

No. 22O155, Original

---

---

**In the Supreme Court of the United States**

---

STATE OF TEXAS,

*Plaintiff,*

v.

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

*Defendants.*

---

On Motion for Leave to File Bill of Complaint

---

---

**BRIEF OF STATE OF MISSOURI AND  
16 OTHER STATES AS *AMICI CURIAE* IN  
SUPPORT OF PLAINTIFF'S MOTION FOR  
LEAVE TO FILE BILL OF COMPLAINT**

---

---

OFFICE OF THE MISSOURI ATTORNEY GENERAL      ERIC S. SCHMITT  
Supreme Court Building      *Attorney General*  
P.O. Box 899      D. John Sauer  
Jefferson City, MO 65102      *Solicitor General*  
John.Sauer@ago.mo.gov      *Counsel of Record*

*Counsel for Amici Curiae*  
(additional counsel listed on signature page)

**TABLE OF CONTENTS**

STATEMENT OF INTEREST OF <i>AMICI</i> .....	1
SUMMARY OF ARGUMENT .....	2
ARGUMENT .....	3
I.    The Separation-of-Powers Provision of the Electors Clause Is a Structural Check on Government That Safeguards Liberty .....	4
II.   Stripping Away Safeguards From Voting by Mail Exacerbates the Risks of Fraud .....	8
III.  The Bill of Complaint Alleges that the De- fendant States Unconstitutionally Abol- ished Critical Safeguards Against Fraud in Voting by Mail .....	16
CONCLUSION .....	22

RETRIEVED FROM DEMOCRACYDOCKET.COM

## TABLE OF AUTHORITIES

### Cases

<i>Alden v. Maine</i> , 527 U.S. 706 (1999).....	6
<i>Anderson v. Celebrezze</i> , 460 U.S. 780 (1983).....	1, 5
<i>Anderson v. United States</i> , 417 U.S. 211 (1974).....	2
<i>Bond v. United States</i> , 564 U.S. 211 (2011).....	6
<i>Bush v. Gore</i> , 531 U.S. 98 (2000).....	4, 5, 19
<i>Bush v. Palm Beach Cty. Canvassing Bd.</i> , 531 U.S. 70 (2000).....	4
<i>Crawford v. Marion County Election Bd.</i> , 553 U.S. 181 (2008).....	8
<i>FERC v. Mississippi</i> , 456 U.S. 742 (1982).....	6
<i>Gregory v. Ashcroft</i> , 501 U.S. 452 (1991).....	6
<i>Moore v. Ogilvie</i> , 394 US 814 (1969).....	19

<i>Morrison v. Olson</i> , 487 U.S. 654 (1988).....	5
<i>NAACP v. State of Missouri</i> , No. 20AC-CC00169-01 (Circuit Court of Cole County, Missouri Sept. 24, 2020), <i>aff'd</i> , 607 S.W.3d 728 (Mo. banc Oct. 9, 2020) .....	15, 17
<i>New York v. United States</i> , 505 U.S. 144 (1992).....	6
<i>Republican Party of Pennsylvania v. Boockvar</i> , No. 20-542, 2020 WL 6304626 (U.S. Oct. 28, 2020)5	
<b>Statutes</b>	
U.S. CONST. art. I, § 4, cl. 2 .....	4
U.S. CONST. art. II, § 1, cl. 4.....	4, 7, 16
<b>Other Authorities</b>	
BUILDING CONFIDENCE IN U.S. ELECTIONS: REPORT OF THE COMMISSION ON FEDERAL ELECTION REFORM, at 46 (Sept. 2005) .....	9
Jonathan Dienst et al., <i>NJ NAACP Leader Calls for Paterson Mail-In Vote to Be Canceled Amid Cor- ruption Claims</i> , NBC NEW YORK (May 27, 2020) 15	
Federal Farmer, No. 12 (1788), <i>reprinted in</i> 2 THE FOUNDERS' CONSTITUTION (Philip B. Kurland & Ralph Lerner eds., 1987) .....	7

Sarah Fenske, <i>FBI, Secretary of State Asking Questions About St. Louis Statehouse Race</i> , RIVERFRONT TIMES (Aug. 16, 2016) .....	12
GAO-14-634, <i>Elections: Issues Related to State Voter Identification Laws</i> 62-63 (U.S. Gov't Accountability Office Sept. 2014) .....	10, 11
Richard Gonzales, <i>North Carolina GOP Operative Faces New Felony Charges That Allege Ballot Fraud</i> , NPR.ORG, (July 30, 2019) .....	13
Brian Heffernan, <i>Berkeley Mayor Hoskins Charged with 5 Felony Counts of Election Fraud</i> , ST. LOUIS PUBLIC RADIO (Nov. 21, 2019) .....	12
<i>In re: Investigation of Irregularities Affecting Counties Within the 9th Congressional District</i> , North Carolina Board of Elections, Evidentiary Hearing, at 2-3 .....	13
Ben Kochman, <i>Bronx politician pleads guilty in absentee ballot scheme for Assembly election</i> , NEW YORK DAILY NEWS (Nov. 22, 2016) .....	14
Robert G. Natelson, <i>The Original Scope of the Congressional Power to Regulate Elections</i> , 13 U. PA. J. CONST. L. 1, 31 (2010) .....	7
News21, <i>Election Fraud in America</i> .....	11
THE FEDERALIST NO. 57, at 350 (C. Rossiter, ed. 2003) (Madison, J.) .....	7
The Heritage Foundation, <i>Election Fraud Cases</i> ...	11, 12

U.S. Dep't of Justice, <i>Federal Prosecution of Election Offenses</i> (8th ed. Dec. 2017) .....	3, 4
--	------

RETRIEVED FROM DEMOCRACYDOCKET.COM

## STATEMENT OF INTEREST OF *AMICI*

“In the context of a Presidential election,” state actions “implicate a uniquely important national interest,” because “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, 794–95 (1983). “For the President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation.” *Id.*

*Amici curiae* are the States of Missouri, Alabama, Arkansas, Florida, Indiana, Kansas, Louisiana, Mississippi, Montana, Nebraska, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, and West Virginia.<sup>1</sup> *Amici* have several important interests in this case. *First*, the States have a strong interest in safeguarding the separation of powers among state actors in the regulation of Presidential elections. The Electors Clause of Article II, § 1 carefully separates power among state actors, and it assigns a specific function to the “Legislature thereof” in each State. U.S. CONST. art. II, § 1, cl. 4. Our system of federalism relies on separation of powers to preserve liberty at every level of government, and the separation of powers in the Electors Clause is no exception. The States have a strong interest in preserving the proper roles of state legislatures in the administration of federal elections, and thus safeguarding the individual liberty of their citizens.

---

<sup>1</sup> This brief is filed under Supreme Court Rule 37.4, and all counsel of record received timely notice of the intent to file this amicus brief under Rule 37.2.

*Second*, *amici* States have a strong interest in ensuring that the votes of their own citizens are not diluted by the unconstitutional administration of elections in other States. When non-legislative actors in other States encroach on the authority of the “Legislature thereof” in that State to administer a Presidential election, they threaten the liberty, not just of their own citizens, but of every citizen of the United States who casts a lawful ballot in that election—including the citizens of *amici* States.

*Third*, for similar reasons, *amici* States have a strong interest in safeguarding against fraud in voting by mail during Presidential elections. “Every voter” in a federal election, “has a right under the Constitution to have his vote fairly counted, without its being distorted by fraudulently cast votes.” *Anderson v. United States*, 417 U.S. 211, 227 (1974). Plaintiff’s Bill of Complaint alleges that non-legislative actors in the Defendant States stripped away important safeguards against fraud in voting by mail that had been enacted by the Legislature in each State. *Amici* States share a vital interest in protecting the integrity of the truly national election for President and Vice President of the United States.

## SUMMARY OF ARGUMENT

The Bill of Complaint raises constitutional questions of great public importance that warrant this Court’s review. First, like every similar provision in the Constitution, the separation-of-powers provision of the Electors Clause provides an important structural check on government designed to protect individual liberty. By allocating authority over



Presidential electors to the “Legislature thereof” in each State, the Clause separates powers both vertically and horizontally, and it confers authority on the branch of state government most responsive to the democratic will. Encroachments on the authority of state Legislatures by other state actors violate the separation of powers and threaten individual liberty.

The unconstitutional encroachments on the authority of state Legislatures in this case raise particularly grave concerns. For decades, responsible observers have cautioned about the risks of fraud and abuse in voting by mail, and they have urged the adoption of statutory safeguards to prevent such fraud and abuse. In the numerous cases identified in the Bill of Complaint, non-legislative actors in each Defendant State repeatedly stripped away the statutory safeguards that the “Legislature thereof” had enacted to protect against fraud in voting by mail. These changes removed protections that responsible actors had recommended for decades to guard against fraud and abuse in voting by mail. The allegations in the Bill of Complaint raise important questions about election integrity and public confidence in the administration of Presidential elections. This Court should grant Plaintiff leave to file the Bill of Complaint.

### ARGUMENT

The Electors Clause provides that each State “shall appoint” its Presidential electors “in such Manner as the *Legislature thereof* may direct.” U.S. CONST. art. II, § 1, cl. 4 (emphasis added). Moreover, “[o]ur constitutional system of representative government only works when the worth of honest

ballots is not diluted by invalid ballots procured by corruption.” U.S. Dep’t of Justice, *Federal Prosecution of Election Offenses*, at 1 (8th ed. Dec. 2017). “When the election process is corrupted, democracy is jeopardized.” *Id.* The proposed Bill of Complaint raises serious concerns about both the constitutionality and ballot security of election procedures in the Defendant States. Given the importance of public confidence in American elections, these allegations raise questions of great public importance that warrant this Court’s expedited review.

**I. The Separation-of-Powers Provision of the Electors Clause Is a Structural Check on Government That Safeguards Liberty.**

Article II requires that each State “shall appoint” its Presidential electors “in such Manner as the *Legislature thereof* may direct.” U.S. CONST. art. II, § 1, cl. 4 (emphasis added); *see also id.* art. I, § 4, cl. 2 (providing that, in each State, the “Legislature thereof” shall establish “[t]he Times, Places and Manner of holding Elections for Senators and Representatives”).

Thus, “in the case of a law enacted by a state legislature applicable not only to elections to state offices, but also to the selection of Presidential electors, the legislature is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under Art. II, § 1, cl. 2, of the United States Constitution.” *Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70, 76 (2000). “[T]he state legislature’s power to select the

manner for appointing electors is plenary.” *Bush v. Gore*, 531 U.S. 98, 104 (2000).

Here, as set forth in the Bill of Complaint, non-legislative actors in each Defendant State have purported to “alter[] an important statutory provision enacted by the [State’s] Legislature pursuant to its authority under the Constitution of the United States to make rules governing the conduct of elections for federal office.” *Republican Party of Pennsylvania v. Boockvar*, No. 20-542, 2020 WL 6304626, at \*1 (U.S. Oct. 28, 2020) (Statement of Alito, J.). See Bill of Complaint, ¶¶ 41-127. In doing so, these non-legislative actors may have encroached upon the “plenary” authority of those States’ respective legislatures over the conduct of the Presidential election in each State. *Bush v. Gore*, 531 U.S. at 104. This encroachment on the authority of each State’s Legislature violated the separation of powers set forth in the Electors Clause. “[I]n the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest. For the President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation.” *Anderson*, 460 U.S. at 794–795.

In every other context, this Court recognizes that the Constitution’s separation-of-powers provisions are designed to preserve liberty. “It is the proud boast of our democracy that we have ‘a government of laws, and not of men.’” *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting). “The Framers of the Federal Constitution . . . viewed the principle of separation of powers as the absolutely central guarantee of a just Government.” *Id.* “Without a

secure structure of separated powers, our Bill of Rights would be worthless, as are the bills of rights of many nations of the world that have adopted, or even improved upon, the mere words of ours.” *Id.* “The purpose of the separation and equilibration of powers in general . . . was not merely to assure effective government but to preserve individual freedom.” *Id.* at 727.

This principle of preserving liberty applies both to the horizontal separation of powers among the branches of government, and the vertical separation of powers between the federal government and the States. “The federal system rests on what might at first seem a counterintuitive insight, that ‘freedom is enhanced by the creation of two governments, not one.’” *Bond v. United States*, 564 U.S. 211, 220–21 (2011) (quoting *Alden v. Maine*, 527 U.S. 706, 758 (1999)). “[F]ederalism secures to citizens the liberties that derive from the diffusion of sovereign power.” *Bond*, 564 U.S. at 221 (2011) (quoting *New York v. United States*, 505 U.S. 144, 181 (1992)). “Federalism also protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions.” *Id.* Moreover, “federalism enhances the opportunity of all citizens to participate in representative government.” *FERC v. Mississippi*, 456 U.S. 742, 789 (1982) (O’Connor, J., concurring in part and dissenting in part). “Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny

and abuse from either front.” *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

The explicit grant of authority to state *Legislatures* in the Electors Clause effects both a horizontal and a vertical separation of powers. The Clause allocates to each State—not to federal actors—the authority to dictate the manner of selecting Presidential Electors. And within each State, it explicitly allocates that authority to a single branch of state government: to the “Legislature thereof.” U.S. CONST. art. II, § 1, cl. 4.

It is no accident that the Constitution allocates such authority to state Legislatures, rather than executive officers such as Secretaries of State, or judicial officers such as state Supreme Courts. The Constitutional Convention’s delegates frequently recognized that the Legislature is the branch most responsive to the People and most democratically accountable. *See, e.g.,* Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. PA. J. CONST. L. 1, 31 (2010) (collecting ratification documents expressing that state legislatures were most likely to be in sympathy with the interests of the people); Federal Farmer, No. 12 (1788), *reprinted in* 2 THE FOUNDERS’ CONSTITUTION (Philip B. Kurland & Ralph Lerner eds., 1987) (arguing that electoral regulations “ought to be left to the state legislatures, they coming far nearest to the people themselves”); THE FEDERALIST NO. 57, at 350 (C. Rossiter, ed. 2003) (Madison, J.) (stating that the “House of Representatives is so constituted as to support in its members an habitual recollection of their dependence on the people”); *id.* (stating that the “vigilant and manly spirit that actuates the people of

America” is greatest restraint on the House of Representatives).

Democratic accountability in the method of selecting the President of the United States is a powerful bulwark safeguarding individual liberty. By identifying the “Legislature thereof” in each State as the regulator of elections for federal officers, the Electors Clause of Article II, § 1 prohibits the very arrogation of power over Presidential elections by non-legislative officials that the Defendant States perpetrated in this case. By violating the Constitution’s separation of powers, these non-legislative actors undermined the liberty of all Americans, including the voters in *amici* States.

## **II. Stripping Away Safeguards From Voting by Mail Exacerbates the Risks of Fraud.**

By stripping away critical safeguards against ballot fraud in voting by mail, non-legislative actors in the Defendant States inflicted another grave injury on the conduct of the recent election: They enhanced the risks of fraudulent voting by mail without authority. An impressive body of public evidence demonstrates that voting by mail presents unique opportunities for fraud and abuse, and that statutory safeguards are critical to reduce such risks of fraud.

For decades prior to 2020, responsible observers emphasized the risks of fraud in voting by mail, and the importance of imposing safeguards on the process of voting by mail to allay such risks. For example, in *Crawford v. Marion County Election Board*, this Court held that fraudulent voting “perpetrated using absentee ballots” demonstrates “that not only is the risk of voter fraud real but that *it could affect the*

*outcome of a close election.” Crawford v. Marion County Election Bd.*, 553 U.S. 181, 195-96 (2008) (opinion of Stevens, J.) (emphasis added).

As noted by Plaintiff, the Carter-Baker Commission on Federal Election Reform emphasized the same concern. The bipartisan Commission—co-chaired by former President Jimmy Carter and former Secretary of State James A. Baker—determined that “[a]bsentee ballots remain 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) (“Carter-Baker Report”).<sup>2</sup> According to the Carter-Baker Commission, “[a]bsentee balloting is vulnerable to abuse in several ways.” *Id.* “Blank ballots mailed to the wrong address or to large residential buildings might be intercepted.” *Id.* “Citizens who vote at home, at nursing homes, at the workplace, or in church are more susceptible to pressure, overt and subtle, or to intimidation.” *Id.* “Vote buying schemes are far more difficult to detect when citizens vote by mail.” *Id.*

Thus, the Commission noted that “absentee balloting in other states has been a major source of fraud.” *Id.* at 35. It emphasized that voting by mail “increases the risk of fraud.” *Id.* And the Commission recommended that “States ... need to do more to prevent ... absentee ballot fraud.” *Id.* at v.

The Commission specifically recommended that States should implement and reinforce safeguards to prevent fraud in voting by mail. The Commission recommended that “States should make sure that

---

<sup>2</sup> Available at <https://www.legislationline.org/download/id/1472/file/-3b50795b2d0374cbef5c29766256.pdf>.

absentee ballots received by election officials before Election Day are kept secure until they are opened and counted.” *Id.* at 46. It also recommended that States “prohibit[] ‘third-party’ organizations, candidates, and political party activists from handling absentee ballots.” *Id.* And the Commission highlighted that a particular state “appear[ed] to have avoided significant fraud in its vote-by-mail elections by introducing *safeguards to protect ballot integrity, including signature verification.*” *Id.* at 35 (emphasis added). The Commission concluded that “[v]ote by mail is ... likely to increase the risks of fraud and contested elections ... where the safeguards for ballot integrity are weaker.” *Id.*

The most recent edition of the U.S. Department of Justice’s Manual on *Federal Prosecution of Election Offenses*, published by its Public Integrity Section, highlights the very same concerns about fraud in voting by mail. U.S. Dep’t of Justice, *Federal Prosecution of Election Offenses* (8th ed. Dec. 2017), at 28-29 (“DOJ Manual”).<sup>3</sup> The Manual states: “Absentee ballots are particularly susceptible to fraudulent abuse because, by definition, they are marked and cast outside the presence of election officials and the structured environment of a polling place.” *Id.* The Manual reports that “the more common ways” that election-fraud “crimes are committed include . . . [o]btaining and marking absentee ballots without the active input of the voters involved.” *Id.* at 28. And the Manual notes that “[a]bsentee ballot

---

<sup>3</sup> Available at <https://www.justice.gov/criminal/file/1029066/download>.



frauds” committed both with and without the voter’s participation are “common.” *Id.* at 29.

Similarly, the U.S. Government Accountability Office concluded that many crimes of election fraud likely go undetected. In 2014, discussing election fraud, the GAO reported that “crimes of fraud, in particular, are difficult to detect, as those involved are engaged in intentional deception.” GAO-14-634, *Elections: Issues Related to State Voter Identification Laws* 62-63 (U.S. Gov’t Accountability Office Sept. 2014).<sup>4</sup>

Despite the difficulties of detecting fraud schemes, recent experience contains many well-documented examples of absentee ballot fraud. For example, the News21 database, which was compiled to *refute* arguments that voter fraud is prevalent, identified 491 cases of absentee ballot over the 12-year period from 2000 to 2012—approximately 41 cases per year. See News21, *Election Fraud in America*.<sup>5</sup> This database reports that “Absentee Ballot Fraud” was “[t]he most prevalent fraud” in America, comprising “24 percent (491 cases)” of all cases reported in the public records surveyed. *Id.* Moreover, the database indicates that this number undercounts the total incidence of reported cases of absentee ballot fraud, because it was based on public-record requests to state and local government entities, many of which did not respond. *Id.*

---

<sup>4</sup> Available at <https://www.gao.gov/assets/670/665966.pdf>.

<sup>5</sup> Available at <https://votingrights.news21.com/interactive/election-fraud-data-base/&xid=17259,15700023,15700124,15700149,15700186,15700191,15700201,15700237,15700242>

Likewise, the Heritage Foundation’s online database of election-fraud cases—which includes only a “sampling” of cases that resulted in an *adjudication* of fraud, such as a criminal conviction or civil penalty—identified 207 cases of proven “fraudulent use of absentee ballots” in the United States. The Heritage Foundation, *Election Fraud Cases*.<sup>6</sup> Again, this database undercounts the incidence of cases of election fraud: “The Heritage Foundation’s Election Fraud Database presents a sampling of recent proven instances of election fraud from across the country. This database is not an exhaustive or comprehensive list.” *Id.*

The public record abounds with recent examples of such fraudulent absentee-ballot schemes. For example, in November 2019, the mayor of Berkeley, Missouri was indicted on five felony counts of absentee ballot fraud for changing votes on absentee ballots to help him and his political allies to get elected. Brian Heffernan, *Berkeley Mayor Hoskins Charged with 5 Felony Counts of Election Fraud*, ST. LOUIS PUBLIC RADIO (Nov. 21, 2019).<sup>7</sup> Mayor Hoskins’ scheme included “going to the home of elderly ... residents” to harvest absentee ballots, “filling out absentee ballot applications for voters and having his campaign workers do the same,” and “altering absentee ballots” after he had procured them from voters. *Id.* Again, in 2016, a state House race in Missouri was overturned amid allegations of

---

<sup>6</sup> Available at [https://www.heritage.org/voterfraud/search?combine=&state=All&year=&case\\_type=All&fraud\\_type=24489&page=12](https://www.heritage.org/voterfraud/search?combine=&state=All&year=&case_type=All&fraud_type=24489&page=12).

<sup>7</sup> Available at <https://news.stlpublicradio.org/post/berkeley-mayor-hoskins-charged-5-felony-counts-election-fraud#stream/0>

widespread absentee-ballot fraud that had occurred across multiple election cycles in the same community. Sarah Fenske, *FBI, Secretary of State Asking Questions About St. Louis Statehouse Race*, RIVERFRONT TIMES (Aug. 16, 2016).<sup>8</sup> One candidate stated that it was widely known in the community that the incumbent ran an “absentee game” that resulted in the absentee vote tipping the outcome in her favor in multiple close elections. *Id.*

Other States have similar experiences. In 2018, a federal Congressional race was overturned in North Carolina, and eight political operatives were indicted for fraud, in an absentee-ballot scheme that sufficed to change the outcome of the election. Richard Gonzales, *North Carolina GOP Operative Faces New Felony Charges That Allege Ballot Fraud*, NPR.ORG, (July 30, 2019).<sup>9</sup> The indicted operatives “had improperly collected and possibly tampered with ballots,” and were charged with “improperly mailing in absentee ballots for someone who had not mailed it themselves.” *Id.*

In the North Carolina case, the lead investigator testified that the investigation was “a continuous case” over two election cycles, and that the scheme involved collecting absentee ballots from voters, altering the absentee ballots, and forging witness signatures on the ballots. *See In re: Investigation of Irregularities Affecting Counties Within the 9th*

---

<sup>8</sup> Available at <https://www.riverfronttimes.com/newsblog/2016/08/16/fbi-secretary-of-state-asking-questions-about-st-louis-statehouse-race>.

<sup>9</sup> Available at <https://www.npr.org/2019/07/30/746800630/north-carolina-gop-operative-faces-new-felony-charges-that-allege-ballot-fraud>.

*Congressional District*, North Carolina Board of Elections, Evidentiary Hearing, at 2-3.<sup>10</sup> The investigators described it as a “coordinated, unlawful, and substantially resourced absentee ballots scheme.” *Id.* at 2. According to the investigators’ trial presentation, the investigation involved 142 voter interviews, 30 subject and witness interviews, and subpoenas of documents, financial records, and phone records. *Id.* at 3. The perpetrators collected absentee ballots and falsified ballot witness certifications outside the presence of the voters. *Id.* at 10, 13. The congressional election at issue was decided by margin of less than 1,000 votes. *Id.* at 4. The scheme involved the submission of well over 1,000 fraudulent absentee ballots and request forms. *Id.* at 11. The perpetrators took extensive steps to conceal the fraudulent scheme, which lasted over multiple election cycles before it was detected. *Id.* at 14.

Similarly, in 2016, a politician in the Bronx was indicted and pled guilty to 242 counts of election fraud based on an absentee ballot fraud scheme. Ben Kochman, *Bronx politician pleads guilty in absentee ballot scheme for Assembly election*, NEW YORK DAILY NEWS (Nov. 22, 2016).<sup>11</sup> Despite pleading guilty to 242 felonies involving absentee ballot fraud in an election that was decided by two votes, the defendant received no jail time and vowed to run for office again after a short disqualification period. *Id.*

---

<sup>10</sup> Available at [https://images.radio.com/wbt/Voter%20ID\\_%20Website.pdf](https://images.radio.com/wbt/Voter%20ID_%20Website.pdf).

<sup>11</sup> Available at <http://www.nydailynews.com/new-york/nyc-crime/bronx-pol-pleads-guilty-absentee-ballot-scheme-article-1.2884009>.

The increases in mail-in voting due to the COVID-19 pandemic likewise increased opportunities for fraud. For instance, in May 2020, the leader of the New Jersey NAACP called for an election in Paterson, New Jersey to be overturned due to widespread mail-in ballot fraud. See Jonathan Dienst et al., *NJ NAACP Leader Calls for Paterson Mail-In Vote to Be Canceled Amid Corruption Claims*, NBC NEW YORK (May 27, 2020).<sup>12</sup> “Invalidate the election. Let’s do it again,” [the NAACP leader] said amid reports more than 20 percent of all ballots were disqualified, some in connection with voter fraud allegations.” *Id.*

Hundreds of other reported cases highlight the same concerns about the vulnerability of voting by mail to fraud and abuse. Recently, a Missouri court considered extensive expert testimony reviewing absentee-ballot fraud cases like these. *Findings of Fact, Conclusions of Law, and Final Judgment in Mo. State Conference of the NAACP v. State*, No. 20AC-CC00169-01 (Circuit Court of Cole County, Missouri Sept. 24, 2020), *aff’d*, 607 S.W.3d 728 (Mo. banc Oct. 9, 2020) (“*Mo. NAACP*”). The court held that cases of absentee-ballot fraud “have several common features that persist across multiple recent cases: (1) close elections; (2) perpetrators who are candidates, campaign workers, or political consultants, not ordinary voters; (3) common techniques of ballot harvesting; (4) common techniques of signature forging; (5) fraud that persisted across multiple elections before it was detected; (6) massive resources

---

<sup>12</sup> Available at <https://www.nbcnewyork.com/news/politics/nj-naACP-leader-calls-for-paterson-mail-in-vote-to-be-canceled-amid-fraud-claims/2435162/>.

required to investigate and prosecute the fraud; and (7) lenient criminal penalties.” *Id.* at 17. Thus, the court concluded “that fraud in voting by mail is a recurrent problem, that it is hard to detect and prosecute, that there are strong incentives and weak penalties for doing so, and that it has the capacity to affect the outcome of close elections.” *Id.* The court held that “the threat of mail-in ballot fraud is real.” *Id.* at 2.

### **III. The Bill of Complaint Alleges that the Defendant States Unconstitutionally Abolished Critical Safeguards Against Fraud in Voting by Mail.**

The Bill of Complaint alleges that non-legislative actors in each Defendant State unconstitutionally abolished or diluted statutory safeguards against fraud enacted by their state Legislatures, in violation of the Presidential Electors Clause. U.S. CONST. art. II, § 1, cl. 4. All the unconstitutional changes to election procedures identified in the Bill of Complaint have two common features: (1) They abrogated statutory safeguards against fraud that responsible observers have long recommended for voting by mail, and (2) they did so in a way that predictably conferred partisan advantage on one candidate in the Presidential election. Such allegations are serious, and they warrant this Court’s review.

***Abolishing signature verification.*** First, the proposed Bill of Complaint alleges that non-legislative actors in Pennsylvania, Michigan, and Georgia unilaterally abolished or weakened signature-verification requirements for mailed ballots. It alleges that Pennsylvania’s Secretary of State

abrogated Pennsylvania's statutory signature-verification requirement for mail-in ballots in a "friendly" settlement of a lawsuit brought by activists. Bill of Complaint, ¶¶ 44-46. It alleges that Michigan's Secretary of State permitted absentee ballot applications online, with no signature at all, in violation of Michigan statutes, *id.* ¶¶ 85-89; and that election officials in Wayne County, Michigan simply disregarded statutory signature verification requirements, *id.* ¶¶ 92-95. And it alleges that Georgia's Secretary of State unilaterally abrogated Georgia's statute authorizing county registrars to engage in signature verification for absentee ballots in another lawsuit settlement. *Id.* ¶¶ 66-72.

In addition to violating the Electors Clause, these actions, as alleged, contradict fundamental principles of ballot security. As noted above, the Carter-Baker Report highlighted the importance of "*signature verification*" as a critical "safeguard[] to protect ballot integrity" for ballots cast by mail. Carter-Baker Report, *supra*, at 35 (emphasis added). Without safeguards such as signature verification, the Report stated that "[v]ote by mail is ... likely to increase the risks of fraud and contested elections ... where the safeguards for ballot integrity are weaker." *Id.* The importance of signature verification is hard to overstate, because absentee-ballot fraud schemes commonly involve "common techniques of signature forging," typically by nefarious actors who are unfamiliar with the voter's signature. *Mo. NAACP*, *supra*, at 17. Verifying the voter's signature thus provides a fundamental safeguard against fraud.

***Insecure ballot handling.*** The Bill of Complaint alleges that non-legislative actors changed

or abolished statutory rules for the secure handling of absentee and mail-in ballots in Pennsylvania, Michigan, and Wisconsin. It alleges that election officials in Democratic areas of Pennsylvania violated state statutes by opening and reviewing mail-in ballots that were required to be kept locked and secure until Election Day. Bill of Complaint, ¶¶ 50-51. It alleges that Michigan's Secretary of State, acting in violation of state law, sent 7.7 million unsolicited absentee-ballot applications to Michigan voters, thus "flooding Michigan with millions of absentee ballot applications prior to the 2020 general election." *Id.* ¶¶ 80-84. And it alleges that the Wisconsin Election Commission violated state law by placing hundreds of unmonitored boxes for the submission of absentee and mail-in ballots around the State, concentrated in heavily Democratic areas. *Id.* ¶¶ 107-114.

In addition to violating the Electors Clause, these actions, as alleged, contradict commonsense ballot-security recommendations. The Department of Justice's Manual on *Federal Prosecution of Election Offenses* notes that vulnerability to mishandling is what makes absentee ballots "particularly susceptible to fraudulent abuse" because "they are marked and cast outside the presence of election officials and the structured environment of a polling place." DOJ Manual, at 28-29. According to the Manual, "[o]btaining and marking absentee ballots without the active input of the voters involved" is one of "the more common ways" that election fraud "crimes are committed." *Id.* at 28. For this reason, the Carter-Baker Commission made recommendations in favor of preventing such insecurity in the handling of ballots. For example, the Commission recommended that



“States should make sure that absentee ballots received by election officials before Election Day are kept secure until they are opened and counted.” *Id.* at 46. It also recommended that States “prohibit[] ‘third-party’ organizations, candidates, and political party activists from handling absentee ballots.” *Id.*

***Inconsistent Statewide Standards.*** The Bill of Complaint alleges that the Defendant States provided different standards and treatment for mail-in ballots submitted in different areas of each State, and that this differential treatment uniformly provided a partisan advantage to one side in the Presidential election. It alleges that election officials in Philadelphia and Allegheny County, Pennsylvania, applied different standards to voters in those Democratic strongholds than applied to other voters in Pennsylvania, in violation of state law. Bill of Complaint, ¶¶ 52-54. Similarly, it alleges that Milwaukee, Wisconsin violated state law by authorizing election officials to “correct” disqualifying omissions on ballot envelopes by entering information that the voter should have entered with a red pen, while no similar “correction” process was granted to other voters in that State. *Id.* ¶¶ 123-127. And it alleges that Wayne County, Michigan provided differential treatment of its voters, in violation of state statutes, by simply ignoring statutorily required signature-verification requirements. *Id.* ¶¶ 92-95.

Such differential treatment, as alleged under circumstances raising concerns of partisan bias, contradicts universal recommendations for integrity and public confidence in elections. As this Court stated in *Bush v. Gore*, “[t]he idea that one group can be granted greater voting strength than another is

hostile to the one man, one vote basis of our representative government.” 531 U.S. at 107 (quoting *Moore v. Ogilvie*, 394 US 814 (1969)). The Carter-Baker Report noted that “inconsistent or incorrect application of electoral procedures may have the effect of discouraging voter participation and may, on occasion, raise questions about bias in the way elections are conducted.” Carter-Baker Report, at 49. “Such problems raise public suspicions or may provide grounds for the losing candidate to contest the result in a close election.” *Id.*

***Excluding Bipartisan Observers.*** The Bill of Complaint alleges that certain counties in Defendant States excluded bipartisan observers from the ballot-opening and ballot-counting processes. For example, it alleges that election officials in Philadelphia and Allegheny County, Pennsylvania, violated state law by excluding Republican observers from the opening, counting, and recording of absentee ballots in those counties. Bill of Complaint, ¶ 49. And it alleges that election officials in Wayne County, Michigan violated state statutes by systematically excluding poll watchers from the counting and recording of absentee ballots. *Id.* ¶¶ 90-91.

Such actions, as alleged, raise concerns about the integrity of the vote count in those counties. As the Carter-Baker Report emphasized, States should “provide observers with meaningful opportunities to monitor the conduct of the election.” Carter-Baker Report, at 47. “To build confidence in the electoral process, it is important that elections be administered in a neutral and professional manner,” without the appearance of partisan bias.” *Id.* at 49. When observers of one political party are illegally and

systematically excluded from observing the vote count, “the appearance of partisan bias” is inevitable. *Id.* For counties in Defendant States to exclude Republican observers weakens public confidence in the electoral process and raises grave concerns about the integrity of ballot counting in those counties.

***Extending the Deadline to Receive Ballots.***

The Bill of Complaint alleges that a non-legislative actor in Pennsylvania—its Supreme Court—extended the statutory deadline to receive absentee and mail-in ballots without authorization from the “Legislature thereof,” and that it directed that ballots with illegible postmarks or no postmarks at all would be deemed timely if received within the extended deadline. Bill of Complaint, ¶¶ 48, 55. Again, these non-legislative changes raise concerns about election integrity in Pennsylvania. They created a post-election window of time during which nefarious actors could wait and see whether the Presidential election would be close, and whether perpetrating fraud in Pennsylvania would be worthwhile. And they enhanced the opportunities for fraud by mandating that late ballots must be counted even when they are not postmarked or have no legible postmark, and thus there is no evidence they were mailed by Election Day.

These changes created needless vulnerability to actual fraud and undermined public confidence in the election. As the Department of Justice’s Manual of *Federal Prosecution of Election Offenses* states, “the conditions most conducive to election fraud are close factional competition within an electoral jurisdiction for an elected position that matters.” DOJ Manual, at 2-3. “[E]lection fraud is most likely to occur in electoral jurisdictions where there is close factional

competition for an elected position that matters.” *Id.* at 27. That statement exactly describes the conditions in each of the Defendant States in the recent Presidential election.

### CONCLUSION

The allegations in the Bill of Complaint raise important constitutional issues under the Electors Clause of Article II, § 1. They also raise serious concerns relating to election integrity and public confidence in elections. These are questions of great public importance that warrant this Court’s attention. The Court should grant the Plaintiff’s Motion for Leave to File Bill of Complaint.

RETRIEVED FROM DEMOCRACYDOCKET.COM

December 9, 2020

Respectfully submitted,

**ERIC S. SCHMITT**

*Attorney General*

D. John Sauer

*Solicitor General*

*Counsel of Record*

Justin D. Smith

*Deputy Attorney General*

OFFICE OF THE MISSOURI

ATTORNEY GENERAL

Supreme Court Building

207 West High Street

P.O. Box 899

Jefferson City, MO 65102

John.Sauer@ago.mo.gov

(573) 751-8870

*Counsel for Amici Curiae*

#### ADDITIONAL COUNSEL

Steve Marshall

Attorney General

STATE OF ALABAMA

Douglas J. Peterson

*Attorney General*

STATE OF NEBRASKA

Leslie Rutledge

*Attorney General*

STATE OF ARKANSAS

Wayne Stenehjem

*Attorney General*

STATE OF NORTH DAKOTA

Ashley Moody

*Attorney General*

STATE OF FLORIDA

Mike Hunter

*Attorney General*

STATE OF OKLAHOMA

Curtis T. Hill, Jr.  
*Attorney General*  
STATE OF INDIANA

Alan Wilson  
*Attorney General*  
STATE OF SOUTH CAROLINA

Derek Schmidt  
*Attorney General*  
STATE OF KANSAS

Jason R. Ravnsborg  
*Attorney General*  
STATE OF SOUTH DAKOTA

Jeff Landry  
*Attorney General*  
STATE OF LOUISIANA

Herbert H. Slatery III  
*Attorney General*  
STATE OF TENNESSEE

Lynn Fitch  
*Attorney General*  
STATE OF MISSISSIPPI

Sean D. Reyes  
*Attorney General*  
STATE OF UTAH

Tim Fox  
*Attorney General*  
STATE OF MONTANA

Patrick Morrissey  
*Attorney General*  
STATE OF WEST VIRGINIA

RETRIEVED FROM DEMOCRACYDOCKET.COM