of a vacancy in the board of electors so ascertained, as have been appointed to fill such vacancy in the mode provided by the laws of the State; but in case there shall arise the question which of two or more of such State authorities determining what electors have been appointed, as mentioned in section 5 of this title, is the lawful tribunal of such State, the votes regularly given of those electors, and those only, of such State shall be counted whose title as electors the two Houses, acting separately, shall concurrently decide is supported by the decision of such State so authorized by its law; and in such case of more than one return or paper purporting to be a return from a State, if there shall have been no such determination of the question in the State aforesaid, then those votes, and those only, shall be counted which the two Houses shall concurrently decide were cast by lawful electors appointed in accordance with the laws of the State, unless the two Houses, acting separately, shall concurrently decide such votes not to be the lawful votes of the legally appointed electors of such State. But if the two Houses shall disagree in respect of the counting of such votes, then, and in that case, the votes of the electors whose appointment shall have been certified by the executive of the State, under the seal thereof, shall be counted. When the two Houses have voted, they shall immediately again meet, and the presiding officer shall then announce the decision of the questions submitted. No

votes or papers from any other State shall be acted upon until the objections previously made to the votes or papers from any State shall have been finally disposed of.

3 U.S.C. § 15.

Presentment Clause

Every Order, Resolution, or Vote, to Which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

U.S. CONST. art. I, § 7, cl. 3.

Electors Clause

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 no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

U.S. CONST. art. II, § 1, cl. 2.

Twelfth Amendment

The electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons

voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;--The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;--the person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President. The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

U.S. CONST. amend. XII.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

LOUIE GOHMERT, TYLER BOWYER, NANCY COTTLE, JAKE HOFFMAN, ANTHONY KERN, JAMES R. LAMON, SAM MOORHEAD, ROBERT MONTGOMERY, LORAINE PELLEGRINO, GREG SAFSTEN, KELLI WARD and MICHAEL WARD, Plaintiffs, v. THE HONORABLE MICHAEL R. PENCE, VICE PRESIDENT OF THE UNITED STATES, in his official capacity. Defendant.	Case No. COMPLAINT FOR EXPEDITED DECLARATORY AND EMERGENCY INJUNCTIVE RELIEF (Election Matter)

NATURE OF THE ACTION

1. This civil action seeks an expedited declaratory judgment finding that the elector dispute resolution provisions in Section 15 of the Electoral Count Act, 3 U.S.C. §§ 5 and 15, are unconstitutional because these provisions violate the Electors Clause and the Twelfth Amendment of the U.S. Constitution. U.S. CONST. art. II, § 1, cl. 1 & Amend. XII. Plaintiffs also request emergency injunctive relief required to effectuate the requested declaratory judgment.

2. These provisions of Section 15 of the Electoral Count Act are unconstitutional insofar as they establish procedures for determining which of two or more competing slates of Presidential Electors for a given State are to be counted in the Electoral College, or how objections to a proffered slate are adjudicated, that violate the Twelfth Amendment. This violation occurs because the Electoral Count Act directs the Defendant, Vice President Michael R. Pence, in his capacity as President of the Senate and Presiding Officer over the January 6, 2021 Joint Session

of Congress: (1) to count the electoral votes for a State that have been appointed in violation of the Electors Clause; (2) limits or eliminates his exclusive authority and sole discretion under the Twelfth Amendment to determine which slates of electors for a State, or neither, may be counted; and (3) replaces the Twelfth Amendment's dispute resolution procedure – under which the House of Representatives has sole authority to choose the President.

3. Section 15 of the Electoral Count Act unconstitutionally violates the Electors Clause by usurping the exclusive and plenary authority of State Legislatures to determine the manner of appointing Presidential Electors, and instead gives that authority to the State's Executive. Similarly, 3 USC § 5 makes clear that the Presidential electors of a state and their appointment by the State Executive shall be conclusive.

4. This is not an abstract or hypothetical question, but a live "case or controversy" under Article III that is ripe for a declaratory judgment arising from the events of December 14, 2020, where the State of Arizona (and several others) have appointed two competing slates of electors.

5. Plaintiffs include the United States Representative for Texas' First Congressional District and the entire slate of Republican Presidential Electors for the State of Arizona. The Arizona Electors have cast Arizona's electoral votes for President Donald J. Trump on December 14, 2020, at the Arizona State Capitol with the permission and endorsement of the Arizona Legislature, *i.e.*, at the time, place, and manner required under Arizona state law and the Electoral Count Act. At the same time, Arizona's Governor and Secretary of State appointed a separate and competing slate of electors who cast Arizona's electoral votes for former Vice-President Joseph R. Biden, despite the evidence of massive multi-state electoral fraud committed on Biden's behalf that changed electoral results in Arizona and in other states such as Georgia, Michigan,

Pennsylvania and Wisconsin that have also put forward competing slates of electors (collectively, the "Contested States"). Collectively, these Contested States have enough electoral votes in controversy to determine the outcome of the 2020 General Election.

6. On January 6, 2021, when Congress convenes to count the electoral votes for President and Vice-President, Plaintiff Representative Gohmert will object to the counting of the Arizona slate of electors voting for Biden and to the Biden slates from the remaining Contested States. Rep. Gohmert is entitled to have his objection determined under the Twelve Amendment, and not through the unconstitutional impositions of a prior Congress by 3 U.S.C. §§ 5 and 15.

7. Senators have also stated that they may object to the Biden slate of electors from the Contested States.[1]

8. This Complaint addresses a matter of urgent national concern that involves only issues of law – namely, a determination that Sections 5 and 15 of the Electoral Count Act violate the Electors Clause and/or the Twelfth Amendment of the U.S. Constitution. The relevant facts are not in dispute concerning the existence of a live case or controversy between Plaintiffs and Defendant, ripeness, standing, and other matters related to the justiciability of Plaintiffs' claims.[2]

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[1] *See* https://www.forbes.com/sites/jackbrewster/2020/12/17/here-are-the-gop-senators-who have-hinted-at-defying-mcconnell-by-challenging-election/?sh=506395c34ce3.

[2] The facts relevant to the justiciability of Plaintiffs' claims are laid out below and demonstrate the certainty or near certainty that the unconstitutional provisions in Section 15 of the Electoral Count Act will be invoked at the January 6, 2021 Joint Session of Congress to choose the next President, namely: (1) there are competing slates of electors for Arizona and the other Contested States that have been or will be submitted to the Electoral College; (2) the Contested States collectively have sufficient (contested) electoral votes to determine the winner of the 2020 General Election – President Trump or former Vice President Biden; (3) legislators in Arizona and other Contested States have contested the certification of their State's electoral votes by State executives, due to substantial evidence of election fraud that is the subject of ongoing litigation and investigations; and (4) Senators and Members of the House of Representatives have expressed their intent to challenge the electors and electoral votes certified by State executives in the Contested States.

9. Because the requested declaratory judgment will terminate the controversy arising from the conflict between the Twelfth Amendment and the Electoral Count Act, and the facts are not in dispute, it is appropriate for this Court to grant this relief in a summary proceeding without an evidentiary hearing or discovery. *See* Notes of Advisory Committee on Federal Rules of Civil Procedure, Fed. R. Civ. P. 57.

10. Accordingly, Plaintiffs have concurrently submitted a motion for a speedy summary proceeding under Rule 57 of the Federal Rules of Civil Procedure ("FRCP") to grant the relief requested herein as soon as possible, and for emergency injunctive relief under Rule 65 thereof consistent with the declaratory judgment requested herein on that same date.

11. Accordingly, Plaintiffs respectfully request this Court to issue a declaratory judgment finding that:

A. Sections 5 and 15 of the Electoral Count Act, 3 U.S.C. §§ 5 and 15, are unconstitutional because they violate the Twelfth Amendment, U.S. CONST. art. II, § 1, cl. 1 & amend. XII on the face of it; and further violate the Electors Clause;

B. That Vice-President Pence, in his capacity as President of Senate and Presiding Officer of the January 6, 2021 Joint Session of Congress under the Twelfth Amendment, is subject solely to the requirements of the Twelfth Amendment and may exercise the exclusive authority and sole discretion in determining which electoral votes to count for a given State, and must ignore and may not rely on any provisions of the Electoral Count Act that would limit his exclusive authority and his sole discretion to determine the count, which could include votes from the slates of Republican electors from the Contested States;

C. That, with respect to competing slates of electors from the State of Arizona or other Contested States, the Twelfth Amendment contains the exclusive dispute resolution mechanisms, namely, that (i) Vice-President Pence determines which slate of electors' votes count, or neither, for that State; (ii) how objections from members of Congress to any proffered slate of electors is adjudicated; and (iii) if no candidate has a majority of 270 elector votes, then the House of Representatives (and only the House of Representatives) shall choose the President where "the votes [in the House of Representatives] shall be taken by states, the representation from each state having one vote," U.S. CONST. amend. XII;

D. That with respect to the counting of competing slates of electors, the alternative dispute resolution procedure or priority rule in 3 U.S.C. § 15, together with its incorporation of 3 U.S.C. § 5, shall have no force or effect because it nullifies and replaces the Twelfth Amendment rules above with an entirely different procedure; and

E. Issue any other declaratory judgments or findings or injunctive relief necessary to support or effectuate the foregoing declaratory judgments.

JURISDICTION AND VENUE

12. This Court has subject matter jurisdiction under 28 U.S.C. § 1331 which provides, "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

13. This Court also has subject matter jurisdiction under 28 U.S.C. § 1343 because this action involves a federal election for President of the United States. "A significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional

question." *Bush v. Gore*, 531 U.S. 98, 113 (2000) (Rehnquist, C.J., concurring); *Smiley v. Holm*, 285 U.S. 355, 365 (1932).

14. The jurisdiction of the Court to grant declaratory relief is conferred by 28 U.S.C. §§ 2201 and 2202 and by Rule 57, Fed. R. Civ. P., and emergency injunctive relief by Rule 65, Fed. R. Civ. P.

15. Venue is proper because Plaintiff Gohmert resides in Tyler, Texas, he maintains his primary congressional office in Tyler, and no real property is involved in the action. 28 U.S.C. § 1391(e)(1).

THE PARTIES

16. Plaintiff Louie Gohmert is a duly elected member of the United States House of Representatives for the First Congressional District of Texas. On November 3, 2020 he won re-election of this Congressional seat and plans to attend the January 6, 2021 session of Congress. He resides in the city of Tyler, in Smith County, Texas.

17. Each of the following Plaintiffs is a resident of Arizona, a registered Arizona voter and a Republican Party Presidential Elector on behalf of the State of Arizona, who voted their competing slate for President and Vice President on December 14, 2020: a) Tyler Bowyer, a resident of Maricopa County and a Republican National Committeeman; b) Nancy Cottle, a resident of Maricopa County and Second Vice-Chairman of the Maricopa County Republican Committee; c) Jake Hoffman, a resident of Maricopa County and member-elect of the Arizona House of Representatives; d) Anthony Kern, a resident of Maricopa County and an outgoing member of the Arizona House of Representatives; e) James R. Lamon, a resident of Maricopa County; f) Samuel Moorhead, a resident of Gila County; g) Robert Montgomery, a resident of Cochise County and Republican Party Chairman for Cochise County; h) Loraine Pellegrino, a

resident of Maricopa County; i) Greg Safsten, a resident of Maricopa County and Executive Director of the Republican Party of Arizona; j) Kelli Ward, a resident of Mohave County and Chair of the Arizona Republican Party; and k) Michael Ward, a resident of Mohave County.

18. The above eleven plaintiffs constitute the full slate of the Arizona Republican party's nominees for presidential electors (the "Arizona Electors").

19. The Defendant is Vice President Michael R. Pence named in his official capacity as the Vice President of the United States. The declaratory and injunctive relief requested herein applies to his duties as President of the Senate and Presiding Officer at the January 6, 2021 Joint Session of Congress carried out pursuant to the Electoral Count Act and the Twelfth Amendment.

STATEMENT OF FACTS

20. The Plaintiffs include a United States Representative from Texas, the entire slate of Republican Presidential Electors for the State of Arizona as well as an outgoing and incoming member of the Arizona Legislature. On December 14, 2020, pursuant to the requirements of applicable state laws and the Electoral Count Act, the Arizona Electors, with the knowledge and permission of the Republican-majority Arizona Legislature, convened at the Arizona State Capitol, and cast Arizona's electoral votes for President Donald J. Trump and Vice President Michael R. Pence.[3] On the same date, the Republican Presidential Electors for the States of Georgia,[4]

[3] *See GOP Elector Nominees cast votes for Trump in Arizona, Georgia, Pennsylvania*, by Dave Boyer, The Washington Times, December 14, 2020. https://www.washingtontimes.com/news/2020/dec/14/gop-electors-cast-votes-trump-georgia-pennsylvania/.

[4] *See id.*

Pennsylvania[5] and Wisconsin[6] met at their respective State Capitols to cast their States' electoral votes for President Trump and Vice President Pence.

21. Michigan's Republican electors attempted to vote at their State Capitol on December 14th but were denied entrance by the Michigan State Police. Instead, they met on the grounds of the State Capitol and cast their votes for President Trump and Vice President Pence vote.[7]

22. On December 14, 2020, in Arizona and the other States listed above, the Democratic Party's slate of electors convened in their respective State Capitols to cast their electoral votes for former Vice President Joseph R. Biden and Senator Kamala Harris. On the same day, Arizona Governor Doug Ducey and Arizona Secretary of State Katie Hobbs submitted the Certificate of Ascertainment with the Biden electoral votes pursuant to the National Archivist pursuant to the Electoral Count Act.[8]

23. Accordingly, there are now competing slates of Republican and Democratic electors in five States with Republican majorities in both houses of their State Legislatures – Arizona, Georgia, Michigan, Pennsylvania, and Wisconsin (*i.e.*, the Contested States) – that

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[5] *See id.*

[6] *See Wisconsin GOP Electors Meet to Cast their own Votes Too Just in Case,* by Nick Viviani, WMTV, NBC15.com, December 14, 2020, https://www.nbc15.com/2020/12/14/wisconsin-gop-electors-meet-to-cast-their-own-votes-too-just-in-case/ last visited December 14, 2020.

[7] *See Michigan Police Block GOP Electors from Entering Capitol*, by Jacob Palmieri, the Palmieri Report, December 14, 2020, https://thepalmierireport.com/michigan-state-police-block-gop-electors-from-entering-capitol/.

[8] *See Democratic Electors Cast Ballots in Arizona for First Time Since 1996*, by Nicole Valdes, ABC15.com, December 14, 2020, *available at*: https://www.abc15.com/news/election-2020/democratic-electors-cast-ballots-in-arizona-for-first-time-since-1996.

collectively have 73 electoral votes, which are more than sufficient to determine the winner of the 2020 General Election.[9]

24. The Arizona Electors, along with Republican Presidential Electors in Georgia, Michigan, Pennsylvania, and Wisconsin, took this step as a result of the extraordinary events and substantial evidence of election fraud and other illegal conduct before, during and after the 2020 General Election in these States. The Arizona Legislature has conducted legislative hearings into these voting fraud allegations, and is actively investigating these matters, including issuing subpoenas of Maricopa County, Arizona (which accounts for over 60% of Arizona's population and voters) voting machines for forensic audits.[10]

25. On December 14, 2020, members of the Arizona Legislature passed a Joint Resolution in which they: (1) found that the 2020 General Election "was marred by irregularities so significant as to render it highly doubtful whether the certified result accurately represents the will of the voters;" (2) invoked the Arizona Legislature's authority under the Electors Clause and 5 U.S.C. § 2 to declare the 2020 General Election a failed election and to directly appoint Arizona's electors; (3) resolved that the Plaintiff Arizona Electors' "11 electoral votes be accepted for … Donald J. Trump or to have all electoral votes nullified completely until a full forensic audit can be conducted;" and (4) further resolved "that the United States Congress is not to consider a slate

[9] Republican Presidential Electors in the States of Nevada and New Mexico, which have Democrat majority state legislature, also met on December 14, 2020, at their State Capitols to cast their votes for President Trump and Vice President Pence.

[10] Maricopa County election officials have refused to comply with these subpoenas or to turn over voting machines or voting records and have sued to quash the subpoena. Plaintiff Arizona Electors have moved to intervene in this Arizona state proceeding. *See generally Maricopa Cty. v. Fann*, Case No. CV2020-016840 (Az. Sup. Ct. Dec. 18, 2020).

of electors from the State of Arizona until the Legislature deems the election to be final and all irregularities resolved."[11]

26. Public reports have also highlighted wide-spread election fraud in the other Contested States that prompted competing Electors' slates. [12]

27. Republican Senators and Republican Members of the House of Representatives have also expressed their intent to oppose the certified slates of electors from the Contested States due to the substantial evidence of election fraud in the 2020 General Election. Multiple Senators and House Members have stated that they will object to the Biden electors at the January 6, 2021 Joint Session of Congress.[13] Plaintiff Gohmert will object to the counting of the Arizona electors voting for Biden, as well as to the Biden electors from the remaining Contested States.

28. Based on the foregoing facts, Defendant Vice President Pence, in his capacity as President of the Senate and Presiding Officer at the January 6, 2021 Joint Session of Congress to select the next President, will be presented with the following circumstances: (1) competing slates of electors from the State of Arizona and the other Contested States (namely, Georgia, Michigan, Pennsylvania, and Wisconsin) (2) that represent sufficient electoral votes (a) if counted, to determine the winner of the 2020 General Election, or (b) if not counted, to deny either President Trump or former Vice President Biden sufficient votes to win outright; and (3) objections from at

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[11] *See* **Ex. A**, "A Joint Resolution of the 54th Legislature, State of Arizona, To The 116th Congress, Office of the President of the Senate Presiding," December 14, 2020 ("December 14, 2020 Joint Resolution").

[12] *See The Immaculate Deception*, *Six Key Dimensions of Election Irregularities, The Navarro Report*. https://bannonswarroom.com/wp-content/uploads/2020/12/The-Immaculate-Deception-12.15.20-1.pdf

[13] *See, e.g., Dueling Electors and the Upcoming Joint Session of Congress*, by Zachary Steiber, Epoch Times, Dec. 17, 2020, *available at:* https://www.theepochtimes.com/explainer-dueling-electors-and-the-upcoming-joint-session-of-congress_3622992.html.

least one Senator and at least one Member of the House of Representatives to the counting of electoral votes from one or more of the Contested States.

29. The choice between the Twelfth Amendment and 3 U.S.C. § 15 raises important procedural differences. In the incoming 117th Congress, the Republican Party has a majority in 27 of the House delegations that would vote under the Twelfth Amendment. The Democrat Party has a majority in 20 of those House delegations, and the two parties are evenly divided in three of those delegations. By contrast, under 3 U.S.C. § 15, Democrats have a ten- or eleven-seat majority in the House, depending on the final outcome of the election in New York's 22nd District.

30. Accordingly, it is the foregoing conflict between the Twelfth Amendment of the U.S. Constitution and Section 15 of the Electoral Count Act that establish the urgency for this Court to issue a declaratory judgment that Section 15 of the Electoral Count Act is unconstitutional.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

31. **Presidential Electors Clause.** The U.S. Constitution grants State Legislatures the exclusive authority to appoint 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 no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector. U.S. CONST. art. II, § 1 ("Electors Clause").

32. The Supreme Court has affirmed that the "power and jurisdiction of the state [legislature]" to select electors "is exclusive," *McPherson v. Blacker*, 146 U.S. 1, 11 (1892); this power "cannot be taken from them or modified" by statute or even the state constitution," and "there is no doubt of the right of the legislature to resume the power at any time." *Id.* at 10 (citations omitted). In *Bush v. Gore*, 531 U.S. 98 (2000), the Supreme Court reaffirmed *McPherson's* holding that "the state legislature's power to select the manner for appointing

electors is plenary," *Bush*, 531 U.S. at 104 (*citing McPherson*, 146 U.S. at 35), noting that the state legislature "may, if it so chooses, select the electors itself," and that even after deciding to select electors through a statewide election, "can take back the power to appoint electors." *Id.* (citation omitted).

33. **The Twelfth Amendment.** The Twelfth Amendment sets forth the procedures for counting electoral votes and for resolving disputes over whether and which electoral votes may be counted for a State. The first section describes the meeting of the Electoral College and the procedures up to the casting of the electoral votes by the Presidential Electors in their respective states, which occurred on December 14, 2020, with respect to the 2020 General Election:

> The electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate.

U.S. CONST. amend. XII.

34. The second section describes how Defendant Vice President Pence, in his role as President of the Senate and Presiding Officer for the January 6, 2021 Joint Session of Congress, shall "count" the electoral votes.

> The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted[.]

U.S. CONST. amend. XII.

35. Under the Twelfth Amendment, Defendant Pence alone has the exclusive authority and sole discretion to open and permit the counting of the electoral votes for a given state, and where there are competing slates of electors, or where there is objection to any single slate of electors, to determine which electors' votes, or whether none, shall be counted. Notably, neither

the Twelfth Amendment nor the Electoral Count Act, provides any mechanism for judicial review of the Presiding Officer's determinations.[14] Instead, the Twelfth Amendment and the Electoral Count Act adopt different procedures for the President of the Senate (Twelfth Amendment) or both Houses of Congress (Electoral Count Act) to resolve any such disputes and the authority for the final determinations, in the event of disagreement, to different parties; namely, the Electoral Count Act gives it to the Executive of the State; while the Twelfth Amendment vests sole authority with the Vice President.

36. The third section of the Twelfth Amendment sets forth the procedures for selecting the President (solely) by the House of Representatives, in the event that no candidate has received a majority of electoral votes counted by the President of the Senate.

> The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of electors appointed; *and if no person have such majority, then* from the persons having the highest numbers not exceeding three on the list of those voted for as President**,** *the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote*; a quorum for this purpose shall consist of a member or members from two-thirds of the states, *and a majority of all the states shall be necessary to a choice*. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.

U.S. CONST. amend. XII (emphasis added).

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[14] *See, e.g.,* Nathan L. Colvin & Edward B. Foley, *The Twelfth Amendment: A Constitutional Ticking Time Bomb*, U. of Miami L. Rev. 64:475, 526 (2010) (discussing reviews of the Electoral Count Act's ("ECA") legislative history and concluding that, "[o]ne of the more thorough reviews of the legislative history of the ECA reveals that Congress considered giving the Court some role in the process but rejected the idea every time, and it was clear that Congress did not think the Court had a constitutional role nor did it believe that the Court should have any jurisdiction at all." Plaintiffs agree that resolution of disputes before Congress, arising on January 6, 2021, over competing slates of electors, or objections to any slate of electors, are matters outside the purview of federal courts; but the federal courts must determine whether the ECA is unconstitutional. This position is fully consistent with the declaratory judgment requested herein.

37. There are four key features of this Twelfth Amendment procedure that should be noted when comparing it with the Electoral Count Act's procedures: (1) the President is to be chosen solely by the House of Representatives, with no role for the Senate; (2) votes are taken by State (with one vote per State), rather than by individual House members; (3) the President is deemed the candidate that receives the majority of States' votes, rather than a majority of individual House members' votes; and (4) there are no other restrictions on this majority rule provision; in particular, no "tie breaker" or priority rules based on the manner or State authority that originally appointed the electors on December 14, 2020 as is the case under the Electoral Count Act (which gives priority to electors' certified by the State's executive).

38. **The Electoral Count Act.** The Electoral Count Act of 1887, as subsequently amended, includes a number of provisions that are in direct conflict with the text of the Electors Clause and the Twelfth Amendment.

39. Sections 5 and 15 of the Electoral Count Act adopt an entirely different set of procedures for the counting of electoral votes, for addressing situations where one candidate does not receive a majority, and for resolving disputes. Sections 16 to 18 of the Electoral Count Act provide additional procedural rules governing the Joint Session of Congress (to be held January 6, 2021 for the 2020 General Election).

40. The first part of Section 15 is consistent with the Twelfth Amendment insofar as it provides that "the President of the Senate shall be their presiding officer" and that "all the certificates and papers purporting to be certificates of the electoral votes" are to be "opened by the President of the Senate." 3 U.S.C. § 15. However, Section 15 diverges from the Twelfth Amendment by adopting procedures for the President of the Senate to "call for objections," and if there are objections made in writing by one Senator and one Member of the House of

Representatives, then this shall trigger a dispute-resolution procedure found nowhere in the Twelfth Amendment.

41. The Section 15's dispute resolution procedures are lengthy and reproduced in their entirety below:

> When all objections so made to any vote or paper from a State shall have been received and read, the Senate shall thereupon withdraw, and such objections shall be submitted to the Senate for its decision; and the Speaker of the House of Representatives shall, in like manner, submit such objections to the House of Representatives for its decision; and no electoral vote or votes from any State which shall have been regularly given by electors whose appointment has been lawfully certified to according to section 6 of this title [3 USCS § 6][15] from which but one return has been received shall be rejected, *but the two Houses concurrently may reject the vote or votes when they agree that such vote or votes have not been so regularly given by electors whose appointment has been so certified*. If more than one return or paper purporting to be a return from a State shall have been received by the President of the Senate, those votes, and those only, shall be counted which shall have been regularly given by the electors who are shown by the determination mentioned in section 5 [3 USCS § 5] of this title to have been appointed, if the determination in said section provided for shall have been made, or by such successors or substitutes, in case of a vacancy in the board of electors so ascertained, as have been appointed to fill such vacancy in the mode provided by the laws of the State; but in case there shall arise the question which of two or more of such State authorities determining what electors have been appointed, as mentioned in section 5 of this title [3 USCS § 5], *is the lawful tribunal of such State, the votes regularly given of those electors, and those only*, of such State shall be counted whose title as electors the two Houses, acting separately, shall concurrently decide is supported by the decision of such State so authorized by its law; and in such case of more than one return or paper purporting to be a return from a State, if there shall have been no such determination of the question in the State aforesaid, then those votes, and those only, shall be counted which the two Houses shall concurrently decide were cast by lawful electors appointed in accordance with the laws of the State, unless the two Houses, acting separately, shall concurrently decide such votes not to be the lawful votes of the legally appointed electors of such

[15] 3 U.S.C. § 6 is inconsistent with the Electors Clause—which provides that electors "shall sign and certify, and transmit sealed to the seat of the government of the United States" the results of their vote, U.S. Const. art. II, § 1, cl. 2-3—because § 6 relies on state executives to forward the results of the electors' vote to the Archivist for delivery to Congress. 3 U.S.C. § 6. Although the means of delivery are arguably inconsequential, the Constitution vests state executives with no role whatsoever in the process of electing a President. A state executive lends no official imprimatur to a given slate of electors under the Constitution.

> State. *But if the two Houses shall disagree in respect of the counting of such votes, then, and in that case, the votes of the electors whose appointment shall have been certified by the executive of the State, under the seal thereof, shall be counted*. When the two Houses have voted, they shall immediately again meet, and the presiding officer shall then announce the decision of the questions submitted. No votes or papers from any other State shall be acted upon until the objections previously made to the votes or papers from any State shall have been finally disposed of.

3 U.S.C. § 15 (emphasis added).

42. First, the Electoral Count Act submits disputes over the "count" of electoral votes to both the House of Representatives and to the Senate. The Twelfth Amendment envisages no such role for both Houses of Congress. The President of the Senate, and the President of the Senate alone, shall "count" the electoral votes. This intent is borne out by a unanimous resolution attached to the final Constitution that described the procedures for electing the first President (*i.e.*, for a time when there would not already be a Vice President), stating in relevant part "that the Senators should appoint a President of the Senate, for the sole Purpose of receiving, opening and counting the Votes for President." 2 M. Farrand, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 666 (1911). For all subsequent elections, when there would be a Vice President to act as President of the Senate, the Constitution vests the opening and counting in the Vice President.

43. Second, the Electoral Count Act gives both the House of Representatives and the Senate the power to vote, or "decide," which of two or more competing slates of electors shall be counted, and it requires the concurrence of both to "count" the electoral votes for one of the competing slates of electors.

44. Under the Twelfth Amendment, the President of the Senate has the sole authority to count votes in the first instance, and then the House may do so *only* in the event that no candidate receives a majority counted by the President of the Senate. There is no role for the Senate to participate in choosing the President.

45. Third, the Electoral Count Act eliminates entirely the unique mechanism by which the House of Representatives under the Twelve Amendment is to choose the President, namely, where "the votes shall be taken by states, the representation for each state having one vote." U.S. CONST. amend. XII. The Electoral Count Act is silent on how the House of Representatives is to "decide" which electoral votes were cast by lawful electors.

46. Fourth, the Electoral Count Act adopts a priority rule, or "tie breaker," "if the two Houses shall disagree in respect of counting of such votes," in which case "the votes of the electors whose appointment shall have been certified by the executive of the State … shall be counted." This provision not only conflicts with the President of the Senate's exclusive authority and sole discretion under the Twelfth Amendment to decide which electoral votes to count, but also with the State Legislature's exclusive and plenary authority under the Electors Clause to appoint the Presidential Electors for their State.

47. The Electoral Count Act is unconstitutional because it exceeds the power of Congress to enact. It is well settled that "one legislature may not bind the legislative authority of its successors," United *States v. Winstar Corp.*, 518 U.S. 839, 872 (1996), which is a foundational and "centuries-old concept," *id.*, that traces to Blackstone's maxim that "Acts of parliament derogatory from the power of subsequent parliaments bind not." *Id.* (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *90). "There is no constitutionally prescribed method by which one Congress may require a future Congress to interpret or discharge a constitutional responsibility in any particular way." Laurence H. Tribe, *Erog v. Hsub and Its Disguises: Freeing* Bush v. Gore *from Its Hall of Mirrors*, 115 HARV. L. REV. 170, 267 n.388 (2001).

48. The Electoral Count Act also violates the Presentment Clause by purporting to create a type of bicameral order, resolution, or vote that is not presented to the President. *See* U.S.

CONST. art. I, § 7, cl. 3 ("Every Order, Resolution, or Vote, to Which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.")

49. The House and Senate cannot resolve the issues that the Electoral Count Act asks them to resolve without either a supermajority in both houses or presentment. The Electoral Count Act similarly restricts the authority of the House of Representatives and the Senate to control their internal discretion and procedures pursuant to Article I, Section 5 which provides that "[e]ach House may determine the Rules of its Proceedings …" U.S. CONST. art. I, § 5, cl. 2.

50. Further, the Electoral Count Act improperly delegates tie-breaking authority to State executives (who have no agency under the Electors Clause or election amendments) when a State presents competing slates that Congress cannot resolve, or when an objection is presented to a particular slate of electors.

51. The Electoral Count Act also violates the non-delegation doctrine, the separation-of-powers and anti-entrenchment doctrines. *See generally* Chris Land & David Schultz, *On the Unenforceability of the Electoral Count Act*, 13 Rutgers J.L. & Pub. Policy 340, 364-377 (2016).

JUSTICIABILITY AND JURISDICTION

52. **This Court Can Grant Declaratory Judgment in a Summary Proceeding.** This Court has the authority to enter a declaratory judgment and to provide injunctive relief pursuant to Rules 57 and 65 of the Federal Rules of Civil Procedure and 28 U.S.C. §§ 2201 and 2202. The court may order a speedy hearing of a declaratory judgment action. Fed. Rules Civ. Proc. R. 57,

Advisory Committee Notes. A declaratory judgment is appropriate when it will "terminate the controversy" giving rise to the proceeding. *Id.* Inasmuch as it often involves only an issue of law on undisputed or relatively undisputed facts, it operates frequently as a summary proceeding, justifying docketing the case for early hearing as on a motion. *Id.*

53. As described above, Plaintiffs' claims involve legal issues only – specifically, whether the Electoral Count Act violates the Twelfth Amendment of the U.S. Constitution – that do not require this court to resolve any disputed factual issues.

54. Moreover, the factual issues related to the justiciability of Plaintiffs' claims are not in dispute. To assist this Court to grant the relief on the expedited basis requested herein, Plaintiffs address a number of likely objections to this Court's jurisdiction and the justiciability of Plaintiffs' claims that may be raised by Defendant.

55. **Plaintiffs Have Standing.** Plaintiffs have standing as including a Member of the House of Representatives, Members of the Arizona Legislature, and as Presidential Electors for the State of Arizona.

56. Prior to December 14, 2020, Plaintiff Arizona Electors had standing under the Electors Clause as candidates for the office of Presidential Elector because, under Arizona law, a vote cast for the Republican Party's President and Vice President is cast for the Republican Presidential Electors. *See* ARS § 16-212. Accordingly, Plaintiff Arizona Electors, like other candidates for office, "have a cognizable interest in ensuring that the final vote tally reflects the legally valid votes cast," as "[a]n inaccurate vote tally is a concrete and particularized injury to candidates such as the Electors." *Carson v. Simon*, 978 F.3d 1051, 1057 (8th Cir. 2020) (affirming that Presidential Electors have Article III and prudential standing under Electors Clause). *See also Wood v. Raffensperger*, No. 20-14418, 2020 WL 7094866, *10 (11th Cir. Dec. 5, 2020) (affirming

that if Plaintiff voter had been a candidate for office "he could assert a personal, distinct injury" required for standing); *Trump v. Wis. Elections Comm'n*, No. 20-cv-1785, 2020 U.S. Dist. LEXIS 233765 at *26 (E.D. Wis. Dec. 12, 2020) (President Trump, "as candidate for election, has a concrete particularized interest in the actual results of the election.").

57. But for the alleged wrongful conduct of Arizona executive branch and Maricopa County officials under color of law, by certifying a fraudulently produced election result in Mr. Biden's favor, the Plaintiff Arizona Electors would have been certified as the presidential electors for Arizona, and Arizona's Governor and Secretary of State would have transmitted uncontested votes for Donald J. Trump and Michael R. Pence to the Electoral College. The certification and transmission of a competing slate of Biden electors has resulted in a unique injury that only Plaintiff Arizona Electors could suffer, namely, having a competing slate of electors take their place and their votes in the Electoral College.

58. The upcoming January 6, 2021 Joint Session of Congress provides further grounds of standing for the requested declaratory judgment that the Electoral Count Act is unconstitutional. Then, Plaintiffs are certain or nearly certain to suffer an injury-in-fact caused by Defendant Vice President Pence, acting as Presiding Officer, if Defendant ignores the Twelfth Amendment and instead follows the procedures in Section 15 of the Electoral Count Act to resolve the dispute over which slate of Arizona electors is to be counted.

59. The Twelfth Amendment gives Defendant exclusive authority and sole discretion as to which set of electors to count, or not to count any set of electors; if no candidate receives a majority of electoral votes, then the President is to be chosen by the House, where "the votes shall be taken by States, the representation from each state having one vote." U.S. CONST. amend. XII. If Defendant Pence instead follows the procedures in Section 15 of the Electoral Count Act,

Plaintiffs' electoral votes will not be counted because (a) the Democratic majority House of Representatives will not "decide" to count the electoral votes of Plaintiff Republican electors; and (b) either the Senate will concur with the House not to count their votes, or the Senate will not concur, in which case, the electoral votes cast by Biden's electors will be counted because the Biden slate of electors was certified by Arizona's executive.

60. It is sufficient for the purposes of declaratory judgment that the injury is threatened. The declaratory and injunctive relief requested by Plaintiffs "may be made before actual completion of the injury-in-fact required for Article III standing," namely, the application of Section 15 of the Electoral Count Act, rather than the Twelfth Amendment to resolve disputes over which of two competing slates of electors to count "if the plaintiff can show an actual present harm or significant possibility of future harm to demonstrate the need for pre-enforcement review." 10 FED. PROC. L. ED. § 23.26 ("Standing to Seek Declaratory Judgment") (citations omitted).

61. Plaintiffs have demonstrated above that this injury-in-fact is to occur at the January 6, 2021 Joint Session of Congress, and they seek the requested declaratory and injunctive relief "only in the last resort, and as a necessity in the determination of a vital controversy." *Id.*

62. **Plaintiffs Present a Live "Case or Controversy."** Plaintiffs' claims present a live "case or controversy" with the Defendant, rather than hypothetical or abstract dispute, that can be litigated and decided by this Court through the requested declaratory and injunctive relief. Here there is a clear threat of the application of an unconstitutional statute, Section 15 of the Electoral Count Act, which is sufficient to establish the requisite case or controversy. *See, e.g., Navegar, Inc. v. U.S.*, 103 F.3d 994, 998 (D.C. Cir. 1997) ("the threat of prosecution provides the foundation of justiciability as a constitutional and prudential matter, and the Declaratory Judgments Act provides the mechanism for seeking pre-enforcement review in federal court.").

63. First, the events of December 14, 2020, gave rise to two competing slates of electors for the State of Arizona: the Plaintiff Arizona Electors, supported by Arizona State legislators (as evidenced by the December 14, 2020 Joint Resolution and the participation of Arizona legislator Plaintiffs), who cast their electoral votes for President Trump and Vice President Pence, and one certified by the Arizona state executives who cast their votes for former Vice President Biden and Senator Harris. Second, the text of the Twelfth Amendment of the Constitution expressly commits to the Defendant Vice President Pence, acting as the President of the Senate and Presiding Officer for the January 6, 2021 Joint Session of Congress, the authority and discretion to "count" electoral votes, *i.e.*, deciding in his sole discretion as to which one of the two, or neither, set of electoral votes shall be counted. The Electoral Count Act similarly designates Defendant as the Presiding Officer responsible for opening and counting electoral votes, but sets forth a different set of procedures, inconsistent with the Twelfth Amendment, for deciding which of two or more competing slates of electors and electoral votes, or neither, shall be counted.

64. Accordingly, a controversy presently exists due to: (1) the existence of competing slates of electors for Arizona and the other Contested States, and (2) distinct and inconsistent procedures under the Twelfth Amendment and the Electoral Count Act to determine which slate of electors and their electoral votes, or neither, shall be counted in choosing the next President. Further, this controversy must be resolved at the January 6, 2021 Joint Session of Congress. Finally, the Constitution expressly designates Defendant Pence as the individual who decides which set of electoral votes, or neither, to count, and the requested declaratory judgment that the procedures under Electoral Count Act are unconstitutional is necessary to ensure that Defendant Pence counts electoral votes in a manner consistent with the Twelfth Amendment of the U.S. Constitution.

65. The injuries that Plaintiffs assert affect the procedure by which the status of their votes will be considered, which lowers the thresholds for immediacy and redressability under this Circuit's and the Supreme Court's precedents. *Nat'l Treasury Employees Union v. U.S.,* 101 F.3d 1423, 1428-29 (D.C. Cir. 1996); *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 571-72 & n.7 (1992). Similarly, a plaintiff with concrete injury can invoke Constitution's structural protections of liberty. *Bond v. United States*, 564 U.S. 211, 222-23 (2011).

66. **Plaintiffs' Claims Are Ripe for Adjudication.** Plaintiffs' claims are ripe for the same reasons that they present a live "case or controversy" within the meaning of Article III. "[T]he ripeness doctrine seeks to separate matters that are premature for review because the injury is speculative and may never occur from those cases that are appropriate for federal court action." *Roark v. Hardee LP v. City of Austin*, 522 F.3d 533, 544 n.12 (5th Cir. 2008) (*quoting* ERWIN CHEMERINSEY, FEDERAL JURISDICTION § 2.4.18 (5th Ed. 2007)). As explained above, the facts underlying the justiciability of Plaintiffs' claims are not in dispute. Further, it is certain or nearly certain that Plaintiffs will suffer an injury-in-fact at the January 6, 2021 Joint Session of Congress, if Defendant Pence disregards the exclusive authority and sole discretion granted to him under the Twelfth Amendment to "count" electoral votes, and instead follows the conflicting and unconstitutional procedures in Section 15 of the Electoral Count Act, pursuant to which Plaintiffs' electoral votes will be disregarded in favor of the competing electors for the State of Arizona.

67. **Plaintiffs' Claims Are Not Moot.** Plaintiffs seek prospective declaratory judgment that portions of the Electoral Count Act are unconstitutional and injunctive relief prohibiting Defendant from following the procedures in Section 15 thereof that authorize the House and Senate jointly to resolve disputes regarding competing slates of electors. This prospective relief would apply to Defendants' future actions at the January 6, 2021 Joint Session

of Congress. The requested relief thus is not moot because it is prospective and because it addresses an unconstitutional "ongoing policy" embodied in the Electoral Count Act that is likely to be repeated and will evade review if the requested relief is not granted. *Del Monte Fresh Produce v. U.S.*, 570 F.3d 316, 321-22 (D.C. Cir. 2009).

COUNT I

DEFENDANT WILL NECESSARILY VIOLATE THE TWELFTH AMENDMENT AND THE ELECTORS CLAUSE OF THE UNITED STATES CONSTITUTION IF HE FOLLOWS THE ELECTORAL COUNT ACT.

68. Plaintiffs reallege all preceding paragraphs as if fully set forth herein.

69. The Electors Clause states that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors" for President and Vice President. U.S. Const. art. II, §1, cl. 2 (emphasis added).

70. The Twelfth Amendment of the U.S. Constitution gives Defendant Vice President, as President of the Senate and the Presiding Officer of January 6, 2021 Joint Session of Congress, the exclusive authority and sole discretion to "count" the electoral votes for President, as well as the authority to determine which of two or more competing slates of electors for a State, or neither, may be counted, or how objections to any single slate of electors is resolved. In the event no candidate receives a majority of the electoral votes, then the House of Representatives shall have sole authority to choose the President where "the votes shall be taken by states, the representation from each state having one vote." U.S. CONST. amend. XII.

71. Section 15 of the Electoral Count Act replaces the procedures set forth in the Twelfth Amendment with a different and inconsistent set of decision making and dispute resolution procedures. As detailed above, these provisions of Section 15 of the Electoral Count Act are unconstitutional insofar as they require Defendant: (1) to count the electoral votes for a

State that have been appointed in violation of the Electors Clause; (2) limits or eliminates his exclusive authority and sole discretion under the Twelfth Amendment to determine which slates of electors for a State, or neither, may be counted; and (3) replaces the Twelfth Amendment's dispute resolution procedure which provides for the House of Representatives to choose the President under a procedure where "the votes shall be taken by states, the representation from each state having one vote" – with an entirely different procedure in which the House and Senate each separately "decide" which slate is to be counted, and in the event of a disagreement, then only "the votes of the electors whose appointment shall have been certified by the executive of the State … shall be counted." 3 U.S.C. § 15.

72. Section 15 of the Electoral Count Act also violates the Electors Clause by usurping the exclusive and plenary authority of State Legislatures to determine the manner of appointing Presidential Electors and gives that authority instead to the State's Executive.

PRAYER FOR RELIEF

73. Accordingly, Plaintiffs respectfully request that this Court issue a judgment that:

A. Declares that Section 15 of the Electoral Count Act, 3 U.S.C. §§5 and 15, is unconstitutional because it violates the Twelfth Amendment on its face, Amend. XII, Constitution;

B. Declares that Section 15 of the Electoral Count Act, 3 U.S.C. §§5 and 15, is unconstitutional because it violates the Electors Clause. U.S. CONST. art. II, § 1, cl. 1;

C. Declares that Vice-President Pence, in his capacity as President of Senate and Presiding Officer of the January 6, 2021 Joint Session of Congress, is subject solely to the requirements of the Twelfth Amendment and may exercise the

exclusive authority and sole discretion in determining which electoral votes to count for a given State;

D. Enjoins reliance on any provisions of the Electoral Count Act that would limit Defendant's exclusive authority and his sole discretion to determine which of two or more competing slates of electors' votes are to be counted for President;

E. Declares that, with respect to competing slates of electors from the State of Arizona or other Contested States, or with respect to objection to any single slate of electors, the Twelfth Amendment contains the exclusive dispute resolution mechanisms, namely, that (i) Vice-President Pence determines which slate of electors' votes shall be counted, or if none be counted, for that State and (ii) if no person has a majority, then the House of Representatives (and only the House of Representatives) shall choose the President where "the votes [in the House of Representatives] shall be taken by states, the representation from each state having one vote," U.S. CONST. amend. XII;

F. Declares that, also with respect to competing slates of electors, the alternative dispute resolution procedure or priority rule in 3 U.S.C. § 15, is null and void insofar as it contradicts and replaces the Twelfth Amendment rules above by with an entirely different procedure in which the House and Senate each separately "decide" which slate is to be counted, and in the event of a disagreement, then only "the votes of the electors whose appointment shall have been certified by the executive of the State … shall be counted," 3 U.S.C. § 15;

G. Enjoins the Defendant from executing his duties on January 6th during the Joint Session of Congress in any manner that is insistent with the declaratory relief set forth herein, and

H. Issue any other declaratory judgments or findings or injunctions necessary to support or effectuate the foregoing declaratory judgment.

74. Plaintiffs have concurrently submitted a motion for a speedy summary proceeding under FRCP Rule 57 to grant the relief requested herein ***as soon as practicable***, and for emergency injunctive relief under FRCP Rule 65 thereof consistent with the declaratory judgment requested herein on that same date.

Dated: December 27, 2020

Respectfully submitted,

/s/ William Lewis Sessions

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COUNSEL FOR PLAINTIFFS LOUIE GOHMERT, TYLER BOWYER, NANCY COTTLE, JAKE HOFFMAN, ANTHONY KERN, JAMES R. LAMON, SAM MOORHEAD, ROBERT MONTGOMERY, LORAINE PELLEGRINO, GREG SAFSTEN, KELLI WARD and MICHAEL WARD

A JOINT RESOLUTION OF THE 54TH LEGISLATURE,

STATE OF ARIZONA

TO

THE 116TH CONGRESS, OFFICE OF THE PRESIDENT OF THE SENATE, PRESIDING.

WHEREAS, it is the constitutional and legal obligation of the Legislature of the State of Arizona to ensure that the state's presidential electors truly represent the will of the voters of Arizona; and

WHEREAS, pursuant to the direction of Congress as set forth in United States Code, title 3, section 1 as authorized by Article II, section 1, clause 4 of the Constitution of the United States, and state law adopted pursuant thereto, Arizona conducted an election for presidential electors on the Tuesday next after the first Monday in November of 2020—that is, on November 3, 2020; and

WHEREAS, that election was marred by irregularities so significant as to render it highly doubtful whether the certified results accurately represent the will of the voters; and

WHEREAS, Congress has further directed in U.S. Code, title 3, section 2 that when a state "has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day in such manner as the legislature of such State may direct"; and

EXHIBIT A

WHEREAS, that provision implicitly recognizes that Article II, Section 1, Clause 2 of the U.S. Constitution grants to each state legislature, with stated limitations, the sole authority to prescribe the manner of appointing electors for that state; and

WHEREAS, the United States Supreme Court and other courts have explained that when a state legislature directs the manner of appointing electors, it does so pursuant to a grant of authority from the U.S. Constitution rather than by reason of any state constitutional or other legal provision; that this authority may be exercised by the legislature alone without other aspects of the normal lawmaking process; and that the state legislature's authority over the appointment of presidential electors is plenary and may be resumed at any time; and

WHEREAS, because U.S. Code, title 3, section 7 mandates that all presidential electors vote for President and Vice President of the United States on December 14, 2020, it is impossible to pursue the Legislature's preferred course of action, which would be for Arizona's voters to participate in a new and fair and free presidential election before that date; and

WHEREAS, in view of the facts heretofore recited, the Legislature is required to exercise its best judgment as to which slate of electors the voters prefer; and

WHEREAS, legal precedent exists where in 1960 the State of Hawaii sent an alternate slate of electors while the Presidential election was still in question in order to meet the deadline of selecting electors, and upon recount the alternate slate of electors' ballots were ultimately counted; and

WHEREAS, the undersigned have an obligation to find the truth. For this reason, on several occasions since November 3, we state lawmakers have requested fact-finding hearings to include a comprehensive and independent forensic audit. At this time, no such audit has been authorized. This leaves the uncertainty of the election results in a state that requires further investigation and resolution; and

WHEREAS, the Senate Judiciary standing committee today called for a forensic audit of various election irregularities, ongoing litigation is currently active, and there are unresolved disputes by both the Legislature and at least one Presidential campaign, rendering the election inconclusive as of date of signing of this letter,

THEREFORE,

Be it resolved by the undersigned Legislators, members of the Arizona House and Senate, request that the alternate 11 electoral votes be accepted for to Donald J. Trump or to have all electoral votes nullified completely until a full forensic audit can be conducted. Be it further resolved that the United States Congress is not to consider a slate of electors from the State of Arizona until the Legislature deems the election to be final and all irregularities resolved

Signed this day, 14 December, 2020.

Senator Elect Kelly Townsend
Legislative District 16

Representative Bret Roberts
Legislative District 11

Senator Paul Boyer
Legislative District 20

Representative Kevin Payne
Legislative District 21

Representative Mark Finchem
Legislative District 11

Senator David Farnsworth
Legislative District 16

Senator Sonny Borrelli
Legislative District 5

Representative Leo Biasiucci
Legislative District 5

Representative Anthony Kern
Legislative District 20

Representative David Cook
Legislative District 8

Senator Sylvia Allen
Legislative District 15

Representative John Fillmore
Legislative District 16

Senator Elect Nancy Barto
Legislative District 15

Representative Travis Grantham
Legislative District 12

Majority Leader Warren Petersen
Legislative District 12

Representative Walter Blackman
Legislative District 6

Representative Steve Pierce
Legislative District 1

Representative Shawnna Bolick
Legislative District 20

Representative Tony Rivero

Representative Noel Campbell

Sen. Hawley Will Object During Electoral College Certification Process On Jan 6

Wednesday, December 30, 2020

Today U.S. Senator Josh Hawley (R-Mo.) announced he will object during the Electoral College certification process on January 6, 2021. Senator Hawley will object to highlight the failure of some states, including notably Pennsylvania, to follow their own election laws as well as the unprecedented interference of Big Tech monopolies in the election. He will call for Congress to launch a full investigation of potential fraud and election irregularities and enact election integrity measures.

Democrats have previously objected during the certification process for the 2004 and 2016 Presidential elections.

Senator Hawley said, "Following both the 2004 and 2016 elections, Democrats in Congress objected during the certification of electoral votes in order to raise concerns about election integrity. They were praised by Democratic leadership and the media when they did. And they were entitled to do so. But now those of us concerned about the integrity of this election are entitled to do the same.

"I cannot vote to certify the electoral college results on January 6 without raising the fact that some states, particularly Pennsylvania, failed to follow their own state election laws. And I cannot vote to certify without pointing out the unprecedented effort of mega corporations, including Facebook and Twitter, to interfere in this election, in support of Joe Biden. At the very least, Congress should investigate allegations of voter fraud and adopt measures to secure the integrity of our elections. But Congress has so far failed to act.

"For these reasons, I will follow the same practice Democrat members of Congress have in years past and object during the certification process on January 6 to raise these critical issues."

Background On Previous Objections to Electoral College Vote Certification

In 2005, Senator Barbara Boxer and Representative Stephanie Tubbs Jones Objected to the Electoral College Votes from Ohio.

Stephanie Tubs-Jones Said, "I Raise This Objection Because I Am Convinced That We As A Body Must Conduct A Formal And Legitimate Debate About Election Irregularities." (C-SPAN (https://outreach.senate.gov/iqextranet/iqClickTrk.aspx?&cid=SenHawley&crop=14310.6298941.5866468.7119050&report_id=&redirect=https%3a%2f%2fwww.c-span.org%2fvideo%2f%3f185005-2%2fdebate-ohio-electoral-vote-objection&redir_log=266954022449514), 1/6/05, 3:10-3:20)

EXHIBIT A

Boxer views her 2005 objection as "her proudest moment on the Senate floor," according to CNN. (CNN (https://outreach.senate.gov/iqextranet/iqClickTrk.aspx?&cid=SenHawley&crop=14310.6298941.5866468.7119050&report_id=&redirect=https%3a%2f%2fwww.cnn.com%2f20: college-objection-bush-boxer%2findex.html&redir_log=628933907465617), 12/27/2020)

In January 2005, 31 Congressional Democrats Voted To Reject Ohio's Electoral Votes. (CNN (applewebdata://849C88A2-A8F5-4FBA-9175-C87F69402B4D/Bush%20carries%20Electoral%20College%20after%20delay), 1/6/05)

Nancy Pelosi Praised The 2005 Objections, Saying Democrats Were "Speaking Up For Their Aggrieved Constituents" During "Their Only Opportunity To Have This Debate While The Country Is Listening"

Nancy Pelosi Said "We Are Witnessing Democracy At Work" And "This Debate Is Fundamental To Our Democracy." " [T]oday we are witnessing democracy at work. This is not, as some of our Republican colleagues have referred to it, sadly, frivolous. This debate is fundamental to our democracy." (C-SPAN (https://outreach.senate.gov/iqextranet/iqClickTrk.aspx?&cid=SenHawley&crop=14310.6298941.5866468.7119050&report_id=&redirect=https%3a%2f%2fwww.c-span.org%2fvideo%2f%3f185005-2%2fdebate-ohio-electoral-vote-objection&redir_log=266954022449514), 1/6/05, 32:49-33:08)

Pelosi Said Democrats Were "Speaking Up For Their Aggrieved Constituents, Many Of Whom May Have Been Disenfranchised In This Process." "The Members of Congress who have brought this challenge are speaking up for their aggrieved constituents, many of whom may have been disenfranchised in this process. This is their only opportunity to have this debate while the country is listening, and it is appropriate to do so. If there were other venues of this caliber, we would have taken that opportunity. But this is the opportunity. We have a responsibility to take advantage of it." (C-SPAN (https://outreach.senate.gov/iqextranet/iqClickTrk.aspx?&cid=SenHawley&crop=14310.6298941.5866468.7119050&report_id=&redirect=https%3a%2f%2fwww.c-span.org%2fvideo%2f%3f185005-2%2fdebate-ohio-electoral-vote-objection&redir_log=266954022449514), 1/6/05, 34:14-34:45)

- **Pelosi Said "This Is Their Only Opportunity To Have This Debate While The Country Is Listening" And "We Have A Responsibility To Take Advantage Of It."** (C-SPAN (https://outreach.senate.gov/iqextranet/iqClickTrk.aspx?&cid=SenHawley&crop=14310.6298941.5866468.7119050&report_id=&redirect=https%3a%2f%2fwww.c-span.org%2fvideo%2f%3f185005-2%2fdebate-ohio-electoral-vote-objection&redir_log=266954022449514), 1/6/05, 34:14-34:45)

Pelosi Said "Do Not Talk About This As A 'Conspiracy Theory.'" "[P]lease do not talk about this as a 'conspiracy theory.' It is not about that. It is not about conspiracy; it is about the Constitution of the United States." (C-SPAN (https://outreach.senate.gov/iqextranet/iqClickTrk.aspx?&cid=SenHawley&crop=14310.6298941.5866468.7119050&report_id=&redirect=https%3a%2f%2fwww.c-span.org%2fvideo%2f%3f185005-2%2fdebate-ohio-electoral-vote-objection&redir_log=266954022449514), 1/6/05, 39:50-40:03)

In 2017, At Least Seven House Democrats Sought To Object To Electoral Votes In Favor Of President Trump:

- **Jim McGovern Said "The Electors Were Not Lawfully Certified, Especially Given The Confirmed And Illegal Activities Engaged By The Government Of Russia."** (CNN (https://outreach.senate.gov/iqextranet/iqClickTrk.aspx?&cid=SenHawley&crop=14310.6298941.5866468.7119050&report_id=&redirect=https%3a%2f%2fwww.cnn.com%college-vote-count-objections%2findex.html&redir_log=106450293475627), 1/6/17)
- **Raul Grijalva Objected After North Carolina's Tally.** (CNN (https://outreach.senate.gov/iqextranet/iqClickTrk.aspx?&cid=SenHawley&crop=14310.6298941.5866468.7119050&report_id=&redirect=https%3a%2f%2fwww.cnn.com%college-vote-count-objections%2findex.html&redir_log=106450293475627), 1/6/17)
- **Pramila Jayapal Objected To Georgia's Vote Certificate.** (CNN (https://outreach.senate.gov/iqextranet/iqClickTrk.aspx?&cid=SenHawley&crop=14310.6298941.5866468.7119050&report_id=&redirect=https%3a%2f%2fwww.cnn.com%college-vote-count-objections%2findex.html&redir_log=106450293475627), 1/6/17)
- **Jamie Raskin Objected To 10 Of Florida's 29 Electoral Votes, Saying "They Violated Florida's Prohibition Against Dual Office Holders."** (CNN (https://outreach.senate.gov/iqextranet/iqClickTrk.aspx?&cid=SenHawley&crop=14310.6298941.5866468.7119050&report_id=&redirect=https%3a%2f%2fwww.cnn.com%college-vote-count-objections%2findex.html&redir_log=106450293475627), 1/6/17)
- **Maxine Waters Objected.** (CNN (https://outreach.senate.gov/iqextranet/iqClickTrk.aspx?&cid=SenHawley&crop=14310.6298941.5866468.7119050&report_id=&redirect=https%3a%2f%2fwww.cnn.com%college-vote-count-objections%2findex.html&redir_log=106450293475627), 1/6/17)

Issues

General (/issues/general)

< PREVIOUS (/HAWLEY-WONT-CONSENT-NDAA-VOTE-WITHOUT-VOTE-2000-DIRECT-ASSISTANCE)

(https://www.facebook.com/SenatorHawley/) (https://twitter.com/SenHawleyPress)

(https://www.youtube.com/channel/UCMzt8xq6qQ3XQ_DINfJx0-w)

(https://www.instagram.com/senatorhawley/)

Sign up for Updates

EXHIBIT B

The Washington Post
Democracy Dies in Darkness

Sen. Hawley announces he will contest certification of electoral college vote

By **John Wagner**

Dec. 30, 2020 at 11:24 a.m. EST

Sen. Josh Hawley (R-Mo.) announced Wednesday that he would object next week when Congress convenes to certify the electoral college vote, a move that all but ensures at least a short delay in cementing President-elect Joe Biden's victory.

President Trump has repeatedly suggested congressional intervention as a last-ditch way to reverse the election results, despite opposition from Senate Majority Leader Mitch McConnell (R-Ky.) and other leading Republicans, who have conceded it is bound to fail and will put their members in an awkward position.

In a statement, Hawley said he feels compelled to put a spotlight on purported election irregularities.

"At the very least, Congress should investigate allegations of voter fraud and adopt measures to secure the integrity of our elections. But Congress has so far failed to act," Hawley said.

Any member of the House, joined by a member of the Senate, can contest the electoral votes on Jan. 6. The challenge prompts a floor debate followed by a vote in each chamber.

Trump will inevitably lose that vote, given that Democrats control the House and a number of Senate Republicans have publicly recognized Biden's victory, including Sen. Mitt Romney (Utah), who has called Trump's refusal to accept the election dangerous.

Even in the unlikely event that Trump were to prevail in the Senate, where Vice President Pence would be in position to cast a tie-breaking vote if needed, the challenge still would fail given the House vote.

Still, a number of Republican members of the House, led by Rep. Mo Brooks (R-Ala.) and encouraged by the president, have said they plan to challenge votes in swing states where they have made unfounded allegations that the vote was marred by fraud.

Prior to Hawley's announcement, one incoming Republican senator, newly elected Tommy Tuberville of Alabama, has said he is considering signing on, as well.

Hawley has been mentioned as a potential 2024 presidential candidate, and his move is certain to appeal to Trump supporters and parts of the Republican base.

EXHIBIT C

Trump, nevertheless, has played up what is usually a ceremonial milestone as a potential turning point in his quest to reverse the election results.

"See you in Washington, DC, on January 6th. Don't miss it," Trump tweeted Sunday.

Meanwhile, a lawsuit filed Sunday by U.S. Rep. Louie Gohmert (R-Tex.) and several Arizona Republicans against Pence attempts to get a federal judge to expand Pence's power to affect the outcome.

Rosalind S. Helderman and Tom Hamburger contributed to this report.

THE HILL

Sen.-elect Tuberville suggests back effort on challenge Electo College vote

BY TAL AXELROD - 12/17/20 01:41 PM EST

Just In...

Bidens honor frontline workers in NYE address: 'We owe them, we owe them, we owe them'
ADMINISTRATION

Florida reports first case of new, contagious coronavirus strain
STATE WATCH

NY restaurant that hosted Republican club's holiday party gets liquor license revoked
STATE WATCH

Roberts commends courthouses for their ability to adapt amid the pandemic
LEGAL

Photos show Wuhan, once epicenter of pandemic, crowded for New Year's celebrations
NEWS

Trump hotel in DC raises room rates for Biden inauguration
NEWS

Indiana law going into effect Jan. 1 will require women to have ultrasound before abortion
HEALTHCARE

GOP lawmaker criticizes Trump,

Sen.-elect Tommy Tuberville (R-Ala.) indicated in a video that surfaced Thursday that that he thinks the Senate should support a challenge to the results of the Electoral College, which certified President-elect Joe Biden's victory this week.

Tuberville suggested he would back a challenge Rep. Mo Brooks (R-Ala.) has vowed to bring against the vote. If a senator joins Brooks, it would require the House and Senate to debate and then vote on the issue.

"You see what's coming. You've been reading about it in the House. We're going to have to do it in the Senate," Tuberville said in the video taken by liberal activist Lauren Windsor at a rally for Sens. Kelly Loeffler (R-Ga.) and David Perdue (R-Ga.) in Georgia.

It appeared that Tuberville believed he was speaking with another rallygoer rather than a liberal activist, and Windsor asked the senator-elect what he could do to "fight to make this election right." The video was taken Wednesday night.

Lauren Windsor
@lawindsor

BREAKING: Defying McConnell, Sen-elect Tuberville suggests he will challenge Electoral College, while stumping in Georgia

EXHIBIT D

colleagues for 'trying to discredit' the election

NEWS

VIEW ALL

9:38 AM · Dec 17, 2020

64.3K 23.6K people are Tweeting about this

by

McConnell signals Senate has votes to...

GOP Georgia senators throw support behind...

Noem rules out Thune challenge after Trump...

Tuberville's campaign did not immediately respond to a request from comment from The Hill, but earlier this week Tuberville's campaign chairman had said that the senator-elect might back the Brooks effort.

"I think that he [Tuberville] and Ted Cruz are the two best candidates to do this," said Stan McDonald, Tuberville's campaign chairman, during an interview on WVNN-radio in Huntsville on Tuesday. "I don't know yet if or when he will do this. He's very seriously considering it."

Senate Majority Leader Mitch McConnell (R-Ky.) pleaded with Republican senators this week to dismiss the drive to challenge the results, which has been spearheaded by Brooks. McConnell indicated that forcing a debate would ultimately lead to a contentious vote to swat away the challenge, which would divide Republicans from President Trump, who remains wildly popular with the GOP base despite his loss.

"I think that there was encouragement on the phone for us to accept the result, as much as it's not what we, you know, would have envisioned for the next four years, and to try to do what's best for American people, which is to look forward," Sen. Shelley Moore Capito (R-W.Va.) said after a conference call with McConnell.

If the vote took place, it would not change the outcome of the election as there is not enough support in the House or Senate for it to be successful.

Trump and his allies have launched a sprawling legal campaign to overturn the election results on claims that widespread voter fraud cost him reelection. But virtually all of the lawsuits have been thrown out, at times by Trump-appointed judges, for lack of evidence or standing.

"We got to grab a hold and hold on. We have no choice. Listen to me now, we have no choice but to win this election. They're going to try to steal it, they're going to try to buy it, they're going to do everything they can, lie, cheat, steal to win this election, like they did in the presidential election," Tuberville told the rally crowd in Georgia.

GOP senator criticizes 'ambitious politicians' for 'dangerous'...

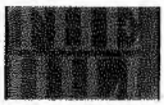
Hawley jams GOP with Electoral College fight

Sen. John Thune (S.D.), the No. 2 Senate Republican, told reporters Thursday he hopes Tuberville does not vote to have a debate on the Electoral College, saying, "it's time ... to move on."

"The fact of the matter is that's been litigated over and over... it's time to be done with this," Thune said. "I would hope that we wouldn't have members of the Senate who would decide that that makes sense. I don't think it's a good decision right now and I don't think it's good for the country."

Jordain Carney contributed to this report.

TAGS SHELLEY MOORE CAPITO MITCH MCCONNELL KELLY LOEFFLER DAVID PERDUE DONALD TRUMP JOHN THUNE JOE BIDEN MO BROOKS TED CRUZ TOMMY TUBERVILLE

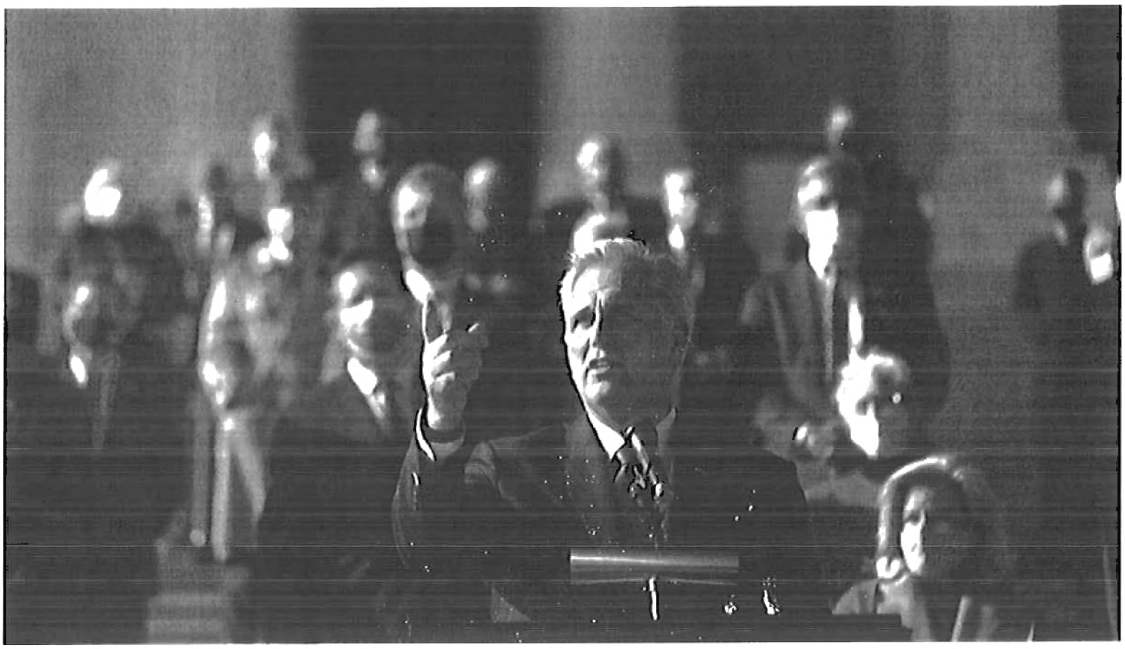


ELECTION 2020 | Dec 31, 2020, 05:31pm EST | 32,917 views

At Least 140 House Republicans Expected To Challenge Electoral College Result

Andrew Solender Forbes Staff
Business
I write about politics and the Biden transition.

TOPLINE As many as 140 Republican House members are expected to object to certification of President-elect Joe Biden's Electoral College victory as part of President Donald Trump's continued efforts to overturn his reelection loss.



WASHINGTON, DC - DECEMBER 10: House Minority Leader Kevin McCarthy (R-CA), surrounded fellow

EXHIBIT E

- "2 House Republicans tell me they expect as of now that at least 140 Republican Members of the House will on Jan. 6 object to and vote against the Electoral College results," tweeted CNN host Jake Tapper on Thursday.

- Rep. Denver Riggleman (R-Va.) told *Forbes* a "staggering number" of his Republican House colleagues will likely object, adding, "140 certainly seems possible... I wouldn't be surprised if it were a little higher."

- Riggleman said he initially expected around a hundred objections but that "pressure [is] being exerted" on House Republicans – as evidenced by state delegations putting out joint statements vowing to object to the vote.

- "I would be getting pressure right now," said Riggleman – who lost renomination to a right-wing challenger in June – adding that the vote to object "keeps their base happy, they know it'll keep the conference happy and they know it's not gonna win anyway."

- Riggleman said there is "not a whole lot of excitement for that vote" because most of his colleagues don't believe in the systemic fraud Trump has alleged, echoing Sen. Ben Sasse, who said, "When we talk in private, I haven't heard a single Congressional Republican allege that the election results were fraudulent – not one."

- Just one senator has confirmed they will join the effort: Sen. Josh Hawley (R-Mo.) said Wednesday he plans to object because "some states, particularly Pennsylvania, failed to follow their own state election laws" –

Hawley's plan to object is in defiance of Senate Majority Leader Mitch McConnell, who has instructed members of his caucus not to object to the electoral college because the eventual vote on whether to sustain objections would put Republican senators in a difficult position. Hawley was absent from a call with Republican senators Thursday morning in which McConnell hoped to challenge him on his position, according to *Politico* and *Axios*. Sen. Pat Toomey (R-Pa.) also opposes Hawley's move.

TANGENT

Just 49 Republican members of Congress have publicly acknowledged Biden as president-elect – 25 House members and 24 senators, including McConnell and Toomey. Biden said during an interview with Stephen Colbert earlier this month that several Republicans called him to ask for time to recognize his victory because they are in a "tough spot" politically.

BIG NUMBER

9. That's how many objections Biden himself – as President of the Senate – shut down during certification of Trump's victory at a joint session of Congress in 2017. All the objections came from House Democrats alleging Russian meddling, voter suppression and civil rights violations, but because none had a senator backing them, Biden repeatedly said the objections "cannot be entertained" and that there was "no debate."

KEY BACKGROUND

The last time a senator and a House member teamed up to challenge an electoral college vote was 2005, when Sen. Barbara Boxer and Rep. Stephanie Tubbs Jones challenged President George W. Bush's 2004 victory in Ohio on the basis of civil rights violations. The objections precipitated two hours of debate in the House and one hour in the Senate before being rejected by wide margins in both chambers.

in debate but will undoubtedly be rejected by the Democrat-controlled House – and, likely, the Republican-controlled Senate. Thus, certification of the result will be delayed but not thwarted.

Follow me on Twitter. Send me a secure tip.

Andrew Solender

Follow

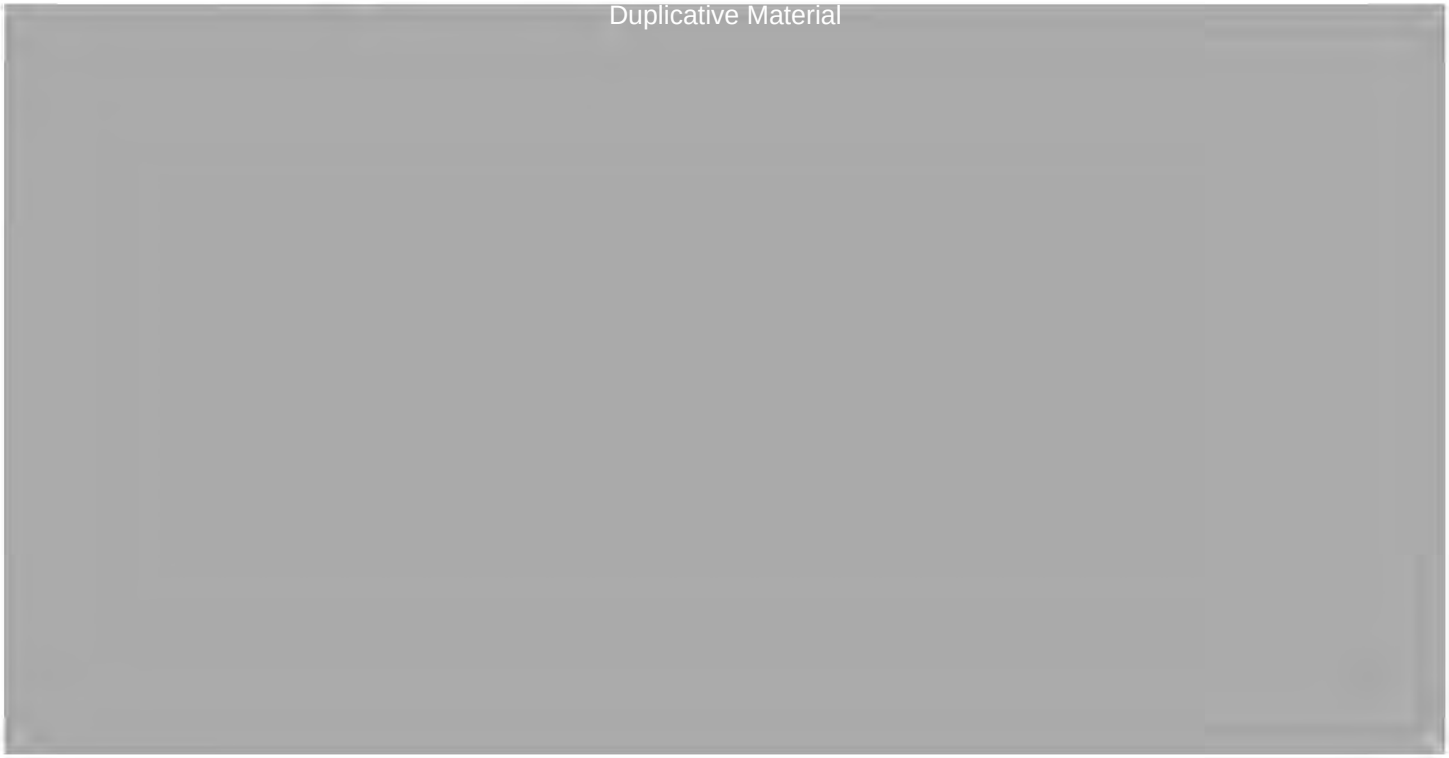
I am a news reporter covering politics and the Biden transition. I have previously worked for MSNBC and Chronogram Magazine. I attended Vassar College and the London... **Read More**

Engel, Steven A. (OLC)

From:	Engel, Steven A. (OLC)
Sent:	Tuesday, December 29, 2020 11:54 AM
To:	Donoghue, Richard (ODAG)
Subject:	RE: USA v. Pennsylvania draft complaint Dec 28 2 pm.docx

Thanks. The author of the document appears to be Larry Joseph, who also represented Texas AG Paxton.

From: Donoghue, Richard (ODAG) <ricdonoghue@jmd.usdoj.gov>
Sent: Tuesday, December 29, 2020 11:49 AM
To: Engel, Steven A. (OLC) [redacted (b) (6)] >
Subject: FW: USA v. Pennsylvania draft complaint Dec 28 2 pm.docx



Rosen, Jeffrey A. (ODAG)

From:	Rosen, Jeffrey A. (ODAG)
Sent:	Thursday, December 31, 2020 12:42 PM
To:	Engel, Steven A. (OLC); Donoghue, Richard (ODAG); Murray, Claire M. (OASG)
Subject:	R (b) (5)

Thanks, Steve. That is very helpful.

From: Engel, Steven A. (OLC) (b) (6) >
Sent: Thursday, December 31, 2020 12:36 PM
To: Rosen, Jeffrey A. (ODAG) <jarosen@jmd.usdoj.gov>; Donoghue, Richard (ODAG) <ricdonoghue@jmd.usdoj.gov>; Murray, Claire M. (OAS (b) (6)
Subjec (b) (5)

Just to close the loop on th (b) (5) question asked this morning:

(b) (5)

Steven A. Engel
Assistant Attorney General
Office of Legal Counsel
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530
Offic (b) (6)
(b) (6)

Engel, Steven A. (OLC)

From:	Engel, Steven A. (OLC)
Sent:	Sunday, January 17, 2021 11:01 PM
To:	Donoghue, Richard (ODAG)
Subject:	Re: DOJ OIG Interview Request

Got it. Will review.

Sent from my iPhone

On Jan 17, 2021, at 10:20 PM, Donoghue, Richard (ODAG) <ricdonoghue@jmd.usdoj.gov> wrote:

Steve,

Just passing this along in case it comes your way from OIG in the next 60 hours. As I said below, I am certainly willing to talk to them, provided it is cleared by the appropriate offices in DOJ and at the WH. I understand the reference to the 2007 U.S. Attorneys matter but, if I recall that correctly, it had to do with Legislative Branch officials (e.g., Senators) and (perhaps) Governors, pressing the Department to remove USAs. I don't believe that matter had to do with Executive Branch personnel decisions made personally by the President. In any event, while I suspect the OIG team will simply wait for the next OLC team to present this issue, I want to be sure you're aware just in case.

Rich

Begin forwarded message:

> **From:** "Horowitz, Michael E.(OIG) (b)(6), (b)(7)(C) per OIG
> **Date:** January 17, 2021 at 10:01:16 PM EST
> **To:** "Donoghue, Richard (ODAG)" <ricdonoghue@jmd.usdoj.gov>
> **Cc:** "Peirce, Lara (OIG) (b)(6), (b)(7)(C) per OIG (b)(6), (b)(7)(C) per OIG (OIG)" (b)(6), (b)(7)(C) per OIG
> **Subject: RE: DOJ OIG Interview Request**
>
> Rich,
>
> Thanks again for sitting for Thursday's interview with my investigators on t (b)(5) per OIG matter. As I mentioned in my earlier email to you, I wanted to respond separately to the issues you mention below about our request to also interview you regardin (b)(5), (b)(6), (b)(7)(C) per OIG . The concerns you raise about the current demands on your time with managing Department operations in response to recent events and the upcoming inaugural, and the need to focus every minute of your time on ensuring the safety and security of the events this week, is completely understandable. Given these circumstances, as well as your expressed willingness to participate in an interview at a future date, we're

certainly willing to defer until after the inauguration our requested interview.

We will separately address with Department officials the questions you raise about the OIG's authority to investigate the circumstances surroundin (b)(5), (b)(6), (b)(7)(C) per OIG, which the OIG does in fact possess. Indeed, the OIG previously exercised this authority in its examination of the removal of nine U.S. Attorneys in 2006. *See An Investigation into the Removal of Nine U.S. Attorneys in 2006* (https://oig.justice.gov/sites/default/files/legacy/special/s0809a/final.pdf). That review included, among other things, examining the process by which the U.S. Attorneys were selected for removal, and included OIG access to information about the Department's decision making process and its interactions with White House officials. Similarly, in other OIG reviews, including our 2012 review of ATF's Operation Fast and Furious, the Department has provided us with access to information potentially covered by Executive Privilege. Additionally, in 2016, Congress reaffirmed and strengthened the OIG's right of access to information through its amendment of IG Act Section 6(a)(1). Lastly, I would note that OLC has opined that "sharing of privileged information within the Executive Branch, including a disclosure of privileged agency information to an agency's Inspector General, does not result in a waiver of applicable privileges." Letter from Steven G. Bradbury, OLC Principal Deputy Assistant Attorney General, to Kathie L. Olsen, Deputy Director, National Science Foundation, Nov. 10, 2008. We therefore believe we have the authority to inquire about what the Department communicated t (b)(5), (b)(6), (b)(7)(C) per OIG, including whether White House officials directed or were otherwise involved in those communications. We will, nonetheless, address the issues you've raised with Department officials and then be back in touch with you.

Thanks again,
Michael

From: Donoghue, Richard (ODAG) <ricdonoghue@jmd.usdoj.gov>
Sent: Wednesday, January 13, 2021 8:30 PM
To: Peirce, Lara (OIG (b)(6), (b)(7)(C) per OIG
C (b)(6), (b)(7)(C) per OIG. (OIG (b)(6), (b)(7)(C) per OIG
Subject: RE: DOJ OIG Interview Request

Lara an (b)(6), (b)(7)(C) per OIG

Thanks for the heads up.

As of now, I am still available tomorrow at 2:00 p.m. so I'll look forward to talking to you about the (b)(5), (b)(6), (b)(7)(C) per OIG the (b) (6)

As for the expansion of the discussion, I cannot agree to that now. There are basically two reasons for that. First, and most important, th (b)(5), (b)(6), (b)(7)(C) per OIG relate to a discretionary personnel decision made by the President. As such, there are significant questions about whether DOJ-OIG even has the authority to investigate such a matter. Relatedly, there may well be Executive Privilege issues that would have to be navigated before I could be confident that it would be permissible for me to answer whatever questions may be asked. I will leave that analysis to lawyers expert in that field, but I assume that it would have to involve OLC and/or the White House Counsel's Office. I have briefly discussed your request that I answer questions abo (b)(5), (b)(6), (b)(7)(C) per OIG with the Acting AG and with others here in ODAG and OLC and the preliminary view is that I could not agree to such an interview until the authority and privilege issues are resolved. Second, and less important, I am completely swamped with managing the Department's response to last week's events and the current threat streams and the inauguration planning and, thus, I need every minute I can get between now and the inauguration. I suggest that you have the right DOJ-OIG people talk to OLC and/or the White House Counsel's Office and, if they clear such an interview, then I'll be happy to participate. Were my own personal interests controlling here, I would gladly talk about the circumstances surroundi (b)(5), (b)(6), (b)(7)(C) per OIG

(b)(5), (b)(6), (b)(7)(C) per OIG but that's obviously not the case.

Also, unless someone can provide me with controlling authority that precludes it, I will be audio recording the interview tomorrow. I will communicate that directly to the IG and explain my reasons for that (it has nothing whatsoever to do with either of you). I fully understand and appreciate the need to maintain the integrity of your investigation and I will not share that recording with anyone who may be a witness. As I said, I'll communicate that to the IG as I do not expect you to operate as messengers on that point, but I want to be completely transparent with you about that.

Thanks again. I'll talk to you tomorrow.

Rich

From: Peirce, Lara (OIG (b)(6), (b)(7)(C) per OIG
Sent: Wednesday, January 13, 2021 1:06 PM
To: Donoghue, Richard (ODAG) <ricdonoghue@jmd.usdoj.gov>
C (b)(6), (b)(7)(C) per OIG OIG) (b)(6), (b)(7)(C) per OIG
Subject: RE: DOJ OIG Interview Request

Mr. Donoghue,

I am the Senior Counsel in the Oversight and Review Division of the OIG and the supervisor on the matter referenced below. We greatly appreciate your willingness to speak with us about t (b)(5), (b)(6), (b)(7)(C) per OIG

Given recent reporting, the OIG also is conducting a preliminary inquiry in [redacted] (b)(5), (b)(6), (b)(7)(C) per OIG. We would like to ask you a few questions regarding information you may have abou (b)(5), (b)(6), (b)(7)(C) per OIG [redacted] In the interest of efficiency and in consideration of your time constraints, would you be willing to answer these questions at the end of your interview on the (b)(5), (b)(6), (b)(7)(C) per OIG ? I do not anticipate that these additional questions will take much time.

Lara M. Peirce
Senior Counsel to the AIG
Oversight and Review Division
Office of the Inspector General
U.S. Department of Justice

dire (b)(6), (b)(7)(C) per OIG | ce (b)(6), (b)(7)(C) per OIG
office 202.616.0645

Fro (b)(6), (b)(7)(C) per OIG (OIG)
Sent: Monday, January 11, 2021 9:42 PM
To: Donoghue, Richard (ODAG) <ricdonoghue@jmd.usdoj.gov>
Subject: RE: DOJ OIG Interview Request

Unfortunately, OIG policy does not allow witnesses to make their own recordings of the interview. The main reason for that is that we try to keep the information we develop during an investigation as closely held as possible in order to protect the integrity of the investigation. If for some reason we need to conduct a follow-up interview with you though, we would give you access to the transcript of your prior interview. Also, once our investigation is complete, you can request the transcript of your interview and that is usually handled through the usual FOIA process.

Sorry for the hassle on this,
(b)(6), (b)(7)(C) per OIG

From: Donoghue, Richard (ODAG) <ricdonoghue@jmd.usdoj.gov>
Sent: Monday, January 11, 2021 9:25 PM
T (b)(6), (b)(7)(C) per OIG (OI (b)(6), (b)(7)(C) per OIG
Subject: Re: DOJ OIG Interview Request

OK, I'll try to look at these in advance so we're as efficient as possible. No problem with any of that. If you guys are recording (which is fine), I assume there's no objection to me doing the same just so we both have it for future reference. If that raises issues I'm not thinking of, just let me know.

On Jan 11, 2021, at 9:06 P (b)(6), (b)(7)(C) per OIG (OIG (b)(6), (b)(7)(C) per OIG wrote:

2 p.m. on Thursday works for us. If you need to adjust the time, just let me know.

I completely understand that this matter feels like it happened in another century. There are not that many documents or emails that I plan to ask you about, and most of the emails we have identified have very little substance. I will just read out the relevant parts to you (in hopes of jogging your memory for the most part). Here are a few emails that you may want to glance at if you have time:

- Two emails you received fro (b)(6), (b)(7)(C) per OIG on 9/23/20 at 10:46 a.m. and 10:48 a.m. relating to (b)(5), (b)(6), (b)(7)(C) per OIG
- A 9/23/20 email chain between you an (b)(6), (b)(7)(C) per OIG with a subject line o (b)(5), (b)(6), (b)(7) The first email is fro (b)(6), (b)(7)(at 2:18 p.m. and the final one is also from (b)(6), (b)(7)(C at 3:37 p.m.
- An email from CRM DAA (b)(6), (b)(7)(C) per OIG to you an (b)(6), (b)(7)(C) per OIG sent on 9/24/19 at 3:54 p.m. and your response at 4:27 p.m. The subject line of the email (b)(5), (b)(6), (b)(7)
- On 10/26/20 at 3:58 p.m (b)(6), (b)(7)(C forwarded you an email chain with the subject line (b)(5), (b)(6), (b)(7)(C) per OIG The chain included a (b)(5), (b)(6), (b)(7)(C) per OIG fro (b)(5), (b)(6), (b)(7)(C) per OIG .

Again, it's not a problem if you don't have time to review these, I'll plan to read any relevant parts to you over the phone. Honestly, the final two emails on the above list are the only ones with much substance. There are a few other emails we will ask you about, but those either have little content or are between other individuals.

Als (b)(5), (b)(6), (b)(7)(C) per OIG .

Lastly, as an FYI, our standard practice is for interviews to be audio recorded and under

oath. I assume you were aware of that, but thought I'd flag it just in case.

Just let me know if you have any questions. Thanks,
(b)(6), (b)(7)(C) per OIG

From: Donoghue, Richard (ODAG) <ricdonoghue@jmd.usdoj.gov>
Sent: Monday, January 11, 2021 8:25 PM
T (b)(6), (b)(7)(C) per OIG (OIG (b)(6), (b)(7)(C) per OIG
Subject: RE: DOJ OIG Interview Request

With the inauguration security planning, this week is very fluid and unpredictable, but let's say 2:00 on Thursday. Just call my desk (b) (6) . Do I need to review anything in advance? Things that happened back in the fall will feel like talking about the Mesozoic Era at this point. Thanks.

Fro (b)(6), (b)(7)(C) per OIG (OIG (b)(6), (b)(7)(C) per OIG
Sent: Friday, January 8, 2021 10:18 PM
To: Donoghue, Richard (ODAG) <ricdonoghue@jmd.usdoj.gov>
Subject: RE: DOJ OIG Interview Request

Rich,

Thursday works for us. Feel free to pick whatever time is best for you on Thursday and we can pencil it in. I completely understand that your schedule will be fluid, so we can adjust the day and/or time as the week progresses. For maximum flexibility, let's plan on doing the interview either by phone or video—as long as that's ok with you. Just let me know if you have a preference.

Once you let me know your time preference on Thursday, I'll send you a calendar invite early next week and we can see how things play out.

Hope the weekend isn't too crazy,
(b)(6), (b)(7)(C) per OIG

From: Donoghue, Richard (ODAG) <ricdonoghue@jmd.usdoj.gov>
Sent: Friday, January 8, 2021 9:16 PM
T (b)(6), (b)(7)(C) per OIG OIG (b)(6), (b)(7)(C) per OIG
Subject: RE: DOJ OIG Interview Request

(b)(6), (b)(7)(C) per OIG

Sorry about the delayed response, you are correct.

I'm in all next week. Let's aim for the latter part of the week if possible – Thursday may be best. As I'm sure you'll understand, I am completely swamped at this point but I'll provide whatever info I can.

Rich

From (b)(6), (b)(7)(C) per OIG (OIG (b)(6), (b)(7)(C) per OIG
Sent: Friday, January 8, 2021 1:58 PM

To: Donoghue, Richard (ODAG) <ricdonoghue@jmd.usdoj.gov>
Subject: RE: DOJ OIG Interview Request

Mr. Donoghue,

Sorry to ping you again on this, but I figured there was a good chance my email got lost in the shuffle given the events that occurred after I sent it on Wednesday. I thought I would just reach out again before the weekend. Anyway, just let me know if you have any questions or need any additional information from me.

Thanks,
(b)(6), (b)(7)(C) per OIG

Fro (b)(6), (b)(7)(C) per OIG (OIG)
Sent: Wednesday, January 6, 2021 10:16 AM
To: Donoghue, Richard (ODAG) <ricdonoghue@jmd.usdoj.gov>
Subject: DOJ OIG Interview Request

Mr. Donoghue,

I'm with DOJ's Office of the Inspector General. The OIG has opened an investigation
(b)(5), (b)(6), (b)(7)(C) per OIG

We would like to interview you as part of this review. If possible, we would like to schedule the interview for next week. We understand that you are incredibly busy, so we can be available on any day and time next week and we can also conduct the interview either telephonically or in-person, whichever is most convenient for you. The interview should take no longer than an hour.

Feel free to email or call if you have any questions. My cell (b)(6), (b)(7)(C) per OIG

(b)(6), (b)(7)(C) per OIG

(b)(6), (b)(7)(C) per OIG
Investigative Counsel
Oversight and Review Division
Office of the Inspector General
U.S. Department of Justice
(b)(6), (b)(7)(C) per OIG