No. 22O155

In the Supreme Court of the United States

STATE OF TEXAS,
Plaintiff

v.

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

ON MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

OPPOSITION TO MOTION FOR LEAVE TO FILE BILL OF COMPLAINT AND MOTION FOR PRELIMINARY INJUNCTION, TEMPROARY RESTRAINING ORDER, OR STAY

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PRELIMINARY STATEMENT

Since Election Day, State and Federal courts throughout the country have been flooded with frivolous lawsuits aimed at disenfranchising large swaths of voters and undermining the legitimacy of the election. The State of Texas has now added its voice to the cacophony of bogus claims. Texas seeks to invalidate elections in four states for yielding results with which it disagrees. Its request for this Court to exercise its original jurisdiction and then anoint Texas's preferred candidate for President is legally indefensible and is an afront to principles of constitutional democracy.

What Texas is doing in this proceeding is to ask this Court to reconsider a mass of baseless claims about problems with the election that have already been considered, and rejected, by this Court and other courts. It attempts to exploit this Court's sparingly used original jurisdiction to relitigate those matters. But Texas obviously lacks standing to bring such claims, which, in any event, are barred by laches, and are moot, meritless, and dangerous. Texas has not suffered harm simply because it dislikes the result of the election, and nothing in the text, history, or structure of the Constitution supports Texas's view that it can dictate the manner in which four other states run their elections. Nor is that view grounded in any precedent from this Court. Texas does not seek to have the Court interpret the Constitution, so much as disregard it.

The cascading series of compounding defects in Texas's filings is only underscored by the surreal alternate reality that those filings attempt to construct. That alternate reality includes an absurd statistical

analysis positing that the probability of President-Elect Biden winning the election was "one in a quadrillion." Bill of Complaint at 6. Texas's effort to get this Court to pick the next President has no basis in law or fact. The Court should not abide this seditious abuse of the judicial process, and should send a clear and unmistakable signal that such abuse must never be replicated.

STATEMENT OF THE CASE

A. Mail-in Voting under the Pennsylvania Election Code

In 2019, with broad and bipartisan support, the Pennsylvania General Assembly enacted Act 77 of 2019, which made several important updates and improvements to Pennsylvania's Election Code.[1] Among these were provisions that, for the first time, offered the option of mail-in voting to all Pennsylvania electors. *See* 25 P.S. §§ 3150.11-3150.17. This change was a significant development that made it easier for all Pennsylvanians to exercise their right to vote and brought the state in line with the practice of dozens of other states.

Voters had until October 27, 2020, to request a mail-in ballot for this year's November 3rd General Election. 25 P.S. § 3150.12a(a). Act 77 set 8:00 p.m. on Election Day as the due date for returning those ballots to the county boards of elections. 25 P.S. § 3150.16. The Election Code provides for a variety of safeguards to ensure

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[1] Act of Oct. 31, 2019 (P.L. 552, No. 77), 2019 Pa. Legis. Serv. 2019-77 (S.B. 421) (West) ("Act 77").

the integrity of this process. *See* 25 P.S. § 3146.8(g)(3); 25 P.S. § 3146.2c; 25 P.S. § 3146.8 (g)(4); 25 P.S. § 3150.12b(a)(2).

B. The 2020 General Election

On November 3, 2020, the Commonwealth conducted the 2020 General Election. Over 6.9 million Pennsylvanians voted in that election, with over 2.6 million of those voters using mail-in or absentee ballots. The presidential election results were certified, and Governor Wolf signed the Certificate of Ascertainment on November 24, 2020.

C. Texas's Allegations regarding Pennsylvania have Already Been Rejected by Both State and Federal Courts

Texas offers statements about Pennsylvania law and Pennsylvania's election administration. Befitting of Texas's distance and unfamiliarity with either, those statements are littered with patently false allegations and conclusions.

First, Texas asserts that the Secretary "abrogated" the mandatory signature verification requirement for absentee or mail-in ballots. Bill of Complaint at 14-15. This is untrue. *See In re Nov. 3, 2020 Election*, 240 A.3d 591, 610 (Pa. 2020) (Election Code does not authorize county election boards to reject mail-in ballots based on an analysis of a voter's signature. "[A]t no time did the Code provide for challenges to ballot signatures."). Far from usurping any legislative authority, the Pennsylvania Supreme Court refused "to rewrite a statute in order to supply terms which [we]re not present

therein." *Id.* at 14. A federal judge reached the same result. *See In Donald Trump for President, Inc. v. Boockvar*, 2020 WL 5997680, at *58 (W.D. Pa. Oct. 10, 2020) ("[T]he Election Code does not impose a signature-comparison requirement for mail-in and absentee ballots.").

Second, Texas alleges that certain county boards of elections did not grant poll-watchers access to the opening, counting, and recording of absentee and mail-in ballots. Bill of Complaint at 16. This is also untrue. *See In re Canvassing Observation*, __ A.3d __, 2020 WL 6737895, *8-9 (Pa. 2020) (holding that state law requires candidate representatives to be in the room but the viewing distance is committed to the county boards, which, in that case, was reasonable); *Trump for President, Inc. v. Sec'y of Pennsylvania*, 2020 WL 7012522, at *8 (3d Cir. Nov. 27, 2020) (affirming dismissal of poll-watcher claim, in part, because the Trump Campaign "has already raised and lost most of these state-law issues, and it cannot relitigate them here.").

Third, Texas asserts that certain counties "adopted [] differential standards favoring voters in Philadelphia and Allegheny Counties with the intent to favor former Vice President Biden." Bill of Complaint at 17. In support of this false assertion, Texas cites to the complaint in *Trump v. Boockvar*, 4:20-cv-02078 (M.D. Pa. Nov. 18, 2020). What Texas neglects to mention is that this complaint was dismissed, *see Trump v. Boockvar*, 2020 WL 6821992 (M.D. Pa. Nov. 21, 2020), and that dismissal was affirmed by the Third Circuit because those charges were backed by neither specific allegations nor evidence, *Trump for President, Inc. v. Sec'y of Pennsylvania*, 2020 WL 7012522, at *8 (3d Cir.

Nov. 27, 2020). Texas's suggestion of a wide-ranging conspiracy is a fantasy.

Fourth, Texas alleges that certain counties illegally permitted voters to cure minor defects in mail-in ballots. But under Pennsylvania law minor defects—such as a failure to handwrite the voter's name and/or address on the declaration—did not, in fact, void the ballot. *See In re Canvass of Absentee & Mail-in Ballots of November 3, 2020 Gen. Election*, 29 WAP 2020, __ A.3d__, 2020 WL 6866415, *15 (Pa. Nov. 23, 2020) ("We have conducted that analysis here and we hold that a signed but undated declaration is sufficient and does not implicate any weighty interest. Hence, the lack of a handwritten date cannot result in vote disqualification."); *Trump v. Boockvar*, 2020 WL 6821992, *12 (M.D. Pa. 2020) ("it is perfectly rational for a state to provide counties discretion to notify voters that they may cure procedurally defective mail-in ballots"), *aff'd* 2020 WL 7012522.

Fifth, there was no state law violation when the Pennsylvania Supreme Court temporarily modified the deadline for the receipt of mail-in and absentee ballots, because state constitutional law required it. *See Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 369-72 (Pa. 2020). Under this Court's jurisprudence, nothing in the Elections Clause of Article I "instructs, nor has this Court ever held, that a state legislature may prescribe regulations on the time, place, and manner of holding federal elections in defiance of provisions of the State's constitution." *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787, 817-18 (2015) (*AIRC*). The same is true for the Elector Clause in Article II.

Sixth, Texas avers that Pennsylvania "broke its promise to the Court to segregate ballots and comingled * * * illegal late ballots." This is also utterly false. The Secretary had already instructed that all ballots received during the three day period be segregated and counted separately. Indeed, Justice Alito adopted these instructions by the Secretary as an order of the Court. And the county boards of elections complied with that order. The qualified ballots received during the three-day extension were segregated and counted separately. That number of ballots is too small to change the outcome of any federal election in Pennsylvania.

Finally, Texas cites to two fundamentally faulty reports. The report authored by certain Pennsylvania House Representatives (the "Ryan Report") arrives at incorrect numbers because it mischaracterizes the total number of absentee and mail-in ballots as only mail-in ballots. Of the 3.1 million ballots sent out, 2.7 million were mail-in ballots and 400,000 were absentee ballots.[2] This fundamental error contaminates their calculations.

Texas also relies on a statistical analysis prepared by Charles J. Cicchetti, Ph.D., in support of the assertion that the results in the four defendant states were so improbable as to be evidence of misconduct. Bill of Complaint ¶¶ 9–12. Texas's allegations and Dr. Cicchetti's analysis are nonsense.

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[2] By the morning of October 27, the total number of absentee and mail-in ballots sent out was already nearly 3.1 million. At no point after October 26 was the number of absentee and mail-in ballots sent below 3 million.

Texas first alleges that "[t]he probability of former Vice President Biden winning the popular vote in the four Defendant States * * * 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." Bill of Complaint at ¶ 10. It bases this astounding assertion on Dr. Cicchetti's assessment, for each of the states, of the extremely low probability that the votes counted before 3 a.m. and those counted afterwards were "randomly drawn from the same population." App. 4a-6a ¶¶ 15-19.[3] But the votes counted later were indisputably *not* "randomly drawn" from the same population of votes, as those counted earlier were predominantly in-person votes while those counted later were predominantly mail-in votes. And Texas's own complaint shows why the later-counted votes led to such a strong shift in favor of President-Elect Biden: "Significantly, in Defendant States, Democrat [sic] voters voted by mail at two to three times the rate of Republicans." Bill of Complaint at ¶ 39. Both this fact and the expectation that it would result in a shift in President-Elect Biden's favor as mail-in votes were counted were widely reported months ahead of the election.

Texas further claims, again based on Dr. Cicchetti's analysis, that "[t]he same less than one in a quadrillion statistical improbability" can be found "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." Bill of Complaint at ¶ 11. For this assertion, Dr. Cicchetti

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[3] We cite to the Appendix attached to the Motion to Expedite as "App."

simply assumes that the likelihood of a given Pennsylvania voter in 2020 voting for Biden was the same as that of a Pennsylvania voter in 2016 voting for Hillary Clinton—and then concludes, based on that assumption, that the 2020 results were quite improbable. App. 6a ¶¶ 18–20. But it should not be necessary to point out that the 2016 and 2020 elections were, in fact, separate events, and any analysis based on the assumption that voters in a particular state would behave the same way in two successive presidential elections is worthless.[4]

ARGUMENT

I. Texas's Claims Do Not Meet the Exacting Standard Necessary for the Court to Exercise its Original Jurisdiction

While this Court has "original and exclusive jurisdiction of all controversies between two or more States," 28 U.S.C. § 1251(a), this Court has "said more than once that [its] original jurisdiction should be exercised only 'sparingly.'" *Mississippi v. Louisiana*, 506 U.S. 73, 76 (1992). The authority to adjudicate original disputes between States is of a "delicate and grave * * * character," *Louisiana v. Texas*, 176 U.S. 1, 15 (1900), because it calls upon the Court to exercise the "extraordinary" power "to control the conduct of one state at the suit of another," *New York v. New Jersey*, 256 U.S. 296, 309 (1921).

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[4] Dr. Cicchetti's methodology and conclusions would utterly fail the basic *Daubert*/*Kumho* standards. *See Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1983); *Kumho Tire v. Carmichael*, 526 U.S. 137 (1999). His report certainly provides no basis for disenfranchising tens of millions of voters across four states.

More practically, this Court is "not well suited to assume the role of a trial judge." *South Carolina v. North Carolina*, 558 U.S. 256, 278 (2010) (Roberts, C.J. concurring). "Original jurisdiction diverts the Court from vital tasks it is well equipped to perform to tasks that warrant judicial resolution only as a final resort after more political processes have failed." 17 Fed. Prac. & Proc. Juris. § 4042 (3d ed.).

For these reasons, this Court has interpreted the Constitution and 28 U.S.C. § 1251(a) as making its original jurisdiction "obligatory only in appropriate cases," *Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972), and as providing it "with substantial discretion to make case-by-case judgments as to the practical necessity of an original forum in this Court," *Texas v. New Mexico*, 462 U.S. 554, 570 (1983).[5]

The Court assesses two factors in determining whether a case is appropriate for original jurisdiction:

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[5] Texas argues that this Court's original jurisdiction is mandatory, not discretionary. That, of course, is contrary to long-standing precedent and hornbook constitutional law. *See, e.g.*, *Arizona v. New Mexico*, 425 U.S. 794, 796 (1976); *Texas v. New Mexico*, 462 U.S. 554, 570 (1983); *see also* 17 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 4053 ("Reasons not less cogent point to the need of the exercise of a sound discretion in order to protect this Court from an abuse of the opportunity to resort to its original jurisdiction in the enforcement by States of claims against citizens of other States."). This case, presented to the Court in an emergency posture, provides no occasion for the Court to overrule its long-standing precedent. Indeed, the Court has recently declined exactly such an invitation, *see Missouri v. California*, No. 148, Orig., Pltfs. Br. 13 n.1, and to do so in this case would only further enmesh this Court in election disputes across the Nation.

(1) the nature of the interest of the complaining State, focusing on the seriousness and dignity of the claim, and (2) the "availability of an alternative forum in which the issue tendered can be resolved." *Mississippi*, 506 U.S. at 77. Neither factor supports an exercise of original jurisdiction here.

1. Before this Court "can be moved to exercise its extraordinary power under the Constitution to control the conduct of one State at the suit of another, the complaining State must demonstrate that it has suffered a threatened invasion of rights that is of serious magnitude." *Florida v. Georgia*, 138 S. Ct. 2502, 2514 (2018) (internal quotation marks omitted). Generally, this Court exercises original jurisdiction to only hear claims that implicate core sovereign interests, such as disputes over boundaries or bodies of water. *See* Stephen Shapiro *et al*., Supreme Court Practice 622 (10th ed. 2013). The "model case" for exercise of original jurisdiction is an interstate dispute "of such seriousness that it would amount to *casus belli* if the States were fully sovereign." *Texas*, 462 U.S. at 571, n.18.

This dispute, on the other hand, involves Pennsylvania's interpretation of its own laws, and Texas's disagreement with that interpretation. *See Arizona*, 425 U.S. at 798 ("It would, indeed, be anomalous were this Court to be held out as a potential principal forum for settling []controversies" when "States and nonresidents clash over the application of state laws."). And Texas's claims are neither serious nor dignified. It

seeks to challenge the integrity of, and commandeer, the election procedures of four sister States.[6]

Far from trying to vindicate its own sovereign or quasi-sovereign interests, Texas is ultimately seeking redress for the political preferences of those of its citizens who voted for President Trump. *See Pennsylvania v. New Jersey*, 426 U.S. 660, 665 (1976) (per curiam) (States cannot, through *parens patriae*, bring an action in this Court's original jurisdiction litigating the personal claims of its citizens. Otherwise, this Court's "docket would be inundated"). In so doing, Texas repeats the same false allegations of election fraud that have already been repeatedly rejected by other courts. *See supra* at 3-6. And its request for relief—to disenfranchise tens of millions of voters who reasonably relied upon the law—is uniquely unserious.

2. Original jurisdiction will not be exercised when there is an adequate alternative forum for resolution of the issues at controversy. *See Illinois*, 406 U.S. at 93; *United States v. Nevada*, 412 U.S. 534, 538 (1973). This Court is far from the only forum to resolve the claims presented by Texas. Again, as detailed above, other litigants have pursued many of the identical claims in state courts, lower federal courts, and in this Court's appellate jurisdiction.

Texas has not demonstrated that the merits of its claims, already considered and rejected by trial and appellate courts across the Nation, are somehow

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[6] After reviewing the substance of our sister states' responses, Pennsylvania aligns with Georgia, Michigan, and Wisconsin in their efforts to safeguard against this challenge to our sovereignty.

different. *See, e.g., Donald J. Trump for Pres., Inc. v. Sec. of Pennsylvania*, 20-3371, 2020 WL 7012522, at *2 (3d Cir. Nov. 27, 2020); *Bognet v. Secretary Commonwealth of Pennsylvania*, 2020 WL 6686120 (3d Cir. Nov. 13, 2020). This Court's original jurisdiction is not an avenue to circumvent the regular certiorari process when claims have been repeatedly rejected by lower courts on the merits.

Finally, if original jurisdiction is allowed, this type of litigation will crowd the Court's docket every four years. Given the global pandemic, many States were forced to modify their election process, including mail-in voting procedures. Texas did.[7] And most, if not every, state has been sued during this election. Texas has. *See e.g. Hotze v. Hollins*, 20-20574, 2020 WL 6440440, at *1 (5th Cir. Nov. 2, 2020); *Pool v. City of Houston*, 978 F.3d 307 (5th Cir. 2020); *Richardson v. Texas Sec'y of State*, 978 F.3d 220 (5th Cir. 2020); *Texas Democratic Party v. Abbott*, 978 F.3d 168 (5th Cir. 2020); *Mi Familia Vota v. Abbott*, 977 F.3d 461 (5th Cir. 2020); *Texas League of United Latin Am. Citizens v. Hughs*, 978 F.3d 136 (5th Cir. 2020); *Texas All. for Retired Americans v. Hughs*, 976 F.3d 564 (5th Cir. 2020). And like Pennsylvania, Texas has prevailed in a large majority of these challenges. But if such failed or frivolous lawsuits are sufficient to raise a question about the integrity of a state's election—as Texas argues—then such an action could be filed against *any* state in *every* presidential election.

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[7] *See* Texas Gov. Abbott's July 27, 2020 Proclamation modifying and suspending certain provision of the Texas Election Code, https://gov.texas.gov/uploads/files/press/PROC_COVID-19_Nov_3_general_election_IMAGE_07-27-2020.pdf (last visited 12/9/2020).

Let us be clear. Texas invites this Court to overthrow the votes of the American people and choose the next President of the United States. That Faustian invitation must be firmly rejected.

II. Texas Does Not Present a Viable Case and Controversy

A. Texas lacks standing to bring this action

Article III, Section 2 of the United States Constitution limits the jurisdiction of the federal courts to resolving "cases" and "controversies." U.S. CONST. art. III, § 2; *Raines v. Byrd*, 521 U.S. 811, 818 (1997). That same jurisdictional limitation applies to actions sought to be commenced in the Court's original jurisdiction. *Maryland v. Louisiana*, 451 U.S. 725, 735-36 (1981). To establish standing, the demanding party must establish a "triad of injury in fact, causation, and redressability." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 103 (1998). More specifically, that the plaintiff has suffered injury to a legally protected interest, which injury is "fairly traceable to the challenged action and redressable by a favorable ruling." *AIRC*, 576 U.S. at 800; *see also Maryland*, 451 U.S. at 736. This Court has "always insisted on strict compliance with this jurisdictional standing requirement." *Raines*, 521 U.S. at 819. For invocation of the Court's original jurisdiction, this burden is even greater: "[t]he threatened invasion of rights must be of serious magnitude and it must be established by clear and convincing evidence." *People of the State of N.Y. v. New Jersey*, 256 U.S. 296, 309 (1921). Texas fails to carry this heavy burden.

First, Texas cannot establish it suffered an injury in fact. An injury in fact requires a plaintiff to show the "invasion of a legally protected interest"; that the injury is both "concrete and particularized"; and that the injury is "actual or imminent, not conjectural or hypothetical." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016). According to Texas, the alleged violations of Pennsylvania's Election Code undermined the authority granted to the Pennsylvania General Assembly under the Electors Clause.[8] Motion at 3, 10-11, 13-15. But as the text of the Electors Clause itself makes clear, the injury caused by the alleged usurpation of the General Assembly's constitutional authority belongs to that institution. *AIRC,* 576 U.S. at 800 (legislature claimed that it was stripped of its responsibility for redistricting vested in it by the Elections Clause). The State of Texas is not the Pennsylvania General Assembly. *See Virginia House of Delegates v. Bethune-Hill*, __ U.S. __, 139 S.Ct. 1945, 1953 (2019) (noting the "mismatch between the body seeking to litigate [the Virginia House of Delegates] and the body to which the relevant constitutional provision allegedly assigned exclusive redistricting authority [the General Assembly]").

Second, Texas's claimed injury is not fairly traceable to a violation of the Electors Clause. As discussed above, each of Texas's allegations of violations of

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[8] In its motion, Texas disclaims a "voting-rights injury as a State" based on either the Equal Protection or Due Process Clauses. Motion at 14. Rather, Texas claims that its legally protected interest arises from "the structure of the Constitution" creating a federalist system of government. *Ibid.* As discussed *infra,* to the extent Texas relies on the Equal Protection and Due Process Clauses, those "Clauses protect people, not States." *Pennsylvania*, 426 U.S. at 665.

Pennsylvania law has been rejected by state and federal courts.

Third, Texas fares no better in relying on *parens patriae* for standing. It is settled law that "a State has standing to sue only when its sovereign or quasi-sovereign interests are implicated and it is not merely litigating as a volunteer the personal claims of its citizens." *Pennsylvania*, 426 U.S. at 665. The state, thus, must "articulate an interest apart from the interests of particular private parties." *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Baez*, 458 U.S. 592, 607 (1982). In other words, "the State must be more than a nominal party." *Ibid.* That, however, is exactly what Texas is here. Texas seeks to "assert *parens patriae* standing for [its] citizens who are Presidential Electors." Motion at 15. Even if, as Texas claims, the presidential electors its citizens have selected suffered a purported injury akin to the personal injury allegedly sustained by the 20-legislator bloc in *Coleman v. Miller*, 307 U.S. 433, 438 (1939), which they did not, that does not somehow metastasize into a claim by the state rather than those presidential electors. The 20-person bloc of legislatures in *Coleman* sued in their own right without the involvement of the State of Kansas. *Ibid.* Texas has no sovereign or quasi-sovereign interest at stake. It is a nominal party, at best.

B. This untimely action is moot

Texas commenced the present action on December 7, 2020, thirty-four days after the General Election and thirteen days after the results were certified by Pennsylvania Governor Tom Wolf. Disenfranchising millions of voters after Pennsylvania has already certified

its election results would grievously undermine the public's trust in the electoral system, contravene democratic principles, and reward Texas for its inexcusable delay and procedural gamesmanship. Accordingly, equity and the public interest disfavor an injunction or any other relief in this case.

In a nutshell, it is too late to reverse or enjoin the results of the election, including the actions of the Secretary and Pennsylvania's 67 county boards of elections. As a consequence, Texas's claims are moot. *See Socialist Labor Party v. Gilligan,* 406 U.S. 583 (1972) (challenge to election statute moot where election has occurred and unlikely issue will recur). Moreover, Texas seeks the unprecedented step of commandeering the electoral process of a separate and co-equal sovereign state and disenfranchising almost 7 million Pennsylvanians who reasonably relied on the rules which were in place when they voted on Election Day. This Court "has been presented with strained legal arguments without merit and speculative accusations * * * unsupported by evidence. In the United States of America, this cannot justify the disenfranchisement of a single voter, let alone all the voters of its sixth most populated state. Our people, laws, and institutions demand more." *Boockvar*, 2020 WL 6821992, at *1, *aff'd sub nom. Donald J. Trump for President, Inc. v. Sec'y of Pennsylvania*, 20-3371, 2020 WL 7012522 (3d Cir. Nov. 27, 2020).

Texas waited until now to seek an injunction to nullify Pennsylvania's election results because all of the other political and litigation machinations of Petitioner's preferred presidential candidate have failed. The Trump campaign began with a series of meritless

litigations. When that failed, it turned to state legislatures to overturn the clear election results. Upon that failure, Texas now turns to this Court to overturn the election results of more than 10% of the country. *Accord, Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 814 (1945) ("[H]e who comes into equity must come with clean hands."). Texas literally seeks to decimate the electorate of the United States.

Further, Texas's failure to act with dispatch substantially undermines its contention that counting these votes would cause it irreparable harm. *Beame v. Friends of the Earth*, 434 U.S. 1310, 1313 (1977) (Marshall, J., in chambers) ("The applicants' delay in filing their petition * * * vitiates much of the force of their allegations of irreparable harm."); *see also Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1318 (1983) (Blackmun, J., in chambers) (applicant's "failure to act with greater dispatch tends to blunt his claim of urgency and counsels against the grant of a stay").

Texas's delay in seeking an injunction should not be rewarded, particularly when Pennsylvania voters relied upon the Pennsylvania Supreme Court's determination that the Commonwealth's electoral system which permitted the use of mail-in ballots was valid. *See, e.g., In re November 3, 2020 General Election,* 240 A.3d 591 (Pa. 2020). Pennsylvania's electors were further entitled to rely on the Pennsylvania Supreme Court's conclusion that a three-day extension for receiving mail-in ballots was required under the Pennsylvania Constitution due to the Covid-19 pandemic and unforeseen delays in the delivery of mail by the United States Postal Service. *See, e.g., Pennsylvania*

Democratic Party v. Boockvar, 238 A.3d 345 (Pa. 2000). This good-faith reliance on the current state of the law heavily weighs against granting an injunction at this late date.

The Court recently recognized the primacy of voters' reliance interests in *Andino v. Middleton*, 20A55 (Oct. 5, 2020). There, a South Carolina District Court order (entered on September 18, 2020), enjoined that state's witness requirement for absentee ballots during the COVID-19 pandemic. On October 5, this Court stayed the District Court's decision, thus reinstating the witness requirement. Recognizing that South Carolina voters submitted ballots without witnesses in the timeframe between the District Court's September 18 injunction and this Court's October 5 stay, however, this Court specified that "any ballots cast before this stay issues and received within two days of this order may not be rejected for failing to comply with the witness requirement." *Andino v. Middleton,* 2020 WL 5887393 *1 (U.S. Oct. 5, 2020).

This Court thus acknowledged that voters should not be punished for relying upon the rules in place when they voted. Similar reliance interests here compel this Court to maintain the status quo for Pennsylvania voters at this late juncture. Overturning Pennsylvania's election results is contrary to any metric of fairness and would do nothing less than deny the fundamental right to vote to millions of Pennsylvania's citizens.

III. Texas Fails to State a Constitutional Violation

A. Texas does not assert a meritorious Electors Clause claim

In addition to its lack of standing and the mootness of this untimely action, Texas's Electors Clause claim has no merit. There was no violation of state law, let alone one that was so significant that it warrants creation of a novel constitutional claim.[9] Again, these claims have already been litigated. As the Third Circuit explained, such a challenge as this "[s]eek[s] to turn * * * state-law claims into federal ones * * * [b]ut its alchemy cannot transmute lead into gold." *Trump v. Secretary of Pa.*, 2020 WL 7012522, *9 (3d Cir. Nov. 27, 2020).

As already discussed, the alleged violations of state law were not, in fact, violations. An analysis of a voter's signature on his or her mail-in ballot is not permitted by state law. *See In re Nov. 3, 2020 Election*, __ A.3d __, 2020 WL 6252803 at *12; *see also See Donald Trump for President, Inc.*, 2020 WL 5997680 at *58. Poll watchers and candidate representatives were allowed access to observe canvassing of mail-in ballots in Philadelphia and Allegheny Counties. The Trump Campaign admitted as much in federal court. *See In re Canvassing Observation*, __ A.3d __, 2020 WL 6737895 at *4 (recounting Campaign telling federal judge that it had a "nonzero number of people in the room" in

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[9] The Electors Clause provides that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors * * *." U.S. Const., art. II, § 1, cl. 2."

Philadelphia). Their complaint was that the observation point was too far away, but the Pennsylvania Supreme Court rejected that claim, holding that "the Election Code requires only that poll watchers be in the room, not that they be within any specific distance of the ballots." *Secretary of Pa.*, 2020 WL 7012522 at *6., citing *In re Canvassing Observation*, __ A.3d __, 2020 WL 6737895 at *8-9. [10] And county boards are not prohibited by state law from instituting notice-and-cure procedures for ballots containing defects. *Boockvar*, 2020 WL 6821992, *12, *aff'd* 2020 WL 7012522 at *2 ("the Election Code says nothing about what should happen if a county notices these errors before election day").

The fourth and final claim of a state law violation—the Pennsylvania Supreme Court's modification of the statutory deadline for receipt of mail-in and absentee ballots—was addressed at length in the Commonwealth's opposition to petitions for writ of certiorari that are currently pending before the Court. *Republican Party of Pa. v. Boockvar*, No. 20-542 (U.S.); *Scarnati v. Boockvar*, No. 20-574 (U.S.). A confluence of unforeseen circumstances—a high demand for mail-in ballots due to COVID and a slowdown in the postal service—created an impending, as-applied state constitutional violation of the Pennsylvania Constitution's Free and Equal Elections Clause. *See Pa. Democratic Party*, 238 A.3d at 371-72 (Pa. 2020). In order to prevent that violation, the Pennsylvania Supreme Court modified

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[10] In fact, as a result of the federal litigation, an interim agreement was reached whereby "all campaign observers" were permitted to observe "within six feet of the first row of tables." *In re Canvassing Observation*, __ A.3d __, 2020 WL 6737895 at *4.

the statutory deadline. Such modification did not violate the Electors Clause because that clause does not relieve state legislatures of the obligation to comply with their state constitutions. *See AIRC,* 576 U.S. at 818; *see also Democratic Nat'l Comm. v. Wisc. State Legislature*, No. 20A66, __ U.S. __, 2020 WL 6275871, *1 (2020) (Roberts, C.J., concurring in denial of stay) (allowing the modification of election rules in Pennsylvania because it "implicated the authority of state courts to apply their own constitutions to election regulations"). Although Texas makes no mention of *AIRC,* that case, not Chief Justice Rehnquist's concurrence in *Bush v. Gore* 531 US 98, 111 (2000) (C.J., Rehnquist) (concurring), controls here.

Indeed, Texas's argument is so untethered from the actual state of the law that it makes the remarkable claim that a state legislature's power to direct the manner by which presidential electors are appointed is "plenary." Motion at 17-18. So plenary is that power, Texas claims, that state legislatures are not bound by either the state constitution that establishes them or the laws that the legislature itself has passed. Motion at 17-18. Texas is gravely mistaken. The "exercise of the [legislative] authority," even over federal elections or the manner by which presidential electors are selected, has to be "in accordance with the method" prescribed in a state's constitution. *Smiley v. Holm*, 285 U.S. 355, 367 (1932); *see also Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916). State legislatures are, of course, also bound by substantive provisions in their state constitutions.

Nothing in the Electors Clause permits a state legislature to enact a law "in defiance of provisions of [its]

State's constitution." *AIRC,* 576 U.S. at 817-818. When this Court said that state legislatures "possess[] plenary authority," it was referring to a legislature's authority to choose a particular "manner" for selecting presidential electors: "by joint ballot," or by "concurrence of the two houses," or by "popular vote," whether by "general ticket" or by congressional "districts." *McPherson v. Blacker*, 146 U.S. 1, 25 (1892). As the Court has made clear, "[t]he legislative power is the supreme authority, except as limited by the constitution of the state." *Ibid.*

Taking a quote from *McPherson* out of context, Texas suggests that this plenary power permits a state legislature to nullify the will of the electorate and select its own electors. Motion at 17-18. There is no support in *McPherson* for such an extraordinarily antidemocratic proposition. Rather, in *McPherson*, this Court was merely quoting from a Senate report. *McPherson*, 146 U.S. at 35.

Having directed the selection of presidential electors by popular vote in Pennsylvania, the General Assembly choosing its own slate of electors *ex post* would be unconstitutional. *Kelly v. Commonwealth*, 2020 WL 7018314, *5 (Pa., Nov. 28, 2020) (Wecht, J., concurring). "There is no basis in [state] law by which the courts may grant [a] request to ignore the results of an election and recommit the choice to the General Assembly to substitute its preferred slate of electors for the one chosen by a majority of Pennsylvania's voters." *Id.* at 3. The "General Assembly 'directed the manner' of appointing presidential electors by popular vote nearly a century ago." *Ibid.* (quoting U.S. CONST. art. II, § 1, cl. 2). There is nothing in the Election Code that

permits the General Assembly to "circumvent [this method and] to substitute its preferred slate of electors for that 'elected by the qualified electors of the Commonwealth.'" *Id.* at 4 (quoting 25 P.S. § 3191). For the General Assembly to "alter that 'method of appointment'" would require new legislation, done "in accordance with constitutional mandates, including presentment of the legislation to the governor to sign or veto." *Ibid.* (quoting *McPherson*, 146 U.S. at 25).

There was no violation of the Commonwealth's election law, and no violation of the Electors Clause here. Texas cannot succeed on the merits of this claim.

B. Texas has no basis for any Equal Protection or Due Process Claim against Pennsylvania

In Counts II and III of its proposed Bill of Complaint, Texas attempts to plead Equal Protection and Due Process claims against Pennsylvania. Any such claims are, by definition, based on the Fourteenth Amendment. Neither claim is viable.

1. The Equal Protection clause prohibits any State from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1, cl. 4. By its terms, this provision operates as a constraint on what "any State" may do to any "person within its jurisdiction." In other words, the Equal Protection Clause protects *persons* in a given state from unequal treatment at the hand of that state. Thus, someone in Texas who has been treated unequally *by* Texas may be able to pursue an equal protection cause of action *against* Texas. But the Equal Protection

Clause does not afford Texas itself, or any other state, a constitutional claim against another state. *Pennsylvania*, 426 U.S. at 665 (Equal Protection Clause protects people not states). For this reason alone, Texas cannot press an Equal Protection claim against four of its sister States.

Apart from the foregoing textual argument, and turning to Texas's own version of its putative Equal Protection claim, the bottom line is the same. That claim alleges that Pennsylvania violated the Equal Protection clause by imposing differential standards for processing and tabulating presidential election ballots (including by implementing notice-and-cure procedures for Democratic voters and affording inadequate access to Republican poll watchers). *See* Bill of Complaint ¶¶ 134-139. According to Texas, these alleged differences cannot be reconciled with *Bush v. Gore*, 531 U.S. 98 (2000), and contravened the bedrock one-person, one-vote concept. Neither theory withstands scrutiny.[11]

"The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination." *Snowden v. Hughes*, 321 U.S. 1, 8 (1944). On the facts as Texas has pled them, "intentional or purposeful discrimination" cannot be inferred. This is so because, if for no other reason, voting

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[11] To support its one-person one-vote assertions, Texas cites *Reynolds v. Sims*, 377 U.S. 533 (1964), a reapportionment case with no direct bearing on the present situation.

operations in Pennsylvania are administered by 67 different counties.

Any suggestion by Texas that variations in county election procedures amount to an equal protection violation under *Bush v. Gore* is misguided. *Bush* was expressly "limited to [its] present circumstances," which involved a state court order requiring a manual recount but without prescribing a uniform standard for doing so. *Id.* at 109. *Bush* was concerned with ensuring the fairness of a post-election recount, and this Court determined that the arbitrary, ad hoc standards for gleaning a voter's intended choice of candidate "lacked sufficient guarantees of equal treatment." 531 U.S. at 107. Here, there is no allegation of state or county officials making determinations about which candidate a Pennsylvania voter selected. And the question before the Court in *Bush* was "not whether local entities in the exercise of their expertise, may develop different systems for implementing elections." *Id.* at 109. Indeed, variations in county election procedures are permissible. *See, e.g., Donald J. Trump for President, Inc. v. Secretary,* No. 20-3371, 2020 WL 7012522, at *6-7 (3d Cir. Nov. 27, 2020) ("Reasonable county-to-county variation is not discrimination. *Bush v. Gore* does not federalize every jot and tittle of state election law.").

Moreover, allowing some Pennsylvania voters to cast provisional ballots or cure ballots did not prevent anyone from voting or burden anyone's right to vote. Rather, it made voting easier—which is not an equal protection violation at all, *see, e.g., Short v. Brown*, 893 F.3d 671 (9th Cir. 2018), and certainly not a violation of any equal protection right purportedly possessed by the state of Texas. *See, e.g., Donald J. Trump for*

President, Inc., 2020 WL 7012522 (rejecting similar Equal Protection claims).

2. Separately, Texas maintains that Pennsylvania has somehow denied it due process of law. *See* Bill of Complaint at ¶¶ 140-144. This attempted claim, too, withers upon scrutiny.

The Due Process clause says, "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1, cl. 3. Here, too, the cited provision limits what "any State" may do to "any person," unless the state affords the person with "due process of law." Because Texas is a state, not a "person," Texas is not in a position to complain that Pennsylvania somehow violated its supposed right to due process.[12]

The Due Process Clause also contains a substantive component, which limits what governments may do regardless of the fairness of the procedures it utilizes.

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[12] Even if Texas could make such a claim, no such claim is actually presented here. Texas cites two prisoner cases (having nothing whatsoever to do with elections) to suggest that random, unauthorized acts by state actors *may* give rise to a procedural due process claim in favor of an individual. *See* Bill of Complaint at ¶ 142 (citing *Parratt v. Taylor*, 451 U.S. 527, 537-541 (1981), and *Hudson v. Palmer*, 468 U.S. 517, 532 (1984)). This is beside the point. When it comes to administering a state-wide election, officials are of course authorized to make judgment calls and policy determinations. State law, moreover, affords appropriate avenues of redress. Under the Pennsylvania Election Code, election-related issues may be—and have been—sorted out in state court when circumstances warrant. *See, e.g.* 25 P.S. § 3456 (regarding election contests). In short, the procedural rights of candidates and voters are protected; Texas has nothing to complain about nor any basis to seek redress.

See County of Sacramento v. Lewis, 523 U.S. 833, 846 (1998). The range of recognized potential substantive due process claims, however, is quite narrow. *See Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 125 (1992). Executive action violates substantive due process only when it shocks the conscience, and "only the most egregious official conduct" meets this demanding standard. *Lewis*, 523 U.S. at 846. To shock the conscience, official action must be egregiously wrong, oppressive, "intended to injure in some way unjustifiable by *any* government interest." *Id.* at 849.

As Texas avers, *see* Bill of Complaint, at ¶ 141, in the election context, patent and fundamental unfairness may amount to a substantive due process violation. But this can only occur where the government official's actions have resulted in total and complete disenfranchisement. *See Afran v. McGreevey*, 115 Fed. Appx. 539, 544 (3d Cir. 2004) (summarizing caselaw but denying relief). Texas does not (and could not) allege that Pennsylvania's actions disenfranchised it. Indeed, it is Texas that seeks complete disenfranchisement.

IV. Texas is Not Entitled to the Extraordinary Preliminary Injunction it Seeks

A. Texas cannot meet the high standard for injunctive relief

In its motion Texas asks this Court to issue an injunction, or, alternatively, issue a stay, that would bar Pennsylvania (and three other states) from certifying its election results and from participating in the Electoral College. Motion at 1-2. In making that request,

Texas muddles the distinction between a stay and an injunction, as the only conceivable action this Court could take would be to issue an injunction. Texas then proceeds to cite the incorrect standard, ignoring the heightened threshold for issuance of an injunction in an original jurisdiction suit between two states. Texas fails to meet that exceedingly high threshold.

In *Nken v. Holder*, 556 U.S. 418, 428 (2009), this Court clarified that "[a]n injunction and a stay have typically been understood to serve different purposes." While an injunction is directed towards the conduct of a particular party and is a means by which a court prohibits some specified act, a stay, by contrast, "operates upon the judicial proceeding itself" by halting or postponing some portion of the proceeding, or by temporarily divesting a judicial order of enforceability. *Ibid.* Stated another way, a stay "simply *suspends judicial alteration* of the status quo, while injunctive relief *grants judicial intervention* that has been withheld by lower courts." *Id.* at 429 (citing *Ohio Citizens for Responsible Energy, Inc., v. NRC*, 479 U.S. 1312, 1313 (1986) (Scalia J., in chambers); *Brown v. Gilmore*, 533 U.S. 1301, 1303 (2001) (Rehnquist, C.J., in chambers) ("Applicants are seeking not merely a stay of a lower court judgment, but an injunction against the enforcement of a presumptively valid state statute."); *Turner Broadcasting System, Inc. v. FCC*, 507 U.S. 1301, 1302 (1993) (Rehnquist, C.J., in chambers) ("By seeking an injunction, applicants request that I issue an order *altering* the legal status quo.") (emphasis added, internal brackets and quotations omitted).

Texas identifies no specific judicial decision that this Court should stay. Rather, it is Texas that seeks to

upend the status quo by getting this Court somehow to reverse the certification of election results and prevent Pennsylvania from participating in the Electoral College. It thus seeks an injunction. But even properly framed as a request for an injunction, Texas identifies the incorrect standard.

Texas urges this Court to apply the standard for a preliminary injunction under Fed. R. Civ. P. 65 that a Federal district court would apply in a dispute between two private parties. *See* Motion at 6 (citing *Winter v. Natural Resources Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). Though this Court's rules specify that in original jurisdiction suits between states, the Federal Rules of Civil Procedure and Evidence "*may* be taken as guides," *see* Supreme Court Rule 17.2, this Court is not bound by those rules. *Alabama v. North Carolina*, 560 U.S. 330, 344 (2010). Here, the relief Texas seeks—judicial disenfranchisement of huge swaths of voters across multiple states—bears no resemblance to the relief typically sought in disputes between private parties. This Court's decisions call for an appropriately heightened standard in seeking such unprecedented relief in a suit between sovereign states.

When this Court hears an original jurisdiction suit between states, its role differs significantly from the one the Court takes in suits between private parties. *Kansas v. Nebraska*, 574 U.S. 445, 453 (2015). Given the sovereign status and "equal dignity" of states, this Court has held that "a complaining State must bear a burden that is much greater than the burden ordinarily shouldered by a private party seeking an injunction." *Florida*, 138 S.Ct. at 2514 (internal quotation marks and citation omitted). The need for caution in

adjudicating the relative rights of States necessitates "expert administrate rather than judicial imposition of a hard and fast rule." *Colorado v. Kansas*, 320 U.S. 383, 392 (1943). Thus, "the complaining State must demonstrate that it has suffered a 'threatened invasion of rights' that is of 'serious magnitude.'" *Florida*, 138 S.Ct. at 2414 (citations omitted). The complaining State must make that showing by "clear and convincing evidence" of a "real or substantial injury." *Ibid.*

Whatever the standard, Texas cannot meet it. Nothing in the text, history, or structure of the Constitution supports Texas's view that it can dictate the manner in which four sister States run their elections, and Texas suffered no harm because it dislikes the results in those elections. Further, Texas's claims are also moot and barred by laches. The predicate for Texas to take action was established well before Election Day, but it waited until now—after all four States have certified their elections—to bring this action. While Texas waited to see the results, millions of voters relied on the settled rules. Those voters should not be punished for not choosing Texas's preferred candidate, and Texas should not be rewarded for its unreasonable delay in bringing this action.

B. Texas's request to disenfranchise tens of millions of voters who reasonably relied upon the law at the time of the election does great damage to the public interest

Texas's request to disenfranchise tens of millions of voters is far too extreme a remedy. In exercising its remedial discretion, this Court consistently takes account of the public interest in stability and order. *See*

U.S. Bancorp Mortg. Co. v. Bonner Mail P'ship, 513 U.S. 18, 26 (1994) (placing burden on petitioner to show "equitable entitlement to the extraordinary remedy" requested); *Norton v. Shelby Cnty.*, 118 U.S. 425, 441 (1886). That obligation counsels against remedies that could provoke "chaos and uncertainty." *EEOC v. Sears, Roebuck & Co.*, 650 F.2d 14, 17 (2d Cir. 1981); *see also, e.g., Buckley v. Valeo*, 424 U.S. 1, 142-143 (1976) (per curiam).

This Court's decisions in election cases have reflected those principles by refusing to invalidate an election after it has occurred despite constitutional or other legal infirmities with the election. *See, e.g., Connor v. Williams*, 404 U.S. 549, 550-551 (1972) (per curiam) (assuming Fourteenth Amendment violation in conduct of elections but "declin[ing] to disturb" them); *Allen v. State Bd. of Elections*, 393 U.S. 544, 571-572 (1969) (rejecting request by appellants and Solicitor General that the Court "set aside" elections conducted in violation of federal law).

At bottom, Texas seeks to invoke this Court's original jurisdiction to achieve the extraordinary relief of disenfranchising all Pennsylvanians who voted and one-tenth of the voters in the entire Nation. Such relief would, of course, be "drastic and unprecedented, disenfranchising a huge swath of the electorate." *Donald J. Trump for President, Inc.*, 2020 WL 7012522, at *7. In support of such a request, Texas brings to the Court only discredited allegations and conspiracy theories that have no basis in fact. And Texas asks this Court to contort its original jurisdiction jurisprudence in an election where millions of people cast ballots under truly extraordinary circumstances, sometimes risking

their very health and safety to do so. Accepting Texas's view would do violence to the Constitution and the Framers' vision, and would plunge this Court into "one of the most intensely partisan aspects of American political life." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019).

CONCLUSION

For the reasons set forth above, the Court should deny the motion for leave to file a bill of complaint and the motion for preliminary injunction and temporary restraining order or, alternatively, for stay and administrative stay.

Respectfully submitted,

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