SUGGESTIONS FOR A NEW LAWSUIT TO CHALLENGE THE PURPORTED RESULT OF THE PRESIDENTIAL AND VICE PRESIDENTIAL ELECTION OF 2020

by

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This paper lays out suggestions for a new lawsuit to be filed in the original jurisdiction of the Supreme Court of the United States in order to deal with the highly irregular and suspicious—almost certainly fraudulent—plebiscites for selections of Electors in certain key (so-called "swing") States which occurred in the course of the 2020 Presidential/Vice Presidential election; and which, absent some timely countervailing action by the Judiciary, will lead to the purported election of Mr. Biden and Ms. Harris as President and Vice President, respectively, under color of the Twelfth Amendment to the Constitution of the United States on January 6, 2020, and to the commencement of their terms in those offices under color of Section 1 of the Twentieth Amendment on January 20, 2021.[1]

THE REASONS FOR THIS PROPOSAL

This paper's premise is that various courts which have been, are now being, or will be presented with this complex of issues in any form—including the Supreme Court, as evidenced in its recent evasive decision in *Texas* v. *Pennsylvania*—have been, are, or will be reluctant to take up the matter because of a perception that, even if the course of the litigation itself would be judicially controllable, the course of events following a decision on the merits would not. That is, any such decision would open a Pandora's box of political (and perhaps social) turmoil for which the courts would be blamed, but for which they could not provide a suitable preventive *ex ante* or remedy *ex post*, and therefore should avoid the dilemma altogether.[2]

Any new litigation must arise as soon as possible in the form of a single case in the original

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[1] The author's suggestions do not include actions, other than litigation or preparation for litigation, which might be undertaken by the Executive Branch or Legislative Branches of the government of the United States in order to challenge the purported election and qualification of the Biden-Harris ticket. This is not meant to dissuade or discourage either Branch from considering such actions. Obviously, though, if any such non-judicial actions are not commenced—indeed, do not take actual effect—no later than "noon on the 20th day of January," 2021, when "[t]he terms of the [incumbent] President and Vice President shall end", "and the terms of their [purported] successors shall then begin", they likely never will. *See* U.S. Const. amend. XX, § 1.

[2] Consideration of other possible explanations for the spate of abnegations of judicial duty which has already taken place in one court after another is beyond the scope of this paper.

jurisdiction of the Supreme Court, simply because insufficient time remains for the Judiciary to assert control over the situation while multiple cases from different jurisdictions, perhaps coming to widely divergent results for disparate reasons, wend their ways from trial courts, to appellate courts, to the Supreme Court, one by one with no guarantee of any coherent overview, for its consideration on petitions for writs of certiorari.

In any new litigation which invokes the Supreme Court's exercise of its original jurisdiction, at the onset the Plaintiffs must convince a majority of the Justices that:

> (i) *pendente lite* the Court can control the on-going conflict arising out of two slates of candidates contending for election to and qualification for the offices of President and Vice President, such that inadvisable and perhaps irreversible steps are not taken by the political branches of the governments of the United States and various States, by the candidates themselves, and by the candidates' irrepressible supporters among the general public; and
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> (ii) the Court can craft a final judgment—plainly justifiable in legal principle *and especially enforceable in practice*—which declares not only which slate has been lawfully elected and qualified, but also at what point in time such election and qualification shall be deemed to have been or to be effective, in the face of events which will have transpired during the course of the litigation.

All other possible personal motivations for avoidance of the exercise of their original jurisdiction aside, the Justices will certainly be keenly aware that a case of this magnitude in terms of the evidence adduced before a Special Master and the legal arguments presented both in that forum and to the Court itself cannot be litigated in a few days or even weeks, perhaps several months. President Trump's and Vice President Pence's terms of office, however, "shall end on the 20th day of January," 2021.[3] And doubtlessly Mr. Biden and Ms. Harris will claim to be entitled to be inaugurated on that day, in reliance on the contested plebiscites in the "swing" States (and other, uncontested popular votes in other States), the supposed certifications of those plebiscites and designations of Electors by those States' officials, counting of all the States' votes in the Electoral College, and the final tally in Congress—*along with the absence of any final judicial decision or order which so draws into question the plebiscites, certifications, designations, count, and tally as to postpone or even preclude their inaugurations.* No matter what concerns may then convulse the general public, what dissension may have broken out in Congress, and what litigation may still be plodding along in different courts in different jurisdictions *other than the Supreme Court*, Mr. Biden and Ms. Harris will claim that the Electoral College process *has* chosen them as President and Vice-President, respectively, that no final judicial determination *has* questioned, let alone set aside, that purported determination, and therefore that "the[ir] terms * * * *shall* then begin" on that date with their

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[3] U.S. Const. amend. XX, § 1.

inaugurations.[4] Worthy of recollection is that on Air Force One, hard upon the assassination of President John F. Kennedy, Lyndon Baines Johnson established the precedent that taking the Presidential "Oath or Affirmation" requires no special venue, no elaborate formal ceremony, no swollen crowd of onlookers, only the simultaneous presence of an individual empowered to administer an oath and a person eager to swear to its terms. So perhaps, on one pretext or another, Mr. Biden might repair even to the privacy of Chief Justice Roberts' chambers in the Supreme Court for that purpose, as free from interference as was Mr. Johnson. And once he "shall [have] take[n] the * * * Oath of Affirmation",[5] what could be done about it?

If Mr. Biden and Ms. Harris were purportedly inaugurated on January 20; if litigation pursued by President Trump, Vice President Pence, and their supporters to set aside those inaugurations were to drag on well into 2021 (or beyond); if the Supreme Court were only tardily to take up any such case; if a majority of the Justices found themselves intellectually swayed by the evidence and legal arguments to decide in favor of Mr. Trump and Mr. Pence; then the Court would be confronted with an intractable dilemma: On the one hand, it could rule that everything the purported Biden-Harris Administration did was invalid *ab initio*, and set it all aside, no matter how consequential the matters might be. On the other hand, it could rule that usurpers who have contrived to have themselves "elected" and " inaugurated" as "President" and "Vice President" through electoral irregularities (and perhaps even fraud) can thereafter pose as such until exposed; but, not withstanding their impostures, whatever acts they perform in those feigned capacities must be treated as "lawful"?[6] One need not be a fortune-teller to predict that either of these courses of action would result in unpredictable and perhaps immitigable political, economic, and social conflicts and even chaos. So, being inclined to avoid assuming responsibility for events they could not control, being able to do so because of their discretionary power over the Court's docket, and being capable of fashioning a facile legal façade to rationalize their decision, the Justices would likely refuse to hear any case which might in that manner "put them between a rock and a hard place". The question then becomes: How can President Trump and his supporters craft a lawsuit which in principle avoids that dilemma?

The answer is to take advantage of Section 3 of the Twentieth Amendment, which provides (in relevant part) that

> [i]f a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

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[4] *See* U.S. Const. amend. XX, § 1 (emphasis supplied).

[5] U.S. Const. art. II, § 1, cl. 7.

[6] Obviously, if the Court were to rule in favor of Mr. Biden and Ms. Harris, this dilemma would not arise.

In such wise, Section 3 explicitly provides for *any and every* situation "wherein neither a President elect nor a Vice President elect shall have qualified" in the present, but "shall have qualified" in the future, including a contested election which comes before the Judiciary for resolution.

At the present moment, Mr. Biden and Ms. Harris claim to be qualified for the offices of President and Vice President on the basis of the 2020 plebiscites in the "swing" States and subsequent events involving Electors whose authority depends upon the legitimacy of those plebiscites. On the grounds that those plebiscites were tainted with irregularities (including possible fraud), President Trump and Vice President Pence deny that Mr. Biden and Ms. Harris have qualified, and insist that they (Trump and Pence) have qualified. The country—ultimately represented by the government of the United States—dare not proceed on the basis of mere assertions and assumptions not supported by facts established in court according to the rules of evidence. Yet, while a suitable case is being litigated, what is the country to do if both slates of candidates claim, but neither has been proven, to be qualified for office?

As authorized by Section 3 of the Twentieth Amendment, Congress has provided for this eventuality in pertinent parts of Section 19 of Title 3 of the United States Code:

> (a)(1) If, by reason of * * * failure to quality, there is neither a President nor Vice President to discharge the powers and duties of the office of President, then the Speaker of the House of Representatives shall, upon his resignation as Speaker and as a Representative in Congress, act as President.
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> (b) If, at the time when under subsection (a) of this section a Speaker is to begin the discharge of the powers and duties of the office of President, there is no Speaker, or the Speaker fails to qualify as acting President, then the President pro tempore of the Senate shall, upon his resignation as President pro tempore and as Senator, act as President.
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> (c) An individual acting as President under subsection (a) or subsection (b) of this section shall continue to act until the expiration of the then current Presidential term, except that—
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> (1) if his discharge of the powers and duties of the office is founded in whole or in part on the failure of both the President-elect and the Vice-President-elect to qualify, then he shall act only until a President or Vice President qualifies; and
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> (d)(1) If, by reason of death, resignation, removal from office, inability, or failure to qualify, there is no President pro tempore to act as President under subsection (b) of this section, then the officer of the United States who is highest on the following list, and who is not under disability to discharge the powers and duties of the office of President shall act as President * * * .
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> (2) An individual acting as President under this subsection shall continue to do so until the expiration of the then current Presidential term, but not after a qualified and prior-entitled individual is able to act, except that the removal of the

> disability of an individual higher on the list contained in paragraph (1) of this subsection or the ability to qualify on the part of an individual higher on such list shall not terminate his service.

Application of these constitutional and statutory provisions would enable the Supreme Court to solve the problem of premature, conflicting, and otherwise legally problematic "inaugurations" of candidates for the offices of President and Vice President while litigation over those candidates' qualifications went on in its original jurisdiction. The Court would need only to enjoin all of the four candidates *pendente lite* from asserting, in any official forum, any claim that any one of them has been proven to be "qualified" for the office of President or Vice President. During the pendency of the litigation, *someone* would be invested will full authority to "act as President" *pro tempore* pursuant to Section 3 of the Twentieth Amendment and 3 U.S.C. § 19, so no hiatus which might endanger or embarrass the government of the United States would occur. And whenever the Court finally decided the issue, it would hold the prevailing candidates to have been and be "qualified" for their offices as of that date—the person who "shall act only until a President * * * qualifies" would then step aside in favor of the true President-elect—and the potentially explosive political crisis would be defused in a manner completely in accord with constitutional norms and procedures.

A further consideration is that, although Section 3 of the Twentieth Amendment provides for a "person who shall act accordingly [*i.e.,* as the President] until a President or Vice President shall have qualified", it does *not* provide for an equivalent interim "act[ing]" Vice President. Conceivably, the person "act[ing] as President" might "nominate a Vice President who [would] take office upon confirmation by a majority vote of both houses of Congress", under color of Section 2 of the Twenty-fifth Amendment. And if the individual so "nominate[d]" and "confirm[ed]" were thereby deemed "qualified" to be President under Section 3 of the Twentieth Amendment, the "act[ing]" President could step aside and the new Vice President could become President, arguably requiring (or at least encouraging) the Supreme Court to dismiss the proposed lawsuit as moot or otherwise no longer justiciable.

The proper legal defense against such an eventuality would be—not simply that such a scheme would obviously be concocted to defeat the Supreme Court's exercise of its original jurisdiction, and unconscionable on that score alone—but especially that Section 2 of the Twenty-fifth Amendment requires "a *vacancy* in the office of the Vice President" *in fact, in law, and in equity*. Under the posited circumstances of the proposed litigation, however, the Speaker would merely "*act* as President" *pro tempore* because, although the identity of the President would initially be unknown, only one of two persons—either Mr. Trump or Mr. Biden, and no one else—would or could qualify for the office, as soon as the controversy over the working of Electoral College process were judicially resolved. Similarly, although the identity of the Vice President would initially be unknown as well, only one of two persons—either Mr. Pence or Ms. Harris, and no one else—would or could qualify for that office. Thus, in fact and law, no true "vacancy in the office of the Vice President" would exist. A true "vacancy" must be the product of the certainty that no one has qualified to assume that office although someone might be "nominate[d]" and "confirm[ed]" for that purpose later on, not the mere uncertainty as to which of two individuals is already qualified in the here and now so as not

to require "nominat[ion]" and "confirmation". Plainly, it would be inequitable for the Speaker to be suffered, when simply "act[ing] as President" *pro tempore* because of and during this state of uncertainty, *and while the matter of uncertainty were itself* sub judice *for resolution*, to set about to disqualify *both* of the true candidates for Vice President by "nominat[ing someone else as] a Vice President". Worse yet, if the person "nominate[d]" and "confirm[ed]" as Vice President would then claim entitlement to the office of President under color of Section 3 of the Twentieth Amendment and 3 U.S.C. § 19(c)(1), the Speaker would succeed in disqualifying *both* of the true candidates for President, too.[7]

In order to forefend the problems which the Speaker could cause when "act[ing as President] only until a President or Vice President qualifies",[8] the Speaker would have to be named as a Defendant in order to be enjoined *pendente lite* from taking any action (i) to "nominate a Vice President" under Section 2 of the Twenty-fifth Amendment, or (ii) to remove the United States from, or allow the attorneys for the United States to shirk their due diligence and other ethical responsibilities on behalf of their client during the course of, the proposed lawsuit.[9]

THE BASIC STRUCTURE OF THE PROPOSED LAWSUIT

What follows is simply a sketch of the basic structural elements of the lawsuit this paper proposes. No attempt will be made to draw upon the voluminous records in cases previously filed in different courts by various plaintiffs ultimately on behalf of the Trump-Pence ticket, because those who peruse this paper presumably already are, or can easily make themselves, familiar with that body of useful information.

I. JURISDICTION

Because the lawsuit proposed herein would invoke the original jurisdiction of the Supreme Court, the following constitutional and statutory provisions would apply:

- Article III, Section 2, Clause 1 — "all Cases, in Law and Equity, arising under this Constitution[and] the Laws of the United States * * * Controversies to

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[7] True enough, these eventualities might be avoided altogether if sufficient Members of Congress subscribed to the view that "a majority vote of both Houses of Congress" under Section 2 of the Twenty-fifth Amendment means a *true majority of all Members*, as opposed to a majority of the "Majority of each [House which] shall constitute a Quorum to do Business". *See* U.S. Const. art. I, § 5, cl. 1. Or the problem might be evaded politically through a tacit agreement among Members that Congress should take no action which might interfere with the Supreme Court's final adjudication of which slate should actually be entitled to the offices of President and Vice President pursuant to the 2020 election. In the present raucous political climate, however, little reliance can be placed upon these possibilities.

[8] 3 U.S.C. § 19(c)(1).

[9] For simplicity's sake, this paper presumes that the Speaker would "act as President" under U.S. Const. amend. XX, § 3, and 3 U.S.C. § 19. Its reasoning applies, of course, to anyone upon whom that authority would devolve pursuant to the latter statute.

which the United States shall be a Party * * * Controversies between two or more States * * * between a State and Citizens of another State".

• Article III, Section 2, Clause 2 — "all Cases * * * in which a State shall be Party".

• 28 U.S.C. § 1251(a): "The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States." And

• 28 U.S.C. § 1251(b)(2): "The Supreme Court shall have original but not exclusive jurisdiction of * * * All controversies between the United States and a State".

Judicial procedure, of course, would conform to Rule 17 of the Rules of the Supreme Court of the United States.

II. The Proposed Parties

The nature and identity of the proposed parties would amply justify invocation of the original jurisdiction of the Supreme Court.

A. The proposed Plaintiffs

The proposed Plaintiffs would include:

1. The United States. The United States would be represented by the Attorney General and/or the Solicitor General, who would be authorized *and commanded* by the President (Mr. Trump) to bring suit in the original jurisdiction of the Supreme Court, in fulfillment of his oath of office,[10] and in the exercise of his constitutional duty, right, and power to "take Care that the Laws be faithfully executed".[11] Representation by the Attorney General and/or the Solicitor General is the traditional manner of proceeding in a case involving the United States.[12] Some consideration, however, ought to be given to possibly pertinent Department of Justice regulations.[13]

In any event, the Defendants could not deny that "Congress has given a very broad authority to the Attorney General to institute and conduct litigation in order to establish and safeguard

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[10] U.S. Const. art. II, § 1, cl. 7.

[11] U.S. Const. art. II, § 3. As much as possible, this paper will use the legal terminology of "right", "power", "duty", and so on in the Hohfeldian sense. *See* Arthur L. Corbin, "Legal Analysis and Terminology", 29 *Yale Law Journal* 163 (1919)

[12] *See, e.g.,* United States v. Louisiana, 339 U.S. 699, 700 (1950), *and* 28 U.S.C. §§ 516-519.

[13] *See* 28 C.F.R §§ 0.45(h) and 0.46 (cases to be litigated by the Assistant Attorney General for the Civil Division, pursuant to delegation of authority by the Attorney General).

government rights", that "no Act of Congress has amended the statutes which impose on the Attorney General the authority and the duty to protect the Government's interests through the courts", and that there exists no "support for a holding that Congress has either explicitly or by implication stripped the Attorney General of his statutorily granted power to invoke [the Supreme Court's original] jurisdiction in this federal-state controversy".[14]

2. The States of A, B, C, and so on (to be determined on legal and political grounds). These States would need to satisfy two requirements: (i) They never actually joined as plaintiffs in *Texas* v. *Pennsylvania*.[15] And (ii) they ought not to be States of which any one of the defendant Electors, Mr. Biden, or Ms. Harris is a citizen.[16]

3. President Trump and Vice President Pence. They would appear in their individual capacities, not as original Plaintiffs but by way of a motion to intervene filed simultaneously with the main action, *inter alia* for the vital purpose of maintaining the *status quo* with respect to application of the Twentieth Amendment.[17] And, possibly,

4. The plaintiff States' Electors. They, too, would appear in their individual capacities, not as original Plaintiffs but by way of a motion to intervene filed simultaneously with the main action.[18]

B. The proposed Defendants

The proposed Defendants would include:

1. At least all of the States which were defendants in *Texas* v. *Pennsylvania* (that is, Pennsylvania, Georgia, Michigan, and Wisconsin), as well as every other so-called "swing" State the joinder of which might be possible and advisable.

The joinder of as many "swing" States as possible would be necessary and proper for the prompt, convenient, and effective administration of justice. It would avoid a multiplicity of suits by addressing in a single lawsuit in a single court the decisive, inextricably interrelated issues—namely, the totality of irregularities in the plebiscites in those States, which would determine the true count of votes for the Trump-Pence and Biden-Harris tickets, the proper composition of those States' slates of Electors, the votes of those States and the overall vote for various candidates in the Electoral

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[14] *See* United States v. California, 332 U.S. 19, 27, 27-28, 28-29 (1947) (footnote omitted).

[15] Presumably, inasmuch as the Supreme Court denied as moot the motions of various States to join that lawsuit when it refused to exercise its original jurisdiction on behalf of Texas, none of those States would even arguably be precluded from participating as plaintiffs in the proposed lawsuit. Only Texas might be disabled from joining the suit.

[16] *See, e.g.,* Georgia v. Pennsylvania Railroad Company, 324 U.S. 439, 463 (1945); California v. Southern Pacific Company, 157 U.S. 229, 257-262 (1895); Pennsylvania v. Quicksilver Company, 77 U.S. (10 Wallace) 553, 556 (1871).

[17] *See post*, at 26-27.

[18] *See post*, at 27-28.

College, the tally of legal Electoral votes in Congress, and thus the qualifications of Mr. Trump and Mr. Pence for the offices of President and Vice President, respectively, and the disqualifications of Mr. Biden and Ms. Harris for those offices. After all, proving that the designation of Electors was improper in any one "swing" State would not prove it so in any other "swing" State. Neither could it prove that the totality of votes in the Electoral College, even minus all of that State's Electors, fell short of being sufficient to elect Mr. Biden and Ms. Harris.[19]

Many decisions of the Supreme Court demonstrate that the proposed defendant States would not be not immune from suit by the United States under Federal law in the original jurisdiction of the Supreme Court.[20] Indeed,

> nothing * * * in any * * * provision of the Constitution prevents or has ever been seriously supposed to prevent a State's being sued by the United States. The United States in the past has in many cases been allowed to file suits in th[e Supreme Court of the United States] * * * against States, * * * with or without specific authorization from Congress * * * . The [contrary] reading of the Constitution * * * is not supported by precedent, is not required by any language of the Constitution, and would without justification in reason diminish the power of courts to protect the people of this country against deprivation and destruction by States of their federally guaranteed rights.[21]

Specifically in the context of the proposed lawsuit, the defendant States surrendered a portion of their sovereignty when they assented to the constitutional provisions for the election of the President and Vice President, and to the constitutional power of Congress to set electoral rules, and therefore may be sued for violations of those provisions and rules.[22]

2. All of the Electors who were originally designated by the defendant States in their various irregular (and possibly fraudulent) manners. These individuals would be sued in their official capacities as undoubted agents of their States ("State actors"), as well as in their capacities as individuals who possibly participated in one or another civil or criminal conspiracy to rig the elections in their States. Because "[t]he [proposed] suit is between states, and the other jurisdictional requirements being satisfied, the[se] individual parties whose presence is necessary or proper for the determination of the case or controversy between the states are properly made parties defendant".[23]

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[19] These considerations need to be stressed in order to distinguish the proposed lawsuit from the type of criticism raised in *Alabama* v. *Arizona*, 291 U.S. 286, 290-291 (1934).

[20] *See, e.g.,* United States v. Texas, 143 U.S. 621, 642-646 (1892); United States v. California, 332 U.S. 19 (1947); United States v. Louisiana, 339 U.S. 699 (1950); United States v. Texas, 339 U.S. 707 (1950).

[21] United States v. Mississippi, 380 U.S. 128, 140-141 (1965).

[22] *Compare* Parden v. Terminal Railway of the Alabama State Docks Department, 377 U.S. 184, 191-196 (1964) (Congressional statute enacted under the Commerce Clause).

[23] *See* Texas v. Florida, 306 U.S. 398, 405 (1939).

Of course, none of these Electors could be a citizen of one of the Plaintiff States.[24]

It might also be advisable to sue certain of the Governors, Secretaries of State, and other officials who authorized, participated in, or failed, neglected, or refused to prevent, mitigate, or correct irregular (or possibly fraudulent) electoral wrongdoing in their States.[25] True, a suit against a Governor in his official capacity would arguably be procedurally redundant, inasmuch as it would also constitute a suit against the State.[26] But naming a Governor as a defendant, in addition to his State, might enhance the Plaintiffs' ability to obtain fruitful discovery, or serve some other useful purpose.[27] And with respect to a defendant State whose Secretary of State was the official who purported to "certify" the result of the State's plebiscite or the designation of her Electors, the Secretary's joinder would seem prudent. In any event, any State officials named as defendants (in addition to the Electors) should be sued in both their official and their individual capacities.

3. Mr. Biden and Ms. Harris. Essential to the Supreme Court's exercise of its original jurisdiction over the proposed lawsuit would be the Justices' belief that political events would remain under control while the legal issues were sorted out. This would require a guarantee that: (i) other than as a participant in the proposed litigation, *no one* would act in pursuance of a claim to be qualified as President or Vice President under color of the Twentieth Amendment on January 20, 2021, and thereafter; and (ii) an acting President would be appointed *pendente lite* pursuant to Section 3 of that Amendment and 3 U.S.C. § 19. As Intervenors, Mr. Trump and Mr. Pence would agree to submit themselves to an injunction so providing.[28] If not named as Defendants, though, Mr. Biden and Ms. Harris would surely refuse to enter into any *extra*-judicial yet binding arrangement to that effect. And, unless they were actually joined as Defendants, an injunction purporting to restrain them in any manner would be improper.[29] Moreover, "when an original cause is pending in th[e Supreme C]ourt to be disposed of [t]here in the first instance and in the exercise of an exceptional jurisdiction, it does not comport with the gravity and finality which should characterize such an adjudication to proceed in the absence of parties whose rights would be in effect determined, even though they might not be technically bound in subsequent litigation in some other tribunal".[30]

4. The Speaker of the House of Representatives. This is the individual who—as the result of the injunction against Mr. Biden, Ms. Harris, Mr. Trump, and Mr. Pence—"shall * * * act as

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[24] "The judicial Power [of the United States] shall extend * * * to Controversies * * * between a State and Citizens of another State". U.S. Const. art. III, § 2, cl. 1. And "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens * * * of the State wherein they reside". U.S. Const. amend. XIV, § 1.

[25] Many of the suits which have already been filed indicate who these individuals might be.

[26] *See* Kentucky v. Dennison, 65 U.S. (24 Howard) 66, 97-98 (1861).

[27] In any event, service of process in an original-jurisdiction case must be made upon the Governor and the Attorney General of the State. *See* Rule 17(3) of the Rules of the Supreme Court of the United States.

[28] *See post,* at 26.

[29] *See, e.g.,* Minnesota v. Northern Securities Company, 184 U.S. 199, 235-239, 244-246 (1902).

[30] California v. Southern Pacific Company, 157 U.S. 229, 257 (1895).

President" after "noon on the twentieth day of January[, 2021]".[31] In anticipation and throughout the performance of his or her rôle as "act[ing]" President, the Speaker would be enjoined *pendente lite*, perforce of the Presidential duty to "take Care that the Laws be faithfully executed",[32] from:

> (i) taking any action under color of "[t]he executive Power"[33] which would entail or depend upon an assertion or claim that "there is a vacancy in the office of Vice President", including (but not limited to) "nominat[ing] a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress", under color of Section 2 of the Twenty-fifth Amendment to the Constitution of the United States; and
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> (ii) ordering, directing, authorizing, counseling, allowing, or in any manner countenancing attorneys for the United States to withdraw the United States from the proposed lawsuit, to settle or compromise the lawsuit except with the concurrence of the other Plaintiffs, or to fail, neglect, or refuse to represent the United States zealously, with due diligence, and in accordance with all of the requirements of legal ethics owed to their clients.[34]

In addition, as with the defendant Electors, the Speaker should not be a citizen of any of the plaintiff States. So, the State in which the Speaker resides should not be included in the list of Plaintiffs.[35]

C. The mix of proposed Plaintiffs and Defendants

The mix of private individuals and public officials along with the United States and various States as both Plaintiffs and Defendants in the lawsuit proposed herein would create no difficulty for the Supreme Court in the exercise of its original jurisdiction. Many original-jurisdiction cases exhibit a mix of States and *non*-State parties (including individuals) as litigants.[36] And, specifically, *South*

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[31] *See* U.S. Const. amend. XX, § 3 *and* 3 U.S.C. § 19(a)(1) and (c)(1).

[32] U.S. Const. art. II, § 3.

[33] U.S. Const. art. II, § 1, cl. 1.

[34] This would be absolutely necessary, because—whatever the political-party affiliation or political persuasions or sympathies of the individual temporarily "act[ing] as President"—the United States would retain an overriding, permanent, and vital interest in ascertaining which candidates were actually selected as President and Vice President as a result of the 2020 elections and subsequent proceedings. A person merely "act[ing] as President" of the United States is not the United States, and might purport to "act as President" but contrary to the true interests of the United States.

[35] "The judicial Power [of the United States] shall extend * * * to Controversies * * * between a State and Citizens of another State". U.S. Const. art. III, § 2, cl. 1. And "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens * * * of the State wherein they reside". U.S. Const. amend. XIV, § 1.

[36] *E.g.*, Chisholm v. Georgia, 2 U.S. (2 Dallas) 419 (1793) (individual as plaintiff); Georgia v. Brailsford, 3 U.S. (3 Dallas) 1 (1794) (individuals as defendants) (jury trial held); New York v. Connecticut, 4 U.S. (4 Dallas) 1 (1799) (a State and individuals as defendants); Florida v. Anderson, 91 U.S. 667 (1875) (individuals as defendants); Missouri v. Illinois and

Carolina v. *Katzenbach* shows that officials of the government of the United States (such as Mr. Trump and Mr. Pence) can be parties adverse to a State in an original-jurisdiction case.[37]

II. The Basic Theory of the Proposed Plaintiffs' Case

A. The interests of the proposed Plaintiffs

1. The United States. The right of the United States to participate among the Plaintiffs in the proposed lawsuit—that is, the so-called "standing" of the United States—is pellucid, undeniable, and compelling. "Standing" "identif[ies] those disputes which are appropriately resolved through the judicial process".[38]

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized * * * and (b) "actual or imminent, not 'conjectural' or 'hypothetical'" * * * . Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." * * * Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."[39]

Viewed in this light, the "standing" of the United States is not simply an "interest" worthy of ordinary judicial consideration, but a *constitutional imperative*.

a. In light of his unique constitutional authority and responsibilities, the proper selection of the President is of critical importance to the United States.[40] The Constitution declares that "[t]he executive Power shall be vested in a President of the United States".[41] Because to this single individual is entrusted the entirety of that awesome "Power"—with neither delimiting condition nor

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the Sanitary District of Chicago, 180 U.S. 208 (1901) (State and public corporation as defendants); Georgia v. City of Chattanooga, Tennessee, 264 U.S. 472 (1924) (city in another State as defendant); Georgia v. Pennsylvania Railroad Company, 324 U.S. 439 (1945) (private corporations as defendants); South Carolina v. Katzenbach, 383 U.S. 301 (1966) (individual official of the United States as defendant) (Voting Rights Act of 1965).

[37] 383 U.S. 301 (1966). They, however, would join the proposed litigation initially as Intervenors. *See post,* at 26-27.

[38] Whitmore v. Arkansas, 495 U.S. 149, 155 (1990).

[39] Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561 (1992).

[40] No need exists separately to belabor the importance to the United States of the proper selection of the Vice President. At any time the Vice President might succeed to the Presidency or become "Acting President". U.S. Const. art. II, § 1, cl. 5, *and* amend. XXV, §§ 1, 3, and 4. And a Vice President-elect can become the President. *See* U.S. Const. amend. XX, § 3. The Vice President also performs an important constitutional function in conjunction with the Senate. U.S. Const. art. I, § 3, cl. 4.

[41] U.S. Const. art. II, § 1, cl. 1.

disabling contingency attached to it[42]—the Constitution requires that "[b]efore he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—'I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States".[43] And, even beyond that, the Constitution then imposes upon the President the duty, and invests him with the corresponding right and power, to "take Care that the Laws be faithfully executed"[44]—including first and foremost among those "Laws", of course, the Constitution itself which he has sworn to "preserve, protect and defend".[45]

An individual who claimed to be the President under the deceptive color of an *improper* operation of the Constitution's Electoral College process (as described below), to the exclusion of the rightful candidate for that office, would be guilty of *usurpation*—that is, "the exercise of Power, which another hath a Right to".[46] Plainly enough, such an individual would be incapable of honestly taking the Presidential "Oath or Affirmation"; and perforce of the falsity of "Oath or Affirmation" he affected would be, not only incapable of performing the duty to "take Care that the Laws be faithfully executed", but also in violation of it insofar as he did not faithfully execute the "Law[ ]" necessary for him to "enter on the Execution of [the] Office" in the first place.

The absolutely critical nature of the *proper* selection of the President through the Electoral College process—that is, the *substantive correctness* of the result, *provable in a court of law according to the rules of evidence if necessary*, not merely the apparent regularity with which the process might have been carried out—emerges most strikingly in:

> • The President's appointment as "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States",[47] which entrusts him with ultimate authority over "the land and naval Forces" of the United States in time of "War",[48] and over the Militia whenever some "Part of them * * * may be employed in the Service of the United States" "to execute the Laws of the Union, suppress Insurrections and repel

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[42] *See Black's Law Dictionary* (St. Paul, Minnesota: Thomas Reuters, 2014), at 1794 (definition of "vested").

[43] U.S. Const. art. II, § 1, cl. 7. Indeed, the Constitution considers the President's recognition of his responsibilities so vital that his "Oath or Affirmation", couched in the first-person-singular future imperative ("I *will*", as opposed to "I shall"), goes beyond the "Oath or Affirmation" simply "to support this Constitution" required of "Senators and Representatives [in Congress] * * * and all [other] executive and judicial Officers * * * of the United States". *See* U.S. Const. art. VI, cl. 3.

[44] U.S. Const. art. II, § 3.

[45] *See In re* Neagle, 135 U.S. 1, 63-68 (1890).

[46] John Locke, *Two Treatises of Government* (London, England: Awnsham & John Churchill, 1698), Book II, Chapter XVIII, § 199. *See Black's Law Dictionary, ante* note 42, at 1778 (definitions of "usurper" and "usurpation").

[47] U.S. Const. art. II, § 2, cl. 1.

[48] *See* U.S. Const. art. I, § 8, cls. 11 through 14.

Invasions".[49]

• His authority to conduct the relations of the United States with foreign nations, including both his "Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur", and his duty, right, and power to "nominate, and by and with the Advice and Consent of the Senate * * * [to] appoint Ambassadors[and] other public Ministers and Consuls" for the United States;[50] and his duty, right, and power to "receive Ambassadors and other public Ministers" from foreign countries.[51]

• His duty, right, and power to "nominate, and by and with the Advice and Consent of the Senate, * * * [to] appoint * * * Judges of the supreme Court.[52]

• His privileges, rights, powers, and duties to participate with Congress in the legislative process.[53]

• His duty, right, and power to "take Care that the Laws be faithfully executed".[54] And

• All other rights, powers, privileges, and duties as may be vouchsafed to him pursuant to "all Laws" enacted by Congress "which shall be necessary and proper for carrying into Execution" the foregoing "Powers vested by th[e] Constitution" in him.[55]

Inconceivable is that the Constitution provides no plain, straightforward, and efficacious "check and balance" against some usurper's purported access to, let alone malign exercise of, those powers, rights, duties, and privileges—whether that usurper might be someone who is "[in]eligible to the Office of President" merely because he is personally disqualified;[56] or someone who places the interests of an hostile foreign power ahead of the interests of the United States;[57] or someone who

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[49] *See* U.S. Const. art. I, § 8, cls. 15 and 16.

[50] U.S. Const. art. II, § 2, cl. 2. *See* U.S. Const. art. VI, cl. 2 ("all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land").

[51] U.S. Const. art. II, § 3.

[52] U.S. Const. art. II, § 2, cl. 2.

[53] U.S. Const. art. I, § 7, cls. 2 and 3; *and* art. II, § 3.

[54] U.S. Const. art. II, § 3.

[55] U.S. Const. art. I, § 8, cl. 18.

[56] U.S. Const. art. II, § 1, cl. 4 (someone who is not "a natural born Citizen" or has not "attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States").

[57] *See* U.S. Const. art. III, § 3, cl. 1; *and* art. II, § 4 ("Treason"). In support of the Electoral College, Alexander Hamilton wrote that "[n]othing was more to be desired than that every practical obstacle should be opposed to cabal, intrigue, and

is the beneficiary of bribery, or the subject of blackmail, whether by foreign or domestic sources;[58] or simply someone whose purported selection as President, "in such Manner as the Legislature [of each State] may direct",[59] is the product of incompetence, gross irregularities, fraud, or other dis-entitling circumstances attributable to "State action" by "State actors".[60]

b. To be sure, many Federal "checks and balances", enforceable in the courts, exist with respect to the rights of citizens to vote in plebiscites. In regard specifically to the selection of the President, however, these are: (i) indirect, because they penalize criminal interference in plebiscites in particular, or violations of civil rights related thereto in general;[61] (ii) inapposite if not irrelevant, because a plebiscite among all citizens for selection of the President is not constitutionally mandated in any State;[62] and most to the point (iii) incapable of causing even an obviously improper selection of the President to be judicially reviewed, let alone set aside.

Selection of the President occurs through the Electoral College process, which is entirely the product of and controlled by the Constitution of the United States and certain Federal statutes.[63] The purpose of the process is *correctly* to determine identity of the persons *properly* selected for the offices of President and Vice President by *properly* designated Electors in each State. Obviously, the ultimate "check and balance" on the *correct* selection of the President and Vice President must be the constitutional means by which the *proper* functioning of that system can *assuredly* be secured in fact, law, and equity *in the interest of the United States*. These means can be found in enforcement *by the United States in the courts of the United States* of the Electoral College process against "State actors" who in whatever manner have caused that process to malfunction. And it is the President's personal

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corruption. These most deadly adversaries of republican government might naturally have been expected to make their approaches from more than one quarter, *but chiefly from the desire in foreign powers to gain an improper ascendant in our councils. How could they better gratify this, than by raising a creature of their own to the chief magistracy of the Union?*" THE FEDERALIST A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES *Being a Collection of Essays written in Support of the Constitution agreed upon September 17, 1787, by the Federal Convention* (Indianapolis, Indiana: National Foundation for Education in American Citizenship, Special Edition, 1937), No. 68, at 442 (emphasis supplied).

[58] *See* U.S. Const. art. II, § 4 ("Bribery"). In political practice, bribery and blackmail are related offenses. The one is the offer of a favor in exchange for a public official's action or forbearance, whereas the other is the threat of harm aimed at extorting the same result. *See Black's Law Dictionary, ante* note 42, at 203 (definition of "blackmail") and 229 (definition of "bribery").

[59] U.S. Const. art. II, § 1, cl. 2.

[60] *See post,* at 17.

[61] *See, e.g.,* 52 U.S.C. §§ 10307 and 20511; *and* 18 U.S.C. §§ 241 and 242 *in the light of* United States v. Saylor, 322 U.S. 385 (1944). There are, as well, after-the-fact remedies available. *See, e.g.,* 18 U.S.C. § 912.

[62] *See* McPherson v. Blacker, 146 U.S. 1, 27-35 (1892). "The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the electoral college." Bush v. Gore, 531 U.S. 98, 104 (2000), *citing* U.S. Const. art. II, § 1, cl. 2. *See* U.S. Const. amends. XV, XIX, XXIV, and XXVI, which secure rights for certain categories of persons to vote in plebiscites, but guarantee no one a right to require that any State must mandate a plebiscite for selection of the President.

[63] *See* U.S. Const. art. II, § 1, cls. 1 through 4; *and* amends. XII, XX, and XXIII. *See also* 3 U.S.C. §§ 1 through 21.

responsibility to rectify that situation by (among other possibilities) initiating an appropriate lawsuit, perforce of his duty to "take Care that the Laws be faithfully executed".[64]

The *correct* vote of *proper* Electors in the Electoral College is the *sine qua non* in the process, upon which everything else depends. The rôle of the States is simply to designate their Electors, by whatever legitimate means their Legislatures may have prescribed. The Constitution delegates to the States' Legislatures the duty and power to "appoint, in such Manner as the Legislature[s] * * * may direct, a Number of Electors".[65] But because the States participate in this process "by virtue of a direct grant of authority made under * * * the United States Constitution",[66] any "significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question".[67]

Procedurally, "[t]he Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States".[68] "[T]he Time of chusing the Electors" is initially set by statute as "the Tuesday next after the first Monday in November"[69]—in this electoral cycle that day having been November 3, 2020, when plebiscites were conducted in all of the defendant States. But, "[w]henever any State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day in such manner as the legislature of such State may direct".[70] Then, in the normal course of events, "[t]he electors of President and Vice President of each State shall meet and give their votes on the first Monday after the second Wednesday in December following their appointment at such place in each State as the legislature of such State shall direct"[71]—in this electoral cycle that day having been December 14, 2020.

Substantively, whatever "Manner" a State's Legislature may "direct" for "appoint[ing]" the State's "Electors" must be calculated, conducted, and checked so as to cause and confirm a result *which has been verified as correct (or possibly falsified as incorrect)*.[72] If a general plebiscite among all citizens eligible to vote is selected as the "Manner" (as was the case in each of the defendant States

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[64] U.S. Const. art. II, § 3.

[65] U.S. Const. art. I, § 1, cl. 2.

[66] Bush v. Palm Beach County Canvassing Board, 531 U.S. 70, 76 (2000), *citing* U.S. Const. art. II, § 1, cl. 2.

[67] Bush v. Gore, 531 U.S. 98, 113 (2000) (Rhenquist, C.J., concurring).

[68] U.S. Const. art. II, § 1, cl. 3.

[69] 3 U.S.C. § 1.

[70] 3 U.S.C. § 2. "[T]he day on which the[Electors] shall give their Votes" must be "the same throughout the United States"; but "Congress may determine the Time for chusing the Electors" in the first place, without concern for that "Time" being necessarily "the same throughout the United States". *See* U.S. Const. art. I, § 1, cl. 3.

[71] 3 U.S.C. § 7. *See* 3 U.S.C. §§ 8 through 11, *and* U.S. Const. amend. XII. This "Day shall be the same throughout the United States". U.S. Const. art. I, § 1, cl. 3.

[72] A plebiscite is a political experiment designed to ascertain the *true* choices of *eligible* voters. To be *scientific*, its results must be verifiable or falsifiable as to both of those particulars.

in 2020), it must be carried out in a competent and honest way, strictly according to whatever regulations the State's Legislature has prescribed. This requires that a State's officials count the votes only of those persons eligible to vote who have in fact voted, subtracting no eligible and adding no ineligible votes—and are able to determine, after the fact, that this is what has actually happened.

For constitutional "Cases" or "Controversies" to exist between the United States and some State, or between two States, or between a State and citizens of another State,[73] though, a default in these electoral requirements must be the result of "State action" of one sort or another.[74] Typically, this would arise from the inadequacy of equipment (such as defective voting machines) the State has employed, or the incompetence of the State officials, employees, or other personnel who have overseen the plebiscite. But even if a conspiracy by rogue public officials or outside forces to rig the selection of Electors by fraud should occur, the improper effect of the rigging would constitute "State action" if the State failed, neglected, or refused to deal with it—say, by not anticipating it (through proper safeguards built into the arrangements for voting); by not investigating and exposing it (when evidence supported a reasonable suspicion that it had occurred); or by not correcting the errors before, or even after, erroneously designating the improper Electors, as circumstances might dictate, perhaps to the extent of choosing entirely new Electors.[75] In any event, "[t]he vital requirement is State responsibility—that somewhere, somehow, to some extent, there be an infusion of conduct by officials, panoplied with State power".[76] If the actor "acts in the name and for the State, and is clothed with the State's power, his act is that of the State".[77] "State action" exists "whatever the agency of the State taking the action" or "whatever the guise in which it is taken".[78]

Here, whatever the particulars of their situations, the defendant States' Electors are quintessentially "State actors"—official representatives of the States in the Electoral College, supposedly entitled by the laws of both the States and the United States to participate in the process of determining the identities of the persons qualified to take office as President and Vice President of the United States on January 20, 2021, under color of the Twentieth Amendment. These Electors are "agen[ts] of the State[s] to do the very things which, according to the theory of the complainant[s'] case, will result in the mischief to be apprehended. It is state action and its result that are complained of", not "officers or functionaries proceeding in a wrongful or malevolent

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[73] *See* U.S. Const. art. III, § 2, cl. 1.

[74] *See specifically as to* inter-*State litigation, e.g.,* Massachusetts v. Missouri, 308 U.S. 1, 15 (1939); Louisiana v. Texas, 176 U.S. 1, 22-23 (1900).

[75] As to the last possibility, "'[w]hatever provisions may be made by statute, or by the state constitution, to choose electors by the people, there is no doubt of the right of the legislature to resume the power *at any time*, for it can neither be taken away nor abdicated'". McPherson v. Blacker, 146 U.S. 1, 35 (1892) (emphasis supplied).

[76] Terry v. Adams, 345 U.S. 461, 473 (1953)

[77] *Ex parte* Virginia, 100 U.S. 339, 347 (1880).

[78] Cooper v. Aaron, 358 U.S. 1, 16-17 (1958). *See* the discussion of "State action" in Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972).

misapplication of the * * * laws" of those States.[79]

What happened in the defendant States to pollute their plebiscites constitutes proof of why their designations of Electors on or after November 3, 2020, were improper and those Electors' votes in the Electoral College on December 14, 2020, were invalid. But the initial harm specifically to the United States (and to all of the other proposed Plaintiffs) occurred when these improper Electors appeared in the Electoral College and cast invalid votes under color of the Twelfth Amendment on December 14, so as to make up a decisive part of a false majority for the Biden-Harris ticket.[80] Thereafter, those invalid votes inextricably corrupted the remainder of the Electoral College process, causing further injury to the United States at each subsequent stage. Ultimately, the defendant States' designations of invalid Electors precluded the normal functioning of Section 1 of the Twentieth Amendment, by (i) making it constitutionally impossible to put into effect the mandate that "[t]he terms of the President and Vice President [*i.e.,* Mr. Trump and Mr. Pence, respectively] shall end at noon on the 20th day of January, [2021,] * * * and the terms of their successors [whoever they might be] shall then begin"; and by (ii) requiring judicial intervention in order to determine who in constitutional fact, law, and equity has actually qualified (or perhaps will qualify) as President-elect and Vice President-elect.

Congress could not have been expected to (and in any event did not) correct this situation on January 6, 2021, during its tally of the Electoral votes theretofore communicated by the States.[81] This was hardly surprising. The statutory method for objecting *seriatim* to each Electoral vote simply does not allow sufficient time for the presentation of significant amounts of evidence as to any one contested vote, let alone a large number of them.[82] Moreover, no provision (let alone requirement) exists for calling witnesses to testify under oath, for authenticating documentary evidence according to the normal rules of evidence, or for preparing formal findings of facts as to each objection. So, in particular, *key "constitutional facts" cannot possibly be determined* (and in the event were not determined, or even considered as such). Moreover, even had Congress purported to do so then, its determinations would not be conclusive thereafter. For, "[i]n cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the *independent* determination of all questions, *both of fact and law*, necessary to the performance of that supreme function".[83]

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[79] *See* Missouri v. Illinois and the Sanitary District of Chicago, 180 U.S. 208, 242 (1901).

[80] *See* U.S. Const. amend. XII *and* 3 U.S.C. §§ 7 through 11.

[81] *See* 3 U.S.C. §§ 6, 9 through 11, and 15.

[82] *See* 3 U.S.C. §§ 15 through 18.

[83] Crowell v. Benson, 285 U.S. 22, 60 (1932) (emphasis supplied). *Accord,* Saint Joseph Stock Yards Company v. United States, 298 U.S. 38, 51-52 (1936); Ohio Valley Water Company v Ben Avon Borough, 253 U.S. 287, 289 (1920). *See also* Wadley Southern Railway Company v. Georgia, 235 U.S. 651, 660-661 (1915); Missouri Pacific Railway Company v. Tucker, 230 U.S. 340, 349 (1913); Reagan v. Farmers' Loan & Trust Company, 154 U.S. 362, 397-399 (1894). To be sure, these cases involved the legislative or administrative fixing of rates, which the complainants claimed were confiscatory. But no rational person could believe that some deprivation of a private party's property without due process of law is more consequential than the installation of imposters as President and Vice President of the United States.

For the same reason, notwithstanding a Federal statute so providing, no State may be licensed to make a "final

This is especially important here, because improper designations of Electors apparently were obtained, in whole or in part, through widespread and systematic *fraud* in the defendant States' plebiscites. Substantial actual or constructive fraud—which, although not committed directly by "State actors", "State actors" failed, neglected, or refused to acknowledge and correct when it was uncovered—would justify the Supreme Court's employment of equity to set aside such designations.[84] With fraud established, *mutatis mutandis* the reasoning set forth in *Hazel-Atlas Glass Company* v. *Hartford-Empire Company*[85] would both apposite and compelling:

> Every element of the fraud here disclosed demands the exercise of the historic power of equity to set aside fraudulently begotten [designations of Electors]. * * * Here * * * we [that is, the Justices of the Supreme Court] find a deliberately planned and carefully executed scheme to defraud not only the [Electoral College] but [every

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determination of any controversy or contest concerning the appointment of all or any of the electors of such State" which "shall be conclusive, and shall govern in the counting of electoral votes as provided in the Constitution". *Pace* 3 U.S.C. § 5. An apparent conflict exists between the President of the Senate's privilege, right, and duty to "to call for objections, if any" to "the certificates and papers purporting to be certificates of the electoral votes" on January 6, 2021, and the States' authority, exercised at an earlier time, to make a purported "final determination" on the matter of "the appointment of all or any of the[ir] electors". *Contrast* 3 U.S.C. § 15 *with* 3 U.S.C. § 5. Whether the former statute overrides the latter or not is ultimately beside the point, because Congress labors under a disability to grant the States such a power of "final determination" purportedly "conclusive" on the Supreme Court of the United States.

> When [Congress] acts directly, its action is subject to judicial scrutiny and determination in order to prevent the transgression of [constitutional] limits of power. [Congress] cannot preclude that scrutiny and determination by any declaration of legislative finding. Legislative declaration or finding is necessarily subject to independent judicial review upon the facts and the law by courts of competent jurisdiction to the end that the Constitution as the supreme law of the land may be maintained. Nor can [Congress] escape the constitutional limitation by authorizing its agent to make findings that the agent has kept within that limitation. * * * [T]o say that the[agents'] findings of fact may be made conclusive where constitutional rights * * * are involved, although the evidence clearly establishes that the findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of [the agents'] officials and seriously to impair the security inherent in our judicial safeguards. * * * Under our system there is no warrant for the view that the judicial power of a competent court can be circumscribed by any legislative arrangement designed to give effect to [the agents'] action going beyond the limits of constitutional authority.

Saint Joseph Stock Yards Company, 298 U.S. at 51-52. Surely it does not matter that Congress's "agents" in the Electoral College process happen to be the States, pursuant to U.S. Const. art. II, § 1, cl. 2, and not some Federal bureaucrats.

Neither would it matter even if a State's "final determination" were made "by judicial * * * methods or procedures" in her own courts, as allowed by 3 U.S.C. § 5. For where Federal constitutional rights are in issue, "findings of state courts are by no means insulated against examination [in the Supreme Court]", and the Court "will, where necessary to the determination of constitutional rights, make an independent examination of the facts, the findings, and the record". Ker v. California, 374 U.S. 23, 33-34 (1963). "If the Constitution and laws of the United States are to be enforced, th[e Court cannot accept as final the decision of the state tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even on local grounds". Davis v. Wechsler, 263 U.S. 22, 24 (1923). *Accord,* Brooks v. Florida, 389 U.S. 413, 415 (1967) ("'we cannot escape the responsibility of making our own examination of the record'").

[84] *See* U.S. Const. art. III, § 2, cl. 1 ("[t]he judicial Power [of the United States] shall extend to all Cases, in Law and Equity, arising under this Constitution, [and] the Laws of the United States").

[85] 322 U.S. 238 (1944).

> lower court called upon to rule against the perpetrators]. * * * Proof of the scheme, and of its complete success up to date, is conclusive. * * * And no equities have intervened through [use of the fraudulently designated Electoral votes for the benefit of] an innocent [candidate].
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> * * * We cannot easily understand how, under the admitted facts, [the United States or any of proposed Plaintiffs] should have been expected to do more than [they] did to uncover the fraud. But even if [the United States or any of the proposed Plaintiffs] did not exercise the highest degree of diligence, [the fraudulent designations of Electors] cannot be condoned for that reason alone. This matter does not concern only private parties. There are issues of great moment to the public in [the selection of a President and Vice President for the United States]. * * * Furthermore, tampering with the administration of [the Electoral College process] in the manner indisputably shown here involves far more than an injury to a single [candidate]. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the [Electoral College] process must always wait upon the diligence of [candidates]. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud.[86]

Were such a fraud proven in one of more of the defendant States (as arguably it will be), it would be far more consequential than the fraud on the Patent Office and a Circuit Court of Appeals which the Supreme Court condemned in *Hazel-Atlas Glass Company.* For it would be exposed as a fraud, not only on the United States, but also on every State which properly designated Electors for the Trump-Pence ticket; on every citizen throughout the United States who cast a vote for that ticket in the several States' plebiscites; on Mr. Trump and Mr. Pence as candidates for the offices of President and Vice President; and even on Congress, hampered as it was by its own inadequate procedure for exposing false Electoral votes.[87]

2. The Plaintiff States. Each State which designated Electors for the Trump-Pence ticket through procedures properly applied under her own laws undoubtedly would have "standing" to be a Plaintiff in the proposed lawsuit, on at least four grounds.[88]

a. On their own behalf—and as *parentes patriae,* trustees, guardians, and representatives of

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[86] *Id.* at 245-246.

[87] *See* 3 U.S.C. §§ 15-18, the problematic nature of which is laid out *ante,* at 18. Self-evidently, the perpetrators of the various frauds in different States counted on this.

[88] Not one of these relates to "the property rights and interests of a State". But access to the original jurisdiction of the Supreme Court does not depend upon an issue of "property rights" in the case or controversy at hand. *E.g.,* Missouri v. Illinois and the Sanitary District of Chicago, 180 U.S. 208, 240-241 (1901).

their Electors, of their voters, and, indeed, of all of their citizens[89]—all of the plaintiff States would second the basic constitutional points raised by the United States against the installation, through irregular (possibly fraudulent) plebiscites, of imposters as President and Vice President.

b. Because the newly selected President's exercise of "[t]he executive Power"[90] would inevitably impact them in numerous ways, the States would point to their significant general legal interests in the *proper* selection of the President through the Electoral College process. To wit—

> • By definition, within the federal system the "President of the United States of America"[91] is the President of every State in the Union.[92]
>
> • The President participates with Congress in the legislative process.[93] And "the Laws of the United States" enacted pursuant thereto "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding".[94]
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> • In conjunction with the Senate (in which the States participate directly), the President conducts the foreign policy of the United States.[95] And any "Treaties" which the President makes (provided two thirds of the Senators present concur) are binding on each of the States (including those which may have dissented) with the same effect as "the Laws of the United States" enacted by Congress.[96]
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> • Also in conjunction with the Senate, the President "nominates" and "appoint[s] * * * Judges of the Supreme Court",[97] who exercise original and final appellate jurisdiction in numerous classes of "Cases" and "Controversies" affecting

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[89] *See, e.g.,* Kansas v. Colorado, 185 U.S. 125, 142 (1902).

[90] U.S. Const. art. II, § 1, cl. 1.

[91] U.S. Const. art. II, § 1, cl. 1.

[92] The Founding Fathers understood the term "United States" in the collective sense of each and every State allied in the Union while retaining each State's own political personality, as opposed to the unitary sense of the States coalesced into one body in the General Government. That is, by the original understanding, "the United States" was taken, not as a singular, but as a *plural*, noun *See* U.S. Const. art. I, § 9, cl. 8 ("under them", referring to "the United States"), and art. III, § 3, cl. 1 ("against them", referring to the United States). *See also* U.S. Const. amends. XI ("against one of the United States") and XIII ("within the United States, or any place subject to their jurisdiction"), which evidence the continuation of this correct usage for some seventy-seven years. The common contemporary employment of the term "United States" as a singular noun is a neologism with no constitutional pedigree.

[93] U.S. Const. art. I, § 7, cls. 2 and 3; *and* art. II, § 3.

[94] U.S. Const. art. VI, cl. 2. *See also* U.S. Const. art. VI, cl. 3.

[95] U.S. Const. art. II, § 2, cls. 2 and 3.

[96] U.S. Const. art. VI, cl. 2. *See also* U.S. Const. art. VI, cl. 3.

[97] U.S. Const. art. II, § 2, cl. 2.

the States and their citizens.[98] Moreover,

> • The President is the officer of the United States most responsible for seeing to the performance of the duty that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government".[99] By virtue of his command over "the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States",[100] he is the single official most capable of fulfilling the duty of "[t]he United States" to "protect each of the[States] against invasion".[101] And Congress has empowered the President to fulfill the duty of the United States to "protect each of the[States] * * * on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic violence".[102]

c. The plaintiff States would also rely on certain very special *sovereign* interests in the *proper* selection of the President. Perforce of the Declaration of Independence, each of the original Thirteen Colonies became "Free and Independent States" with "full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do".[103] In the Constitution, these newly minted "Independent States" surrendered all or parts of these sovereign powers, to a significant degree in favor of the President of the United States.[104] Other States then entered the Union on the same terms, similarly relinquishing whatever claims to sovereignty they might have had in those particulars.[105] To wit—

> • "No State shall, without the Consent of Congress, * * * engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay".[106]

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[98] U.S. Const. art. III, § 2, cls. 1 and 2.

[99] U.S. Const. art. IV, § 4. On the face of this provision, "[t]he United States" should be bound to fulfill this obligation through appropriate exercises of their legislative, executive, and judicial authority, as the situation at hand warrants. The Supreme Court, however, largely absolved itself of responsibility for enforcement of this requirement long ago. *Compare* Luther v. Borden, 48 U.S. (7 Howard) 1, 42-45 (1849), *with* Minor v. Happersett, 88 U.S. (21 Wallace) 162, 175-176 (1875); Forsyth v. Hammond, 166 U.S. 506, 518-519 (1897); *and* Pacific States Telephone and Telegraph Company v. Oregon, 223 U.S. 118 (1912).

[100] U.S. Const. art. II, § 2, cl. 1. *See* U.S. Const. art. I, § 8, cls. 12, 13, 15, and 16.

[101] U.S. Const. art. IV, § 4. The States, of course, retain the authority to "engage in War" when "actually invaded, or in such imminent Danger as will not admit of delay". U.S. Const. art. I, § 10, cl. 3.

[102] U.S. Const. art. IV, § 4. *See* 10 U.S.C. §§ 251 and 253, *along with* U.S. Const. art. I, § 8, cls. 12, 13, 15, and 16; *and* art. II, § 2, cl. 1.

[103] *Documents Illustrative of the Formation of the Union of the American States*, House Document No. 398, 69th Congress, 1st Session (Washington, D.C.: Government Printing Office, 1927), at 25.

[104] *See* this type of analysis performed in Kansas v. Colorado, 185 U.S. 125, 139-142 (1902).

[105] *See* U.S. Const. art. IV, § 3, cl. 1.

[106] U.S. Const. art. I, § 10, cl. 3.

But all of the States can be committed to "War" upon a declaration of Congress,[107] at which point "the Army and Navy of the United States" and "the Militia of the several States" will come under the command of the President.[108]

• Similarly, "[n]o State shall, without the Consent of Congress, * * * keep Troops, or Ships of War in time of Peace".[109] But Congress may "keep Troops, or Ships of War" at any time, and always under the command of the President.[110]

• "No State shall enter into any Treaty, Alliance, or Confederation".[111] But the President ("provided two thirds of the Senators present concur") "make[s] Treaties".[112]

• With certain reservations, "[n]o State shall, without the Consent of Congress, lay any Imposts or Duties on Imports or Exports".[113] But in every case in which "the Consent of Congress" is required for such regulations of foreign commerce by the States, the President plays a rôle in the legislative determination.[114] And

• The States may not exercise exclusive control over even their own Militia (which the Constitution acknowledges to be "the Militia *of the several States*"), because these forces are subject to being "call[ed] forth to execute the Laws of the Union, suppress Insurrections and repel Invasions" under the President's command.[115]

d. Furthermore, the plaintiff States would assert their unique constitutional interests in the *proper* functioning of the Electoral College process, through which *they* (along with their sister States), *and no one else*, select the President and Vice President.[116] The central rôle of all of the States in that process entitles each State to question, to challenge, and to require the highest judicial authority of the United States to determine whether the Electors from any other States have been improperly selected.

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[107] U.S. Const. art. I, § 8, cl. 11.

[108] U.S. Const. art. I, § 8, cls. 12, 13, 15, and 16; *and* art. II, § 2, cl. 1.

[109] U.S. Const. art. I, § 10, cl. 3. Conversely, the States may "keep Troops, or Ships of War" even "without the Consent of Congress" whenever they are compelled to "engage in War" because "actually invaded, or in such imminent Danger as will not admit of delay".

[110] U.S. Const. art. I, § 8, cls. 12 and 13; *and* art. II, § 2, cl. 1.

[111] U.S. Const. art. I, § 10, cl. 1.

[112] U.S. Const. art. II, § 2, cl. 2.

[113] U.S. Const. art. I, § 10, cl. 2.

[114] U.S. Const. art. I, § 7, cls. 2 and 3. As well as with respect to Congressional regulation of "Commerce with foreign nations". U.S. Const. art. I, § 8, cl. 3.

[115] U.S. Const. art. I, § 8, cls. 15 and 16; *and* art. II, § 2, cl. 1 (emphasis supplied).

[116] *See* U.S. Const. art. II, § 1, cl. 2 *and* amend. XII.

Self-evidently, "the votes eligible for inclusion in the [Electoral College] are the votes meeting the properly established legal requirements";[117] "the impact of the votes cast [by Electors] in each State is affected by the votes cast [by Electors] for the various candidates in other States";[118] and "the right of suffrage [in the Electoral College] can be denied by a debasement or dilution of the weight of a[n Elector's] vote just as effectively as by wholly prohibiting the free exercise of the [Electoral College] franchise".[119] With respect to the 2020 elections, the plaintiff States have been deprived, in their own sovereign and corporate capacities, of equal participation and an honest result in the Electoral College process, through irregular behavior of one sort or another on the part of the defendant States and various "State actors" which contradicted the foregoing requirements. This is *the plaintiff States' own* injury, not just an injury inflicted upon their citizens. (As voters in plebiscites, the citizens of the plaintiff States are merely adventitious participants, one step removed, in the Electoral College process, because the ultimate power to appoint Electors, in whatever "Manner", is exercised by each State's Legislature.[120])

Nonetheless, "[t]o constitute * * * a controversy [between States], it must appear that the complaining State has suffered a wrong through the action of the other State, furnishing ground for judicial redress, or is asserting a right against the other State which is susceptible of judicial enforcement according to the accepted principles of the common law or equity systems of jurisprudence".[121] "[I]n order that a controversy between States, justiciable in th[e Supreme C]ourt, can be held to exist, something more must be put forward than that the citizens of one State are injured by the maladministration of the laws of another. * * * When there is no agreement, whose breach might create it, a controversy between States does not arise unless the action complained of is state action, and acts of state officers in abuse or excess of their powers cannot be laid hold of as in themselves committing one State to a distinct collision with a sister State."[122]

Here, though, an *inter*-State "agreement" of the highest order *did and does* exist, in the form of the Electoral College process established in the Constitution and statutes of the United States. Moreover, in supposed compliance with this process—

- "Each" of the defendant States was constitutionally empowered to "appoint, in such Manner as the Legislature thereof may direct, a Number of Electors".[123] Self evidently, this required that, whatever "Manner" were "direct[ed]" for each State, it would be so implemented as to designate the *proper* "Number" and identities of Electors.

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[117] *See* Bush v. Gore, 531 U.S. 98, 103 (2000).

[118] *See* Anderson v. Celebrezze, 460 U.S. 780, 795 (1983).

[119] *See* Reynolds v. Sims, 377 U.S. 533, 555 (1964) (footnote omitted), *quoted in* Bush v. Gore, 531 U.S. 98, 105 (2000).

[120] U.S. Const. art. II, § 2, cl. 1. *See* McPherson v. Blacker, 146 U.S. 1, 27-35 (1892).

[121] Massachusetts v. Missouri, 308 U.S. 1, 15 (1939). *Accord, e.g.,* Texas v. Florida, 306 U.S. 398, 405 (1939).

[122] Louisiana v. Texas, 176 U.S. 1, 22 (1900).

[123] U.S. Const. art. II, § 2, cl. 1.

• The defendant States' Legislatures all chose general plebiscites as the "Manner" by which they would "appoint" their Electors.

• The plebiscites of 2020, however, were shot through with serious deficiencies. Each of the defendant States authorized, allowed, and tolerated procedures which enabled ineligible individuals to participate, facilitated the collection of invalid ballots, miscounted votes, and in other ways rendered the results inaccurate—thereby indelibly tainting the designations of their Electors. These were all "State actions" taken under color of State law by "State actors" and thus imputable to the defendant States. (Indeed, all of the defendant States would surely attempt to justify these actions and their consequences as authorized by State law.)[124]

• Although irregular in their designations, the Electors were the agents of the defendant States and their Legislatures. The irregular designation of these Electors, their irregular participation in the Electoral College, and the transmission of their irregular votes to Congress for a final tally (itself unavoidably irregular) all constituted "State action". In this manner,

• Notwithstanding that each and every Elector in every State "has a constitutionally protected right to participate in [the Electoral College] on an equal basis with other [Electors]",[125] the defendant States effectively nullified the plaintiff States' rights and powers, vouchsafed to them by the Constitution and laws of the United States, to appoint Electors whose votes would have had equal and full effect throughout the Electoral College process. So far, this has imposed upon the plaintiff States what they believe to be a pair of imposters posing as "President-elect" and "Vice President-elect" (Mr. Biden and Ms. Harris). These, of course, are not actual "offices" recognized by the Constitution of the United States. If the plaintiff States are correct, though, absent intervention by the Supreme Court Mr. Biden and Ms. Harris will advance from mere imposters to actual usurpers, purporting to exercise powers which the Constitution does grant.

In sum, the litigation proposed in this paper would not concern itself only with the defendant States' shoddy creation or faulty administration of their own laws relating to the plebiscites they held in 2020, which demerits supposedly affected only their own citizens with no untoward

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[124] Added to this could and should be the evidence of widespread and systematic *fraud* which began to emerge as early as the day the plebiscites were held. Of course, to prevail in the litigation proposed herein the Plaintiffs would not be required to demonstrate the existence of fraud which decisively affected the outcome of any of the plebiscites. Proof of fraud to any degree would, however, strongly support the contention that the defendant States' electoral procedures lacked adequate means to prevent, control, review, and correct mistakes of any kind. Doubtlessly, the poor quality of and control over these procedures convinced the perpetrators of the frauds that they could succeed, and enabled them to put their schemes into successful operation. And if outright *fraud* could not have been prevented, detected, and its effects eliminated, what other errors must have flooded into the process?

[125] *See* Dunn v. Blumstein, 405 U.S. 330, 336 (1972).

consequences outside of their own borders. Instead, it would seek to address irregularities which occurred under color of those laws by various "State actors" within those States which adversely affected the *Federal* rights, powers, privileges, and immunities of the plaintiff States *as States*. This brings the proposed litigation within the rule that, "[w]hen a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. *But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right.*"[126]

3. Mr. Trump and Mr. Pence. Simultaneously with the United States' and the plaintiff States' filing of their joint motion for leave to file a bill of complaint, Mr. Trump and Mr. Pence should file a joint motion to intervene in their *individual* capacities. As a practical matter, seeking to join Mr. Trump and Mr. Pence in their *official* capacities in the proposed lawsuit, whether as Plaintiffs or Intervenors, would be pointless. For if, as should be anticipated, the litigation were to proceed beyond noon on January 20, 2021, they would thereafter enjoy no "official" capacities, except in a state of suspension dependent on the outcome of the case.

a. A motion for intervention would appear to be necessary, because, although Mr. Trump and Mr. Pence are not citizens of any of the defendant States, if they were originally named as Plaintiffs they would be attempting to "commence[ ] or prosecute[ ]" a "suit in law or equity * * * against one of the United States", in violation of the Eleventh Amendment. Intervention avoids this issue.[127]

b. A practical necessity to induce the Supreme Court to exercise its original jurisdiction over the proposed lawsuit would be a guarantee that political events would remain under control while the legal issues were sorted out.[128] This would require the entry of a preliminary injunction *pendente lite*, on the motion of the United States and the defendant States, which provided that, other than in the course of participation in the proposed lawsuit, (i) none of the contenders for the offices of President and Vice President would take any action on the basis of any claim to be qualified for those offices under the Twentieth Amendment on and after January 20, 2021, and (ii) after that date an acting President would be appointed *pendente lite* pursuant to Section 3 of that Amendment and 3 U.S.C. § 19. As non-parties to the proposed lawsuit, Mr.Trump and Mr. Pence could not be made subject to such an injunction.[129] But as Intervenors they could and would agree to submit themselves to it.

c. Because of the irregular plebiscites and designations of Electors in the defendant States, and the consequent improprieties of those Electors' actions, Mr. Trump and Mr. Pence have been, and will continue to be, injured in their capacities as individuals seeking re-election to the offices of President and Vice President, respectively. So each of them has "standing" in the proposed litigation,

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[126] Gomillion v. Lightfoot, 364 U.S. 339, 347 (1960) (emphasis supplied), *quoted and applied in* South Carolina v. Katzenbach, 383 U.S. 301, 325 (1966).

[127] *See post,* at 27.

[128] *See ante,* at 1-3.

[129] *See* California v. Southern Pacific Company, 157 U.S. 229, 257 (1895).

because he "ha[s] a direct stake in th[e] controversy".[130]

d. So, as long as they "do not seek to bring new claims or issues against the [defendant] States, but only ask leave to participate in an adjudication of their * * * rights that was commenced by the United States [and the plaintiff States]", intervention would be justified—necessary for the preliminary injunction and at least permissive for everything else.[131]

Instructive here is *Utah* v. *United States,* in which the Supreme Court determined that a private party with an interest in the litigation would not be permitted to intervene because the State had "consistently opposed" intervention, the Court's "original jurisdiction should be invoked sparingly", the Court "decline[d] to permit intervention for the sole purpose of permitting a private party to introduce new issues which have not been raised by the sovereigns directly concerned", and it was "'equitable and in good conscience to proceed to adjudicate the controversy between the State * * * and the United States' in [the private party's] absence".[132] In the proposed litigation, conversely, the ultimate interests of Mr. Trump and Mr. Pence are inextricably tied to the issues raised "by the sovereigns directly concerned"; and it would be worse than merely inequitable "'to proceed to adjudicate the controversy between the [defendant] State[s] and the United States' in [their] absence", but actually senseless.

4. The plaintiff States' Electors. Serious consideration should be given to filing a motion to intervene on behalf of these Electors simultaneously with the motion for leave to file a bill of complaint on behalf of the United States and the plaintiff States.[133] Each of these Electors "ha[d, and still has,] a constitutionally protected right to participate in [the Electoral College] on an equal basis with other [Electors]".[134] So each of them has "standing" in the proposed litigation, because his "right * * * was [and remains] a definite, personal one, capable of enforcement by a court".[135] So, as with Mr. Trump and Mr. Pence, the Electors "have a direct stake in th[e] controversy".[136] And as long as they "do not seek to bring new claims or issues against the [defendant] States, but only ask leave to participate in an adjudication of their * * * rights that was commenced by the United States [and the plaintiff States]", and meet the requirements for permissive intervention, they should be allowed

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[130] *See* Maryland v. Louisiana, 451 U.S. 725, 745 note 21 (1981).

[131] *See* Arizona v. California, 460 U.S. 605, 614-615 (1983).

[132] 394 U.S. 89, 95-96 (1968).

[133] As with Mr. Trump and Mr. Pence, a motion for intervention would appear to be necessary, because, although these Electors are not citizens of any of the defendant States, if originally named as plaintiffs they would be attempting to "commence[ ] or prosecute[ ]" a "suit in law or equity * * * against one of the United States", in violation of the Eleventh Amendment.

[134] *See* Dunn v. Blumstein, 405 U.S. 330, 336 (1972).

[135] *See* United States v. Bathgate, 246 U.S. 220, 226 (1918). *See* Reynolds v. Sims, 377 U.S. 533, 561 (1964), *quoting* Bathgate, 246 U.S. at 227 ("[t]he right to vote is personal") .

[136] *See* Maryland v. Louisiana, 451 U.S. 725, 745 note 21 (1981).

to intervene.[137]

To be sure, it is arguable that these Electors' inclusion in the case would be unnecessary, because: (i) inasmuch as they (with support from their States) would claim to be the true agents of their States in the Electoral College, those States could advance their interests as *parentes patriae;*[138] and (ii) inasmuch as they (with support from the United States) would claim to be the true Electors from their States, whose votes in the Electoral College were and are necessary for the election of the true President and Vice President of the United States, the United States (which shares their concern over those persons' identities) could adequately represent their interests. Yet the Electors' reason for intervening in their own right *is* compelling. And seeking their intervention could hardly hurt. Indeed, at this late stage of the contest leaving any stone unturned would be imprudent.

5. In support of all of the foregoing arguments, and of further useful arguments raised in other lawsuits now being litigated on these matters, is an ever-mounting plenitude of evidence that the defendant and other "swing" States have designated their purported Electors by means of highly irregular (even possibly fraudulent) plebiscites. No need exists to rehearse these facts here. Those charged with the task of preparing the paperwork for the lawsuit proposed herein can look to the records in litigation which has already been filed, and to submissions of evidence to various State legislative committees, for everything they might need.[139]

At the present point in time, this mass of evidence should be more than enough. For, although "[t]he party invoking federal jurisdiction bears the burden of establishing the[ ] elements [of 'standing']", "[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim'".[140]

III. A SURVEY OF THE PROPOSED RELIEF

A. Some general considerations

1. When the Plaintiffs request the Supreme Court to exercise its original jurisdiction over the lawsuit proposed in this paper, they should remind the Court that

> in its discretion [it] has withheld the exercise of its jurisdiction where there has been no want of another suitable forum to which the cause may be remitted in the interests of convenience, efficiency and justice.
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[137] *See* Arizona v. California, 460 U.S. 605, 614-615 (1983).

[138] *See* New Jersey v. New York, 345 U.S. 369, 372-374 (1953) ("compelling interest" for intervention should be shown).

[139] *See* the compendium of evidence in <https://www.zenger.news/sidney-powell-document-binder-2020-election-fraud>.

[140] Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992).

> There is, however, a reason why [the Court] should not follow that procedure here * * * .
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> * * * [I]t is apparent that [the United States and the plaintiff States] might sue the defendants only in the judicial district where they are inhabitants or where they may be found or transact business. * * * [I]t is apparent that [the plaintiffs] could not find all of the defendants in one * * * judicial district[ ] * * * so as to maintain a suit of this character against all of them * * * . Unless it were clear that all of the[defendants] could be found in some convenient forum [the Court] could not say that [the plaintiffs] had a "proper and adequate remedy" apart from the original jurisdiction of this Court. * * * Once [the plaintiffs] make[ ] out a case which comes within [the Court's] original jurisdiction, [their] right to come here is established. There is no requirement in the Constitution that [they] go further and show that no other forum is available to [them].[141]

2. The proposed Plaintiffs should also emphasize that "in all cases where original jurisdiction is given by the Constitution, th[e Supreme C]ourt has authority to exercise it without any further act of Congress to regulate its process or confer jurisdiction, and that the [C]ourt may regulate and mould the process it uses in such manner as in its judgment will best promote the purposes of justice".[142] In particular,

> [e]quitable relief against fraud[ ] * * * is not of statutory creation. It is a judicially devised remedy fashioned to relieve hardships which, from time to time, arise from a hard and fast adherence to [ ]other court-made rule[s] * * * . Created to avert the evils of archaic rigidity, this equitable procedure has always been characterized by flexibility which enables it to meet new situations which demand equitable intervention, and to accord all the relief necessary to correct the particular injustices involved in these situations.[143]

3. Finally, the proposed Plaintiffs should not shrink from pointing out to the Justices that resolution of the factual issues in the proposed litigation might "involve many complexities and difficulties. But that does not make this any the less a justiciable controversy. Certainly [determination of the facts] is not an impossibility."[144] And, with the evidence which has already

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[141] *See* Georgia v. Pennsylvania Railroad Company, 324 U.S. 439, 464-466 (1945). So allegations to this effect should be made in the bill of complaint, as to both Federal and State courts. *See id.* at 470-471 (Stone, C.J., dissenting).

[142] Kentucky v. Dennison, 65 U.S. (24 Howard) 66, 98 (1861).

[143] Hazel-Atlas Glass Company v. Hartford-Empire Company, 322 U.S. 238, 248 (1944).

[144] *See* United States v. California, 332 U.S. 19, 26 (1947). For an example of a complex hearing before a Special Master in an original-jurisdiction case, *see* Arizona v. California, 373 U.S. 546, 551 (1963) (footnote omitted): "The Master conducted a trial lasting from June 14, 1956, to August 28, 1958, during which 340 witnesses were heard orally or by deposition, thousands of exhibits were received, and 25,000 pages of transcript were filed. Following many motions, arguments, and briefs, the Master in a 433-page volume reported his findings, conclusions, and recommended decree, received by the Court on January 16, 1961. The case has been extensively briefed here and orally argued twice, the first

been amassed concerning the 2020 election in hand, it should not be especially prolonged or tedious. In any event, *in light of the cruciality of the issues with respect to the continued legitimacy of the Executive Branch of the government of the United States, as well as to the continued credibility of the Judiciary*, the Court cannot shirk its duty simply because the effort necessary to resolve those issues might be onerous.

B. Specific elements of proposed relief

It should be kept in mind that, for political as well as legal reasons, *the relief which would be requested as described in sub-parts B.1. and B.2.* ***must*** *be had prior to noon on January 20, 2021.*

1. As part and in explanation of the emergency preliminary injunction *pendente lite* which the Supreme Court would issue on the motion of the proposed Plaintiffs immediately upon its assertion of original jurisdiction (as detailed in sub-part B.2.), the Court would make plain the following:[145]

> • Under Article III, Sections 1 and 2 of the Constitution of the United States, the Court has complete and unfettered "judicial Power" to hear and decide this case in its "original Jurisdiction". The "judicial Power of the United States shall be vested in one supreme Court".[146] The Court's "Power" "extend[s]" to this litigation, because it is a "Case[ ], in Law and Equity, arising under th[e] Constitution[and] the Laws of the United States"; a "Controvers[y] to which the United States shall be a Party"; a "Controvers[y] between two or more States"; and a "Controvers[y] between a State and Citizens of another State".[147] Moreover, the Court has "original Jurisdiction" in this litigation, because it is a "Case[ ] * * * in which a State shall be Party".[148]
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> • In this "Case" and "Controversy" (as in all others which come before the Court), the Justices must and will exercise "the judicial Power of the United States" with absolute fidelity to the law, political neutrality, and personal impartiality. "Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. * * * Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect * * * to the will of the law."[149]
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> • An unprecedented, unavoidable, and urgent necessity compels the Court

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time about 16 hours, the second, over six."

[145] These points would be set out in full detail in a proposed emergency order for the preliminary injunction *pendente lite* which the Plaintiffs would submit as part of their package of initial filings.

[146] U.S. Const. art. III, § 1.

[147] U.S. Const. art. III, § 2, cl. 1.

[148] U.S. Const. art. III, § 2, cl. 2.

[149] Osborn v. Bank of the United States, 22 U.S. (9 Wheaton) 738, 866 (1824).

to accept this case in its original jurisdiction. Even more than to ascertain and enforce the rights of the Plaintiffs, the Defendants, and the Intervenors, the Court must decide this case in order to safeguard and reassure the American people. The national security—indeed, the national survival—of this country depends upon strict enforcement of the Constitution with respect to the *proper* selection of the President and Vice President of the United States. No one is more aware than the Justices that is it *constitutionally impermissible* to suffer *usurpers* to pretend to occupy those offices. No usurper cannot truthfully take the "Oath or Affirmation" that he "will faithfully execute the Office of President of the United States, and will to the best of [his] Ability, preserve, protect and defend the Constitution of the United States".[150] Being so forsworn, no usurper can "take Care that the Laws be faithfully executed".[151] And no usurper can be suffered to serve as "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States",[152] "to make Treaties" with hostile and conniving foreign powers (even "provided two third of the Senators present concur"),[153] to "nominate, and * * * appoint * * * Judges of the supreme Court" (even "by and with the Advice and Consent of the Senate"),[154] to participate with Congress in the legislative process,[155] or to perform any other act within "[t]he executive Power".[156]

• To protect this country, preserve the Constitution, perpetuate the true continuity of government, and promote the confidence of the American people in their institutions, the Court *must* ascertain who should *actually* be deemed to be qualified for the offices of President and Vice President. And

• To that end, the Court must fulfill its responsibility and exercise its authority, if the facts so warrant—(i) to determine whether the plebiscites in 2020 in each of the defendant States, as a result of which those States first designated their Electors, were conducted in such a manner as to select *proper* Electors; (ii) if in any of the defendant States a plebiscite was defective, then to declare null and void all proceedings and actions in the Electoral College process to date with respect to that State; (ii) to order each State which conducted a defective plebiscite to designate proper Electors "in such Manner as the Legislature thereof may direct",[157] and if any such State cannot or will not do so, then to declare that State to have forfeited all

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[150] *See* U.S. Const. art. II, § 1, cl. 7.

[151] *See* U.S. Const. art. II, § 3.

[152] *See* U.S. Const. art. II, § 2, cl. 1.

[153] *See* U.S. Const. art. II, § 2, cl. 1.

[154] *See* U.S. Const. art. II, § 2, cl. 1.

[155] *See* U.S. Const. art. I, § 7, cls. 2 and 3; *and* art. II, § 3.

[156] *See* U.S. Const. art. II, § 1, cl. 1.

[157] Perforce of U.S. Const. art. II, § 1, cl. 2.

right to participation in the 2020 Electoral College; (iii) to order a new vote to be had by proper Electors in the defendant States (the votes of original Electors in all other States to remain the same), and the final tally of votes to be suitably amended; and (iv) on the basis of the foregoing, to find either Mr. Trump and Mr. Pence, or Mr. Biden and Ms. Harris, to be qualified as President-elect and Vice President-elect.

2. To secure and maintain the political as well as the legal *status quo*, the Plaintiffs (and any Intervenors allowed to join the litigation) would request from the Court, as quickly as possible on an emergency basis (but to take effect no later than 11:59 a.m. on January 20, 2021), a preliminary injunction *pendente lite* which would—

• Prohibit the defendant States from enforcing or threatening to enforce against anyone any law, regulation, judicial decision, or executive order the terms, operation, or execution of which is premised, predicated, preconditioned, or dependent upon an assertion in any form (other than an Order from the Court) that: (i) those States' Electors were validly selected by the plebiscites conducted under the laws of those States in 2020; or (ii) that the purported designations of those Electors pursuant to those plebiscites were authorized under the Constitution and laws of the United States; or (iii) that any of those Electors' purported votes in the Electoral College (on December 14, 2020) and the purported inclusion of any of those votes in the tally of all Electoral votes by Congress (on January 6, 2021) were valid under the Constitution and laws of the United States, including (but not necessarily limited to) Article II, § 1; Amendment XII; and 3 U.S.C. §§ 1through 18.

• Prohibit the defendant Electors (whether individually, collectively, or in any combination, other than as parties in the pending litigation) from in any manner soliciting, initiating, taking, participating in, ratifying, or attempting to reap any benefit from any action by any individual which is premised, predicated, preconditioned, or dependent upon an assertion, allegation, or claim in any form (other than an Order from the Court): (i) that they were validly selected as Electors by the plebiscites conducted under the laws of their States in 2020; or (ii) that their purported designations as Electors pursuant to those plebiscites were authorized under the Constitution and laws of the United States; or (iii) that their purported votes in the Electoral College (on December 14, 2020) and the purported inclusion of those votes in the tally of all supposed Electoral votes by Congress (on January 6, 2021) were valid under the Constitution and laws of the United States, including (but not necessarily limited to) Article II, § 1; Amendment XII; and 3 U.S.C. §§ 1 through 18.

• Prohibit intervenors Trump and Pence and defendants Biden and Harris (whether individually, collectively, or in any combination, other than as parties in the pending litigation) from in any manner soliciting, initiating, taking, participating in, ratifying, or attempting to reap any benefit from any action by any individual which

is premised, predicated, preconditioned, or dependent upon an assertion, allegation, or claim in any form (other than an Order from the Court) that any one of them has qualified or will qualify as of noon on January 20, 2021, or thereafter at any time, for the office of President or Vice President of the United States under the Constitution and laws of the United States, including (but not necessarily limited to) Article II, § 2; Amendments XII and XX, § 1; and 3 U.S.C. §§ 1 through 18. And

• Prohibit the defendant Speaker of the House of Representatives, if and when "act[ing] as President" pursuant to Amendment XX, § 3, and 3 U.S.C. § 19(a)(1) and (c)(1), and perforce of the constitutional duty of the President to "take Care that the Laws be faithfully executed" under Article III, § 3, from:

First, taking any action under color of "[t]he executive Power" in Article II, § 1, which would entail or depend upon an assertion or claim that "there is a vacancy in the office of Vice President", including (but not limited to) "nominat[ing] a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress", under color of Amendment XXV, § 2.

Second, ordering, directing, authorizing, counseling, allowing, or in any manner countenancing attorneys for the United States: (i) to withdraw the United States as a Plaintiff from the instant lawsuit, except in compliance with a specific Order of the Court; (ii) to settle or compromise the instant lawsuit, whether in whole or in part, except with the concurrence of the other Plaintiffs, or in compliance with a specific Order of the Court; or (iii) to fail, neglect, or refuse to represent the United States zealously, with due diligence, and in accordance with all the requirements of legal ethics owed thereto.[158]

3. The Court would appoint a Special Master to hear evidence, make findings of fact, propose conclusions of law, recommend a final decree, and prepare a report with respect to those matters.

a. To ensure against insinuations of political or other biases, the Plaintiffs would suggest that the Court create a tripartite Panel of Special Masters, one member to be selected by the Plaintiffs, one by the Defendants, and one by the Court from an extensive list supplied by the Court. The Order assigning the Panel should emphasize that "[t]he Court, in original actions, passing as it does on controversies between sovereigns which involve issues of high public importance, has always been liberal in allowing full development of the facts".[159]

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[158] With respect to both of these prohibitions, the Court's Order would contain a special finding of fact and conclusion of law that the Speaker had or would become "act[ing]" President *pendente lite* only because of: (i) the uncertainty as to who the true President and Vice President are or were as of noon on January 20, 2021, and thereafter; and (ii) the injunction against Mr. Trump, Mr. Pence, Mr. Biden, and Ms. Harris to secure the *status quo*. Thus, the Speaker's authority to "act as President" would have to be understood in that context and circumscribed for that purpose, whether by the Speaker's own restraint as "act[ing]" President or by the Court's intervention should such become necessary.

[159] *See* United States v. Texas, 339 U.S. 707, 715 (1950).

b. With respect to each of the defendant States, the Panel of Special Masters would ascertain the following:

> • Whether serious irregularities (including fraud) arose in the original plebiscite of November 2, 2020; the nature, causes, and extent of those irregularities; who was responsible for them, whether by acts of commission or omission; and what effects they had on the true count of legal votes for the Trump-Pence and Biden-Harris tickets.
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> • Whether, notwithstanding any irregularities which may have been uncovered in the original plebiscite of 2020, a true count of legal votes in that plebiscite can still be had, and on that basis the Panel can determine which of the Trump-Pence and Biden-Harris tickets should be declared the winner, and therefore whose slate of Electors should be designated as valid.
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> • Whether, if a true count of legal votes in the original plebiscite of 2020 cannot be had, a new plebiscite (with what whatever safeguards would be necessary in light of the irregularities discovered in the original plebiscite) can be completed within thirty (30) days of an Order from the Supreme Court so mandating, pursuant to the statutory permission that, "[w]henever any State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day in such manner as the legislature of such State may direct",[160] with the State's Legislature "direct[ing]" a new plebiscite as "such manner" for "choosing electors".
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> • Whether, if it is determined that a new plebiscite cannot be completed within thirty (30) days of an Order of the Supreme Court so mandating, the State's Legislature will "direct" a "Manner" for "appoint[ing]" Electors other than a plebiscite,[161] such that Electors shall be designated within thirty (30) days of such Order. And
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> • Whether, if a true count of legal votes in the original plebiscite of 2020 cannot be had, the State's Legislature will refuse to "direct" both a new plebiscite and any other "Manner" for "appoint[ing]" Electors.

c. The Panel of Special Masters would prepare and deliver to the Court, and serve on the Parties, a Report containing its proposed findings of fact, conclusions of law, and recommended decree. Within ten (10) days of service thereof, the Parties would file briefs in support of or

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[160] 3 U.S.C. § 2, *pursuant to* U.S. Const. art. II, § 1, cl. 3 ("[t]he Congress may determine the time of chusing the Electors").

[161] *See* U.S. Const. art. II, § 1, cl. 2. *See* 3 U.S.C. § 2.

opposition to the Report. And the Court would determine whether oral argument would be necessary.

4. Presumably, if favorable to the Plaintiffs the Court's final Order would provide that—

• Each defendant State in which the original plebiscite of 2020, corrected for errors in the count of votes exposed by the Panel of Special Masters' Report, can be used to designate Electors shall do so by certification to the Court within five (5) days of the date of this Order.

• In each defendant State as to which the Panel of Special Masters' Report shall have found the original plebiscite of 2020 to be irremediably defective, the said plebiscite shall be declared null and void in all respects as of the date of that Report.

• Within thirty (30) days of the date of this Order, each defendant State as to which the Panel of Special Masters' Report shall have found the original plebiscite of 2020 irremediably defective shall conduct a new plebiscite, or shall adopt and implement some other "Manner" for "appoint[ing]" Electors, "as the Legislature [of such State] may direct" under Article II, Section 1 of the Constitution of the United States, with designations of the Electors so "appoint[ed]" to be certified to this Court no later than five (5) days after the new plebiscite or other "Manner" shall have been conducted or implemented.

• Any defendant State which fails, neglects, or refuses to designate Electors pursuant to the terms of this Order shall forfeit the right of "appoint[ing]" Electors for the selection of President and Vice President.

• Any controversy over the designation of Electors pursuant to this Order in any defendant State shall be presented to this Court no later than five (5) days after such designation shall have occurred, to be adjudicated as expeditiously as possible.

• On the weekday next following the day on which this Court shall have finally ruled on every controversy concerning the designation of Electors pursuant to this Order, the Panel of Special Masters shall conduct a recount of all Electors in the United States, including therein all of the Electors previously designated by the States not subject to this Order, along with all of the Electors designated by the defendant States pursuant to this Order, but excluding all of the Electors from the defendant States which have forfeited their Electors perforce of the terms hereof. No later than the day next following the day of said recount, the Panel of Special Masters shall certify to this Court the results thereof, identifying the individuals who have qualified for the offices of President and Vice President as the result of the Panel's count of Electoral votes (with specifications of the numbers of votes from each State for each candidate), and stating the date of those individuals' qualification.

• The individuals who have qualified for the offices of President and Vice President pursuant to the count of Electoral votes by the Panel of Special Masters shall assume those offices at noon on the day next following the day of the Panel of Special Masters' certification, at which time the person then "act[ing] as President" shall relinquish that position. The terms of the new President and Vice President shall end at noon on January 20, 2025, and the terms of their successors shall then begin, pursuant to Amendment XX, § 1.

CONCLUSION

The lawsuit proposed in this paper offers four inestimable benefits:

First, it allows the issue to be decided once and for all in a single, comprehensive action litigated at the highest level of the Judiciary.

Second, it preserves the *status quo*, with neither set of candidates gaining an unfair advantage, inasmuch as all of them will be enjoined *pendente lite* from acting on any claim to be qualified for the offices of President or Vice President

Third, it forecloses the individual who will be chosen to act as President *pendente lite* from attempting (presumably, for reasons of partisan politics) to negate, obstruct, or interfere with the full and fair exercise of the Supreme Court's original jurisdiction in this case. And

Fourth, on an expeditious schedule it qualifies either Mr. Trump and Mr. Pence, or Mr. Biden and Ms. Harris, as President and Vice President—either by adopting the results of the original plebiscites conducted in 2020 in one or more of the defendant States; or by requiring one or more of those States' Legislatures to direct that new plebiscites or other means for appointing Electors be conducted or implemented in a timely fashion, on pain of forfeiting the right to appoint any Electors at all; or by some combination of one method or another employed in different States.

The proposed lawsuit has, however, one drawback: *time*. To have any reasonable chance of success, this or some equivalent approach must be put into operation immediately.

— *finis* —