No. 22O155

IN THE
Supreme Court of the United States

STATE OF TEXAS,
Plaintiff,

v.

COMMONWEALTH OF PENNSYLVANIA, *ET AL.*,
Defendants.

On Motion for Leave to File a Bill of Complaint and Motion for Expedited Consideration and for Emergency Injunctive Relief or Stay

MOTION FOR LEAVE TO FILE AND BRIEF OF CARTER PHILLIPS, STUART GERSON, JOHN DANFORTH, CHRISTINE TODD WHITMAN, LOWELL WEICKER, *ET AL.*, AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS AND IN OPPOSITION TO (1) MOTION FOR LEAVE TO FILE BILL OF COMPLAINT AND (2) MOTION FOR PRELIMINARY INJUNCTION AND TEMPORARY RESTRAINING ORDER OR, ALTERNATIVELY, FOR STAY AND ADMINISTRATIVE STAY

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December 9, 2020

MOTION FOR LEAVE TO FILE[1]

Amici respectfully move for leave to file a short brief as *amici curiae* in support of Respondents and in opposition to Plaintiff's (1) Motion for Leave to File a Bill of Complaint and (2) Motion for Preliminary Injunction and Temporary Restraining Order or, Alternatively, for Stay and Administrative Stay (the "Plaintiff's Motions"). Defendants Georgia and Pennsylvania consent to, and Defendants Michigan and Wisconsin do not oppose, the filing of the enclosed *amici* brief in opposition to Plaintiff's Motions. Counsel for Plaintiff has not yet responded to *amici* counsel's request for consent.

Amici respectfully request that the Court consider the arguments herein and in the enclosed, short *amici* brief. There are myriad reasons to deny Plaintiff's Motions. This *amici* brief focuses on one: the Constitution does not make this Court the multidistrict litigation panel for trials of presidential election disputes. Pursuant to the Electors Clause and 3 U.S.C. § 5, state legislatures have made state courts the tribunals for presidential election disputes. This Court's only jurisdiction

[1] No counsel for any party authored the *amici* brief in whole or in part and no person or entity other than *amici* made a monetary contribution to its preparation or submission.

is appellate.

The Electors Clause and 3 U.S.C. § 5 contradict the Plaintiff's unprecedented argument that a presidential election dispute is a controversy between two or more states. These provisions contradict Plaintiff's argument by authorizing *each* state to delegate by statute the adjudication of all controversies or contests concerning federal presidential election results in *that* state to *that* state's courts. Such statutory delegation to state courts is part of each state legislature's chosen statutory "manner" for presidential elections as much as are the statutes on, for example, mail-in voting. A state's chosen "manner" applies "exclusively," *McPherson v. Blacker,* 146 U.S. 1, 27 (1892), "absent some *other* constitutional constraint." *Chiafalo v. Washington,* 140 S. Ct. 2316, 2324 (2020) (emphasis added). There is no constitutional constraint against state courts being the trial courts for presidential election disputes.

Moreover, 3 U.S.C. § 5 expressly and properly enables a state to designate "its" *state* tribunals as the "conclusive" arbiter of "*any* controversy or contest concerning" presidential election results in that state. (Emphasis added.) In the rare instance that a state supreme court's

ruling violates a federal constitutional provision or statute, this Court has appellate jurisdiction. *See, e.g., Bush v. Gore,* 531 U.S. 98, 100-01 (2000) (per curiam).

Plaintiff's Motions make a mockery of federalism and separation of powers. It would violate the most fundamental constitutional principles for this Court to serve as the trial court for presidential election disputes.

I. Statement of Movant's Interest.

Amici include lawyers and others who have worked in Republican administrations, and former Senators, governors and Congressional representatives. *See* Appendix A. Reflecting their experience in supporting the rule of law, *amici* have an interest in seeing that judicial decisions about the forthcoming election are based on sound legal principles. *Amici* speak only for themselves personally, and not for any entity or other person.

II. Statement Regarding Brief Form and Timing.

Given the circumstances, *amici* respectfully request leave to file the enclosed brief supporting Defendants and their opposition to the motion without 10 days' advance notice to the parties of intent to file. *See* Sup. Ct R. 37.2(a). Plaintiff filed the motions on December 8, 2020. The Court

ordered responses by 3 p.m. on December 10, 2020. On December 9, 2020, counsel for *amici* gave notice to Plaintiff and Defendants of the intent of *amici* to file an *amici* brief opposing Plaintiff's Motions. On December 9, 2020, Georgia and Pennsylvania consented, and Michigan and Wisconsin stated that they do not oppose the filing of the *amici* brief. As of the filing of this motion, counsel for *amici* had not yet heard from counsel for Plaintiff. The above justifies the request to file the enclosed *amici* brief supporting Defendants and in opposition to Plaintiffs' Motions without 10 days' advance notice to the parties of intent to file.

In addition, *amici* respectfully request leave to file the enclosed brief on 8½-by-11-inch paper. Because of the urgent timing of the motion and the logistics required to print this *amici* brief, *amici* respectfully request leave to file their brief on 8½-x-11-inch paper.

CONCLUSION

The Court should grant *amici curiae* leave to file the enclosed brief in support of Defendants and in opposition to Plaintiff's Motions, and leave to file the *amici* brief on 8½-x-11-inch paper.

December 9, 2020

Respectfully submitted,

/s/ Richard D. Bernstein

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INTEREST OF *AMICI CURIAE*

Amici include Carter Phillips, former Acting Attorney General Stuart Gerson, former Senator John Danforth, former Governor Christine Todd Whitman, former Senator and Governor Lowell Weicker, conservative legal scholars, and others who have worked in Republican federal administrations. *See* Appendix A.[1] Reflecting their experience in supporting the rule of law, *amici* have an interest in seeing the rule of law applied in contentious election cases. *Amici* speak only for themselves personally, and not for any entity or other person.

INTRODUCTION AND SUMMARY OF ARGUMENT

There are myriad reasons to deny both Plaintiff's motion for leave to file a bill of complaint and its motion for a preliminary injunction and temporary restraining order or, alternatively, for a stay and administrative stay (the "Plaintiff's Motions"). This *amici* brief focuses on one: the Constitution does not make this Court the multidistrict litigation panel for trials of presidential election disputes. To the contrary, pursuant to the Electors Clause and 3 U.S.C. § 5, state legislatures have

[1] No counsel for any party authored the brief in whole or in part, and no person other than *amici* made a monetary contribution to its preparation or submission.

made state courts the tribunals for presidential election disputes. This Court's only jurisdiction is appellate.

The Electors Clause and 3 U.S.C. § 5 contradict the Plaintiff's unprecedented argument that a presidential election dispute is a controversy between two or more states. One way these provisions contradict Plaintiff's argument is by authorizing *each* state to delegate by statute the adjudication of all controversies or contests concerning federal presidential election results in *that* state to *that* state's courts. Such statutory delegation to state courts is part of each state legislature's chosen statutory "manner" for presidential elections as much as are the statutes on, for example, mail-in voting. A state's chosen "manner" applies "exclusively," *McPherson v. Blacker,* 146 U.S. 1, 27 (1892), "absent some *other* constitutional constraint." *Chiafalo v. Washington,* 140 S. Ct. 2316, 2324 (2020) (emphasis added). There is no constitutional constraint against state courts being the trial courts for presidential election disputes.

Moreover, 3 U.S.C. § 5 expressly and properly enables a state to designate "its" *state* tribunals as the "conclusive" arbiter of "*any* controversy or contest concerning" presidential election results in that

state. (Emphasis added). In the rare instance that a state supreme court's ruling violates a federal constitutional provision or statute, this Court has appellate jurisdiction. *See, e.g., Bush v. Gore,* 531 U.S. 98, 100-01 (2000) (per curiam).

Plaintiff's Motions make a mockery of federalism and separation of powers. It would violate the most fundamental constitutional principles for this Court to serve as the trial court for presidential election disputes.

ARGUMENT

I. A PRESIDENTIAL ELECTION DISPUTE IS A CONTROVERSY WITHIN ONE STATE, NOT BETWEEN TWO OR MORE STATES.

Plaintiff raises the unprecedented assertion, contrary to 230 years of history, that a presidential election dispute is, under 28 U.S.C. § 1251(a), a "controvers[y] between two or more States." Brief in Support of Mot. For Leave to File Bill of Complaint, at 7-8. This jiggery-pokery is contradicted by the Electors Clause and 3 U.S.C. § 5.

The Electors Clause begins: "*Each* State shall appoint, in such manner as the Legislature *thereof* may direct . . . ." U.S. Const., art. II, § 1, cl. 2 (emphasis added). This plainly makes the appointment of electors a state-by-state matter. *See also* U.S. Const. amend. XII ("The electors

shall meet in their *respective* states . . . .") (emphasis added). That is the opposite of a controversy between two or more states.

Each state's power over its state's "manner" includes its legislature's power to "delegate[] the authority to run the election and to oversee election disputes to [its] Secretary of State . . . and to [its] state . . . courts." *Bush v. Gore,* 531 U.S. at 113-14 (Rehnquist, C.J., concurring, joined by Scalia and Thomas, JJ.). In particular, the exclusive "manner" includes statutorily-designated state court proceedings for post-election "protest[s]" and "[c]ontests" concerning, among other things, "canvassing" and "certification." *Id.* at 116-18.

Likewise, 3 U.S.C. § 5 states that "when *any State* shall have provided," under pre-election law, for "*its* final determination of *any controversy or contest* concerning [presidential election results], by judicial or other methods or procedures," a *state* supreme court's decision about its state's law is "conclusive" for "the electors appointed by *such* state." (Emphases added). The multiple references to a state-by-state process is confirmed by the drafting history of 3 U.S.C. § 5, in which sponsors repeatedly stated that the phrase "*its* final determination . . . by judicial or other methods or procedures" meant determination by "*the*

State tribunal." 18 Cong. Rec. 52 (1885) (statement of Rep. Adams) (emphases added); 8 Cong. Rec. 70-71 (1878) (statement of Sen. Morgan) (emphases added); *see also, e.g.,* 17 Cong. Rec. 1020 (1886) (statement of Sen. Hoar) ("The bill provides that where *the State* has created a tribunal for determination of [presidential election controversies], the proceedings of *that tribunal* shall be conclusive . . . .") (emphases added); *id.* at 867 (statement of Sen. Morgan) (3 U.S.C. § 5 "secure[s] to *each State* its full electoral power, to be expressed and exercised, as far as may be, under the Constitution, through its own laws *and through the final and conclusive judgment of its own tribunals.*") (emphases added). In this election, the courts of each of the four defendant states have diligently adjudicated each of the presidential election controversies and contests brought before them – including the many belated and repetitive cases. *See* Democracy Docket, http://democracydocket.com (last vistited Dec. 9, 2020) (cataloging cases and orders state by state).

The *Bush v. Gore* concurrence explained that a state's legislature's chosen "manner" is not merely "isolated sections of the code" but rather the "general coherence of the legislative scheme." 531 U.S. at 114. Using Pennsylvania as an example, statutes enacted by its General Assembly

both give state courts original jurisdiction over presidential election disputes in that state, *see, e.g.,* 25 P.S. §§ 3291, 3456, and make the *Pennsylvania* Supreme Court, not this Court, the final adjudicator of state law in all cases, including presidential election disputes arising in Pennsylvania. *See, e.g.,* 42 P.S. §§ 501-02, 722(2), 724, 726; Act of October 31, 2019 (P.L. 552, No. 77), § 13(2), 2019 Pa. Legis. Sen. Act. 2019-77. Neither "manner" in the Electors Clauses nor "*its* final determination" in 3 U.S.C. § 5 permits any exception that would allow this Court to override these Pennsylvania statutes or similar statutes in Georgia, Michigan, and Wisconsin. When a text does not "include any exceptions to a broad rule, courts apply the broad rule." *Bostock v. Clayton County,* 140 S. Ct. 1731, 1747 (2020).

The delegated final authority of state courts is a part of the exclusive "manner" directed by a state legislature just as much as are that state's statutes regarding, for example, mail-in voting. Plaintiff has offered no legal argument how the word "Legislature" permits overriding the state *statutes* that give state courts both original jurisdiction and

final authority to interpret state election laws and decide any remedial issues thereunder.[2]

This does not mean that, under the Electors Clause, every interpretation of state law by a final state supreme court decision in a presidential election dispute is immune to review by this Court. As *Bush v. Gore* illustrates and *Chiafalo* held, this Court can exercise discretionary appellate review if state election law, or any remedial issue thereunder, as interpreted by a state supreme court, violates "some *other* constitutional constraint." 140 S. Ct. at 2324. That is not remotely this case.[3]

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[2] Although this Court lacks original jurisdiction, it has discretion to deny the Plaintiff's Motions instead or, alternatively, on any non-merits ground, including lack of standing. *See Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.,* 549 U.S. 422, 431-32 (2007).

[3] *Amici* have filed *amici* briefs in Pennsylvania, Georgia, and Wisconsin state courts demonstrating that the narrow, rare exception in 3 U.S.C. § 2 does not apply and that state legislatures in those states are barred by 3 U.S.C. § 1, 3 U.S.C. § 6, and the Electors Clause from appointing electors after election day. *See Kelly v. Commonwealth of Pennsylvania,* No. 620 M.D. 2020, filed Nov 23, 2020 (Pa. Commonw. Ct.), available at http://www.pacourts.us/assets/files/setting-7840/file-10708.pdf?cb=6c4b7b; *Wood v. Raffensperger,* No. 2020CV342959, filed Dec. 4, 2020 (Ga. Super. Ct.), available at http://kattentemple.com/wp-content/uploads/2020/12/2020-12-04-GEORGIA-AMICI-BRIEF.pdf; *Wisconsin Voters Alliance v. Wisconsin Election Comm'n,* No. 2020AP1930-OA (Wis. Sup. Ct.), available at http://kattentemple.com/wp-content/uploads/2020/12/2020-11-27-Amici-Brief-final.pdf. Those same *amici* briefs demonstrate that each state, by statute, requires popular election of presidential electors, and any change from popular election to legislature selection would require a new statute, which would be subject to the governor's veto under *Smiley v. Holm,* 285 U.S. 355, 368-73 (1932).

II. THE PLAINTIFF'S ORIGINAL ACTION VIOLATES BASIC CONSTITUTIONAL PRINCIPLES.

Federalism and the separation of powers protect our liberties. *See Shelby County v. Holder,* 570 U.S. 529, 543 (2013). They "divide[] power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day." *New York v. United States,* 505 U.S. 144, 187 (1992). Consistent with these principles, the Constitution and Congress have enabled each state to provide law and to adjudicate in its courts all controversies about the presidential election in that state.

This Court should reject Plaintiff's request to transfer the powers of 50 state court systems to this Court. The caution of *Rucho v. Common Cause,* 139 S. Ct. 2484 (2019), fits here even more:

> What the [Plaintiff] seek[s] is an unprecedented expansion of [federal] judicial power. . . . The expansion of judicial authority 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 [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.

CONCLUSION

This Court should deny Plaintiff's Motions.

December 9, 2020

Respectfully submitted,

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APPENDIX A

LIST OF AMICI CURIAE

Carter Phillips, Assistant to the Solicitor General, 1981-1984.

Stuart M. Gerson, Acting Attorney General, 1993; Assistant Attorney General for the Civil Division, 1989–1993; Assistant United States Attorney for the District of Columbia, 1972–1975.

Christine Todd Whitman, Administrator, Environmental Protection Agency, 2001–2003; Governor, New Jersey, 1994–2001.

John Danforth, United States Senator from Missouri, 1976-1995; United States Ambassador to the United Nations, 2004-2005; Attorney General of Missouri, 1969-1976.

Lowell Weicker, Governor, Connecticut, 1991-1995; United States Senator from Connecticut, 1971-1989; Representative of the Fourth Congressional District of Connecticut in the United States House of Representatives, 1969-1971.

Constance Morella, Representative of the Eighth Congressional District of Maryland in the United States House of Representatives, 1987-2003; Permanent Representative from the United States to the Organisation for Economic Co-operation and Development, 2003-2007.

Christopher Shays, Representative of the Fourth Congressional District of Connecticut in the United States House of Representatives, 1987-2009.

Donald Ayer, Deputy Attorney General 1989-90; Principal Deputy Solicitor General 1986-88; United States Attorney, E.D. Cal 1982-86; Assistant U.S. Attorney, N.D. Cal 1977-79.

Edward J. Larson, Counsel, Office of Educational Research and Improvement, United States Department of Education, 1986-1987; Associate Minority Counsel, Committee on Education and Labor, United States House of Representatives, 1983-1986; formerly University of Georgia Law School Professor; currently Hugh & Hazel Darling Chair in Law at Pepperdine University.*

* The views expressed are solely those of the individual amici, and reference to current positions is solely for identification purposes.

John Bellinger III, Legal Adviser to the Department of State, 2005-2009; Senior Associate Counsel to the President and Legal Adviser to the National Security Council, 2001-2005.

Michael Stokes Paulsen, Attorney-Advisor, Office of Legal Counsel, U.S. Department of Justice, 1989-1991; Special Assistant United States Attorney, Eastern District of Virginia, 1986; Staff Attorney, Criminal Appellate Section, United States Department of Justice, 1986; currently University Chair & Professor of Law, The University of St. Thomas.*

Alan Charles Raul, Associate Counsel to the President, 1986-1988; General Counsel of the Office of Management and Budget, 1988-1989; General Counsel of the United States Department of Agriculture, 1989-1993; Vice Chairman of the Privacy and Civil Liberties Oversight Board, 2006-2008.

Paul Rosenzweig, Deputy Assistant Secretary for Policy, Department of Homeland Security, 2005-2009; Office of Independent Counsel, 1998-1999; United States Department of Justice, 1986-1991; currently Professorial Lecturer In Law, The George Washington University Law School.*

Robert Shanks, Deputy Assistant Attorney General, Office of Legal Counsel, 1981-1984.

Stanley Twardy, U.S. Attorney for the District of Connecticut, 1985–1991.

Keith E. Whittington, William Nelson Cromwell Professor of Politics, Princeton University, 2006-present; currently Visiting Professor of Law, Georgetown University Law Center.*

Richard Bernstein, Appointed by the United States Supreme Court to argue in *Carmell v. Texas*, 529 U.S. 513, 515 (2000); *Montgomery v. Louisiana*, 136 S. Ct. 718, 725 (2016).

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* The views expressed are solely those of the individual *amici,* and reference to current positions is solely for identification purposes.