

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.

**BRIEF FOR THE DISTRICT OF COLUMBIA AND THE STATES AND
TERRITORIES OF CALIFORNIA, COLORADO, CONNECTICUT,
DELAWARE, GUAM, HAWAII, ILLINOIS, MAINE, MARYLAND,
MASSACHUSETTS, MINNESOTA, NEVADA, NEW JERSEY, NEW MEXICO,
NEW YORK, NORTH CAROLINA, OREGON, RHODE ISLAND, VERMONT,
VIRGINIA, U.S. VIRGIN ISLANDS, AND WASHINGTON AS *AMICI CURIAE*
IN SUPPORT OF DEFENDANTS AND IN OPPOSITION TO PLAINTIFF'S
MOTION FOR LEAVE TO FILE A BILL OF COMPLAINT**

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STATEMENT OF INTEREST OF *AMICI CURIAE*

“A fundamental principle of our representative democracy is . . . that the people should choose whom they please to govern them.” *Powell v. McCormack*, 395 U.S. 486, 547 (1969) (internal quotation marks omitted). The people have chosen. But Texas, supported by 17 other states, asks this Court to overturn that choice. Those states urge this Court “to exercise its extraordinary power under the Constitution to control the conduct of one State at the suit of another,” *New York v. New Jersey*, 256 U.S. 296, 309 (1921), by nullifying millions of lawful votes and voiding the result of a free and fair election. The District of Columbia, together with the States and territories of California, Colorado, Connecticut, Delaware, Guam, Hawaii, Illinois, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Rhode Island, Vermont, Virginia, U.S. Virgin Islands, and Washington (*Amici States*), submit this brief in support of the four defendant states. *Amici States* urge this Court to reject Texas’s last-minute attempt to throw out the results of an election decided by the people and securely overseen and certified by its sister states.

Indeed, this Court has long recognized that it will only exercise original jurisdiction based on a showing of “the seriousness and dignity of the claim” and the lack of “another forum where there is jurisdiction.” *Wyoming v. Oklahoma*, 502 U.S. 437, 451 (1992) (quoting *Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972)). Here, the underlying legal claims Texas belatedly seeks to litigate in this Court can be, and indeed have been, litigated—and thus far lost—in alternate forums where facts can be developed and issues fully aired, subject to this Court’s ordinary certiorari review.

See Illinois v. Michigan, 409 U.S. 36, 37 (1972) (per curiam) (rejecting use of the Court’s original jurisdiction as “an alternative to the redress of grievances which could have been sought in the normal appellate process, if the remedy had been timely sought”).

Moreover, the claimed “threatened invasion” of Texas’s own rights is neither “of serious magnitude” nor “established by clear and convincing evidence,” as this Court’s cases require for invocation of its original jurisdiction. *Maryland v. Louisiana*, 451 U.S. 725, 736 n.11 (1981) (quoting *New York*, 256 U.S. at 309). Indeed, Texas’s novel theory of the Electors Clause would overrule a century’s worth of precedent, upend state election systems nationwide, and invert core principles of federalism. Texas and its *amici* also make much of defendants’ choice to allow voting by mail, but simply recycle speculative “fraud” claims rejected by dozens of federal courts. As the experience of *amici* and the four defendant states demonstrates, voting by mail is a safe, secure, and lawful method for conducting an election, particularly during a public health crisis. The *Amici* States therefore urge the Court to deny Texas leave to file its bill of complaint—and to reaffirm that “[v]oters, not lawyers, choose the President.” *Donald J. Trump for President, Inc v. Pennsylvania*, No. 20-3371, 2020 WL 7012522, at *9 (3d Cir. Nov. 27, 2020) (Bibas, J.).

ARGUMENT

I. The Electors Clause Provides No Basis To Second-Guess State Courts And Local Actors In Their Interpretation Of State Law.

Texas and its *amici*, including Missouri and other states (“Missouri *Amici*”), contend that by interpreting or implementing state law, state officials and state

courts have “encroached upon the ‘plenary’ authority of [Pennsylvania, Michigan, Georgia, and Wisconsin’s] respective legislatures over the conduct of the Presidential election,” thereby violating the Electors Clause. Missouri et al. Br. 5; see U.S. Const. art. II, § 1, cl. 2. That reading of the Electors Clause, however, would upend a century’s worth of this Court’s precedent; render unconstitutional routine and critical election administration; and supplant states’ sovereign power to structure their own systems of government. Indeed, by demanding this Court police state interpretation of state law, Texas’s theory of the Electors Clause would reorder the Constitution and undermine our federalist system.

At the outset, more than a hundred years of Supreme Court precedent forecloses Texas and its *amici*’s theory that the Constitution requires legislative bodies alone to set election procedures. In *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916), for instance, this Court rejected an argument in the analogous Elections Clause context that a state legislative body alone must structure the election process when the Court upheld a popular referendum that rejected redistricting legislation passed by the Ohio Legislature. *Id.* at 567, 569. Later, in *Smiley v. Holm*, 285 U.S. 355 (1932), this Court similarly held that a governor may veto a congressional redistricting plan, even though a Governor is plainly not part of a legislative body. *See id.* at 372-73. There, this Court emphasized that the *function* envisioned by the Constitution’s reference to state legislatures “is that of making laws,” *id.* at 366, and it is within “the authority of the state to determine what should constitute its legislative process,” *id.* at 372. More recently, in *Arizona State Legislature v. Arizona*

Independent Redistricting Commission, 576 U.S. 787 (2015), this Court—again—explained that the word “Legislature” does “not mean the representative body alone.” *Id.* at 805; see *Chiafalo v. Washington*, 140 S. Ct. 2316, 2324 (2020) (unanimously reaffirming states’ broad authority to oversee elections).

That unbroken line of precedent allows states to fulfil their sovereign role in our Constitutional structure. As this Court has explained, “the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections.” *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973) (internal quotation marks and citation omitted). That constitutionally reserved authority “inheres in the State[s] by virtue of [their] obligation . . . ‘to preserve the basic conception of a political community.’” *Id.* (quoting *Dunn v. Blumstein*, 405 U.S. 330, 344 (1972)).

The Constitution allows States to fulfil that obligation by “structuring and monitoring the election process” in different ways, consistent with core principles of federalism. *Cal. Democratic Party v. Jones*, 530 U.S. 567, 572 (2000). Some states might choose to “vest considerable authority in localities to carry out basic tasks.” Heather K. Gerken, *The Democracy Index* 20 (2009). Others may rely on offices “expressly empowered by the legislature to carry out its constitutional mandate”—including non-legislative institutions like a “Secretary of State and . . . state circuit courts” to whom “the legislature has delegated the authority to run the elections.” *Bush v. Gore*, 531 U.S. 98, 113-14 (2000) (Rehnquist, C.J., concurring). And many others look beyond their legislative bodies to state constitutions in order to regulate

“[c]ore aspects of the electoral process.” *Ariz. State Legislature*, 576 U.S. at 823 (citing provisions regulating “voting by ballot or secret ballot, voter registration, absentee voting, vote counting, and victory thresholds” (footnotes and internal quotation marks omitted)). Texas and its *amici*’s wooden reading of the Electors Clause would eviscerate states’ carefully calibrated election systems, nullifying their “constitutional responsibility for the establishment and operation of [their] own government[s],” *Sugarman*, 413 U.S. at 648, including the processes “[t]hrough [which . . . the] State defines itself as a sovereign,” *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991).

Texas’s reading of the Electors Clause would also reverse the roles of the state and federal judiciaries, further undermining federalism. Under Texas’s view, this Court would supplant state courts as the primary interpreter of state election law. According to Texas and its *amici*, state courts have no role—indeed, no *power*—when it comes to constraining state legislatures according to state law or state constitutions, so long as the legislature acts in the electoral sphere. But this Court has explained that “[i]t is fundamental” to our Constitutional scheme “that state courts be left free and unfettered by [federal courts] in interpreting their state constitutions.” *Minnesota v. Nat’l Tea Co.*, 309 U.S. 551, 557 (1940). Indeed, it is typically “unsatisfactory” for federal courts to “interpret state laws with which [they] are generally unfamiliar.” *Michigan v. Long*, 463 U.S. 1032, 1039 (1983). Only recently, this Court concluded that nothing in the Constitution permits or requires state actors to hold “elections in defiance of provisions of the State’s constitution,”

Ariz. State Legislature, 576 U.S. at 818, and emphasized that “state constitutions can provide standards and guidance for state courts to apply,” *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019). Under Texas and its *amici*’s theory, any disagreement about the proper interpretation or implementation of state legislative directives—no matter how trivial—becomes not just an issue of federal Constitutional law, but one for this Court’s *original jurisdiction*. It is hard to imagine a scheme less “sensitiv[e] to the legitimate interests of both State and National Governments.” *Younger v. Harris*, 401 U.S. 37, 44 (1971).

II. States’ Common-Sense Measures Taken In Response To The Coronavirus Pandemic Did Not Introduce Widespread Fraud.

In response to the coronavirus pandemic, states devised myriad ways to make voting safer and easier, while still preserving the sanctity of the electoral process. Many states expanded access to absentee voting, some by removing or reinterpreting excuse requirements, *see, e.g.*, Ala. Admin. Code. r. 820-2-3-.06-.04ER(1); Ark. State Bd. of Election Comm’rs, Res. No. 4, at 2 (July 22, 2020),¹ some by sending all qualified voters an absentee application, *see, e.g.*, Stephen Gruber-Miller, *Iowa Secretary of State Will Mail Ballot Request Forms to All Voters Before Fall Election*, Des Moines Reg. (July 17, 2020),² or even a ballot, *see, e.g.*, Nev. Rev. Stat. § 293.8844 (effective Aug. 3, 2020). Others set up or expanded their use of secure ballot drop boxes, *see, e.g.*, Ky. Sec’y of State Michael Adams, *2020 General Updates* (2020),³

¹ Available at <https://bit.ly/373HVL3>.

² Available at <https://bit.ly/3lNiGBB>.

³ Available at <https://bit.ly/2W4dqhQ>.

made curbside voting more available, *see, e.g.*, Frank LaRose, Ohio Sec’y of State, Directive 2020-11, at 12 (July 6, 2020),⁴ or extended the period for early voting, *see, e.g.*, Greg Abbott, Governor of the State of Tex., Proclamation (July 27, 2020).⁵

Of course, absentee voting is “not a newfangled idea; it was already deeply embedded in the American electoral system before the coronavirus hit.” Wendy R. Weiser & Harold Ekeh, *The False Narrative of Vote-by-Mail Fraud*, Brennan Ctr. for Just. (Apr. 10, 2020).⁶ Since 2000, over 250 million ballots in all 50 states have been cast via mail-in ballots. *Id.* Notably, even as states have expanded access to mail-in voting, *see id.*, “voter fraud rates have remained infinitesimally small,” *Cook Cnty. Republican Party v. Pritzker*, No. 20-CV-4676, 2020 WL 5573059, at *3 (N.D. Ill. Sept. 17, 2020) (internal quotation marks omitted). Indeed, “[f]or years, military personnel stationed abroad have voted by absentee ballot with virtually no claims of election fraud.” Darrell M. West, *How Does Vote-By-Mail Work and Does It Increase Election Fraud?*, Brookings (June 22, 2020).⁷

Simply put, there is no evidence that voting by mail threatens the integrity of elections. In fact, the Missouri *Amici*’s brief only underscores that point: the total number of fraudulent absentee votes cited by the Missouri *Amici* over many years and elections, cast for various candidates and various parties, would not come close to making a difference in even the tightest of defendant states’ races this November,

⁴ Available at <https://bit.ly/2VYxZwc>.

⁵ Available at <https://bit.ly/2HsitVw>.

⁶ Available at <https://bit.ly/3iUkbvz>.

⁷ Available at <https://brook.gs/3jM64K0>.

even if they had all been improperly cast for a single candidate. *Compare* Missouri et al. Br. 11-14 (totaling fewer than 2,000 votes), *with* Ga. Sec’y of State Brad Raffensberger, *November 3, 2020 General Election: Results* (Nov. 20, 2020) (reporting President-Elect Biden won in Georgia by 12,670 votes).⁸ And this election was no outlier: fraud has been exceedingly rare.

1. The Missouri *Amici* trumpet the fraud risks associated with absentee voting. *See* Missouri et al. Br. 8. But five states—Colorado, Hawaii, Oregon, Washington, and one of Missouri’s *co-amici*, Utah—already conducted all-mail elections before the pandemic. *See* Colo. Rev. Stat. § 1-5-401; Haw. Rev. Stat. § 11-101; Ore. Rev. Stat. § 254.465(1); Utah Code § 20A-3a-202(1); Wash. Rev. Code § 29A.40.010. And none of those states have encountered widespread fraud since shifting to mail-in ballots. Weiser & Ekeh, *supra*.

Oregon, the first state to adopt all-mail voting, “has sent out more than 100 million mail-in ballots since 2000, and has documented only about a dozen cases of proven fraud.” Ed. Bd., *The 2020 Election Won’t Look Like Any We’ve Seen Before*, N.Y. Times (Mar. 21, 2020).⁹ Similarly, Washington State announced that, out of 3.1 million votes cast in 2018, it had referred 142 cases, or 0.004 percent, to local election officials on suspicion of improper voting. Elise Viebeck, *Miniscule Number of Potentially Fraudulent Ballots in States with Universal Mail Voting Undercuts*

⁸ Available at <https://bit.ly/33Wc8dm>.

⁹ Available at <https://nyti.ms/2KcSPW9>.

Trump Claims About Election Risks, Wash. Post (June 8, 2020).¹⁰ A Washington Post analysis of data collected by Colorado, Oregon, and Washington identified only 372 “possible cases of double voting or voting on behalf of deceased people out of about 14.6 million votes cast by mail in the 2016 and 2018 general elections.” *Id.* That amounts to a rate of just 0.0025 percent. *Id.* Data collected by the Heritage Foundation from the five states with universal mail-in voting also found few cases of fraud: only 29 cases of fraudulent votes attempted by mail and 24 cases of duplicative voting or absentee ballot fraud out of nearly 50 million general election votes cast between 1982 and 2019. Elaine Kamarck & Christine Stenglein, *Low Rates of Fraud in Vote-by-Mail States Show the Benefits Outweigh the Risks*, Brookings (June 2, 2020) (reproducing data from the Heritage Foundation’s database).¹¹ This evidence highlights that, contrary to plaintiff’s and the Missouri *Amici*’s assertions, fraud in expanded vote-by-mail systems is insignificant.

2. Despite the isolated incidents of fraud that the Missouri *Amici* identify, *see* Missouri et al. Br. 11-14, election and security experts have time and again voiced confidence in voting by mail. The commissioner of the Federal Election Commission

¹⁰ Available at <https://wapo.st/3ixefbJ>.

¹¹ Available at <https://brook.gs/2F4NM7X>. The Heritage Foundation caveats that its database is not “exhaustive or comprehensive,” Heritage Found., *A Sampling of Recent Election Fraud Cases from Across the United States*, <https://herit.ag/3m3hGZF> (last visited Dec. 10, 2020). According to an investigation by USA Today and Frontline, “[f]ar from being proof of organized, large-scale vote-by-mail fraud, the Heritage database presents misleading and incomplete information that overstates the number of alleged fraud instances and includes cases where no crime was committed.” Pat Beall et al., *Here’s Why Concerns About Absentee Ballot Fraud Are Overhyped*, Frontline (Oct. 20, 2020), <https://to.pbs.org/37P80gn>.

recently said that there is “simply no basis” for the “theory that voting by mail causes fraud.” *US Election: Do Postal Ballots Lead to Voting Fraud?*, BBC News (Sept. 25, 2020) (internal quotation marks omitted).¹² Senior intelligence officials “who have been consulting with election workers across all 50 states” similarly stated that they found no “evidence of a coordinated effort to commit mail-in voting fraud.” Alfred Ng, *Election Security Officials Find No Evidence of Coordinated Fraud With Mail-In Ballots*, CNET (Aug. 26, 2020).¹³ And the Presidential Advisory Commission on Election Integrity, established by President Trump following the 2016 election, “uncovered no evidence to support claims of widespread voter fraud.” Marina Villeneuve, *Report: Trump Commission Did Not Find Widespread Voter Fraud*, Associated Press (Aug. 3, 2018).¹⁴

November’s election was no different. In fact, the Cybersecurity and Infrastructure Security Agency, a government agency within the U.S. Department of Homeland Security, declared that “[t]he November 3rd election was the most secure in American history.” Press Release, *Joint Statement from Elections Infrastructure Government Coordinating Council & The Election Infrastructure Sector Coordinating Executive Committees* (Nov. 12, 2020).¹⁵ It explained that while “there are many unfounded claims and opportunities for misinformation about the process of our

¹² Available at <https://bbc.in/2GJvUQA>.

¹³ Available at <https://cnet.co/3nnmYRu>.

¹⁴ Available at <https://bit.ly/39XnukS>.

¹⁵ Available at <https://bit.ly/39VmfCL>.

elections,” the agency has “the utmost confidence in the security and integrity of our elections.” *Id.* Courts have also uniformly rejected claims of widespread fraud. See Colleen Long & Ed White, *Trump Thought Courts Were Key to Winning. Judges Disagreed.*, AP (Dec. 8, 2020).¹⁶ For example, the Third Circuit recently balked at the notion of invalidating millions of votes in Pennsylvania where “there is no clear evidence of massive absentee-ballot fraud or forgery.” *Donald J. Trump for President*, 2020 WL 7012522, at *7.

3. The Missouri *Amici* argue that mail-in voting is insecure absent, among other things, signature matching and Election Day receipt deadlines. Missouri et al. Br. 16, 21. For example, the Missouri *Amici* argue that “abolish[ing] or weaken[ing] signature-verification requirements for mailed ballots” “contradict[s] fundamental principles of ballot security.” *Id.* at 16-17. But even before the pandemic, at least 15 states did *not* use signature matching to verify mail-in ballots, including several of Missouri’s co-*amici*, and there are no credible allegations that those states suffered rampant fraud. *Voter Dashboard*, Democracy Docket (Alabama, Alaska, Connecticut, Delaware, Maryland, Nebraska, New Hampshire, New Mexico, North Carolina, Oklahoma, South Carolina, Vermont, Virginia, Wisconsin).¹⁷ Additionally, the Missouri *Amici* posit that post-Election Day receipt deadlines “create[] 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 [a state]

¹⁶ Available at <https://bit.ly/3a1TvIC>.

¹⁷ Available at <https://bit.ly/37S2o4O> (last visited Dec. 10, 2020).

would be worthwhile.” Missouri et al. Br. 21. This speculation is curious given that nearly 20 states and the District of Columbia accepted ballots received post-Election Day before the pandemic, including Texas and several of Missouri’s co-*amici*, and two of the five all-mail states. Nat’l Conf. of State Legs., *Voting Outside the Polling Place: Table 11: Receipt and Postmark Deadlines for Absentee Ballots* (Sept. 29, 2020) (e.g., Kansas, North Dakota, Texas, Utah, West Virginia, Washington).¹⁸ Again, there is no evidence that states without signature matching or that accept ballots received post-Election Day were plagued by rampant fraud before or during this year’s election.

4. To be sure, “[t]here is no denying the abstract importance, the compelling nature, of combating voter fraud.” *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 225 (2008). The *Amici* States are deeply committed to protecting the integrity of their elections and have thus deployed an array of safeguards to ensure the security of their absentee voting systems. But contrary to the Missouri *Amici*’s argument, states need not deploy *every* security measure available to safeguard the integrity of their elections, but rather, as federalism permits, can deploy the safeguards most suitable for local conditions.

For example, many states require that ballots be “printed on the proper type of paper” and “include specific technical markings” to be counted. Andy Sullivan, *Explainer: Fraud Is Rare in U.S. Mail-In Voting. Here Are the Methods That Prevent*

¹⁸ Available at <https://bit.ly/3qQM5y7>.

It, Reuters (July 7, 2020).¹⁹ Most states now print unique bar codes on mail-in ballot envelopes, which enable election officials to track ballot processing and to “identify and eliminate duplicate ballots.” Weiser & Ekeh, *supra*. Once a voter returns his ballot and the bar code is scanned, “no other ballot can be cast by that voter for that election.” Viebeck, *supra*. And most states require voters to include personal identifying information when voting by mail. Viebeck, *supra*; see 1 Miss. Admin. Code Pt. 10, R. 5.3 (requiring that voters provide their complete name, current residence, mailing address, telephone number, date of birth, and other information with their absentee ballot).

Signature matching *can* also be an “effective deterrent for fraud” if “[d]one correctly—with signature matching software, bipartisan review by officials trained in signature verification, and outreach to flagged voters.” Weiser & Ekeh, *supra*. “When done incorrectly,” however, “it can disenfranchise eligible voters.” *Id.* This past October, for example, Mississippi seemed to acknowledge the distinction between effective and ineffective signature matching, when, in response to a lawsuit filed challenging the arbitrariness of its matching processes, state officials promulgated rules to require voters to be given notice and a chance to cure signature mismatches. See 1 Miss. Admin. Code Pt. 17, R. 4.1, 4.2 (effective Nov. 3, 2020).

Moreover, criminal and civil penalties “provide a strong deterrent to voter fraud.” Weiser & Ekeh, *supra*. An individual convicted of voter fraud in a federal election is subject to a \$10,000 fine and/or a five-year term of imprisonment per

¹⁹ Available at <https://reut.rs/33zi7oE>.

violation. 52 U.S.C. §§ 10307, 20511. Many states also punish voter fraud with hefty fines and potential jail time. *See, e.g.*, Ga. Code Ann. § 21-2-573 (“Any person who votes or attempts to vote by absentee ballot . . . who knows that he or she is not qualified to vote shall be guilty of a felony and, upon conviction thereof, shall be sentenced to imprisonment for not less than one nor more than ten years or to pay a fine not to exceed \$100,000.00, or both.”); Mich. Comp. Laws §§ 168.932, .932a (punishing as a felony various forms of voter fraud including voting when unqualified to do so, voting more than once, and returning another’s absentee ballot); 25 Penn. Cons. Stat. § 3553 (punishing various forms of mail-in ballot fraud with up to two years imprisonment and/or up to \$2,500 in fines); Wis. Stat. §§ 12.13(3), 12.60, 939.50 (punishing various election crimes with up to three years imprisonment and/or up to \$10,000 in fines).

CONCLUSION

This Court should deny Texas’s motion for leave to file a bill of complaint.

Respectfully submitted,

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