**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

# GEORGIA'S OPPOSITION TO TEXAS'S MOTION FOR LEAVE TO FILE BILL OF COMPLAINT AND ITS MOTION FOR PRELIMINARY RELIEF

Christopher M. Carr
Attorney General of Georgia
Andrew A. Pinson
Solicitor General of Georgia
*Counsel of Record*
Ross W. Bergethon
Deputy Solicitor General
Drew F. Waldbeser
Assistant Solicitor General
Office of the Attorney General
40 Capitol Square SW
Atlanta, Georgia 30334
(404) 458-3409
apinson@law.ga.gov

*Counsel for the State of Georgia**

Brian D. Boone
Brandon C.E. Springer
J. Stephen Tagert*
ALSTON & BIRD LLP
101 S. Tryon Street #4000
Charlotte, NC 28280
(704) 444-1000
brian.boone@alston.com
**Admitted to practice in New York only.*

William H. Jordan
Bryan W. Lutz
Lee A. Deneen
William J. Repko
ALSTON & BIRD LLP
1201 West Peachtree Street
Atlanta, Georgia 30309
(404) 881-7000
bill.jordan@alston.com

Joseph H. Hunt
ALSTON & BIRD LLP
950 F Street, NW
Washington, D.C. 20004
Telephone: 202-239-3300
jody.hunt@alston.com

Erik S. Jaffe
James A. Heilpern*
Joshua J. Prince
SCHAERR | JAFFE LLP
1717 K Street NW, Suite
900 Washington, DC 20006
(202) 787-1060
ejaffe@schaerr-jaffe.com
**Admitted to practice in Virginia.*

*Counsel for the State of Georgia*

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## INTRODUCTION

"None are more conscious of the vital limits on judicial authority than are the members of this Court, and none stand more in admiration of the Constitution's design to leave the selection of the President to the people, through their legislatures, and to the political sphere." *Bush v. Gore*, 531 U.S. 98, 111 (2000) (per curiam). That is as it should be, given that the Constitution vests each State with the power to "appoint, in such manner as the Legislature thereof may direct, a number of electors." U.S. Const. art. II, § 1, cl. 2. And that reality requires that Texas's motions challenging the results of the presidential election in Georgia be denied.

Contrary to Texas's argument, Georgia has exercised its powers under the Electors Clause. Georgia's legislature enacted laws governing elections and election disputes, and the State and its officers have implemented and followed those laws. To ensure the accuracy of the results of that process, it has completed three total counts of the vote for its presidential electors, including a historic 100 percent manual recount—all in accordance with state law. It has, consistent with its authority under 3 U.S.C. § 5, authorized its courts to resolve election disputes. *See Bush*, 531 U.S. at 112 (Rehnquist, C.J., concurring, with Scalia, J. and Thomas, J.) ("In most cases, comity and respect for federalism compel [this Court] to defer to the decisions of state courts on issues of state law"—a practice that "reflects [the Court's] understanding that the decisions of state courts are definitive pronouncements of the will of the States as sovereigns."). It has defended its election process in

multiple lawsuits in the State. And the disputes that challengers have filed in the State have all resolved in Georgia's favor.

Texas nevertheless asks this Court to transfer Georgia's electoral powers to the federal judiciary. Respect for federalism and the constitutional design prohibits that transfer of power, but this Court should never even reach that issue because the Court's rules governing its original jurisdiction, constitutional limitations on standing, and principles of federalism all preclude the exercise of this Court's original jurisdiction over Texas's belated action.

This Court should deny Texas's motions.

## STATEMENT

1. This election cycle, Georgia did what the Constitution empowered it to do: it implemented processes for the election, administered the election in the face of logistical challenges brought on by COVID-19, and confirmed and certified the election results—again and again and again.

Yet Texas has sued Georgia anyway, asserting claims based on essentially four factual allegations—(1) Georgia's State Election Board adopted State Rule 183-1-14-0.9-.15, which allowed county election officials before November 3 to begin processing (but not tabulating) the record-setting number of absentee ballots cast during the pandemic (Compl. ¶ 67); (2) Georgia's Secretary of State, represented by the Georgia Attorney General's office, entered into a settlement agreement providing that (i) the Secretary of State would send a communication to the counties that recommended best practices for reviewing ballots,

which included a panel of three registrars or clerks (instead of only one) to review absentee ballots with questionable signatures, although only one member makes the final decision with agreement from at least one other member, (ii) state election officials should consider providing county officials with certain guidance and training materials (*id.* ¶¶ 70–71); and (3) Georgiawould enforce its voluntarily promulgated State Election Board regulation requiring prompt notification of absentee ballot rejection, but also providing voters with telephonic notice of any deficiencies (*id.* ¶ 71).

Those measures complied with Georgia law. Take the State Election Board's processing rule first. Under Georgia law, the State Elections Board has authority "[t]o formulate, adopt, and promulgate such rules and regulations . . . as will be conducive to the fair, legal, and orderly conduct of primaries and elections" so long as those rules are "consistent with law." O.C.G.A. 21-2-31(2). The State Elections Board exercised that statutory authority by adopting State Rule 183-1-14-0.9-.15. Indeed, a different statute—O.C.G.A. § 21-2-386—allows the State Elections Board to preliminarily review absentee ballots before Election Day, and expressly provides the county election superintendent with "discretion" to tabulate ballots prior to the close of the polls even in regular times. *Id.* at § 21-2-386(a)(1)(B), (a)(3) (allowing the registrar, "[u]pon receipt of each ballot" to begin steps that include certifying signatures, and that the "county election superintendent may . . . choose[] to open the inner envelopes and begin tabulating such ballots prior to the close of the polls on the day of the primary, election, or runoff"). In taking these actions, the State Elections

Board followed State law and enabled registrars to process efficiently and accurately a record-setting number of absentee ballots.

As for the signature-verification guidance, neither communications with counties to recommend best practices on how to analyze absentee-ballot signatures, nor alerting a voter of ballot deficiencies by telephone and in writing presents any conflict with State law. Texas cites no Georgia law suggesting otherwise. Nor does Texas cite any Georgia law suggesting that an election official cannot even *consider* sending guidance and training materials to county officials.

Texas suggests that those lawful implementation measures, and not the Georgia Legislature's actions, resulted in election officials' rejecting absentee ballots at a "seventeen times" lower rate in 2020 than in 2016. Compl. ¶ 75. But there is no basis for Texas's speculation about the reasons for the alleged differences in rejection rates. Rejection rates for *signatures* on absentee ballots remained largely unchanged. *See Wood v. Raffensperger*, No. 1:20-cv-04651-SDG, 2020 WL 6817513, at *10 (N.D. Ga. Nov. 20, 2020). But overall rejection rates were influenced by many factors, including significant legislative action. In 2019, the Georgia Legislature eliminated certain information that voters had been required to provide on absentee ballots during the 2016 election cycle; for instance, because of the 2019 legislative changes, in 2020, voters casting mail-in ballots were not required to write their date of birth and address on the ballot before submitting it. H.B. 316, 236 Gen. Assemb., Reg. Sess. (Ga. 2019). That same law adopted a cure process, giving absentee voters the opportunity to cure deficient or missing signatures on absentee

ballots. That process did not exist in Georgia law prior to 2019. Those changes by the Georgia Legislature in 2019—combined with the 2020 election's record turnout and extensive public and private educational efforts regarding voting procedures—explain the allegedly lower rejection rates better than Texas's fact-less speculation about the (lawful) steps taken to process absentee ballots.

2. Following the November 3 General Election, Georgia took additional steps to ensure the security, reliability, and integrity of its electoral process. First, in accordance with O.C.G.A. § 21-2-498, Georgia completed a risk-limiting audit. To satisfy the statutory audit requirements, Secretary of State Brad Raffensperger could have chosen a sample size of ballots for *any* race, but he selected the presidential election, recognizing its significance. The audit resulted in a manual count of nearly 5 million ballots cast—a process that lasted the better part of a week and required the State to deploy immense human and financial resources. Ultimately, the audit confirmed the initial election results, and Secretary Raffensperger certified the results on November 20, 2020.

That was not all. Responding to the Trump Campaign's request, Georgia undertook a machine tabulation recount of the nearly 5 million ballots. Again, the recount confirmed the initial election results. So Secretary Raffensperger recertified the state's results again on December 7, 2020.

3. Against that backdrop, Texas alleges that Georgia violated the Electors Clause (but unlike with other States, does not plead facts even suggesting

violations of the Equal Protection Clause or Due Process Clause). Texas asks this Court to override Georgia's election results, enjoin its electors from participating in the election, and command Georgia's Legislature to either re-appoint new electors or forgo presenting electors at all and let the House and Senate select the President and Vice President.

Texas's claims are no different than the multiple cases pressed in state and federal courts in Georgia over the past weeks. Since the November election, there have been at least six Georgia cases alleging that state election officials violated the law by acting in accordance with the State's settlement agreement or by adopting State Rule 183-1-14-0.9-.15. *See, e.g.*, *Wood v. Raffensperger*, No. 1:20-cv-04651-SDG (N.D. Ga.); *Pearson et al. v. Kemp et al.*, No. 1:20-cv-04809-TCB (N.D. Ga.); *Wood v. Raffensperger et al.*, No. 2020-CV-342959 (Fulton Cnty. Sup. Ct.); *Boland v. Raffensperger*, No. 2020-CV-343018 (Fulton Cnty. Sup. Ct.); *Della Polla v. Raffensperger,* No. 20-1-7490 (Cobb Cnty. Sup. Ct); *Trump et al. v. Raffensperger et al.*, No. 2020-CV-343255 (Fulton Cnty. Sup. Ct.). And none of that litigation has gone anywhere. The Eleventh Circuit, the Northern District of Georgia, and the Superior Courts of Fulton County and Cobb County, Georgia have rejected all the claims except for in one case, which was filed just this week and is thus still winding through Georgia's courts just as the Georgia Legislature envisioned. In the one remaining case, *Trump et al. v. Raffensperger et al.*, No. 2020-CV-343255, which was not approved for filing until December 7, 2020, due to filing errors made by the plaintiffs, it is the *plaintiffs* who have *withdrawn* their

emergency motion for relief as of December 8, 2020, slowing the ultimate resolution of that action.

Despite those rulings, Texas now asserts virtually identical claims hoping that this Court will accept the arguments that Georgia courts have rejected. This Court should reject Texas's claims—both because the Court lacks jurisdiction and because Texas has not shown a likelihood of success in any event.

## ARGUMENT

### I. Texas lacks standing.

Texas lacks Article III standing to pursue its claims. Texas alleges two types of injuries—a direct injury to the State and a supposed injury to its Electors, whom Texas seeks to represent in a *parens patriae* capacity. Neither is cognizable.

A. Texas argues that it has suffered a direct injury because "the States have a distinct interest in who is elected *Vice President* and thus who can cast the tie-breaking vote in the Senate." Mot. for TRO 14–15 (emphasis in original); *see also id.* at 15 (arguing that a "Plaintiff State suffers an Article III injury when another State violates federal law to affect the outcome of a presidential election"). Under governing precedent, that is not an injury in fact. A State—like any plaintiff—has standing only if it alleges an injury that is actual or imminent, concrete, and particularized. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (citing *Lujan*, 504 U.S. at 560); *see also id.* (injury in fact is the "[f]irst and foremost" of the standing elements) (quoting *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 103 (1998)). But Texas has no cognizable interest specific to Texas in how the Vice President

votes. Texas's interest is in its own representation in the Senate; Georgia has not impaired that interest. Texas still has two Senators, and those Senators may represent Texas's interests however they choose. Even by its own logic, Texas has suffered no injury.

In any event, Texas's speculation that the Vice President may one day cast a tie-breaking vote is not a cognizable injury. That speculation hinges on many events that may not materialize, including how unidentified Senators may vote concerning unidentified future legislation; whether those Senators will vote exclusively along party lines; the outcome of Georgia's Senate race in January 2021; and how the Vice President may vote in a hypothetical tie-breaking situation involving future legislation. Indeed, certain Vice Presidents—Mr. Biden, for example—never cast a tie-breaking vote during their tenure. Texas's alleged injury is not the type of imminent, concrete, or particularized injury that Article III demands. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410 (2013) (a "threatened injury must be certainly impending to constitute injury in fact" (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990))); *id.* (standing theory that "relies on a highly attenuated chain of possibilities[] does not satisfy the requirement that threatened injury must be certainly impending").

Texas's alleged injury is also not cognizable because it is a generalized grievance—the kind of injury "that is 'plainly undifferentiated and common to all members of the public.'" *Lance v. Coffman*, 549 U.S. 437, 440– 41 (2007) (quoting *United States v. Richardson*, 418 U.S. 166, 176–77 (1974)); *id.* (The only injury plaintiffs allege is that the law—specifically the Elections Clause—has not been followed. This injury is precisely

the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past."); *see also Gill v. Whitford*, 138 S. Ct. 1916, 1923 (2018) (the alleged injury must be "distinct from a 'generally available grievance about government'" (quoting *Lance*, 549 U.S. at 439)).

The injuries that Texas alleges on behalf of its citizens are injuries that would be common to not only every citizen of Texas, but also every citizen of every state. *Cf. Lance*, 549 U.S. at 440 ("To have standing . . . a plaintiff must have more than a general interest common to all members of the public." (quoting *Ex parte Levitt*, 302 U.S. 633, 633 (1962))). And in all events, by Texas's logic any State would have standing to pursue the alleged claims because every State purportedly "suffers an Article III injury when another State violates federal law to affect the outcome of a presidential election" (Mot. for TRO 15). So Texas's injury is specific neither to its citizens nor to Texas as a State. An injury unique to no one is not an injury in fact.

Texas cites no case supporting its assertion that it has suffered an injury in fact. Texas cites *Massachusetts v. Envtl. Prot. Agency* for the proposition that "states seeking to protect their sovereign interests are 'entitled to special solicitude in our standing analysis'" (Mot. for TRO 15 (citing 549 U.S. 497, 520 (2007)), but Texas strips that language of its context. The Court there explained that Massachusetts was entitled to "special solicitude" in the standing analysis because a State has a quasi-sovereign interest in "preserv[ing] its sovereign territory" and because Congress had afforded "a concomitant procedural right to challenge the rejection of its rulemaking petition as

arbitrary and capricious." *Massachusetts*, 549 U.S. at 519–20; *see also Gov't of Manitoba v. Bernhardt*, 923 F.3d 173, 182 (D.C. Cir. 2019) (explaining context of the Court's reasoning). Neither thing is true here. In any case, *Massachusetts* involved a State's loss of coastal property from rising sea levels, which is nothing like Texas's alleged injury (a speculative tie-breaking vote by the Vice President). Texas has not alleged a direct injury in fact.

B. Nor does Texas have standing to raise claims for its electors in a *parens patriae* capacity (*cf.* Mot. for TRO 15). A State may sue *parens patriae* only if it proves that it has Article III standing (*see, e.g.*, *Bernhardt*, 923 F.3d at 178), which Texas hasn't done. But even if it had, Texas would lack *parens patriae* standing because that concept applies only when a State seeks to vindicate the interests of more than a discrete and identifiable subset of its citizens (most often in the health and welfare contexts). *See, e.g.*, *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607 (1982) ("[M]ore must be alleged than injury to an identifiable group of individual residents . . ."); *Pennsylvania v. New Jersey*, 426 U.S. at 665 (a State may not sue *parens patriae* when it is "merely litigating as a volunteer the personal claims of its citizens"). Here, Texas purports to represent the interests of only thirty-eight people (its Electors).

But Texas's problems run even deeper. This Court has explained that "[o]ne helpful indication in determining whether an alleged injury to the health and welfare of its citizens suffices to give the State standing to sue as *parens patriae* is whether the injury is one that the State, if it could, would likely attempt to address through its sovereign lawmaking powers."

*Alfred L. Snapp & Son*, 458 U.S. at 607; *see also Bernhardt*, 923 F.3d at 178 (same). That is not the case here. Under our federalist system, Texas could never "address through its sovereign lawmaking powers" how another State elects its Electors. Texas lacks *parens patriae* standing.

C. Texas also lacks standing because it asserts the rights of third parties. A plaintiff generally "cannot rest his claim to relief on the legal rights or interests of third parties" unless the plaintiff establishes (1) a "close" relationship with the third party and (2) a "hindrance" preventing the third party from asserting her own rights. *Kowalski v. Tesmer*, 543 U.S. 125, 129–30 (2004). Otherwise, the plaintiff fails to present a "particularized" injury. *See Spokeo*, 136 S. Ct. at 1548; *see also Warth v. Seldin*, 422 U.S. 490, 502 (1975) ("Petitioners must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.").

In substance, Texas tries to assert claims that are at least three steps removed from the arguably proper plaintiff: Texas seeks to assert its citizens' rights to representation, which seek to assert Georgia's citizens' voting rights, which really seek to assert the Georgia Legislature's rights to have its plenary authority over voting procedures followed.[1] This Court has held that

[1] The Eleventh Amendment bars Texas citizens from bringing such claims against Georgia in federal court, so Texas cannot circumvent that bar when asserting such individual rights in a *parens patria* capacity. *See Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 465 (1945) ("By reason of the Eleventh Amendment the

derivative or attenuated injuries of that sort are not enough for standing. *See, e.g.*, *Hollingsworth v. Perry*, 570 U.S. 693, 708 (2013) ("It is, however, a 'fundamental restriction on our authority' that '[i]n the ordinary course, a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties.'" (quoting *Powers v. Ohio*, 499 U.S. 400, 410 (1991)).

## II. Texas raises nonjusticiable political questions.

This Court should also deny Texas's motion because it raises nonjusticiable political questions.

Texas seeks to alter how Georgia appoints it electors. Yet there is a "textually demonstrable constitutional commitment" to Georgia's political branches for how the State appoints electors. *Baker* v. *Carr*, 369 U.S. 186, 217 (1962). Texas itself touts the "plenary" authority (Mot. for TRO 27 (quoting *Bush*, 531 U.S. at 104 (per curiam))), of "[e]ach state" to appoint electors "in such Manner as the *Legislature* thereof may direct." U.S. Const. art. II, §1, cl. 2 (emphasis added)); *see also McPherson*, 146 U.S. at 35 ("[F]rom the formation of the government until now the practical construction of the clause has conceded plenary power to the state legislatures in the matter of the appointment of electors."). And Article II limits Congress's authority to directing the time, not the

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judicial power of the United States does not extend to suits brought against a state by a citizen of another state.").

manner, of "chusing" such Electors. U.S. Const. art. II, §1, cl. 4.[2]

Because the "direct grant of authority made under" the Electors Clause empowers the Georgia Legislature, *Bush* v. *Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70, 76 (2000), the means for determining whether executive agents of the legislature are acting in accordance with legislative direction is likewise within the Georgia Legislature's power.

Although this Court has held that "there is a role for the [federal] courts" with respect to protecting individual rights of a state's own citizens in "two areas—one-person, one-vote and racial gerrymandering"—the Court's cases addressing those two areas arose from a "State's drawing of congressional districts" (*Rucho v. Common Cause*, 139 S. Ct. 2484, 2495–96 (2019))—which is not the context here. Beyond those issues, at "no point" has there been any "suggestion that the federal courts had a role to play" either in setting the time, place, and manner of elections, nor "was there any indication that the Framers had ever heard of courts doing such a thing." *Id.* at 2496.

And this Court recently applied the political question doctrine when it rejected expanding the federal courts' role in states' administering of elections even in that context, concluding that "partisan gerrymandering claims present political questions

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[2] Insofar as the provisions of Article I's Elections Clause is read in *pari materia* with Article II's Electors Clause, supervisory authority over the "Manner" of state elections of federal officeholders is given exclusively to Congress, not to federal courts. U.S. Const. Art. I, § 4, cl.1.

beyond the reach of the federal courts," because "[f]ederal judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions." *Id.* at 2506–07. The Court reasoned that "hold[ing] that legislators cannot take partisan interests into account when drawing district lines would essentially countermand the Framers' decision to entrust districting to political entities." *Id.* at 2497.

If that were not enough, there are no judicially discernable or manageable standards for adjudicating Texas's claims. *See Baker*, 369 U.S. at 226. Federal courts may act only when a challenge raises a "claim[] of *legal* right, resolvable according to *legal* principles." *Rucho*, 139 S. Ct. at 2494. To that end, only those questions "historically viewed as capable of resolution through the judicial process" are appropriate for judicial review. *Id.* (quotation omitted). Otherwise, it is a "political question[] that must find [its] resolution elsewhere." *Id.*

That is true here: The novel and far-reaching claims that Texas asserts, and the breathtaking remedies it seeks, are impossible to ground in legal principles and unmanageable. This Court has never allowed one state to co-opt the legislative authority of another state, and there are no limiting or manageable principles to cabin that kind of overreach. If this Court were to entertain Texas's attack on Georgia's sovereignty, it would trample the "historic tradition that all the States enjoy equal sovereignty," *Nw. Austin Mun. Util. Dist. No. One* v. *Holder*, 557 U.S. 193, 203 (2009) (quoting *United States v. Louisiana*, 363 U.S. 1, 16 (1960)).

Consider, for example, the questions that Texas's novel legal theory leaves unresolved. When can this Court hear a case employing Texas's theory of standing? Can state attorneys general controlled by opposing political parties mount any challenge to a federal election that could affect the balance of power, either through the presidency or through a change in either house of Congress? How many votes must be in question for a state to mount a challenge? What state election laws can another state challenge and what laws are off limits? What is the deadline for this Court to resolve those sorts of challenges? Can this Court bind Congress should it decide to accept Electors challenged by a disgruntled state? Is Congress a necessary party to the suit? Those are only a few of the questions that this case presents. Texas does not attempt to answer any of them.

At bottom, the questions presented in this case involve (1) powers granted exclusively to state legislatures and (2) powers granted to state legislatures that are subject to congressional, not judicial, oversight. As with political gerrymandering, exercising judicial authority to override state prerogatives to set their own procedures for resolving internal election disputes would significantly expand the judicial power, one ungrounded in law and lacking any limiting or manageable principle. This Court's cautionary words in *Rucho* are at least as important here as they were in the political gerrymandering context:

> The expansion of judicial authority [sought by the plaintiffs] would not be into just any area of controversy, but into one of the most intensely partisan aspects of

> American political life. That intervention would be unlimited in scope and duration—it would recur over and over again around the country with each new [Presidential election]. Consideration of the impact of today's ruling on democratic principles cannot ignore the effect of the unelected and politically unaccountable branch of the Federal Government assuming such an extraordinary and unprecedented role.

139 S. Ct. at 2507.

For those reasons, this Court's resolving of Texas's proposed original action would violate the Court's long-standing political question doctrine.

## III. Texas's claims do not meet the high standard for an original action against another state.

This Court has exclusive, but discretionary, jurisdiction over "controversies between States that, if arising among independent nations, 'would be settled by treaty or by force.'" *South Carolina v. North Carolina*, 558 U.S. 256, 267 (2010) (quoting *Kansas* v. *Colorado*, 206 U.S. 46, 98 (1907). The Court has reserved its original jurisdiction for those exceptional circumstances involving State actions that "directly" violate another State's rights. *Pennsylvania v. New Jersey*, 426 U.S. at 663 (per curiam). And even then, the availability of another forum in which the issues may be resolved counsels against permitting an original action. *Arizona v. New Mexico*, 425 U.S. 794, 796–97 (1976).

Here, Texas presses a generalized grievance that does not involve the sort of direct state-against-state "controversy" required for original jurisdiction. And in any case, there is another forum in which parties who (unlike Texas) have standing can challenge Georgia's compliance with its own election laws: Georgia's own courts.

### A. The claims presented do not involve a controversy between states.

In deciding whether a case involves the requisite controversy between States, this Court has required an actual—not theoretical or abstract—conflict. *Kansas v. Colorado*, 206 U.S. at 97 ("[W]henever . . . the action of one State reaches through the agency of natural laws *into the territory of another State*, this court is called upon to settle that dispute." (emphasis added)); *Louisiana v. Texas*, 176 U.S. 1, 18 (1900) ("In the absence of agreement [by compact] it may be that a controversy might arise between two States for the determination of which the original jurisdiction of this court be invoked, but there must be a direct issue between them . . . .").

A canvass of this Court's original-jurisdiction cases confirms that direct controversy requirement. The Court has exercised original jurisdiction only when conflict between the States is concrete and unmistakable, not a legal abstraction. Those cases include disputes over things like territorial boundaries or water rights (*see, e.g.*, *Kansas v. Colorado*, 206 U.S. at 98), pollution discharged into a neighboring State (*Missouri v. Illinois*, 180 U.S. 208, 246–47 (1901)), a violation of an interstate contract or compact (*see Texas v. New Mexico*, 462 U.S. 554, 562 (1983)), or a tax

"clearly intended" to reach across state lines to a neighboring state's consumers. *See Maryland v. Louisiana*, 451 U.S. 725, 736 (1981); *accord Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992) ("The model case for invocation of this Court's original jurisdiction is a dispute between States of such seriousness that it would amount to *casus belli* if the States were fully sovereign." (quoting *Texas v. New Mexico*, 462 U.S. at 571 n.18))). All those cases share the feature that one State's actions allegedly injured another State in concrete ways *in that State*.

On the flip side, there is no direct controversy when a State complains about another State's actions that apply to that other State's *own* citizenry or activities within its *own* borders. *See Louisiana v. Texas*, 176 U.S. at 23 (finding no case of controversy 'between a State and citizens of another State'" when a Texas health officer implemented a quarantine embargo on incoming commerce from Louisiana to address yellow fever); *accord Pennsylvania v. New Jersey*, 426 U.S. at 664 ("It has long been the rule that in order to engage this Court's original jurisdiction, a plaintiff State must first demonstrate that the injury for which it seeks redress was directly caused by the actions of another State.").

Texas's motions do not present a controversy between two States. There is no allegation that Georgia targeted Texas with any of the actions that allegedly violate the Electors Clause, the Equal Protection Clause, or the Due Process Clause. Texas concedes, as it must, that the Georgia Legislature has plenary authority to decide how to conduct elections in Georgia. Mot. for TRO 4; *see also* U.S. Const. art. II, § 1, cl. 2 ("Each State shall appoint, *in such Manner as the*

*Legislature thereof may direct*, a Number of Electors . . . ." (emphasis added)); *Bush*, 531 U.S. at 104 ("[T]he state legislature's power to select the manner for appointing electors is plenary."); *McPherson v. Blacker*, 146 U.S. 1, 27 (1892) (a State's chosen manner of delegating adjudication presidential election controversies are the exclusive method of challenging). Yet Texas bases its claims on allegations that *Georgia's* election process violated *Georgia's* laws, thereby depriving *Georgia citizens* of their constitutional right to select electors as the *Georgia Legislature* deemed fit. This Court has never exercised original jurisdiction over such an attenuated "controversy."

### B. There are alternative forums where those with standing can challenge (and are challenging) Georgia's election processes.

Even if Texas had presented a direct controversy between it and Georgia, principles of comity and federalism counsel against the exercise of original jurisdiction, especially given the availability of another forum for those with standing to challenge Georgia's election processes. As this Court has explained,

> In the exercise of our original jurisdiction so as truly to fulfill the constitutional purpose we not only must look to the nature of the interest of the complaining State—the essential quality of the right asserted—but we must also inquire whether recourse to that jurisdiction . . . is necessary for the State's protection. . . . [T]he broad statement that a court having jurisdiction must exercise it . . . is not

> universally true but has been qualified in certain cases where the federal courts may, in their discretion, properly withhold the exercise of the jurisdiction conferred upon them where there is no want of another suitable forum.

*Massachusetts v. Missouri*, 308 U.S. 1, 18–19 (1939). The alternative forum doesn't need to be available to the State seeking to invoke this Court's original jurisdiction. It is enough if the "issues tendered" in the proposed original action may be litigated in another forum. *Arizona v. New Mexico*, 425 U.S. at 797 ("[W]e are persuaded that the pending state-court action provides an appropriate forum in which the issues tendered here may be litigated." (emphasis in original)).

Here, the availability of alternative fora could not be more plain, for the issues that Texas raises are already the subject of numerous lawsuits in Georgia. At bottom, Texas's claims rest on allegations that Georgia election officials violated Georgia law by (i) adopting Georgia Secretary of State Rule 183-1-14-0.9-.15 and (ii) issuing guidance consistent with a settlement agreement entered in *Democratic Party of Georgia v. Raffensperger*, No. 1:19-cv-5028-WMR (N.D. Ga.). But since the General Election on November 3, several suits raising the same issues have made their way through federal and state courts in Georgia, with one still pending. *See, e.g.*, *Wood v. Raffensperger*, No. 1:20-cv-04651-SDG, 2020 WL 6817513, at *10–11 (N.D. Ga. Nov. 20, 2020) (holding that plaintiff failed to demonstrate substantial likelihood of success on claim that the Georgia Secretary of State violated state law by acting in accordance with the settlement

agreement), *aff'd*, No. 20-14418, 2020 WL 7094866 (11th Cir. Dec. 5, 2020); Compl., *Pearson et al. v. Kemp et al.*, No. 1:20-cv-04809-TCB (N.D. Ga. Nov. 25, 2020), ECF No. 1 ¶¶ 59, 62 (claiming that Georgia election officials violated state law by adopting Rule 183-1-14-0.9-.15 and acting in accordance with the settlement agreement); Order on State Defs.' Mot. to Dismiss, *Boland v. Raffensperger*, No. 2020-CV-343018 (Fulton Cnty. Sup. Ct. Dec. 8, 2020) at 4 (dismissing plaintiffs' challenge to the legality of the settlement agreement); Compl., Trump *et al. v. Raffensperger et al.*, No. 2020-CV-343255 (Fulton Cnty. Sup. Ct. Dec. 4, 2020), ¶¶ 142, 278 (similar allegations).[3]

In that regard, the issues presented in Texas's motion stand in contrast to issues uniquely sovereign in nature—like territorial boundaries—that cannot properly be raised by other parties in other forums. *See, e.g.*, *South Carolina v. North Carolina*, 558 U.S. at 259 (invoking original jurisdiction where South Carolina sought equitable apportionment of the Catawba River). That difference requires denial of Texas's motions as to Georgia.

## IV. Texas has not shown that it is entitled to preliminary injunctive relief.

Nor has Texas proved entitlement to its requested preliminary relief.

As a threshold matter, "a party requesting a preliminary injunction must generally show

[3] In addition, Georgia's Election Board adopted Rule 183-1-14-0.9-.15 under the Georgia Administrative Procedure Act, O.C.G.A. §§ 50-13-1 through 50-13-44. Georgia's APA requires and the Election Board app appropriately provided notice of the contemplated rule and an opportunity for public comment.

reasonable diligence." *Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018). Texas filed this motion over a month after the 2020 presidential election and just one day before the congressionally mandated "safe harbor" in relation to the Electoral College. Demanding a rushed exercise of extraordinary power due to time pressures of its own making is not demonstrative of reasonable diligence.

In any event, "[a] preliminary injunction is an extraordinary remedy never awarded as of right." *Winter*, 555 U.S. at 24. To obtain a preliminary injunction, a plaintiff "must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tip in his favor, and [4] that an injunction is in the public interest." *Id.* at 20. Texas has not established these required factors.

### A. Texas has not shown a likelihood of success on the merits.

Consistent with the Electors Clause, U.S. Const., art. II, § 1, cl. 2., the Georgia Legislature has directed the "Manner" of appointing presidential Electors to be through a statewide vote and has delegated authority to the State Board of Elections to promulgate rules and regulations to ensure that this happens. *See* O.C.G.A. §§ 21-2-10; 21-2-31. The Legislature has given the Election Board express authority to "promulgate rules and regulations" to ensure "uniformity" among election officials and a "fair, legal, and orderly" election. O.C.G.A. § 21-2-31.

Texas challenges three of the Board's regulations implementing the election code as supposedly contrary to state law—and thus seeks to supplant the

Legislature's chosen agents and means for resolving election disputes with its own. This same alleged conduct is the basis for all three of Texas's claims. Whatever the label, Texas's claims violate the principles of federalism and separation of powers, are incompatible with Congress's deference to and safe-harbor for state-court mechanisms for resolving presidential election disputes, and would do more damage to legislative prerogatives than anything alleged in the proposed Complaint.

1. As *Bush v. Gore* makes clear, if a court fails to "defer to the [State's] interpretations" as required, then the court unconstitutionally "depart[s] from the legislative scheme." 531 U.S. at 120. That premise—honoring the legislative scheme and its authority—illustrates the difference between this case and *Bush v. Gore*. Here, it is Texas that seeks to alter the "legislative scheme" to deprive the state of its safe-harbor protections and to change Georgia's "statutorily provided apportionment of responsibility." *Id.* at 114.

2. The Georgia Legislature has delegated to the State Election Board (which includes the Secretary of State) the authority to promulgate rules concerning election officers, the conducts of primaries and elections, investigations concerning irregularities, and to define standards of what constitutes a valid vote. O.C.G.A. § 21-2-31. The Board exercised that authority, promulgating the very rules that Texas now complains about. O.C.G.A. § 21-2-386(a)(1)(B). That statute establishes a floor, which the Compromise Settlement Agreement does not lower. Other than requiring the registrar or clerk to compare the signature on the absentee ballot with a signature on file, the statute does not require a single individual to

have *exclusive* decision-making authority regarding initial evaluation, preclude others from assisting in that endeavor, or specify a particular procedure for determining whether the signatures matched. Indeed, the subsequent provision regarding when a ballot may be rejected based on the signature is framed in the passive voice, stating that "if the signature does not appear to be valid . . . the registrar or clerk shall write across the face of the envelope 'Rejected,' giving the reason therefore." O.C.G.A. § 21-2-386(a)(1)(C) Recommending the further safeguard of having the registrar or clerk consult with two co-workers before invalidating a ballot was a reasonable measure to obtain uniformity in the practices and proceedings of election officers.

3. Likewise, the Code allows voters to "cure" certain defects on an absentee ballot within three days of the election. To facilitate that process, Georgia law requires that the "board of registrars or absentee ballot clerk shall promptly notify the elector of such of such rejection" and "retain a copy" of such notification. O.C.G.A. § 21-2-386(a)(1)(C). Once again, the Settlement Agreement and implementing regulations are entirely consistent with this provision. Contrary to Texas's argument, the Settlement calls for enforcement of the State Election Board's voluntarily passed rule requiring prompt notification of rejection of absentee ballots, including telephone notification where possible. State Election Board Rule 183-1-14-.13. That supplemental notification does not remotely conflict with the statute and is a reasonable "rule" that ensures "uniformity" and a "fair, legal, and orderly" election. O.C.G.A. § 21-2-31.

4. The same is true of the Board rule authorizing county election superintendents to begin processing—but not tabulating—absentee ballots three weeks before the election. State Election Board Rule 183-1-14-0.9-.15. That emergency rule addressed a potential conflict in statutory directives brought about by the unusual press of excess ballots in a time of pandemic-related precautions, and which required Board guidance to ensure a "uniformity" and a "fair, legal, and orderly" election. O.C.G.A. § 21-2-31. Given the tremendous surge in absentee ballots expected due to COVID-19, there was a significant risk that the ballots could not be processed quickly enough on election day to meet other statutory requirements in a timely manner. Accordingly, state election officials had to choose which provisions took priority in the face of such conflict. It was entirely within the scope of their delegated authority to determine that it would be more "fair, legal, and orderly" to permit early processing (with strong safeguards for privacy and informational security in place), rather than risk a backlog on election day that would delay the count and endanger other timing requirements.

5. Even if the Board's Emergency pre-processing rule deviated from the statute, it did not do so significantly—and it caused no harm in any event. When reconciling potentially conflicting requirements, the Board is in the best position to choose which of the Legislature's commands take precedence. And its emergency rule preserved all of the safeguards of the statute regarding privacy, non-disclosure, notice, and observers. In any case, the proposed Complaint does not even allege how many ballots were in fact subject to such pre-processing—county superintendents are

not required to start early—so there is no allegation that this violation impacted enough ballots to affect the outcome.

6. In addition, Texas's claims would draw this Court into a sphere that Congress has itself reserved to the States. The federal election code, 3 U.S.C. § 5, "creates a 'safe harbor' for a State insofar as congressional consideration of its electoral votes is concerned." *Palm Beach Cty. Canvassing Bd.*, 531 U.S. at 77. That safe-harbor provision does not impose affirmative duties on state legislatures, but instead governs how Congress and the courts must treat the results of qualifying state procedures.

7. And enacting a state election law setting the manner of choosing Electors is only one part of the equation. The statute also provides that qualifying matters include the "final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures." 3 U.S.C. § 5. Georgia has done precisely that, and its state courts are the venue for resolving any such controversy of contest. O.C.G.A. § 21-2-523 (election disputes "shall be tried and determined by the superior court of the county where the defendant resides."). Texas's request that this Court interpret Georgia's election code turns Section 5's assumption on its head.

8. Even setting aside these federalism and separation-of-powers concerns, Texas has failed to meet its pleading standard. When asking this Court to exercise original jurisdiction, "[t]he burden upon the plaintiff state fully and clearly to establish all essential elements of its case is greater than that generally

required to be borne by one seeking an injunction in a suite between private parties. *Alabama v. Arizona*, 291 U.S. 286, 292 (1934) (citing *Connecticut v. Massachusetts*, 282 U.S. 660, 669 (1931)). Instead, "[a] state asking leave to sue another . . . must allege, in the complaint offered for filing, facts that are clearly sufficient to call for a decree in its favor." *Id.* at 291. Texas has not done so. For all the reasons stated above, Texas has identified no injury flowing from the regulations that underlie its claims.

### B. Texas has not shown irreparable harm.

When one state seeks an injunction against another, "[l]eave will not be granted unless the threatened injury is clearly shown to be of serious magnitude and imminent." *Alabama v. Arizona*, 291 U.S. at 292. Texas fails this high standard. The appointment of Georgia Electors is not the final word in choosing the president and vice president because those electors must still vote and Congress must accept those votes. U.S. Const., 12th amend. Insofar as the safe-harbor provision of 3 U.S.C. § 5 would guarantee acceptance of Georgia's Electors, then this case is too late, the injury is extant rather than imminent, and it cannot be cured or forestalled by a preliminary injunction.

In any event, the harms alleged by Texas concerning the outcome of the Electoral College vote—or the supposed harm to the "Republic" from loss of confidence in the elections in general (Mot. for TRO 32)—are not the type of injuries supporting a preliminary injunction. First, a plaintiff "must establish that . . . *he* is likely to suffer irreparable harm

in the absence of preliminary relief." *Winter*, 555 U.S. at 20 (emphasis added). Thus, harms to "the Republic" are generalized harms that are not specific to Texas. Otherwise, Texas could obtain a preliminary injunction on behalf of a harm to the entire nation.

Second, the alleged harm specific to Texas is not harm at all. Supposed dilution of Texas votes vis-à-vis the votes in other states cannot be a cognizable harm because it is baked into the Constitution. The Electoral College guarantees votes to states based on the number of their representatives and senators. *See* U.S. Const., art. II, § 1, cl. 2. Texas's electoral total was not—and could not be—diminished by the electoral vote in other States. This means that Texans' votes are *always* diminished compared to smaller states. As for the supposed denial of representation "in the presidency and in the senate" (Mot. for TRO 32), Texas will still have two Senators.

### C. The equities and the public interest favor Georgia.

Normally, the last two factors—"assessing the harm to the opposing party and weighing the public interest"—"merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009). But this makes little sense when governments of equal authority are on both sides of a preliminary injunction request, as is the case here. *See Escanaba Co. v. City of Chicago*, 107 U.S. 678, 689 (1883).

In balancing the equities, a court "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Winter*, 555 U.S. at 24 (quoting *Amoco Prod. Co. v. Vill. of Gambell,* 480 U.S. 531, 542

(1987)). The lack of genuine harm to Texas has been noted above, but Georgia risks significant potential harm—another State's encroachment on Georgia's plenary authority to regulate elections in the State. The Court's granting this preliminary injunction would create a precedent of allowing one State to reach into the internal political affairs of another in a way that no State has done before. The Equal Footing Doctrine forbids one "state be[ing] placed upon a plane of inequality with its sister states in the Union." *Coyle v. Smith*, 221 U.S. 559, 565 (1911). In short, the balance of equities favors denial of a preliminary injunction.

So does the public interest. "In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Winter*, 555 U.S. at 24 (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982)). And the public consequences here would be enormous. Texas worries about "sowing distrust in federal elections" (Mot. for TRO 32), but imagine the distrust and discouragement that would bloom here if voters understood that their votes could be nullified by a different state.

Courts must give "a due regard for the public interest in orderly elections." *Benisek v. Lamone,* 138 S. Ct. 1942, 1944 (2018). After-the-fact, out-of-state suits seeking nullification are anything but orderly. The public interest cuts in favor of keeping one State out of another State's election process.

* * * *

Texas cannot satisfy any element of the four-part preliminary-injunction test, much less the "greater"

burden that it bears in seeking an injunction against a sister state. *Alabama*, 291 U.S. at 292.

## V. Texas is not entitled to the remedies that it seeks.

Even if there were any merit to Texas's claims, its requested remedies are improper.

First, Texas may not obtain declaratory relief because this Court "may not be called on to give advisory opinions or to pronounce declaratory judgments." *Alabama v. Arizona*, 291 U.S. at 291 (collecting cases). Even if the Court construed the request as a request for injunctive relief, Texas's request for a declaration that certain electoral college votes "cannot be counted" is still a nonstarter because none of the State Defendants participates in counting such votes and the U.S. Congress is not a party. *See* U.S. Const. amend. XII (electoral votes counted in U.S. Congress); 3 U.S.C. § 15 (same).

Nor does Texas attempt to support its request to enjoin the Defendants from using the election results to appoint electors. Texas admits that "the state legislature's power to select the manner for appointing electors is plenary." *Bush*, 531 U.S. at 104. Texas does not cite any statute that would allow this Court to intrude on a power expressly reserved to the States. In any case, Texas's follow-up request that the Court authorize a special election runs headlong into 3 U.S.C. § 5, whose "safe harbor" provision mandates that a State's own final determination on the appointment of electors "shall be conclusive."

Texas's request that the Court direct the appointment of new electors (or none at all) fares no

better. Read together, the cited provisions authorize the belated appointment of electors "as [a state legislature] may direct," so they augment rather than diminish a State's autonomy to determine its own appointment processes. 3 U.S.C. § 2; *see also* U.S. Const. art. II, § 1, cl. 2.

Likewise, Texas's attempt to bar the Defendants from meeting for electoral college purposes finds no basis in 3 U.S.C. §§ 5 or 7. On the contrary, Section 7 provides that the State's chosen electors "shall meet . . . at such place . . . as the [state legislature] shall direct." 3 U.S.C. § 7. There is no basis for Texas, in the guise of protecting state legislative authority, to intrude into those same legislative prerogatives.

## CONCLUSION

The Court should deny Texas's motion for leave to file a bill of complaint and its motion for a temporary restraining order. Alternatively, if the Court grants Texas's motion for leave, then it should dismiss Texas's claims.

Respectfully submitted December 10, 2020.

/s/ *Andrew A. Pinson*

Christopher M. Carr
Attorney General of Georgia
Andrew A. Pinson
Solicitor General of Georgia
*Counsel of Record*
Ross W. Bergethon
Deputy Solicitor General
Drew F. Waldbeser
Assistant Solicitor General
Office of the Attorney General
40 Capitol Square SW
Atlanta, Georgia 30334
(404) 458-3409
apinson@law.ga.gov

Brian D. Boone
Brandon C.E. Springer
J. Stephen Tagert*
Alston & Bird LLP
101 S. Tryon Street #4000
Charlotte, NC 28280
(704) 444-1000
brian.boone@alston.com
*Admitted to practice in New York only.

William H. Jordan
Bryan W. Lutz
Lee A. Deneen
William J. Repko
Alston & Bird LLP
1201 West Peachtree Street
Atlanta, Georgia 30309
(404) 881-7000
bill.jordan@alston.com

Joseph H. Hunt
Alston & Bird LLP
950 F Street, NW
Washington, D.C. 20004

Erik S. Jaffe
James A. Heilpern*
Joshua J. Prince
Schaerr | Jaffe LLP

Telephone: 202-239-3300
jody.hunt@alston.com

1717 K Street NW, Suite 900 Washington, DC 20006
(202) 787-1060
ejaffe@schaerr-jaffe.com
*Admitted to practice in Virginia.

*Counsel for Defendant State of Georgia*