PA Issue

From: "Moran, John (ODAG)" (b) (6)
To: "Donoghue, Richard (ODAG)" (b) (6)
Cc: "Hodes, Jarad (ODAG)" (b) (6), "Creegan, Erin (ODAG)" (b) (6)
Richard DiZinno (b) (6)
Date: Tue, 03 Nov 2020 10:31:37 -0500

A lawyer volunteering with the Pennsylvania GOP reached out to say that they are hearing reports of the New Black Panthers inside polling places in Philadelphia. I can try to find out more, and others may have better information, but I wanted to pa it along

John

Transition Leads

From: "Moran, John (ODAG)" [redacted]
To: "Lofthus, Lee J (JMD)" [redacted]
Date: Tue, 03 Nov 2020 17:31:19 -0500

Lee

I hope you are feeling well. Can you send me the name(s) of the DOJ transition lead for the Biden campaign? We will wait to ee what happen obviou ly but we want to prepare for the po ibility of a tran ition

Regards,
John

Office of the Attorney General
Washington, D. C. 20530

December 22, 2020

MEMORANDUM FOR: ASSISTANT ATTORNEY GENERAL
CIVIL RIGHTS DIVISION

FROM: THE ATTORNEY GENERAL

SUBJECT: Safe-Harbor Enforcement Policy for State and Local Voting Procedures

The integrity of the voting process is essential to the democratic elections we rely on to select leaders in our country. The Department of Justice enforces federal law that protects the right to vote and governs voting procedures and therefore plays an important role. The Department, however, is not the only or even the primary governmental entity charged under the Constitution and laws of the United States with regulating the voting process. It is critical that our enforcement policies respect the proper balance between the Department's obligation to enforce federal voting rights laws and its obligation to respect the authority of state and local jurisdictions to regulate elections.

I therefore direct the Civil Rights Division to adopt the following enforcement policy: a change in voting laws or procedures by a state or local jurisdiction which readopts prior laws or procedures shall be presumed lawful unless the prior regime was found to be unlawful. This policy is particularly timely as state and local jurisdictions consider their experience with pandemic-related voting changes and whether to maintain or abandon those procedures for future elections.

* * *

The United States Constitution provides that state legislatures "bear primary responsibility for setting election rules." *Democratic Nat'l Comm. v. Wisconsin State Legislature*, No. 20A66, 2020 WL 6275871 (U.S. Oct. 26, 2020) (Gorsuch, J., concurring). This responsibility extends even to federal elections. Article I of the Constitution establishes 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[.]" U.S. Const., Art. I, § 4, cl. 1. Article II of the Constitution mandates that the States establish rules for presidential elections "in such Manner as the Legislature thereof may direct." U.S. Const., Art. II, § 1, cl. 2.

The Constitution thus vests authority for federal elections in state legislatures, and state and local jurisdictions have even broader authority to enact laws that govern state and local elections.

The Constitution's recognition of the broad latitude that state and local jurisdictions retain under our Constitution reflects the Founders' decision to create a federal government of limited authority. In our system, states function as "laboratories for devising solutions to difficult legal problems." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 817 (2015) (quoting *Oregon v. Ice*, 555 U.S. 160, 171 (2009)). "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

The role of state and local jurisdictions as "laboratories of democracy" extends to elections. State legislatures and local jurisdictions can and do lawfully change election procedures from time to time. For example, some states may count only absentee votes received by election day while others may count absentee ballots mailed by election day. "The variation in state responses reflects our constitutional system of federalism." *Democratic Nat'l Comm. v. Wis. State Legislature*, 2020 WL 6275871, at *13-14 (October 26, 2020) (Kavanaugh, J., concurring).

State and local jurisdictions may lawfully change voting procedures, including by readopting long-established previous practices. For example, a state or local jurisdiction may determine that a new voting procedure fails to serve voters well or that circumstances changed and that a prior practice is better suited to more recent circumstances. "[E]venhanded restrictions that protect the integrity and reliability of the electoral process itself" are not "invidious" and are generally lawful. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 189-90 (2008) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983)). "States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997).

Both the Constitution and federal statutory law recognize that state and local jurisdictions can and will address changing circumstances, sometimes-unique local issues, and different policy preferences related to voting, and that their voting-related laws and processes will change from time to time.

For example, a state that never before allowed early voting may decide to permit early voting, and then later—after some experience—decide to maintain but shorten that period for early voting. This kind of policy change does not, by itself, raise any inference of illegality. *See Ohio Democratic Party v. Husted*, 834 F.3d 620, 623 (6th Cir. 2016) ("Adopting plaintiffs' theory of disenfranchisement would create a 'one-way ratchet' that would discourage states from ever increasing early voting opportunities, lest they be prohibited by federal courts from later modifying their election procedures in response to changing circumstances.").

Of course, state and local jurisdictions do not have unlimited authority with respect to voting procedures. The Constitution contains several amendments and provisions that protect the right to vote. The Fifteenth Amendment requires that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. Const., Amend. XV, §1. The Nineteenth Amendment provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex." U.S. Const. Amend. XIX; *see also*, *e.g.*, U.S. Const. Amend. XXIV (prohibiting "any poll tax or other tax" in federal elections).

States cannot condition the right to vote on the payment of a poll tax, *Harper v. Virginia Bd. Of Elections*, 383 U.S. 663 (1966), and states must comply with the Constitution's limits on state authority. *E.g., Timmons*, 520 U.S. at 357-58; U.S. Const. Amend. XXVI (extending the right to vote to citizens who "are eighteen years of age or older"). Furthermore, "state and local officials must communicate to voters how, when, and where they may cast their ballots through in-person voting on election day, absentee voting, or early voting." *Democratic Nat'l Comm.*, No. 20A66, 2020 WL 6275871, at *9 (Kavanaugh, J., concurring).

States must also comply with federal election-related laws. These include the Voting Rights Act of 1965, 52 U.S.C 10301 et seq. (formerly 42 U.S.C. 1973 et seq.); the National Voter Registration Act of 1993, 52 U.S.C. 20501 et seq. (formerly 42 U.S.C. 1973gg et. seq.); the Help America Vote Act of 2002, 52 U.S.C. 20901 et seq. (formerly 42 U.S.C. 15301 et seq.); the Uniformed and Overseas Citizens Absentee Voting Act of 1986, 52 U.S.C. 20301 et seq. (formerly 42 U.S.C. 1973ff et seq.); the Americans with Disabilities Act of 1990, 42 U.S.C. 12101 et seq.; the Civil Rights Acts, 52 U.S.C. 10101, 20701 et seq. (formerly 42 U.S.C. 1971, 1974); and the Voting Accessibility for the Elderly and Handicapped Act of 1984, 52 U.S.C. 20101 et seq. (formerly 42 U.S.C. 1973ee et seq.).

Because of our nation's system of divided government and federalism and the Department's role as a law enforcement agency, the Department must both properly respect the broad authority of state and local jurisdictions to adapt their laws to changing circumstances and different policy preferences, and zealously enforce the federal voting-related statutes. When state and local jurisdictions change their voting laws and procedures, the Department should and will consider carefully these twin obligations before it seeks to challenge a state or local law as a violation of federal statutory law.

This care is particularly important when a state or local jurisdiction maintains a voting-related procedure that is lawful, then changes to another lawful procedure, then changes back to the original procedure. The Department of Justice will presume that enactment of a state or local voting-related law that reverts back to or adopts a state or local jurisdiction's prior lawful voting procedures complies with federal law.

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. <u>Plaintiffs have suffered an injury in fact.</u>

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. <u>The balance of equities favors Plaintiffs.</u>

"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. <u>The public interest favors Plaintiffs.</u>

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,

Howard Kleinhendler
Howard Kleinhendler Esquire
NY Bar No. 2657120
369 Lexington Ave., 12th Floor
New York, New York 10017
Tel: (917) 793-1188
Fax: (732) 901-0832
Email: howard@kleinhendler.com

William Lewis Sessions
Texas Bar No. 18041500
Sessions & Associates, PLLC
14591 North Dallas Parkway, Suite 400
Dallas, TX 75254
Tel: (214) 217-8855
Fax: (214) 723-5346 (fax)
Email: lsessions@sessionslaw.net

Lawrence J. Joseph
DC Bar No. 464777
Law Office of Lawrence J. Joseph
1250 Connecticut Ave, NW, Suite 700-1A
Washington, DC 20036
Tel: (202) 355-9452
Fax: 202) 318-2254
Email: ljoseph@larryjoseph.com

Julia Z. Haller
DC Bar No. 466921
Brandon Johnson
DC Bar No. 491370
Defending the Republic
601 Pennsylvania Ave., NW
Suite 900
South Building
Washington, DC 20004
Tel: (561) 888-3166
Fax:
Email: hallerjulia@outlook.com
Email: brandoncjohnson6@aol.com

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:

Gregory F. Jacob
Counsel to the Vice President
Office of the Vice President
Eisenhower Executive Office Building
Washington, DC 20501
Tel (b) (6)
Email: gregory.f.jacob@ovp.eop.gov

Stephen J. Cox
United States Attorney
350 Magnolia Ave., Suite 150
Beaumont, Texas 77701
Tel. (409) 839-2538
Fax: (409) 839-2550
Email: stephen.j.cox@usdoj.gov

Dated: December 28, 2020

William Lewis Sessions,
Texas Bar No. 18041500
Sessions & Associates, PLLC
14591 North Dallas Parkway, Suite 400
Dallas, TX 75254
Tel: (214) 217-8855
Fax: (214) 723-5346
Email: lsessions@sessionslaw.net

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.

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

William Lewis Sessions
Texas Bar No. 18041500
Sessions & Associates, PLLC
14591 North Dallas Parkway, Suite 400
Dallas, TX 75254
Tel: (214) 217-8855
Fax: (214) 723-5346 (fax)
Email: lsessions@sessionslaw.net

Howard Kleinhendler
Howard Kleinhendler Esquire
NY Bar No. 2657120
369 Lexington Ave., 12th Floor
New York, New York 10017
Tel: (917) 793-1188
Fax: (732) 901-0832
Email: howard@kleinhendler.com

Lawrence J. Joseph
DC Bar No. 464777
Law Office of Lawrence J. Joseph
1250 Connecticut Ave, NW, Suite 700-1A
Washington, DC 20036
Tel: (202) 355-9452
Fax: 202) 318-2254
Email: ljoseph@larryjoseph.com

Julia Z. Haller
DC Bar No. 466921
Brandon Johnson
DC Bar No. 491370
Defending the Republic
601 Pennsylvania Ave., NW
Suite 900
South Building
Washington, DC 20004
Tel: (561) 888-3166
Fax: 202-888-2162
Email: hallerjulia@outlook.com
Email: brandoncjohnson6@aol.com

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

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

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[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 the Court 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

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[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.

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[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

User Name: Kurt Olsen
Date and Time: Tuesday, December 29, 2020 8:47:00 PM EST
Job Number: 133075079

Document (1)

1. *S.C. v. Katzenbach, 383 U.S. 301*
Client/Matter: new matter
Search Terms: 383 us 301
Search Type: Natural Language
Narrowed by:

Content Type	Narrowed by
Cases	-None-

S.C. v. Katzenbach

Supreme Court of the United States

January 17-18, 1966, Argued ; March 7, 1966, Decided

No. 22, Orig.

Reporter
383 U.S. 301 *; 86 S. Ct. 803 **; 15 L. Ed. 2d 769 ***; 1966 U.S. LEXIS 2112 ****

SOUTH CAROLINA v. KATZENBACH, ATTORNEY GENERAL

Prior History: **[****1]** ON BILL OF COMPLAINT.

Disposition: Bill of complaint dismissed.

Core Terms

voting, attorney general, political subdivision, tests, registration, election, qualification, appointment, district court, provisions, remedies, right to vote, abridging, color, formula, listing, state law, prescribed, account of race, coverage, five year, sections, Census, cases, prerequisite, registered, declaratory judgment, voting rights, determinations, eligibility

Case Summary

Procedural Posture

Plaintiff State filed a bill of complaint against defendant attorney general to contest the constitutionality of certain remedial provisions of the Voting Rights Act of 1965 (Act), *42 U.S.C.S. § 1973*.

Overview

The State argued that, among other things, the complained of provisions of the Act exceeded the powers of Congress and encroached on an area reserved to the states. The court found that Congress was not limited to forbidding violations of the *Fifteenth Amendment* in general terms and, as against the reserved powers of the states, Congress could use any rational means to effectuate the constitutional prohibition of racial discrimination in voting. The court found that congress was justified in limiting the operation of the Act through the use of a formula to only a handful of states because the record indicated that actual voter discrimination occurred in these states. The court found that the temporary suspension of voter qualifications, such as literacy tests, were not unconstitutional because the record indicated that such tests were traditionally used to disenfranchise minorities and their suspension was a legitimate response to the problem. The court found that the suspension of new voter qualifications pending review was constitutional because the record indicated that states often enacted new laws to perpetuate discrimination in the face of adverse federal court decrees.

Outcome
The court dismissed the State's bill of complaint.

LexisNexis® Headnotes

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > General Overview

Constitutional Law > Congressional Duties & Powers > Bills of Attainder & Ex Post Facto Clause > General Overview

Constitutional Law > Substantive Due Process > Scope

HN1[] Fundamental Rights, Procedural Due Process

The word "person" in the context of the *Due Process Clause of the Fifth Amendment* cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union.

Business & Corporate Compliance > ... > Protection of Rights > Federally Assisted Programs > Civil Rights Act of 1964

Constitutional Law > Elections, Terms & Voting > Race-Based Voting Restrictions

Constitutional Law > Elections, Terms & Voting > General Overview

HN2[] Governments, Civil Rights Act of 1964

As against the reserved powers of the states, congress may use any rational means to effectuate the Constitutional prohibition of racial discrimination in voting.

Constitutional Law > Elections, Terms & Voting > Race-Based Voting Restrictions

HN3[] Elections, Terms & Voting, Race-Based Voting Restrictions

See U.S. Const. amend. XV, § 1.

Constitutional Law > Elections, Terms & Voting > Race-Based Voting Restrictions

Constitutional Law > Elections, Terms & Voting > General Overview

HN4[] Elections, Terms & Voting, Race-Based Voting Restrictions

The prohibition against racial discrimination in voting contained in the *Fifteenth Amendment* has always been treated as self-executing and has repeatedly been construed, without further legislative specification, to invalidate state voting qualifications or procedures which are discriminatory on their face or in practice.

Constitutional Law > State Sovereign Immunity > General Overview

Constitutional Law > Elections, Terms & Voting > Race-Based Voting Restrictions

HN5[] Constitutional Law, State Sovereign Immunity

States have broad powers to determine the conditions under which the right of suffrage may be exercised. However, the *Fifteenth Amendment* supersedes contrary exertions of state power. When a state exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right.

Constitutional Law > Elections, Terms & Voting > Race-Based Voting Restrictions

HN6[] Elections, Terms & Voting, Race-Based Voting Restrictions

See U.S. Const. amend. XV, § 2.

Civil Rights Law > Protection of Rights > Voting Rights > General Overview

Constitutional Law > Elections, Terms & Voting > Race-Based Voting Restrictions

Governments > Legislation > Effect & Operation > Amendments

Constitutional Law > Elections, Terms & Voting > General Overview

Governments > Federal Government > US Congress

HN7 Protection of Rights, Voting Rights

By adding § 2 to the Fifteenth Amendment, the Framers indicated that Congress was to be chiefly responsible for implementing the rights created in § 1. It is the power of congress which has been enlarged. Congress is authorized to enforce the prohibitions by appropriate legislation. Some legislation is contemplated to make the Civil War amendments fully effective. Accordingly, in addition to the courts, congress has full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting.

Constitutional Law > Elections, Terms & Voting > Race-Based Voting Restrictions

Constitutional Law > Congressional Duties & Powers > Reserved Powers

HN8 Elections, Terms & Voting, Race-Based Voting Restrictions

The basic test to be applied in a case to test the constitutionality of legislation enacted pursuant to § 2 of the Fifteenth Amendment is the same as in all cases concerning the express powers of congress with relation to the reserved powers of the states. The classic formulation was laid down 50 years before the *Fifteenth Amendment* was ratified: Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

Constitutional Law > Congressional Duties & Powers > Reserved Powers

Contracts Law > ... > Perfections & Priorities > Perfection > General Overview

Contracts Law > ... > Secured Transactions > Perfections & Priorities > General Overview

HN9 Congressional Duties & Powers, Reserved Powers

Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against state denial or invasion, if not prohibited, is brought within the domain of Congressional power.

Constitutional Law > Relations Among Governments > Federal Territory & New States

HN10 Relations Among Governments, Federal Territory & New States

The doctrine of equality of states applies only to the terms upon which states are admitted to the Union, and not to the remedies for local evils which have subsequently appeared.

Constitutional Law > Elections, Terms & Voting > Race-Based Voting Restrictions

Evidence > ... > Presumptions > Exceptions > Statutory Presumptions

HN11 Elections, Terms & Voting, Race-Based Voting Restrictions

Congress is clearly not bound by the rules relating to statutory presumptions in criminal cases when it prescribes civil remedies against other organs of government under § 2 of the Fifteenth Amendment.

Constitutional Law > ... > Case or Controversy > Constitutionality of Legislation > General Overview

HN12 Case or Controversy, Constitutionality of Legislation

Legislation need not deal with all phases of a problem in the same way, so long as the distinctions drawn have some basis in practical experience.

Constitutional Law > Elections, Terms & Voting > Race-Based Voting Restrictions

HN13[] Elections, Terms & Voting, Race-Based Voting Restrictions

Literacy tests and related devices are not in themselves contrary to the *Fifteenth Amendment*. Of course a literacy test, fair on its face, may be employed to perpetuate that discrimination which the *Fifteenth Amendment* was designed to uproot.

Civil Rights Law > Protection of Rights > Voting Rights > Racial Discrimination

Constitutional Law > Elections, Terms & Voting > Race-Based Voting Restrictions

Governments > Federal Government > Elections

HN14[] Voting Rights, Racial Discrimination

Sections 4 (a)-(d), 5, 6 (b), 7, 9, 13 (a), and certain procedural portions of § 14 of the Voting Rights Act, codified at *42 U.S.C.S. § 1973 (1964)* are a valid means for carrying out the commands of the *Fifteenth Amendment*.

Constitutional Law > Elections, Terms & Voting > Race-Based Voting Restrictions

Governments > Federal Government > Elections

HN15[] Elections, Terms & Voting, Race-Based Voting Restrictions

See *42 U.S.C.S. § 1973*.

Lawyers' Edition Display

Summary

By leave of the Court, South Carolina filed in the United States Supreme Court a bill of complaint, seeking a declaration that selected provisions of the Voting Rights Act of 1965 violated the Federal Constitution, and asking for an injunction against enforcement of these provisions by the Attorney General of the United States. More specifically, South Carolina and five other states supporting her attacked the provisions for suspension of literacy and other voting tests (4(a)(c)(d)) in states and political subdivisions to which according to the formula described in 4(b) the new remedies of the Act apply; for termination of coverage (4(a)); for the suspension of all new voting regulations in these states and political subdivisions pending review by federal authorities to determine whether their use would perpetuate voting discrimination (5); for the assignment of federal examiners by the Attorney General to list qualified applicants thereafter entitled to vote in all elections (6(b), 7, 9, 13(a)); and for the exclusive jurisdiction of the United States District Court for the District of Columbia over litigation as to termination of the statutory coverage (14(b)).

The Supreme Court dismissed the bill of complaint. In an opinion by Warren, Ch. J., expressing the views of eight members of the Court, it was held that the challenged provisions of the Act were valid as an appropriate exercise of the power, given to Congress in 2 of the *Fifteenth Amendment*, to enforce that amendment.

Black, J., agreed with substantially all of the Court's opinion, but dissented from the holding that the provisions in 5 of the Act were valid.

Headnotes

SUPREME COURT OF THE UNITED STATES §51 > state's action against Attorney General -- > Headnote:
LEdHN[1][] [1]

Original jurisdiction of the Supreme Court of the United States over a state's suit against the Attorney General of the United States, seeking a declaration of the invalidity, and an injunction against the enforcement of, selected provisions of the Voting Rights Act of 1965 (79 Stat 437) is founded on the presence of a controversy between a state and a citizen of another state under Article 3 2 of the Federal Constitution.

CIVIL RIGHTS §5 > Voting Rights Act -- purpose -- > Headnote:
LEdHN[2][ ] [2]

The Voting Rights Act of 1965 (79 Stat 437), creating stringent new remedies and strengthening existing remedies, is designed by Congress to banish the blight of racial discrimination in voting, which has infected the electoral process in parts of the United States for nearly a century.

CIVIL RIGHTS §5.1 > Voting Rights Act -- validity -- > Headnote:
LEdHN[3A][ ] [3A]LEdHN[3B][ ] [3B]LEdHN[3C][ ] [3C]LEdHN[3D][ ] [3D]

The key provisions of the Voting Rights Act of 1965 (79 Stat 437)--concerning the suspension of literacy and other voting tests (4(a)(c)(d)) in states and political subdivisions to which according to the formula described in 4(b) the new remedies of the Act apply; termination of coverage (4(a)); the suspension of all new voting regulations in these states and political subdivisions pending review by federal authority to determine whether their use would perpetuate voting discriminations (5); the assignment of federal examiners by the Attorney General of the United States to list qualified applicants thereafter entitled to vote in all elections (6(b), 7, 9, 13(a)); and the exclusive jurisdiction of the United States District of Columbia over litigation as to termination of the statutory coverage (14(b))--are within the power of Congress to prescribe under 2 of the *Fifteenth Amendment*, prohibiting racial discrimination in voting, are appropriate means for carrying out Congress' constitutional responsibilities, and are consonant with all other provisions of the Federal Constitution.

CIVIL RIGHTS §5.1 > Voting Rights Act -- constitutionality -- > Headnote:
LEdHN[4][ ] [4]

The constitutional propriety of the Voting Rights Act of 1965 (79 Stat 437) must be judged with reference to the historical experience which it reflects.

SUPREME COURT OF THE UNITED STATES §71 > original jurisdiction -- questions not considered -- > Headnote:
LEdHN[5][ ] [5]

In a suit by a state against the Attorney General of the United States for a declaration of invalidity of the Voting Rights Act of 1965 (79 Stat 437), judicial review of those sections of the statute which are not challenged must await subsequent litigation.

ACTION OR SUIT §14 > DECLARATORY JUDGMENTS §5 > prematurity of suit -- > Headnote:
LEdHN[6][ ] [6]

A state's attack, by suit for a declaration of invalidity and injunction against enforcement, on the criminal sanctions (11, 12(a)-(c)) of the Voting Rights Act of 1965 (79 Stat 437) is premature where no person has yet been subjected to, or even threatened with, these criminal sanctions.

CONSTITUTIONAL LAW §520 > state as "person" -- > Headnote:
LEdHN[7][ ] [7]

The word "person" in the context of the *due process clause of the Fifth Amendment* does not encompass the states of the Union.

ATTAINDER AND OUTLAWRY §2 > CONSTITUTIONAL LAW §68.5 > separation of power -- subjects of protection -- > Headnote:
LEdHN[8][ ] [8]

The bill of attainder clause of Article 1 9 clause 3 of the Federal Constitution and the principle of the separation of powers do not protect states but only individual persons and private groups, those who are peculiarly vulnerable to nonjudicial determinations of guilt; a state has no standing as a parent of its citizens to invoke these constitutional provisions against the Federal Government, the ultimate parens patriae of every American citizen.

exercised, the *Fifteenth Amendment*, prohibiting racial discrimination in voting, supersedes contrary exertions of state power.

CIVIL RIGHTS §5.1 > Voting Rights Act -- validity -- > Headnote:
LEdHN[9][] [9]

Objections raised by a state against the Voting Rights Act of 1965 (79 Stat 437) on the ground that certain provisions constitute a forbidden bill of attainder and impair the doctrine of separation of powers by adjudicating guilt through legislation may be considered only as additional aspects of the question whether Congress exercised its powers under the *Fifteenth Amendment*--which prohibits racial discrimination in voting--in an appropriate manner with relation to the states.

COURTS §92.3 > STATES §18 > state and federal power -- > Headnote:
LEdHN[13][] [13]

When a state exercises power wholly within the domain of state interest, it is insulated from federal judicial review, but such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right.

CIVIL RIGHTS §5.1 > voting -- powers of Congress -- > Headnote:
LEdHN[10][] [10]

As against the reserved powers of the states, Congress, under the *Fifteenth Amendment*, may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting.

CONSTITUTIONAL LAW §7 > enforcement of Fifteenth Amendment -- > Headnote:
LEdHN[14][] [14]

In addition to the courts, Congress has full remedial power to effectuate the *Fifteenth Amendment's* prohibition against racial discrimination in voting.

CONSTITUTIONAL LAW §44 > CIVIL RIGHTS §5 > Fifteenth Amendment -- self-executing provision -- voting -- > Headnote:
LEdHN[11][] [11]

Section one of the *Fifteenth Amendment*, prohibiting racial discrimination in voting, is self-executing, and invalidates, without further legislative specification, state voting qualifications or procedures which are discriminatory on their face or in practice.

UNITED STATES §16 > powers of Congress -- > Headnote:
LEdHN[15][] [15]

In exercising the express powers conferred upon it by the Federal Constitution, Congress may, where the end is legitimate and within the scope of the Constitution, use all means which are appropriate, which are plainly adapted to that end, and which are not prohibited, but are consistent with the letter and spirit of the Constitution.

CIVIL RIGHTS §5 > voting -- Fifteenth Amendment -- > Headnote:
LEdHN[12][] [12]

While states have broad powers to determine the conditions under which the right of suffrage may be

CONSTITUTIONAL LAW §7 > enforcement of Fifteenth Amendment -- > Headnote:
LEdHN[16][] [16]

Under the *Fifteenth Amendment*, prohibiting racial discrimination in voting, the task of fashioning specific remedies or of applying them to particular localities must not necessarily be left entirely to the courts; the power of Congress is complete in itself, may be exercised to its

utmost extent, and acknowledges no limitations other than are prescribed in the Constitution.

CIVIL RIGHTS §5.1 > Voting Rights Act -- remedies -- > Headnote:
LEdHN[17] [17]

Confining the remedies of the Voting Rights Act of 1965 (79 Stat 437) to a small number of states and political subdivisions where immediate actions seemed necessary, is a permissible method, not barred by the doctrine of the equality of states, of dealing with the problem of state racial discrimination in voting, where Congress had learned that substantial voting discrimination presently occurred in certain sections of the country, and it knew of no way of accurately forecasting whether the evil might spread elsewhere in the future.

STATES §3 > STATES §120 > doctrine of equality -- > Headnote:
LEdHN[18] [18]

The doctrine of the equality of states applies only to the terms upon which states are admitted to the Union, and not to the remedies for local evils which have subsequently appeared.

CIVIL RIGHTS §5.1 > Voting Rights Act -- powers of Congress -- > Headnote:
LEdHN[19A] [19A]LEdHN[19B] [19B]

The express powers of enforcement conferred upon Congress by the Fifteenth Amendment, which prohibits racial discrimination in voting, are justifiably applied to the specific states and political subdivisions within 4(b) of the Voting Rights Act of 1965 (79 Stat 437) as an appropriate target for the new remedies created by the Act, where Congress had reliable evidence of actual voting discrimination in a great majority of the states and political subdivisions affected by these new remedies and the formula eventually evolved, as expressed in 4(b), was relevant to the problem of voting discrimination, and Congress therefore was entitled to infer a significant danger of the evil in the few remaining states and political subdivisions covered by 4(b).

CIVIL RIGHTS §5.1 > Voting Rights Act -- geographical scope -- > Headnote:
LEdHN[20A] [20A]LEdHN[20B] [20B]

The new remedies of the Voting Rights Act of 1965 (79 Stat 437) are appropriately imposed on Alabama, Louisiana, and Mississippi, in which states federal courts have repeatedly found substantial voting discrimination, and also on Georgia, South Carolina, and large portions of North Carolina, for which states there was more fragmentary evidence of recent voting discrimination; it is also appropriate for Congress to impose the new remedies on the few remaining states and political subdivisions covered by the formula, at least in the absence of proof that they have been free of substantial voting discrimination in recent years.

UNITED STATES §14 > Congress -- source of information -- > Headnote:
LEdHN[21] [21]

In identifying past evils, Congress may avail itself of information from any probative source.

CONSTITUTIONAL LAW §829 > discrimination -- voting -- presumptions. -- > Headnote:
LEdHN[22] [22]

Congress is not bound by due process rules relating to statutory presumptions in criminal cases when prescribing civil remedies against other organs of government under its power to enforce the Fifteenth Amendment, prohibiting racial discrimination in voting.

CIVIL RIGHTS §5.1 > Voting Rights Act -- coverage formula -- > Headnote:
LEdHN[23] [23]

In determining the validity of the coverage formula of 4(b) of the Voting Rights Act of 1965 (79 Stat 437), defining the area in which voting tests are suspended by the Act, it is irrelevant that the formula excludes certain localities which do not employ voting tests and devices but for which there is evidence of voting discrimination by other means, where Congress has learned that widespread and persistent discrimination in voting during recent years has typically entailed the misuse of tests and devices, and this was the evil for which the new remedies were specifically designed.

CONSTITUTIONAL LAW §321 > legislation aimed at particular evils -- > Headnote:
LEdHN[24] [24]

Legislation need not deal with all phases of the problem in the same way, so long as the distinctions drawn have some basis in practical experience.

COURTS §530 > federal -- powers of Congress -- > Headnote:
LEdHN[25A] [25A]LEdHN[25B] [25B]

Litigation under 4(a) of the Voting Rights Act of 1965 (79 Stat 437), providing for termination of special statutory coverage at the behest of states and political subdivisions in which the danger of substantial voting discrimination has not materialized during the preceding 5 years, may be appropriately limited by Congress, under its power under *Article 3 1 of the Federal Constitution* to ordain and establish inferior federal tribunals, to the United States District Court for the District of Columbia (14(b) of the Act).

CONSTITUTIONAL LAW §830.7 > COURTS §537.5 > power of Congress -- burden of proof -- > Headnote:
LEdHN[26A] [26A]LEdHN[26B] [26B]

Congress may appropriately put the burden of proving nondiscrimination on the areas seeking termination of coverage under 4(a) of the Voting Rights Act of 1965 (79 Stat 437), particularly since the relevant facts relating to the conduct of voting officials are peculiarly within the knowledge of the states and political subdivisions themselves.

ADMINISTRATIVE LAW §203 > CIVIL RIGHTS §5.1 > Voting Rights Act -- judicial review -- > Headnote:
LEdHN[27] [27]

Section 4(b) of the Voting Rights Act of 1965 (79 Stat 437), insofar as it provides for nonreviewability by the courts of determinations, triggering the application of the coverage formula of 4(b), by the Attorney General and by the Director of the Census as to the percentages of non-white voters, is not invalid on the ground that it allows the new remedies of the Act to be imposed in an arbitrary way.

CIVIL RIGHTS §5 > voting -- racial discrimination -- > Headnote:
LEdHN[28] [28]

While voting qualifications consisting of literacy tests and related devices are not in themselves contrary to the *Fifteenth Amendment*, prohibiting racial discrimination in voting, the Amendment is violated where these tests and devices have been instituted with the purpose of disenfranchising Negroes, have been framed in such a way as to facilitate this aim, and have been administered in a discriminatory fashion for many years.

CIVIL RIGHTS §5.1 > Voting Rights Act -- suspension of literacy tests -- > Headnote:
LEdHN[29] [29]

The suspension, under 4(a) of the Voting Rights Act of 1965 (79 Stat 437), of literacy tests and similar devices for a period of 5 years from the last occurrence of substantial voting discrimination is a legitimate remedy within the power of Congress under the *Fifteenth Amendment*, where Congress believed that states and political subdivisions which had been allowing white illiterates to vote for years could not sincerely complain about dilution of their electorates through the registration of Negro illiterates, and where Congress knew that

continuance of the tests and devices in use at the present time, no matter how fairly administered in the future, would freeze the effect of past discrimination in favor of unqualified white registrants.

COURTS §236.5 > federal -- requisite of "controversy" -- > Headnote:
LEdHN[30][] [30]

The Voting Rights Act of 1965 (79 Stat 437) does not, by authorizing the United States District Court for the District of Columbia in 5 to determine whether new rules, practices, and procedures adopted by the states would violate the *Fifteenth Amendment*, prohibiting racial discrimination in voting, authorize the court to issue advisory opinions in violation of the principles of Article 3 of the Federal Constitution, since a state or political subdivision wishing to make use of a recent amendment to its voting laws has a concrete and immediate "controversy" with the Federal Government, and an appropriate remedy is a judicial determination that continued suspension of the new rule is unnecessary to vindicate rights guaranteed by the *Fifteenth Amendment*.

CIVIL RIGHTS §5.1 > Voting Rights Act -- challenge to eligibility -- > Headnote:
LEdHN[31][] [31]

The provisions of the Voting Rights Act of 1965 (79 Stat 437) requiring that a challenge to a listing on an eligibility list prepared by a federal examiner be made within 10 days after the listing is made available for public inspection 9(a), does not, on account of the briskness of the procedure, violate due process, in view of Congress' knowledge that in some of the areas affected, challenges have been persistently employed to harass registered Negroes.

ADMINISTRATIVE LAW §34 > CIVIL RIGHTS §5.1 > Voting Rights Act -- delegation of powers -- > Headnote:
LEdHN[32][] [32]

Section 6(b) of the Voting Rights Act of 1965 (79 Stat 437) does not, by authorizing the Attorney General of the United States to determine the localities to which federal examiners should be sent, permit this power to be used in an arbitrary fashion, without regard for the purposes of the Act, since 6(b) sets adequate standards to guide the exercise of his discretion, by directing him to calculate the registration ratio of non- whites to whites, and to weigh evidence of good-faith efforts to avoid possible voting discrimination, and since the special termination procedures of 13(a) provide indirect judicial review for the political subdivisions affected, assuring the withdrawal of federal examiners from areas where they are clearly not needed.

Syllabus

Invoking the Court's original jurisdiction under Art. III, § 2, of the Constitution, South Carolina filed a bill of complaint seeking a declaration of unconstitutionality as to certain provisions of the Voting Rights Act of 1965 and an injunction against their enforcement by defendant, the Attorney General. The Act's key features, aimed at areas where voting discrimination has been most flagrant, are: (1) A coverage formula or "triggering mechanism" in § 4 (b) determining applicability of its substantive provisions; (2) provision in § 4 (a) for temporary suspension of a State's voting tests or devices; (3) procedure in § 5 for review of new voting rules; and (4) a program in §§ 6 (b), 7, 9, and 13 (a) for using federal examiners to qualify applicants for registration who are thereafter entitled to vote in all elections. These remedial sections automatically apply to any State or its subdivision which the Attorney General has determined maintained on November 1, 1964, a registration or voting "test or device" (a literacy, educational, character, or voucher requirement as defined in § 4 (c)) and in which according to the Census **[****2]** Director's determination less than half the voting-age residents were registered or voted in the 1964 presidential election. Statutory coverage may be terminated by a declaratory judgment of a three-judge District of Columbia District Court that for the preceding five years racially discriminatory voting tests or devices have not been used. No person in a covered area may be denied voting rights because of failure to comply with a test or device. § 4 (a). Following administrative determinations, enforcement was temporarily suspended of South Carolina's literacy test as well as of tests and devices in certain other areas. The Act further provides

in § 5 that during the suspension period, a State or subdivision may not apply new voting rules unless the Attorney General has interposed no objection within 60 days of their submission to him, or a three-judge District of Columbia District Court has issued a declaratory judgment that such rules are not racially discriminatory. South Carolina wishes to apply a recent amendment to its voting laws without following these procedures. In any political subdivision where tests or devices have been suspended, the Civil Service Commission **[****3]** shall appoint voting examiners whenever the Attorney General has, after considering specified factors, duly certified receiving complaints of official racial voting discrimination from at least 20 residents or that the examiners' appointment is otherwise necessary under the *Fifteenth Amendment.* § 6 (b). Examiners are to transmit to the appropriate officials the names of applicants they find qualified; and such persons may vote in any election after 45 days following transmission of their names. § 7 (b). Removal by the examiners of names from voting lists is provided on loss of eligibility or on successful challenge under prescribed procedures. § 7 (d). The use of examiners is terminated if requested by the Attorney General or the political subdivision has obtained a declaratory judgment as specified in § 13 (a). Following certification by the Attorney General, federal examiners were appointed in two South Carolina counties as well as elsewhere in other States. Subsidiary cures for persistent voting discrimination and other special provisions are also contained in the Act. In addition to a general assault on the Act as unconstitutionally encroaching on States' rights, specific **[****4]** constitutional challenges by plaintiff and certain *amici curiae* are: The coverage formula violates the principle of equality between the States, denies due process through an invalid presumption, bars judicial review of administrative findings, is a bill of attainder, and legislatively adjudicates guilt; the review of new voting rules infringes Art. III by directing the District Court to issue advisory opinions; the assignment of federal examiners violates due process by foreclosing judicial review of administrative findings and impairs the separation of powers by giving the Attorney General judicial functions; the challenge procedure denies due process on account of its speed; and provisions for adjudication in the District of Columbia abridge due process by limiting litigation to a distant forum. *Held*:

1. This Court's judicial review does not cover portions of the Voting Rights Act of 1965 not challenged by plaintiff; nor does it extend to the Act's criminal provisions, as to which South Carolina's challenge is premature. Pp. 316-317.

2. The sections of the Act properly before this Court are a valid effectuation of the *Fifteenth Amendment*. Pp. 308-337.

(a) The Act's **[****5]** voluminous legislative history discloses unremitting and ingenious defiance in certain parts of the country of the *Fifteenth Amendment* (see paragraphs (b)-(d), *infra*) which Congress concluded called for sterner and more elaborate measures than those previously used. P. 309.

(b) Beginning in 1890, a few years before repeal of most of the legislation to enforce the *Fifteenth Amendment*, Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina and Virginia enacted tests, still in use, specifically designed to prevent Negroes from voting while permitting white persons to vote. Pp. 310-311.

(c) A variety of methods was used thereafter to keep Negroes from voting, one of the principal means being through racially discriminatory application of voting tests. Pp. 311-313.

(d) Case-by-case litigation against voting discrimination under the Civil Rights Acts of 1957, 1960, and 1964, has not appreciably increased Negro registration. Voting suits have been onerous to prepare, protracted, and where successful have often been followed by a shift in discriminatory devices, defiance or evasion of court orders. Pp. 313-315.

(e) A State is not a "person" within the meaning **[****6]** of the *Due Process Clause of the Fifth Amendment*; nor does it have standing to invoke the Bill of Attainder Clause of Art. I or the principle of separation of powers, which exist only to protect private individuals or groups. Pp. 323-324.

(f) Congress, as against the reserved powers of the States, may use any rational means to effectuate the constitutional prohibition of racial voting discrimination. P. 324.

(g) The *Fifteenth Amendment*, which is self-executing, supersedes contrary exertions of state power, and its enforcement is not confined to judicial invalidation of racially discriminatory state statutes and procedures or to general legislative prohibitions against violations of the Amendment. Pp. 325, 327.

(h) Congress, whose power to enforce the *Fifteenth Amendment* has repeatedly been upheld in the past, is free to use whatever means are appropriate to carry out

the objects of the Constitution. *McCulloch v. Maryland, 4 Wheat. 316*; *Ex parte Virginia, 100 U.S. 339, 345-346*. Pp. 326-327.

(i) Having determined case-by-case litigation inadequate to deal with racial voting discrimination, Congress has ample authority to prescribe remedies **[****7]** not requiring prior adjudication. P. 328.

(j) Congress is well within its powers in focusing upon the geographic areas where substantial racial voting discrimination had occurred. Pp. 328-329.

(k) Congress had reliable evidence of voting discrimination in a great majority of the areas covered by § 4 (b) of the Act and is warranted in inferring a significant danger of racial voting discrimination in the few other areas to which the formula in § 4 (b) applies. Pp. 329-330.

(l) The coverage formula is rational in theory since tests or devices have so long been used for disenfranchisement and a lower voting rate obviously results from such disenfranchisement. P. 330.

(m) The coverage formula is rational as being aimed at areas where widespread discrimination has existed through misuse of tests or devices even though it excludes certain areas where there is voting discrimination through other means. The Act, moreover, strengthens existing remedies for such discrimination in those other areas. Pp. 330-331.

(n) The provision for termination at the behest of the States of § 4 (b) coverage adequately deals with possible overbreadth; nor is the burden of proof imposed on the States **[****8]** unreasonable. Pp. 331-332.

(o) Limiting litigation to a single court in the District of Columbia is a permissible exercise of power under *Art. III, § 1, of the Constitution*, previously exercised by Congress on other occasions. Pp. 331-332.

(p) The Act's bar of judicial review of findings of the Attorney General and Census Director as to objective data is not unreasonable. This Court has sanctioned withdrawal of judicial review of administrative determinations in numerous other situations. Pp. 332-333.

(q) Congress has power to suspend literacy tests, it having found that such tests were used for discriminatory purposes in most of the States covered; their continuance, even if fairly administered, would freeze the effect of past discrimination; and re-registration of all voters would be too harsh an alternative. Such States cannot sincerely complain of electoral dilution by Negro illiterates when they long permitted white illiterates to vote. P. 334.

(r) Congress is warranted in suspending, pending federal scrutiny, new voting regulations in view of the way in which some States have previously employed new rules to circumvent adverse federal court decrees. P. 335.

(s) The provision **[****9]** whereby a State whose voting laws have been suspended under § 4 (a) must obtain judicial review of an amendment to such laws by the District Court for the District of Columbia presents a "controversy" under Art. III of the Constitution and therefore does not involve an advisory opinion contravening that provision. P. 335.

(t) The procedure for appointing federal examiners is an appropriate congressional response to the local tactics used to defy or evade federal court decrees. The challenge procedures contain precautionary features against error or fraud and are amply warranted in view of Congress' knowledge of harassing challenging tactics against registered Negroes. P. 336.

(u) Section 6 (b) has adequate standards to guide determination by the Attorney General in his selection of areas where federal examiners are to be appointed; and the termination procedures in § 13 (b) provide for indirect judicial review. Pp. 336-337.

Counsel: David W. Robinson II and Daniel R. McLeod, Attorney General of South Carolina, argued the cause for the plaintiff. With them on the brief was David W. Robinson.

Attorney General Katzenbach, defendant, argued the cause pro se. With him on the brief were **[****10]** Solicitor General Marshall, Assistant Attorney General Doar, Ralph S. Spritzer, Louis F. Claiborne, Robert S. Rifkind, David L. Norman and Alan G. Marer.

R. D. McIlwaine III, Assistant Attorney General, argued the cause for the Commonwealth of Virginia, as amicus curiae, in support of the plaintiff. With him on the brief were Robert Y. Button, Attorney General, and Henry T. Wickham. Jack P. F. Gremillion, Attorney General, argued the cause for the State of Louisiana, as amicus curiae, in support of the plaintiff. With him on the brief were Harry J. Kron, Assistant Attorney General, Thomas W. McFerrin, Sr., Sidney W. Provensal, Jr., and Alfred

Avins. Richmond M. Flowers, Attorney General, and Francis J. Mizell, Jr., argued the cause for the State of Alabama, as amicus curiae, in support of the plaintiff. With them on the briefs were George C. Wallace, Governor of Alabama, Gordon Madison, Assistant Attorney General, and Reid B. Barnes. Joe T. Patterson, Attorney General, and Charles Clark, Special Assistant Attorney General, argued the cause for the State of Mississippi, as amicus curiae, in support of the plaintiff. With them on the brief was Dugas Shands, Assistant Attorney **[****11]** General. E. Freeman Leverett, Deputy Assistant Attorney General, argued the cause for the State of Georgia, as amicus curiae, in support of the plaintiff. With him on the brief was Arthur K. Bolton, Attorney General.

Levin H. Campbell, Assistant Attorney General, and Archibald Cox, Special Assistant Attorney General, argued the cause for the Commonwealth of Massachusetts, as amicus curiae, in support of the defendant. With Mr. Campbell on the brief was Edward W. Brooke, Attorney General, joined by the following States through their Attorneys General and other officials as follows: Bert T. Kobayashi of Hawaii; John J. Dillon of Indiana, Theodore D. Wilson, Assistant Attorney General, and John O. Moss, Deputy Attorney General; Lawrence F. Scalise of Iowa; Robert C. Londerholm of Kansas; Richard J. Dubord of Maine; Thomas B. Finan of Maryland; Frank J. Kelley of Michigan, and Robert A. Derengoski, Solicitor General; Forrest H. Anderson of Montana; Arthur J. Sills of New Jersey; Louis J. Lefkowitz of New York; Charles Nesbitt of Oklahoma, and Charles L. Owens, Assistant Attorney General; Robert Y. Thornton of Oregon; Walter E. Alessandroni of Pennsylvania; J. Joseph Nugent of Rhode **[****12]** Island; John P. Connarn of Vermont; C. Donald Robertson of West Virginia; and Bronson C. LaFollette of Wisconsin. Alan B. Handler, First Assistant Attorney General, argued the cause for the State of New Jersey, as amicus curiae, in support of the defendant. Briefs of amici curiae, in support of the defendant, were filed by Thomas C. Lynch, Attorney General, Miles J. Rubin, Senior Assistant Attorney General, Dan Kaufmann, Assistant Attorney General, and Charles B. McKesson, David N. Rakov and Philip M. Rosten, Deputy Attorneys General, for the State of California; and by William G. Clark, Attorney General, Richard E. Friedman, First Assistant Attorney General, and Richard A. Michael and Philip J. Rock, Assistant Attorneys General, for the State of Illinois.

Judges: Warren, Fortas, Harlan, Brennan, Black, Stewart, Clark, White, Douglas

Opinion by: WARREN

Opinion

[*307] **[***774]** **[**807]** MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

LEdHN[1][1]By leave of the *Court, 382 U.S. 898*, South Carolina has filed a bill of complaint, seeking a declaration that selected provisions of the Voting Rights Act of 1965 [1] violate the Federal Constitution, and asking for an injunction against enforcement **[****13]** of these provisions by the Attorney General. Original jurisdiction is founded on the presence of a controversy between a State and a citizen of another State under Art. III, § 2, of the Constitution. See *Georgia v. Pennsylvania R. Co., 324 U.S. 439*. Because no issues of fact were raised in the complaint, and because of South Carolina's desire to obtain a ruling prior to its primary elections in June 1966, we dispensed with appointment of a special master and expedited our hearing of the case.

Recognizing that the questions presented were of urgent concern to the entire country, we invited all of the States **[**808]** to participate in this proceeding as friends of the Court. A majority responded by submitting **[***775]** or joining in briefs on the merits, some supporting South Carolina and others the Attorney General. [2] Seven of these States **[*308]** also requested and received permission to argue the case orally at our hearing. **[****14]** Without exception, despite the emotional overtones of the proceeding, the briefs and oral arguments were temperate, lawyerlike and

[1] 79 Stat. 437, *42 U. S. C. § 1973 (1964 ed., Supp. I)*.

[2] States supporting South Carolina: Alabama, Georgia, Louisiana, Mississippi, and Virginia. States supporting the Attorney General: California, Illinois, and Massachusetts, joined by Hawaii, Indiana, Iowa, Kansas, Maine, Maryland, Michigan, Montana, New Hampshire, New Jersey, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Vermont, West Virginia, and Wisconsin.

constructive. All viewpoints on the issues have been fully developed, and this additional assistance has been most helpful to the Court.

LEdHN[2][↑] [2] LEdHN[3A][↑] [3A]The Voting Rights Act was designed by Congress to banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century. The Act creates stringent new remedies for voting discrimination where it persists on a pervasive scale, and in addition the statute strengthens existing remedies for pockets of voting discrimination **[****15]** elsewhere in the country. Congress assumed the power to prescribe these remedies from § 2 of the Fifteenth Amendment, which authorizes the National Legislature to effectuate by "appropriate" measures the constitutional prohibition against racial discrimination in voting. We hold that the sections of the Act which are properly before us are an appropriate means for carrying out Congress' constitutional responsibilities and are consonant with all other provisions of the Constitution. We therefore deny South Carolina's request that enforcement of these sections of the Act be enjoined.

I.

LEdHN[4][↑] [4]The constitutional propriety of the Voting Rights Act of 1965 must be judged with reference to the historical experience which it reflects. Before enacting the measure, Congress explored with great care the problem of racial discrimination in voting. The House and Senate Committees on the Judiciary each held hearings for nine days and received testimony from a total of 67 witnesses. [3] **[*309]** More than three full days were consumed discussing the bill on the floor of the House, while the debate in the Senate covered 26 days in all. [4] At the close of these deliberations, the verdict of both **[****16]** chambers was overwhelming. The House approved the bill by a vote of 328-74, and the measure passed the Senate by a margin of 79-18.

Two points emerge vividly from the voluminous legislative history of the Act contained in the committee hearings and floor debates. First: Congress felt itself confronted by an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution. Second: Congress concluded that the unsuccessful remedies which it had prescribed in the past would **[****17]** have to be replaced by sterner and more elaborate measures in order to satisfy **[***776]** the clear commands of the *Fifteenth Amendment*. We pause here to summarize the majority reports of the House and Senate Committees, which document in considerable detail the factual basis for these **[**809]** reactions by Congress. [5] See H. R. Rep. No. 439, 89th Cong., 1st Sess., 8-16 (hereinafter cited as House Report); S. Rep. No. 162, pt. 3, 89th Cong., 1st Sess., 3-16 (hereinafter cited as Senate Report).

[**18]** **[*310]** The *Fifteenth Amendment to the Constitution* was ratified in 1870. Promptly thereafter Congress passed the Enforcement Act of 1870, [6] which made it a crime for public officers and private persons to obstruct exercise of the right to vote. The statute was amended in the following year [7] to provide for detailed federal supervision of the electoral process, from registration to the certification of returns. As the years passed and fervor for racial equality waned, enforcement of the laws became spotty and ineffective, and most of their provisions were repealed in 1894. [8] The remnants have had little significance in the recently renewed battle against voting discrimination.

Meanwhile, beginning in 1890, the States of Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia enacted tests still in use which were specifically designed to prevent Negroes from

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[3] See Hearings on H. R. 6400 before Subcommittee No. 5 of the House Committee on the Judiciary, 89th Cong., 1st Sess. (hereinafter cited as House Hearings); Hearings on S. 1564 before the Senate Committee on the Judiciary, 89th Cong., 1st Sess. (hereinafter cited as Senate Hearings).

[4] See the Congressional Record for April 22, 23, 26, 27, 28, 29, 30; May 3, 4, 5, 6, 7, 10, 11, 12, 13, 14, 17, 18, 19, 20, 21, 24, 25, 26; July 6, 7, 8, 9; August 3 and 4, 1965.

[5] The facts contained in these reports are confirmed, among other sources, by *United States v. Louisiana, 225 F.Supp. 353, 363-385* (Wisdom, J.), aff'd, *380 U.S. 145*; *United States v. Mississippi, 229 F.Supp. 925, 983-997* (dissenting opinion of Brown, J.), rev'd and rem'd, *380 U.S. 128*; *United States v. Alabama, 192 F.Supp. 677* (Johnson, J.), aff'd, *304 F.2d 583*, aff'd, *371 U.S. 37*; Comm'n on Civil Rights, Voting in Mississippi; 1963 Comm'n on Civil Rights Rep., Voting; 1961 Comm'n on Civil Rights Rep., Voting, pt. 2; 1959 Comm'n on Civil Rights Rep., pt. 2. See generally Christopher, The Constitutionality of the Voting Rights Act of 1965, 18 Stan. L. Rev. 1; Note, Federal Protection of Negro Voting Rights, 51 Va. L. Rev. 1051.

[6] 16 Stat. 140.

[7] 16 Stat. 433.

[8] 28 Stat. 36.

voting. [9] **[****20]** Typically, they made the ability to read and write **[****19]** **[*311]** a registration qualification and also required completion of a registration form. These laws were based on the fact that as of 1890 in each of the named States, more than two-thirds of the adult Negroes were illiterate while less than one-quarter of the adult whites were unable to read or write. [10] At the same time, alternate tests were prescribed in **[***777]** all of the named States to assure that white illiterates would not be deprived of the franchise. These included grandfather clauses, property qualifications, **[**810]** "good character" tests, and the requirement that registrants "understand" or "interpret" certain matter.

The course of subsequent *Fifteenth Amendment* litigation in this Court demonstrates the variety and persistence of these and similar institutions designed to deprive Negroes of the right to vote. Grandfather clauses were invalidated in *Guinn v. United States, 238 U.S. 347*, and *Myers v. Anderson, 238 U.S. 368*. Procedural hurdles were struck down in *Lane v. Wilson, 307 U.S. 268*. The white primary was outlawed in *Smith v. Allwright, 321 U.S. 649*, and *Terry v. Adams, 345 U.S. 461*. Improper challenges were nullified in *United States v. Thomas, 362 U.S. 58*. **[****21]** Racial gerrymandering was forbidden by *Gomillion v. Lightfoot, 364 U.S. 339*. Finally, discriminatory application of voting tests was condemned in *Schnell v. Davis, 336 U.S. 933*; *Alabama **[*312]** v. United States, 371 U.S. 37*; and *Louisiana v. United States, 380 U.S. 145*.

According to the evidence in recent Justice Department voting suits, the latter stratagem is now the principal method used to bar Negroes from the polls. Discriminatory administration of voting qualifications has been found in all eight Alabama cases, in all nine Louisiana cases, and in all nine Mississippi cases which have gone to final judgment. [11] Moreover, in almost all of these cases, the courts have held that the discrimination was pursuant to a widespread "pattern or practice." White applicants for registration have often been excused altogether from the literacy and understanding tests or have been given easy versions, have received extensive help from voting officials, and have been registered despite serious errors in their answers. [12] **[****23]** Negroes, on the other hand, have typically been required to pass difficult **[****22]** versions of all the tests, without any outside assistance and without the slightest error. [13] The good-morals requirement **[*313]** is so vague and subjective that it has constituted an open invitation **[***778]** to abuse at the hands of voting officials. [14] Negroes obliged to obtain vouchers from registered voters have found it virtually impossible to comply in areas where almost no Negroes

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[9] The South Carolina Constitutional Convention of 1895 was a leader in the widespread movement to disenfranchise Negroes. Key, Southern Politics, 537-539. Senator Ben Tillman frankly explained to the state delegates the aim of the new literacy test: "The only thing we can do as patriots and as statesmen is to take from [the 'ignorant blacks'] every ballot that we can under the laws of our national government." He was equally candid about the exemption from the literacy test for persons who could "understand" and "explain" a section of the state constitution: "There is no particle of fraud or illegality in it. It is just simply showing partiality, perhaps, [laughter,] or discriminating." He described the alternative exemption for persons paying state property taxes in the same vein: "By means of the $ 300 clause you simply reach out and take in some more white men and a few more colored men." Journal of the Constitutional Convention of the State of South Carolina 464, 469, 471 (1895). Senator Tillman was the dominant political figure in the state convention, and his entire address merits examination.

[10] Prior to the Civil War, most of the slave States made it a crime to teach Negroes how to read or write. Following the war, these States rapidly instituted racial segregation in their public schools. Throughout the period, free public education in the South had barely begun to develop. See *Brown v. Board of Education, 347 U.S. 483, 489-490, n. 4*; 1959 Comm'n on Civil Rights Rep. 147-151.

[11] For example, see three voting suits brought against the States themselves: *United States v. Alabama, 192 F.Supp. 677*, aff'd, *304 F.2d 583*, aff'd, *371 U.S. 37*; *United States v. Louisiana, 225 F.Supp. 353*, aff'd, *380 U.S. 145*; *United States v. Mississippi, 339 F.2d 679*.

[12] A white applicant in Louisiana satisfied the registrar of his ability to interpret the state constitution by writing, "FRDUM FOOF SPETGH." *United States v. Louisiana, 225 F.Supp. 353, 384*. A white applicant in Alabama who had never completed the first grade of school was enrolled after the registrar filled out the entire form for him. *United States v. Penton, 212 F.Supp. 193, 210-211*.

[13] In Panola County, Mississippi, the registrar required Negroes to interpret the provision of the state constitution concerning "the rate of interest on the fund known as the 'Chickasaw School Fund.'" *United States v. Duke, 332 F.2d 759, 764*. In Forrest County, Mississippi, the registrar rejected six Negroes with baccalaureate degrees, three of whom were also Masters of Arts. *United States v. Lynd, 301 F.2d 818, 821*.

[14] For example, see *United States v. Atkins, 323 F.2d 733, 743*.

are on the rolls. [15]

In recent years, Congress has repeatedly tried to cope with the problem by facilitating case-by-case litigation against voting discrimination. The Civil **[**811]** Rights Act of 1957 [16] authorized the Attorney General to seek injunctions against public and private interference with the right to vote on racial grounds. Perfecting amendments in the Civil Rights Act of 1960 [17] permitted the joinder of States as parties defendant, gave the Attorney General **[****24]** access to local voting records, and authorized courts to register voters in areas of systematic discrimination. Title I of the Civil Rights Act of 1964 [18] expedited the hearing of voting cases before three-judge courts and outlawed some of the tactics used to disqualify Negroes from voting in federal elections.

Despite the earnest efforts of the Justice Department and of many federal judges, these new laws have done little to cure the problem of voting discrimination. According to estimates by the Attorney General during hearings on the Act, registration of voting-age Negroes in Alabama rose only from 14.2% to 19.4% between 1958 and 1964; in Louisiana it barely inched ahead from 31.7% to 31.8% between 1956 and 1965; and in Mississippi it increased only from 4.4% to 6.4% between 1954 and 1964. In each instance, registration of voting-age whites ran roughly 50 percentage points or more ahead of Negro registration.

[*314] **[****25]** The previous legislation has proved ineffective for a number of reasons. Voting suits are unusually onerous to prepare, sometimes requiring as many as 6,000 manhours spent combing through registration records in preparation for trial. Litigation has been exceedingly slow, in part because of the ample opportunities for delay afforded voting officials and others involved in the proceedings. Even when favorable decisions have finally been obtained, some of the States affected have merely switched to discriminatory devices not covered by the federal decrees or have enacted difficult new tests designed to prolong the existing disparity between white and Negro registration. [19] **[****26]** Alternatively, certain local officials have defied and evaded court orders or have simply closed their registration offices to freeze the voting rolls. [20] The provision of the 1960 law authorizing registration by federal officers has had little impact on local maladministration because of its procedural complexities.

During the hearings and debates on the Act, Selma, Alabama, was **[***779]** repeatedly referred to as the pre-eminent example of the ineffectiveness of existing legislation. In Dallas County, of which Selma is the seat, there were four years of litigation by the Justice Department and two findings by the federal courts of widespread voting discrimination. Yet in those four years, Negro registration **[*315]** rose only from 156 to 383, although there are approximately 15,000 Negroes of voting age in the county. Any possibility that these figures were attributable to political apathy was dispelled by the protest demonstrations in Selma in the early months of 1965. The House Committee on the Judiciary summed up the reaction of Congress to these developments in the following words:

"The litigation in Dallas County took more than 4 years to open **[**812]** the door to the exercise of constitutional rights conferred almost a century ago. The problem **[****27]** on a national scale is that the difficulties experienced in suits in Dallas County have been encountered over and over again under existing voting laws. Four years is too long. The burden is too heavy -- the wrong to our citizens is too serious -- the damage to our national conscience is too great not to adopt more effective measures than exist today.

"Such is the essential justification for the pending bill." House Report 11.

II.

The Voting Rights Act of 1965 reflects Congress' firm intention to rid the country of racial discrimination in

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[15] For example, see *United States v. Logue, 344 F.2d 290, 292*.

[16] 71 Stat. 634.

[17] 74 Stat. 86.

[18] 78 Stat. 241, *42 U. S. C. § 1971 (1964 ed.)*.

[19] The Court of Appeals for the Fifth Circuit ordered the registrars of Forrest County, Mississippi, to give future Negro applicants the same assistance which white applicants had enjoyed in the past, and to register future Negro applicants despite errors which were not serious enough to disqualify white applicants in the past. The Mississippi Legislature promptly responded by requiring applicants to complete their registration forms without assistance or error, and by adding a good-morals and public-challenge provision to the registration laws. *United States v. Mississippi, 229 F.Supp. 925, 996-997* (dissenting opinion).

[20] For example, see *United States v. Parker, 236 F.Supp. 511*; *United States v. Palmer, 230 F.Supp. 716*.

voting. [21] The heart of the Act is a complex scheme of stringent remedies aimed at areas where voting discrimination has been most flagrant. Section 4 (a)-(d) lays down a formula defining the States and political subdivisions to which these new remedies apply. The first of the remedies, contained in § 4 (a), is the suspension of literacy tests and similar voting qualifications for a period of five years from the last occurrence of substantial voting discrimination. Section 5 prescribes a second **[*316]** remedy, the suspension of all new voting regulations pending review by federal authorities to determine whether their use would perpetuate **[****28]** voting discrimination. The third remedy, covered in §§ 6 (b), 7, 9, and 13 (a), is the assignment of federal examiners on certification by the Attorney General to list qualified applicants who are thereafter entitled to vote in all elections.

Other provisions of the Act prescribe subsidiary cures for persistent voting discrimination. Section 8 authorizes the appointment of federal poll-watchers in places to which federal examiners have already been assigned. Section 10 (d) excuses those made eligible to vote in sections of the country covered by § 4 (b) of the Act from paying accumulated past poll taxes for state and local elections. Section 12 (e) provides for balloting by persons denied access to the polls in areas where federal examiners have been appointed.

The remaining remedial portions of the Act are aimed at voting discrimination in any area of the country where it may occur. Section 2 broadly prohibits the use of **[****29]** voting rules to abridge exercise of the franchise on racial grounds. Sections 3, 6 (a), and 13 (b) strengthen existing procedures for attacking voting discrimination by means of litigation. Section 4 (e) excuses citizens educated in American schools conducted in a foreign language from **[***780]** passing English-language literacy tests. Section 10 (a)-(c) facilitates constitutional litigation challenging the imposition of all poll taxes for state and local elections. Sections 11 and 12 (a)-(d) authorize civil and criminal sanctions against interference with the exercise of rights guaranteed by the Act.

LEdHN[5][↑] [5]*LEdHN[6]*[↑] [6]At the outset, we emphasize that only some of the many portions of the Act are properly before us. South Carolina has not challenged §§ 2, 3, 4 (e), 6 (a), 8, 10, 12 (d) and (e), 13 (b), and other miscellaneous provisions having nothing to do with this lawsuit. Judicial review of these sections must await subsequent litigation. [22] **[*317]** In addition, **[**813]** we find that South Carolina's attack on §§ 11 and 12 (a)-(c) is premature. No person has yet been subjected to, or even threatened with, the criminal sanctions which these sections of the Act authorize. See *United States v. Raines, 362 U.S. 17, 20-24*. **[****30]** Consequently, the only sections of the Act to be reviewed at this time are §§ 4 (a)-(d), 5, 6 (b), 7, 9, 13 (a), and certain procedural portions of § 14, all of which are presently in actual operation in South Carolina. We turn now to a detailed description of these provisions and their present status.

Coverage formula.

The remedial sections of the Act assailed by South Carolina automatically apply **[****31]** to any State, or to any separate political subdivision such as a county or parish, for which two findings have been made: (1) the Attorney General has determined that on November 1, 1964, it maintained a "test or device," and (2) the Director of the Census has determined that less than 50% of its voting-age residents were registered on November 1, 1964, or voted in the presidential election of November 1964. These findings are not reviewable in any court and are final upon publication in the Federal Register. § 4 (b). As used throughout the Act, the phrase "test or device" means any requirement that a registrant or voter must "(1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications **[*318]** by the voucher of registered voters or members of any other class." § 4 (c).

Statutory coverage of a State or political subdivision under § 4 (b) is terminated if the area obtains a declaratory judgment from the District Court for the District of Columbia, determining that tests and devices have not been used during **[****32]** the preceding five years to abridge the franchise on racial grounds. The Attorney General shall consent to entry of the judgment if

[21] For convenient reference, the entire Act is reprinted in an Appendix to this opinion.

[22] Section 4 (e) has been challenged in *Morgan v. Katzenbach, 247 F.Supp. 196*, prob. juris. noted, ***382 U.S. 1007***, and in *United States v. County Bd. of Elections, 248 F.Supp. 316*. Section 10 (a)-(c) is involved in *United States v. Texas, 252 F.Supp. 234*, and in *United States v. Alabama, 252 F.Supp. 95*; see also *Harper* v. *Virginia State Bd. of Elections*, No. 48, 1965 Term, and *Butts* v. *Harrison*, No. 655, 1965 Term, which were argued together before this Court on January 25 and 26, 1966.

he has no reason to believe that the facts are otherwise. § 4 (a). For the purposes of this section, tests and devices are not deemed to have been used in a forbidden manner if the incidents of discrimination are few in number and have been promptly corrected, if their continuing effects have been abated, and if they are **[***781]** unlikely to recur in the future. § 4 (d). On the other hand, no area may obtain a declaratory judgment for five years after the final decision of a federal court (other than the denial of a judgment under this section of the Act), determining that discrimination through the use of tests or devices has occurred anywhere in the State or political subdivision. These declaratory judgment actions are to be heard by a three-judge panel, with direct appeal to this Court. § 4 (a).

South Carolina was brought within the coverage formula of the Act on August 7, 1965, pursuant to appropriate administrative determinations which have not been challenged in this proceeding. [23] On the same day, coverage was also extended to Alabama, **[****33]** Alaska, Georgia, Louisiana, Mississippi, Virginia, 26 counties in North Carolina, and one county in Arizona. [24] Two more counties in Arizona, one county in Hawaii, and one county in Idaho were added to the list on November 19, 1965. [25] **[*319]** Thus far Alaska, the three Arizona counties, and the single county in Idaho have asked the District Court for the District of Columbia to grant a declaratory judgment terminating statutory coverage. [26]

Suspension **[**814]** *of tests*.

In a State or political subdivision covered by § 4 (b) of the Act, no person may be denied the right to vote in any election because of his failure to comply with a "test or device." § 4 (a).

On account of this provision, South Carolina is temporarily barred from **[****34]** enforcing the portion of its voting laws which requires every applicant for registration to show that he:

"Can both read and write any section of [the State] Constitution submitted to [him] by the registration officer or can show that he owns, and has paid all taxes collectible during the previous year on, property in this State assessed at three hundred dollars or more." S. C. Code Ann. § 23-62 (4) (1965 Supp.).

The Attorney General has determined that the property qualification is inseparable from the literacy test, [27] and South Carolina makes no objection to this finding. Similar tests and devices have been temporarily suspended in the other sections of the country listed above. [28]

Review of new rules.

In a State or political subdivision covered by § 4 (b) of the Act, no person may be denied the right to vote **[****35]** in any election because of his failure to comply with a voting qualification or procedure different from those in force on **[*320]** November 1, 1964. This suspension of new rules is terminated, however, under either of the following circumstances: (1) if the area has submitted the rules to the Attorney General, and he has not interposed an objection within 60 days, or (2) if the area has obtained a declaratory judgment from the District Court for the District of Columbia, determining that the rules will not abridge the franchise **[***782]** on racial grounds. These declaratory judgment actions are to be heard by a three-judge panel, with direct appeal to this Court. § 5.

South Carolina altered its voting laws in 1965 to extend the closing hour at polling places from 6 p. m. to 7 p. m. [29] The State has not sought judicial review of this change in the District Court for the District of Columbia, nor has it submitted the new rule to the Attorney General for his scrutiny, although at our hearing the Attorney General announced that he does not challenge the amendment. There are indications in the record that other sections of the country listed above have also altered their voting **[****36]** laws since November 1, 1964. [30]

Federal examiners.

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[23] ***30 Fed. Reg. 9897***.

[24] *Ibid*.

[25] ***30 Fed. Reg. 14505***.

[26] *Alaska* v. *United States*, Civ. Act. 101-66; *Apache County* v. *United States*, Civ. Act. 292-66; *Elmore County* v. *United States*, Civ. Act. 320-66.

[27] *30 Fed. Reg. 14045*-14046.

[28] For a chart of the tests and devices in effect at the time the Act was under consideration, see House Hearings 30-32; Senate Report 42-43.

[29] S. C. Code Ann. § 23-342 (1965 Supp.).

[30] Brief for Mississippi as *amicus curiae*, App.

In any political subdivision covered by § 4 (b) of the Act, the Civil Service Commission shall appoint voting examiners whenever the Attorney General certifies either of the following facts: (1) that he has received meritorious written complaints from at least 20 residents alleging that they have been disenfranchised under color of law because of their race, or (2) that the appointment of examiners is otherwise necessary to effectuate the guarantees of the *Fifteenth Amendment*. In making the latter determination, the Attorney General must consider, among other factors, whether the registration ratio of non-whites to whites seems reasonably attributable to **[*321]** racial discrimination, or whether there is substantial evidence of good-faith efforts to comply with the *Fifteenth Amendment.* § 6 (b). These certifications are not reviewable in any court and are **[****37]** effective upon publication in the Federal Register. § 4 (b).

The examiners who have been appointed are to test the voting qualifications **[**815]** of applicants according to regulations of the Civil Service Commission prescribing times, places, procedures, and forms. §§ 7 (a) and 9 (b). Any person who meets the voting requirements of state law, insofar as these have not been suspended by the Act, must promptly be placed on a list of eligible voters. Examiners are to transmit their lists at least once a month to the appropriate state or local officials, who in turn are required to place the listed names on the official voting rolls. Any person listed by an examiner is entitled to vote in all elections held more than 45 days after his name has been transmitted. § 7 (b).

A person shall be removed from the voting list by an examiner if he has lost his eligibility under valid state law, or if he has been successfully challenged through the procedure prescribed in § 9 (a) of the Act. § 7 (d). The challenge must be filed at the office within the State designated by the Civil Service Commission; must be submitted within 10 days after the listing is made available for public inspection; **[****38]** must be supported by the affidavits of at least two people having personal knowledge of the relevant facts; and must be served on the person challenged by mail or at his residence. A hearing officer appointed by the Civil Service Commission shall hear the challenge and render a decision within 15 days after the challenge is filed. A petition for review of the hearing officer's decision must be submitted within an additional 15 days after service of the decision on the person seeking review. The court of appeals for the **[***783]** circuit in which the person challenged resides is to **[*322]** hear the petition and affirm the hearing officer's decision unless it is clearly erroneous. Any person listed by an examiner is entitled to vote pending a final decision of the hearing officer or the court. § 9 (a).

The listing procedures in a political subdivision are terminated under either of the following circumstances: (1) if the Attorney General informs the Civil Service Commission that all persons listed by examiners have been placed on the official voting rolls, and that there is no longer reasonable cause to fear abridgment of the franchise on racial grounds, or (2) if the political **[****39]** subdivision has obtained a declaratory judgment from the District Court for the District of Columbia, ascertaining the same facts which govern termination by the Attorney General, and the Director of the Census has determined that more than 50% of the non-white residents of voting age are registered to vote. A political subdivision may petition the Attorney General to terminate listing procedures or to authorize the necessary census, and the District Court itself shall request the census if the Attorney General's refusal to do so is arbitrary or unreasonable. § 13 (a). The determinations by the Director of the Census are not reviewable in any court and are final upon publication in the Federal Register. § 4 (b).

On October 30, 1965, the Attorney General certified the need for federal examiners in two South Carolina counties, [31] and examiners appointed by the Civil Service Commission have been serving there since November 8, 1965. Examiners have also been assigned to 11 counties in Alabama, five parishes in Louisiana, and 19 counties in Mississippi. [32] The examiners are listing people found eligible to vote, and the challenge procedure has been **[*323]** employed extensively. **[****40]** [33] No political subdivision has yet sought to have federal examiners withdrawn through the Attorney General or the **[**816]** District Court for the District of Columbia.

III.

These provisions of the Voting Rights Act of 1965 are challenged on the fundamental ground that they exceed the powers of Congress and encroach on an area reserved to the States by the Constitution. South Carolina and certain of the *amici curiae* also attack

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[31] ***30 Fed. Reg. 13850***.

[32] ***30 Fed. Reg. 9970-9971, 10863, 12363, 12654, 13849-13850, 15837***; ***31 Fed. Reg. 914***.

[33] See Comm'n on Civil Rights, The Voting Rights Act (1965).

specific sections of the Act for more particular reasons. They argue that the coverage formula prescribed in § 4 (a)-(d) violates the principle of the equality of States, denies due process by employing an invalid presumption and by barring judicial review of administrative findings, constitutes a forbidden bill of attainder, and impairs the separation of powers **[****41]** by adjudicating guilt through legislation. They claim that the review of new voting rules required in § 5 infringes Article III by directing the District Court to issue advisory opinions. They contend that the assignment of federal examiners authorized in § 6 (b) abridges due process by precluding judicial review of administrative findings and impairs the separation of powers by giving the Attorney **[***784]** General judicial functions; also that the challenge procedure prescribed in § 9 denies due process on account of its speed. Finally, South Carolina and certain of the *amici curiae* maintain that §§ 4 (a) and 5, buttressed by § 14 (b) of the Act, abridge due process by limiting litigation to a distant forum.

LEdHN[7][] [7]*LEdHN[8]*[] [8]*LEdHN[9]*[] [9]Some of these contentions may be dismissed at the outset. *HN1*[] The word "person" in the context of the *Due Process Clause of the Fifth Amendment* cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union, and to our knowledge **[*324]** this has never been done by any court. See *International Shoe Co.* v. *Cocreham, 246 La. 244, 266, 164 So.2d 314, 322, n. 5*; cf. *United States v. City of Jackson, 318 F.2d 1, 8* **[****42]** (C. A. 5th Cir.). Likewise, courts have consistently regarded the Bill of Attainder Clause of Article I and the principle of the separation of powers only as protections for individual persons and private groups, those who are peculiarly vulnerable to nonjudicial determinations of guilt. See *United States v. Brown, 381 U.S. 437*; *Ex parte Garland, 4 Wall. 333*. Nor does a State have standing as the parent of its citizens to invoke these constitutional provisions against the Federal Government, the ultimate *parens patriae* of every American citizen. *Massachusetts v. Mellon, 262 U.S. 447, 485-486*; *Florida v. Mellon, 273 U.S. 12, 18*. The objections to the Act which are raised under these provisions may therefore be considered only as additional aspects of the basic question presented by the case: Has Congress exercised its powers under the *Fifteenth Amendment* in an appropriate manner with relation to the States?

LEdHN[10][] [10]The ground rules for resolving this question are clear. The language and purpose of the *Fifteenth Amendment*, the prior decisions construing its several provisions, and the general **[****43]** doctrines of constitutional interpretation, all point to one fundamental principle. *HN2*[] As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting. Cf. our rulings last Term, sustaining Title II of the Civil Rights Act of 1964, in *Heart of Atlanta Motel v. United States, 379 U.S. 241, 258-259, 261-262*; and *Katzenbach v. McClung, 379 U.S. 294, 303-304*. We turn now to a more detailed description of the standards which govern our review of the Act.

[*325] *LEdHN[11]*[] [11]*LEdHN[12]*[] [12]*LEdHN[13]*[] [13]*HN3*[] Section 1 of the Fifteenth Amendment declares that "the right of citizens of the United States to vote shall not be denied or abridged by the United **[**817]** States or by any State on account of race, color, or previous condition of servitude." *HN4*[] This declaration has always been treated as self-executing and has repeatedly been construed, without further legislative specification, to invalidate state voting qualifications or procedures which are discriminatory on their face or in practice. See *Neal v. Delaware, 103 U.S. 370*; *Guinn v. United States, 238 U.S. 347*; **[****44]** *Myers v. Anderson, 238 U.S. 368*; *Lane v. Wilson, 307 U.S. 268*; *Smith v. Allwright, 321 U.S. 649*; *Schnell v. Davis, 336 U.S. 933*; **[***785]** *Terry v. Adams, 345 U.S. 461*; *United States v. Thomas, 362 U.S. 58*; *Gomillion v. Lightfoot, 364 U.S. 339*; *Alabama v. United States, 371 U.S. 37*; *Louisiana v. United States, 380 U.S. 145*.These decisions have been rendered with full respect for the general rule, reiterated last Term in *Carrington v. Rash, 380 U.S. 89, 91*, that *HN5*[] States "have broad powers to determine the conditions under which the right of suffrage may be exercised." The gist of the matter is that the *Fifteenth Amendment* supersedes contrary exertions of state power. "When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right." *Gomillion v. Lightfoot, 364 U.S., at 347*.

[**45]** *LEdHN[14]*[] [14]South Carolina contends that the cases cited above are precedents only for the authority of the judiciary to strike down state statutes and procedures -- that to allow an exercise of this authority by Congress would be to rob the courts of their rightful constitutional role. On the contrary, *HN6*[] § 2 of the

Fifteenth Amendment expressly declares that "Congress shall have power to enforce this article by appropriate legislation." HN7[] By adding this **[*326]** authorization, the Framers indicated that Congress was to be chiefly responsible for implementing the rights created in § 1. "It is the power of Congress which has been enlarged. Congress is authorized to *enforce* the prohibitions by appropriate legislation. Some legislation is contemplated to make the [Civil War] amendments fully effective." *Ex parte Virginia, 100 U.S. 339, 345*. Accordingly, in addition to the courts, Congress has full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting.

Congress has repeatedly exercised these powers in the past, and its enactments have repeatedly been upheld. For recent examples, see the Civil Rights Act of 1957, which was **[****46]** sustained in *United States v. Raines, 362 U.S. 17*; *United States v. Thomas, supra*; and *Hannah v. Larche, 363 U.S. 420*; and the Civil Rights Act of 1960, which was upheld in *Alabama v. United States, supra*; *Louisiana v. United States, supra*; and *United States v. Mississippi, 380 U.S. 128*. On the rare occasions when the Court has found an unconstitutional exercise of these powers, in its opinion Congress had attacked evils not comprehended by the *Fifteenth Amendment*. See *United States v. Reese, 92 U.S. 214*; *James v. Bowman, 190 U.S. 127*.

LEdHN[15][] [15]HN8[] The basic test to be applied in a case involving § 2 of the Fifteenth Amendment is the same as in all cases concerning the express powers of Congress with relation to the reserved powers of the States. Chief Justice Marshall laid down the classic formulation, 50 **[**818]** years before the *Fifteenth Amendment* was ratified:

"Let the end be legitimate, let it be within the scope of the constitution, **[***786]** and all means which are appropriate, which are plainly **[****47]** adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *McCulloch v. Maryland, 4 Wheat. 316, 421*.

[*327] The Court has subsequently echoed his language in describing each of the Civil War Amendments:

HN9[] "Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power." *Ex parte Virginia, 100 U.S., at 345-346*.

This language was again employed, nearly 50 years later, with reference to Congress' related authority under § 2 of the Eighteenth Amendment. *James Everard's Breweries v. Day, 265 U.S. 545, 558-559*.

LEdHN[16][] [16]We therefore reject South Carolina's argument that Congress may appropriately do no more than to forbid violations of the *Fifteenth Amendment* in general terms -- that the task of fashioning specific remedies **[****48]** or of applying them to particular localities must necessarily be left entirely to the courts. Congress is not circumscribed by any such artificial rules under § 2 of the Fifteenth Amendment. In the oft-repeated words of Chief Justice Marshall, referring to another specific legislative authorization in the Constitution, "This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." *Gibbons v. Ogden, 9 Wheat. 1, 196*.

IV.

Congress exercised its authority under the *Fifteenth Amendment* in an inventive manner when it enacted the Voting Rights Act of 1965. First: The measure prescribes remedies for voting discrimination which go into **[*328]** effect without any need for prior adjudication. This was clearly a legitimate response to the problem, for which there is ample precedent under other constitutional provisions. See *Katzenbach v. McClung, 379 U.S. 294, 302-304*; *United States v. Darby, 312 U.S. 100, 120-121*. Congress had found that case-by-case litigation was inadequate to combat **[****49]** widespread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably

encountered in these lawsuits. [34] After enduring nearly a century of systematic resistance to the *Fifteenth Amendment*, Congress might well decide to shift the advantage of time and inertia from the perpetrators of the evil to its victims. The question remains, of course, whether the specific remedies prescribed in the Act were an appropriate means of combatting the evil, and to this question we shall presently address ourselves.

LEdHN[17][] [17] ***LEdHN[18]***[] [18]Second: The Act intentionally confines these remedies to **[***787]** a small number of States and political subdivisions which in most instances were familiar to Congress by name. [35] This, too, was a permissible method of dealing with the problem. Congress had learned that substantial voting discrimination **[**819]** presently occurs in certain sections of the country, and it knew no way **[****50]** of accurately forecasting whether the evil might spread elsewhere in the future. [36] In acceptable legislative fashion, Congress chose to limit its attention to the geographic areas where immediate action seemed necessary. See *McGowan v. Maryland, 366 U.S. 420, 427*; *Salsburg v. Maryland, 346 U.S. 545, 550-554*. The doctrine of the equality of States, invoked by South Carolina, does not bar this approach, for ***HN10***[] that doctrine applies only to the terms **[*329]** upon which States are admitted to the Union, and not to the remedies for local evils which have subsequently appeared. See *Coyle v. Smith, 221 U.S. 559*, and cases cited therein.

Coverage formula.

LEdHN[19A][] [19A]We now consider the related question of whether the specific States and political subdivisions within § 4 (b) of the Act were an appropriate target for the new remedies. South Carolina contends that **[****51]** the coverage formula is awkwardly designed in a number of respects and that it disregards various local conditions which have nothing to do with racial discrimination. These arguments, however, are largely beside the point. [37] Congress began work with reliable evidence of actual voting discrimination in a great majority of the States and political subdivisions affected by the new remedies of the Act. The formula eventually evolved to describe these areas was relevant to the problem of voting discrimination, and Congress was therefore entitled to infer a significant danger of the evil in the few remaining States and political subdivisions covered by § 4 (b) of the Act. No more was required to justify the application to these areas of Congress' express powers under the *Fifteenth Amendment*. Cf. *North American Co.* v. *S. E. C., 327 U.S. 686, 710-711*; *Assigned Car Cases, 274 U.S. 564, 582-583*.

[**52]** ***LEdHN[20A]***[] [20A] ***LEdHN[21]***[] [21]To be specific, the new remedies of the Act are imposed on three States -- Alabama, Louisiana, and Mississippi -- in which federal courts have repeatedly found substantial voting discrimination. [38] Section 4 (b) of the Act also embraces two other States -- Georgia and South Carolina -- plus large portions of a third State -- North Carolina -- for which there was more fragmentary evidence of **[*330]** recent voting discrimination mainly adduced by the Justice Department and the Civil Rights Commission. [39] All of these areas were appropriately subjected to the new remedies. In identifying past evils, Congress obviously may avail itself of information from any probative source. See **[***788]** *Heart of Atlanta Motel v. United States, 379 U.S. 241, 252-253*; *Katzenbach v. McClung, 379 U.S., at 299-301*.

[**53]** ***LEdHN[19B]***[] [19B] ***LEdHN[20B]***[] [20B] ***LEdHN[22]***[] [22]The areas listed above, for which there was evidence of actual voting discrimination, share two characteristics incorporated by Congress into the coverage formula: the use of tests and devices for voter registration, and a voting rate in the 1964 presidential election at least 12 points below the national average. Tests and devices are relevant to voting discrimination because of their long history as a tool for perpetrating the evil; a low voting rate is pertinent for the obvious **[**820]** reason that widespread disenfranchisement must inevitably affect the number of actual voters. Accordingly, the coverage formula is rational in both practice and theory. It was therefore permissible to impose the new remedies on the few remaining States and political subdivisions covered by the formula, at least in the absence of proof that they have been free of substantial voting discrimination in recent years. ***HN11***[] Congress is clearly not bound by

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[34] House Report 9-11; Senate Report 6-9.

[35] House Report 13; Senate Report 52, 55.

[36] House Hearings 27; Senate Hearings 201.

[37] For Congress' defense of the formula, see House Report 13-14; Senate Report 13-14.

[38] House Report 12; Senate Report 9-10.

[39] Georgia: House Hearings 160-176; Senate Hearings 1182-1184, 1237, 1253, 1300-1301, 1336-1345. North Carolina: Senate Hearings 27-28, 39, 246-248. South Carolina: House Hearings 114-116, 196-201; Senate Hearings 1353-1354.

the rules relating to statutory presumptions in criminal cases when it prescribes civil remedies against other organs of government under § 2 of the Fifteenth Amendment. Compare *United States v. Romano, 382 U.S. 136*; *Tot v. United States, 319 U.S. 463*.

[**54]** *LEdHN[23]*[↑] [23]*LEdHN[24]*[↑] [24]It is irrelevant that the coverage formula excludes certain localities which do not employ voting tests and **[*331]** devices but for which there is evidence of voting discrimination by other means. Congress had learned that widespread and persistent discrimination in voting during recent years has typically entailed the misuse of tests and devices, and this was the evil for which the new remedies were specifically designed. [40] At the same time, through §§ 3, 6 (a), and 13 (b) of the Act, Congress strengthened existing remedies for voting discrimination in other areas of the country. *HN12*[↑] Legislation need not deal with all phases of a problem in the same way, so long as the distinctions drawn have some basis in practical experience. See *Williamson v. Lee Optical Co., 348 U.S. 483, 488-489*; *Railway Express Agency v. New York, 336 U.S. 106*. There are no States or political subdivisions exempted from coverage under § 4 (b) in which the record reveals recent racial discrimination involving tests and devices. This fact confirms the rationality of the formula.

[**55]** *LEdHN[25A]*[↑] [25A]

Acknowledging the possibility of overbreadth, the Act provides for termination of special statutory coverage at the behest of States and political subdivisions in which the danger of substantial voting discrimination has not materialized during the preceding five years. Despite South Carolina's argument to the contrary, Congress might appropriately limit litigation under this provision to a single court in the District of Columbia, pursuant to its constitutional power under Art. III, § 1, to "ordain and establish" inferior federal tribunals. See *Bowles v. Willingham, 321 U.S. 503, 510-512*; *Yakus v. United States, 321 U.S. 414, 427-431*; *Lockerty v. Phillips, 319 U.S. 182*. At the present time, **[***789]** contractual claims against the United States for more than $ 10,000 must be brought in the Court of Claims, and, until 1962, the District of Columbia was the sole venue of suits against **[*332]** federal officers officially residing in the Nation's Capital. [41] We have discovered no suggestion that Congress exceeded constitutional bounds in imposing these limitations on litigation against the Federal Government, **[****56]** and the Act is no less reasonable in this respect.

LEdHN[26A][↑] [26A]

South Carolina contends that these termination procedures are a nullity because they impose an impossible burden of proof upon States and political subdivisions entitled to relief. As the Attorney General pointed out during hearings on the Act, however, an area need do no more than submit affidavits from voting officials, asserting that **[**821]** they have not been guilty of racial discrimination through the use of tests and devices during the past five years, and then refute whatever evidence to the contrary may be adduced by the Federal Government. [42] Section 4 (d) further assures that an area need not **[****57]** disprove each isolated instance of voting discrimination in order to obtain relief in the termination proceedings. The burden of proof is therefore quite bearable, particularly since the relevant facts relating to the conduct of voting officials are peculiarly within the knowledge of the States and political subdivisions themselves. See *United States v. New York, N. H. & H. R. Co., 355 U.S. 253, 256, n. 5*; cf. *S. E. C.* v. *Ralston Purina Co., 346 U.S. 119, 126*.

LEdHN[27][↑] [27]The Act bars direct judicial review of the findings by the Attorney General and the Director of the Census which trigger application of the coverage formula. We reject the claim by Alabama as *amicus curiae* that this provision is invalid because it allows the new remedies of **[*333]** the Act to be imposed in an arbitrary way. The Court has already permitted Congress to withdraw judicial review of administrative determinations in numerous cases involving the **[****58]** statutory rights of private parties. For example, see *United States v. California Eastern Line, 348 U.S. 351*; *Switchmen's Union v. National Mediation Bd., 320 U.S. 297*.In this instance, the findings not subject to review consist of objective statistical

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[40] House Hearings 75-77; Senate Hearings 241-243.

[41] Regarding claims against the United States, see *28 U. S. C. §§ 1491*, *1346 (a) (1964 ed.)*. Concerning suits against federal officers, see *Stroud v. Benson, 254 F.2d 448*; H. R. Rep. No. 536, 87th Cong., 1st Sess.; S. Rep. No. 1992, 87th Cong., 2d Sess.; *28 U. S. C. § 1391 (e) (1964 ed.)*; 2 Moore, Federal Practice para. 4.29 (1964 ed.).

[42] House Hearings 92-93; Senate Hearings 26-27.

determinations by the Census Bureau and a routine analysis of state statutes by the Justice Department. These functions are unlikely to arouse any plausible dispute, as South Carolina apparently concedes. In the event that the formula is improperly applied, the area affected can always go into court and obtain termination of coverage under § 4 (b), provided of course that it has not been guilty of voting discrimination in recent years. This procedure serves as a partial substitute for direct judicial review.

Suspension of tests.

LEdHN[28][↑] [28]We now arrive at consideration of the specific remedies prescribed by the Act for areas included within the coverage formula. South Carolina assails the temporary suspension of existing voting qualifications, reciting the rule laid down by *Lassiter v. Northampton [***790] County Bd. of Elections, 360 U.S. 45*, that **HN13**[↑] literacy **[****59]** tests and related devices are not in themselves contrary to the *Fifteenth Amendment*. In that very case, however, the Court went on to say, "Of course a literacy test, fair on its face, may be employed to perpetuate that discrimination which the *Fifteenth Amendment* was designed to uproot." *Id., at 53*. The record shows that in most of the States covered by the Act, including South Carolina, various tests and devices have been instituted with the purpose of disenfranchising Negroes, have been framed in such a way as to facilitate this aim, and have been administered **[*334]** in a discriminatory fashion for many years. [43] Under these circumstances, the *Fifteenth Amendment* has clearly been violated. See *Louisiana v. United States, 380 U.S. 145*; *Alabama v. United States, 371 U.S. 37*; *Schnell v. Davis, 336 U.S. 933*.

LEdHN[29][↑] [29]The Act suspends literacy tests and similar devices for a period **[****60]** of five years from the last occurrence of substantial voting discrimination. This was a legitimate response to the problem, for which there is ample precedent in *Fifteenth Amendment* cases. *Ibid*. Underlying the response was the feeling that **[**822]** States and political subdivisions which had been allowing white illiterates to vote for years could not sincerely complain about "dilution" of their electorates through the registration of Negro illiterates. [44] Congress knew that continuance of the tests and devices in use at the present time, no matter how fairly administered in the future, would freeze the effect of past discrimination in favor of unqualified white registrants. [45] Congress permissibly rejected the alternative of requiring a complete re-registration of all voters, believing that this would be too harsh on many whites who had enjoyed the franchise for their entire adult lives. [46]

[**61]** *Review of new rules.*

LEdHN[3B][↑] [3B]

The Act suspends new voting regulations pending scrutiny by federal authorities to determine whether their use would violate the *Fifteenth Amendment*. This may have been an uncommon exercise of congressional power, as South Carolina contends, but the Court has recognized that exceptional conditions can justify legislative measures not otherwise appropriate. See *Home **[*335]** Bldg. & Loan Assn.* v. *Blaisdell, 290 U.S. 398*; *Wilson v. New, 243 U.S. 332*. Congress knew that some of the States covered by § 4 (b) of the Act had resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees. [47] Congress had reason to suppose that these States might try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself. Under the compulsion of these unique circumstances, Congress responded in a permissibly decisive manner.

[**62]** **LEdHN[25B]**[↑] [25B] **LEdHN[26B]**[↑] [26B] **LEdHN[30]**[↑] [30]For reasons already **[***791]** stated, there was nothing inappropriate about limiting litigation under this provision to the District Court for the District of Columbia, and in putting the burden of proof on the areas seeking relief. Nor has Congress authorized the District Court to issue advisory opinions, in violation of the principles of Article III invoked by Georgia as *amicus curiae*. The Act automatically suspends the operation of voting regulations enacted after November 1, 1964, and furnishes mechanisms for enforcing the suspension. A State or political subdivision wishing to make use of a recent amendment to its voting laws therefore has a concrete and immediate "controversy" with the Federal Government. Cf. *Public Utilities Comm'n v. United States, 355 U.S. 534, 536-539*; *United States v.*

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[43] House Report 11-13; Senate Report 4-5, 9-12.

[44] House Report 15; Senate Report 15-16.

[45] House Report 15; Senate Report 16.

[46] House Hearings 17; Senate Hearings 22-23.

[47] House Report 10-11; Senate Report 8, 12.

California, 332 U.S. 19, 24-25. An appropriate remedy is a judicial determination that continued suspension of the new rule is unnecessary to vindicate rights guaranteed by the Fifteenth Amendment.

Federal examiners.

LEdHN[3C][↑] [3C]LEdHN[31][↑] [31]The Act authorizes the appointment of federal examiners to list qualified applicants who are thereafter **[*336]** **[****63]** entitled to vote, subject to an expeditious challenge procedure. This was clearly an appropriate response to the problem, closely related to remedies authorized in prior cases. See Alabama v. United States, supra; United States v. Thomas, 362 U.S. 58.In many of the political subdivisions covered by § 4 (b) of the Act, voting officials have persistently employed a variety of procedural tactics to deny Negroes the franchise, often in direct defiance **[**823]** or evasion of federal court decrees. [48] **[****64]** Congress realized that merely to suspend voting rules which have been misused or are subject to misuse might leave this localized evil undisturbed. As for the briskness of the challenge procedure, Congress knew that in some of the areas affected, challenges had been persistently employed to harass registered Negroes. It chose to forestall this abuse, at the same time providing alternative ways for removing persons listed through error or fraud. [49] In addition to the judicial challenge procedure, § 7 (d) allows for the removal of names by the examiner himself, and § 11 (c) makes it a crime to obtain a listing through fraud.

LEdHN[32][↑] [32]In recognition of the fact that there were political subdivisions covered by § 4 (b) of the Act in which the appointment of federal examiners might be unnecessary, Congress assigned the Attorney General the task of determining the localities to which examiners should be sent. [50] There is no warrant for the claim, asserted by Georgia as *amicus curiae*, that the Attorney General is free to use this power in an arbitrary fashion, without regard to the purposes of the Act. Section 6 (b) sets adequate standards to guide the exercise of his discretion, by directing him to calculate the registration ratio of non-whites to whites, and to weigh evidence of good-faith **[*337]** efforts to avoid possible voting discrimination. At the same time, the special termination procedures of § 13 (a) provide indirect judicial review for the political subdivisions affected, assuring the withdrawal of federal examiners from areas where they are **[***792]** clearly not needed. Cf. Carlson v. Landon, 342 U.S. 524, 542-544; Mulford v. Smith, 307 U.S. 38, 48-49. **[****65]**

LEdHN[3D][↑] [3D]

After enduring nearly a century of widespread resistance to the Fifteenth Amendment, Congress has marshalled an array of potent weapons against the evil, with authority in the Attorney General to employ them effectively. Many of the areas directly affected by this development have indicated their willingness to abide by any restraints legitimately imposed upon them. [51] We here hold that HN14[↑] the portions of the Voting Rights Act properly before us are a valid means for carrying out the commands of the Fifteenth Amendment. Hopefully, millions of non-white Americans will now be able to participate for the first time on an equal basis in the government under which they live. We may finally look forward to the day when truly "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

[**66]** The bill of complaint is

Dismissed.

APPENDIX TO OPINION OF THE COURT.

HN15[↑] VOTING RIGHTS ACT OF 1965.

AN ACT

To enforce the fifteenth amendment to the Constitution of the United States, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress ***[*338]*** *assembled*, That this Act shall be known as the "Voting Rights Act of 1965."

SEC. 2. No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote

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[48] House Report 16; Senate Report 15.

[49] Senate Hearings 200.

[50] House Report 16.

[51] See Comm'n on Civil Rights, The Voting Rights Act (1965).

on account of race or color.

[824]** SEC. 3. (a) Whenever the Attorney General institutes a proceeding under any statute to enforce the guarantees of the *fifteenth amendment* in any State or political subdivision the court shall authorize the appointment of Federal examiners by the United States Civil Service Commission in accordance with section 6 to serve for such period of time and for such political subdivisions as the court shall determine is appropriate to enforce the guarantees of the *fifteenth amendment* (1) as part of any interlocutory order if the **[****67]** court determines that the appointment of such examiners is necessary to enforce such guarantees or (2) as part of any final judgment if the court finds that violations of the *fifteenth amendment* justifying equitable relief have occurred in such State or subdivision: *Provided*, That the court need not authorize the appointment of examiners if any incidents of denial or abridgement of the right to vote on account of race or color (1) have been few in number and have been promptly and effectively corrected by State or local action, (2) the continuing effect of such incidents has been eliminated, and (3) there is no reasonable probability of their recurrence in the future.

(b) If in a proceeding instituted by the Attorney General under any **[***793]** statute to enforce the guarantees of the *fifteenth amendment* in any State or political subdivision the court finds that a test or device has been used for the purpose or with the effect of denying or abridging the right of any citizen of the United States to vote on account of race or color, it shall suspend the use of **[*339]** tests and devices in such State or political subdivisions as the court shall determine is appropriate and for **[****68]** such period as it deems necessary.

(c) If in any proceeding instituted by the Attorney General under any statute to enforce the guarantees of the *fifteenth amendment* in any State or political subdivision the court finds that violations of the *fifteenth amendment* justifying equitable relief have occurred within the territory of such State or political subdivision, the court, in addition to such relief as it may grant, shall retain jurisdiction for such period as it may deem appropriate and during such period no voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect at the time the proceeding was commenced shall be enforced unless and until the court finds that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official **[****69]** of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the court's finding nor the Attorney General's failure to object shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure.

SEC. 4. (a) To assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color, no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been **[*340]** made under subsection (b) or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia in an action for a declaratory judgment brought by such State or subdivision against the United States has determined that no such test or device has been used during the five years preceding the filing of the **[**825]** action for the purpose or with the effect of denying or abridging **[****70]** the right to vote on account of race or color: *Provided*, That no such declaratory judgment shall issue with respect to any plaintiff for a period of five years after the entry of a final judgment of any court of the United States, other than the denial of a declaratory judgment under this section, whether entered prior to or after the enactment of this Act, determining that denials or abridgments of the right to vote on account of race or color through the use of such tests or devices have occurred anywhere in the territory of such plaintiff.

An action pursuant to this subsection shall be heard and determined by a court of three judges in accordance **[***794]** with the provisions of *section 2284 of title 28 of the United States Code* and any appeal shall lie to the Supreme Court. The court shall retain jurisdiction of any action pursuant to this subsection for five years after judgment and shall reopen the action upon motion of the Attorney General alleging that a test or device has been used for the purpose or with the effect of denying or abridging the right to vote on account of race or color.

If the Attorney General determines that he has no reason to believe that any such **[****71]** test or device has been used during the five years preceding the filing of the

action for the purpose or with the effect of denying or abridging the right to vote on account of race or color, he shall consent to the entry of such judgment.

[*341] (b) The provisions of subsection (a) shall apply in any State or in any political subdivision of a state which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964.

A determination or certification of the Attorney General or of the Director of the Census under this section or under section 6 or section 13 shall not be reviewable in any court and shall be effective upon publication in the Federal Register.

(c) The phrase "test or device" shall mean any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate **[****72]** any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.

(d) For purposes of this section no State or political subdivision shall be determined to have engaged in the use of tests or devices for the purpose or with the effect of denying or abridging the right to vote on account of race or color if (1) incidents of such use have been few in number and have been promptly and effectively corrected by State or local action, (2) the continuing effect of such incidents has been eliminated, and (3) there is no reasonable probability of their recurrence in the future.

(e)(1) Congress hereby declares that to secure the rights under the *fourteenth amendment* of persons educated in American-flag schools in which the predominant **[*342]** classroom language was other than English, it is necessary to prohibit the States from conditioning the right to vote of such persons on ability to read, write, understand, or interpret any matter in the English language.

(2) No person who demonstrates that he has successfully completed the sixth primary grade in **[****73]** a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English, shall be denied the right to vote in any Federal, **[**826]** State, or local election because of his inability to read, write, understand, or interpret any matter in the English language, except that in States in which State law provides that a different level of education is presumptive **[***795]** of literacy, he shall demonstrate that he has successfully completed an equivalent level of education in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English.

SEC. 5. Whenever a State or political subdivision with respect to which the prohibitions set forth in section 4 (a) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, such State or subdivision may institute an **[****74]** action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, **[*343]** or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. Any action under this section shall be **[****75]** heard and determined by a court of three judges in accordance with the provisions of *section 2284 of title 28 of the United States Code* and any appeal shall lie to the Supreme Court.

SEC. 6. Whenever (a) a court has authorized the appointment of examiners pursuant to the provisions of section 3 (a), or (b) unless a declaratory judgment has been rendered under section 4 (a), the Attorney General certifies with respect to any political subdivision named in, or included within the scope of, determinations made

under section 4 (b) that (1) he has received complaints in writing from twenty or more residents of such political subdivision alleging that they have been denied the right to vote under color of law on account of race or color, and that he believes such complaints to be meritorious, or (2) that in his judgment (considering, among other factors, whether the ratio of nonwhite persons to white persons registered to vote within such subdivision appears to him to be reasonably attributable to violations of the *fifteenth amendment* or whether substantial evidence exists that bona fide efforts are being made within such subdivision to comply with the *fifteenth amendment*), the appointment **[****76]** of examiners is otherwise necessary to **[*344]** enforce the guarantees of the *fifteenth amendment*, the Civil Service Commission shall appoint as many examiners for such subdivision as it may deem appropriate to prepare and maintain lists of persons eligible to vote in Federal, State, and local elections. Such examiners, hearing officers provided for in section 9 (a), and other persons deemed necessary by the Commission to carry **[***796]** out the provisions and purposes of this Act shall be appointed, compensated, and separated without regard to the provisions of any statute administered by the Civil Service Commission, and service under this Act shall not be considered employment for the purposes of any statute administered by **[**827]** the Civil Service Commission, except the provisions of section 9 of the Act of August 2, 1939, as amended (5 U. S. C. 118i), prohibiting partisan political activity: *Provided*, That the Commission is authorized, after consulting the head of the appropriate department or agency, to designate suitable persons in the official service of the United States, with their consent, to serve in these positions. Examiners and hearing officers shall have **[****77]** the power to administer oaths.

SEC. 7. (a) The examiners for each political subdivision shall, at such places as the Civil Service Commission shall by regulation designate, examine applicants concerning their qualifications for voting. An application to an examiner shall be in such form as the Commission may require and shall contain allegations that the applicant is not otherwise registered to vote.

(b) Any person whom the examiner finds, in accordance with instructions received under section 9 (b), to have the qualifications prescribed by State law not inconsistent with the Constitution and laws of the United States shall promptly be placed on a list of eligible voters. A challenge to such listing may be made in accordance with section 9 (a) and shall not be the basis for a prosecution under section 12 of this Act. The examiner **[*345]** shall certify and transmit such list, and any supplements as appropriate, at least once a month, to the offices of the appropriate election officials, with copies to the Attorney General and the attorney general of the State, and any such lists and supplements thereto transmitted during the month shall be available for public inspection on **[****78]** the last business day of the month and in any event not later than the forty-fifth day prior to any election. The appropriate State or local election official shall place such names on the official voting list. Any person whose name appears on the examiner's list shall be entitled and allowed to vote in the election district of his residence unless and until the appropriate election officials shall have been notified that such person has been removed from such list in accordance with subsection (d): *Provided*, That no person shall be entitled to vote in any election by virtue of this Act unless his name shall have been certified and transmitted on such a list to the offices of the appropriate election officials at least forty-five days prior to such election.

(c) The examiner shall issue to each person whose name appears on such a list a certificate evidencing his eligibility to vote.

(d) A person whose name appears on such a list shall be removed therefrom by an examiner if (1) such person has been successfully challenged in accordance with the procedure prescribed in section 9, or (2) he has been determined by an examiner to have lost his eligibility to vote under State law **[****79]** not inconsistent with the Constitution and the laws of the United States.

Sec. 8. Whenever an examiner is serving under this Act in any political subdivision, the Civil Service Commission may assign, at the request of the Attorney General, one or more persons, who may be officers of the United States, (1) to **[***797]** enter and attend at any place for holding an election in such subdivision for the purpose **[*346]** of observing whether persons who are entitled to vote are being permitted to vote, and (2) to enter and attend at any place for tabulating the votes cast at any election held in such subdivision for the purpose of observing whether votes cast by persons entitled to vote are being properly tabulated. Such persons so assigned shall report to an examiner appointed for such political subdivision, to the Attorney General, and if the appointment of examiners has been authorized pursuant to section 3 (a), to the court.

SEC. 9. (a) Any challenge to a listing on an eligibility list prepared by an examiner shall be heard and determined by **[**828]** a hearing officer appointed by and responsible to the Civil Service Commission and under such rules as the Commission shall by

regulation **[****80]** prescribe. Such challenge shall be entertained only if filed at such office within the State as the Civil Service Commission shall by regulation designate, and within ten days after the listing of the challenged person is made available for public inspection, and if supported by (1) the affidavits of at least two persons having personal knowledge of the facts constituting grounds for the challenge, and (2) a certification that a copy of the challenge and affidavits have been served by mail or in person upon the person challenged at his place of residence set out in the application. Such challenge shall be determined within fifteen days after it has been filed. A petition for review of the decision of the hearing officer may be filed in the United States court of appeals for the circuit in which the person challenged resides within fifteen days after service of such decision by mail on the person petitioning for review but no decision of a hearing officer shall be reversed unless clearly erroneous. Any person listed shall be entitled and allowed to vote pending final determination by the hearing officer and by the court.

[*347] (b) The times, places, procedures, and form for **[****81]** application and listing pursuant to this Act and removals from the eligibility lists shall be prescribed by regulations promulgated by the Civil Service Commission and the Commision shall, after consultation with the Attorney General, instruct examiners concerning applicable State law not inconsistent with the Constitution and laws of the United States with respect to (1) the qualifications required for listing, and (2) loss of eligibility to vote.

(c) Upon the request of the applicant or the challenger or on its own motion the Civil Service Commission shall have the power to require by subpena the attendance and testimony of witnesses and the production of documentary evidence relating to any matter pending before it under the authority of this section. In case of contumacy or refusal to obey a subpena, any district court of the United States or the United States court of any territory or possession, or the District Court of the United States for the District of Columbia, within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or is domiciled or transacts business, or has appointed an agent for receipt of service of process, upon **[****82]** application by the Attorney General of the United States shall have jurisdiction to issue to such person an order requiring such person to appear before the Commission or a hearing officer, there to produce pertinent, relevant, and nonprivileged documentary evidence if so ordered, or there to give testimony **[***798]** touching the matter under investigation; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

SEC. 10. (a) The Congress finds that the requirement of the payment of a poll tax as a precondition to voting (i) precludes persons of limited means from voting or imposes unreasonable financial hardship upon such persons **[*348]** as a precondition to their exercise of the franchise, (ii) does not bear a reasonable relationship to any legitimate State interest in the conduct of elections, and (iii) in some areas has the purpose or effect of denying persons the right to vote because of race or color. Upon the basis of these findings, Congress declares that the constitutional right of citizens to vote is denied or abridged in some areas by the requirement of the payment of a poll tax as a precondition to voting.

(b) In the exercise **[****83]** of the powers of Congress under section 5 of the fourteenth amendment and section 2 of the fifteenth amendment, the Attorney General is authorized and directed to institute forthwith in the name of the United States such actions, including actions against States or political subdivisions, **[**829]** for declaratory judgment or injunctive relief against the enforcement of any requirement of the payment of a poll tax as a precondition to voting, or substitute therefor enacted after November 1, 1964, as will be necessary to implement the declaration of subsection (a) and the purposes of this section.

(c) The district courts of the United States shall have jurisdiction of such actions which shall be heard and determined by a court of three judges in accordance with the provisions of *section 2284 of title 28 of the United States Code* and any appeal shall lie to the Supreme Court. It shall be the duty of the judges designated to hear the case to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited.

(d) During the pendency of such actions, and thereafter if the courts, notwithstanding **[****84]** this action by the Congress, should declare the requirement of the payment of a poll tax to be constitutional, no citizen of the United States who is a resident of a State or political **[*349]** subdivision with respect to which determinations have been made under subsection 4 (b) and a declaratory judgment has not been entered under subsection 4 (a), during the first year he becomes otherwise entitled to vote by reason of registration by State or local officials or listing by an examiner, shall be denied the right to vote for failure to pay a poll tax if he

tenders payment of such tax for the current year to an examiner or to the appropriate State or local official at least forty-five days prior to election, whether or not such tender would be timely or adequate under State law. An examiner shall have authority to accept such payment from any person authorized by this Act to make an application for listing, and shall issue a receipt for such payment. The examiner shall transmit promptly any such poll tax payment to the office of the State or local official authorized to receive such payment under State law, together with the name and address of the applicant.

SEC. 11. (a) No **[****85]** person acting under color of law shall fail or refuse to permit any person to vote who is entitled to vote under any provision of this Act or is otherwise qualified to vote, or willfully fail or refuse **[***799]** to tabulate, count, and report such person's vote.

(b) No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote, or intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for urging or aiding any person to vote or attempt to vote, or intimidate, threaten, or coerce any person for exercising any powers or duties under section 3 (a), 6, 8, 9, 10, or 12 (e).

(c) Whoever knowingly or willfully gives false information as to his name, address, or period of residence in the voting district for the purpose of establishing his eligibility to register or vote, or conspires with another **[*350]** individual for the purpose of encouraging his false registration to vote or illegal voting, or pays or offers to pay or accepts payment either for registration to vote or for voting shall be fined not more than $ 10,000 or imprisoned **[****86]** not more than five years, or both: *Provided, however*, That this provision shall be applicable only to general, special, or primary elections held solely or in part for the purpose of selecting or electing any candidate for the office of President, Vice President, presidential elector, Member of the United States Senate, Member of the United States House of Representatives, or Delegates or Commissioners from the territories or possessions, or Resident Commissioner of the Commonwealth of Puerto Rico.

(d) Whoever, in any matter within the jurisdiction of an examiner or hearing officer knowingly and willfully falsifies or conceals a material fact, or makes any false, fictitious, or fraudulent statements **[**830]** or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious, or fraudulent statement or entry, shall be fined not more than $ 10,000 or imprisoned not more than five years, or both.

SEC. 12. (a) Whoever shall deprive or attempt to deprive any person of any right secured by section 2, 3, 4, 5, 7, or 10 or shall violate section 11 (a) or (b), shall be fined not more than $ 5,000, or imprisoned not more than five years, **[****87]** or both.

(b) Whoever, within a year following an election in a political subdivision in which an examiner has been appointed (1) destroys, defaces, mutilates, or otherwise alters the marking of a paper ballot which has been cast in such election, or (2) alters any official record of voting in such election tabulated from a voting machine or otherwise, shall be fined not more than $ 5,000, or imprisoned not more than five years, or both.

[*351] (c) Whoever conspires to violate the provisions of subsection (a) or (b) of this section, or interferes with any right secured by section 2, 3, 4, 5, 7, 10, or 11 (a) or (b) shall be fined not more than $ 5,000, or imprisoned not more than five years, or both.

(d) Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice prohibited by section 2, 3, 4, 5, 7, 10, 11, or subsection (b) of this section, the Attorney General may institute for the United States, or in the name of the United States, an action for preventive relief, including an application for a temporary or permanent injunction, restraining order, or other order, and **[***800]** including an order directed **[****88]** to the State and State or local election officials to require them (1) to permit persons listed under this Act to vote and (2) to count such votes.

(e) Whenever in any political subdivision in which there are examiners appointed pursuant to this Act any persons allege to such an examiner within forty-eight hours after the closing of the polls that notwithstanding (1) their listing under this Act or registration by an appropriate election official and (2) their eligibility to vote, they have not been permitted to vote in such election, the examiner shall forthwith notify the Attorney General if such allegations in his opinion appear to be well founded. Upon receipt of such notification, the Attorney General may forthwith file with the district court an application for an order providing for the marking, casting, and counting of the ballots of such persons and requiring the inclusion of their votes in the total vote before the results of such election shall be deemed final and any force or effect given thereto. The district court shall hear and determine

such matters immediately after the filing of such application. The remedy provided **[*352]** in this subsection shall not preclude **[****89]** any remedy available under State or Federal law.

(f) The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether a person asserting rights under the provisions of this Act shall have exhausted any administrative or other remedies that may be provided by law.

SEC. 13. Listing procedures shall be terminated in any political subdivision of any State (a) with respect to examiners appointed pursuant to clause (b) of section 6 whenever the Attorney General notifies the Civil Service Commission, or whenever the District Court for the District of Columbia determines in an action for declaratory judgment brought by any political subdivision with respect to which the Director of the Census has determined that more than 50 per centum of the nonwhite persons of voting age residing therein are registered to vote, (1) that all persons listed by an examiner for such subdivision have been placed on the appropriate voting registration **[**831]** roll, and (2) that there is no longer reasonable cause to believe that persons will be deprived of or denied the right to vote on account of race **[****90]** or color in such subdivision, and (b), with respect to examiners appointed pursuant to section 3 (a), upon order of the authorizing court. A political subdivision may petition the Attorney General for the termination of listing procedures under clause (a) of this section, and may petition the Attorney General to request the Director of the Census to take such survey or census as may be appropriate for the making of the determination provided for in this section. The District Court for the District of Columbia shall have jurisdiction to require such survey or census to be made by the Director of the Census and it shall require him to do so if it deems the Attorney **[*353]** General's refusal to request such survey or census to be arbitrary or unreasonable.

SEC. 14. (a) All cases of criminal contempt arising under the provisions of this Act shall be governed by section 151 of the Civil Rights Act of 1957 (*42 U. S. C. 1995*).

(b) No court other than the District Court for the District of Columbia **[***801]** or a court of appeals in any proceeding under section 9 shall have jurisdiction to issue any declaratory judgment pursuant to section 4 or section 5 or any restraining order or **[****91]** temporary or permanent injunction against the execution or enforcement of any provision of this Act or any action of any Federal officer or employee pursuant hereto.

(c) (1) The terms "vote" or "voting" shall include all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, listing pursuant to this Act, or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election.

(2) The term "political subdivision" shall mean any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting.

(d) In any action for a declaratory judgment brought pursuant to section 4 or section 5 of this Act, subpenas for witnesses who are required to attend the District Court for the District of Columbia may be served in any judicial district of the United States: **[****92]** *Provided*, That no writ of subpena shall issue for witnesses without the District of Columbia at a greater distance than one hundred **[*354]** miles from the place of holding court without the permission of the District Court for the District of Columbia being first had upon proper application and cause shown.

SEC. 15. Section 2004 of the Revised Statutes (*42 U. S. C. 1971*), as amended by section 131 of the Civil Rights Act of 1957 (71 Stat. 637), and amended by section 601 of the Civil Rights Act of 1960 (74 Stat. 90), and as further amended by section 101 of the Civil Rights Act of 1964 (78 Stat. 241), is further amended as follows:

(a) Delete the word "Federal" wherever it appears in subsections (a) and (c);

(b) Repeal subsection (f) and designate the present subsections (g) and (h) as (f) and (g), respectively.

SEC. 16. The Attorney General and the Secretary of Defense, jointly, shall make a full and complete study to determine whether, under the laws or practices of any State or States, there are preconditions to voting, which might tend to result in discrimination against citizens serving in the Armed Forces of the United States seeking to vote. Such officials shall, jointly, **[****93]** make a report to the Congress not later than June 30, **[**832]** 1966, containing the results of such study, together with a list of any States in which such preconditions exist, and shall include in such report such recommendations for legislation as they deem advisable to prevent discrimination in voting against citizens serving

in the Armed Forces of the United States.

SEC. 17. Nothing in this Act shall be construed to deny, impair, or otherwise adversely affect the right to vote of any person registered to vote under the law of any State or political subdivision.

SEC. 18. There are hereby authorized **[***802]** to be appropriated such sums as are necessary to carry out the provisions of this Act.

[*355] SEC. 19. If any provision of this Act or the application thereof to any person or circumstances is held invalid, the remainder of the Act and the application of the provision to other persons not similarly situated or to other circumstances shall not be affected thereby.

Approved August 6, 1965.

Concur by: BLACK

Dissent by: BLACK

Dissent

MR. JUSTICE BLACK, concurring and dissenting.

I agree with substantially all of the Court's opinion sustaining the power of Congress under § 2 of the Fifteenth Amendment to **[****94]** suspend state literacy tests and similar voting qualifications and to authorize the Attorney General to secure the appointment of federal examiners to register qualified voters in various sections of the country. Section 1 of the Fifteenth Amendment provides that "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." In addition to this unequivocal command to the States and the Federal Government that no citizen shall have his right to vote denied or abridged because of race or color, § 2 of the Amendment unmistakably gives Congress specific power to go further and pass appropriate legislation to protect this right to vote against any method of abridgment no matter how subtle. Compare my dissenting opinion in *Bell v. Maryland, 378 U.S. 226, 318*. I have no doubt whatever as to the power of Congress under § 2 to enact the provisions of the Voting Rights Act of 1965 dealing with the suspension of state voting tests that have been used as notorious means to deny and abridge voting rights on racial grounds. This same congressional **[****95]** power necessarily exists to authorize appointment of federal examiners. I also agree with the judgment of the Court upholding § 4 (b) of **[*356]** the Act which sets out a formula for determining when and where the major remedial sections of the Act take effect. I reach this conclusion, however, for a somewhat different reason than that stated by the Court, which is that "the coverage formula is rational in both practice and theory." I do not base my conclusion on the fact that the formula is rational, for it is enough for me that Congress by creating this formula has merely exercised its hitherto unquestioned and undisputed power to decide when, where, and upon what conditions its laws shall go into effect. By stating in specific detail that the major remedial sections of the Act are to be applied in areas where certain conditions exist, and by granting the Attorney General and the Director of the Census unreviewable power to make the mechanical determination of which areas come within the formula of § 4 (b), I believe that Congress has acted within its established power to set out preconditions upon which the Act is to go into effect. See, *e. g.*, *Martin v. Mott, 12 Wheat. 19*; **[****96]** *United States v. Bush & Co., 310 U.S. 371*; *Hirabayashi v. United States, 320 U.S. 81*.

Though, as I have said, I agree **[***803]** with most of the Court's conclusions, I dissent from its holding that every part **[**833]** of § 5 of the Act is constitutional. Section 4 (a), to which § 5 is linked, suspends for five years all literacy tests and similar devices in those States coming within the formula of § 4 (b). Section 5 goes on to provide that a State covered by § 4 (b) can in no way amend its constitution or laws relating to voting without first trying to persuade the Attorney General of the United States or the Federal District Court for the District of Columbia that the new proposed laws do not have the purpose and will not have the effect of denying the right to vote to citizens on account of their race or color. I think this section is unconstitutional on at least two grounds.

[*357] (a) The Constitution gives federal courts jurisdiction over cases and controversies only. If it can be said that any case or controversy arises under this section which gives the District Court for the District of Columbia jurisdiction to approve **[****97]** or reject state laws or constitutional amendments, then the case or controversy must be between a State and the United States Government. But it is hard for me to believe that a justiciable controversy can arise in the constitutional sense from a desire by the United States Government or some of its officials to determine in advance what

legislative provisions a State may enact or what constitutional amendments it may adopt. If this dispute between the Federal Government and the States amounts to a case or controversy it is a far cry from the traditional constitutional notion of a case or controversy as a dispute over the meaning of enforceable laws or the manner in which they are applied. And if by this section Congress has created a case or controversy, and I do not believe it has, then it seems to me that the most appropriate judicial forum for settling these important questions is this Court acting under its original Art. III, § 2, jurisdiction to try cases in which a State is a party. [1] At least a trial in this Court would treat the States with the dignity to which they should be entitled as constituent members of our Federal Union.

[**98]** The form of words and the manipulation of presumptions used in § 5 to create the illusion of a case or controversy should not be allowed to cloud the effect of that section. By requiring a State to ask a federal court to approve the validity of a proposed law which has in no way become operative, Congress has asked the State to **[*358]** secure precisely the type of advisory opinion our Constitution forbids. As I have pointed out elsewhere, see my dissenting opinion in *Griswold v. Connecticut, 381 U.S. 479, 507, n. 6*, pp. 513-515, some of those drafting our Constitution wanted to give the federal courts the power to issue advisory opinions and propose new laws to the legislative body. These suggestions were rejected. We should likewise reject any attempt by Congress to flout constitutional limitations by authorizing federal courts to render advisory opinions when there is no case or controversy before them. Congress has ample power to protect the rights of citizens to vote **[***804]** without resorting to the unnecessarily circuitous, indirect and unconstitutional route it has adopted in this section.

(b) My second and more basic objection to § 5 is that **[****99]** Congress has here exercised its power under § 2 of the Fifteenth Amendment through the adoption of means that conflict with the most basic principles of the Constitution. As the Court says the limitations of the power granted under § 2 are the same as the limitations imposed on the exercise of any of the powers expressly granted Congress by the Constitution. The classic **[**834]** formulation of these constitutional limitations was stated by Chief Justice Marshall when he said in *McCulloch v. Maryland, 4 Wheat. 316, 421*, "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, *which are not prohibited, but consist with the letter and spirit of the constitution*, are constitutional." (Emphasis added.) Section 5, by providing that some of the States cannot pass state laws or adopt state constitutional amendments without first being compelled to beg federal authorities to approve their policies, so distorts our constitutional structure of government as to render any distinction drawn in the Constitution between state and federal power almost meaningless. One **[*359]** **[****100]** of the most basic premises upon which our structure of government was founded was that the Federal Government was to have certain specific and limited powers and no others, and all other power was to be reserved either "to the States respectively, or to the people." Certainly if all the provisions of our Constitution which limit the power of the Federal Government and reserve other power to the States are to mean anything, they mean at least that the States have power to pass laws and amend their constitutions without first sending their officials hundreds of miles away to beg federal authorities to approve them. [2] Moreover, it seems to me that § 5 which gives federal officials power to veto state laws they do not like is in direct conflict with the clear command of our Constitution that "The United States shall guarantee to every State in this Union a Republican Form of Government." I cannot help but believe that the inevitable effect of any such law which forces any one of the States to entreat federal

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[1] If § 14 (b) of the Act by stating that no court other than the District Court for the District of Columbia shall issue a judgment under § 5 is an attempt to limit the constitutionally created original jurisdiction of this Court, then I think that section is also unconstitutional.

[2] The requirement that States come to Washington to have their laws judged is reminiscent of the deeply resented practices used by the English crown in dealing with the American colonies. One of the abuses complained of most bitterly was the King's practice of holding legislative and judicial proceedings in inconvenient and distant places. The signers of the Declaration of Independence protested that the King "has called together legislative bodies at places unusual, uncomfortable, and distant from the depository of their public Records, for the sole purpose of fatiguing them into compliance with his measures," and they objected to the King's "transporting us beyond Seas to be tried for pretended offences." These abuses were fresh in the minds of the Framers of our Constitution and in part caused them to include in Art. 3, § 2, the provision that criminal trials "shall be held in the State where the said Crimes shall have been committed." Also included in the *Sixth Amendment* was the requirement that a defendant in a criminal prosecution be tried by a "jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law."

authorities in far-away places for approval of local laws before they can become effective is to **[*360]** create the impression that the State or States treated in this **[***805]** **[****101]** way are little more than conquered provinces. And if one law concerning voting can make the States plead for this approval by a distant federal court or the United States Attorney General, other laws on different subjects can force the States to seek the advance approval not only of the Attorney General but of the President himself or any other chosen members of his staff. It is inconceivable to me that such a radical degradation of state power was intended in any of the provisions of our Constitution or its Amendments. Of course I do not mean to cast any doubt whatever upon the indisputable power of the Federal Government to invalidate a state law once enacted and operative on the ground that it intrudes into the area of supreme federal power. But the Federal Government has heretofore always been content to exercise this power to protect federal supremacy by authorizing its agents to bring lawsuits against **[**835]** state officials once an operative state law has created an actual case and controversy. A federal law which assumes the power to compel the States to submit in advance any proposed legislation they have for approval by federal agents approaches dangerously near **[****102]** to wiping the States out as useful and effective units in the government of our country. I cannot agree to any constitutional interpretation that leads inevitably to such a result.

[**103]** I see no reason to read into the Constitution meanings it did not have when it was adopted and which have not been put into it since. The proceedings of the original Constitutional Convention show beyond all doubt that the power to veto or negative state laws was denied Congress. On several occasions proposals were submitted to the convention to grant this power to Congress. These proposals were debated extensively and on every occasion when submitted for vote they were overwhelmingly rejected. [3] **[*361]** The refusal to give Congress this extraordinary power to veto state laws was based on the belief that if such power resided in Congress the States would be helpless to function as effective governments. [4] Since that time neither the *Fifteenth Amendment* nor any other Amendment to the Constitution has given the slightest indication of a purpose to grant Congress the power to veto state laws either by itself or its agents. Nor does any provision in the Constitution endow the federal courts with power to participate with state legislative bodies in determining what state policies shall be enacted into law. The judicial power to invalidate a law in a case or controversy after **[****104]** the law has become effective is a long way from the power to prevent a State from passing a law. I cannot agree with the Court that Congress -- denied a power in itself to veto a state law -- can delegate this same power to the Attorney General or the District Court for the District of Columbia. For the effect on the States is the same in both cases -- they cannot pass their laws without sending their agents to the City of Washington to plead to federal officials for their advance approval.

In this and other prior Acts Congress **[***806]** has quite properly vested the Attorney General **[****105]** with extremely broad power to protect voting rights of citizens against discrimination on account of race or color. Section 5 viewed in this context is of very minor importance and in my judgment is likely to serve more as an irritant to **[*362]** the States than as an aid to the enforcement of the Act. I would hold § 5 invalid for the reasons stated above with full confidence that the Attorney General has ample power to give vigorous, expeditious and effective protection to the voting rights of all citizens. [5]

References

Race discrimination

Annotation References:

Race discrimination. 94 L ed 1121, 96 L ed 1291, 98 L **[****106]** ed 882, 100 L ed 488, 3 L ed 2d 1556, 6 L ed 2d 1302, 10 L ed 2d 1105. See also *38 ALR2d 1188*.

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[3] See Debates in the Federal Convention of 1787 as reported by James Madison in Documents Illustrative of the Formation of the Union of the American States (1927), pp. 605, 789, 856.

[4] One speaker expressing what seemed to be the prevailing opinion of the delegates said of the proposal, "Will any State ever agree to be bound hand & foot in this manner. It is worse than making mere corporations of them . . . ." *Id., at 604*.

[5] Section 19 of the Act provides as follows:

"If any provision of this Act or the application thereof to any person or circumstances is held invalid, the remainder of the Act and the application of the provision to other persons not similarly situated or to other circumstances shall not be affected thereby."

What constitutes bill of attainder under the Federal Constitution. 4 L ed 2d 2155.

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33RD SENATORIAL DISTRICT

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HARRISBURG, PA 17120-3033
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FAX: 717-772-2753

37 SOUTH MAIN STREET, SUITE 200
CHAMBERSBURG, PA 17201
PHONE: 717-264-6100
FAX: 717-264-3652

16-A DEATRICK DRIVE
GETTYSBURG, PA 17325
PHONE: 717-334-4169
FAX: 717-334-5911

118 CARLISLE STREET, SUITE 309
HANOVER, PA 17331
PHONE: 717-632-1153
FAX: 717-632-1183

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DOUG MASTRIANO
SENATOR

December 28, 2020

Acting Deputy Attorney General Richard Donoghue
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

RE: General Election Irregularities in Pennsylvania during the November 2020 cycle

Dear Honorable Donoghue:

Election fraud is real and prevalent in Pennsylvania. Yet, despite evidence, our Governor and Secretary of State inexplicably refuse to investigate. Every legal vote must count. Our Republic cannot long endure without free and fair elections where each person has one legal vote. However, allegations of fraudulent activity, as well as violations of election law in 2020 have placed the nation's eyes upon this Commonwealth.

Several of the key findings are delineated below:

1. Senate Majority Policy Committee November hearing review on statistical anomalies, such as hundreds of thousands of votes being dumped into a processing facility, with 570,000 Vice President Biden, and only 3,200 for President Trump (https://policy.pasenategop.com/112520/).

   Testimony provided at a Senate hearing from witnesses in Philadelphia, Northampton, Luzerne, Montgomery, Allegheny and Delaware counties detailed instances of:

   (a) Interference with poll watchers' ability to perform functions as provided for in the state election code, specifically regarding the submission, review and canvasing of mail-in ballots;

   (b) Delayed opening or closing of polling locations on Election Day;

   (c) Improper forfeiture and spoiling of mail-in ballots;

   (d) Illegal ballot harvesting;

   (e) Improper "curing" of insufficiently completed mail-in ballots;

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(f) Poll worker intimidation and harassment;

(g) Voter intimidation;

(h) Improper chain of custody of ballots and election materials;

(i) Submission of fraudulent ballots by an individual other than the named voter.

2. There is a massive ***VOTER DEFICIT*** in Pennsylvania. 205,122 more votes were counted than total number of voters who voted. A comparison of official county election results to the total number of voters who cast ballots November 3, 2020…as recorded by the Department of State…shows the difference of 205,122 more votes cast than voters actually voting. (Rep Frank Ryan. http://www.repfrankryan.com/News/18754/Latest-News/PA-Lawmakers-Numbers-Don%E2%80%99t-Add-Up,-Certification-of-Presidential-Results-Premature-and-In-Error).

3. ***Unidentified*** Voters: When anyone registers to vote online or by paper, two options are provided for gender: Male or Female. If left blank; gender defaults to "No" – leaving three types of voters: Male, Female and "No." However, there are four genders in state voter rolls: Male, Female, "No" and ***Unidentified***. It has been estimated that there are 121,000 "non-female/male voters" on state voter rolls, and 90,000 voted in 2020. Initial assessments have concluded *that at least 1/3 of these "U" voters are fraudulent* (*Unidentified "U" Voters, Kathy Barnette for Congress*); (*Unidentified "U" Voters, Kathy Barnette for Congress*);

4. The mandate by Governor Wolf last year, requiring new voting machines for 2020 raised concerns from county officials and state lawmakers. As a result, 14 counties are using Dominion voting machines. The counties using Dominion voting equipment (1.3 million voters in Pennsylvania): York, Erie, Montgomery, Bedford, Armstrong, Carbon, Crawford, Clarion, Fayette, Luzerne, Fulton, Jefferson, Pike and Warren." (*"As Pennsylvania Counties Ring in the New year with New Voting Machines, Pressure from Election Security Advocates Remains," The PLS Reporter, 01/06/2020*; https://www.pennlive.com/politics/2018/12/county-commissioners-question-the-funding-the-timing-the-need-for-replacing-voting-machines.html; *Questions Abound Over New Voting Machines, Citizens' Voice, 03/22/2019*; https://whyy.org/articles/despite-gop-objections-wolf-moves-to-upgrade-voting-machines-unilaterally/; *As Wolf Administration Pushes to Replace All Voting Machines by 2020, Lawmakers and County Officials Question Rush and Expense, PA Watchdog, 03/29/2019*).

5. Statistical experts examined Pennsylvania voting records and reached conclusions indicating there are "major statistical aberrations" in state voting records that are "unlikely to occur in a normal setting;" eleven counties (Montgomery, Allegheny, Chester, Bucks, Delaware, Lancaster, Cumberland, Northampton, Lehigh, Dauphin, York) showed "distinctive signs of voting abnormalities" for Vice President Biden. These analyses "provide scientific evidence that the reported results are highly unlikely to be an accurate reflection of how Pennsylvania citizens voted." (*Pennsylvania 2020 Voting Analysis Report, 11/16/2020*).

6. Gettysburg Senate Hearing - On November 25, Senator Doug Mastriano, together with Senator David Argall, hosted the Senate Majority Policy Committee hearing in Gettysburg where hours of testimony were presented, reviewed, and vetted regarding voting fraud and violations of voting law in Pennsylvania. The hearing demonstrated that there is rampant election fraud in Pennsylvania that must be investigated, remedied and rectified. The purpose of the hearing was to find out what happened in

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Pennsylvania in the aftermath of hearing allegations from thousands of people from across the Commonwealth sharing stories of violations of election law and other infringements of voting law related to the November 03, 2020 general election. We heard eyewitness testimony from citizens who experienced their rights being violated. Additionally, during the hearing, expert witnesses testified to statistical anomalies, where massive quantities of ballots arrived without a chain of custody. **In one such spike, close to 600k votes were dumped in a processing facility with 570k of these votes going for Biden, and a paltry 3,200 for President Trump**. Another witness testified that an election worker was plugging flash drives into voting machines in a heavily democrat area, for no stated purpose.

Other irregularities included in the testimony presented at the hearing included:

(a) Mail-in ballots were not inspected by Republican representatives in portions of Philadelphia and Allegheny County;

(b) Montgomery County was never provided with guidelines from State Department Secretary about "curing" defective ballots;

(c) Timeline spikes depict more ballots being processed during specific periods than voting machines are capable of tabulating;

(d) The Philadelphia Board of Elections processed hundreds of thousands of mail-in ballots with zero civilian oversight.

(e) Ballots were separated from envelopes in numerous precincts; a recount is useless because the votes cannot be verified;

(f) Observers were corralled behind fencing in Philadelphia, at least 10 feet away from processors; similarly, in Allegheny County, observers were placed at least 15 feet away;

(g) Mail-in ballots were already opened in portions of Allegheny County; no one observed the opening of these ballots;

(h) Illegal "pop-up" election sites developed, where voters would apply, receive a ballot and vote;

(i) Forensic evidence in Delaware County has disappeared;

(j) A poll watcher with appropriate certificates and clearances was denied access;

(k) There was no meaningful observation of ballots in Montgomery County, and no signature verification, as well;

(l) A senior citizen voted for President Trump, but it was not displayed on receipt;

(m) Election workers illegally pre-canvased ballots in Northampton County; no meaningful canvas observation was permitted;

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(n) several voters from across the state went to vote in person but when they arrived, they were told "they already voted" and were turned away and could not actually vote or were able to fill out a provisional ballot but was it really counted?

Despite the mounting evidence, our Governor and Secretary of State decline to investigate these serious allegations.

The United States of America has spent millions of dollars and put her men and women in harm's way to oversee safer, more reliable and freer elections in Afghanistan, Iraq, Kosovo and Bosnia. Why is the very state where the light of liberty was lit in 1776 is unable or unwilling to have elections as free and safe as war-torn Afghanistan? Something is seriously wrong in this Commonwealth and unless this is corrected, our republic cannot long endure.

The odyssey of PA finding itself in this position began in early 2020. Using the COVID-19 pandemic as a pretense, the Wolf Administration, together with the Pennsylvania Supreme Court, threw voting law into disarray.

The General Assembly (State House and State Senate) are constitutionally responsible for writing election law, not Gov Wolf, Secretary of Secretary Boockvar or the PA Supreme Court. These altered the original meaning of key provisions of Act 77. The state Supreme Court and Secretary Boockvar fundamentally altered and unconstitutionally rewrote the original meaning of key provisions of Act 77.

Voting law, as passed by the General Assembly in 2019, was clear and specific:

- All mail-in ballots must be received by 8 p.m. on Election Day;
- Officials at polling locations must authenticate the signatures of voters;
- County Boards of Elections can conduct pre-canvasing of absentee and mail-in ballots after 8 a.m. on Election Day;
- Defective absentee and mail-in ballots shall not be counted; and
- "Watchers" selected by candidates and political parties are permitted to observe the process of canvasing absentee and mail-in ballots.

The corruption of our election began with Governor Wolf during the COVID crisis. Wolf urged mail in voting upon people with a campaign to perpetuate the dangers of COVID. Likewise, he inferred that polling stations would be closed or undermanned due to the risk of the virus.

But the coup de main was seven weeks before Election Day, where the PA Supreme Court unilaterally – and in direct contravention of the wording of election law – extended the deadline for mailed ballots to be received from Election Day, to three days later. Similarly, the court declared that ballots mailed without a postmark must be counted. Additionally, the court mandated that mail-in ballots lacking a verified signature be accepted.

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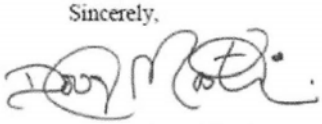
On the eve of Election Day, the State Department encouraged some counties – but not all – to notify party and candidate representatives of mail-in voters, whose ballots contained disqualifying defects, thereby enabling voters to cure said defects. This was unprecedented as it had never happened before in our Commonwealth. Election law is very specific to the way defects of mail-in ballots are to be treated, and it provides no authority for county officials to contact campaigns, or other political operatives, to affect the cure of such defects.

Actions taken by the PA State Supreme Court and Secretary Boockvar in the 2020 general election were so fraught with inconsistencies, improprieties and irregularities that the results for the office of President of the United States cannot be determined in our state.

This election is an embarrassment to our nation. John Adams rightly said that, "Facts are stubborn things," and armed with this, as Jesus stated, "We shall know the truth and the truth shall set us free." What happened on November 3, 2020 must be immediately addressed using facts and the testimony of the good people of our state.

Sincerely,



Senator Doug Mastriano
33rd Senate District

DM/kms

cc: Hon. United States Attorney William McSwain
U.S. Attorney's Office
504 W. Hamilton St., #3701
Allentown, PA 18101

Moran, John (ODAG)

From:	Moran, John (ODAG)
Sent:	Sunday, January 3, 2021 7:54 PM
To:	Raimondi, Marc (PAO)
Cc:	Donoghue, Richard (ODAG)
Subject:	Re: The Post Most: In extraordinary hour-long call, Trump pressures Georgia secretary of state to recalculate the vote in his favor

Thanks, Marc. Kira Antell is leading OLA for the next few weeks.

John

> On Jan 3, 2021, at 6:30 PM, Raimondi, Marc (PAO) <mraimondi@jmd.usdoj.gov> wrote:
>
> ? This story is getting a lot of pick up and some members of Congress are taking to social media saying there should be an investigation. Several reporters have called me and I've no commented and will continue to do so. Not sure who is leading OLA these days but may want to flag for them too.
>
> Marc Raimondi
> Acting Director of Public Affairs
> U.S. Department of Justice
> (b) (6)
>
> Begin forwarded message:
>
> **From:** The Washington Post <email@washingtonpost.com>
> **Date:** January 3, 2021 at 1:34:51 PM EST
> **To:** "Raimondi, Marc (PAO)" <mraimondi@jmd.usdoj.gov>
> **Subject: The Post Most: In extraordinary hour-long call, Trump pressures Georgia secretary of state to recalculate the vote in his favor**
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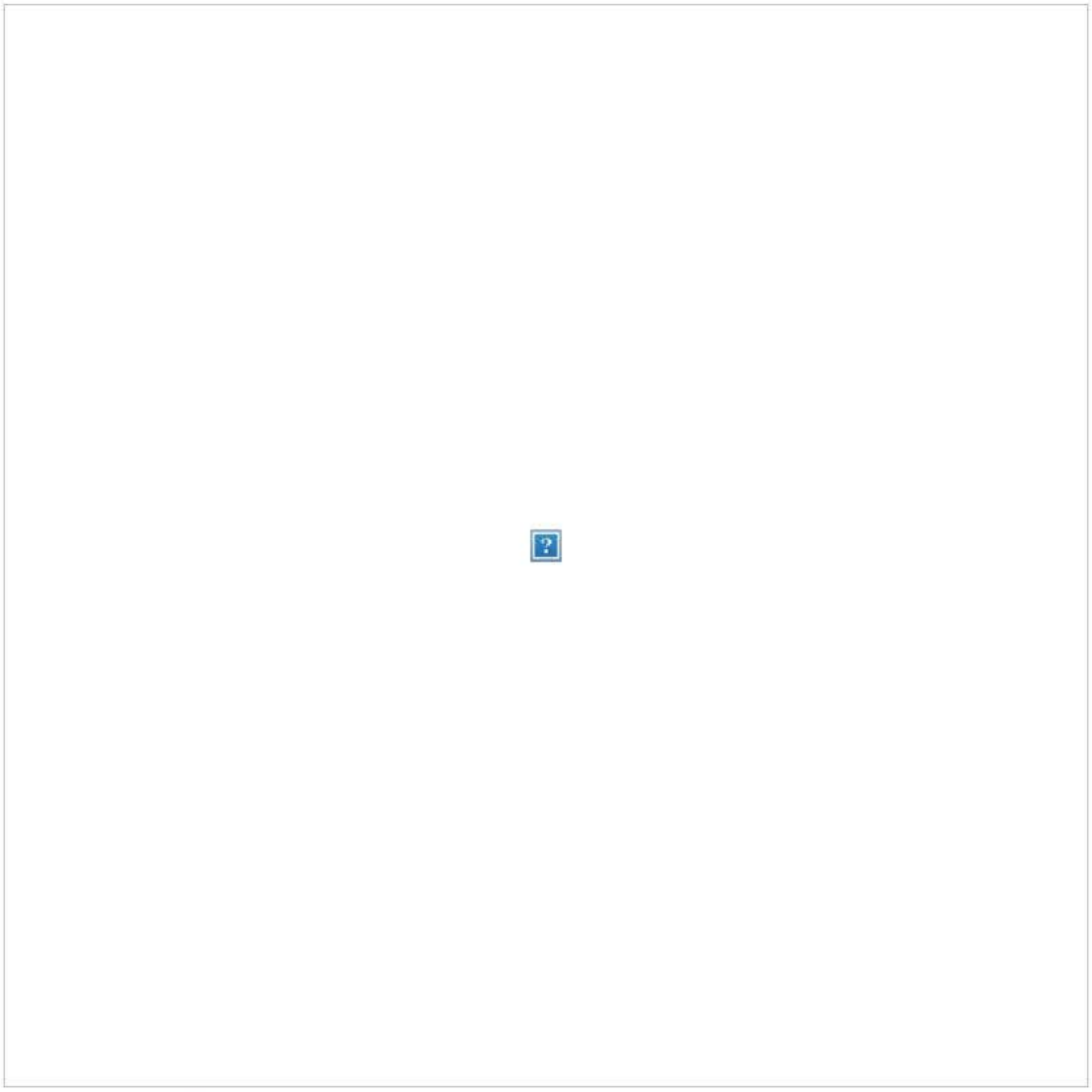

(Bill O'Leary/The Post)

‘I just want to find 11,780 votes’: In extraordinary hour-long call, Trump pressures Georgia secretary of state to recalculate the vote in his favor

In a recording obtained by The Washington Post, President Trump alternately berated, begged and threatened Brad Raffensperger to overturn President-elect Joe Biden’s win in the state.

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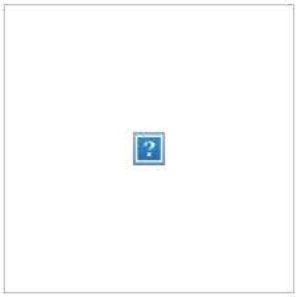

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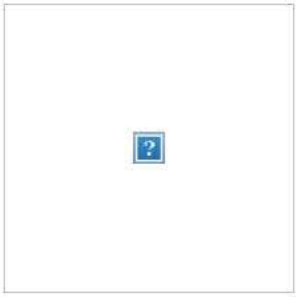

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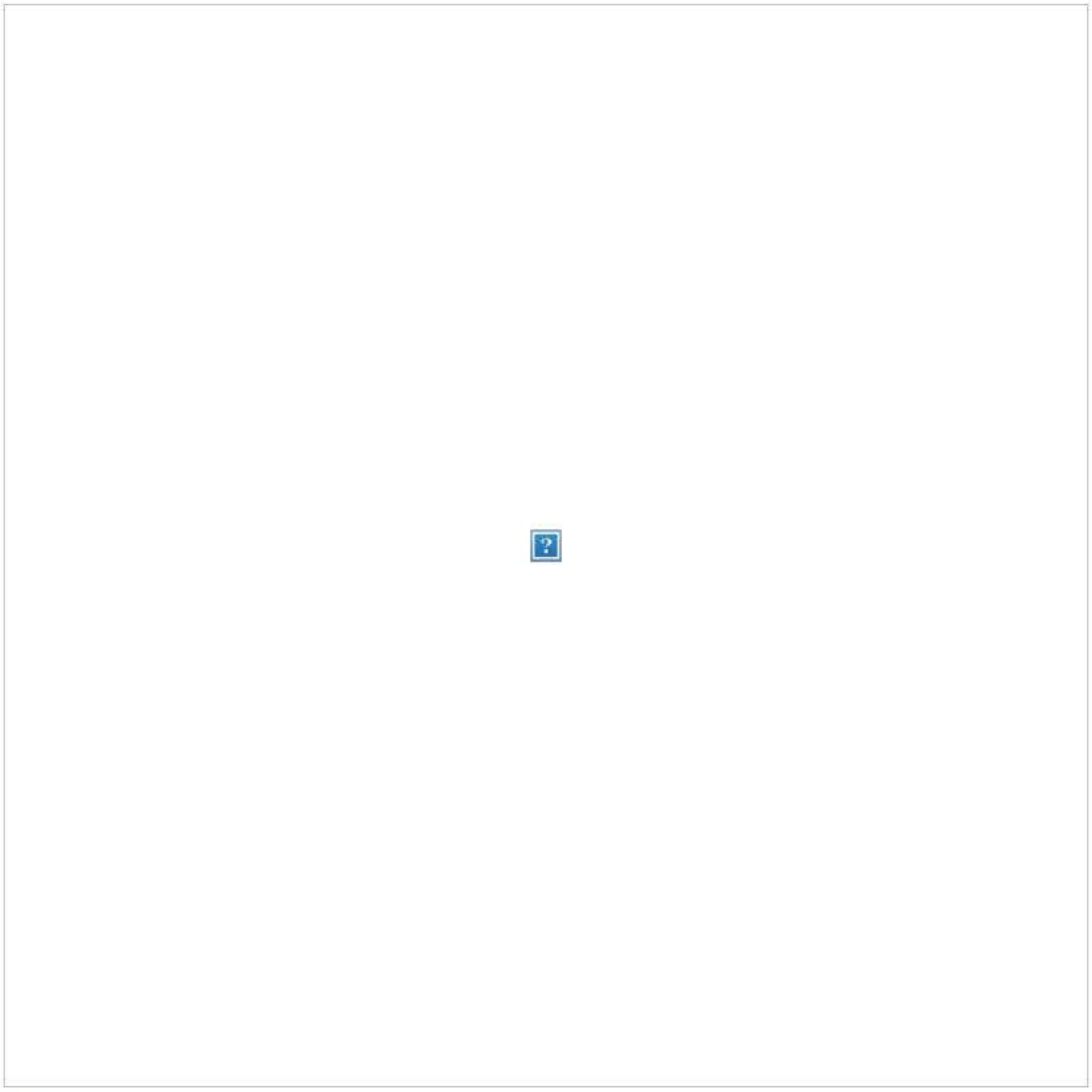

(Aysha Tengiz)

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NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

January 12, 2021

The Honorable Jeffrey A. Rosen
Acting Attorney General
U.S. Department of Justice
950 Pennsylvania Ave., NW
Washington, DC 20530

Dear Acting Attorney General Rosen:

We, the undersigned state attorneys general, are committed to the protection of public safety, the rule of law, and the U.S. Constitution. We are appalled that on January 6, 2021, rioters invaded the U.S. Capitol, defaced the building, and engaged in a range of criminal conduct—including unlawful entry, theft, destruction of U.S. government property, and assault. Worst of all, the riot resulted in the deaths of individuals, including a U.S. Capitol Police officer, and others were physically injured. Beyond these harms, the rioters' actions temporarily paused government business of the most sacred sort in our system—certifying the result of a presidential election.

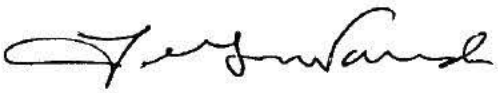
We all just witnessed a very dark day in America. The events of January 6 represent a direct, physical challenge to the rule of law and our democratic republic itself. Together, we will continue to do our part to repair the damage done to institutions and build a more perfect union. As Americans, and those charged with enforcing the law, we must come together to condemn lawless violence, making clear that such actions will not be allowed to go unchecked.

Thank you for your consideration of and work on this crucial priority.

Sincerely

Phil Weiser
Colorado Attorney General

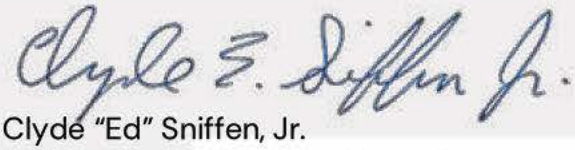
Karl A. Racine
District of Columbia Attorney General



Lawrence Wasden
Idaho Attorney General

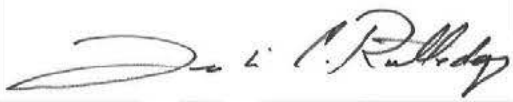
Douglas Peterson
Nebraska Attorney General

Steve Marshall
Alabama Attorney General



Clyde "Ed" Sniffen, Jr.
Acting Alaska Attorney General

Mark Brnovich
Arizona Attorney General

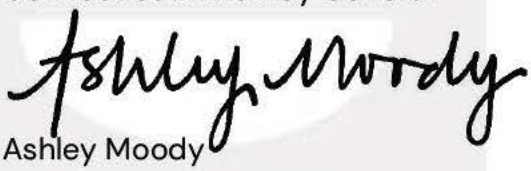


Leslie Rutledge
Arkansas Attorney General

Xavier Becerra
California Attorney General

William Tong
Connecticut Attorney General

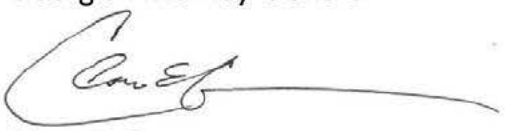
Kathleen Jennings
Delaware Attorney General



Ashley Moody
Florida Attorney General

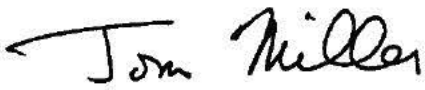
Christopher M. Carr
Georgia Attorney General

Leevin Taitano Camacho
Guam Attorney General



Clare E. Connors
Hawaii Attorney General

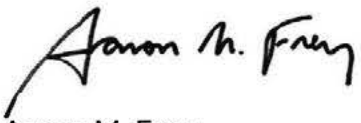
Kwame Raoul
Illinois Attorney General



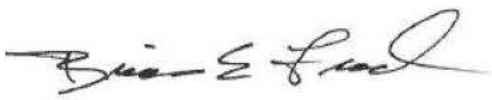
Tom Miller
Iowa Attorney General

Derek Schmidt
Kansas Attorney General

Daniel Cameron
Kentucky Attorney General



Aaron M. Frey
Maine Attorney General

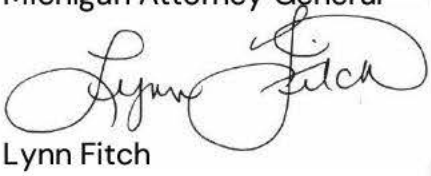


Brian Frosh
Maryland Attorney General

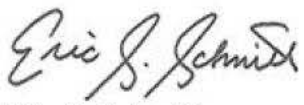
Maura Healey
Massachusetts Attorney General

Dana Nessel
Michigan Attorney General

Keith Ellison
Minnesota Attorney General

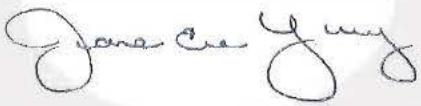


Lynn Fitch
Mississippi Attorney General



Eric S. Schmitt
Missouri Attorney General

Aaron D. Ford
Nevada Attorney General



Jane E. Young
New Hampshire Deputy Attorney General

Gurbir S. Grewal
New Jersey Attorney General

Hector Balderas
New Mexico Attorney General

Letitia James
New York Attorney General

Josh Stein
North Carolina Attorney General

Wayne Stenehjem
North Dakota Attorney General

Edward Manibusan
Northern Mariana Islands Attorney General

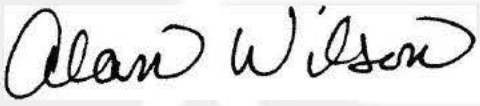
Dave Yost
Ohio Attorney General

Mike Hunter
Oklahoma Attorney General

Ellen F. Rosenblum
Oregon Attorney General

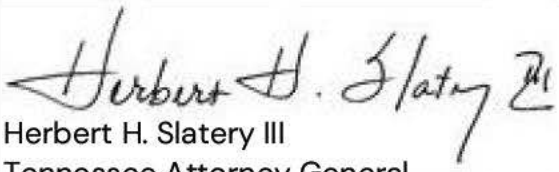
Josh Shapiro
Pennsylvania Attorney General

Peter F. Neronha
Rhose Island Attorney General

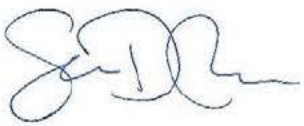


Alan Wilson
South Carolina Attorney General

Jason R. Ravnsborg
South Dakota Attorney General

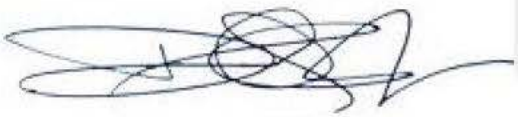


Herbert H. Slatery III
Tennessee Attorney General

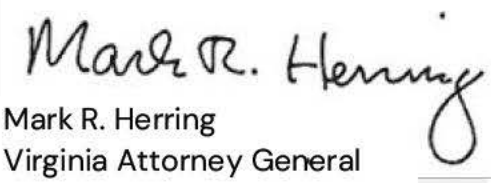


Sean Reyes
Utah Attorney General

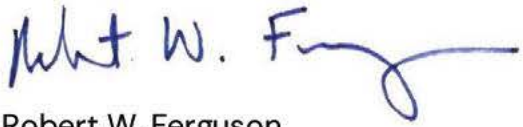
T.J. Donovan
Vermont Attorney General



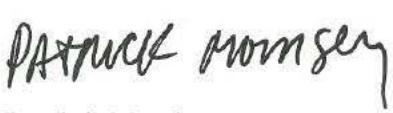
Denise N. George
Virgin Islands Attorney General



Mark R. Herring
Virginia Attorney General



Robert W. Ferguson
Washington Attorney General



Patrick Morrisey
West Virginia Attorney General

Joshua L. Kaul
Wisconsin Attorney General

Bridget Hill
Wyoming Attorney General

Moran, John (ODAG)

From:	Moran, John (ODAG)
Sent:	Thursday, January 14, 2021 10:14 PM
To:	Rosen, Jeffrey A. (ODAG)
Cc:	Donoghue, Richard (ODAG)
Subject:	Fwd: ACTING ATTORNEY GENERAL JEFFREY A. ROSEN ATTENDS SECURITY BRIEFING AT FBI'S STRATEGIC INFORMATION AND OPERATIONS CENTER ON INAUGURATION PLANNING AND RECENT CAPITOL ATTACK

Sir,

As an FYI, in response to the briefing read out, NBC sent Marc the following:

> Thanks for sending this. Trump officials meanwhile tell me POTUS is considering demanding Special Counsels on Hunter Biden and Dominion. If he makes that request of Rosen, how would Rosen respond?

John

Begin forwarded message:

> **From:** "Raimondi, Marc (PAO)" <mraimondi@jmd.usdoj.gov>
> **Date:** January 14, 2021 at 9:56:31 PM EST
> **To:** "Moran, John (ODAG) [redacted (b) (6)]
> **Subject: Fwd: ACTING ATTORNEY GENERAL JEFFREY A. ROSEN ATTENDS SECURITY BRIEFING AT FBI'S STRATEGIC INFORMATION AND OPERATIONS CENTER ON INAUGURATION PLANNING AND RECENT CAPITOL ATTACK**
>
> ?
>
> Marc Raimondi
> Acting Director of Public Affairs
> U.S. Department of Justice
> [redacted (b) (6)]
>
> Begin forwarded message:
>
> **From:** "Javers, Eamon (NBCUniversal [redacted (b) (6)]
> **Date:** January 14, 2021 at 9:49:41 PM EST
> **To:** "Raimondi, Marc (PAO)" <mraimondi@jmd.usdoj.gov>
> **Subject: RE: ACTING ATTORNEY GENERAL JEFFREY A. ROSEN ATTENDS SECURITY BRIEFING AT FBI'S STRATEGIC INFORMATION AND OPERATIONS CENTER ON INAUGURATION PLANNING AND RECENT CAPITOL ATTACK**
>
> ?
> Thanks for sending this. Trump officials meanwhile tell me POTUS is considering demanding Special Counsels on Hunter Biden and Dominion. If he makes that request of Rosen, how would Rosen respond?
>
> Thanks!
>
> Eamon
>
> ---
>
> **From:** Raimondi, Marc (PAO) <Marc.Raimondi@usdoj.gov>
> **Sent:** Thursday, January 14, 2021 7:53 PM
> **To:** Raimondi, Marc (PAO) <Marc.Raimondi@usdoj.gov>
> **Subject:** [EXTERNAL] ACTING ATTORNEY GENERAL JEFFREY A. ROSEN ATTENDS SECURITY BRIEFING AT FBI'S STRATEGIC INFORMATION AND OPERATIONS CENTER ON INAUGURATION PLANNING AND RECENT CAPITOL ATTACK
>
> FOR IMMEDIATE RELEASE THURSDAY, JANUARY 14, 2021
>
> **ACTING ATTORNEY GENERAL JEFFREY A. ROSEN ATTENDS SECURITY BRIEFING AT FBI'S STRATEGIC INFORMATION AND OPERATIONS CENTER ON INAUGURATION PLANNING AND RECENT CAPITOL ATTACK**

Washington -- Acting Attorney General Jeffrey A. Rosen attended a briefing today at the FBI's Strategic Information and Operations Center (SIOC) on the recent attack on the Capitol building and law enforcement preparations for the upcoming presidential inauguration. Following the briefing, he addressed the assembled law enforcement partners and thanked them for their efforts.

"Americans can be proud of the effort the men and women of the Justice Department and our federal, state, and local partners have made in the days since the attack on the Capitol building," said Acting Attorney General Jeffrey Rosen. "As I have said repeatedly, our efforts at investigating the wrongdoing of that day are continuing around the clock and we are fully committed to hold those who engaged in criminal acts accountable. Simultaneously, security preparations for the presidential inauguration and peaceful transfer of power continue and we will have absolutely no tolerance whatsoever for any attempts to disrupt any aspect of the inauguration or associated events leading up to, on, and following January 20."

During the SIOC visit, Rosen was briefed by federal, state, and local partners on specifics of the security plans for this week and next. Following that security briefing, Mr. Rosen met with a team of FBI leaders for another update on the investigations concerning the attack on the Capitol building.

To date, approximately 80 cases have been charged and 34 individuals have been arrested for their alleged criminal conduct during the attack on the Capitol Building. The FBI has opened approximately 200 subject case files and received about 140,000 digital media tips from the public. Notably, many of the tips are coming from friends, co-workers and other acquaintances of those allegedly involved in the attack.

The Department also launched a new online service for the public and media to track defendants charged with criminal offenses related to the Capitol attack. The link is at Investigations Regarding Violence at the Capitol (justice.gov).

Following arrests, or surrender, defendants will appear before district court magistrate/judge where the arrest takes place, in accordance with the Federal Rules of Criminal Procedure, and prosecution will be by the U.S. Attorney's Office for the District of Columbia.

###

Marc Raimondi
Acting Director of Public Affairs
U.S. Department of Justice
Marc.raimondi@usdoj.gov
(b) (6)