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

MOTION FOR LEAVE TO FILE AND BRIEF OF *AMICUS CURIAE* OHIO IN SUPPORT OF NEITHER PARTY

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MOTION FOR FLEAVE TO FILE

Ohio respectfully moves for leave to file an *amicus curiae* brief in support of neither party. It is unclear whether any such motion is required. Under Rule 37.4, Ohio is permitted to file an *amicus* brief without first obtaining leave. But under Rule 37.2(a), all *amici* must provide counsel for the parties with notice of their intent to file an amicus brief more than ten days before the brief's due date. It is unclear when any *amicus* briefs in this expedited proceeding would be due, and so it is unclear whether Ohio can provide timely notice. What is more, while Ohio attempted to provide notice to counsel for all parties on December 10, 2020, it has not been able to confirm the contact information for each party's counsel. So, in an abundance of caution, Ohio moves for leave to file this brief.

Ohio has previously argued that this Court has mandatory jurisdiction in original actions, and that it therefore lacks authority to deny leave to file bills of complaint. *See Arizona v. Sackler*, No. 22O151, Br. of Ohio and *amici* States (Sept. 26, 2019). Its *amicus* brief in this case will address something else: the proper understanding of the Electors Clause, U.S. Const. art. II, §1, cl.2; the incompatibility of the Clause and the remedy that Texas seeks; and the need for a Supreme Court ruling, at the earliest available opportunity, on the proper application of the Clause to cases in which state courts or state executive officers alter election rules in presidential elections.

Ohio believes its brief would be of value to the Court's decisionmaking process, and respectfully moves for leave to file.

Respectfully submitted,

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STATEMENT OF AMICUS INTEREST AND SUMMARY OF ARGUMENT*

The Presidential Electors Clause provides: "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress." Art. II, §1, cl.2. Ohio has previously taken the position that this language means what it says. In a brief filed just last month, it argued that this Clause must be understood as empowering "state legislatures, not state courts, [to] set the rules for picking presidential electors." *Republican Party of Pa. v. Boockvar*, Nos. 20-542, 20-574, Br. of *Amicus Curiae* Ohio in Support of Petitioners 3 (Nov. 9, 2020). This means that state courts violate the Constitution when they use judge-made doctrines or strained interpretations to change the legislatively fashioned rules governing the manner by which presidential electors are chosen. *Id*. at 5.

The Electors Clause means today what it meant a month ago. Ohio hopes this Court agrees. But either way, the States need this Court to decide, at the earliest available opportunity, the question whether the Electors Clause permits state courts (and state executive officials) to alter the rules by which presidential elections are conducted. The People need an answer, too. Until they get one, elections will continue to be plagued by doubts regarding whether the President was chosen in the constitutionally prescribed manner.

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* Ohio attempted to notify all parties, through the parties' attorneys, of its intent to file this *amicus* brief on December 10, 2020.

Ohio is submitting this brief under Rule 37.4 to address these points.

ARGUMENT

Article II of the Constitution directs that "[e]ach State shall appoint" presidential electors "in such Manner as the Legislature thereof may direct." Art. II, §1, cl.2. Whatever "the Legislature thereof" means, it does not mean "the courts thereof." Thus, when state election codes dictate the manner for appointing presidential electors, state courts must respect the legislature's work: they may not change the rules by which electors are chosen through judge-made doctrines or by rewriting statutes in the guise of interpretation. *See Democratic Nat'l Comm. v. Wis. State Legislature*, 592 U.S. __, slip op. 9 n.1 (2020) (Kavanaugh, J., concurring); *Bush v. Gore*, 531 U.S. 98, 120 (2000) (Rehnquist, C.J., concurring); *see also Republican Party of Pa. v. Boockvar*, 592 U.S. __, slip op. 1 (2020) (Statement of Alito, J.). This does not mean that state-court interpretations of state law are entitled to no deference. But at some point, a purported "interpretation" becomes "not a construction" of the relevant text, "but a rewriting of it." *State Bd. of Equalization of Cal. v. Young's Market Co.*, 299 U.S. 59, 62 (1936). The Electors Clause prohibits such rewritings in the context of presidential elections.

Precisely because Ohio holds this view about the meaning of the Electors Clause, it cannot support Texas's plea for relief. Texas seeks a "remand to the State legislatures to allocate electors in a manner consistent with the Constitution." Br. in Support of Motion for Leave to File 16. Such an order would violate, not honor, the Electors Clause. Federal courts, just

like state courts, lack authority to change the legislatively chosen method for appointing presidential electors. And so federal courts, just like state courts, lack authority to order legislatures to appoint electors without regard to the results of an already-completed election.

What is more, the relief that Texas seeks would undermine a foundational premise of our federalist system: the idea that the States are sovereigns, free to govern themselves. The federal government has only those powers that the Constitution gives to it. And nothing in the Constitution empowers courts to issue orders affirmatively directing the States how to exercise their constitutional authority. *See Missouri v. Jenkins*, 515 U.S. 70, 132–33 (1995) (Thomas, J., concurring). The courts have no more business ordering the People's representatives how to choose electors than they do ordering the People themselves how to choose their dinners. In the Federalist Papers, Hamilton endorsed the idea that "there is no liberty, if the power of judging be not separated from the legislative and executive powers." The Federalist No. 78 (Hamilton), p. 523 (Cooke, ed., 1961). He was talking about the separation of federal powers. But the principle applies with equal (and perhaps greater) force as applied to the Constitution's separation of state and federal power. As this Court is fond of noting, the "Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other." *Saenz v. Roe*, 526 U.S. 489, 504 n.17 (1999) (quoting *U.S. Term Limits v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring)). "By denying any one government complete

jurisdiction over all the concerns of public life, federalism" ensures that one government is able to check overreach by the other, and thus "protects the liberty of the individual from arbitrary power." *Bond v. United States*, 564 U.S. 211, 222 (2011). By asking this Court to direct four sovereign States in the exercise of *their* authority under the Electors Clause, Texas erodes both this structure and the protection that the structure provides.

Although Ohio does not endorse Texas's proposed relief, it does endorse its call for a ruling on the meaning of the Electors Clause. More precisely, Ohio urges the Court to decide, at the earliest available opportunity, whether state courts and state executive actors violate the Electors Clause when they change the rules by which presidential elections are run. In late October, Justice Alito predicted that the Court's failure to decide that question in another case had "needlessly created conditions that could lead to serious post-election problems." *Boockvar*, 592 U.S. __, slip op. at 1 (Statement of Alito, J.). Unfortunately, he was right. In many States, citizens voted for President under rules created by state judiciaries and state executive actors rather than state legislatures. *See, e.g.*, *id.*, slip op. at 1–2; *Moore v. Circosta*, 592 U.S. __, slip op. 1–2 (2020) (Gorsuch, J., dissenting from denial of application for injunctive relief); *Tex. League of United Latin Am. Citizens v. Hughs*, 978 F.3d 136, 151–52 (5th Cir. 2020) (Ho, J., concurring). Because this Court has never decided whether the Electors Clause permits such alterations to the method for choosing presidential electors, Americans are left to wonder whether the process by which they voted for President was consistent with our country's founding charter. Those doubts will linger, "robbing the winners of" a

victory that all Americans will deem legitimate, and "the losers of the peace that comes from a fair defeat." *United States v. Windsor*, 570 U.S. 744, 802 (2013) (Scalia, J., dissenting).

The importance of the public's constitutional doubts, however, pales in comparison to the importance of the public's concerns regarding basic fairness. In States around the country, judges and executive officials changed the rules that would govern the election "immediately preceding or during" the election. *Wise v. Circosta*, 978 F.3d 93, 104 (4th Cir. 2020) (Wilkinson, J., dissenting); *see also Pa. Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020). If there is anything more American than representative government, it is a firm conviction that the rules ought not be changed after the game has begun. Because this Court has never held that the Electors Clause forbids state courts and state executive officers from meddling with state legislatures' work, state courts and state executive officers retained leeway to change the rules in the final stretch of election season. It is not unreasonable to wonder—and many millions of Americans do—whether those hastily implemented changes exposed the election systems to vulnerabilities. Nor is it unreasonable to object on fairness grounds—as many millions of Americans do—to changing the voting rules when the election is impending and the changes' impact on the results can be predicted. These concerns undermine "public confidence in the integrity of the electoral process." *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 197 (2008) (Stevens, J., op.). That confidence is necessary if there is to be "citizen participation in the democratic process," which is itself necessary for the success of the American project. *Id.*

It may prove difficult at this late date to fashion a remedy that does not create equal or greater harms. But there will be an election in 2024, another four years after that, and so on. If only to prevent the doubts that have tainted this election from arising again in some future election, the Court should decide, as soon as possible, the extent of the power that the Electors Clause confers on state legislatures and withholds from other actors.

CONCLUSION

The Court should issue a decision on the meaning of the Electors Clause at the earliest available opportunity.

Respectfully submitted,

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