No. 21-40001

United States Court of Appeals for the Fifth Circuit

LOUIE GOHMERT, TYLER BOWYER, NANCY COTTLE, JAKE HOFFMAN, ANTHONY KERN, JAMES R. LAMON, SAM MOORHEAD, ROBERT MONTGOMERY, LORAINE PELLEGRINO, GREG SAFSTEN, KELLI WARD AND MICHAEL WARD,
Plaintiffs-Appellants,

v.

THE HONORABLE MICHAEL R. PENCE, VICE PRESIDENT OF THE UNITED STATES, IN HIS OFFICIAL CAPACITY,
Defendant-Appellee.

ON APPEAL FROM U.S. DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS, TYLER DIVISION,
CIVIL NO. 6:20-CV-00660-JDK, HON. JEREMY D. KERNODLE

EMERGENCY MOTION FOR EXPEDITED APPEAL

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Counsel for Plainitfs-Appellants

CERTIFICATE OF INTERESTED PERSONS

The case number is No. 21-40001. The case is styled as *Gohmert v. Pence.* The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These presentations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Plaintiffs

Louie Gohmert
Tyler Bowyer
Nancy Cottle
Jake Hoffman
Anthony Kern
James R. Lamon
Sam Moorhead
Robert Montgomery
Loraine Pellegrino
Greg Safsten
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Vice President Michael R. Pence

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Dated: January 2, 2021

Respectfully submitted,

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INTRODUCTION

By and through the undersigned counsel, movants U.S. Rep. Louie Gohmert (TX-1), Tyler Bowyer, Nancy Cottle, Jake Hoffman, Anthony Kern, James R. Lamon, Sam Moorhead, Robert Montgomery, Loraine Pellegrino, Greg Safsten, Kelli Ward, and Michael Ward—plaintiffs below and appellants in this Court—respectfully file this emergency motion pursuant to Circuit Rule 27.3 to expedite their appeal.

Pursuant to Rule 27.3, the undersigned counsel conferred by telephone with the Office of the Clerk and with the counsel for the defendant, Vice President Michael R. Pence. In addition to serving Vice President Pence's counsel via the ECF system and Federal Express, the undersigned counsel also provided a copy of this motion via email to his counsel from both the Federal Program Branch if the Department of Justice's Civil Division (i.e., his trial counsel) and the Office of the Vice President.

NATURE OF THE EMERGENCY

Plaintiffs-Appellants seek to declare the Electoral Count Act of 1887, PUB. L. NO. 49–90, 24 Stat. 373 (codified at 3 U.S.C. §§ 5, 15) unconstitutional and to prevent the joint session of Congress set for January 6, 2021, from invoking that statute as part of the 2020 presidential election. Although the statute has been in the

United States Code for more than 130 years, it has not affected any presidential election, but threatens to do so now. Moreover, Plaintiffs-Appellants' claims did not arise until after the electoral college voted on December 14, 2020, so the emergency could not have been avoided.

Specifically, the nature of the emergency is that rival slates of presidential electors, representing an outcome-determinative number of electoral votes will be presented to the joint session on January 6, 2021. Neither the Electors Clause nor the Twelfth Amendment includes a dispute-resolution provision for addressing the rival slates or the election anomalies related to the various non-legislative eviscerations of ballot-integrity measures (*e.g.*, signature verification or witness requirements) based on the COVID-19 pandemic:

> In the original plan, as well as in the amendment, no provision is made for the discussion or decision of any questions, which may arise, as to the regularity and authenticity of the returns of the electoral votes …. It seems to have been taken for granted, that no question could ever arise on the subject; and that nothing more was necessary, than to open the certificates, which were produced, in the presence of both houses, and to count the names and numbers, as returned.

J. Story, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1464 (Boston, Hilliard, Gray, & Co. 1833). The dispute-resolution process in 3 U.S.C. § 15 is blatantly unconstitutional for the reasons that Plaintiffs-Appellants briefed in the district court, without significant dispute from the Vice President or his principal

amicus curiae from the U.S. House of Representatives. The irreparable harm is that, once the election completes under the constitutional procedures under § 15, it could require impeachment to set it aside. In place of § 15, Plaintiffs-Appellants seek to have Congress follow the procedures laid out in the Twelfth Amendment.

The issues were fully briefed below, and the district court dismissed for lack of standing. Upon the reversal of such dismissals, the ordinarily course would be to remand for merits proceedings, *Montano v. Texas*, 867 F.3d 540, 546 (5th Cir. 2017) ("a court of appeals sits as a court of review, not of first view"), but "[t]he matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals." *Singleton v. Wulff*, 428 U.S. 106, 121 (1976). Here, the facts are not in dispute, the defendant and its principal *amicus curiae* below largely ignored the merits issues, thus essentially waiving the merits issues. *See*, *e.g.*, *Christopher M. v. Corpus Christi Indep. Sch. Dist.*, 933 F.2d 1285, 1293 (5th Cir. 1991) ("an issue waived by appellant cannot be raised by *amicus curiae*"); *Bd. of Miss. Levee Comm'rs v. EPA*, 674 F.3d 409, 417-18 (5th Cir. 2012) ("[u]nlike constitutional standing, prudential standing arguments may be waived"); *June Med. Servs. L.L.C. v. Russo*, 140 S.Ct. 2103, 2117 (2020) ("the rule that a party cannot ordinarily rest his claim to relief on the legal rights or interests of third parties … does not involve the Constitution's case-or-controversy requirement … [a]nd so … it can be forfeited or waived") (interior quotations and citations omitted);

Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 126 (2014). In short, the only questions presented are essentially the jurisdictional ones that this Court would need to consider in any event. *Steel Co. v. Citizens for a Better Env't.,* 523 U.S. 83, 95 (1998). Under the circumstances, if the Court finds jurisdiction, the Court could enter the requested declaratory judgment for the Plaintiffs-Appellants because a remand for waived merits issues would make little sense.

RELIEF REQUESTED

In order to complete the appeal before the joint session schedule for January 6, 2021, Plaintiffs-Appellants respectfully request that the Court immediately enter an expedited briefing schedule to set the following timeline for the appeal:

Opening brief & supporting *amici* briefs	Midnight (Central), January 2, 2021
Response brief & supporting *amici* briefs	6:00 p.m. (Central), January 3, 2021
Reply brief	10:00 a.m. (Central), January 4, 2021
Entry of judgment	Midnight (Central), January 5, 2021

Although Plaintiffs-Appellants sought to resolve the matter in district court via an emergency declaratory ruling as a final matter, Plaintiffs-Appellants did seek style their filings as requests for interim relief. Accordingly, as an alternative to resolving the full appeal before January 6, 2021, the Court could, alternatively, enter an interim order in the nature of a preliminary injunction.

CONCLUSION

WHEREFORE, for the foregoing reasons, Plaintiffs-Appellants respectfully request that the Court set the expedited briefing schedule above and resolve this appeal by Tuesday, January 5, 2021.

Dated: January 2, 2021

Respectfully submitted,

/s/ Lawrence J. Joseph

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COMBINED CERTIFICATE OF COMPLIANCE

1. The accompanying motion complies with the type-volume limitation of FED. R. APP. P. 27(d)(2)(A) and Circuit Rule 27-1(1)(d) because the motion contains 959 words, including footnotes, but excluding the parts of the motion exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

2. The motion complies with the typeface and type style requirements of FED. R. APP. P. 27(d)(1)(E) because the motion has been prepared in a proportionally spaced typeface using Microsoft Word 365 in Times New Roman 14-point font.

3. Pursuant to Circuit Rule 27.3, copies of the relevant order and judgment of the district court, as well as all relevant pleadings, briefs, memoranda, and other papers filed by all parties in the district court, will be filed as exhibits within an hour of the filing of this motion.

4. Pursuant to Circuit Rule 27.3, the undersigned counsel certifies that the facts supporting emergency consideration of the motion are true and complete.

Dated: January 2, 2021

Respectfully submitted,

/s/ Lawrence J. Joseph

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CERTIFICATE OF CONFERENCE

On January 2, 2021, the undersigned counsel called the Counsel for the Vice President and the trial counsel for the Vice President to confer regarding this motion, speaking to the former and leaving a voicemail for the latter circa 10:45 a.m. (Central). In addition, at 10:49 a.m. (Central), counsel emailed the Vice President's trial counsel—to whom the Counsel for the Vice President referred us—as well as the General Counsel for the U.S. House of Representatives to confer regarding this motion and requested a response. Although the Vice President's trial counsel read the email at 10:53 a.m. (Central) according to an email return receipt, he has not responded. Counsel for House indicated that his client would meet the Vice President's deadline; counsel for the Vice President indicated that his client took no position on this motion.

Dated: January 2, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the day specified below, I electronically filed the foregoing document with the Clerk of the Court for the U.S. Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I further certify that I provided a served a true and correct copy of the foregoing document on the following counsel for the parties and the principal *amicus curiae* in district court via Priority U.S. Mail, postage prepaid:

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I further certify that I provided a courtesy copy of the foregoing document via email to those counsel for the parties and the principal amicus curiae in district court.

Dated: January 2, 2021

Respectfully submitted,

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No. 21-40001

United States Court of Appeals for the Fifth Circuit

LOUIE GOHMERT, TYLER BOWYER, NANCY COTTLE, JAKE HOFFMAN, ANTHONY KERN, JAMES R. LAMON, SAM MOORHEAD, ROBERT MONTGOMERY, LORAINE PELLEGRINO, GREG SAFSTEN, KELLI WARD AND MICHAEL WARD,
Plaintiffs-Appellants,

v.

THE HONORABLE MICHAEL R. PENCE, VICE PRESIDENT OF THE UNITED STATES, IN HIS OFFICIAL CAPACITY,
Defendant-Appellee.

ON APPEAL FROM U.S. DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS, TYLER DIVISION,
CIVIL NO. 6:20-CV-00660-JDK, HON. JEREMY D. KERNODLE

EXHIBITS TO
EMERGENCY MOTION FOR EXPEDITED APPEAL

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TABLE OF EXHIBITS

U.S. District Court
Eastern District of TEXAS [LIVE] (Tyler)
CIVIL DOCKET FOR CASE #: 6:20-cv-00660-JDK

Gohmert et al v. Pence
Assigned to: District Judge Jeremy D. Kernodle
Cause: 28:1332 Diversity-Injunctive & Declaratory Relief

Date Filed: 12/27/2020
Date Terminated: 01/01/2021
Jury Demand: None
Nature of Suit: 441 Civil Rights: Voting
Jurisdiction: Federal Question

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Date Filed	#	Docket Text
12/27/2020	1	COMPLAINT *EMERGENCY COMPLAINT FOR EXPEDITED DECLARATORY AND EMERGENCY INJUNCTIVE RELIEF* against Michael R. Pence (Filing fee $ 402 receipt number 0540-8169550.), filed by Louie Gohmert. (Attachments: # 1 Exhibit EX A Arizona Joint Resolution, # 2 Civil Cover Sheet)(Sessions, William) (Entered: 12/27/2020)
12/28/2020		District Judge Jeremy D. Kernodle added. (mll,) (Entered: 12/28/2020)
12/28/2020	2	Emergency MOTION for Preliminary Injunction *AND EXPEDITED DECLARATORY JUDGMENT* by Tyler Bowyer, Nancy Cottle, Louie Gohmert, Jake Hoffman, Anthony Kern, James R. Lamon, Robert Montgomery, Sam Moorhead, Loraine Pellegrino, Greg Safsten, Kelli

		Ward, Michael Ward. (Attachments: # 1 Text of Proposed Order Proposed Order)(Sessions, William) (Entered: 12/28/2020)
12/28/2020	3	Summons Issued as to Michael R. Pence, U.S. Attorney and U.S. Attorney General, and emailed to plaintiff for service. (Attachments: # 1 Summons(es) US Attorney, # 2 Summons(es) US Attorney General)(mll,) (Entered: 12/28/2020)
12/28/2020	4	NOTICE of Attorney Appearance - Pro Hac Vice by Howard Kleinhendler on behalf of All Plaintiffs. Filing fee $ 100, receipt number 0540-8171069. (Kleinhendler, Howard) (Entered: 12/28/2020)
12/29/2020	5	AFFIDAVIT of Service for Summons and Proof of Service served on Stephen J. Cox on 12/29/20, filed by Tyler Bowyer, Nancy Cottle, Louie Gohmert, Jake Hoffman, Anthony Kern, James R. Lamon, Robert Montgomery, Sam Moorhead, Loraine Pellegrino, Greg Safsten, Kelli Ward, Michael Ward. (Sessions, William) (Entered: 12/29/2020)
12/29/2020	6	NOTICE of Attorney Appearance - Pro Hac Vice by Lawrence J Joseph on behalf of All Plaintiffs. Filing fee $ 100, receipt number 0540-8172359. (Joseph, Lawrence) (Entered: 12/29/2020)
12/29/2020	7	MOTION to Expedite *Shorten Time for Response to Plaintiffs' Emergency Motion for Expedited Declaratory Judgment and Emergency Injunctive Relief and Request for Expedited Scheduling Order* by Tyler Bowyer, Nancy Cottle, Louie Gohmert, Jake Hoffman, Anthony Kern, James R. Lamon, Robert Montgomery, Sam Moorhead, Loraine Pellegrino, Greg Safsten, Kelli Ward, Michael Ward. (Attachments: # 1 Text of Proposed Order Proposed Order Granting Motion to Shorten Time)(Sessions, William) (Entered: 12/29/2020)
12/29/2020	8	NOTICE of Attorney Appearance - Pro Hac Vice by Timothy P Dowling on behalf of Timothy P Dowling. Filing fee $ 100, receipt number 0540-8172653. (Dowling, Timothy) (Entered: 12/29/2020)
12/29/2020		MINUTE ORDER: The Court ORDERS that a briefing schedule will be set on Plaintiffs emergency motion (Docket No. 2) after Plaintiffs file proof of service in accordance with Federal Rule of Civil Procedure 4(i). (ksd) (Entered: 12/29/2020)
12/29/2020	9	NOTICE by Timothy P Dowling (Dowling, Timothy) (Entered: 12/29/2020)
12/29/2020	10	SUMMONS Returned Executed by James R. Lamon, Kelli Ward, Nancy Cottle, Sam Moorhead, Loraine Pellegrino, Timothy P Dowling, Michael Ward, Tyler Bowyer, Robert Montgomery, Louie Gohmert, Jake Hoffman, Greg Safsten, Anthony Kern. Michael R. Pence served on 12/29/2020, answer due 2/27/2021. (Joseph, Lawrence) (Entered: 12/29/2020)

12/29/2020	11	SUMMONS Returned Executed by James R. Lamon, Kelli Ward, Nancy Cottle, Sam Moorhead, Loraine Pellegrino, Timothy P Dowling, Michael Ward, Tyler Bowyer, Robert Montgomery, Louie Gohmert, Jake Hoffman, Greg Safsten, Anthony Kern. All Defendants. (Joseph, Lawrence) (Entered: 12/29/2020)
12/29/2020	12	ORDER for Expedited Briefing on 2 Emergency Motion for Preliminary Injunction and Expedited Declaratory Judgment - Granting In Part 7 Motion to Expedite. Signed by District Judge Jeremy D. Kernodle on 12/29/2020. (jdk1) (Entered: 12/29/2020)
12/30/2020	13	MOTION for Leave to File an Amicus Brief by John S. Campbell, Amicus Curiae. (Attachments: # 1 Text of Proposed Order, # 2 Envelope(s))(ksd) (Entered: 12/30/2020)
12/31/2020	14	NOTICE of Attorney Appearance - Pro Hac Vice by Alan Hamilton Kennedy on behalf of Alan Hamilton Kennedy. Filing fee $ 100, receipt number 0540-8175915. (Kennedy, Alan) (Entered: 12/31/2020)
12/31/2020	15	MOTION to Intervene *as Presidential Elector, Brief in Support of Motion to Intervene, and Opposition to Plaintiffs Louie Gohmert et al.'s Emergency Motion* by Alan Hamilton Kennedy. (Attachments: # 1 Text of Proposed Order)(Kennedy, Alan) (Entered: 12/31/2020)
12/31/2020	16	NOTICE of Attorney Appearance by Douglas N. Letter on behalf of U.S. House of Representatives (Letter, Douglas) (Entered: 12/31/2020)
12/31/2020	17	NOTICE of Attorney Appearance by John V. Coghlan on behalf of All Defendants (Coghlan, John) (Entered: 12/31/2020)
12/31/2020	18	RESPONSE in Opposition re 2 Emergency MOTION for Preliminary Injunction *AND EXPEDITED DECLARATORY JUDGMENT filed by Michael R. Pence*. (Coghlan, John) (Entered: 12/31/2020)
12/31/2020	19	MOTION to Intervene by Timothy P Dowling. (Attachments: # 1 Exhibit Motion to dismiss, # 2 Exhibit Order granting motion)(Dowling, Timothy) (Entered: 12/31/2020)
12/31/2020	20	MOTION to Dismiss by Timothy P Dowling. (Attachments: # 1 Text of Proposed Order Order to intervene, # 2 Text of Proposed Order Order to dismiss)(Dowling, Timothy) (Entered: 12/31/2020)
12/31/2020	21	MOTION for Leave to File *Amicus Brief* by U.S. House of Representatives. (Attachments: # 1 Text of Proposed Order)(Letter, Douglas) (Entered: 12/31/2020)
12/31/2020	22	TRIAL BRIEF *Proposed Amicus Brief* by U.S. House of Representatives. (Letter, Douglas) (Entered: 12/31/2020)

12/31/2020	23	Unopposed MOTION for Leave to File Excess Pages *for Plaintiffs' Response to Defendants' and Intervenors' Briefs In Opposition* by Louie Gohmert, Jake Hoffman. (Attachments: # 1 Text of Proposed Order Proposed Order)(Sessions, William) (Entered: 12/31/2020)
12/31/2020	24	ORDER granting 23 Motion for Leave to File Excess Pages. Signed by District Judge Jeremy D. Kernodle on 12/31/2020. (jdk1) (Entered: 12/31/2020)
01/01/2021	25	Unopposed MOTION to Intervene *INTERVENORS MICHELE LUNDGREN ET.AL.S UNOPPOSED MOTION TO INTERVENE* by MIchele Lundgren, Marian Sheridan, Meshawn Maddock, Mari-Ann Henry, Amy Facchinello. (Attachments: # 1 Exhibit Intervenor Lundgren's Original Complaint, # 2 Text of Proposed Order)(Bundren, Wm.) (Entered: 01/01/2021)
01/01/2021	26	Unopposed MOTION for Extension of Time to File *Plaintiff's Reply Brief* by Tyler Bowyer, Nancy Cottle, Louie Gohmert, Jake Hoffman, Anthony Kern, James R. Lamon, Robert Montgomery, Sam Moorhead, Loraine Pellegrino, Greg Safsten, Kelli Ward, Michael Ward. (Sessions, William) (Entered: 01/01/2021)
01/01/2021	27	Unopposed MOTION for Extension of Time to File *Plaintiff's Reply Brief* by Tyler Bowyer, Nancy Cottle, Louie Gohmert, Jake Hoffman, Anthony Kern, James R. Lamon, Robert Montgomery, Sam Moorhead, Loraine Pellegrino, Greg Safsten, Kelli Ward, Michael Ward. (Attachments: # 1 Text of Proposed Order)(Sessions, William) (Entered: 01/01/2021)
01/01/2021	28	NOTICE of Attorney Appearance - Pro Hac Vice by Julia Zsuzsa Haller on behalf of All Plaintiffs. Filing fee $ 100, receipt number 0540-8176550. (Haller, Julia) (Entered: 01/01/2021)
01/01/2021	29	ORDER granting 27 Motion for Extension of Time to File. Signed by District Judge Jeremy D. Kernodle on 1/1/2021. (jdk1) (Entered: 01/01/2021)
01/01/2021	30	RESPONSE in Support re 2 Emergency MOTION for Preliminary Injunction *AND EXPEDITED DECLARATORY JUDGMENT*, 27 Unopposed MOTION for Extension of Time to File *Plaintiff's Reply Brief filed by Tyler Bowyer, Nancy Cottle, Louie Gohmert, Jake Hoffman, Anthony Kern, James R. Lamon, Robert Montgomery, Sam Moorhead, Loraine Pellegrino, Greg Safsten, Kelli Ward, Michael Ward*. (Attachments: # 1 Exhibit Exhibit A, # 2 Exhibit Exhibit B, # 3 Exhibit Exhibit C, # 4 Errata Exhibit D, # 5 Exhibit Exhibit E)(Sessions, William) (Entered: 01/01/2021)

01/01/2021	31	Unopposed MOTION for Extension of Time to File *Response or Brief to Defendant and Others* by MIchele Lundgren. (Attachments: # 1 Text of Proposed Order)(Bundren, Wm.) (Entered: 01/01/2021)
01/01/2021	32	BRIEF filed *INTERVENORS MICHELE LUNDGREN ET.AL.S BRIEF IN SUPPORT OF PLAINTIFFS' RELIEF SOUGHT* by MIchele Lundgren. (Bundren, Wm.) (Entered: 01/01/2021)
01/01/2021	33	Additional Attachments to Main Document: 30 Response in Support of Motion,,.. (Sessions, William) (Entered: 01/01/2021)
01/01/2021	34	REPLY to Response to Motion re 2 Emergency MOTION for Preliminary Injunction *AND EXPEDITED DECLARATORY JUDGMENT Reply to Plaintiffs Response 1/1/21 re Rule 19 filed by Timothy P Dowling*. (Dowling, Timothy) (Entered: 01/01/2021)
01/01/2021	35	NOTICE by Timothy P Dowling re 19 MOTION to Intervene (Dowling, Timothy) (Entered: 01/01/2021)
01/01/2021	36	Emergency MOTION to Intervene *as Presidential Elector, Brief in Support of Motion to Intervene, and Opposition to Plaintiffs' Emergency Motion (Amending and Expanding Motion to Intervene of Dec. 31, 2020 at Docket No. 15)* by Alan Hamilton Kennedy. (Attachments: # 1 Text of Proposed Order)(Kennedy, Alan) (Entered: 01/01/2021)
01/01/2021	37	ORDER OF DISMISSAL. The Court dismisses the case without prejudice. Signed by District Judge Jeremy D. Kernodle on 1/1/2021. (efarris,) (Entered: 01/01/2021)
01/01/2021	38	FINAL JUDGMENT. Signed by District Judge Jeremy D. Kernodle on 1/1/2021. (efarris,) (Entered: 01/01/2021)
01/01/2021	39	NOTICE OF APPEAL as to 37 Order Dismissing Case, 38 Order by Tyler Bowyer, Nancy Cottle, Louie Gohmert, Jake Hoffman, Anthony Kern, James R. Lamon, Robert Montgomery, Sam Moorhead, Loraine Pellegrino, Greg Safsten, Kelli Ward, Michael Ward. Filing fee $ 505, receipt number 0540-8176796. Appeal Record due by 1/15/2021. (Joseph, Lawrence) (Entered: 01/01/2021)
01/02/2021	40	NOTICE OF APPEAL by MIchele Lundgren. Filing fee $ 505, receipt number 0540-8176887. (Bundren, Wm.) (Entered: 01/02/2021)

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

LOUIE GOHMERT, TYLER BOWYER, NANCY COTTLE, JAKE HOFFMAN, ANTHONY KERN, JAMES R. LAMON, SAM MOORHEAD, ROBERT MONTGOMERY, LORAINE PELLEGRINO, GREG SAFSTEN, KELLI WARD and MICHAEL WARD, Plaintiffs, v. THE HONORABLE MICHAEL R. PENCE, VICE PRESIDENT OF THE UNITED STATES, in his official capacity. Defendant.	Case No. COMPLAINT FOR EXPEDITED DECLARATORY AND EMERGENCY INJUNCTIVE RELIEF (Election Matter)

NATURE OF THE ACTION

1. This civil action seeks an expedited declaratory judgment finding that the elector dispute resolution provisions in Section 15 of the Electoral Count Act, 3 U.S.C. §§ 5 and 15, are unconstitutional because these provisions violate the Electors Clause and the Twelfth Amendment of the U.S. Constitution. U.S. CONST. art. II, § 1, cl. 1 & Amend. XII. Plaintiffs also request emergency injunctive relief required to effectuate the requested declaratory judgment**.**

2. These provisions of Section 15 of the Electoral Count Act are unconstitutional insofar as they establish procedures for determining which of two or more competing slates of Presidential Electors for a given State are to be counted in the Electoral College, or how objections to a proffered slate are adjudicated, that violate the Twelfth Amendment. This violation occurs because the Electoral Count Act directs the Defendant, Vice President Michael R. Pence, in his capacity as President of the Senate and Presiding Officer over the January 6, 2021 Joint Session

of Congress: (1) to count the electoral votes for a State that have been appointed in violation of the Electors Clause; (2) limits or eliminates his exclusive authority and sole discretion under the Twelfth Amendment to determine which slates of electors for a State, or neither, may be counted; and (3) replaces the Twelfth Amendment's dispute resolution procedure – under which the House of Representatives has sole authority to choose the President.

3. Section 15 of the Electoral Count Act unconstitutionally violates the Electors Clause by usurping the exclusive and plenary authority of State Legislatures to determine the manner of appointing Presidential Electors, and instead gives that authority to the State's Executive. Similarly, 3 USC § 5 makes clear that the Presidential electors of a state and their appointment by the State Executive shall be conclusive.

4. This is not an abstract or hypothetical question, but a live "case or controversy" under Article III that is ripe for a declaratory judgment arising from the events of December 14, 2020, where the State of Arizona (and several others) have appointed two competing slates of electors.

5. Plaintiffs include the United States Representative for Texas' First Congressional District and the entire slate of Republican Presidential Electors for the State of Arizona. The Arizona Electors have cast Arizona's electoral votes for President Donald J. Trump on December 14, 2020, at the Arizona State Capitol with the permission and endorsement of the Arizona Legislature, *i.e.*, at the time, place, and manner required under Arizona state law and the Electoral Count Act. At the same time, Arizona's Governor and Secretary of State appointed a separate and competing slate of electors who cast Arizona's electoral votes for former Vice-President Joseph R. Biden, despite the evidence of massive multi-state electoral fraud committed on Biden's behalf that changed electoral results in Arizona and in other states such as Georgia, Michigan,

Pennsylvania and Wisconsin that have also put forward competing slates of electors (collectively, the "Contested States"). Collectively, these Contested States have enough electoral votes in controversy to determine the outcome of the 2020 General Election.

6. On January 6, 2021, when Congress convenes to count the electoral votes for President and Vice-President, Plaintiff Representative Gohmert will object to the counting of the Arizona slate of electors voting for Biden and to the Biden slates from the remaining Contested States. Rep. Gohmert is entitled to have his objection determined under the Twelve Amendment, and not through the unconstitutional impositions of a prior Congress by 3 U.S.C. §§ 5 and 15.

7. Senators have also stated that they may object to the Biden slate of electors from the Contested States.[1]

8. This Complaint addresses a matter of urgent national concern that involves only issues of law – namely, a determination that Sections 5 and 15 of the Electoral Count Act violate the Electors Clause and/or the Twelfth Amendment of the U.S. Constitution. The relevant facts are not in dispute concerning the existence of a live case or controversy between Plaintiffs and Defendant, ripeness, standing, and other matters related to the justiciability of Plaintiffs' claims.[2]

[1] *See* https://www.forbes.com/sites/jackbrewster/2020/12/17/here-are-the-gop-senators-who have-hinted-at-defying-mcconnell-by-challenging-election/?sh=506395c34ce3.

[2] The facts relevant to the justiciability of Plaintiffs' claims are laid out below and demonstrate the certainty or near certainty that the unconstitutional provisions in Section 15 of the Electoral Count Act will be invoked at the January 6, 2021 Joint Session of Congress to choose the next President, namely: (1) there are competing slates of electors for Arizona and the other Contested States that have been or will be submitted to the Electoral College; (2) the Contested States collectively have sufficient (contested) electoral votes to determine the winner of the 2020 General Election – President Trump or former Vice President Biden; (3) legislators in Arizona and other Contested States have contested the certification of their State's electoral votes by State executives, due to substantial evidence of election fraud that is the subject of ongoing litigation and investigations; and (4) Senators and Members of the House of Representatives have expressed their intent to challenge the electors and electoral votes certified by State executives in the Contested States.

9. Because the requested declaratory judgment will terminate the controversy arising from the conflict between the Twelfth Amendment and the Electoral Count Act, and the facts are not in dispute, it is appropriate for this Court to grant this relief in a summary proceeding without an evidentiary hearing or discovery. *See* Notes of Advisory Committee on Federal Rules of Civil Procedure, Fed. R. Civ. P. 57.

10. Accordingly, Plaintiffs have concurrently submitted a motion for a speedy summary proceeding under Rule 57 of the Federal Rules of Civil Procedure ("FRCP") to grant the relief requested herein as soon as possible, and for emergency injunctive relief under Rule 65 thereof consistent with the declaratory judgment requested herein on that same date.

11. Accordingly, Plaintiffs respectfully request this Court to issue a declaratory judgment finding that:

A. Sections 5 and 15 of the Electoral Count Act, 3 U.S.C. §§ 5 and 15, are unconstitutional because they violate the Twelfth Amendment, U.S. CONST. art. II, § 1, cl. 1 & amend. XII on the face of it; and further violate the Electors Clause;

B. That Vice-President Pence, in his capacity as President of Senate and Presiding Officer of the January 6, 2021 Joint Session of Congress under the Twelfth Amendment, is subject solely to the requirements of the Twelfth Amendment and may exercise the exclusive authority and sole discretion in determining which electoral votes to count for a given State, and must ignore and may not rely on any provisions of the Electoral Count Act that would limit his exclusive authority and his sole discretion to determine the count, which could include votes from the slates of Republican electors from the Contested States;

C. That, with respect to competing slates of electors from the State of Arizona or other Contested States, the Twelfth Amendment contains the exclusive dispute resolution mechanisms, namely, that (i) Vice-President Pence determines which slate of electors' votes count, or neither, for that State; (ii) how objections from members of Congress to any proffered slate of electors is adjudicated; and (iii) if no candidate has a majority of 270 elector votes, then the House of Representatives (and only the House of Representatives) shall choose the President where "the votes [in the House of Representatives] shall be taken by states, the representation from each state having one vote," U.S. CONST. amend. XII;

D. That with respect to the counting of competing slates of electors, the alternative dispute resolution procedure or priority rule in 3 U.S.C. § 15, together with its incorporation of 3 U.S.C. § 5, shall have no force or effect because it nullifies and replaces the Twelfth Amendment rules above with an entirely different procedure; and

E. Issue any other declaratory judgments or findings or injunctive relief necessary to support or effectuate the foregoing declaratory judgments.

JURISDICTION AND VENUE

12. This Court has subject matter jurisdiction under 28 U.S.C. § 1331 which provides, "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

13. This Court also has subject matter jurisdiction under 28 U.S.C. § 1343 because this action involves a federal election for President of the United States. "A significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional

question." *Bush v. Gore*, 531 U.S. 98, 113 (2000) (Rehnquist, C.J., concurring); *Smiley v. Holm*, 285 U.S. 355, 365 (1932).

14. The jurisdiction of the Court to grant declaratory relief is conferred by 28 U.S.C. §§ 2201 and 2202 and by Rule 57, Fed. R. Civ. P., and emergency injunctive relief by Rule 65, Fed. R. Civ. P.

15. Venue is proper because Plaintiff Gohmert resides in Tyler, Texas, he maintains his primary congressional office in Tyler, and no real property is involved in the action. 28 U.S.C. § 1391(e)(1).

THE PARTIES

16. Plaintiff Louie Gohmert is a duly elected member of the United States House of Representatives for the First Congressional District of Texas. On November 3, 2020 he won re-election of this Congressional seat and plans to attend the January 6, 2021 session of Congress. He resides in the city of Tyler, in Smith County, Texas.

17. Each of the following Plaintiffs is a resident of Arizona, a registered Arizona voter and a Republican Party Presidential Elector on behalf of the State of Arizona, who voted their competing slate for President and Vice President on December 14, 2020: a) Tyler Bowyer, a resident of Maricopa County and a Republican National Committeeman; b) Nancy Cottle, a resident of Maricopa County and Second Vice-Chairman of the Maricopa County Republican Committee; c) Jake Hoffman, a resident of Maricopa County and member-elect of the Arizona House of Representatives; d) Anthony Kern, a resident of Maricopa County and an outgoing member of the Arizona House of Representatives; e) James R. Lamon, a resident of Maricopa County; f) Samuel Moorhead, a resident of Gila County; g) Robert Montgomery, a resident of Cochise County and Republican Party Chairman for Cochise County; h) Loraine Pellegrino, a

resident of Maricopa County; i) Greg Safsten, a resident of Maricopa County and Executive Director of the Republican Party of Arizona; j) Kelli Ward, a resident of Mohave County and Chair of the Arizona Republican Party; and k) Michael Ward, a resident of Mohave County.

18. The above eleven plaintiffs constitute the full slate of the Arizona Republican party's nominees for presidential electors (the "Arizona Electors").

19. The Defendant is Vice President Michael R. Pence named in his official capacity as the Vice President of the United States. The declaratory and injunctive relief requested herein applies to his duties as President of the Senate and Presiding Officer at the January 6, 2021 Joint Session of Congress carried out pursuant to the Electoral Count Act and the Twelfth Amendment.

STATEMENT OF FACTS

20. The Plaintiffs include a United States Representative from Texas, the entire slate of Republican Presidential Electors for the State of Arizona as well as an outgoing and incoming member of the Arizona Legislature. On December 14, 2020, pursuant to the requirements of applicable state laws and the Electoral Count Act, the Arizona Electors, with the knowledge and permission of the Republican-majority Arizona Legislature, convened at the Arizona State Capitol, and cast Arizona's electoral votes for President Donald J. Trump and Vice President Michael R. Pence.[3] On the same date, the Republican Presidential Electors for the States of Georgia,[4]

[3] *See GOP Elector Nominees cast votes for Trump in Arizona, Georgia, Pennsylvania*, by Dave Boyer, The Washington Times, December 14, 2020. https://www.washingtontimes.com/news/2020/dec/14/gop-electors-cast-votes-trump-georgia-pennsylvania/.

[4] *See id.*

Pennsylvania[5] and Wisconsin[6] met at their respective State Capitols to cast their States' electoral votes for President Trump and Vice President Pence.

21. Michigan's Republican electors attempted to vote at their State Capitol on December 14th but were denied entrance by the Michigan State Police. Instead, they met on the grounds of the State Capitol and cast their votes for President Trump and Vice President Pence vote.[7]

22. On December 14, 2020, in Arizona and the other States listed above, the Democratic Party's slate of electors convened in their respective State Capitols to cast their electoral votes for former Vice President Joseph R. Biden and Senator Kamala Harris. On the same day, Arizona Governor Doug Ducey and Arizona Secretary of State Katie Hobbs submitted the Certificate of Ascertainment with the Biden electoral votes pursuant to the National Archivist pursuant to the Electoral Count Act.[8]

23. Accordingly, there are now competing slates of Republican and Democratic electors in five States with Republican majorities in both houses of their State Legislatures – Arizona, Georgia, Michigan, Pennsylvania, and Wisconsin (*i.e.*, the Contested States) – that

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[5] *See id.*

[6] *See Wisconsin GOP Electors Meet to Cast their own Votes Too Just in Case*, by Nick Viviani, WMTV, NBC15.com, December 14, 2020, https://www.nbc15.com/2020/12/14/wisconsin-gop-electors-meet-to-cast-their-own-votes-too-just-in-case/ last visited December 14, 2020.

[7] *See Michigan Police Block GOP Electors from Entering Capitol*, by Jacob Palmieri, the Palmieri Report, December 14, 2020, https://thepalmierireport.com/michigan-state-police-block-gop-electors-from-entering-capitol/.

[8] *See Democratic Electors Cast Ballots in Arizona for First Time Since 1996*, by Nicole Valdes, ABC15.com, December 14, 2020, *available at*: https://www.abc15.com/news/election-2020/democratic-electors-cast-ballots-in-arizona-for-first-time-since-1996.

collectively have 73 electoral votes, which are more than sufficient to determine the winner of the 2020 General Election.[9]

24. The Arizona Electors, along with Republican Presidential Electors in Georgia, Michigan, Pennsylvania, and Wisconsin, took this step as a result of the extraordinary events and substantial evidence of election fraud and other illegal conduct before, during and after the 2020 General Election in these States. The Arizona Legislature has conducted legislative hearings into these voting fraud allegations, and is actively investigating these matters, including issuing subpoenas of Maricopa County, Arizona (which accounts for over 60% of Arizona's population and voters) voting machines for forensic audits.[10]

25. On December 14, 2020, members of the Arizona Legislature passed a Joint Resolution in which they: (1) found that the 2020 General Election "was marred by irregularities so significant as to render it highly doubtful whether the certified result accurately represents the will of the voters;" (2) invoked the Arizona Legislature's authority under the Electors Clause and 5 U.S.C. § 2 to declare the 2020 General Election a failed election and to directly appoint Arizona's electors; (3) resolved that the Plaintiff Arizona Electors' "11 electoral votes be accepted for … Donald J. Trump or to have all electoral votes nullified completely until a full forensic audit can be conducted;" and (4) further resolved "that the United States Congress is not to consider a slate

[9] Republican Presidential Electors in the States of Nevada and New Mexico, which have Democrat majority state legislature, also met on December 14, 2020, at their State Capitols to cast their votes for President Trump and Vice President Pence.

[10] Maricopa County election officials have refused to comply with these subpoenas or to turn over voting machines or voting records and have sued to quash the subpoena. Plaintiff Arizona Electors have moved to intervene in this Arizona state proceeding. *See generally Maricopa Cty. v. Fann*, Case No. CV2020-016840 (Az. Sup. Ct. Dec. 18, 2020).

of electors from the State of Arizona until the Legislature deems the election to be final and all irregularities resolved."[11]

26. Public reports have also highlighted wide-spread election fraud in the other Contested States that prompted competing Electors' slates. [12]

27. Republican Senators and Republican Members of the House of Representatives have also expressed their intent to oppose the certified slates of electors from the Contested States due to the substantial evidence of election fraud in the 2020 General Election. Multiple Senators and House Members have stated that they will object to the Biden electors at the January 6, 2021 Joint Session of Congress.[13] Plaintiff Gohmert will object to the counting of the Arizona electors voting for Biden, as well as to the Biden electors from the remaining Contested States.

28. Based on the foregoing facts, Defendant Vice President Pence, in his capacity as President of the Senate and Presiding Officer at the January 6, 2021 Joint Session of Congress to select the next President, will be presented with the following circumstances: (1) competing slates of electors from the State of Arizona and the other Contested States (namely, Georgia, Michigan, Pennsylvania, and Wisconsin) (2) that represent sufficient electoral votes (a) if counted, to determine the winner of the 2020 General Election, or (b) if not counted, to deny either President Trump or former Vice President Biden sufficient votes to win outright; and (3) objections from at

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[11] *See* **Ex. A**, "A Joint Resolution of the 54th Legislature, State of Arizona, To The 116th Congress, Office of the President of the Senate Presiding," December 14, 2020 ("December 14, 2020 Joint Resolution").

[12] *See The Immaculate Deception, Six Key Dimensions of Election Irregularities, The Navarro Report.* https://bannonswarroom.com/wp-content/uploads/2020/12/The-Immaculate-Deception-12.15.20-1.pdf

[13] *See, e.g., Dueling Electors and the Upcoming Joint Session of Congress*, by Zachary Steiber, Epoch Times, Dec. 17, 2020, *available at:* https://www.theepochtimes.com/explainer-dueling-electors-and-the-upcoming-joint-session-of-congress_3622992.html.

least one Senator and at least one Member of the House of Representatives to the counting of electoral votes from one or more of the Contested States.

29. The choice between the Twelfth Amendment and 3 U.S.C. § 15 raises important procedural differences. In the incoming 117th Congress, the Republican Party has a majority in 27 of the House delegations that would vote under the Twelfth Amendment. The Democrat Party has a majority in 20 of those House delegations, and the two parties are evenly divided in three of those delegations. By contrast, under 3 U.S.C. § 15, Democrats have a ten- or eleven-seat majority in the House, depending on the final outcome of the election in New York's 22nd District.

30. Accordingly, it is the foregoing conflict between the Twelfth Amendment of the U.S. Constitution and Section 15 of the Electoral Count Act that establish the urgency for this Court to issue a declaratory judgment that Section 15 of the Electoral Count Act is unconstitutional.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

31. **Presidential Electors Clause.** The U.S. Constitution grants State Legislatures the exclusive authority to appoint Presidential Electors:

> Each State shall appoint, in such Manner as the Legislature thereof may direct, a number of electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector. U.S. CONST. art. II, § 1 ("Electors Clause").

32. The Supreme Court has affirmed that the "power and jurisdiction of the state [legislature]" to select electors "is exclusive," *McPherson v. Blacker*, 146 U.S. 1, 11 (1892); this power "cannot be taken from them or modified" by statute or even the state constitution," and "there is no doubt of the right of the legislature to resume the power at any time." *Id.* at 10 (citations omitted). In *Bush v. Gore*, 531 U.S. 98 (2000), the Supreme Court reaffirmed *McPherson's* holding that "the state legislature's power to select the manner for appointing

electors is plenary," *Bush*, 531 U.S. at 104 (*citing McPherson*, 146 U.S. at 35), noting that the state legislature "may, if it so chooses, select the electors itself," and that even after deciding to select electors through a statewide election, "can take back the power to appoint electors." *Id.* (citation omitted).

33. **The Twelfth Amendment.** The Twelfth Amendment sets forth the procedures for counting electoral votes and for resolving disputes over whether and which electoral votes may be counted for a State. The first section describes the meeting of the Electoral College and the procedures up to the casting of the electoral votes by the Presidential Electors in their respective states, which occurred on December 14, 2020, with respect to the 2020 General Election:

> The electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate.

U.S. CONST. amend. XII.

34. The second section describes how Defendant Vice President Pence, in his role as President of the Senate and Presiding Officer for the January 6, 2021 Joint Session of Congress, shall "count" the electoral votes.

> The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted[.]

U.S. CONST. amend. XII.

35. Under the Twelfth Amendment, Defendant Pence alone has the exclusive authority and sole discretion to open and permit the counting of the electoral votes for a given state, and where there are competing slates of electors, or where there is objection to any single slate of electors, to determine which electors' votes, or whether none, shall be counted. Notably, neither

the Twelfth Amendment nor the Electoral Count Act, provides any mechanism for judicial review of the Presiding Officer's determinations.[14] Instead, the Twelfth Amendment and the Electoral Count Act adopt different procedures for the President of the Senate (Twelfth Amendment) or both Houses of Congress (Electoral Count Act) to resolve any such disputes and the authority for the final determinations, in the event of disagreement, to different parties; namely, the Electoral Count Act gives it to the Executive of the State; while the Twelfth Amendment vests sole authority with the Vice President.

36. The third section of the Twelfth Amendment sets forth the procedures for selecting the President (solely) by the House of Representatives, in the event that no candidate has received a majority of electoral votes counted by the President of the Senate.

> The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of electors appointed; *and if no person have such majority, then* from the persons having the highest numbers not exceeding three on the list of those voted for as President**,** *the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote*; a quorum for this purpose shall consist of a member or members from two-thirds of the states, *and a majority of all the states shall be necessary to a choice*. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.

U.S. CONST. amend. XII (emphasis added).

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[14] *See, e.g.*, Nathan L. Colvin & Edward B. Foley, *The Twelfth Amendment: A Constitutional Ticking Time Bomb*, U. of Miami L. Rev. 64:475, 526 (2010) (discussing reviews of the Electoral Count Act's ("ECA") legislative history and concluding that, "[o]ne of the more thorough reviews of the legislative history of the ECA reveals that Congress considered giving the Court some role in the process but rejected the idea every time, and it was clear that Congress did not think the Court had a constitutional role nor did it believe that the Court should have any jurisdiction at all." Plaintiffs agree that resolution of disputes before Congress, arising on January 6, 2021, over competing slates of electors, or objections to any slate of electors, are matters outside the purview of federal courts; but the federal courts must determine whether the ECA is unconstitutional. This position is fully consistent with the declaratory judgment requested herein.

37. There are four key features of this Twelfth Amendment procedure that should be noted when comparing it with the Electoral Count Act's procedures: (1) the President is to be chosen solely by the House of Representatives, with no role for the Senate; (2) votes are taken by State (with one vote per State), rather than by individual House members; (3) the President is deemed the candidate that receives the majority of States' votes, rather than a majority of individual House members' votes; and (4) there are no other restrictions on this majority rule provision; in particular, no "tie breaker" or priority rules based on the manner or State authority that originally appointed the electors on December 14, 2020 as is the case under the Electoral Count Act (which gives priority to electors' certified by the State's executive).

38. **The Electoral Count Act.** The Electoral Count Act of 1887, as subsequently amended, includes a number of provisions that are in direct conflict with the text of the Electors Clause and the Twelfth Amendment.

39. Sections 5 and 15 of the Electoral Count Act adopt an entirely different set of procedures for the counting of electoral votes, for addressing situations where one candidate does not receive a majority, and for resolving disputes. Sections 16 to 18 of the Electoral Count Act provide additional procedural rules governing the Joint Session of Congress (to be held January 6, 2021 for the 2020 General Election).

40. The first part of Section 15 is consistent with the Twelfth Amendment insofar as it provides that "the President of the Senate shall be their presiding officer" and that "all the certificates and papers purporting to be certificates of the electoral votes" are to be "opened by the President of the Senate." 3 U.S.C. § 15. However, Section 15 diverges from the Twelfth Amendment by adopting procedures for the President of the Senate to "call for objections," and if there are objections made in writing by one Senator and one Member of the House of

Representatives, then this shall trigger a dispute-resolution procedure found nowhere in the Twelfth Amendment.

41. The Section 15's dispute resolution procedures are lengthy and reproduced in their entirety below:

> When all objections so made to any vote or paper from a State shall have been received and read, the Senate shall thereupon withdraw, and such objections shall be submitted to the Senate for its decision; and the Speaker of the House of Representatives shall, in like manner, submit such objections to the House of Representatives for its decision; and no electoral vote or votes from any State which shall have been regularly given by electors whose appointment has been lawfully certified to according to section 6 of this title [3 USCS § 6][15] from which but one return has been received shall be rejected, *but the two Houses concurrently may reject the vote or votes when they agree that such vote or votes have not been so regularly given by electors whose appointment has been so certified*. If more than one return or paper purporting to be a return from a State shall have been received by the President of the Senate, those votes, and those only, shall be counted which shall have been regularly given by the electors who are shown by the determination mentioned in section 5 [3 USCS § 5] of this title to have been appointed, if the determination in said section provided for shall have been made, or by such successors or substitutes, in case of a vacancy in the board of electors so ascertained, as have been appointed to fill such vacancy in the mode provided by the laws of the State; but in case there shall arise the question which of two or more of such State authorities determining what electors have been appointed, as mentioned in section 5 of this title [3 USCS § 5], *is the lawful tribunal of such State, the votes regularly given of those electors, and those only*, of such State shall be counted whose title as electors the two Houses, acting separately, shall concurrently decide is supported by the decision of such State so authorized by its law; and in such case of more than one return or paper purporting to be a return from a State, if there shall have been no such determination of the question in the State aforesaid, then those votes, and those only, shall be counted which the two Houses shall concurrently decide were cast by lawful electors appointed in accordance with the laws of the State, unless the two Houses, acting separately, shall concurrently decide such votes not to be the lawful votes of the legally appointed electors of such

[15] 3 U.S.C. § 6 is inconsistent with the Electors Clause—which provides that electors "shall sign and certify, and transmit sealed to the seat of the government of the United States" the results of their vote, U.S. Const. art. II, § 1, cl. 2-3—because § 6 relies on state executives to forward the results of the electors' vote to the Archivist for delivery to Congress. 3 U.S.C. § 6. Although the means of delivery are arguably inconsequential, the Constitution vests state executives with no role whatsoever in the process of electing a President. A state executive lends no official imprimatur to a given slate of electors under the Constitution.

> State. *But if the two Houses shall disagree in respect of the counting of such votes, then, and in that case, the votes of the electors whose appointment shall have been certified by the executive of the State, under the seal thereof, shall be counted*. When the two Houses have voted, they shall immediately again meet, and the presiding officer shall then announce the decision of the questions submitted. No votes or papers from any other State shall be acted upon until the objections previously made to the votes or papers from any State shall have been finally disposed of.

3 U.S.C. § 15 (emphasis added).

42. First, the Electoral Count Act submits disputes over the "count" of electoral votes to both the House of Representatives and to the Senate. The Twelfth Amendment envisages no such role for both Houses of Congress. The President of the Senate, and the President of the Senate alone, shall "count" the electoral votes. This intent is borne out by a unanimous resolution attached to the final Constitution that described the procedures for electing the first President (*i.e.*, for a time when there would not already be a Vice President), stating in relevant part "that the Senators should appoint a President of the Senate, for the sole Purpose of receiving, opening and counting the Votes for President." 2 M. Farrand, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 666 (1911). For all subsequent elections, when there would be a Vice President to act as President of the Senate, the Constitution vests the opening and counting in the Vice President.

43. Second, the Electoral Count Act gives both the House of Representatives and the Senate the power to vote, or "decide," which of two or more competing slates of electors shall be counted, and it requires the concurrence of both to "count" the electoral votes for one of the competing slates of electors.

44. Under the Twelfth Amendment, the President of the Senate has the sole authority to count votes in the first instance, and then the House may do so *only* in the event that no candidate receives a majority counted by the President of the Senate. There is no role for the Senate to participate in choosing the President.

45. Third, the Electoral Count Act eliminates entirely the unique mechanism by which the House of Representatives under the Twelve Amendment is to choose the President, namely, where "the votes shall be taken by states, the representation for each state having one vote." U.S. CONST. amend. XII. The Electoral Count Act is silent on how the House of Representatives is to "decide" which electoral votes were cast by lawful electors.

46. Fourth, the Electoral Count Act adopts a priority rule, or "tie breaker," "if the two Houses shall disagree in respect of counting of such votes," in which case "the votes of the electors whose appointment shall have been certified by the executive of the State … shall be counted." This provision not only conflicts with the President of the Senate's exclusive authority and sole discretion under the Twelfth Amendment to decide which electoral votes to count, but also with the State Legislature's exclusive and plenary authority under the Electors Clause to appoint the Presidential Electors for their State.

47. The Electoral Count Act is unconstitutional because it exceeds the power of Congress to enact. It is well settled that "one legislature may not bind the legislative authority of its successors," United *States v. Winstar Corp.*, 518 U.S. 839, 872 (1996), which is a foundational and "centuries-old concept," *id.*, that traces to Blackstone's maxim that "Acts of parliament derogatory from the power of subsequent parliaments bind not." *Id.* (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *90). "There is no constitutionally prescribed method by which one Congress may require a future Congress to interpret or discharge a constitutional responsibility in any particular way." Laurence H. Tribe, *Erog v. Hsub and Its Disguises: Freeing* Bush v. Gore *from Its Hall of Mirrors*, 115 HARV. L. REV. 170, 267 n.388 (2001).

48. The Electoral Count Act also violates the Presentment Clause by purporting to create a type of bicameral order, resolution, or vote that is not presented to the President. *See* U.S.

CONST. art. I, § 7, cl. 3 ("Every Order, Resolution, or Vote, to Which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.")

49. The House and Senate cannot resolve the issues that the Electoral Count Act asks them to resolve without either a supermajority in both houses or presentment. The Electoral Count Act similarly restricts the authority of the House of Representatives and the Senate to control their internal discretion and procedures pursuant to Article I, Section 5 which provides that "[e]ach House may determine the Rules of its Proceedings …" U.S. CONST. art. I, § 5, cl. 2.

50. Further, the Electoral Count Act improperly delegates tie-breaking authority to State executives (who have no agency under the Electors Clause or election amendments) when a State presents competing slates that Congress cannot resolve, or when an objection is presented to a particular slate of electors.

51. The Electoral Count Act also violates the non-delegation doctrine, the separation-of-powers and anti-entrenchment doctrines. *See generally* Chris Land & David Schultz, *On the Unenforceability of the Electoral Count Act*, 13 Rutgers J.L. & Pub. Policy 340, 364-377 (2016).

JUSTICIABILITY AND JURISDICTION

52. **This Court Can Grant Declaratory Judgment in a Summary Proceeding.** This Court has the authority to enter a declaratory judgment and to provide injunctive relief pursuant to Rules 57 and 65 of the Federal Rules of Civil Procedure and 28 U.S.C. §§ 2201 and 2202. The court may order a speedy hearing of a declaratory judgment action. Fed. Rules Civ. Proc. R. 57,

Advisory Committee Notes. A declaratory judgment is appropriate when it will "terminate the controversy" giving rise to the proceeding. *Id.* Inasmuch as it often involves only an issue of law on undisputed or relatively undisputed facts, it operates frequently as a summary proceeding, justifying docketing the case for early hearing as on a motion. *Id.*

53. As described above, Plaintiffs' claims involve legal issues only – specifically, whether the Electoral Count Act violates the Twelfth Amendment of the U.S. Constitution – that do not require this court to resolve any disputed factual issues.

54. Moreover, the factual issues related to the justiciability of Plaintiffs' claims are not in dispute. To assist this Court to grant the relief on the expedited basis requested herein, Plaintiffs address a number of likely objections to this Court's jurisdiction and the justiciability of Plaintiffs' claims that may be raised by Defendant.

55. **Plaintiffs Have Standing.** Plaintiffs have standing as including a Member of the House of Representatives, Members of the Arizona Legislature, and as Presidential Electors for the State of Arizona.

56. Prior to December 14, 2020, Plaintiff Arizona Electors had standing under the Electors Clause as candidates for the office of Presidential Elector because, under Arizona law, a vote cast for the Republican Party's President and Vice President is cast for the Republican Presidential Electors. *See* ARS § 16-212. Accordingly, Plaintiff Arizona Electors, like other candidates for office, "have a cognizable interest in ensuring that the final vote tally reflects the legally valid votes cast," as "[a]n inaccurate vote tally is a concrete and particularized injury to candidates such as the Electors." *Carson v. Simon*, 978 F.3d 1051, 1057 (8th Cir. 2020) (affirming that Presidential Electors have Article III and prudential standing under Electors Clause). *See also Wood v. Raffensperger*, No. 20-14418, 2020 WL 7094866, *10 (11th Cir. Dec. 5, 2020) (affirming

that if Plaintiff voter had been a candidate for office "he could assert a personal, distinct injury" required for standing); *Trump v. Wis. Elections Comm'n*, No. 20-cv-1785, 2020 U.S. Dist. LEXIS 233765 at *26 (E.D. Wis. Dec. 12, 2020) (President Trump, "as candidate for election, has a concrete particularized interest in the actual results of the election.").

57. But for the alleged wrongful conduct of Arizona executive branch and Maricopa County officials under color of law, by certifying a fraudulently produced election result in Mr. Biden's favor, the Plaintiff Arizona Electors would have been certified as the presidential electors for Arizona, and Arizona's Governor and Secretary of State would have transmitted uncontested votes for Donald J. Trump and Michael R. Pence to the Electoral College. The certification and transmission of a competing slate of Biden electors has resulted in a unique injury that only Plaintiff Arizona Electors could suffer, namely, having a competing slate of electors take their place and their votes in the Electoral College.

58. The upcoming January 6, 2021 Joint Session of Congress provides further grounds of standing for the requested declaratory judgment that the Electoral Count Act is unconstitutional. Then, Plaintiffs are certain or nearly certain to suffer an injury-in-fact caused by Defendant Vice President Pence, acting as Presiding Officer, if Defendant ignores the Twelfth Amendment and instead follows the procedures in Section 15 of the Electoral Count Act to resolve the dispute over which slate of Arizona electors is to be counted.

59. The Twelfth Amendment gives Defendant exclusive authority and sole discretion as to which set of electors to count, or not to count any set of electors; if no candidate receives a majority of electoral votes, then the President is to be chosen by the House, where "the votes shall be taken by States, the representation from each state having one vote." U.S. CONST. amend. XII. If Defendant Pence instead follows the procedures in Section 15 of the Electoral Count Act,

Plaintiffs' electoral votes will not be counted because (a) the Democratic majority House of Representatives will not "decide" to count the electoral votes of Plaintiff Republican electors; and (b) either the Senate will concur with the House not to count their votes, or the Senate will not concur, in which case, the electoral votes cast by Biden's electors will be counted because the Biden slate of electors was certified by Arizona's executive.

60. It is sufficient for the purposes of declaratory judgment that the injury is threatened. The declaratory and injunctive relief requested by Plaintiffs "may be made before actual completion of the injury-in-fact required for Article III standing," namely, the application of Section 15 of the Electoral Count Act, rather than the Twelfth Amendment to resolve disputes over which of two competing slates of electors to count "if the plaintiff can show an actual present harm or significant possibility of future harm to demonstrate the need for pre-enforcement review." 10 FED. PROC. L. ED. § 23.26 ("Standing to Seek Declaratory Judgment") (citations omitted).

61. Plaintiffs have demonstrated above that this injury-in-fact is to occur at the January 6, 2021 Joint Session of Congress, and they seek the requested declaratory and injunctive relief "only in the last resort, and as a necessity in the determination of a vital controversy." *Id.*

62. **Plaintiffs Present a Live "Case or Controversy."** Plaintiffs' claims present a live "case or controversy" with the Defendant, rather than hypothetical or abstract dispute, that can be litigated and decided by this Court through the requested declaratory and injunctive relief. Here there is a clear threat of the application of an unconstitutional statute, Section 15 of the Electoral Count Act, which is sufficient to establish the requisite case or controversy. *See, e.g., Navegar, Inc. v. U.S.*, 103 F.3d 994, 998 (D.C. Cir. 1997) ("the threat of prosecution provides the foundation of justiciability as a constitutional and prudential matter, and the Declaratory Judgments Act provides the mechanism for seeking pre-enforcement review in federal court.").

63. First, the events of December 14, 2020, gave rise to two competing slates of electors for the State of Arizona: the Plaintiff Arizona Electors, supported by Arizona State legislators (as evidenced by the December 14, 2020 Joint Resolution and the participation of Arizona legislator Plaintiffs), who cast their electoral votes for President Trump and Vice President Pence, and one certified by the Arizona state executives who cast their votes for former Vice President Biden and Senator Harris. Second, the text of the Twelfth Amendment of the Constitution expressly commits to the Defendant Vice President Pence, acting as the President of the Senate and Presiding Officer for the January 6, 2021 Joint Session of Congress, the authority and discretion to "count" electoral votes, *i.e.*, deciding in his sole discretion as to which one of the two, or neither, set of electoral votes shall be counted. The Electoral Count Act similarly designates Defendant as the Presiding Officer responsible for opening and counting electoral votes, but sets forth a different set of procedures, inconsistent with the Twelfth Amendment, for deciding which of two or more competing slates of electors and electoral votes, or neither, shall be counted.

64. Accordingly, a controversy presently exists due to: (1) the existence of competing slates of electors for Arizona and the other Contested States, and (2) distinct and inconsistent procedures under the Twelfth Amendment and the Electoral Count Act to determine which slate of electors and their electoral votes, or neither, shall be counted in choosing the next President. Further, this controversy must be resolved at the January 6, 2021 Joint Session of Congress. Finally, the Constitution expressly designates Defendant Pence as the individual who decides which set of electoral votes, or neither, to count, and the requested declaratory judgment that the procedures under Electoral Count Act are unconstitutional is necessary to ensure that Defendant Pence counts electoral votes in a manner consistent with the Twelfth Amendment of the U.S. Constitution.

65. The injuries that Plaintiffs assert affect the procedure by which the status of their votes will be considered, which lowers the thresholds for immediacy and redressability under this Circuit's and the Supreme Court's precedents. *Nat'l Treasury Employees Union v. U.S.,* 101 F.3d 1423, 1428-29 (D.C. Cir. 1996); *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 571-72 & n.7 (1992). Similarly, a plaintiff with concrete injury can invoke Constitution's structural protections of liberty. *Bond v. United States*, 564 U.S. 211, 222-23 (2011).

66. **Plaintiffs' Claims Are Ripe for Adjudication.** Plaintiffs' claims are ripe for the same reasons that they present a live "case or controversy" within the meaning of Article III. "[T]he ripeness doctrine seeks to separate matters that are premature for review because the injury is speculative and may never occur from those cases that are appropriate for federal court action." *Roark v. Hardee LP v. City of Austin*, 522 F.3d 533, 544 n.12 (5th Cir. 2008) (*quoting* ERWIN CHEMERINSEY, FEDERAL JURISDICTION § 2.4.18 (5th Ed. 2007)). As explained above, the facts underlying the justiciability of Plaintiffs' claims are not in dispute. Further, it is certain or nearly certain that Plaintiffs will suffer an injury-in-fact at the January 6, 2021 Joint Session of Congress, if Defendant Pence disregards the exclusive authority and sole discretion granted to him under the Twelfth Amendment to "count" electoral votes, and instead follows the conflicting and unconstitutional procedures in Section 15 of the Electoral Count Act, pursuant to which Plaintiffs' electoral votes will be disregarded in favor of the competing electors for the State of Arizona.

67. **Plaintiffs' Claims Are Not Moot.** Plaintiffs seek prospective declaratory judgment that portions of the Electoral Count Act are unconstitutional and injunctive relief prohibiting Defendant from following the procedures in Section 15 thereof that authorize the House and Senate jointly to resolve disputes regarding competing slates of electors. This prospective relief would apply to Defendants' future actions at the January 6, 2021 Joint Session

of Congress. The requested relief thus is not moot because it is prospective and because it addresses an unconstitutional "ongoing policy" embodied in the Electoral Count Act that is likely to be repeated and will evade review if the requested relief is not granted. *Del Monte Fresh Produce v. U.S.*, 570 F.3d 316, 321-22 (D.C. Cir. 2009).

COUNT I

DEFENDANT WILL NECESSARILY VIOLATE THE TWELFTH AMENDMENT AND THE ELECTORS CLAUSE OF THE UNITED STATES CONSTITUTION IF HE FOLLOWS THE ELECTORAL COUNT ACT.

68. Plaintiffs reallege all preceding paragraphs as if fully set forth herein.

69. The Electors Clause states that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors" for President and Vice President. U.S. Const. art. II, §1, cl. 2 (emphasis added).

70. The Twelfth Amendment of the U.S. Constitution gives Defendant Vice President, as President of the Senate and the Presiding Officer of January 6, 2021 Joint Session of Congress, the exclusive authority and sole discretion to "count" the electoral votes for President, as well as the authority to determine which of two or more competing slates of electors for a State, or neither, may be counted, or how objections to any single slate of electors is resolved. In the event no candidate receives a majority of the electoral votes, then the House of Representatives shall have sole authority to choose the President where "the votes shall be taken by states, the representation from each state having one vote." U.S. CONST. amend. XII.

71. Section 15 of the Electoral Count Act replaces the procedures set forth in the Twelfth Amendment with a different and inconsistent set of decision making and dispute resolution procedures. As detailed above, these provisions of Section 15 of the Electoral Count Act are unconstitutional insofar as they require Defendant: (1) to count the electoral votes for a

State that have been appointed in violation of the Electors Clause; (2) limits or eliminates his exclusive authority and sole discretion under the Twelfth Amendment to determine which slates of electors for a State, or neither, may be counted; and (3) replaces the Twelfth Amendment's dispute resolution procedure which provides for the House of Representatives to choose the President under a procedure where "the votes shall be taken by states, the representation from each state having one vote" – with an entirely different procedure in which the House and Senate each separately "decide" which slate is to be counted, and in the event of a disagreement, then only "the votes of the electors whose appointment shall have been certified by the executive of the State … shall be counted." 3 U.S.C. § 15.

72. Section 15 of the Electoral Count Act also violates the Electors Clause by usurping the exclusive and plenary authority of State Legislatures to determine the manner of appointing Presidential Electors and gives that authority instead to the State's Executive.

PRAYER FOR RELIEF

73. Accordingly, Plaintiffs respectfully request that this Court issue a judgment that:

A. Declares that Section 15 of the Electoral Count Act, 3 U.S.C. §§5 and 15, is unconstitutional because it violates the Twelfth Amendment on its face, Amend. XII, Constitution;

B. Declares that Section 15 of the Electoral Count Act, 3 U.S.C. §§5 and 15, is unconstitutional because it violates the Electors Clause. U.S. CONST. art. II, § 1, cl. 1;

C. Declares that Vice-President Pence, in his capacity as President of Senate and Presiding Officer of the January 6, 2021 Joint Session of Congress, is subject solely to the requirements of the Twelfth Amendment and may exercise the

exclusive authority and sole discretion in determining which electoral votes to count for a given State;

D. Enjoins reliance on any provisions of the Electoral Count Act that would limit Defendant's exclusive authority and his sole discretion to determine which of two or more competing slates of electors' votes are to be counted for President;

E. Declares that, with respect to competing slates of electors from the State of Arizona or other Contested States, or with respect to objection to any single slate of electors, the Twelfth Amendment contains the exclusive dispute resolution mechanisms, namely, that (i) Vice-President Pence determines which slate of electors' votes shall be counted, or if none be counted, for that State and (ii) if no person has a majority, then the House of Representatives (and only the House of Representatives) shall choose the President where "the votes [in the House of Representatives] shall be taken by states, the representation from each state having one vote," U.S. CONST. amend. XII;

F. Declares that, also with respect to competing slates of electors, the alternative dispute resolution procedure or priority rule in 3 U.S.C. § 15, is null and void insofar as it contradicts and replaces the Twelfth Amendment rules above by with an entirely different procedure in which the House and Senate each separately "decide" which slate is to be counted, and in the event of a disagreement, then only "the votes of the electors whose appointment shall have been certified by the executive of the State … shall be counted," 3 U.S.C. § 15;

G. Enjoins the Defendant from executing his duties on January 6th during the Joint Session of Congress in any manner that is insistent with the declaratory relief set forth herein, and

H. Issue any other declaratory judgments or findings or injunctions necessary to support or effectuate the foregoing declaratory judgment.

74. Plaintiffs have concurrently submitted a motion for a speedy summary proceeding under FRCP Rule 57 to grant the relief requested herein ***as soon as practicable***, and for emergency injunctive relief under FRCP Rule 65 thereof consistent with the declaratory judgment requested herein on that same date.

Dated: December 27, 2020

Respectfully submitted,

/s/ William Lewis Sessions

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

LOUIE GOHMERT, TYLER BOWYER, NANCY COTTLE, JAKE HOFFMAN, ANTHONY KERN, JAMES R. LAMON, SAM MOORHEAD, ROBERT MONTGOMERY, LORAINE PELLEGRINO, GREG SAFSTEN, KELLI WARD and MICHAEL WARD, Plaintiffs, v. THE HONORABLE MICHAEL R. PENCE, VICE PRESIDENT OF THE UNITED STATES, in his official capacity, Defendant.	Civil Action No. 6:20-cv-00660-JDK **(Election Matter)**

PLAINTIFFS' EMERGENCY MOTION FOR EXPEDITED DECLARATORY JUDGMENT AND EMERGENCY INJUNCTIVE RELIEF

COME NOW Plaintiffs, U.S. Rep. Louie Gohmert (TX-1), Tyler Bowyer, Nancy Cottle, Jake Hoffman, Anthony Kern, James R. Lamon, Sam Moorhead, Robert Montgomery, Loraine Pellegrino, Greg Safsten, Kelli Ward, and Michael Ward, by and through their undersigned counsel, and file this Motion for Expedited Declaratory Judgment and Emergency Injunctive Relief ("Motion"), and Memorandum of Law In Support Thereof, pursuant to Rules 57 and 65 of the FEDERAL RULES OF CIVIL PROCEDURE to request the following relief.

As explained in the Complaint, Plaintiffs seek an expedited declaratory judgment declaring that Sections 5 and 15 of the Electoral Count Act of 1887, PUB. L. NO. 49–90, 24 Stat. 373 (codified at 3 U.S.C. §§ 5, 15), are unconstitutional because these provisions violate the Electors Clause and the Twelfth Amendment of the U.S. Constitution. U.S. CONST. art. II, § 1, cl. 1 & amend. XII. The Complaint and this Motion address a matter of urgent national concern that involves only issues of law—namely, a determination that Sections 5 and 15 of the Electoral Count Act violate

the Electors Clause and the Twelfth Amendment of the U.S. Constitution—where the relevant facts concerning the Plaintiffs' standing, the justiciability of Plaintiffs' claims by this Court, and this Court's ability to grant the relief requested are not in dispute.

Further, the purpose of this Complaint is a declaratory judgment regarding the rights and legal relations of Plaintiffs and of Defendant, namely, that Vice President Michael R. Pence, acting in his capacity as President of the Senate and Presiding Officer for the ***January 6, 2021 Joint Session of Congress*** to count Arizona and other States' electoral votes for choosing President, is free to exercise his exclusive authority and sole discretion under the Twelfth Amendment to determine which slate of electoral votes to count, or neither, and must disregard any provisions of the Electoral Count Act that conflict with the Twelfth Amendment, U.S. CONST. amend. XII.

Because the requested declaratory judgment will terminate the controversy arising from the conflict between the Twelfth Amendment and the Electoral Count Act, and the facts are not in dispute, it is appropriate for this Court to grant this relief in a summary proceeding without an evidentiary hearing or discovery. *See* FED. R. CIV. P. 57, Advisory Committee Notes. Accordingly, Plaintiffs request an expedited summary proceeding under Rule 57 of the Federal Rules of Civil Procedure to grant the relief requested herein no later than ***Thursday, December 31, 2020***, and for emergency injunctive relief under FED. R. CIV. P. 65 consistent with the declaratory judgment requested herein on that same date. Plaintiffs style their motion as an emergency motion under Local Civil Rule 7(l) because there is not enough time before December 31 to move for an expedited briefing schedule under Local Civil Rule 7(e).

Plaintiffs adopt all allegations contained in their Complaint.

Plaintiffs respectfully request an opportunity for oral argument. A proposed Order is attached.

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INTRODUCTION

Plaintiffs, U.S. Representative Louie Gohmert (TX-1) ("Rep. Gohmert"), Tyler Bowyer, Nancy Cottle, Jake Hoffman, Anthony Kern, James R. Lamon, Sam Moorhead, Robert Montgomery, Loraine Pellegrino, Greg Safsten, Kelli Ward and Michael Ward seek an expedited declaratory judgment declaring that Sections 5 and 15 of the Electoral Count Act of 1887, PUB. L. NO. 49–90, 24 Stat. 373 (codified at 3 U.S.C. §§ 5, 15), are unconstitutional because these provisions violate the Electors Clause and the Twelfth Amendment of the U.S. Constitution. U.S. CONST. art. II, § 1, cl. 1 & Amend. XII.

FACTS

The facts relevant to this motion are set forth in the Complaint and its accompanying exhibit are incorporated herein by reference. Plaintiffs present here only a summary.

The Plaintiffs include Rep. Louie Gohmert—a Member of the U.S. House of Representatives, representing Texas's First Congressional District in both the current and the next Congress—who seeks to enjoin the operation of the Electoral Count Act to prevent a deprivation of his rights—and the rights of those he represents—under the Twelfth Amendment. The Plaintiffs also include the entire slate of Republican Presidential Electors for the State of Arizona, as well as an outgoing and incoming member of the Arizona Legislature. On December 14, 2020, pursuant to the requirements of applicable state laws, the Constitution, and the Electoral Count Act, the Plaintiff Arizona Electors, with the knowledge and permission of the Republican-majority Arizona Legislature, convened at the Arizona State Capitol, and cast Arizona's electoral votes for President Donald J. Trump and Vice President Michael R. Pence. On the same date, the Republican Presidential Electors for the States of Georgia, Pennsylvania, and Wisconsin met at their respective State Capitols to cast their States' electoral votes for President Trump and Vice President Pence

(or in the case of Michigan, attempted to do so but were blocked by the Michigan State Police, and ultimately voted on the grounds of the State Capitol).

There are now competing slates of Republican and Democratic electors in five States with Republican majorities in both houses of their State Legislatures—Arizona, Georgia, Michigan, Pennsylvania, and Wisconsin (*i.e.*, the Contested States)—that collectively have 73 electoral votes, which are more than sufficient to determine the winner of the 2020 General Election. On December 14, 2020, in Arizona and the other Contested States, the Democratic Party's slate of electors convened in the State Capitol to cast their electoral votes for former Vice President Joseph R. Biden and Senator Kamala Harris. On the same day, Arizona Governor Doug Ducey and Secretary of State Katie Hobbs submitted the Certificate of Ascertainment with the Biden electoral votes to the National Archivist pursuant to the Electoral Count Act.

Republican Senators and Republican Members of the House of Representatives have also expressed their intent to oppose the certified slates of electors from the Contested States due to the substantial evidence of voter fraud in the 2020 General Election. Multiple Senators and House Members have stated that they will object to the Biden electors at the January 6, 2021 Joint Session of Congress. These public statements by legislators, combined with the fact that President Trump has not conceded and has given no indication that he will concede and political pressure from his nearly 75 million voters and other supporters, make it a near certainty that at least one Senator and one House Member will follow through on their commitments and invoke the (unconstitutional) Electoral Count Act's dispute resolution procedures.

Defendant Vice President Pence, in his capacity as President of the Senate and Presiding Officer at the January 6, 2021 Joint Session of Congress to select the next President, will be presented with the following circumstances: (1) competing slates of electors from the State of

Arizona and the other Contested States, (2) that represent sufficient electoral votes (a) if counted, to determine the winner of the 2020 General Election, or (b) if not counted, to deny either President Trump or former Vice President Biden sufficient votes to win outright; and (3) objections from at least one Senator and at least one Member of the House of Representatives to the counting of electoral votes from one or more of the Contested States and thereby invoking the unconstitutional procedures set forth in Section 15 of the Electoral Count Act.

As a result, Defendant Vice President Pence will necessarily have to decide whether to follow the unconstitutional provisions of the Electoral Count Act or the Twelfth Amendment to the U.S. Constitution at the January 6, 2021 Joint Session of Congress. This approaching deadline establishes the urgency for this Court to issue a declaratory judgment that Sections 5 and 15 of the Electoral Count Act are unconstitutional and provide the undisputed factual basis for this Court to do so on an expedited basis, and to enjoin Defendant Vice President Pence from following any Electoral Count Act procedures in 3 U.S.C. §§ 5 and 15 because they are unconstitutional under the Twelfth Amendment.

ARGUMENT

I. THIS COURT HAS JURISDICTION FOR PLAINTIFFS' CLAIMS.

Before entertaining the merits of this action, the Court first must establish its jurisdiction over the subject matter and the parties. This action obviously raises a federal question, 28 U.S.C. § 1331, so Plaintiffs establish below that this action presents a case or controversy for purposes of Article III and their entitlement to seek relief in this Court via this action.

A. Plaintiffs have standing.

Article III standing presents the tripartite test of whether the party invoking a court's jurisdiction raises an "injury in fact" under Article III: (a) a legally cognizable injury (b) that is

both caused by the challenged action, and (c) redressable by a court. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561-62 (1992). The task of establishing standing varies, depending "considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue." *Id* at 561. If so, "there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it." *Id.* at 562. If not, standing may depend on third-party action:

> When … a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed. In that circumstance, causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction – and perhaps on the response of others as well.

Id. (emphasis in original). Here, Plaintiffs can assert both first-party and third-party injuries, with the showing for standing easier for the first-party injuries. Specifically, Vice President Pence's action under the unconstitutional Electoral Count Act would have the effect of ratifying injuries inflicted—in the first instance—by third parties in Arizona.

1. <u>Plaintiffs have suffered an injury in fact.</u>

Plaintiffs have standing as a member of the United States House of Representatives, Members of the Arizona Legislature, and as Presidential Electors for the State of Arizona.

Rep. Louie Gohmert is a Member of the U.S. House of Representatives, representing Texas's First Congressional District in both the current and the next Congress. Rep. Louie Gohmert requests declaratory relief from this Court to prevent action as prescribed by 3 U.S.C. § 5, and 3 U.S.C. §15 and to give the power back to the states to vote for the President in accordance with the Twelfth Amendment. Otherwise he will not be able to vote as a Congressional Representative in accordance with the Twelfth Amendment, and instead, his vote in the House, if there is disagreement, will be eliminated by the current statutory construct under the Electoral

Count Act, or diluted by votes of the Senate and ultimately by passing the final determination to the state Executives.

In the event that objections occur leading to a vote in the House of Representatives, then under the Twelfth Amendment, on January 6, in the new House of Representatives, there will be twenty-seven states led by Republican majorities, and twenty states led by Democrat majorities, and three states that are tied. Twenty-six seats are required for a victor under the Twelfth Amendment, and further that, under the Twelfth Amendment, in the event neither candidate wins twenty-six seats by March 4, then the then-current Vice President would be declared the President. However, if the Electoral Count Act is followed, this one vote on a state-by-state basis in the House of Representatives for President simply would not occur and would deprive this Member of his constitutional right as a sitting member of a Republican delegation, where his vote matters.

The Twelfth Amendment specifically states that "if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote." The authority to vote with this authority is taken from the House of Representatives, of which Mr. Gohmert is a member, and usurped by statutory construct set forth in 3 U.S.C. § 5 and 3 U.S.C. §15. Therein the authority is given back to the state's executive branch in the process of counting and in the event of disagreement – while also giving the Senate concurrent authority with the House to vote for President. As a result, the application of 3 U.S.C. § 5 and 3 U.S.C. §15 would prevent Rep. Gohmert from exercising his constitutional duty to vote pursuant for President to the Twelfth Amendment.

Prior to December 14, 2020, Plaintiff Arizona Electors had standing under the Electors Clause as candidates for the office of Presidential Elector because, under Arizona law, a vote cast for the Republican Party's President and Vice President is cast for the Republican Presidential Electors. *See* ARIZ. REV. STAT. § 16-212. Accordingly, Plaintiff Arizona Electors, like other candidates for office, "have a cognizable interest in ensuring that the final vote tally reflects the legally valid votes cast," as "[a]n inaccurate vote tally is a concrete and particularized injury to candidates such as the Electors." *Carson v. Simon*, 978 F.3d 1051, 1057 (8th Cir. 2020) (affirming that Presidential Electors have Article III and prudential standing under Electors Clause); *see also Wood v. Raffensperger*, No. 20-14418, 2020 WL 7094866, *10 (11th Cir. Dec. 5, 2020) (affirming that if Plaintiff voter had been a candidate for office "he could assert a personal, distinct injury" required for standing); *Trump v. Wis. Elections Comm'n*, No. 20-cv-1785, 2020 U.S. Dist. LEXIS 233765 at *26 (E.D. Wis. Dec. 12, 2020) (President Trump, "as candidate for election, has a concrete particularized interest in the actual results of the election."). Plaintiffs suffer a "debasement" of their votes, which "state[s] a justiciable cause of action on which relief could be granted" *Wesberry v. Sanders*, 376 U.S. 1, 5-6 (1964) (citing *Baker v. Carr*, 369 U.S. 186 (1962)).

The Twelfth Amendment provides as follows:

> *The electors shall meet in their respective states and vote by ballot for President and Vice President*, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they *shall make distinct lists of all persons voted for as President*, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate.

U.S. CONST. amend. XII (emphasis added).

2. Plaintiffs' injuries are traceable to Defendant.

Rep. Gohmert faces imminent threat of injury that the Defendant will follow the unlawful Electoral Count Act and, in so doing, eviscerate Rep. Gohmert's constitutional right and duty to vote for President under the Twelfth Amendment. With injuries directly caused by a defendant, plaintiffs can show an injury in fact with "little question" of causation or redressability. *Defenders of Wildlife,* 504 U.S. at 561-62. Although the Defendant did not cause the underlying election fraud, the Defendant nonetheless will directly cause Rep. Gohmert's injury, which is causation—and redressability—under *Defenders of Wild*.

By contrast, the Arizona Electors suffer indirect injury *vis-à-vis* this Defendant. But for the alleged wrongful conduct of Arizona executive branch officials under color of law, the Plaintiff Arizona Electors would have been certified as the presidential electors for Arizona, and Arizona's Governor and Secretary of State would have transmitted uncontested votes for Donald J. Trump and Michael R. Pence to the Electoral College. The certification and transmission of a competing slate of Biden electors has resulted in a unique injury that only Plaintiff Arizona Electors could suffer, namely, having a competing slate of electors take their place and their votes in the Electoral College. While the Vice President did not cause Plaintiffs' initial injury—that happened in Arizona—the Vice President stands in the position at the Joint Session on January 6 to ratify and purport to make lawful the unlawful injuries that Plaintiffs suffered in Arizona. That is causation enough for Article III:

> According to the USDA, the injury suffered by Sierra Club is caused by the independent actions (*i.e.*, pumping decisions) of third party farmers, over whom the USDA has no coercive control. Although we recognize that causation is not proven if the injury complained of is the result of the *independent* action of some third party not before the court, this does not mean that causation can be proven only if the governmental agency has coercive control over those third parties. Rather, the relevant inquiry in this case is whether the USDA has the ability through various programs to affect the

> pumping decisions of those third party farmers to such an extent that the plaintiff's injury could be relieved.

Sierra Club v. Glickman, 156 F.3d 606, 614 (5th Cir. 1998) (interior quotation marks, citations, and alterations omitted, emphasis in original); *Tel. & Data Sys. v. FCC*, 19 F.3d 42, 47 (D.C. Cir. 1994); *Synthetic Organic Chem. Mfrs. Ass'n v. Sec'y, Dep't of Health & Human Servs.*, 720 F.Supp. 1244, 1248 n.2 (W.D. La. 1989) ("any traceable injury will provide a basis for standing, even where it occurs through the acts of a third party").

When third parties inflict injury—even private third parties—that injury is traceable to government action if the injurious conduct "would have been illegal without that [governmental] action." *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 45 n.25 (1976). As explained below, Vice President Pence stands ready to ratify Plaintiffs' injuries via the unconstitutional Electoral Count Act, which is causation enough to enjoin his actions. Alternatively, "plaintiff's injury could be relieved" within the meaning of *Sierra Club v. Glickman* if the Vice President rejected the Electoral Count Act as unconstitutional.

A procedural-rights plaintiff must also show that "fixing the alleged procedural violation could cause the agency to 'change its position' on the substantive action," *Ctr. for Biological Diversity v. United States EPA*, 937 F.3d 533, 543 (5th Cir. 2019), which is easy enough here/ Under the Electoral Count Act, the "Blue" or "Biden" states have a bare House majority in the Congress that will vote on January 6. Under the Twelfth Amendment, however, the "Red" or "Trump" states have a 27-20-3 majority where each state delegation gets one vote in the House's election of the President. That distinction satisfies both third-party causation and procedural-rights tests for Article III standing.

The Twelfth Amendment gives Defendant exclusive authority and sole discretion as to which set of electors to count, or not to count any set of electors. If no candidate receives a majority

of electoral votes, then the President is to be chosen by the House, where "the votes shall be taken by States, the representation from each state having one vote." U.S. CONST. amend. XII. If Defendant Pence instead follows the procedures in Section 15 of the Electoral Count Act, Plaintiffs' electoral votes will not be counted because (a) the Democratic majority House of Representatives will not "decide" to count the electoral votes of Plaintiff Republican electors; and (b) either the Senate will concur with the House not to count their votes, or the Senate will not concur, in which case, the electoral votes cast by Biden's electors shall be counted because the Biden slate of electors was certified by Arizona's executive. Under the Constitution, by contrast, the Vice President counts the votes and—if the count is indeterminate—the vote proceeds immediately to the House for President and to the Senate for Vice President. *See* U.S. CONST. amend. XII.[1]

3. <u>This Court can redress Plaintiffs' injuries.</u>

Even if this Court would lack jurisdiction to *enjoin* the Vice President, *but see* Sections I.B-I.C, *infra* (immunity does not bar this action), this Court's authoritative declaration would provide redress enough. *See Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992) ("we may assume it is substantially likely that the President and other executive and congressional officials would abide by an authoritative interpretation of the census statute and constitutional provision by the District Court, even though they would not be directly bound by such a determination"). The

[1] This intent that the Vice President count the votes is borne out by a unanimous resolution attached to the final Constitution that described the procedures for electing the first President (*i.e.*, for the one time when there would not already be a sitting Vice President), stating in relevant part "that the Senators should appoint a President of the Senate, for the sole Purpose of receiving, opening and counting the Votes for President." 2 M. Farrand, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 666 (1911). For all subsequent elections, when there would be a Vice President to act as President of the Senate, the Constitution vests the opening and counting in the Vice President.

Electoral Count Act is blatantly unconstitutional in many respects, *see* Section I.A, *infra*, and "it is the province and duty of the judicial department to determine in cases regularly brought before them, whether the powers of any branch of the government, and even those of the legislature in the enactment of laws, have been exercised in conformity to the Constitution." *Powell v. McCormack*, 395 U.S. 486, 506 (1969) (interior quotations omitted).

Even if Plaintiffs do not ultimately prevail under the process that the Twelfth Amendment requires, the relief requested would nonetheless redress their injuries from the unconstitutional Electoral Count Act process in two respects . First, with respect to seeking to follow the Twelfth Amendment procedure over that of 3 U.S.C. § 15, it would redress Rep. Gohmert's procedural injuries enough to proceed under the correct procedure, even if they do not prevail substantively. *FEC v. Akins*, 524 U.S. 11, 25 (1998). Second, with respect to the Arizona Electors, it would redress their unequal-footing injuries to treat all rival elector slates the same, even if the House and not the electors choose the next President. *Heckler v. Mathews*, 465 U.S. 728, 739-40 (1984) ("when the right invoked is that to equal treatment, the appropriate remedy is a *mandate* of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class") (citations and footnotes omitted, emphasis in original). In each respect, Article III does not require that Plaintiffs show that they will prevail in order to show redressability.

The declaratory relief that Plaintiffs request would redress their injuries enough for Article III and in the chart as set forth:

Event/Issue	3 U.S.C. § 15	Twelfth Amendment
One Congress purports to bind future Congresses	Yes	No
Rival slates of electors	Bicameral dispute resolution with no presentment; state executive breaks ties	Vice President counts; House and Senate respectively elect President and Vice President if inconclusive
Violates Presentment Clause	Yes	No
Role for state governors	Yes	No
House voters	Each member votes (*e.g.*, CA gets 53 votes, ND gets 1)	Each state delegation votes (*e.g.*, CA and ND get 1 vote)

As is plain from these material—and, here, dispositive—differences between the Twelfth Amendment and 3 U.S.C. § 15, the two provisions cannot be reconciled.

4. Plaintiffs' procedural injuries lower the constitutional bar for immediacy and redressability.

Given that Plaintiffs suffer a concrete injury to their voting rights, Plaintiffs also can press their procedural injuries under the Electoral Count Act. For procedural injuries, Article III's redressability and immediacy requirements apply to the *procedural violation* that will (or someday might) injure a concrete interest, rather than to the concrete future injury. *Defenders of Wildlife*, 504 U.S. at 571-72 & n.7. Specifically, the injuries that Plaintiffs assert affect the procedure by which the status of their votes will be considered, which lowers the thresholds for immediacy and redressability under this Circuit's and the Supreme Court's precedents. *Id.*; *Glickman*, 156 F.3d at 613 ("in a procedural rights case, … the plaintiff is not held to the normal standards for [redressability] and immediacy"); *accord Nat'l Treasury Employees Union v. U.S.*, 101 F.3d 1423, 1428-29 (D.C. Cir. 1996). Similarly, a plaintiff with concrete injury can invoke Constitution's structural protections of liberty. *Bond v. United States*, 564 U.S. 211, 222-23 (2011).

Finally, voters from smaller states like Arizona suffer an equal-footing injury and a procedural injury *vis-à-vis* larger states like California because the Electoral Count Act purports

to replace the process provided in the Twelfth Amendment. Under the Electoral Count Act, California has five times the votes that Arizona has, but under the Twelfth Amendment California and Arizona each have one vote. *Compare* 3 U.S.C. § 15 *with* U.S. CONST. amend. XII. That analysis applies in third-party injury cases. *See Clinton v. New York*, 524 U.S. 417, 433 & n.22 (1998) (unequal-footing analysis applies to indirect-injury plaintiffs); *cf. id.* at 456-57 (that analysis should apply only to equal-protection cases) (Scalia, J., dissenting). Nullification of a procedural protection and any related bargaining power is injury enough, even in third-party cases. *Clinton*, 524 U.S. at 433 & n.22.

B. <u>The Speech or Debate Clause does not insulate the Vice President.</u>

The Speech or Debate Clause provides that "Senators and Representatives" "shall not be questioned in any other Place" "for any Speech or Debate in either House":

> The Senators and Representatives … for any speech or debate in either House, … shall not be questioned in any other place.

U.S. CONST. art I, § 6, cl. 1. "Not everything a Member of Congress may regularly do is a legislative act within the protection of the Speech or Debate Clause," *Minton v. St. Bernard Par. Sch. Bd.*, 803 F.2d 129, 134-35 (5th Cir. 1986) (interior quotations omitted), because the "clause has been interpreted to protect only purely legislative activities," *Williams v. Brooks*, 945 F.2d 1322, 1326 (5th Cir. 1991) (internal quotation marks omitted), which renders it inapposite here. Where it applies, the Clause poses a jurisdictional bar not only to a court reaching the merits but also to putting the defendant to the burden of putting up a defense. *Powell*, 395 U.S. at 502-03. But "Legislative immunity does not, of course, bar all judicial review of legislative acts," *Powell*, 395 U.S. at 503, and the Speech or Debate Clause does not even apply—by its terms—to the Vice President in his role as President of the Senate or to the Joint Session on January 6.

First, the Clause does not protect the Vice President acting in his role as President of the Senate. *See* U.S. CONST. art I, § 6, cl. 1; *cf. Common Cause v. Biden*, 748 F.3d 1280, 1284 (D.C. Cir. 2014) (declining to decide whether or not the Speech or Debate Clause protects the Vice President). At best for the Vice President, the question is an open one, but Plaintiffs respectfully submit that the Constitution's plain language should govern: The Clause does not apply to the Vice President. Instead, as here, where an unprotected officer of the House or Senate implements an unconstitutional action of the House or Senate, the judiciary has the power to enjoin the officer, even if it would lack the power to enjoin the House, the Senate, or their Members. *Powell*, 395 U.S. at 505. In short, the Speech or Debate Clause does not protect Vice President Pence at all.

Second, even if the Speech or Debate Clause did protect the Vice President acting as President of the Senate for legislative activity in the Senate, the Joint Session on January 6 is no such action. *See* U.S. CONST. art I, § 6, cl. 1. This is an election, and the Vice President has no more authority to disenfranchise voters via unconstitutional means as any other person.

C. Sovereign immunity does not bar this action.

The Defendant is Vice President Pence named as a defendant in his official capacity as the Vice President of the United States. With respect to injunctive or declaratory relief, it is a historical fact that at the time that the states ratified the federal Constitution, the equitable, judge-made, common-law doctrine that allows use of the sovereign's courts in the name of the sovereign to order the sovereign's officers to account for their unlawful conduct (*i.e.*, the rule of law) was as least as firmly established and as much a part of the legal system as the judge-made, common-law doctrine of federal sovereign immunity. Louis L. Jaffee, *The Right to Judicial Review I*, 71 HARV. L. REV. 401, 433 (1958); A.B.A. Section of Admin. Law & Regulatory Practice, *A Blackletter Statement of Federal Administrative Law*, 54 ADMIN. L. REV. 1, 46 (2002) (it is blackletter law

that "suits against government officers seeking prospective equitable relief are not barred by the doctrine of sovereign immunity").

In determining whether the doctrine of *Ex parte Young* avoids immunity, a court need only conduct a "straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md. Inc. v. Pub. Serv. Comm'n of Maryland*, 535 U.S. 635, 645 (2002) (citations omitted). That is enough to survive a motion to dismiss on jurisdictional grounds: "The inquiry into whether suit lies under *Ex parte Young* does not include an analysis of the merits of the claim[.]" *Id.* at 638. Sovereign immunity poses no bar to jurisdiction here.[2]

The prayer for injunctive relief—that the Vice President be restrained from enforcing 3 U.S.C. §5 and §15 in contravention of the Twelfth Amendment of the Constitution—to instead follow the Twelfth Amendment, clearly satisfies the "straightforward inquiry." Plaintiffs request declaratory relief to prevent unconstitutional action under 3 U.S.C. § 5 and § 15 and to give the power back to the states to vote for the President in accordance with the Twelfth Amendment. Therefore, the Defendant should be enjoined from proceeding to certify or count dueling electoral votes under the unconstitutional dispute resolution procedures in 3 U.S.C. § 5 and § 15, and instead to follow the constitutional process as set forth in the Twelfth Amendment of the Constitution.

[2] Indeed, the sovereign immunity afforded a Member of Congress is co-extensive with the protections afforded by the Speech or Debate Clause. In all other respects, Members of Congress are bound by the law to the same extent as other persons. *Davis v. Passman*, 442 U.S. 228, 246 (1979) ("although a suit against a Congressman for putatively unconstitutional actions taken in the course of his official conduct does raise special concerns counseling hesitation, we hold that these concerns are coextensive with the protections afforded by the Speech or Debate Clause").

D. The political-question doctrine does not bar this suit.

The "political questions doctrine" can bar review of certain issues that the Constitution delegates to one of the other branches, but that bar does not apply to constitutional claims related to voting (other than claims brought under the Guaranty Clause of Article IV, §4):

> We hold that this challenge to an apportionment presents no nonjusticiable "political question." The mere fact that the suit seeks protection of a political right does not mean it presents a political question. Such an objection "is little more than a play upon words."

Baker, 369 U.S. at 209. As in *Baker*, litigation over political rights is not the same as a political question.

E. This case presents a federal question, and abstention principles do not apply.

Article III, § 2, of the Federal Constitution provides that, "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority[.]" It is clear that the cause of action is one which "arises under" the Federal Constitution. *Baker*, 369 U.S. at 199. In *Baker*, the Plaintiffs alleged that, by means of a 1901 Tennessee statute that arbitrarily and capriciously apportioned the seats in the General Assembly among the State's 95 counties and failed to reapportion them subsequently notwithstanding substantial growth and redistribution of the State's population, they suffered a "debasement of their votes" and were thereby denied the equal protection of the laws guaranteed them by the Fourteenth Amendment. They sought, *inter alia*, a declaratory judgment that the 1901 statute is unconstitutional and an injunction restraining certain state officers from conducting any further elections under it. *Id*. The *Baker* line of cases recognizes that "that voters who allege facts showing disadvantage to themselves as individuals have standing to sue.'

The federal and constitutional nature of these controversies deprives abstention doctrines of any relevance whatsoever. First, state laws for the appointment of presidential electors are federalized by the operation of The Electoral Count Act of 1887. *McPherson v. Blacker*, 146 U.S. 1, 27 (1892); *Bush v. Gore*, 531 U.S. 98, 113 (2000) (Rehnquist, C.J., concurring) ("A significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question."). Second, "[i]t is no original prerogative of State power to appoint a representative, a senator, or President for the Union." J. Story, 1 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 627 (3d ed. 1858). Logically, "any state authority to regulate election to [federal] offices could not precede their very creation by the Constitution," meaning that any "such power had to be delegated to, rather than reserved by, the States." *Cook v. Gralike*, 531 U.S. 510, 522 (2001) (internal quotations omitted).

A more quintessentially federal question than which slate of electors will be counted under the 12th Amendment and 3 U.S.C. § 15 to elect the President and Vice President can scarcely be imagined.

F. <u>Plaintiffs are entitled to an expedited declaratory judgment.</u>

Under Rule 57, an expedited declaratory judgment is appropriate where, as here, it would "terminate the controversy" based on undisputed or relatively undisputed facts. *See* FED. R. CIV. P. 57, Advisory Committee Notes. The facts relevant to this controversy are not in dispute, namely: (1) there are competing slates of electors for Arizona and the other Contested States that have been or will be submitted to the Electoral College; (2) the Contested States collectively have sufficient (contested) electoral votes to determine the winner of the 2020 General Election—President Trump or former Vice President Biden; (3) legislators in Arizona and other Contested States have contested the certification of their State's electoral votes by State executives, due to substantial evidence of voter fraud that is the subject of ongoing litigation and investigations; and

(4) Senators and Members of the House of Representatives have expressed their intent to challenge the electors and electoral votes certified by State executives in the Contested States.

As a result, Defendant Vice President Pence, in his capacity as President of the Senate and as the Presiding Officer for the January 6, 2021 Joint Session of Congress will be have to decide between (a) following the requirements of the Twelfth Amendment, and exercising his exclusive authority and sole discretion in deciding which slate of electors and electoral votes to count for Arizona, or neither, or (b) following the distinct and inconsistent procedures set forth in Section 15 of the Electoral Count Act. The expedited declaratory judgment requested, namely, declaring that Section 5 and 15 of the Electoral Count Act are unconstitutional to the extent they conflict with the Twelfth Amendment and the Electors Clause, and that Defendant Pence may not follow these unconstitutional procedures, will terminate the controversy. Further, as discussed below, the requested declaratory judgment would also establish that Plaintiffs meet all of the requirements for any additional injunctive relief required to effectuate the declaratory judgment by enjoining Defendant Pence from violating the Twelfth Amendment.

II. PLAINTIFFS ARE ENTITLED TO EMERGENCY INJUNCTIVE RELIEF.

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 21 (2008). If this Court grants the requested declaratory judgment, then all elements required for injunctive relief will have been met.

A. Plaintiffs have a substantial likelihood of success.

The first—and most important—*Winter* factor is the likelihood of movants' prevailing. *Winter*, 555 U.S. at 20. Plaintiffs are likely to prevail because this Court has jurisdiction for this action, *see* Section I, *supra*, and because the Electoral Count Act is blatantly unconstitutional.

1. Unconstitutional laws are nullities.

At the outset, if the Electoral Count Act violates the Constitution, the Electoral Count Act is a nullity:

> [I]t is the province and duty of the judicial department to determine in cases regularly brought before them, whether the powers of any branch of the government, and even those of the legislature in the enactment of laws, have been exercised in conformity to the Constitution; and if they have not, to treat their acts as *null and void*.

Powell, 395 U.S. at 506 (interior quotations omitted, emphasis added). "Due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds." *United States v. Morrison*, 529 U.S. 598, 607 (2000) (finding Congress exceeded its authority under the Commerce Clause in regulating an area of the law left to the States. "Constitutional deprivations may not be justified by some remote administrative benefit to the State." *Harman v. Forssenius*, 380 U.S. 528, 542-43 (1965). Put simply, "that which is not supreme must yield to that which is supreme." *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 448 (1827). Although *Brown* arose in a federal-versus-state context, the same simple truth applies in a constitution-versus-statute context: the supreme enactment controls the lesser enactment.

2. The Electoral Count Act violates the Electors Clause and the Twelfth Amendment.

The requested expedited summary proceeding granting declaratory judgment will address the merits of Plaintiffs' claims, which raise only legal issues as to whether the provisions of Sections 5 and 15 of the Electoral Count Act addressing the counting of electoral votes from competing slates of electors for a given state are in conflict with the Twelfth Amendment and the Electors Clause and are therefore unconstitutional. In other words, if the Court grants the requested relief, that holding and relief will be granted because the Court has found that these provisions of

the Electoral Count Act are unconstitutional and that Plaintiffs have in fact succeeded on the merits.

Under 3 USC § 5, the Presidential electors of a state and their appointment by the State shall be conclusive:

> If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned.

3 USCS § 5.

This statutory provision takes away the authority given to the Vice-President under the Twelfth Amendment in determining which electoral votes are conclusive. 3 U.S.C. §15 in relevant part states that both Houses, referencing the House of Representatives and the Senate, may concurrently reject certified votes, and further that if there is a disagreement, then, in that case, the votes of the electors who have been certified by the Executive of the State shall be determinative:

> …When all objections so made to any vote or paper from a State shall have been received and read, the Senate shall thereupon withdraw, and such objections shall be submitted to the Senate for its decision; and the Speaker of the House of Representatives shall, in like manner, submit such objections to the House of Representatives for its decision; and no electoral vote or votes from any State which shall have been regularly given by electors whose appointment has been lawfully certified to according to section 6 of this title [3 USCS § 6] from which but one return has been received shall be rejected, but the two Houses concurrently may reject the vote or votes when they agree that such vote or votes have not been so regularly given by electors whose appointment has been so certified. If more than one return or paper purporting to be a return from a State shall have been received by the President of the Senate,

> those votes, and those only, shall be counted which shall have been regularly given by the electors who are shown by the determination mentioned in section 5 [3 USCS § 5] of this title to have been appointed, if the determination in said section provided for shall have been made, or by such successors or substitutes, in case of a vacancy in the board of electors so ascertained, as have been appointed to fill such vacancy in the mode provided by the laws of the State; but in case there shall arise the question which of two or more of such State authorities determining what electors have been appointed, as mentioned in section 5 of this title [3 USCS § 5], is the lawful tribunal of such State, the votes regularly given of those electors, and those only, of such State shall be counted whose title as electors the two Houses, acting separately, shall concurrently decide is supported by the decision of such State so authorized by its law; and in such case of more than one return or paper purporting to be a return from a State, if there shall have been no such determination of the question in the State aforesaid, then those votes, and those only, shall be counted which the two Houses shall concurrently decide were cast by lawful electors appointed in accordance with the laws of the State, unless the two Houses, acting separately, shall concurrently decide such votes not to be the lawful votes of the legally appointed electors of such State. But if the two Houses shall disagree in respect of the counting of such votes, then, and in that case, the votes of the electors whose appointment shall have been certified by the executive of the State, under the seal thereof, shall be counted. When the two Houses have voted, they shall immediately again meet, and the presiding officer shall then announce the decision of the questions submitted. No votes or papers from any other State shall be acted upon until the objections previously made to the votes or papers from any State shall have been finally disposed of.

3 U.S.C. § 15.

This expressly conflicts with the Twelfth Amendment which has already set what role the House and the Senate play in addressing the votes of electors:

> The electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the

> Senate;--The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;--the person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. *But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice*. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President. The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

U.S. CONST. amend. XII. (emphasis added).

The Constitution is unambiguously clear that: "The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted" "… and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives [who] shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote." Whereas 3 U.S.C. §15 and the incorporated referenced to 3 U.S.C. §5 delegate the authority to the

Executive of the State in the event of disagreement, in direct conflict with the Twelfth Amendment and directly taking the opportunity of Presidential Electors' competing slates from being counted.[3]

3. <u>The Electoral Count Act violates the Constitution's structural protections of liberty.</u>

The Electoral Count Act exceeds the power of Congress to enact because "one legislature may not bind the legislative authority of its successors," *United States v. Winstar Corp.*, 518 U.S. 839, 872 (1996), which is a foundational and "centuries-old concept," *id.*, that traces to Blackstone's maxim that "Acts of parliament derogatory from the power of subsequent parliaments bind not." *Id.* (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *90). "There is no constitutionally prescribed method by which one Congress may require a future Congress to interpret or discharge a constitutional responsibility in any particular way." Laurence H. Tribe, *Erog v. Hsub and Its Disguises: Freeing* Bush v. Gore *from Its Hall of Mirrors*, 115 HARV. L. REV. 170, 267 n.388 (2001). Thus, the Electoral Count Act is a nullity because it exceeded the power of Congress to enact.

The Electoral Count Act also violates the Presentment Clause by purporting to create a type of bicameral order, resolution, or vote that is not presented to the President:

> *Every Order, Resolution, or Vote*, to Which the Concurrence of the Senate and House of Representatives may be necessary (*except on a question of Adjournment*) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by

[3] Similarly, 3 U.S.C. § 6 is inconsistent with the Electors Clause—which provides that electors "shall sign and certify, and transmit sealed to the seat of the government of the Unit-ed States" the results of their vote, U.S. Const. art. II, § 1, cl. 2-3—because § 6 relies on state executives to forward the results of the electors' vote to the Archivist for delivery to Congress. 3 U.S.C. § 6. Although the means of delivery are arguably inconsequential, the Constitution vests state executives with no role whatsoever in the process of electing a President. A state executive lends no official imprimatur to a given slate of electors under the Constitution.

> two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

U.S. CONST. art. I, § 7, cl. 3 (emphasis added). The House and Senate cannot resolve the issues that the Electoral Count Act asks them to resolve without either a supermajority in both houses or presentment.

The Electoral Count Act similarly improperly restricts the authority of the House of Representatives and the Senate to control their internal discretion and procedures pursuant to Article I, Section 5 which provides that "[e]ach House may determine the Rules of its Proceedings …" U.S. CONST. art. I, § 5, cl. 2. The Electoral Count Act also delegates tie-breaking authority to State executives (who have no agency under the Electors Clause or election amendments) when a State presents competing slates that Congress cannot resolve. As such, the Electoral Count Act also violates the non-delegation doctrine, the separation-of-powers and anti-entrenchment doctrines. *See generally* Chris Land & David Schultz, *On the Unenforceability of the Electoral Count Act*, 13 Rutgers J.L. & Pub. Policy 340, 364-377 (2016).

As indicated, Plaintiffs have standing to press these structural protections of liberty because Plaintiffs also suffer concrete injury through the debasement of their votes. *See* Section I.A.4, *supra*.

B. <u>Plaintiffs will suffer irreparable injury.</u>

Plaintiffs' votes will be counted or not counted at the January 6 joint session. The failure to count a lawful vote is an irreparable injury. *See, e.g.*, *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) ("A restriction on the fundamental right to vote . . . constitutes irreparable injury."). Indeed, the deprivation of any fundamental right constitutes irreparable injury, *Murphree v. Winter*, 589 F. Supp. 374, 381 (S.D. Miss. 1984) (citing *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976)), and voting rights are "a fundamental political right, because preservative of all

rights." *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964) (internal quotations omitted). Moreover, if the counting of votes proceeds under the Electoral Count Act, Plaintiffs' votes will be adjudicated via an unconstitutional procedure, which also qualifies as irreparable harm: there will be no opportunity to revisit the issue. As with standing for procedural injuries, irreparable harm from a procedural violation requires an underlying concrete injury or due-process interest, which Plaintiffs have and which will be irretrievably lost if the Vice President proceeds under the Electoral Count Act. Under the circumstances, Plaintiffs' procedural harms also are irreparable. *Commissioner v. Shapiro*, 424 U.S. 614, 629-30 (1976).

C. Plaintiffs need not demonstrate irreparable harm for declaratory relief.

"The traditional prerequisite for the granting of injunctive relief, demonstration of irreparable injury, is not a prerequisite to the granting of a declaratory relief" because the Declaratory Judgments Act "provides an adequate remedy and at law, and hence a showing of irreparable injury is unnecessary." 10 FED. PROC., L. ED. §23 :4 (citing 28 U.S.C. § 2201 and *Steffel v. Thompson*, 415 U.S. 452 (1974)). "The existence of another adequate remedy does not preclude a declaratory judgment that is otherwise appropriate." FED. R. CIV. P. 57. In fact, the central purpose of the Declaratory Judgments Act is to enable parties to adjudicate their rights without waiting until after the injury has occurred or damages have accrued. *See, e.g., Russian Standard Vodka (USA), Inc. v. Allied Domecq Spirits & Wine USA, Inc.*, 523 F.Supp.2d 376, 381 (S.D.N.Y. 2007) (citing *In re Combustion*, 838 F.2d 35, 36 (2d Cir. 1988)).

In any event, the irreparable-harm requirement for injunctive relief does not apply to declaratory relief. The fact that another remedy would be equally effective affords no ground for declining declaratory relief: "Rule 57 … expressly states that the availability of an alternative remedy does not prevent the district court from granting a declaratory judgment." *Marine Chance Shipping v. Sebastian*, 143 F.3d 216, 218-19 (5th Cir. 1998); *see also* 28 U.S.C. §2201; *Hurley v.*

Reed, 288 F.2d 844, 848 (D.C. Cir. 1961); *Tierney v. Schweiker,* 718 F.2d 449, 457 (D.C. Cir. 1983). A prior formal or informal demand to the defendant is not a prerequisite to seeking declaratory relief, *Rowan Cos. v. Griffin*, 876 F.2d 26, 28 (5th Cir. 1989), and showing "irreparable injury… is not necessary for the issuance of a declaratory judgment." *Tierney,* 718 F.2d at 457 (*citing Steffel v. Thompson,* 415 U.S. 452, 471-72 (1974)). Thus, even if not entitled to injunctive relief, Plaintiffs still would be entitled to declaratory relief.

The requested declaratory judgment would terminate the controversy, offer relief from uncertainty, and eliminate the need for Plaintiffs to suffer the irreparable harm from the certainty that their electoral votes would be disregarded that would occur if Defendant Vice President Pence were to count electoral votes, and resolve disputes regarding competing slates of electors, under the unconstitutional provisions of the Electoral Count Act, rather than the procedures set forth in the Twelfth Amendment.

D. <u>The balance of equities favors Plaintiffs.</u>

"Traditional equitable principles requiring the balancing of public and private interests control the grant of declaratory or injunctive relief in the federal courts." *Webster v. Doe*, 486 U.S. 592, 604-05 (1988). The scope of requested injunctive relief—directing Defendant Pence to carry out his duties as President of the Senate and as Presiding Officer for the January 6, 2021 Joint Session of Congress in compliance with the U.S. Constitution—is drawn as narrowly as possible and does not require Defendant Pence to take any affirmative action apart from those he is authorized to take under the Twelfth Amendment. Moreover, it is difficult to imagine how the relief requested, which ***expands rather than restricts*** Defendant's discretion and authority, by eliminating facially unconstitutional restrictions on the same could cause any hardship to Defendant.

E. The public interest favors Plaintiffs.

The last stay criterion is the public interest. Where the parties dispute the lawfulness of government actions, the public interest collapses into the merits: "It is always in the public interest to prevent the violation of a party's constitutional rights." *Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 458 n.9 (5th Cir. 2014) (alterations omitted); *cf. Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 595 (5th Cir. 2006) ("injunction serves the public interest in that it enforces the correct and constitutional application of Texas's duly-enacted election laws") *League of Women Voters of the United States v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016) ("no public interest in the perpetuation of unlawful [government] action"); *accord ACLU v. Ashcroft*, 322 F.3d 240, 247 (3d Cir. 2003) ("the public interest [is] not served by the enforcement of an unconstitutional law") (interior quotation omitted); *Washington v. Reno*, 35 F.3d 1093, 1103 (6th Cir. 1994) (recognizing "greater public interest in having governmental agencies abide by the federal laws"); *Pac. Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1237 (10th Cir. 2005).

Here the declaratory and injunctive relief sought vindicates both Defendant Vice President's plenary authority as President of the Senate and Presiding Officer to count electoral votes, as well as the constitutional rights of the Plaintiffs to have their electoral votes counted in the manner that the Constitution provides, the rights of the Arizona legislative Plaintiffs under the Electors Clause to appoint Presidential Electors for the State of Arizona, and the right of Rep Gohmert and those he represents to have their vote counted in the manner that the Twelfth Amendment provides.

CONCLUSION

Therefore, it is respectfully requested that the Court grant Plaintiffs' Motion and the Court grant a declaratory judgment declaring 3 U.S.C. §5 - §15 unconstitutional on its face for violating the specific delegated authorities of the Twelfth Amendment of the Constitution.

Dated: December 28, 2020

Respectfully submitted,

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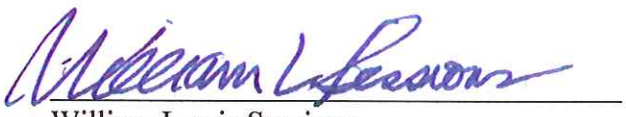
Counsel for Plaintiffs

CERTIFICATE OF CONFERENCE

I hereby certify that as counsel for Plaintiffs, I have complied with the meet and confer requirement in Local Rule CV-7(h) in the following respects: I have personally contacted and spoken this morning with Gregory F. Jacob, Counsel for Vice President Michael R. Pence, the Defendant. I have caused Mr. Jacob to receive a copy of the Complaint for Expedited Declaratory and Emergency Injunctive Relief and a duplicate unfiled copy of Plaintiffs' Emergency Motion for Expedited Declaratory Judgment and Emergency Motion for Injunctive Relief without the certificate of conference or certificate of service. Mr. Jacob, co-counsel Larry Joseph, and I discussed the legal merits of the foregoing motion at length. Mr. Jacob advised that he needed to consult with his client, who was absent from his office and on vacation, and would contact Mr. Joseph and me regarding Vice President Pence's position on the merits of the motion after conferring with his client. Counsel for Defendant Pence stated that he did not presently have authority to agree to or oppose the motion. In light of the emergency nature of this motion and the fact that the parties' counsel could not presently agree on the merits of the motion, undersigned counsel has concluded that the parties are presently at an impasse, leaving an open issue for the court to resolve. Undersigned counsel will immediately advise the Court of any change in the parties' positions.

Dated: December 28, 2020



William Lewis Sessions
Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the date specified below, I electronically filed the foregoing motion (together with its accompanying proposed order) with the Clerk of the Court using the CM/ECF system. In addition, because counsel for the defendant has not yet filed an appearance, I served one true and correct copy via Federal Express, next-day delivery, on the defendant and on the United States Attorney for the Eastern District of Texas at the following addresses, with a courtesy copy via facsimile and/or email to the addresses specified:

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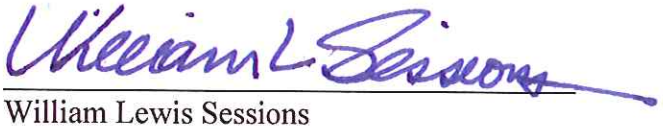
Dated: December 28, 2020



William Lewis Sessions
Counsel for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

LOUIE GOHMERT, TYLER BOWYER, NANCY COTTLE, JAKE HOFFMAN, ANTHONY KERN, JAMES R. LAMON, SAM MOORHEAD, ROBERT MONTGOMERY, LORAINE PELLEGRINO, GREG SAFSTEN, KELLI WARD and MICHAEL WARD, Plaintiffs, v. THE HONORABLE MICHAEL R. PENCE, VICE PRESIDENT OF THE UNITED STATES, in his official capacity, Defendant.	Civil Action No. 6:20-cv-00660 **(Election Matter)**

[PROPOSED] ORDER GRANTING EMERGENCY INJUNCTIVE RELIEF

The Court has before it Plaintiffs' Emergency Motion for Expedited Declaratory Judgment and Emergency Motion for Injunctive Relief filed December 28, 2020 ("Motion") and the Plaintiffs' December 27, 2020 Complaint for Expedited Declaratory Judgment and Emergency Injunctive Relief ("Complaint") seeking:

1. A declaratory judgment finding that:

   a. Sections 5 and 15 of the Electoral Count Act, 3 U.S.C. §§ 5 and 15, are unconstitutional insofar as they conflict with and violate the Electors Clause and the Twelfth Amendment, U.S. CONST. art. II, § 1, cl. 1 & amend. XII;

   b. That Defendant Vice-President Michael R. Pence, in his capacity as President of Senate and Presiding Officer of the January 6, 2021 Joint Session of Congress under the Twelfth Amendment, is subject solely to

the requirements of the Twelfth Amendment and may exercise the exclusive authority and sole discretion in determining which electoral votes to count for a given State, and must ignore and may not rely on any provisions of the Electoral Count Act that would limit his exclusive authority and at his sole discretion to determine which of two or more competing slates of electors' votes are to be counted for President;

c. That, with respect to competing slates of electors the State of Arizona or other Contested States, the Twelfth Amendment contains the exclusive dispute resolution mechanisms, namely, that (i) Vice-President Pence determines which slate of electors' votes shall be counted, or neither, for that State and (ii) if no person has a majority, then the House of Representatives (and only the House of Representatives) shall chose the President where "the votes [in the House of Representatives] shall be taken by states, the representation from each state having one vote," U.S. CONST. amend. XII;

d. That, also with respect to competing slates of electors, the alternative dispute resolution procedure or priority rule in 3 U.S.C. § 15, is null and void insofar as it nullifies and replaces the Twelfth Amendment rules above by with an entirely different procedure in which the House and Senate each separately "decide" which slate is to be counted, and in the event of a disagreement, then only "the votes of the electors whose appointment shall have been certified by the executive of the State … shall be counted," 3 U.S.C. § 15; and

2. An order granting any other declaratory or injunctive relief necessary to support or effectuate the foregoing declaratory judgments.

The Court has reviewed the terms and conditions of the December 28, 2020 Motion and Complaint, and the Court's Declaratory Judgment issued December 31, 2020, granting the requested expedited declaratory judgments in Paragraphs 1(a)-1(d) above and for good cause shown IT IS HEREBY ORDERED THAT:

1. Defendant Vice President Michael R. Pence shall, in his capacity as President of the Senate and as Presiding Officer for the January 6, 2021 Joint Session of Congress ("Joint Session"), solely follow the terms of the Twelfth Amendment in counting the electoral votes at the Joint Session and any other proceedings addressing the counting of electoral votes for choosing the next President in connection with the 2020 General Election;

2. Defendant Vice President Pence shall not follow the provisions of Sections 5 or 15 of the Electoral Count Act that this Court has found to be unconstitutional and in conflict with the Twelfth Amendment, and in particular, Defendant Vice President Pence

    a. Shall not "call for objections" from Senators or House Members following the reading of any certificate or paper from electors for a given State, and instead shall exercise his exclusive authority and sole discretion under the Twelfth Amendment to "count" the electoral votes for a given state, including the decision as to which of the competing slates of electors' electoral votes to count, or not to count, for that State;

b. Shall not give any preference or priority in counting electors certified by the State's executive over any other slate of electors, and shall instead give effect to the provisions of the Electors Clause for electors appointed by the State Legislature in whatever manner indicated by that State's legislatures;

c. Shall not submit any disputes between competing slates of electors to be resolved under the procedures set forth in Section 15 of the Electoral Count Act, nor as Presiding Officer shall he permit any such objections or disputes to interrupt the counting of electoral votes at the Joint Session or delegate his exclusive authority under the Twelfth Amendment to Congress to determine which electoral votes are to be counted; and

d. If and only if neither President Trump nor former Vice President Biden fails to receive a majority of electoral votes at the Joint Session, is he relieved is his exclusive authority to count electoral votes for choosing the President, at which point he shall direct the House of Representatives to "choose immediately by ballot" the President where "the votes shall be taken by states, the representation from each state having one vote," as required under the Twelfth Amendment.

SO ORDERED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

THE HONORABLE LOUIE GOHMERT, et al.,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	Case No. 6:20-cv-660-JDK
	§	
THE HONORABLE MICHAEL R. PENCE,	§	
	§	
Defendant,	§	
	§	
and	§	
	§	
ALAN KENNEDY,	§	
	§	
Proposed Intervenor-Defendant.	§	

MOTION OF ALAN KENNEDY TO INTERVENE AS PRESIDENTIAL ELECTOR, BRIEF IN SUPPORT OF MOTION TO INTERVENE, AND OPPOSITION TO PLAINTIFFS LOUIE GOHMERT ET AL.'S EMERGENCY MOTION

Proposed Intervenor-Defendant, Alan Kennedy, respectfully moves to intervene in their capacity as a presidential elector for President-elect Joseph R. Biden, Jr., and Vice President-elect Kamala D. Harris, in support of Defendant, The Honorable Michael R. Pence, and in opposition to Plaintiffs, The Honorable Louie Gohmert, et al., and their emergency motion filed December 28, 2020 (Docket No. 2). In support, Proposed Intervenor-Defendant states as follows:

FACTS

1. On November 3, 2020, President-elect Joseph R. Biden, Jr., and Vice President-elect Kamala D. Harris, were elected by the People of the United States of America as our next President and Vice President. Biden and Harris received more than 81 million votes nationally, more than 7 million more votes than President Donald J. Trump and Vice President Michael R.

Pence. On December 14, 2020, when the elected and certified presidential electors convened in accordance with the Constitution and applicable laws, Biden and Harris received 306 electoral votes, while Trump and Pence received 232 electoral votes. Each ballot cast by a duly elected and certified presidential elector was signed by the elector, the lists of electoral votes from each state were certified by the respective secretaries of state, and the certified lists of electoral votes were transmitted to the seat of government, directed to the President of the Senate. On January 6, 2020, it is expected that the electoral votes will be opened, read, counted, and results announced.

2. Alan Kennedy is a presidential elector for President-elect Joseph R. Biden, Jr., and Vice President-elect Kamala D. Harris. On April 18, 2020, Kennedy was selected to be a Democratic presidential elector by delegates to the Colorado Democratic Party state convention. On November 3, 2020, Kennedy was elected to serve as a presidential elector for President-elect Joseph R. Biden, Jr., and Vice President-elect Kamala D. Harris, by the voters of Colorado. On December 8, 2020, Kennedy was certified as a presidential elector by the Colorado Secretary of State. On December 14, 2020, Kennedy cast ballots for President-elect Joseph R. Biden, Jr., and Vice President-elect Kamala D. Harris, as one of Colorado's nine certified presidential electors. Kennedy has a strong personal and representative interest in ensuring that all the electoral votes cast by all the certified electors on December 14, 2020, are lawfully counted on January 6, 2020.

3. Since November 3, 2020, President Trump and Vice President Pence have refused to concede that President-elect Biden and Vice President-elect Harris majorities of both electoral votes and popular votes. President Trump has made frequent false claims of voter fraud that have been debunked. Twenty Arizona legislators have even urged Congress to overturn results there by having the state's 11 electoral votes for Biden and Harris "nullified." Trump's campaign and supporters have filed dozens of unsuccessful lawsuits in an effort to overturn the election results.

PLAINTIFFS' LAWSUIT HAS NO MERIT

4. This is yet another frivolous lawsuit filed by supporters of President Trump and Vice President Pence without merit or any evidence of the alleged "wide-spread election fraud" (Docket No. 1, no. 10; incorporated in Docket No. 2, Facts). This last-ditch lawsuit, like dozens of others before it, seeks to overturn the election of President-elect Biden and Vice President-elect Harris, and sew unfounded doubts about legitimacy both before and after President-elect Biden and Vice President-elect Harris are inaugurated on January 20, 2020. What is different about this suit is that it specifically seeks to overturn the votes of certified presidential electors. By any measure, this lawsuit is fundamentally undemocratic and without basis in fact or law.

5. Plaintiffs falsely state in emergency motion that "facts relevant to this controversy are not in dispute" (Docket No. 2, I(F)). Plaintiffs falsely claim that there are "competing slates of electors for Arizona and other Contested States" and that "substantial voter fraud" occurred in the 2020 presidential election (Docket No. 2, I(F)). In fact, Arizona's secretary of state certified that state's election, which President-elect Biden and Vice President-elect Harris won, as well as results of the electoral votes of that state's duly elected and certified presidential electors, and no "competing slate" of presidential electors was ever elected or certified. This falsehood may arise from confusion about the fact that multiple political parties select presidential elector candidates. However, only the candidates for President and for Vice Presidential who win the most votes in the state (or congressional districts in states that elect electors by district) receive electoral votes from that state. The Supreme Court recently affirmed this Electoral College principle in a ruling that the Constitution does not prohibit states from requiring electors to vote for the winner of the state's popular votes. *See Colorado v. Baca*, 140 S. Ct. 2316 (2020) (mem.) (*per curiam*), and *Chiafolo v. Washington*, 140 S. Ct. 2316 (2020). With the apparent exception of Rep. Gohmert,

Plaintiffs are all Arizona Republicans unwilling to accept the results of the presidential election, who were not elected as electors by Arizona voters, and who were thus not certified as electors. The fact that a few members of Congress plan to oppose electoral votes cast for President-elect Biden and Vice President-elect Harris, for purely partisan reasons, adds no support for Plaintiffs' false claims of "competing slates of electors" and "substantial voter fraud" in this election. I am a presidential elector; Plaintiffs' false claims that they are electors does not make them electors.

6. Without regard to the merits of Plaintiffs' legal claims, Plaintiffs admit that their claims "raise only legal issues" and suggest that the Court rule on the merits without any factual determinations, tacit acknowledgment that Plaintiffs' facts are not facts (Docket No 2, II(A)(2)). Thus, the only question before the Court is whether Electoral Count Act provisions, 3 U.S.C. § 5 and 3 U.S.C. § 15, unconstitutionally conflict with the Constitution's electoral clause in Art. II, § 1, and the Twelfth Amendment. They do not. As a former acting solicitor general recently noted, Art. II, § 1, and Twelfth Amendment require the "President of the Senate" to "open" the electoral vote certificates, and the 1887 Electoral Count Act adds procedural details regarding the timeline and tabulation, culminating on January 6, and delineates the ministerial powers of the "President of the Senate," in this case Defendant Pence. *See* Neal K. Katyal & John Monsky, *Will Pence Do the Right Thing?*, N.Y. Times, Dec. 29, 2020. Plaintiffs incorrectly claim 3 U.S.C. § 5 involves the "authority" of Defendant Pence (Docket No. 2, II(A)(2)); instead, it concerns appointment of electors, which has already occurred in compliance with Art. II, § 1, Twelfth Amendment, and Electoral Count Act. *Compare* Art. II, § 1 *and* amend. XII *with* 3 U.S.C. § 5. Similarly, Plaintiffs wrongly claim 3 U.S.C. § 15, concerning electoral vote tabulation, conflicts with constitutional provisions for the House of Representatives and Senate to choose a President and Vice President, respectively, if no person receives a majority of electoral votes. Defendant Pence's constitutional

and statutory role is limited to the ministerial task of opening electoral vote certificates, calling for any objections by members of Congress, announcing results of votes on such objections, and announcing final electoral votes results. *Compare* Art. II, § 1 *and* amend. XII *with* 3 U.S.C. § 15. Thus, Plaintiffs' legal claims are wholly without merit, undemocratic, and should be dismissed.

7. Neither the Constitution of the United States nor any provision of Electoral Count Act gives Defendant Pence substantive powers, much less "plenary authority" to count the votes of presidential electors in a way contrary to the votes of the presidential electors and the millions of voters who elected them (Docket No. 2, II(E)), nor do they give Defendant Pence "discretion" to overturn the results of the 2020 election by replacing electors with people who are not electors (Docket No. 2, II(D). Similarly, neither the Constitution nor Electoral Count Act offer any basis for claims by people who are not duly elected and certified presidential electors to replace duly elected and certified presidential electors solely because such non-electors were not elected, but would have liked to have been elected, resulting in their preferred candidates losing re-election. Plaintiffs' claims to the contrary find no support in the text of the cited constitutional provisions or the Electoral Count Act, and are contrary to the whole point of holding elections. If President Trump could be re-elected simply by the Vice President exercising falsely claimed "discretion" (Docket No. 2, II(D)), there would be no point to hold elections. If an incumbent Vice President could keep his or her job that way, then votes of millions of people and votes of duly elected and certified electors would be meaningless, and our nation's most cherished principle -- "here, We the People rule" -- would be eviscerated. *Chiafolo v. Washington*, 140 S. Ct. 2316, 2328 (2020).

8. Finally, Plaintiffs conclude their Electoral College fantasy by proposing unlimited discretion for Defendant Pence to usurp the electoral process as Plaintiffs desire, while enjoining Pence from doing his job on Jan. 6. On behalf of the American People, please stop this madness.

SUPPORT FOR MOTION TO INTERVENE

9. Under Fed. R. Civ. P. 24(a)(2), a court must permit a third party to intervene of right if: (1) motion to intervene is timely; (2) potential intervener asserts an interest that is related to the underlying basis for controversy in the case in which they seek to intervene; (3) disposition of that case may impair or impede the potential intervener's ability to protect their interest; and (4) existing parties do not adequately represent the potential intervener's interest. *John Doe No. 1 v. Glickman*, 256 F.3d 371, 375 (5th Cir. 2001). "Rule 24 is to be liberally construed," and the "[f]ederal courts should allow intervention when no one would be hurt and the greater justice could be attained." *Wal–Mart Stores, Inc. v. Tex. Alcoholic Beverage Comm'n*, 834 F.3d 562, 565 (5th Cir. 2016) (quoting *Texas v. United States*, 805 F.3d 653, 656 (5th Cir. 2015).

10. Proposed Intervenor-Defendant requests intervention of right under Fed. R. Civ. P. 24(a)(2). Proposed Intervenor-Defendant has timely moved to intervene less than one week after initiation of this lawsuit (Docket No. 1) and prior to the first expedited deadline for response by Defendant which has been set by the Court (Docket No. 12). As an actual presidential elector for President-elect Biden and Vice President-elect Harris, Proposed Intervenor-Defendant could not have a stronger or more fundamental interest in this litigation's outcome. Should the Court grant Plaintiffs' meritless requests, Proposed Intervenor-Defendant's ability to protect their interests as a presidential elector for President-elect Biden and Vice President-elect Harris would be harmed. Finally, Defendant may not adequately protect Proposed Intervenor-Defendant's interests due to the obvious differences between the interests of Defendant and Proposed Intervenor-Defendant, most notably the potential conflict of interest between Defendant's duty to preserve, protect, and defend the Constitution, and Defendant's potential interest in potentially being Vice President beyond January 20, 2020, by acceding to the requests of Plaintiffs to usurp the electoral process.

10. Alternatively, under Fed. R. Civ. P. 24(b)(1)(B), Proposed Intervenor-Defendant should be granted permissive intervention, as Proposed Intervenor-Defendant will raise common questions of law and fact, the motion is timely, and the intervention will not delay adjudication. *See United States v. League of United Latin Am. Citizens*, 793 F.2d 636, 644 (5th Cir. 1986). Rule 24 does not "require prospective intervenors to wait on the sidelines until after a court has already decided enough issues contrary to their interests." *Brumfield v. Dodd*, 749 F.3d 339, 344-345 (5th Cir. 2014). "The very purpose of intervention is to allow interested parties to air their views so that a court may consider them before making potentially adverse decisions." *Id.* For reasons described, Proposed Intervenor-Defendant could hardly be a more interested party. Therefore, Proposed Intervenor-Defendant should be permitted to intervene in this litigation.

CONCLUSION

For the reasons stated, it is respectfully requested that Proposed Intervenor-Defendant's motion to intervene filed this day be **GRANTED**, Plaintiffs' emergency motion filed December 28, 2020 be **DENIED**, and Plaintiffs' complaint filed December 27, 2020 be **DISMISSED**.

Dated: December 31, 2020

Respectfully submitted,

By: /s/ *Alan Kennedy*

Alan Hamilton Kennedy, Esquire
Colorado Bar No. 50275
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Denver, CO 80203
(303) 345-3397
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Proposed Intervenor-Defendant

CERTIFICATE OF CONFERENCE

I hereby certify compliance with the meet and confer requirement in Local Rule CV-7(h). On December 30, 2020, I spoke by telephone with William Lewis Sessions, Esquire, counsel for Plaintiffs, and Christopher Healy, Esquire, counsel for Defendant. We expressed and compared views, including the reasons for Proposed Intervenor-Defendant's proposed motion to intervene and opposition to Plaintiffs' position. Attorney Sessions, on behalf of Plaintiffs, expressed firm opposition to the proposed motion to intervene and any related filings due to my capacity as a presidential elector for President-elect Biden and Vice President-elect Harris. Attorney Healy, on behalf of Defendant, relayed that the Defendant takes no current position on intervention. Thus, discussions have ended in impasse. Given lack of time between when Plaintiffs filed emergency motion (Docket No. 2) and the response deadline (Docket No. 12), resolution is up to the Court.

Dated: December 31, 2020

Respectfully submitted,

By: /s/ *Alan Kennedy*
Alan Hamilton Kennedy, Esquire
Proposed Intervenor-Defendant

CERTIFICATE OF SERVICE

I hereby certify that on this day, December 31, 2020, I electronically filed Proposed Intervenor-Defendant's foregoing motion (with proposed order attached as required), with the Clerk of the Court using CM/ECF system, causing a copy to be served on all counsel of record. Additionally, a courtesy copy of this filing has also been emailed to all known counsel of record.

Dated: December 31, 2020

Respectfully submitted,

By: /s/ *Alan Kennedy*
Alan Hamilton Kennedy, Esquire
Proposed Intervenor-Defendant

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

LOUIE GOHMERT, *et al.*, Plaintiffs, v. THE HONORABLE MICHAEL R. PENCE, VICE PRESIDENT OF THE UNITED STATES, in his official capacity, Defendant .	Case No. 6:20-cv-00660

DEFENDANT'S RESPONSE TO PLAINTIFF'S EMERGENCY MOTION FOR EXPEDITED DECLARATORY JUDGMENT AND EMERGENCY INJUNCTIVE RELIEF

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INTRODUCTION

Plaintiffs have presented this Court with an emergency motion raising a host of weighty legal issues about the manner in which the electoral votes for President are to be counted. But these plaintiffs' suit is not a proper vehicle for addressing those issues because plaintiffs have sued the wrong defendant. The Vice President—the only defendant in this case—is ironically the very person whose power they seek to promote. The Senate and the House, not the Vice President, have legal interests that are sufficiently adverse to plaintiffs to ground a case or controversy under Article III. Defendant respectfully request denial of plaintiffs' emergency motion because the relief that plaintiffs request does not properly lie against the Vice President.

BACKGROUND

The Constitution of the United States establishes the process for the election of a President and Vice President of the United States. The Electors Clause of Article II provides, "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector." U.S. Const., Art. II, § 2, cl. 2. The Twelfth Amendment then describes the process by which these Electors cast their ballots for President and those ballots are counted:

> The Electors shall meet in their respective states and vote by ballot for President and Vice-President, . . . they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President . . . ; The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted; The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall

be taken by states, the representation from each state having one vote. . . .

U.S. Const., amend. XII.

Following a century of debate over the appropriate process under the Constitution for counting electoral votes and resolving any objections thereto, Congress enacted the Electoral Control Act of 1887. *See* Stephen A. Siegel, *The Conscientious Congressman's Guide to the Electoral Count Act of 1887*, 56 Fla. L. Rev. 541, 551-56 (2004). That Act sets forth a procedure by which the Senate and the House of Representatives can, jointly, decide upon objections to votes or papers purporting to certify electoral votes submitted by the States. 3 U.S.C. § 15. It further sets forth a procedure for determining a controversy as to the appointment of electors. 3 U.S.C. § 5.

Plaintiffs, who are the U.S. Representative for Texas' First Congressional District, together with the slate of Republican Presidential Electors for the State of Arizona, filed this lawsuit and emergency motion on Sunday, December 27, 2020, challenging the constitutionality of these provisions of the Electoral Count Act. Plaintiffs allege that the procedures violate the Electors Clause of Article II and the Twelfth Amendment because they "take[] away the authority given to the Vice-President under the Twelfth Amendment" Mot. at 19, and "exceeded the power of Congress to enact," Mot. 22. They seek, *inter alia*, a declaratory judgment that "Sections 5 and 15 of the Electoral Count Act, 3 U.S.C. §§ 5 and 15, are unconstitutional insofar as they conflict with and violate the Electors Clause and the Twelfth Amendment" and that Vice President Pence "may exercise the exclusive authority and sole discretion in determining which electoral votes to count for a given State," along with related injunctive relief.

ARGUMENT

The Vice President is not the proper defendant to this lawsuit. "When considering a

declaratory judgment action, a district court must engage in a three-step inquiry. The court must ask (1) whether an actual controversy [of legal interests] exists between the parties in the case; (2) whether it has authority to grant declaratory relief; and (3) whether to exercise its broad discretion to decide or dismiss a declaratory judgment action." *Frye v. Anadarko Petroleum Corp.*, 9553 F.3d 285, 293-94 (5th Cir. 2019) (internal citations and quotation marks omitted). With respect to the first inquiry, the Supreme Court has required that a dispute be "definite and concrete, touching the legal relations of parties having adverse legal interests; and that it be real and substantial and admit of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical set of facts." *MedImmunte, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007) (internal quotation marks and alteration omitted). Plaintiffs' lawsuit against the Vice President does not meet that standard.

Plaintiffs' suit seeks to empower the Vice President to unilaterally and unreviewably decide objections to the validity of electoral votes, notwithstanding the Electoral Count Act. Plaintiffs are thus not sufficiently adverse to the legal interests of the Vice President to ground a case or controversy under Article III. *Cf. Muskrat v. United States*, 219 U.S. 346, 361 (1911) (no case or controversy where "the United States is made a defendant to this action, but it has no interest adverse to the claimants" who are simply seeking "to determine the constitutional validity of this class of legislation"); *Donelon v. Louisiana Div. of Admin. Law ex rel. Wise*, 522 F.3d 564, 568 (5th Cir. 2008) (no case or controversy where the plaintiff head of a state agency created a situation "where the state is essentially suing itself"); *Okpalobi v. Foster*, 244 F.3d 405, 409 (5th Cir. 2001) (en banc) ("Although, in this facial attack on the constitutionality of the statute, consideration of the merits may have strong appeal to some, we are powerless to act except to say that we cannot act: these plaintiffs have no case or controversy with these defendants, the Governor and Attorney General of

Louisiana, and consequently we lack Article III jurisdiction to decide this case."). Indeed, if plaintiffs' suit were to succeed, the result would be to *remove* any constraint the Electoral Count Act places on the Vice President.

To the extent any of these particular plaintiffs have a judicially cognizable claim, it would be against the Senate and the House of Representatives. After all, it is the role prescribed for the Senate and the House of Representatives in the Electoral Count Act to which plaintiffs object, not any actions that Vice President Pence has taken. Specifically, plaintiffs object to the Senate and the House of Representatives asserting a role for themselves in determining which electoral votes may be counted—a role that these plaintiffs assert is constitutionally vested in the Vice President. *Cf. Common Cause v. Biden*, 748 F.3d 1280, 1285 (D.C. Cir. 2014) ("In short, Common Cause's alleged injury was caused not by any of the defendants, but by an 'absent third party'—the Senate itself."); *Castanon v. United States*, 444 F. Supp. 3d 118, 133 (D.D.C. 2020) (three-judge court) (citing *Common Cause* and noting that plaintiffs' injuries were not caused by defendants (including the Vice President) but by "the House and the Senate."). And it would be the Senate and the House of Representatives that are best positioned to defend the Act.[1] Indeed, as a matter of logic, it is those bodies against whom plaintiffs' requested relief must run. The House of Representatives has already expressly recognized those interests by informing the Defendant that it intends to present the Court numerous arguments in response to plaintiffs' motion. By contrast, a suit to establish that the Vice President has discretion over the count, *filed against the Vice President*, is a walking legal contradiction.

[1] The United States disagrees with plaintiffs' unsupported assertion that the Constitution's Speech or Debate Clause does not apply to the Vice President in his official capacity as the President of the Senate. *See* U.S. Const. art. I, § 6, cl. 1("[F]or any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place."); Mot. 12.

Plaintiffs also have not established that they are entitled to the extraordinary relief of an injunction against the Vice President. "According to well-established principles of equity, a plaintiff seeking a permanent injunction . . . must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). A district court properly refuses to issue an injunction when it is anticipated that a defendant will "respect [a] declaratory judgment." *See Robinson v. Hunt County, Texas*, 921 F.3d 440, 450 (5th Cir. 2019) (quoting *Poe v. Gerstein*, 417 U.S. 281, 281 (1974)). Plaintiffs have made no allegation that the Vice President would refuse to respect a declaratory judgment issued against him. The extraordinary remedy of an injunction is accordingly unnecessary and inappropriate in this case. *Cf. Franklin v. Massachusetts*, 505 U.S. 788, 802 (1992).

It is the responsibility of the Department of Justice, on behalf of the United States, to also raise to the Court's attention a number of threshold issues, which plaintiffs themselves anticipate at pp. 4-15 of their opening brief. First, it is well established that Article III standing requires a plaintiff to "have suffered an 'injury in fact' . . . which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical"'; the injury must be "fairly traceable to the challenged action of the defendant, and not . . . the result of the independent action of some third party not before the court"; and "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal citations and quotation marks omitted). Here, Representative Gohmert identifies as his injury the mere possibility that "he will not be able to vote as a Congressional Representative in accordance with the

Twelfth Amendment, and instead, his vote in the House, if there is disagreement, will be eliminated by the current statutory construct under the Electoral Count Act, or diluted by votes of the Senate and ultimately by passing the final determination to the state Executives."[2] Mot. at 4-5. Plaintiff Arizona Electors claim a theoretical injury in the "debasement of their votes." Mot. at 6. But the declaration and injunction these plaintiffs seek would not ensure any particular outcome that favors plaintiffs. They do not seek an order requiring that the presidential election be resolved by the House of Representatives, or that the Republican Electors' votes from Arizona be counted, and even if plaintiffs were granted the relief that they do request, any possibility that those events might occur depends on speculation concerning objections that may or may not be raised in the future, and exercises of discretion concerning those as-yet-unraised objections. Thus, these plaintiffs have not adequately alleged redress for their specifically-asserted conjectural injuries. *See Lujan*, 504 U.S. at 568-69 (finding no standing where plaintiffs had not sued all of the relevant parties needed to provide redress). The Senate and the House of Representatives, by contrast, could take action to redress such injury by amending the Electoral Control Act.

These plaintiffs' claims against the Vice President in his capacity as President of the Senate also fail to address the Constitution's Speech and Debate Clause, which prevents the other Branches of Government from questioning Congress in connection with "legislative acts," which have "consistently been defined as an act generally done in Congress in relation to the business before it." *United States v. Brewster*, 408 U.S. 501, 512 (1972). *See also supra* n.1. Moreover, nothing in *Ex Parte Young*, 209 U.S. 123 (1908), or its progeny supports these particular plaintiffs' novel suit to enjoin the Vice President in the exercise of his constitutional authority as President

[2] Ironically, Representative Gohmert's position, if adopted by the Court, would actually deprive him of his opportunity as a Member of the House under the Electoral Count Act to raise objections to the counting of electoral votes, and then to debate and vote on them.

of the Senate. *See Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320, 327 (2015) (looking to history to understand the scope of equitable suits to enjoin executive action). To the extent the Court is inclined to address these and other issues, the House of Representatives has informed the Defendant that it intends to present this Court with a number of arguments in response to plaintiffs' motion. In light of Congress's comparative legal interests in the Electoral Count Act, Defendant respectfully defers to the Senate and the House of Representatives, as those bodies see fit, to present those arguments.

Finally "[i]t is a well established principle . . . that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case." *Escambia Cty., Fla. v. McMillan*, 466 U.S. 48, 51 (1984); *see also Texas v. United States*, 328 F. Supp. 3d 662, 710 (S.D. Tex. 2018) ("There is no need to rule on the Take Care Clause issue because the Court has reached a conclusion on a non-constitutional basis."). Plaintiffs' motion presents several novel constitutional issues with respect to the Act. But this Court can and should resolve this motion under the well settled requirement of true and not artificial adversity or the other threshold issues outlined above, particularly given the time constraints and expedited briefing necessitated by Plaintiffs' recent filings.

CONCLUSION

The relief requested by plaintiffs does not properly lie against the Vice President, and plaintiffs' suit can be resolved on a number of threshold issues. For the foregoing reasons, the Court should deny plaintiffs' request for expedited declaratory judgment and emergency injunctive relief against the Vice President.

Dated: December 31, 2020

Respectfully submitted,

JEFFREY BOSSERT CLARK
Acting Assistant Attorney General

JENNIFER B. DICKEY
Principal Deputy Assistant Attorney General

/s/ John V. Coghlan
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Attorneys for Defendant

CERTIFICATE OF SERVICE

I certify that on December 31, 2020, this document was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ John V. Coghlan
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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

LOUIE GOHMERT, *et al.*, Plaintiffs, v. THE HONORABLE MICHAEL R. PENCE, VICE PRESIDENT OF THE UNITED STATES, in his official capacity, Defendant .	Case No. 6:20-cv-00660

[PROPOSED] ORDER DENYING EMERGENCY INJUNCTIVE RELIEF

Plaintiffs' Emergency Motion for Expedited Declaratory Judgment and Emergency Motion for Injunctive Relief filed December 28, 2020 is hereby DENIED.

_____
Judge Jeremy D. Kernodle

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

Louie Gohmert, Tyler Bowyer,
Nancy Cottle, Jake Hoffman,
Anthony Kern, James R. Lamon,
James Moorhead, Robert Montgomery,
Loraine Pellegrino, Greg Safsten,
Kelli Ward and Michael Ward
Plaintiffs

v.

Civil Action No. 6:20-cv-00660
(Election Matter)

The Honorable Michael R. Pence, Vice
President of the United States,
in his official capacity,
Defendant

Emergency Opposed Motion of Timothy P. Dowling to Intervene

To the Honorable Jeremy D. Kernodle, United States District Court Judge:

Timothy P. Dowling ("Dowling") hereby files his motion to intervene in this case, and in support thereof would show the Court the following.

1. Dowling is an American citizen who is a resident of Texas. Dowling has been a continuously licensed Texas attorney since 1981. Dowling files this motion pro se (he represents no person or entity in this case). Dowling voted for Joseph R. Biden in the 2020 presidential election, and he wishes for Mr. Biden to become the President of the United States on January 20, 2021. Dowling requests that he be permitted to intervene in this case as a matter of right under Federal Rule of Civil Procedure 24 (a), or alternatively, be allowed to permissibly intervene in this case under Rule 24 (b).
2. In this case Plaintiffs have sued a "friendly" Defendant, Vice President Michael Pence, who was the 2020 Republican nominee for the office of Vice President, and who has served as the Vice President of the United States of America since January 20, 2017. Plaintiff Louie Gohmert is a Republican member of the House of Representatives. The other Plaintiffs are Republicans who allegedly live in Arizona.
3. In this case Plaintiffs are asking this Court to authorize a de jure coup by overturning the results of the 2020 presidential election so that Defendant Pence can use his imagined "discretion" to determine which of allegedly

competing slates of Presidential Electors should be recognized from various states of the United States. The goal of this suit is to permit that to occur so that the current President of the United States remains as the President of the United States and that Joseph R. Biden does not become the President of the United States on January 20, 2021.

4. Intervention as a matter of right. Federal Rule of Civil Procedure 24(a)(2) provides in relevant part that "on timely motion, the court must permit anyone to intervene who… claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest" (emphasis added). As an American citizen who wishes Mr. Biden to be the President of the United States beginning on January 20, 2021, Dowling has a direct and very consequential interest in the matters that are the subject of this lawsuit. He is clearly "so situated that disposing of the action may as a practical matter impair or impede" his ability to protect his interest in having Mr. Biden become President of the United States on January 20, 2021. There is currently no party in this case who adequately represents Dowling's interest. Indeed, the Defendant, the current Vice President of the United

States, has an interest contrary to that Mr. Dowling, since Defendant is the Vice President under the current President who Plaintiffs wish to have remain as President. Therefore Dowling clearly has the right to intervene in this case.

5. Dowling's motion has been brought timely, as this case was filed on Sunday, December 27, 2020. Plaintiffs filed an emergency motion on December 28, 2020 seeking very expedited relief, and they are in no position to complain of Dowling seeking emergency relief in this motion.

6. Permissive intervention. Dowling also requests that the Court permit Dowling to permissibly intervene under Federal Rule of Civil Procedure 24(b). That Rule provides in relevant part that "on timely motion the court may permit anyone to intervene who… has a claim or defense that shares with the main action a common question of law or fact." In compliance with Federal Rule of Civil Procedure 24(c), the pleading that Dowling seeks to file in this case is attached hereto as Exhibit 1. As this pleading indicates, Dowling has defenses in this case regarding common questions of law and fact.

7. Dowling requests that the Court order that Dowling be made a party to this case based on intervention as a matter of right under Rule 24(a), and that Dowling also be permitted to permissibly intervene in this case under

Rule 24(b). The Court should grant this motion immediately because Plaintiffs seek relief prior to January 6, 2021, and there is inadequate time for the typical response period to a motion to expire before this imminent date. Dowling will be irreparably harmed if this motion is not granted at this time, as granting it after any hearings are held in this case would likely be meaningless.

8. Dowling requests that he be permitted to appear at any hearings in this case by telephone or video if the Court authorizes participation at any hearings by either or both of both methods. It is a more than 7 hour trip from Dowling's home to the Court. Dowling is 65 years of age, and given the current pandemic, substantial risk is involved in travelling this distance and appearing in court in person. Therefore good cause exists for Dowling to appear at hearings in this case by telephone or video.
9. Dowling requests that the Court grant this relief by signing the proposed order attached hereto as Exhibit 2, and additionally grant him such further additional relief, whether in law or in equity, as may be just.

/s/ Timothy P. Dowling
Pro se
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Corpus Christi, TX 78414

(361) 960-3135

Relampago@aol.com

Certificate of consultation

Dowling and lead counsel for Plaintiffs, William Lewis Sessions, complied by telephone with the meet and confer requirement of Local Rule CV-7(h) on December 29, 2020 at approximately 11:45am. This discussion conclusively ended in an impasse, leaving an open issue for the Court to resolve. This motion is opposed by Plaintiffs.

/s/ Timothy P. Dowling

Certificate of service

The undersigned hereby certifies that counsel for Plaintiffs were served by filing this motion with the Clerk of this Court, and such counsel (and other counsel) were also served by email service on December 31, 2020 as follows:

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Alan Kennedy

/s/ Timothy P. Dowling

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

Louie Gohmert, Tyler Bowyer,
Nancy Cottle, Jake Hoffman,
Anthony Kern, James R. Lamon,
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Loraine Pellegrino, Greg Safsten,
Kelli Ward and Michael Ward
Plaintiffs

v. Civil Action No. 6:20-cv-00660
(Election Matter)

The Honorable Michael R. Pence, Vice
President of the United States,
in his official capacity,
Defendant

Emergency Motion of Timothy P. Dowling to Dismiss

To the Honorable Jeremy D. Kernodle, United States District Court Judge:

Timothy P. Dowling ("Dowling") hereby files his motion to dismiss this case. He does so pursuant to Federal Rule of Civil Procedure 12 (for among other reasons, lack of subject matter jurisdiction, "failure to state a claim upon which relief can be granted," and "failure to join a party under Rule 19;" *see* Fed. R. Civ. Pro. 12(b)), and any other applicable law. Dowling represents no person or entity other than himself. Dowling has also filed a motion to intervene. If the Court does not grant Dowling's motion to intervene, Dowling requests that the Court consider this pleading as an amicus brief. Dowling believes that the filing of an amicus brief is appropriate for the reasons stated in the motion for leave to file amicus brief filed by John Campbell (Document No. 13). Given the immediate relief sought by Plaintiffs, Dowling's motion to dismiss should be considered at this time. In support of his motion to intervene and his motion to dismiss Dowling would show the Court the following.

1. **Summary of Dowling's arguments**

Plaintiffs ask this Court to do what no court in the history of our Republic has ever done: convert the loser of a free and fair Presidential election (as determined by the Administrations' own Justice Department) into the winner. Plaintiffs are twelve Republicans, led by the Chair of the Arizona Republican Party (Kelli Ward), ten other purported (but not actual) Presidential Electors from Arizona, and the Republican Congressman who resides in the Congressional

district where this Court sits. The Defendant is the Vice President of the United States, who was on the losing ticket in the 2020 Presidential election. Accordingly Defendant would be delighted if this Court grants the preposterous relief requested by Plaintiffs. There are prosaic procedural grounds to dismiss this case even if the substantive relief requested by Plaintiffs was not absurd (see pages 15-25).

There are also four procedural bases to dismiss this case. First, Plaintiffs have no standing, and this Court has no jurisdiction to address this "friendly suit" (see pages 4-6). Second, Plaintiffs have no evidence to support their claims that there was sufficient electoral fraud to overturn the Presidential election results (a conclusion shared by the former Attorney General of the United States, William Barr, and many courts around the country) (see pages 12-13). Third, there are factual disputes that make the extremely summary disposition of this case requested by Plaintiffs inappropriate (see pages 10-11). Fourth, Plaintiffs have failed to show that they are entitled to injunctive relief (see pages 13-14). Plaintiffs must hurdle each of these procedural obstacles to even be entitled to address the constitutional questions they raise, yet they can surmount none of them.

Even if this Court does not dismiss this case at this time, there are multiple reasons that prevent the Court from properly making a summary immediate ruling granting injunctive relief as Plaintiffs request. First, Plaintiffs chose to ignore their obligation to make certain persons who are clearly indispensable parties under

Federal Rule of Civil Procedure 19 defendants (see pages 6-8). That must be corrected if this case proceeds any further. Second, it appears that as a result of 28 U.S.C. 2403(a), the Attorney General of United States must be given an opportunity to intervene before this case proceeds any further (see pages 8-9). Third, Plaintiffs have failed to plead fraud with the "particularity" required by Federal Rule of Civil Procedure 9, and that must be corrected (see pages9-10). But delay based on the points is not the appropriate thing to do. Rather his Court should dismiss this case with prejudice at this time.

2. Plaintiffs lack standing and this Court does not have subject matter jurisdiction over this "friendly suit"

One of the twelve Plaintiffs in this case is a Republican member of the House and Representatives, and the other eleven plaintiffs are Republicans who purportedly are proper presidential electors from Arizona (the "Purported Electors"). Very extensive litigation occurred in Arizona with the goal of having the Purported Electors be Arizona's electors in the Electoral College. That litigation went up to the Arizona Supreme Court with the result that the Purported Electors were not determined to be Arizona's actual Presidential Electors. See https://patch.com/arizona/phoenix/az-supreme-court-affirms-ruling-dismiss-gop-election-lawsuit.

One of the Plaintiffs in this case, Ms. Kelli Ward, is the Chair of the Arizona Republican Party. Ms. Ward stated a few days ago that this lawsuit is a "friendly lawsuit", we "love Vice President Pence", that this suit was filed to assist him in doing what she considers to be his job, and to "give him the tools necessary." *See* https://www. https://www.youtube.com/watch?v=eGLXD8zblJU. Defendant Pence has the relevant "tools" the law makes available to him regarding the upcoming count of Presidential Electors on January 6, 2021, and he does not need the help of Ms. Ward (or of the other Plaintiffs), or an advisory opinion from this Court, to use whatever legal "tools" he may have. Ms. Ward's video is a party admission of what is obvious -- there is no real case or controversy here. All Plaintiffs and the lone Defendant wish to achieve the same result: have Donald Trump remain as the President of the United States after January 20, 2021. This lawsuit is a phony dispute, and this Court should decline Plaintiffs' invitation to swim in these political waters where it does not have proper subject matter jurisdiction over this bogus alleged controversy. The federal courts are not in business to provide advisory opinions over fake controversies.

The only credibly arguable plaintiff with standing to make the argument that the Electoral Count Act ("ECA") is unconstitutional is in fact the Defendant in this case. The Vice President arguably would have standing as a plaintiff to argue something like "the ECA is unconstitutional, and I should not be required on

January 6, 2021 to comply with its unconstitutional procedures regarding Presidential Electoral votes." The proper and indispensable defendants in a lawsuit by the Vice President making such an allegation would at a minimum be the United States, Joseph Biden, Kamala Harris, Arizona's actual certified (Democratic) Electors. Instead this person who arguably does have standing to make this unconstitutionality argument is not the plaintiff in this case, but the defendant, which furthermore underscores the "friendly" nature of this bogus dispute. Of course if the Vice President was the plaintiff in this case there would be no proper venue in this Court. *See* 28 U.S.C. 1391.

Plaintiffs have no standing, and since there is no genuine case or controversy here, this Court lacks proper subject matter jurisdiction. That means that this Court must dismiss this case, because Federal Rule of Civil Procedure 12(h)(3) provides that "if the court determines at any time that it lacks subject matter jurisdiction, the court must dismiss the action" (emphasis added).

3. The Court should make no rulings in this case until Plaintiffs' failure to join indispensable parties under Rule 19 is corrected

This is a "friendly suit" where the Defendant wishes to achieve the same ultimate result as Plaintiffs. Plaintiffs' Complaint (Document No. 1) violates Federal Rule of Civil Procedure 19 (b), which provides in relevant part that "a person who is subject to service of process and whose joinder will not deprive the

court of subject-matter jurisdiction must be joined as a party if… that person claims an interest relating to the subject of the action and is so situated that disposing of the action in that person's absence may… as a practical matter impair or impede the person's ability to protect the interest." Plaintiffs' failure to name as defendants genuine adverse parties, which at a minimum would include the United States, Joseph Biden and Kamala Harris (whose interests are directly impacted by the relief Plaintiffs seek), and Arizona's actual certified (Democratic) Electors as defendants (and perhaps the Congress), means Plaintiffs have clearly violated Rule 19(a)(1)(B).

This violation is especially reprehensible because Rule 19(c) unequivocally states that "when asserting a claim for relief a party must state… the name, if known, of any person who is required to be joined if feasible but is not joined and… the reasons for not joining that person." Clearly Plaintiffs know who the Democratic nominees for President and Vice President are and who the Democratic Arizona Electors (the "Actual Electors") are. The Complaint does not state why they were not joined and nor does it offer any explanation for why Plaintiffs chose to join as a defendant only the "friendly" defendant Vice President Pence. When a person "has not been joined as required, the court must order that the person be made a party." Fed. R. Civ. Pro. 19(a)(2) (emphasis added). Therefore if this Court does not dismiss this case, the Court must enter in order at a

minimum requiring that the United States, Mr. Biden, Ms. Harris, and the Actual Electors be made defendants, and then give them a sufficient opportunity to oppose the relief sought by Plaintiffs before the Court makes any rulings.

4. Consistent with 28 U.S.C. 2403(a) the Court should make no ruling until the Attorney General of the United States has intervened in this case

If a party in a federal lawsuit contends that a federal statute affecting the public interest is unconstitutional, the court "shall certify such fact to the Attorney General," and permit him or her to intervene in the case. 28 U.S.C. 2403(a). There is an exception if the "United States or any agency, officer or employee thereof is … a party", and superficially this exception may seem to apply because the Defendant is the Vice President. However the Defendant is not a party who is adverse to Plaintiffs, as all of the present parties seek a ruling that the statutes in question in this case are unconstitutional since they believe that would result in Donald Trump remaining as the President. Therefore if the Court i does not dismiss this case at this time, it must permit the Attorney General to intervene to defend the constitutionality of the federal statutes challenged by Plaintiffs. Alternatively Dowling requests that he and the other parties be given adequate time to examine the legal question of whether the above exception in section 2403(a) applies in the bizarre lineup of the parties here where they are seek the same

ultimate result, and provide the results of that research in briefs to the Court before the Court makes any rulings.

5. If the Court does not dismiss this case at this time, it should not make any rulings until after Plaintiffs have complied with Federal Rule of Civil Procedure 9(b)

Plaintiffs Complaint is premised on alleged "massive multi-state electoral fraud committed on Biden's behalf that changed electoral results in Arizona" and what Plaintiffs describe as other "Contested States." Complaint at 2-3 (paragraph 5; emphasis added); id. at 20 (paragraph 57; reference to an allegedly "fraudulently produced election result" in Arizona). Federal Rule of Civil Procedure 9(b) states that "in alleging fraud … a party must state with particularity the circumstances constituting fraud" (emphasis added). Plaintiffs have failed to allege any, or alternatively adequately allege, "circumstances constituting fraud" with "particularity" although they are required to do so. The best that Plaintiffs do is to allege that "public reports" [that is to say, inadmissible hearsay documents] have highlighted [alleged] wide-spread election fraud in the other Contested States." Complaint at 10, paragraph 26. Such broad brush conclusions from documents that are not admissible in evidence unquestionably do not satisfy Rule 9(b)'s "particularity" requirement (to say nothing about the many courts around the country that Plaintiffs ignore that have failed to find such alleged fraud). Therefore if this Court does not dismiss this case at this time, Court should defer any rulings

in this case until at least ten days after Plaintiffs have filed a pleading that complies with Rule 9(b).

6. There are factual disputes in this case, and therefore the immediate and definitive ruling sought by Plaintiffs without any pretrial discovery is inappropriate

In the Complaint and in other pleadings Plaintiffs contend either that there are no factual disputes, or no meaningful ones. This is not accurate. First, obviously the question of whether there was any electoral fraud across the many states alleged by Plaintiffs, or alternatively sufficient electoral fraud to change the result of the Presidential election, is sharply disputed.

Second, Plaintiffs contend that "with the permission and endorsement of the Arizona Legislature" they cast Arizona's electoral votes for President Trump. Complaint at 2 (paragraph 5). On information and belief, Dowling believes that approximately only 17 of the 60 members of the Arizona House supported this alleged action of the Purported Electors and that only five of the 30 members of the Arizona Senate did so.

Furthermore, Dowling cannot improve upon the very recent statement made about this by Northwestern University Law school professor Steven Lubet:

"Rep. Louie Gohmert, along with the eleven Trump/Pence would-be electors from Arizona, sued Vice President Pence in a Texas federal court, seeking to (1) declare the Electoral Count Act unconstitutional, and (2) confer exclusive authority

on Pence to recognize electors, which (3) would mean accepting the votes of the "alternative" slate of Republican electors from Arizona and perhaps other states. Others have addressed the merits of the legal claims. Here, I want to point out that the central factual predicate of the complaint is apparently untrue. The complaint alleges,

"The Arizona Electors have cast Arizona's electoral votes for President Donald J. Trump on December 14, 2020, at the Arizona State Capitol **with the permission and endorsement of the Arizona Legislature**" (emphasis added).

As far as I can tell, the bolded allegation is a false statement of fact. Although the eleven Trump electors, who are also plaintiffs in the case, purported to cast votes for Trump/Pence on December 14, they had at most the support of 22 Arizona legislators (out of 90) who signed a purported "joint resolution," which was manifestly not the endorsement of *the* Arizona Legislature (which appears not even to have been in session at the time). The assertion that the actual Arizona legislature endorsed the Republican slate is material to the Gohmert complaint, as it comprises the underlying factual basis for the claimed dispute over "which electoral votes may be counted." Without the so-called legislative endorsement, there could be no "competing slates of Republican and Democratic electors" for Pence to choose between."https://www.thefacultylounge.org/

The forgoing makes it very clear that given these factual disputes, Rule 57, which Plaintiffs rely on for this Court to make the most consequential ruling imaginable to the citizens of the United States on an expedited basis with no pretrial discovery and no presentation of evidence to this Court, cannot serve as a proper procedural vehicle to grant them the breathtakingly audacious and preposterous relief they seek. Therefore for this reason alone the Court must deny all of the relief sought by Plaintiffs.

7. The Court must dismiss this case because Plaintiffs have no evidence to support the relief they seek

Plaintiff seeks the most expansive relief imaginable--overturning the result of the duly held Presidential election. In order for the Court to even consider such an audacious request, Plaintiffs must produce admissible evidence to support the relief they seek. Their case, like many other post-election cases brought by President Trump or his allies, have the same fundamental flaw: they have no, or insufficient, admissible evidence to support their contentions. Plaintiffs have filed no documents with this Court (not even affidavits of any kind) to support the relief they seek. Plaintiffs have not even deigned to file documentary evidence with the Court that may be evaluated to determine if it merits granting Plaintiffs any relief.

Plaintiffs' Complaint on occasion makes reference to various news reports (e.g., Complaint at 7 n.3; 8 n. 6-8; 10 n. 12-13), but all such reports are inadmissible hearsay. Indeed, any such reports have multiple levels of hearsay, since a "report" by definition contains alleged statements heard by the "reporter" from other people. Plaintiffs of course must establish a hearsay exception for each hearsay statement. They will be unable to do so. Furthermore, Plaintiffs' efforts are focused on what happened in Arizona, and even if the Court was convinced that Arizona's eleven electoral vote should be cast for President Trump, Mr. Biden would still have more than the necessary 270 Electoral votes to become the next

President. There is no evidentiary basis to support the relief sought by Plaintiffs, and this Court should dismiss this case.

8. Plaintiffs are not entitled to any injunctive relief

Plaintiffs in their motion seeking emergency injunctive relief (Document No. 2; the "Injunction Motion") correctly cite the typical four elements for obtaining injunctive relief: the plaintiff is likely to succeed on the merits, he will likely suffer irreparable harm absent the injunctive relief sought, the equities are in his favor, and that injunctive relief is in the public interest. Injunction Motion at 23 (the reference to "23" is to the ECF page number, not page 17 as Plaintiffs have enumerated this motion). However, Plaintiffs conveniently omit an indispensable requirement for obtaining injunctive relief. Federal Rule of Civil Procedure 65(c) states that the court may injunctive relief order "only if the movant gives security in the amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained" (emphasis added). Typically a party seeking injunctive relief will inform the Court in its pleading what it believes the appropriate amount of its bond should be under Rule 65(c). Plaintiffs have failed to do so. Dowling submits that the word "party" in this Rule in the present context must justly include the more than 81 million Americans who voted for Mr. Biden instead of for Mr. Trump. For the reasons pointed out below, if Plaintiff's interpretation of the Constitution is adopted, our

nation will be transformed from a democracy into an autocratic one-party state. What is the appropriate amount of a bond to prevent that from happening? Dowling respectfully submits that that amount is one larger than Plaintiffs could ever pay.

For this reason alone, Plaintiffs' inability o comply with Rule 65(c), the Court must deny Plaintiff's any injunctive relief.

Even if Plaintiffs could post this bond, they are not entitled to injunctive relief. First, for all of the reasons pointed out in this pleading, they clearly are not "likely to succeed on the merits." Second, Plaintiffs will not suffer irreparable harm if the legal mechanisms for counting Electoral votes proceeds. Plaintiffs are seeking to disregard the results of a duly held Presidential election where the Republican Majority Leader of the Senate recognized over two weeks ago that the Democratic presidential nominee is now the Present-elect. The "equities" are most definitely not in Plaintiffs' favor, since to do as they ask will be to overturn the will of the people of the United States in the 2020 Presidential election. Fourth, the usurpation of democracy advocated by Plaintiffs is most definitely not "in the public interest." For all of these reasons the Court must deny Plaintiffs any injunctive relief.

9. Each State tells Defendant Pence who their Presidential Electors are; he does not tell them who they are

The foregoing shows that there are eight independent reasons to deny Plaintiffs any relief and this time, and that there are four independent bases to dismiss this case now (lack of jurisdiction and standing, lack of evidence, factual disputes that make summary disposition inappropriate, and failure to satisfy the requirements for injunctive relief). Even if Plaintiffs could surmount all of these hurdles so that addressing the merits of their substantive arguments was appropriate (which they clearly cannot do), Plaintiffs' statutory and Constitutional arguments are meritless for the reasons explained below.

Plaintiffs' substantive arguments are most concisely summarized in the Injunction Motion at 8-9. Reduced to its essence, their argument is that if a State submits two purported separate slates of Presidential Electors, the Vice President gets to decide which slate he approves. That means that the Vice President, not each of the separate States, decides who each State's Electors are. This outlandish contention plainly violates basic concepts of federalism and a proper constitutional balance of powers, as it would give the person with a direct and massive conflict of interest, the Vice President, the ultimate decision-making role in choosing the next President. Dowling agrees that Defendant opens and counts Electoral votes. But the Vice President does not have the power as Plaintiffs contend to decide WHAT Electoral votes to count. That is decided by each of the separate States of the

Union. Each separate State tells the Vice President who its Presidential Electors are. The Vice President does not tell any State who its Electors are. The Vice President's role is merely ministerial, just as it is when he presides in the Senate and announces the result of the Senate's vote on a particular bill, such as "Regarding Senate Bill 1216, the 'ayes' are 57 and the 'nays' are 43." The Vice President when making this announcement does not get to change the vote of any Senator so that the total vote count conforms to his desires. Neither does the Vice President have the power to change the Electoral College votes for President (or Vice President) to conform to his desires. Plaintiffs' contention that he does is entirely antithetical to the democratic principles of our Republic.

Plaintiffs repeat ad nauseam in their pleadings that the Vice President has the "exclusive authority and sole discretion" under the Twelfth Amendment to decide which votes to count in the apparent hope that repetition of this mantra will cause it to be less outlandish and preposterous that it is. *See, e.g.,* Complaint at paragraphs 63, 70, 71, and 73(C-D); Injunction Motion at 2, 8). Yet Plaintiffs have been unable to refer the Court to even a single legal authority that supports their contention that the sitting Vice President can determine who the next President will be. The Vice President's Constitutional role is entirely ministerial—he open envelopes with certified Electoral votes from the fifty States and simply mathematically announces the votes in those envelopes.

If Plaintiffs' position is accepted, our Republic will be transformed from a democracy, where sometimes the President comes from one political party, and at other times he or she comes from the other political party, into a permanent one party autocracy. Here is the simple playbook to make that happen if the Court were to accept Plaintiffs' arguments:

1. Allege electoral fraud in the states that the Republican candidate for President did not win. Do this even if you do not have any evidence that fraud (if any) is sufficient to change the result of who won the Presidential election in the state.

2. Republicans send Electors from each state they won, but also, and critically relevant here, from each state they lost (assuming for the same of argument that was legitimate).

3. Contend that the Vice President of the United States (who currently is a Republican) has the "sole discretion" to choose which slate of Electors from each State will be recognized from the State's two slates of competing Electors.

4. The Republican Vice President (in this instance, Defendant Pence) chooses the Republican Electors in all states where the Republican candidate for President won, plus enough additional Republican Electors from States the Republican candidate for President lost to get the Republican Presidential candidate over the 270 College votes threshold he needs to become (or remain) President.

5. By this simple yet fundamentally fatally constitutionally flawed playbook the current Republican Vice President, and his later successors, forever determines who is elected President of the United States of America (the same would be true if the current Vice President was a Democrat).

The Court should reject out of hand Plaintiffs' absurd contention that this is what the authors of the Constitution intended, or what Congress intended when the ECA was passed. Surely they did not intend for one person to have the power to

decide who the next President will be, especially when that person has a direct and monumental conflict of interest in the outcome.

Plaintiffs in their Complaint cite a Law Review article co-authorized by Edward Foley Complaint at 13 n. 14. Mr. Foley is a law professor at Ohio State University and is an election law expert. He is the former Ohio Solicitor General, and he clerked for the United States Supreme Court (his biographical summary is located here: https://ucom.osu.edu/for-media/faculty-experts/a-m/foley-edward.html). This is what Professor Foley had to say about issues relevant in this case two days ago:

"The Constitution and the Electoral Count Act of 1887 intended the Jan. 6 session to address a narrow question: Are the electoral votes received by Congress ones cast by electors the states appointed?
This limited inquiry requires Congress simply to authenticate the documents. Remember, these rules were formulated in the 19th century, when there was a realistic risk of counterfeit papers pretending to be official. Thus, the 1887 act requires a state's governor to affix "the seal of the State" to the certificate confirming the appointment of electors.

Further, the 1887 act obligates Congress to consider "conclusive" a state's own "final determination" of litigation over a state's appointment of electors when two conditions are met. The "final determination" must occur by a certain date, Dec. 8 this year, and must be based on state laws existing before Election Day, Nov. 3. Congress instructs governors to provide verification of these two conditions in their certifications.
This is the opposite of Trump allies' feverish imaginings about using the session as an opportunity for congressional fact-finding on whether fraud or error tainted the tally of the state's popular vote.

This provision, part of the 12th Amendment that reengineered the electoral college after the calamitous Jefferson-Burr tie in 1800, presumed that counting a state's electoral votes would be straightforward: The joint session would merely identify the state's electoral votes and add them up.
It would not be Congress's job to second-guess the state's appointment of its own electors. And it certainly would not be Congress's job to let a sitting vice president — as Adams had been in 1796 or Jefferson in 1800 — determine the election's outcome by deciding unilaterally whether or not to count a state's electoral votes. Note that, Vice President Pence.

While the Constitution makes each house of Congress the "judge" of elections to its own body, there's no comparable provision for presidential elections. In fact, it's the reverse. To prevent the electoral college from being subservient to Congress, the Constitution requires Congress to accept whatever the state decides regarding the appointment of its electors.

The constitutionally appropriate venue for claiming fraud in the counting of a state's popular vote, therefore, is the state's own courts. Trump sued there but failed — because his claims lacked merit. Having lost, he can't now relitigate his allegations in a congressional proceeding designed solely to receive what the state sent. As Justice Joseph Bradley explained during the disputed 1876 election, "It is the business and jurisdiction of the State to prevent frauds from being perpetrated in the appointment of its electors, and not the business or jurisdiction of the Congress."

Imagine if Richard Nixon had tried Trump's stunt. Nixon in 1960 had far better grounds for claiming fraud. But it would have been inappropriate for Nixon, who as vice president chaired the joint session, to insist that Congress adjudicate claims that John F. Kennedy's allies in Illinois and Texas had stolen the election. Nixon knew Congress was bound by what the states themselves determined.

Even more preposterous is the idea that Nixon would have been entitled to unilaterally disqualify the electoral votes from these two states just because he personally distrusted them. Yet that is the desperate argument being made in a new lawsuit brought by Rep.Louie Gohmert (R-Tex.). According to Gohmert, a vice president can dictate the outcome of an election in which he is a candidate. Al Gore could have decided by himself the fate of Florida's electoral votes in 2000.

Giving any individual this kind of self-serving power is contrary to a Constitution that aims at checks and balances" (emphasis added). https://www.washingtonpost.com/opinions/2020/12/29/sorry-president-trump-january-6-is-not-an-election-do-over/

Professor Foley has additional scholarly writing relevant to the present dispute that is found in the Law Review article cited by Plaintiffs (Complaint at 13 n. 14; *Symposium: How Far Have We Come Since 2000?: Article: The Twelfth Amendment: A Constitutional Ticking Time Bomb*, N. Colvin and E. Foley, 64 U. Miami L. Rev. 475 (2010) (hereafter the "Foley Article") as follows:

Regarding Presidential Elector disputes Professor Foley concludes that "the Framers must not have anticipated that they were placing an individual likely to have a conflict of interest--the Vice President of the United States--at the center of the storm. Sure enough, the sitting Vice President has been a candidate for President or Vice President, while simultaneously serving in his capacity as President of the Senate. If the Vice President's role is merely ministerial, there is not much of a conflict of interest as a practical matter; but if the Vice President's duty encompasses resolving potentially decisive controversies over which candidate gets a state's electoral votes, then the conflict is monumental." Foley Article at 481 (emphasis added); *accord* Bruce Ackerman & David Fontana, *Thomas Jefferson Counts Himself into the Presidency*, 90 Va. L. Rev. 551, 556 (2004) ("The Vice-President … is a natural candidate in the next presidential contest. It is an obvious mistake to designate him as the presiding officer over the electoral vote count.").

Professor Foley also drew these additional very relevant conclusions:

"[Supreme Court Associate] Justice [Joseph] Bradley [Justice Bradley was a member of the Electoral Commission that resolved the disputed 1876 Presidential Commission; that dispute lead to the Electoral Count Act at issue in this case] first concluded that the President of the Senate has merely ministerial powers, with no authority to conduct any investigation behind the certificates; any proper investigation "must be performed and exercised by the two Houses." But, Bradley noted that the "extreme reticence" of the Constitution left serious doubt about whether Congress had any power to go behind the returns. Bradley turned next to Article II of the Constitution, which appeared to ensure that the "mode of

appointment belong exclusively to the State. Congress has nothing to do with it, and no control over it, except … to determine the time of choosing the electors, and the day on which they shall give their votes." Thus, Bradley concluded, the state controls all of the mechanics of the elections. However, this exclusive power and control of the State is ended and determined when the day fixed by Congress for voting has arrived, and the electors have deposited their votes and made out the lists and certificates required by the Constitution. Up to that time the whole proceeding (except the time of election) is conducted under State law and State authority. All machinery, whether of police, examining boards, or judicial tribunals, deemed requisite and necessary for securing and preserving the true voice of the State in the appointment of electors, is prescribed and provided for by the State itself.

With this timing in mind, Bradley argued that "the findings and recorded determinations of the State board or constituted authorities [should be] binding and conclusive since the State can only act through its constituted authorities[.]" Addressing whether this meant that Congress must accept potentially fraudulent results in the appointment of electors, Justice Bradley concluded that Congress has no jurisdiction to do otherwise because it is entirely within the state's jurisdiction to prevent frauds. Florida statute imposed a duty upon the Florida governor to certify the returns, and Justice Bradley held that the certificate must at least be prima facie evidence of a valid return. Justice Bradley summarized his conclusion as follows:

The governor's certificate is prima-facie evidence that the State canvassers performed their duty. Indeed, it is conceded by the objectors that they made a canvass and certified or declared the same. It is not the failure of the board to act, or to certify and declare the result of their action, but an illegal canvass, of which they complain. To review that canvass, in my judgment, the Houses of Congress have no jurisdiction or power."

Foley Article at 508-09 (footnotes omitted) (emphasis added); *see* id. at 508 n. 192 ("Going further, Justice Bradley noted that the prohibition against federal office holders acting as electors makes clear that the Constitution intended to remove any congressional or federal influence from the process)."

The foregoing makes it clear that Arizona and the other 49 States decide who their Presidential Electors are, and neither the Vice President (as Plaintiffs contend) nor Congress has the power to change their decisions. The Purported Electors'

remedy was in the Arizona courts. They vigorous pursued their remedies there to the highest court in Arizona. They lost. They do not have a "do-over" opportunity in this federal Court, and nor will Defendant Pence have an opportunity on January 6, 2021 to reverse the results of how Arizona (or any other state) chose its Presidential Electors.

Professor Foley's conclusion in the document he wrote two days ago cited above is shared by other scholars. One of the co-authors of the document quoted directly below is Neal K. Katyal, a law professor at Georgetown University and a former acting Solicitor General of the United States. Two days ago Professor Katyal had this to say about the issues present here:

> ""On Monday Representative Louie Gohmert of Texas and other politicians filed a frivolous lawsuit, which has multiple fatal flaws in both form and substance, in an attempt to force the vice president to appoint pro-Trump electors.
>
> But as a matter of constitutional text and history, any effort on Jan. 6 is doomed to fail. It would also be profoundly anti-democratic and unconstitutional.
>
> Both Article II of the Constitution and the 12th Amendment say that the votes of the Electoral College are to be opened by the "president of the Senate," meaning the vice president. The Electoral Count Act, passed in 1887 to avoid chaotic counts like the one that followed the 1876 election, adds important details. It provides a detailed timeline to tabulate electoral votes, culminating with the final count to take place on Jan. 6, and it delineates the powers of the vice president.
>
> He is to be the "presiding officer" (meaning he is to preserve order and decorum), open the ballot envelopes, provide those results to a group of tellers, call for any objection by members of Congress, announce the results of any votes on objections, and ultimately announce the result of the vote.

Nothing in either the text of the Constitution or the Electoral Count Act gives the vice president any substantive powers. His powers are ministerial, and that circumscribed role makes general sense: The whole point of an election is to let the people decide who will rule them. If an incumbent could simply maneuver to keep himself in office — after all, a maneuver to protect Mr. Trump also protects Mr. Pence — the most foundational precept of our government would be gravely undermined. In America, "we the people," not "we, the vice president," control our destiny.

The drafters of the Electoral Count Act consciously insisted on this weakened role for the vice president. They guarded against any pretense he might have to throw out a particular state's votes, saying that the vice president must open "all certificates and papers purporting to be" electoral votes. They further said, in the event of a dispute, both chambers of Congress would have to disagree with a particular state's slate of electoral votes to reject them. And they made it difficult for Congress to disagree, adding measures such as a "safe harbor" provision and deference to certification by state officials.

In this election, certification is clear. There are no ongoing legal challenges in the states of any merit whatsoever. All challenges have lost, spectacularly and often, in the courts. The states and the electors have spoken their will. Neither Vice President Pence nor the loyal followers of President Trump have a valid basis to contest anything.

To be sure, this structure creates awkwardness, as it forces the vice president to announce the result even when personally unfavorable.

After the close election of 1960, Richard Nixon, as vice president, counted the votes for his opponent, John Kennedy. Al Gore, in perhaps one of the more dramatic moments of our Republic's short history, counted the votes and reported them in favor of George W. Bush.

Watching Mr. Gore count the votes, shut off all challenges and deliver the presidency to Mr. Bush was a powerful moment in our democracy. By the time he counted the votes, America and the world knew where he stood. And we were all lifted up when Mr. Gore, at the end, asked God to bless the new president and vice president and joined the chamber in applause.

Republican leaders — including Senators McConnell, Roy Blunt and John Thune — have recognized the outcome of the election, despite the president's wrath. Mr.

McConnell put it in clear terms: "The Electoral College has spoken. So today, I want to congratulate President-elect Joe Biden."

Notably, Mr. Pence has been silent. He has not even acknowledged the historic win by Kamala Harris, the nation's first female, first African-American and first Asian-American vice president.

He now stands on the edge of history as he begins his most consequential act of leadership. The question for Vice President Pence, as well as other members of Congress, is which side of history he wants to come down on. Can he show the integrity demonstrated by every previous presidential administration? The American people accept a graceful loser, but a sore loser never goes down well in the history books.

We urge Mr. Pence to study our first president. After the Revolutionary War, the artist Benjamin West reported that King George had asked him what General Washington would do now that America was independent. West said that Washington would give up power and go back to farming. King George responded with words to the effect that "if he does that, he will be the greatest man in the world."

Indeed, Washington did so, surrendering command of the army to Congress and returning to Mount Vernon for years until he was elected president. And he again relinquished power eight years later, even though many would have been happy to keep him president for life. Washington in this way fully realized the American Republic, because there is no Republic without the peaceful transfer of power.

And it's now up to Mr. Pence to recognize exactly that. Like all those that have come before him, he should count the votes as they have been certified and do everything he can to oppose those who would do otherwise. This is no time for anyone to be a bystander — our Republic is on the line."
https://www.nytimes.com/2020/12/29/opinion/mike-pence-electoral-college-votes-congress.html?action=click&module=Opinion&pgtype=Homepage (emphasis added).

The States have told Defendant Pence, and our Republic, who their Presidential Electors are. Defendant does not have the power to overrule their instruction, and reach his own conclusion about who any State's Electors will be.

Since the entire basis of Plaintiffs' suit rests on the contention that Defendant Pence can decide who a State's Presidential Electors are, and that contention is patently meritless, this Court must dismiss this suit with prejudice at this time.

10. Conclusion and request for relief

This Court should reject Plaintiffs' invitation to be the first court in American history to overturn the result of a Presidential election. The Court should do so by dismissing this case with prejudice. The grounds to do so are multiple, on both procedural and substantive grounds. On the merits, each of the respective fifty States tell the Vice President who their Presidential Electors are. The Vice President has no statutory or constitutional authority to disagree with them and make his own choices about who their Presidential Electors are.

There are also four procedural bases to dismiss this case. First, Plaintiffs have no standing to bring this suit, and the Court has no jurisdiction to grant Plaintiffs relief in this "friendly suit." Second, Plaintiffs have no evidence to support their claims that there was sufficient electoral fraud that the Presidential election results should be overturned (these claims were rejected by the former Attorney General of the United States, William Barr, and by many courts around the country). Third, there are factual disputes that make the extremely summary disposition of this case requested by Plaintiffs inappropriate. Fourth, Plaintiffs

have failed to show that they are entitled to injunctive relief (and they could not post a bond as required by Federal Rule of Civil Procedure 65 of adequate size even if they were otherwise entitled to such relief). Plaintiffs must hurdle each of these procedural obstacles to even be entitled to address the constitutional questions they raise. They can surmount none of them.

Even if this Court does not dismiss this case at this time, there are multiple reasons that prevent the Court from properly making an immediate ruling as Plaintiffs request. First, Plaintiffs chose to ignore their obligation to make certain persons who are clearly indispensable parties under Federal Rule of Civil Procedure 19 defendants. That must be corrected if this case proceeds any further in any way. Second, it appears that as a result of 28 U.S.C. 2403(a), the Attorney General of the United States must be given an opportunity to intervene before this case proceeds any further. Third, Plaintiffs have failed to plead fraud with the "particularity" required by Federal Rule of Civil Procedure 9, and that must be corrected.

This Court should do as so many other courts around our Republic have recently done by denying any relief to those who seek to overturn the results of the 2020 Presidential election. Dowling requests that the Court grant his motion: (1) to intervene by signing the proposed order attached hereto as Exhibit 1; and (2) dismiss this case by signing the proposed order attached hereto as Exhibit 2.

Dowling requests that the Court additionally grant him such further additional relief, whether in law or in equity, as may be just.

/s/ Timothy P. Dowling

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Certificate of service

The undersigned hereby certifies that counsel for Plaintiffs were served by filing this motion with the Clerk of this Court, and such counsel (and other counsel) were also served by email service on December 31, 2020 as follows:

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/s/ Timothy P. Dowling

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

LOUIE GOHMERT, *et al.*, *Plaintiffs*, v. THE HONORABLE MICHAEL R. PENCE, VICE PRESIDENT OF THE UNITED STATES, in his official capacity, *Defendant*.	Civil Action No. 6:20-cv-00660-JDK

BRIEF OF THE U.S. HOUSE OF REPRESENTATIVES AS *AMICUS CURIAE* IN SUPPORT OF DISMISSAL

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INTRODUCTION AND INTEREST OF AMICUS CURIAE

Amicus curiae, the United States House of Representatives, has a direct and immediate interest in this case.[1] Plaintiffs ask this Court to displace Congress's longstanding role in counting the votes of the Electoral College in Presidential elections. The unprecedented relief plaintiffs seek would invalidate the primary role of Congress in counting electoral votes—a role that Congress has played in our constitutional system for more than two hundred years and has been embodied in a federal statute since 1887. In a radical departure from our constitutional procedures and consistent legislative practices, it would authorize the Vice President to ignore the will of the Nation's voters and to choose the winner in an election in which the holder of the office will often be a candidate, as is true in the 2020 election. To achieve this extraordinary result, plaintiffs filed suit on the eve of the Joint Session of Congress, when electoral votes are counted, to ask this Court to strike down an Act of Congress—"the gravest and most delicate duty that this Court is called on to perform," *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (opinion of Holmes, J.). This belated and disruptive effort to impose a novel legal rule is at odds with sound judicial process, the limited role of the Article III courts, constitutional text, and American history.

Pursuant to the Twelfth Amendment, following each Presidential election, each state's properly designated electors meet in their respective states, certify lists of all electors who voted

[1] The Bipartisan Legal Advisory Group (BLAG) of the U.S. House of Representatives, which "speaks for, and articulates the institutional position of, the House in all litigation matters," has authorized the filing of an *amicus* brief in this matter. Rules of the U.S. House of Representatives (116th Cong.), Rule II.8(b), https://perma.cc/M25F-496H. The BLAG comprises the Honorable Nancy Pelosi, Speaker of the House, the Honorable Steny H. Hoyer, Majority Leader, the Honorable James E. Clyburn, Majority Whip, the Honorable Kevin McCarthy, Republican Leader, and the Honorable Steve Scalise, Republican Whip. Representative McCarthy and Representative Scalise dissented.

for President and Vice President, and transmit their lists to the President of the United States Senate. After that process, "[t]he President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted." U.S. Const. amend. XII.

This Court should reject plaintiffs' effort to overturn Congress's centuries-old role in counting electoral votes and resolving disputes about them in the constitutionally mandated Joint Session. In 1865, Congress formalized its primacy in counting electoral votes with the passage of the 22d Joint Rule, which specified a procedure for resolving objections.[2] Since the Presidential election of 1888, Congress has conducted the Joint Session pursuant to procedures set forth in the Electoral Count Act of 1887. Consistent with the text of the Twelfth Amendment, the Electoral Count Act assigns a ministerial role to the Vice President as President of the Senate. The Vice President opens the electors' certificates, but does not count the votes. Congress designed the Electoral Count Act to ensure an orderly process for it to count the electoral votes and thus enhance public confidence in Presidential elections. Traditionally, Congress has also adopted a concurrent resolution before each such electoral count that incorporates the Electoral Count Act's provisions by reference.[3]

Plaintiffs' motion should be denied and their complaint dismissed for multiple reasons. This Court has no jurisdiction over plaintiffs' claims because plaintiffs lack standing. Plaintiffs' delay in bringing their claims independently warrants dismissal based on the doctrine of laches. Their constitutional challenges have no merit. And the public interest and equities cut strongly

[2] Subcomm. on Compilation of Precedents, Counting Electoral Votes, H.R. Misc. Doc. No. 44-13, at 148 (1877) (House of Representatives); *id.* at 224 (Senate). *Compare* 3 U.S.C. § 15.

[3] *See* Dechsler's Precedents, ch. 10, § 2.6.

against a first-of-its-kind injunction that would rewrite longstanding procedural rules for Congressional vote counting and create confusion just days before the required Joint Session.

Setting aside Representative Gohmert's claims—for which he clearly lacks standing—this case is simply another attempt by defeated Arizona electoral nominees to overturn the results of the popular vote in their state. The Arizona plaintiffs have tried and failed to overturn the election in suits they filed in federal and state courts in Arizona. Thus, they now ask this Court in Texas to help them achieve what they failed to do in Arizona. This Court should reject plaintiffs' bid to overturn a cornerstone of our Nation's democratic processes.

BACKGROUND

A. The Relevant Constitutional And Statutory Scheme

1. Every four years, voters nationwide cast their ballots in the Presidential election. *See* U.S. Const., Art. II, § 1, cl. 3; 3 U.S.C. § 1. Those votes "go toward selecting members of the Electoral College." *Chiafalo v. Washington*, 140 S. Ct. 2316, 2319 (2020). The Constitution provides that the electors are, in turn, empowered to elect the President and Vice President. U.S. Const. amend. XII. "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress[.]" U.S. Const., Art. II, § 1, cl. 2. This constitutional power to appoint electors "gives the States far-reaching authority over presidential electors." *Chiafalo*, 140 S. Ct. at 2324; *accord McPherson v. Blacker*, 146 U.S. 1, 27 (1892) (states have "broadest power of determination" over who may serve as an elector).

The Constitution also addresses the process for electoral voting: The Twelfth Amendment requires that electors "meet in their respective states," cast ballots for President and Vice President, "sign and certify" their votes, and transmit the results "sealed to the seat of

government of the United States, directed to the President of the Senate." U.S. Const. amend. XII. The Amendment further provides that "[t]he President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted." *Id.*

2. Consistent with these constitutional requirements, Congress has long established the process needed to carry out the Twelfth Amendment responsibilities of casting and counting electoral votes. *See generally* Stephen A. Siegel, *The Conscientious Congressman's Guide to the Electoral Count Act of 1887*, 56 Fla. L. Rev. 541, 551-53 (2004) (*Conscientious Congressman's Guide*) (describing historical understanding of electoral vote counting).

Although Congress had been responsible for counting electoral votes and resolving disputes about them since the early days of our Nation, the Electoral Count Act, 24 Stat. 373, 3 U.S.C. §§ 5-6, 15-18, sought to clarify—and codify—Congress's role in the wake of the disputed 1876 Presidential election. *See* Siegel, *Conscientious Congressman's Guide*, 56 Fla. L. Rev. at 547-50. For more than 130 years, the Electoral Count Act has governed the electoral voting process, and its procedures have been followed in every election since its enactment. *See* Cong. Rsch. Serv., RL32717, *Counting Electoral Votes: An Overview of Procedures at the Joint Session, Including Objections by Members of Congress* (Dec. 8, 2020), https://perma.cc/8TS3-8873.

The Electoral Count Act, as revised and in conjunction with other statutes, establishes procedures by which electoral votes must be cast and counted, culminating with the final count in the Joint Session of Congress on January 6. *See* 3 U.S.C. §§ 5-8, 15. The statute assigns primary responsibility to the states for resolving challenges to electoral slates, *id.* § 5; requires state executives to certify final vote counts and send those counts to the Archivist of the United

States in "a certificate of such ascertainment," *id.* § 6; specifies when electors shall meet to ensure uniformity, *id.* §§ 7-9; and provides that, during the Joint Session, the President of the Senate will open and present the vote certificates to the House and Senate for counting, *id.* § 15. The Electoral Count Act also establishes a process by which objections to slates of electors may be made and considered by Congress. *See id.* §§ 15, 17.

3. Under Arizona law, electors are chosen by popular vote. *See* Ariz. Rev. Stat. § 16-212(A). Then, after the "secretary of state issues the statewide canvass containing the results of" the election, the electors must "cast their electoral college votes for the [Presidential ticket that] received the highest number of votes in [the] state as prescribed in the canvass." *Id.* § 16-212(B). Indeed, Arizona law specifically prohibits the electors from voting for other candidates, stating that any "elector who knowingly refuses" to vote for the winner of the state's popular vote "is no longer eligible to hold the office of presidential elector" and shall be replaced with a qualified elector (who must vote for the ticket that won the popular vote). *Id.* § 16-212(C).[4]

B. The 2020 Election

1. On November 3, 2020, more than 3.4 million Arizona voters participated in the general election. *See Bowyer v. Ducey*, __ F. Supp.3d __, No. CV-20-02321, 2020 WL 7238261, at *1 (D. Ariz. Dec. 9, 2020), *appeal filed*, No. 20-17399 (9th Cir. Dec. 10, 2020). After the election, all fifteen counties in Arizona performed a hand-count audit, which confirmed that there were no discrepancies with the tabulation equipment (as in the case of Maricopa County,

[4] Arizona law does not permit the state legislature to replace electors or appoint new ones. *See* Ariz. Rev. Stat. § 16-212(A). Rather, if an elector position becomes vacant, the "chairperson of the state committee of the political party represented by that elector shall appoint a person who is otherwise qualified to be a presidential elector." Id. § 16-212(C).

Arizona's largest county) or that, if any discrepancies existed, they were "within the acceptable margin." Ariz. Sec'y of State, *Summary of Hand Count Audits—2020 General Election* (Nov. 17, 2020), https://perma.cc/VJD8-6YL8; *see also* Ariz. Rev. Stat. § 16-602; *Bowyer*, 2020 WL 7238261, at *1. Following the audits, each county's Board of Supervisors timely canvassed the election results and transmitted them to the Arizona Secretary of State Katie Hobbs. *See* Arizona 2020 General Election County Canvass Returns, https://perma.cc/6SU9-D239; Ariz. Rev. Stat. §§ 16-642(A), 16-645(B).

On November 30, 2020, Secretary Hobbs certified the statewide canvass, reporting that President-Elect Joseph Biden had prevailed over President Donald Trump by 10,457 votes. *See* 2020 General Election Official Canvass Certification (Nov. 30, 2020), https://perma.cc/N7NT-43EP; Ariz. Rev. Stat. § 16-648. On the same day, Arizona Governor Douglas Ducey signed the state's Certificate of Ascertainment for the Biden electors. *See* Certificate of Ascertainment for Presidential Electors (Nov. 30, 2020), https://perma.cc/WQ9D-FRDF.

On December 14, 2020, pursuant to federal and state law, Arizona's electors met and cast Arizona's electoral votes for President-Elect Biden and Vice President-Elect Kamala Harris. *See* 3 U.S.C. § 7; Ariz. Rev. Stat. § 16-212; Arizona Presidential Elector Ballot Certificate of Vote (Dec. 14, 2020), https://perma.cc/KWS2-E8D6.

2. Before, during, and in the immediate aftermath of the general election, the Arizona state courts heard numerous challenges to the conduct of the election—all of which were rejected. The courts rejected an attempt to redo the hand-count audit. *See Arizona Republican Party v. Fontes*, No. CV2020-014553 (Ariz. Super. Ct., Maricopa Cnty. Dec. 21, 2020). The Trump Campaign dismissed its own case that had initially challenged the performance of the tabulation machines. *See Donald J. Trump for President v. Hobbs,* No. CV2020-014248 (Ariz.

Super. Ct., Maricopa Cnty. Nov. 13, 2020). The courts found no merit to challenges based on the purported misuse of "Sharpies" to fill out ballots. *See Aguilera v. Fontes*, No. CV2020-014562 (Ariz. Super. Ct., Maricopa Cnty. Nov. 30, 2020); *Aguilera v. Fontes,* No. CV2020-014083 (Ariz. Super. Ct., Maricopa Cnty. Nov. 7, 2020). And another lawsuit challenging the election results was voluntarily dismissed even before an initial hearing in court. *See Stevenson v. Ducey*, No. CV2020-096490 (Ariz. Super. Ct., Maricopa Cnty. *filed* Dec. 4, 2020).

After the electoral slate was certified, putative Republican elector Kelli Ward—who is also a plaintiff in this suit—filed an election contest challenging the statewide canvass. The trial court rejected her claims, finding no fraud, no misconduct, and no illegal votes. The court entered an order "confirming" that President-Elect Biden had won the state's electoral votes. *See Ward v. Jackson*, No. CV2020-015285 (Ariz. Super. Ct., Maricopa Cnty. Dec. 4, 2020). The Arizona Supreme Court unanimously affirmed that ruling, finding that "the challenge fails to present any evidence of 'misconduct,' 'illegal votes' or that the Biden Electors 'did not in fact receive the highest number of votes for office,' let alone establish any degree of fraud or a sufficient error rate that would undermine the certainty of the election results." *Ward v. Jackson*, CV-20-0343-AP/EL, slip op. at 6 (Ariz. Dec. 8, 2020), *pet. for cert. filed*, No. 20-809 (U.S. Dec. 11, 2020). The court therefore "confirm[ed] the election of the Biden Electors" under state law. *Id.*

At nearly the same time, Ward and others (including many of the plaintiffs here) filed suit in federal district court, alleging fraud and seeking to "decertify" Arizona's election results. The district court rejected the challenge. *Bowyer*, 2020 WL 7238261, at *16. The court found that, among other things, the plaintiffs lacked standing because they alleged only a generalized grievance, *id.* at *2-*5, and that their claims were barred by laches, *id.* at *9-*11.

C. Plaintiffs' Suit Before This Court

Plaintiffs in this suit are Louie Gohmert, United States Representative for the First Congressional District of Texas, and eleven individuals. Compl. ¶¶ 16-17. The individual plaintiffs are all unsuccessful electors in Arizona; they allege that they constitute a putative slate of Arizona electors that also met on December 14, 2020—and, contrary to the state's popular vote, cast electoral votes for President Trump and Vice President Pence. *Id.* ¶ 20. *But see* Ariz. Rev. Stat. § 16-212 (providing that electors must vote for the party of the candidate who won the statewide popular vote; failure to do so renders one ineligible to serve as an elector). Their purported slate was not certified by the Governor and did not otherwise comply with the state statutory scheme (as enacted by the Arizona legislature) or the Electoral Count Act.

Plaintiffs waited until December 27, 2020, to file this complaint against Vice President Michael Pence. Compl. Plaintiffs allege that Sections 5 and 15 of the Electoral Count Act are unconstitutional because, among other reasons, the Vice President assertedly has "exclusive authority and sole discretion under the Twelfth Amendment to determine which slates of electors for a State, or neither, may be counted." *Id.* ¶¶ 2, 3. Plaintiffs seek emergency declaratory relief that those sections of the Electoral Count Act are unconstitutional and an injunction prohibiting Vice President Pence "from following any Electoral Count Act procedures in 3 U.S.C. §§ 5 and 15." Doc. 2, at 3 (Mot. for Expedited Declaratory Judgment and Emergency Injunctive Relief).

ARGUMENT

This Court should dismiss the complaint and deny the extraordinary and unprecedented relief requested: a declaration that the Electoral Count Act is unconstitutional and an injunction that would interfere with the time-honored procedures of Congress for counting electoral votes.

Plaintiffs lack standing; their claims are barred by laches; and their legal and constitutional claims—which this Court should not reach—lack merit. At bottom, this litigation seeks to enlist the federal courts in a belated and meritless assault on longstanding constitutional processes for confirming the results of a national election for President. The Court should reject this improper and legally unfounded effort.

I. Plaintiffs Lack Standing

"The familiar elements of standing are (1) an injury in fact, (2) that is fairly traceable to the challenged conduct of the respondent, and (3) that is likely to be redressed by a favorable judicial decision." *Shrimpers & Fishermen of RGV v. Texas Comm'n on Envtl. Quality*, 968 F.3d 419, 424 (5th Cir. 2020). The standing inquiry is "especially rigorous" when, as here, plaintiffs ask the court to declare a statute unconstitutional. *Raines v. Byrd*, 521 U.S. 811, 819-20 (1997); *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013) ("The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches."). Plaintiffs do not satisfy the requirements for standing.

A. Representative Gohmert Lacks Standing

Under established Supreme Court precedent, individual legislators like Representative Gohmert lack standing to assert abstract injuries to their legislative interests. In *Raines*, the Supreme Court addressed the standing of legislators who brought suit alleging that a statute was unconstitutional because it "diluted their Article I voting power." 521 U.S. at 817 (alteration omitted). The Court held that the legislators lacked standing because their alleged injury was "wholly abstract and widely dispersed." *Id.* at 829. It was abstract because the plaintiffs had not "claim[ed] that they ha[d] been deprived of something to which they *personally* [were] entitled."

Id. at 821. And it was widely dispersed because the plaintiffs had "not been singled out for specially unfavorable treatment as opposed to other Members of their respective bodies." *Id.* In addition, the suit was "contrary to historical experience," and "ha[d] not been authorized" by the legislators' "respective Houses of Congress." *Id.* at 829.

Following *Raines*, courts have repeatedly rejected individual legislators' claims to standing when they are "not singled out" and when "their claim is based entirely on the loss of political power." *Blumenthal v. Trump*, 949 F.3d 14, 19 (D.C. Cir. 2020); *Chenoweth v. Clinton*, 181 F.3d 112, 115 (D.C. Cir. 1999); *Campbell v. Clinton*, 203 F.3d 19, 22 (D.C. Cir. 2000); *see also Maloney v. Murphy*, __F.3d__ , No. 18-5305, 2020 WL 7702700, *1 (D.C. Cir. Dec. 29, 2020) (reiterating that "generalized injuries claimed by legislators that are tied broadly to the law-making process and that affect all legislators equally" are "non-cognizable"). Each of these cases, like *Raines* itself, stressed "the need for the judiciary to avoid meddling in the internal affairs of the legislative branch by entertaining a lawsuit by an individual legislator whose rights could be vindicated by congressional repeal of the offending statute." *Comm. on Judiciary of U.S. House of Reps. v. McGahn*, 968 F.3d 755, 770 (D.C. Cir. 2020) (en banc) (alterations, quotation marks, and citations omitted).

Representative Gohmert's claim is even weaker than the claims to legislator standing that the Supreme Court and other courts have rejected. The complaint contains no specific allegations of injury to Representative Gohmert at all. In the motion for a preliminary injunction, Representative Gohmert asserts an interest in "vot[ing] as a Congressional Representative" under the Twelfth Amendment, which establishes procedures for the House to select a President if no candidate receives an electoral college majority. Mot. 4-5. Representative Gohmert appears to contend that the Electoral Count Act, by giving States and

the Senate a role in selecting the electoral college winner, makes it less likely that the House will be called upon to select the President under the Twelfth Amendment, which in turn he claims "eviscerates [his] constitutional right and duty to vote for President." Mot. 7.

This standing argument fails for several reasons. Representative Gohmert's asserted interest in voting for President under the Twelfth Amendment is "wholly abstract." *Raines*, 521 U.S. at 829. As in *Raines*, Representative Gohmert alleges the "dilution of institutional legislative power" rather than the "loss of any private right." *Id.* at 821, 826. And he alleges "no injury to [himself] as [an] individual[]" as opposed to the body in which he serves. *Id.* at 829. There is thus a "mismatch" between Representative Gohmert—an individual legislator—and the entity to whom his alleged injury belongs—the House as a whole. *See Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1953 (2019). Indeed, Representative Gohmert's asserted injury is yet more abstract than the injury rejected in *Raines*, because the gravamen of Representative Gohmert's complaint is that the Electoral Count Act diminishes the power of the Vice President, as distinct from the legislative body in which Representative Gohmert serves. *See* Compl. ¶¶ 42-44 (arguing that the Electoral Count Act violates the Twelfth Amendment by depriving the Vice President of the power to count Electoral College votes).

Representative Gohmert's asserted injury fails under *Raines* for additional reasons. It is "widely dispersed," *Raines*, 521 U.S. at 829, because it is shared by every Member of the House, each of whom is affected by the Electoral Count Act in the same way. As in *Raines*, his claims are contrary to historical practice and opposed by the House. And, also as in *Raines*, rejecting his claim to standing will not deprive him of an adequate remedy, because he may always work to repeal the Electoral Count Act through the legislative process.

Finally, Representative Gohmert's alleged injury is neither "actual" nor "imminent." *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Even if—contrary to constitutional text, logic, and history—the procedures of the Congressional Joint Session were altered as Representative Gohmert seeks, he makes no plausible claim that the Presidential election would be thrown to the House under the Twelfth Amendment. Nor could he, as that remarkable outcome has not happened in nearly 200 years and there is no plausible basis for questioning the state-certified electoral votes in this Presidential election.

Representative Gohmert therefore lacks a cognizable injury and must be dismissed as a plaintiff. Because venue in this Court is supported only by Representative Gohmert's residency in this district (*see* Compl. ¶ 15), dismissal of the case on venue grounds or transfer to a more appropriate venue may be warranted. *See* 28 U.S.C. § 1406(a) (providing that the district court in "a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought").

B. The Arizona Plaintiffs Lack Standing

The eleven plaintiffs purporting to be "Arizona Electors" (Compl. ¶¶ 17-18) also lack standing. They have not suffered an injury that is "concrete and particularized" or "actual or imminent." *Lujan*, 504 U.S. at 560. A "grievance that amounts to nothing more than an abstract and generalized harm to a citizen's interest in the proper application of the law does not count as an 'injury in fact'" and "does not show standing." *Carney v. Adams*, — S. Ct. —, No. 19-309, 2020 WL 7250101, at *3 (U.S. Dec. 10, 2020).

The Arizona plaintiffs have merely alleged just such a generalized grievance. They assert injury from "having a competing slate of electors take their place and their votes in the Electoral College" and from the use of the Electoral Count Act at the Joint Session "to resolve the dispute

over which slate of Arizona electors is to be counted." Compl. ¶¶ 57-58. But, as Plaintiffs themselves appear to concede (*see id.* ¶ 57), they have no special status at the Joint Session. Under Arizona law, the only individuals entitled to cast electoral college votes are the electors for the "candidate for president and the candidate for vice president who jointly received the highest number of votes in this state," Ariz. Rev. Stat. § 16-212(B)—here, President-Elect Biden and Vice President-Elect Harris. The appointment of the Biden electors was certified by Governor Ducey on November 30, and was "confirm[ed]" by the Arizona Supreme Court on December 8. *See supra* pp. 6-7. Thus, by binding operation of Arizona law, the Arizona plaintiffs are not "candidates for office" (Compl. ¶ 56); nor are they Presidential electors, *see* Ariz. Rev. Stat.§ 16-212(C); and they cannot assert any interests that might be available to lawful electors. They instead stand in the same position as the other 3.4 million Arizona voters with "no particularized stake in the litigation." *Lance v. Coffman*, 549 U.S. 437, 442 (2007).

The Arizona plaintiffs' alleged injury from the Electoral Count Act is therefore "precisely the kind of undifferentiated, generalized grievance about the conduct of government that [courts] have refused to countenance in the past." *Id.*; *see also Bowyer*, 2020 WL 7238261, at *4-*5. While plaintiffs invoke (Mot. 6) *Carson v. Simon*, 978 F.3d 1051 (8th Cir. 2020) (per curiam), that case actually undermines their standing. *Carson* held that prospective Minnesota electors had standing because Minnesota law gave them a "cognizable interest" in ensuring the integrity of an election in which they were candidates. *Id.* at 1057. Here, by contrast, even if their nominations rendered them "candidates" prior to the election, now that the election has occurred, Arizona law makes clear that the plaintiffs are not and may not serve as electors representing the state. *See* Ariz. Rev. Stat. § 16-212(B)-(C). They therefore lack any special interest in the administration of the Joint Session.

The Arizona plaintiffs have likewise not met their burden as to causation. To establish causation for purposes of standing, a plaintiff must show "a causal connection between the injury and the conduct complained of." *Lujan*, 504 U.S. at 560. But plaintiffs acknowledge (Mot. 7) that the "Vice President did not cause [their] initial injury," which they concede "happened in Arizona." Their complaint and motion for a preliminary injunction repeatedly emphasize that their injury is caused by the "conduct of Arizona executive branch and Maricopa County officials" in certifying the election results (Compl. ¶ 57), and that they are challenging "unlawful injuries that Plaintiffs suffered in Arizona" (Mot. 7). Their true grievance is not with Vice President Pence or the functioning of the Electoral Count Act, but with the operation of Arizona law and the decisions of Arizona officials who are not parties to this suit. They nonetheless seek to establish causation (Mot. 7) on the ground that Vice President Pence may "ratify" their state-law injury at the Joint Session, but they fail to explain how any such ratification would render their state-law injury legally traceable to him.

For the same reason, an order from this Court invalidating the Electoral Count Act would provide no redress to the Arizona plaintiffs. It would have no bearing on the Arizona law that determined the slate of Biden electors to be presented to the President of the Senate at the Joint Session, and it could not require Arizona to appoint them as electors instead. *See* Ariz. Rev. Stat. § 16-212(B).

II. The Laches Doctrine Bars Plaintiffs' Claims

Even if plaintiffs had standing, the doctrine of laches would bar their claims. Laches bars equitable relief when a plaintiff's inexcusable delay in asserting a claim unduly prejudices the defendant. *See Save Our Wetlands, Inc. v. U.S. Army Corps of Eng'rs*, 549 F.2d 1021, 1026 (5th

Cir. 1977); *see also, e.g.*, *Elvis Presley Enters. v. Capece*, 141 F.3d 188, 205 (5th Cir. 1998). Those criteria are plainly met here.[5]

Federal courts have long recognized that the laches doctrine bars untimely claims for equitable relief in election challenges. *See, e.g.*, *Lopez v. Hale County*, 797 F. Supp. 547, 550 (N.D. Tex. 1992) (three-judge district court) (plaintiff was "guilty of laches" in waiting until after the primary election to file suit), *aff'd*, 506 U.S. 1042 (1993); *Dulcan v. Martin*, 64 F.R.D. 327, 328-29 (D.D.C. 1974) (three-judge district court) (per curiam) ("plaintiffs have waited too long in bringing their allegations of unconstitutionality of the Act for this court to act responsibly without interfering" with upcoming election); *see also Toney v. White*, 488 F.2d 310, 314 (5th Cir. 1973) ("[T]he law imposes the duty on parties . . . to bring [their] grievances forward for pre-election adjudication. . . . [T]he failure to require prompt pre-election action in such circumstances as a prerequisite to post-election relief may permit, if not encourage, parties who could raise a claim to lay by and gamble upon receiving a favorable decision of the electorate and then, upon losing, seek to undo the ballot results in a court action." (internal quotation marks and citation omitted)).

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[5] This Court may in its discretion choose to dismiss this case on laches grounds before addressing Article III jurisdiction. "[A] federal court has leeway to choose among threshold grounds for denying audience to a case on the merits." *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007) (quotation marks omitted). Numerous courts have held that laches is one such threshold ground, and have accordingly denied claims on laches grounds without addressing standing. *See Memphis A. Phillip Randolph Inst. v. Hargett*, 473 F. Supp. 3d 789, 802 n.18 (M.D. Tenn. 2020) ("the Court can decide the applicability of laches before deciding whether it has subject-matter jurisdiction"); *Singh v. Joshi*, 152 F. Supp. 3d 112, 121 (E.D.N.Y. 2016) (because laches and standing were both threshold issues "distinct from the merits," the court may "address them in any order"); *Collins v. W. Digital Techs., Inc.*, 2011 WL 3849310, at *6 (E.D. Tex. 2011) (similar). And this Court may deny plaintiffs' request for equitable relief on laches grounds regardless of whether the Vice President invokes it. *Cf. Day v. McDonough*, 547 U.S. 198, 209 (2006).

Indeed, federal and state courts in Arizona, Georgia, Michigan, Pennsylvania, and Wisconsin have held that laches barred post-election challenges to the 2020 Presidential election in suits filed well before this one—including in a suit brought in Arizona federal district court by the same purported Arizona Republican electors who filed suit here. *Bowyer*, 2020 WL 7238261, at *10-*11 (applying laches to lawsuit filed nearly one month after Election Day and two days after Governor certified results, where basis for claimed violations of the Electors Clause "was either known well before Election Day or soon thereafter" and "the prejudice to the Defendants and the nearly 3.4 million Arizonans who voted in the 2020 General Election would be extreme, and entirely unprecedented").[6]

Plaintiffs inexcusably delayed filing this suit—which they initiated only after the Arizona federal district court and the Arizona Supreme Court rejected other attempts to invalidate the election (including by the same Arizona plaintiffs who filed suit here). Plaintiffs filed this complaint on December 27, 2020, and effectuated service on December 29. Doc. Nos. 1, 5, 11. Plaintiffs thus waited almost an entire month after November 30, when the Arizona Secretary of State certified the election and the Secretary and Governor signed the Certificate of Ascertainment for the Biden electors; almost twenty days after December 8, when the Arizona

[6] *See Trump v. Wisconsin Elections Comm'n*, – F.3d. –, No. 20-3414, 2020 WL 7654295, at *3-4 (7th Cir. Dec. 24, 2020) (explaining that "[t]he President's delay alone is enough to warrant affirming" dismissal because "[a]ny claim against a state electoral procedure must be expressed expeditiously" and "[a]llowing the President to raise his arguments, at this late date, after Wisconsin has tallied the votes and certified the election outcome, would impose unquestionable harm on the defendants, and the State's voters"); *King v. Whitmer*, – F. Supp. 3d. – , No. CV 20-13134, 2020 WL 7134198, at *7 (E.D. Mich. Dec. 7, 2020), *appeal filed,* No. 20-2205 (6th Cir. Dec. 8, 2020); *Wood v. Raffensperger*, No. 1:20-CV-04651-SDG, 2020 WL 6817513, at *7-8 (N.D. Ga. Nov. 20, 2020), *aff'd on other grounds*, 981 F.3d 1307 (11th Cir. 2020); *Trump v. Biden*, No. 2020AP2038, 2020 WL 7331907 ¶ 32 (Wis. Dec. 14, 2020); *Kelly v. Commonwealth*, 240 A.3d 1255, 1257 (Pa. 2020).

Supreme Court confirmed the election of the Biden electors, *see Ward*, CV-20-0343-AP/EL, at *6; and almost two weeks after December 14, when the Biden electors voted pursuant to Arizona state law. Plaintiffs could have brought their claims weeks ago, if not earlier. *See Bowyer*, 2020 WL 7238261, at *10 ("When contesting an election, any delay is prejudicial, but waiting until a month after Election Day and two days after certification of the election is inexcusable.").

In addition, the provisions of the Electoral Count Act that plaintiffs challenge have been in force since 1887. *See* Pub. L. No. 49-90, 24 Stat. 373 (1887). Plaintiffs have thus known from the start what rules would govern the Joint Session and, to the extent they could ever have standing to bring this suit, they could have done so earlier. Representative Gohmert—who has been a Member of Congress for four previous Joint Sessions (in 2005, 2009, 2013, and 2017)—was well aware of the rules governing that proceeding and could have brought this challenge immediately after the 2020 election, if not earlier. And the putative elector plaintiffs could have filed at the same time.[7] They did not do so, attempting to reserve their claims for extreme relief sought here until the many other legal challenges to the Arizona election were explored unsuccessfully. Plaintiffs offer no justification—nor could they— for their eleventh-hour resort to this Court.

The prejudice to Congress, the states, millions of voters—and, indeed, to the Vice-President himself—that would result from entertaining plaintiffs' claims at this late date would be immense. Plaintiffs request a declaration that the challenged provisions of the Electoral Count Act are unconstitutional and that the Vice President (in his capacity as President of the Senate) "may exercise the exclusive authority and sole discretion in determining which electoral

[7] Presidential elector nominations were due in Arizona by August 14, 2020. *See* https://perma.cc/TJ9X-XS5Z.

votes to count for a given State." Compl. ¶ 73(C); *see also* Mot. 3, 27. Such relief would upend the electoral count system that has governed Presidential elections, and that has clearly defined the role and responsibilities of the President of the Senate in a manner that no prior Vice President has found objectionable, for well over a century. *See Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (per curiam) ("This Court has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election." (citing *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam)).

If plaintiffs obtain the relief they seek, they would drastically unsettle expectations about the Vice President's role at the Joint Session in a manner calculated to turn a ministerial duty into one fraught with peril and controversy. Moreover, their arguments could result in the disenfranchisement of millions of voters, if (as plaintiffs intend) the Vice President went on to disregard certified slates of electors or to refuse to accept any slates at all from a particular state. *Cf. Wood*, 2020 WL 6817513, at *8 ("[The] requested relief could disenfranchise a substantial portion of the electorate and erode the public's confidence in the electoral process."). Plaintiffs effectively ask this Court to turn over determination of the 2020 Presidential election in its entirety to Vice President Pence, and they would have him make that determination in the absence of any governing rules. This would create chaos at the Joint Session, present intractable conflicts of interest, and prejudice the Vice President in the execution of his duties. Plaintiffs should not be permitted, at this late date, to pursue such "extreme, and entirely unprecedented" relief. *Bowyer*, 2020 WL 7238261, at *11.

Plaintiffs' delay has also prejudiced this Court's ability to decide this case before the Joint Session on January 6. *See id.* ("[T]he challenges that Plaintiffs assert quite simply could have been made weeks ago, when the Court would have had more time to reflect and resolve the

issues."); *Dulcan*, 64 F.R.D. at 329 ("[P]laintiffs have waited too long in bringing their allegations of unconstitutionality of the Act for this court to act responsibly without interfering with the date of the November 5, 1974 election. A court must have time for study and reflection."). Courts have cautioned against "taking action in a case where the election was imminent, even where constitutional defects in the election process have already been found." *Dulcan*, 64 F.R.D. at 330; *see also Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 919 (9th Cir. 2003) (per curiam) (en banc) ("Interference with impending elections is extraordinary, and interference with an election after voting has begun is unprecedented." (citing *Reynolds v. Sims*, 377 U.S. 533, 585 (1964)). "Unreasonable delay can prejudice the administration of justice by compelling the court to steamroll through delicate legal issues in order to meet election deadlines." *Bowyer*, 2020 WL 7238261, at *11 (alteration and quotation marks omitted). That principle applies with even greater force where—as here—plaintiffs' constitutional claims have profound ramifications for the Nation and yet lack any colorable support in constitutional text, precedent, or practice.

III. Plaintiffs Are Not Entitled To The Extraordinary Equitable Relief They Seek

For the reasons noted above, the Court should not reach the merits of plaintiffs' claims. But if the Court reaches the merits, it should reject plaintiffs' erroneous arguments.

1. To the extent that plaintiffs contend (*see* Mot. 18-22) that the Twelfth Amendment endows the Vice President with substantive authority concerning the counting of electoral votes, that contention is belied by the Amendment's text.

The relevant portion of the Twelfth Amendment states: "The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted." The Amendment's use of the active voice and mention of the Vice

President in the first clause—"The President of the Senate shall … open all the certificates"—in contrast with its use of the passive voice and omission of the Vice President from the second clause—"the votes shall then be counted"—demonstrates that the Amendment assigns the Vice President the task of opening the certificates and leaves the counting of the votes to others.

In other words, the text does not say that the Vice President shall "open all the certificates *and* then count the votes." Significantly, it separates those two actions through distinct grammatical constructions and assigns only the first of them to the Vice President. The linguistic formulation used in the Amendment would be an extremely odd way to describe in common speech an intent for the Vice President to open the certificates *and* for him to also count the votes. The Amendment's text thus provides no support for the claim that the Vice President has unreviewable discretion to decide which slate of electors shall be counted from each State.

This conclusion is reinforced by constitutional understandings and consistent practice, dating back to the Nation's early days, of the Vice President presiding at the Joint Session and the House and Senate themselves resolving any substantive disputes over counting electoral votes. *See, e.g.*, Siegel, *Conscientious Congressman's Guide*, 56 Fla. L. Rev. at 551-53. Such a "[l]ong settled and established practice [carries] great weight in a proper interpretation of constitutional provisions." *Chiafalo*, 140 S. Ct. at 2326 (quoting *The Pocket Veto Case*, 279 U.S. 655, 689 (1929)). This conclusion is further supported by the structure of the Constitution, which cannot reasonably be understood to assign to the sitting Vice President the momentous decision of who shall be elected to the Presidency and Vice Presidency—offices for which he might in that very election actually be a candidate. Granting such power to the Vice President would be at odds with the Constitution's numerous provisions designed to avoid conflicts of interest of this type and with basic principles of democratic governance.

Plaintiffs' claim (Mot. 22-23) that Congress lacks the authority to create procedures for implementing the Twelfth Amendment is equally misconceived. From the beginning of the Republic, Congress has been understood to have the power to establish the procedures for electoral vote counting, whether by resolution or by statute. *See also* U.S. Const., Art. I, § 8, cl. 18 ("Congress shall have Power … [t]o make all Laws which shall be necessary and proper for carrying into Execution … all … Powers vested by this Constitution in the Government of the United States, or in any … Officer thereof."). The Electoral Count Act is only one example of Congress's exercise of that power.[8]

To the extent plaintiffs argue that the Electoral Count Act violates the Electors Clause (Mot. 21, 22 n.3), that argument also fails. The Electoral Count Act is entirely consistent with the Electors Clause, which provides that each State shall appoint electors "in such Manner as the Legislature thereof may direct." U.S. Const., Art. II § 1, cl. 2. The Electoral Count Act is grounded in deference to the laws and procedures of the states. And any assertion that the statute deprives the Arizona legislature of its constitutionally assigned role in the process of selecting electors is incorrect: The Arizona legislature exercised its authority to create the system of popular election and gubernatorial certification that was used to appoint Arizona's electors. *Cf. Wisconsin Elections Comm'n*, 2020 WL 7654295, at *4 (rejecting a similar Electors Clause argument). The procedures followed here effectuate, rather than undermine, the Electors Clause.

[8] Congress's consistent practice of establishing procedures for electoral vote counting—typically based on the recommendations of a joint committee—can be traced in Hinds' Precedents of the House of Representatives ch. 59, §§ 1929, 1952 (counts of 1793-1873); *id.* at ch. 60 (counts of 1877-1905); *see also* House Practice: A Guide to the Rules, Precedents, and Procedures of the House (2017) ch. 24 §§ 1-3.

2. The balance of equities and the public interest strongly support denial of declaratory and injunctive relief. Courts have repeatedly warned of the dangers of altering election rules on the eve of elections "absent a powerful reason for doing so." *Crookston v. Johnson*, 841 F.3d 396, 398 (6th Cir. 2016) (citing *Purcell*, 549 U.S. at 5-6). Principles of judicial restraint apply with special force where plaintiffs seek to alter the established rules governing the constitutionally prescribed Joint Session to count the electoral votes after millions of voters have cast their ballots and the electoral results have been duly certified.

Plaintiffs ask this Court to authorize the Vice President to ignore the will of the Nation's voters and determine the winner in an election in which he is a candidate. Granting plaintiffs this extraordinary relief just days before the Joint Session would not only reward their inexcusably delayed filing; it would also risk upending the orderly rules that have governed Congressional counting of electoral votes for more than a century and undermining the public's confidence in the constitutionally prescribed processes for confirming—not overturning—the results of the election.

CONCLUSION

The Court should deny plaintiffs' motion for expedited declaratory judgment and emergency injunctive relief, and dismiss plaintiffs' complaint.

Respectfully submitted,

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December 31, 2020

CERTIFICATE OF SERVICE

I certify that on December 31, 2020, I caused the foregoing document to be filed via the United States District Court for the Eastern District of Texas CM/ECF system, which I understand caused a copy to be served on all registered parties.

/s/ Douglas N. Letter
Douglas N. Letter

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION**

LOUIE GOHMERT, TYLER BOWYER, NANCY COTTLE, JAKE HOFFMAN, ANTHONY KERN, JAMES R. LAMON, SAM MOORHEAD, ROBERT MONTGOMERY, LORAINE PELLEGRINO, GREG SAFSTEN, KELLI WARD and MICHAEL WARD, Plaintiffs, v. THE HONORABLE MICHAEL R. PENCE, VICE PRESIDENT OF THE UNITED STATES, in his official capacity, Defendant.	Civil Action No. 6:20-cv-00660-JDK **(Election Matter)**

<u>PLAINTIFFS' REPLY IN SUPPORT OF EMERGENCY MOTION FOR EXPEDITED DECLARATORY JUDGMENT AND EMERGENCY INJUNCTIVE RELIEF</u>

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INTRODUCTION

Plaintiffs, U.S. Rep. Louie Gohmert (TX-1), Tyler Bowyer, Nancy Cottle, Jake Hoffman, Anthony Kern, James R. Lamon, Sam Moorhead, Robert Montgomery, Loraine Pellegrino, Greg Safsten, Kelli Ward, and Michael Ward, respectfully file this reply in support of their Motion for Expedited Declaratory Judgment and Emergency Injunctive Relief ("Motion"). Neither the opposition filed by the Defendant Vice President nor the supplemental arguments filed by amici curiae briefs or would-be intervenors rebut the clear constitutional violations in Sections 5 and 15 of the Electoral Count Act of 1887, PUB. L. NO. 49–90, 24 Stat. 373 (codified at 3 U.S.C. §§ 5, 15), Plaintiffs' right to petition this Court for review of those violations, or this Court's jurisdiction to enter the requested relief. Before addressing the substantive and procedural arguments, Plaintiffs first reiterate what their cause is about and what it is not about.

In 1787, James Madison explained that we live in a democratic republic, not a pure democracy. That choice of government was designed by the framers of the Constitution, a visionary work that has guided this country since its inception. The system of choosing a president by the Electoral College, and not popular vote, was the product of deep thought and conviction. It is the law of the land.

On January 6th, a joint session of Congress will convene to formally elect the President. The defendant, Vice-President Pence, will preside. Under the Constitution, he has the authority to conduct that proceeding as he sees fit. He may count elector votes certified by a state's executive, or he can prefer a competing slate of duly qualified electors. He may ignore all electors from a certain state. That is the power bestowed upon him by the Constitution.

For over a century, the counting of elector votes and proclaiming the winner was a formality to which the prying eye of the media and those outside the halls of the government paid

no attention. But not this time. Plaintiff Representative Gohmert, along with 140 of his Republican House colleagues have announced that they will object to the counting of state certified electors pledged to former Vice-President Biden[1] because of the mounting and convincing evidence of voter fraud in key swing states whose combined electoral count change the election results. Ex. B.

The Court is now asked to rule on a pressing and critical question: which set of rules does Vice-President Pence follow when confronted by these objections? The rules set by the Constitution, or those in a simple statute, 3 USC 15, last updated in 1948 by a session of Congress long ago ended. Plaintiffs are not asking this Court to choose a winner of the presidential contest. Nor are Plaintiffs asking the Court to rule on whether there was pervasive fraud in the swing states that are subject to objection. Those are matters left to the January 6th joint session of Congress. The issue before this Court hinges on an obvious and elementary concept – that a federal statute cannot conflict or abrogate the United States Constitution.

In their submissions, Defendant and amici never reach this issue. Instead, they hide behind procedural arguments such as standing, laches and other "gatekeeping" defenses that, as set forth below, are easily disposed above. They argue that the January 6th joint session is no more than a perfunctory coronation. A ceremony where the Vice-President is relegated to the mundane task of opening envelopes filled with electoral votes certified by state governors. They say that the Vice President, the glorified envelope-opener in chief, has no authority to preside over anything else or to decide anything of substance or to even count the votes in those weighty envelopes. He is only the envelope-opener.

[1] Senator Josh Hawley has also pledged to object to the Biden electors in the contested states. Ex. A.

This relief sought is supported by a clear historical perspective of the role of the Vice President in the electoral process. Below, we set forth a brief study of the background to the Vice-President's weighty and prudential powers afforded under the Constitution – the foundation of American democracy -- which unequivocally entrusts to him all the prerogatives and rights to determine what electoral votes to count or to disregard that are attendant to his role as President of the Senate. We further explain how 3 USC 15 is unconstitutional and why it is of no force or effect whatsoever. Finally, we discuss and dispose of the various defenses and arguments put forward by the Defendant and amici.

This country is deeply divided along political lines. This division is compounded by a broad and strongly held mistrust of the election processes employed and their putative result by a very large segment of the American population. The Congress is set for a showdown on January 6th with over 140 House members pledging to object to Mr. Biden's claim of victory. By reaffirming the Constitutional prerequisites and processes for deciding the Presidential election and granting the relief requested, this Court can set the stage for a calm and permanent resolution of any and all objections and help smooth the path toward a reliable and peaceful conclusion to the presidential election process. Accordingly, Plaintiffs' motion for declaratory and injunctive relief should be granted.

FACTS

In addition to the opposition (ECF #18) filed by the Defendant, Vice President Michael R. Pence, the Democrat-dominated Bipartisan Legal Advisory Group ("BLAG") of the U.S. House of Representatives filed an *amicus* brief (ECF #22), with the two Republican BLAG members—the Honorable Kevin McCarthy, Republican Leader, and the Honorable Steve Scalise, Republican Whip—dissenting. *See* BLAG Br. at 1 n.1. In addition, a Texas resident— Timothy P. Dowling—

who supports former Vice President Joseph R. Biden's candidacy moved to intervene (ECF #19), also filing a motion to dismiss (ECF #20), and a Colorado elector for Mr. Biden— Alan Kennedy—moved to intervene in a unified document (ECF #15) that includes a section opposing the merits of Plaintiffs' claims. For purposes of their Motion, Plaintiffs will treat the Dowling and Kennedy filings as *amicus* briefs opposed to Plaintiffs' Motion. *See, e.g., Lelsz v. Kavanagh*, 98 F.R.D. 11, 13 (E.D. Tex. 1982) (denying leave to intervene but allowing movant to file *amicus* brief). Plaintiffs reserve the right to oppose the two motions to intervene, as well as to respond to the Dowling motion to dismiss in the event that the Court grants the Dowling motion to intervene.

In the interval since Plaintiffs filed their Motion, Sen. Josh Hawley of Missouri has announced the intent to object to Biden electors On the House side, in addition to Plaintiff Louie Gohmert ("Rep. Gohmert"), approximately 140 Republican Members of the House have announced plans to object to the Biden electors.

ARGUMENT

I. LEGAL AND HISTORICAL BACKGROUND.

A. The Vice Presidents of the Framers' Generation Acted as Presiding Officers and Established Rules of Parliamentary Procedure

While the discussion of the Vice President's role in the Constitutional Convention and Ratification Debates is sparse, two of the most significant Framers, John Adams and Thomas Jefferson, subsequently served as Vice Presidents. In these roles, they immediately established that the Vice President was not a merely ceremonial position, but rather an active and leading role as Presiding Officer of the Senate in establishing rules of parliamentary procedure for the new Congress.

Vice President Adams drew upon his knowledge of British parliamentary procedure in presiding over the Senate. See Richard Allan Baker, The Senate of the United States: "Supreme

Executive Council of the Nation," 1787-1800, in 1 THE CONGRESS OF THE UNITED STATES, 1787-1989, at 135, 148 (Joel H. Silbey ed., 1991). Vice President Jefferson, also on expert on British parliamentary procedure, authored the Senate's first manual of procedure. See Thomas Jefferson, A Manual of Parliamentary Practice: for the Use of the Senate of the United States, in JEFFERSON'S PARLIAMENTARY WRITINGS: "PARLIAMENTARY POCKET-BOOK" AND A MANUAL OF PARLIAMENTARY PRACTICE (Wilbur Samuel Howell ed., 1988). Thus, two of the most important men who not only wrote the Constitution, but also established and documented the Senate's first rules as Presiding Officers, did not see their role as clerks or tabulators in counting votes. They were candidates and parliamentarians who also established the rules and processes for deciding the winner (i.e., them in both cases). This is not a new or convenient theory. In fact, this has been the case since the founding of the nation.

The process for electing the President was one of the most divisive of all issues debated in the Philadelphia Convention, with competing proposals for direct election, federal congressional election and state election argued. *See* 3 Jonathan Elliot , Debates on the Adoption of the Federal Constitution 547 (James McClellan & M.E. Bradford eds., James River Press 1989) (2d ed. 1836). Sixty ballots were taken before the original 1787 Constitution was adopted, pursuant to which electors from each State, appointed by the State Legislature under the Electors Clause, elect the President; or in the event no candidate receives a majority as counted by the Vice President, the House of Representatives chooses the President by the "one vote per state delegation" rule.

U.S. CONST. art II, § 1, cl. 3, amended by U.S. CONST. amend. XII. Article II of the Constitution provides, in relevant part:

> The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which

> List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. **The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted**.

U.S. Const., art. II, § 1, cl. 3 (amended by U.S. Const. amend. XII). (Emphasis added)

In *The Federalist Papers,* No. 68, Alexander Hamilton provides the rationale for the unique role of Presidential Electors in electing the President of the United States. Hamilton first explains that the choice of indirect election through electors, rather than direct democracy, because it is preferable for "[a] small number of persons, selected by their fellow-citizens from the general mass, will be most likely to possess the information and discernment requisite to such complicated investigations," and it will "afford as little opportunity as possible to tumult and disorder." Hamilton, Alexander. *The Federalist Papers,* No. 68, at 410-11 (C. Rossiter, ed. 1961).

Hamilton reasoned that the Electoral College should not meet as a national body in one place, but instead should meet and elect the President in each State: the electors chosen in each State are to assemble and vote in the State in which they are chosen. This detached and divided construct intentionally exposes the electors to far less heats and ferments which might be communicated from them to the people than if they were all convened at one time in one place.

Nothing was more desired by the Framers than that every practicable obstacle should be opposed to cabal, intrigue, and 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 foreign powers desire to gain an improper ascendant in our councils. *Id*.

If no candidate received a majority of the Electors' vote, then and only then, should the decision be made by the national legislature, namely the House of Representatives: *Id.*

B. Presidential Electoral Count Provisions.

The presidential electoral count procedures in the original Constitution are largely identical to those in the Twelfth Amendment. These procedures – in particular those regarding the Vice President's role as Presiding Officer in counting electoral votes and the House's "one vote per state delegation" for choosing the President – were carried over into the Twelfth Amendment *verbatim* -- with one important exception.

A critical and near fatal flaw in this process became apparent immediately after the Presidency of George Washington, in the elections of 1796 and 1800, namely, that the while the original Constitutional language gave each elector two votes, "it did not allow the electors to designate one of their votes for President and one for Vice President.[2]" As a result, "the vice presidency went to the losing Presidential candidate with the largest number of electoral votes." Richard K. Neumann, *The Revival of Impeachment as a Partisan Political Weapon*, 34 Hastings Const. L.Q. 161, 180 (2002).

1. The Election of 1800.

Thomas Jefferson lost the election of 1796 to John Adams, receiving the second highest number of electoral votes. As a result, he became President Adams' Vice President. Jefferson ran for President again in 1800 for the Democratic-Republican Party, as the candidate for President and Aaron Burr as candidate for Vice President. As sitting Vice President, Vice President Jefferson was also President of the Senate and Presiding Officer over the Electoral College proceedings. As such, he was responsible for counting electoral votes for himself and competing candidates.

[2] *The Twelfth Amendment: A Constitutional Ticking Time Bomb*, Nathan L. Colvin & Edward B. Foley, 65 U. MIAMI L. REV. 475, 489 (2010).

2. Legislative History and Ratification.

In 1803, both Houses approved the text of the Twelfth Amendment, and 13 of 17 States had ratified it by June of 1804. Foley (2010) at 490. The Amendment provides, in relevant part:

> The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate; -- **The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted[.]**

U.S. Const. amend. XII (emphasis added).

Commentators argue that the passive voice in the sentence "and the votes shall then be counted" means that the President of the Senate, the Vice President, has "further powers hidden in the passive voice" which today would be referenced as "discretion." Bruce Ackerman & David Fontana, *Thomas Jefferson Counts Himself into the Presidency*, 90 VA. L. REV. at 629 (2004).

This is consistent with the Framers' original intent and their inherent bias that a presiding officer was not merely a ceremonial figure, but one that has authority to render substantive decisions in the face of disputes or other disruptions to the electoral process devolved to his mandate.

C. The Congress That Enacted 3 USC 5 Recognized that It Required a Constitutional Amendment but Adopted the ECA as a Shortcut Because They did not Have the Votes.

In Section 2 of the Electoral Count Act of 1887, codified at 3 U.S.C. § 5, Congress sought to require States to resolve any disputes over the appointment of Presidential electors to avoid the necessity for Congress to do so in the 1876 election. "What Congress wanted was for the states to

develop, or apply, their existing, more streamlined election laws to Presidential Elections." Stephen A Siegel, The Conscientious Congressman's Guide to the Electoral Count Act of 1887, 56 Fla. L. Rev. 541, 585 (2004). Members of Congress recognized at the time that they could not require states to do so "absent a constitutional amendment." Id. at 586 (citations omitted). Because Congress was "[u]nable to agree on any constitutional amendment," it attempted, "to remove, as far as it is possible to be done by legislation . . ., a difficulty which grows out of an imperfection in the Constitution itself.'" Id. at 658-59 (*quoting* 17 Cong. Rec. 1019 (1886) (statement of Sen. Hoar)).

This was a continuation of Congress' prior debate over the repeal of the Reconstruction-Era Twenty-Second Joint Rule of 1865 ("Joint Rule"), which had authorized either house of Congress to reject a State's electors. Republicans had been dominant in the Reconstruction Era following 1865, but by 1875 it was "anticipated that the Democrats would control the House of Representatives for the first time in two decades," and "Senate Republicans were no longer willing to allow the House to unilaterally discard electoral votes that could turn the outcome of the election or throw the election to the House." Nathan L. Colvin & Edward B. Foley, *The Twelfth Amendment: A Constitutional Ticking Time Bomb*, 64 U. MIAMI L. REV. 475, 499 (2010).

In the run up to the 1876 election, the Senate debated repeal or modification of the Joint Rule where the "primary disagreement" was whether Congress could adopt a rule permitting one house of Congress to reject a State's electoral votes "without a constitutional amendment," and "[t]he dividing lines were drawn between those did not believe the Constitution gave Congress a right to say whether votes shall be counted or not be counted and those who did." *Id.* at 500 (internal quotations and citations omitted). Consequently, if Congress itself cannot determine

whether to count (or not count votes), then that function must remain with the President of the Senate.

1. History of Competing State Electoral Slates

Historical precedent for dual electoral slates getting to the President of the Senate arose, before the ECA. While the circumstances varied, in the Tilden and Hayes election of 1876 each of three states submitted two or three slates of electors with at least one each for Tilden and Hayes. There were also serious allegations of violence, voter intimidation, fraud, and corruption.

- **Florida:** Three sets of electors: (1) Hayes, from Board of State Canvassers and signed by Governor; (2) Tilden, alleging violence, voter intimidation, fraud, and discarding Tilden ballots, "the slate of Presidential electors pledged to Tilden decided to go ahead and meet as if they were the authorized Electoral College delegates from Florida," certified by Florida Attorney General; and (3) Tilden, when the Florida legislature called for a new canvas, which certified electors for Tilden and a Florida court ruling that Tilden electors were legitimate, the newly elected Democratic Governor certified third slate of electors for Tilden. Foley (2010) at 503-04.
- **Louisiana:** "The first slate of electors was for Hayes; it came from the canvassing board and was certified by the ostensible governor. The second was for Tilden, with these electors disregarding the work of the canvassing board on the ground that the board was corrupt.157 This slate was certified by a different individual who purported to be the lawful governor. The third slate was in effect a duplicate of the first." Id. at 504.
- **South Carolina:** "South Carolina submitted two slates, one for Hayes from the Board of Canvassers, certified by the governor, and another for Tilden, alleging that the Tilden electors were the rightful voters." Id.

- **Oregon:** "In Oregon, the voters had elected a postmaster general as one of Hayes's electors, a possible violation of the constitutional prohibition against federal office holders acting as electors. Because of this, the elector resigned from his office as postmaster, and Oregon law allowed the remaining electors to choose a replacement; they chose the resigned elector. The Democratic Oregon governor refused to certify this slate of electors and instead certified a slate with two Hayes electors and a Tilden elector as a replacement for the former postmaster. The secretary of state, on the other hand, submitted a certificate that contained the three original Hayes electors and noted that there was no question that the Hayes electors received the most votes on election day." *Id.* at 504-05.

As a result of this tumult, Congress found a quick fix to potential future disruptions through enactment of the ECA.

a) Binding Law, Congressional Rule, or Unreviewable Statement of Principle/Moral Obligation?

"Whether the ECA is a statute or a joint rule enacted in statutory form is ambiguous. In truth, both theories underlay its enactment. The difference between the two theories disappears, however, to the extent that the ECA involves political questions not subject to judicial review. The difference between the two theories also disappears to the extent that Congress self-enforces its own internal rules." Siegel at 565.

Internal Rule: "Many congressmen spoke in opposition to the ECA on the grounds that legislating the matter was an unconstitutional attempt to bind Congress's discretion. It was unconstitutional, they said, because enacting and amending legislation required Presidential approval (or an extraordinary majority in Congress), and thus improperly involved the President in implementing the rules for determining Presidential Elections. In addition, one Congress could never bind another in this matter. Congress could govern itself, they reasoned, by enacting

concurrent rules for each vote count, or a continuing joint rule which the houses could amend at any time." Siegel at 560-61.

Binding Legislation: "Many other congressmen believed that electoral vote counting was a proper subject for binding legislation. Congress's rulemaking authority governed its own proceedings, and the ECA was properly legislative because through it the two houses adopted rules to govern each other's actions. Moreover, the power to count electoral votes was a power vested in the national government, and the Sweeping Clause allows Congress to "make all Laws which shall be necessary and proper for carrying into Execution . . . all . . . Powers vested by this Constitution in the Government of the United States, or in any Department . . . thereof." Siegel at 561.

"Recognizing the equality of the houses of Congress, the authors of the ECA presumed that, under the Constitution, Congress could not count an electoral vote unless both the House and the Senate agreed that it should be counted. Given the frequency of houses of Congress being controlled by different political parties, frequent tie votes and the inability to decide questions raised during the count were ever-present threats when Congress met to count electoral votes. … The ECA, in effect, arbitrated differences between the houses by "reduc[ing] to a minimum the cases where any difference [between the houses] can properly arise.'" Stephen A Siegel, The Conscientious Congressman's Guide to the Electoral Count Act of 1887, 56 Fla. L. Rev. 541, 557 (2004).

Unreviewable/Unenforceable Statement of Principle/Moral Obligation: "These congressmen assumed that Congress's electoral count decisions were not subject to judicial review. Because they believed that '[n]o power in this Government can or ever will set aside and annul the

declaration of who is elected President . . . when that declaration is made in the presence of the two Houses of Congress.'" Siegel at 563.

"Yet, to these congressmen, an unenforceable law was better than no agreement at all. In addition, they believed an unenforceable law was better than a joint rule because of the law's greater ability to bind Congress's conscience and create a moral obligation to abide by its terms. Congress understood that even if the ECA enacted rules of only moral obligation, it nonetheless would constrain behavior both outside and inside Congress" Siegel at 564. In Chris Land & David Schultz, ON THE UNENFORCEABILITY OF THE ELECTORAL COUNT ACT, 13 Rutgers J.L. & Pub. Pol'y 340, 386 (2016), Land and Shultz note that, while the concept of non-binding "rulemaking statutes" and "anti-entrenchment clauses" developed during the 20th Century, "a number of Congressmen stated during debate on the ECA that this measure would attempt in vain to entrench procedures that would bind future Congresses." Land at 376 (*citing* 8 CONG. REC. 164 (1878)

As stated by Sen. Augustus Garland in debate on a precursor to the ECA: "**An act passed by a previous Congress assuming to bind ... a succeeding Congress need not be repealed because it is void; and for that I reason I oppose this bill.**" Id. (Emphasis added).

Plaintiffs could not have stated the principle any clearer. The ECA is void and unconstitutional because a previous Congress cannot bind a succeeding one.

D. <u>Plaintiffs' requested remedy is warranted.</u>

Amicus BLAG argues that abandoning the ECA will create havoc and cast the upcoming January 6th Joint Session into turmoil. They offer a "parade of horribles" that somehow justify continuing with a statutory scheme that flies on the face of the Constitution and the Framer's intent. They argue, "we know better" than those who framed the Constitution. Indeed, under their casual

degradation of the Vice-President's role at the Joint Session, they may be right. If we abandon the ECA, there is no one in charge. And that's precisely the point.

The Constitution did not leave matters to chance. It empowered the Vice-President to take control of the proceeding and resolve disputes. Therefore, the remedy sought by Plaintiffs is easily crafted. The Court should declare that:

- ECA sections 5 and 15 are unconstitutional.
- When a member of the House objects to a slate of electors or between two slates of competing electors presented for any single state, the Vice President, as President of the Senate, shall determine the dispute as he sees fit. He may choose between competing elector slates or he may choose to disregard electors altogether from any state.
- If after all the states' electors are counted, no single candidate had 270 votes, the House shall vote for President, which each State delegation having one vote.

The sections that follow demonstrate Plaintiffs' entitlement to that relief.

II. PLAINTIFFS ARE LIKELY TO PREVAIL ON THE MERITS.

In evaluating a plaintiff's claim for interim or emergency relief, the first—and most important—factor is the likelihood of movants' prevailing. *Winter v. Natural Resources Def. Council, Inc.*, 555 U.S. 7, 20 (2008). As set forth in this section, Plaintiffs are likely to prevail because they are right on the merits, have a cause of action against the Defendant in this Court, and this Court has jurisdiction over Plaintiffs' claims.

A. The Electoral Count Act is unconstitutional.

With limited exceptions, the Defendant and *amici* rely jurisdictional and prudential gate-keeper arguments to avoid the merits. In so doing, they largely concede the merits. *See U.S. Bank Nat'l Ass'n v. Verizon Commc'ns, Inc.*, 761 F.3d 409, 425 (5th Cir. 2014).

1. Unconstitutional laws are nullities.

Neither the Defendant nor *amici* dispute that—to the extent a statute is unconstitutional—the statute is a nullity. *See* Pls.' Mot. at 18.

2. The Electoral Count Act violates the Electors Clause and the Twelfth Amendment.

Neither the Defendant nor his *amici* dispute that nothing in the Constitution supports the Electoral Count Act's use of the state executive's decisions on a state's voting. *See* Pls.' Mot. at 18-22.

3. The Electoral Count Act violates the Constitution's structural protections of liberty.

Neither the Defendant nor his *amici* dispute that the Electoral Count Act violates the Presentment Clause. *See* Pls.' Mot. at 22-23.

4. The Electoral Count Act's enactment in 1887 does not create a vested right or tradition of violating the Constitution.

Amicus BLAG argues not only that the Electoral Count Act creates a "tradition" but also that "since the Presidential election of 1888 that Congress has conducted the Joint session pursuant to the procedures set forth in the Electoral Count Act of 1887." BLAG Br. at 2. Citing *Chiafalo v. Washington*, 140 S.Ct. 2316, 2326 (2020), *Amicus* BLAG further argues that "[s]uch a long and established practice [carries] great weight in a proper interpretation of constitutional provisions." BLAG Br. at 20. Similarly, Defendant's brief argues that the Electoral Count Act is "procedure" that "[f]ollow[s] a century of debate over the appropriate process under the Constitution for counting electoral votes and resolving any objections thereto, Congress enacted the Electoral Control Act of 1887." Def.'s Opp'n at 2.

The *Chiafalo* Court, however, held that

> "[T]he presidential electors," one historian writes, "were understood to be instruments for expressing the will of those who selected them,

> not independent agents authorized to exercise their own judgment." Whittington, Originalism, Constitutional Construction, and the Problem of Faithless Electors, 59 Ariz. L. Rev. 904, 911 (2017). And when the time came to vote in the Electoral College, all but one elector did what everyone expected, faithfully representing their selectors' choice of presidential candidate.

Chiafalo v. Washington, 140 S.Ct. at 2326. Wherein Presidential Electors went against their own party candidates as individuals - despite their elected roles… and completely in opposite to the case at bar where Plaintiff Electors, unified with their Party's Presidential nominee, seek relief on the unconstitutional application of the ECA because of its direct violation of how their slate of electors' votes are to be treated under it versus the Twelfth Amendment. The Supreme Court explained that in *Chiafalo*, "[t]he Electors' constitutional claim has neither text nor history on its side." *Id*. at 2328. Whereas these Plaintiffs submit that both history and text of the Twelfth Amendment is on their side – which neither the House in its Amicus or the Defendant actually genuinely dispute, but instead relying heavily on the history of process since 1888[3]--while ignoring the history that led to the Congressional Amendment of the Twelfth Amendment.

The passage of time does not bar fresh challenges to the application of unconstitutional or *ultra vires* laws or regulations. *Texas v. United States*, 749 F.2d 1144, 1146 (5th Cir. 1985). "Arbitrary [governmental] action becomes no less so by simple dint of repetition." *Judulang v. Holder*, 565 U.S. 42, 61 (2011). Mere "tradition" is no basis for preserving legal doctrines that plainly violate the Constitution. *Compare Plessy v. Ferguson*, 163 U.S. 537, 540 (1896) with *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954). Defendant cannot claim "prejudice" from a suit that challenges the Electoral Count Act in the first election since that statute's enactment in 1887 where the statute could unconstitutionally affect the outcome.

[3] The Electoral Count Act was amended in 1948 in its present form, but never has it been passed as a Constitutional Amendment.

5. The Necessary and Proper Clause does not save the Electoral Count Act.

Amicus BLAG argues that the Necessary and Proper Clause authorized Congress to enact the Electoral Count Act.[4] BLAG Br. at 21. The Twelfth Amendment is not one of the "foregoing powers" under the Clause, *id.*, and the Twelfth Amendment does not expressly vest any power in the Congress to count votes or to vote, unless and until no candidate achieves a majority of electoral votes. *See* U.S. CONST. amend. XII. To the extent that the Constitution does vest a dispute-resolution power for the vote-counting function, that power could just as easily be assigned to the Vice President as an "officer thereof" as to Congress itself under the express terms of the Necessary and Proper Clause. U.S. CONST. art. I, §8, cl. 18. Indeed, Vice Presidents Adams and Jefferson undertook such actions in the 1796 and 1800 elections, Bruce Ackerman & David Fontana, *Thomas Jefferson Counts Himself into the Presidency*, 90 VA. L. REV. 551, 585, 571-90 (2004), and the United States adopted the Twelfth Amendment shortly thereafter, without trimming the Vice President's responsibilities.

To contrary, as Justice Story explained, neither the original Constitution nor the Twelfth Amendment included a dispute-resolution provision:

> In the original plan, as well as in the amendment, no provision is made for the discussion or decision of any questions, which may arise, as to the regularity and authenticity of the returns of the electoral votes …. It seems to have been taken for granted, that no question could ever arise on the subject; and that nothing more was necessary, than to open the certificates, which were produced, in the presence of both houses, and to count the names and numbers, as returned.

[4] The Clause provides that "Congress shall have power … [t]o make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof." U.S. CONST. art. I, §8, cl. 18.

J. Story, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1464 (Boston, Hilliard, Gray, & Co. 1833). Whatever the Vice President's dispute-resolution powers, the House's theory of dispute resolution by the House and Senate is constitutionally impossible.

Constitutional law recognizes two distinct types of unconstitutionality: "laws for the accomplishment of objects not entrusted to the government" and those "which are prohibited by the constitution." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819). Put another way, "a federal statute, in addition to *being authorized* by Art. I, § 8, must also '*not [be] prohibited*' by the Constitution." *United States v. Comstock*, 560 U.S. 126, 135 (2010) (*quoting McCulloch*, 17 U.S. (4 Wheat.) at 421) (alterations in *Comstock*, emphasis added). Clearly, "the Constitution does not conflict with itself by conferring, upon the one hand, a … power, and taking the same power away, on the other, by the limitations of the due process clause." *Brushaber v. Union Pac. R. Co.*, 240 U.S. 1, 24 (1916). As applied here, that means that the Necessary and Proper Clause did not authorize the joint session or the two houses, separately, to violate the Presentment Clause. *See* Pls.' Mot. at 22-23 (all votes, resolutions, and orders—except adjournments—require presentment).

The fact that Congress steadfastly believed in bicameral resolutions steadfastly until the Supreme Court resolved the issues almost 200 years into the Constitution, *INS v. Chadha*, 462 U.S. 919, 946 (1983), goes a long way to explaining how the Electoral Count Act survived 133 years:

> A close reading of *Chadha*, unavailable of course to the participants in the Electoral Count Act debates, fortifies the basic argument made by Senator George and casts further doubt upon the constitutionality of the Electoral Count Act. The *Chadha* Court carefully explained why the "one-House veto" provision of the Immigration and Nationality Act was subject to the requirements of bicameralism and presentment in Article I. The Court began by noting that whether actions taken by either House are, in law and

> fact, an exercise of legislative power depends not on their form but upon whether they contain matter which is properly to be regarded as legislative in its character and effect. The Court then described the one-House veto provision in that case as one that had the purpose and effect of altering the legal rights, duties and relations of persons, including the Attorney General, Executive Branch officials and Chadha, all outside the legislative branch[.]

Vasan Kesavan, *Is the Electoral Count Act Unconstitutional*?, 80 N.C.L. REV. 1653, 1791 (2002). A second factor is that the last election where the Electoral Count Act would have mattered was in 1876 (*i.e.*, more than a decade *prior* to its enactment). It should be no surprise that Plaintiffs bring this suit now, a fortnight after an electoral vote in which the Electoral Count Act matters for the first time. These two factors—the advent of *Chadha* in 1983 and the novelty of this pandemic election in 2020—readily answer the House's incredulity about "why now?"

B. Plaintiffs have a cause of action in this Court.

Plaintiffs have a cause of action under *Ex parte Young* and the Declaratory Judgment Act.

1. *Ex parte Young* applies.

The availability of judicial review does not hinge on the merits of an argument that government action violated a statute or the Constitution: "inquiry into whether suit lies [for judicial review] under *Ex parte Young* does not include [merits] analysis," *Verizon Md., Inc. v. Public Serv. Comm'n of Md.*, 535 U.S. 635, 636-37 (2002). Plaintiffs allege that proceeding under the Electoral Count Act violates the Constitution, and this is all the is required for purposes of a cause of action.

2. The Declaratory Judgment Act and Rule 57 apply.

With the advent of the Declaratory Judgment Act, 28 U.S.C. §§2201-2202 ("DJA"), equitable relief in the form of a declaration of the law is even more readily available that traditional equitable relief in the form of injunctions. The federal-question statute, 28 U.S.C. §1331, provides subject-matter jurisdiction for nonstatutory review of federal agency action. *Califano v. Sanders*, 430 U.S. 99, 105 (1977) (1976 amendments to §1331 removed the amount-in-controversy

threshold for "any [federal-question] action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity") (*quoting* Pub. L. 94-574, 90 Stat. 2721 (1976)), and 28 U.S.C. §2201(a) authorizes declaratory relief "whether or not further relief … could be sought." *Accord Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 70-71 n.15 (1978); *Steffel v. Thompson*, 415 U.S. 452, 471-72 (1974). Since 1976, §1331 has authorized DJA actions against federal officers, regardless of the amount in controversy. *Sanders*, 430 U.S. at 105 (quoted *supra*). Declaratory relief makes it even easier for parties to obtain pre-enforcement review.[5]

Significantly, the availability of declaratory relief against federal officers predates the Administrative Procedure Act, 5 U.S.C. §§ 551-706 ("APA"), *see* WILLIAM J. HUGHES, FEDERAL PRACTICE §25387 (1940 & Supp. 1945); EDWIN BORCHARD, DECLARATORY JUDGMENTS, 787-88, 909-10 (1941), and the APA did not displace such relief, either as enacted in 1946 or as amended in 1976. *See* APA LEG. HIST., at 37, 212, 276; 5 U.S.C. §559; *Darby v. Cisneros*, 509 U.S. 137, 153 (1993) (rejecting argument that 1976 APA amendments expanded APA's preclusion of review). Thus, even if APA §10(c) precludes declaratory relief *under the APA*, 5 U.S.C. §704, suitable plaintiffs nonetheless can obtain that relief *under the DJA*.

The Fifth Circuit has identified a nonexclusive list of seven factors that a district court must consider when exercising its discretion to hear, stay, or dismiss a case brought under the DJA.

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[5] In 1980, Congress amended §1331 to its current form, Pub. L. No. 96-486, §2(a), 94 Stat. 2369 (1980), without repealing the 1976 amendment relied on by *Sanders* and its progeny. H.R. REP. NO. 96-1461, at 3-4, *reprinted in* 1980 U.S.C.C.A.N. 5063, 5065; *Bowen v. Massachusetts*, 487 U.S. 879, 891 n.16 (1988); *U.S. v. Mitchell*, 463 U.S. 206, 227 & n.32 (1983); *cf. Morton v. Mancari*, 417 U.S. 535, 550 (1974) (repeal by implication is disfavored). Indeed, "'repeals by implication are disfavored,' and this canon of construction applies with particular force when the asserted repealer would remove a remedy otherwise available." *Schlesinger v. Councilman*, 420 U.S. 738, 752 (1975).

> (1) whether there is a pending state action in which all of the matters in controversy may be fully litigated; (2) whether the plaintiff filed suit in anticipation of a lawsuit filed by the defendant; (3) whether the plaintiff engaged in forum shopping in bringing the suit; (4) whether possible inequities in allowing the declaratory plaintiff to gain precedence in time or to change forums exist; (5) whether the federal court is a convenient forum for the parties and witnesses; (6) whether retaining the lawsuit would serve the purposes of judicial economy; and (7) whether the federal court is being called on to construe a state judicial decree involving the same parties and entered by the court before whom the parallel state suit between the same parties is pending.

Sherwin-Williams Co. v. Holmes Cty., 343 F.3d 383, 388 (5th Cir. 2003); *see also Frye v. Anadarko Petroleum Corp.*, 953 F.3d 285, 293-94 (5th Cir. 2019) (requiring actual controversy, the court's authority for declaratory relief, and the court's discretion).

Under the *Sherwin-Williams* factors, this Court should grant the requested declaratory relief:

- **Pending state action**. There is no pending state action.
- **Anticipatory suit**. The declaratory-judgment Plaintiffs did not race the Defendant to the courthouse; Defendant did not plan to sue Plaintiffs.
- **Forum shopping**. Rep. Gohmert is the lead plaintiff and has brought suit in his home district as Title 28 allows federal plaintiffs to do. Plaintiff Arizona Electors have no other ties to this forum, but their claims do not materially change the claims before this Court.
- **Possible inequities on timing and forum**. Rep. Gohmert is the lead plaintiff and has brought suit in his home district as Title 28 allows federal plaintiffs to do.
- **Federal court's convenience**. Given that Plaintiffs have sued the Vice President of the United States on a question of federal law, a state forum would not be an option.
- **Judicial economy**. There are no concerns about judicial economy because this is the only action .between the parties.

- **Federalism concerns from parallel actions**. There are no parallel state-court actions for Rep. Gohmert, and—although the Arizona Elector Plaintiffs have engaged in state-court litigation—the issues here are purely federal.

This Circuit's primary concern with declaratory-judgment actions is whether, under that the standard of *Brillhart v. Excess Ins. Co. of Am.*, 316 U.S. 491 (1942), "the questions in controversy between the parties to the federal suit … can be better settled in the proceeding pending in the state court." *Sherwin-Williams*, 343 F.3d at 389 (quoting *Brillhart v. Excess Ins. Co. of Am.*, 316 U.S. at 494). As indicated, this is an entirely federal action that does not raise that concern.

Under the parallel *Anadarko Petroleum* standards, declaratory relief is also appropriate under the exigent circumstances here:

- **An actual controversy is imminent**. The concern with that an actual controversy exists is easily met by the exigent circumstances of a contested election potentially being decided under an unconstitutional process as early as January 6. *See* Section II, *supra*. That does not trigger the Fifth Circuit's concern that the dispute is "not sufficiently definite and immediate to be justiciable." *Anadarko Petro. Corp.*, 953 F.3d at 293.
- **Jurisdiction**. This Court has jurisdiction for this dispute, *see* Section II.C, *supra*, and none of the concerns about superior state-court jurisdiction or burdens of factual proof for diversity jurisdiction enter into the analysis. *See id.*
- **Discretion**. Plaintiffs respectfully submit that this Court must address the constitutional concerns presented here: " flores

3. The action is not barred by laches.

Amicus BLAG cites laches—namely, an "unreasonable, prejudicial delay in commencing suit," *Petrella v. MGM*, 572 U.S. 663, 667 (2014)—as a basis to dismiss this action or deny relief.

BLAG Br. at 14-19. Because Plaintiffs did not have a ripe claim until December 14, 2020 and filed this action on December 27, 2020, laches presents no question of unreasonable delay. Plaintiffs' timing is measured from their claims' arising, not from the enactment of the Electoral Count Act in 1887:

> It is axiomatic that a claim that has not yet accrued is not ripe for adjudication.

Sid Richardson Carbon & Gasoline Co. v. Interenergy Res., 99 F.3d 746, 756 (5th Cir. 1996). For that reason, Justice Blackmun aptly called laches "precisely the opposite argument" from ripeness. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 915 n.16 (1990) (Blackmun, J., dissenting); *accord What-A-Burger of Va., Inc. v. Whataburger, Inc.*, 357 F.3d 441, 449-50 (4th Cir. 2004) ("'One cannot be guilty of laches until his right ripens into one entitled to protection. For only then can his torpor be deemed inexcusable'") (quoting 5 J. Thomas McCarthy, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 31: 19 (4th ed. 2003); *Gasser Chair Co. v. Infanti Chair Mfg. Corp.*, 60 F.3d 770, 777 (Fed. Cir. 1995) (same); *Profitness Physical Therapy Ctr. v. Pro-Fit Orthopedic & Sports Physical Therapy P.C.*, 314 F.3d 62, 70 (2d Cir. 2002) (same). Because Plaintiffs could not have brought this action before the electoral college vote on December 14, 2020., this Court should reject any suggestion of unreasonable delay.[6]

[6] In support of its timing argument, BLAG cites a raft of extra-Circuit district court decisions and one unreported decision from this Court. *See* BLAG Br. at 15 n.5. In *Collins v. W. Digital Techs., Inc.*, 2011 WL 3849310, 2011 U.S. Dist. LEXIS 96663, at *14 (E.D. Tex. Aug. 29, 2011) (No. 2:09-cv-219-TJW), the plaintiff waited 13 years to file suit. By contrast, Plaintiffs waited 13 days to file their Complaint. Specifically, Plaintiffs' claims arose on December 14, 2020, and Plaintiffs filed their complaint on December 27, 2020. Comparing 13 years to 13 days is absurd. Although BLAG's citation to *Day v. McDonough*, 547 U.S. 198, 209 (2006), has higher pedigree than the other citations in BLAG's footnote, *Day* is simply inapposite to this case: "In sum, we hold that district courts are permitted, but not obliged, to consider, *sua sponte*, the timeliness of a state prisoner's *habeas* petition." *Id.*

Even if Plaintiffs had delayed bringing suit, the Defendant still would need to show *prejudice* as a prerequisite to obtaining dismissal for laches. *Envtl. Def. Fund, Inc. v. Alexander*, 614 F.2d 474, 479 (5th Cir. 1980). The test for prejudice requires balancing the equities: "Measuring prejudice entails balancing equities." *Id.* The Vice Presidency has not acquired a vested right to violate the Constitution because 133 have passed since Congress enacted the Electoral Count Act in 1887. The passage of time does not bar fresh challenges to the application of unconstitutional or *ultra vires* laws or regulations. *Texas v. United States*, 749 F.2d 1144, 1146 (5th Cir. 1985). "Arbitrary [governmental] action becomes no less so by simple dint of repetition." *Judulang v. Holder*, 565 U.S. 42, 61 (2011). In truth, however, the Electoral Count Act has laid dormant since its enactment in 1887, and the only prior elects in which it might have mattered occurred prior to 1887 (*e.g.*, 1800 or 1876). The Defendant cannot claim "prejudice" from a suit that challenges the Electoral Count Act in the first election since that statute's enactment in 1887 where the statute could unconstitutionally affect the outcome.

4. Transfer would be inappropriate.

BLAG suggests that Rep. Gohmert lacks standing and that he should therefore be dismissed and the case transferred to a venue suitable to the Arizona Electors. BLAG Br. at 12. Courts do not generally dismiss plaintiffs piecemeal, and Rep. Gohmert—a Tyler resident with his principal home-state office here—satisfies the venue rules and statutes. Since only one plaintiff needs to have standing, it would be entirely possible that an out-of-state plaintiff would provide standing while an in-state resident provides venue. But that is a mere hypothetical because Rep. Gohmert has standing. *See* Section I.C.1, *infra*.

5. No absent third parties are necessary parties.

An *amicus* has suggested that the rival state of Arizona electors are necessary parties that must be joined under FED. R. CIV. P. 19. Dowling Br. at 6-8. While *amicus* arguments should be

deemed waived unless raised by a party, *Christopher M. v. Corpus Christi Indep. Sch. Dist.*, 933 F.2d 1285, 1293 (5th Cir. 1991) ("an issue waived by appellant cannot be raised by *amicus curiae*"), the Rule 19 necessary-party argument is meritless.

Leaving aside whether Arizona citizens are "subject to service of process" in Texas, FED. R. CIV. P. 19(a)(1) so as even to be relevant here, this Court can "accord complete relief among existing parties" with respect to declaratory and injunctive relief regarding the Electoral Count Act and the Constitution's alternate procedures. *Id.* 19(a)(1)(A). More importantly, the rival electors cannot claim an "interest" in an unconstitutional statute:

> It is undoubtedly true that even expectancies characterized as "vested rights" under state law must fall before a court adjudication that [federal law] mandates that the expectancies not be fulfilled.

United States v. City of Miami, 614 F.2d 1322, 1341-42 (5th Cir. 1980) (subjective expectations on the continued adherence to past practice are not a sufficient interest). Here, as in *Miami*, "the crucial point here, to wit, that the [proposed relief] orders no relief against the [absent party]." *Id.* at 1329, Simply put, the relief requested has no legally prejudicial effect on any absent party:

> Unless the [absent party] can demonstrate that it has been ordered to take some action by the decree, or ordered not to take some action, or that its *rights or legitimate interests* have otherwise been affected, it has no right to prevent the other parties and the Court from signing the decree.

Id. (emphasis added). As indicated with respect to laches, *see* Section I.B.3, *supra*, there is no vested right in anyone to the continued following of the blatantly unconstitutional Electoral Count Act.

6. <u>28 U.S.C.§ 2403(a) does not require pausing relief.</u>

Mr. Dowling argues that this Court should defer reaching the merits until Plaintiffs serve the U.S. Attorney General pursuant to 28 U.S.C.§ 2403(a). See Dowling Br. at 8-9. That section provides as follows:

> In any action, suit or proceeding in a court of the United States to which *the United States or any agency, officer or employee thereof is not a party*, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the United States to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The United States shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

28 U.S.C.§ 2403(a) (emphasis added). As signaled by the emphasized text, Defendant here is an officer of the United States. Moreover, Plaintiffs have served the United States Attorney for the Eastern District of Texas (ECF #5) and the United States Attorney General (ECF #10). This argument is meritless.[7]

C. <u>This Court has constitutional and prudential jurisdiction over Plaintiffs' claims.</u>

Although jurisdiction and the merits are "independent," *Howard v. Dretke*, 157 F.App'x 667, 670 (5th Cir. 2005), a plaintiff needs to be right on both issues to obtain interim relief: "Absent an adequate jurisdictional basis for the Court's consideration of the merits, there is *no likelihood* that the Plaintiff will prevail on the merits." *Herwald v. Schweiker*, 658 F.2d 359, 363 (5th Cir. 1981) (emphasis added). In this section, Plaintiffs establish this Court's jurisdiction.

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[7] The remaining arguments in Mr. Dowling's motion to dismiss are similarly meritless (*e.g.*, Plaintiffs do not plead a fraud count and so need not plead with particularity under FED. R. CIV. P. 9(b) and no party has requested discovery). Moreover, to the extent he raises bases for dismissal that differ from those raised by Defendant, Mr. Dowling would need to prove—and has not—his own standing: "For all relief sought, there must be a litigant with standing, whether that litigant joins the lawsuit as a plaintiff, a coplaintiff, or an intervenor of right. Thus, … an intervenor of right must demonstrate Article III standing when it seeks additional relief beyond that which the plaintiff requests." *Town of Chester v. Laroe Estates, Inc.*, 137 S.Ct. 1645, 1651 (2017).

1. This case presents an Article III case or controversy.

In a case where Plaintiffs ask an Article III court to hear a case against a federal defendant who is simultaneously a part of the Article I legislature and the Article II executive, Plaintiffs acknowledge that the jurisdictional scope of the federal judicial power under Article III is "important[t] … in maintaining separation of powers among the branches of the federal government." *In re Frazin*, 732 F.3d 313, 319 (5th Cir. 2013). It is also important for courts to "protect[] litigants," *id.*, and ultimately the judiciary's role to interpret the Constitution in properly presented cases and controversies: "The power to interpret the Constitution in a case or controversy remains in the Judiciary." *City of Boerne v. Flores*, 521 U.S. 507, 524 (1997). By bringing a proper case or controversy under Article III, Plaintiffs present this Court not only the opportunity but also the *duty*[8] to resolve issues that other courts have not decided because those courts found those cases, by those parties, to fall outside their Article III jurisdiction under the law of those other circuits. In some respects, this Court's opportunity and duty arise because these Plaintiffs press different claims that are justiciable, whereas other plaintiffs did not; in other respects, the law of this Circuit simply differs from the law of other circuits. *Compare, e.g.*, *Donald J. Trump for President, Inc. v. Sec'y Pa.*, No. 20-3371, 2020 U.S. App. LEXIS 37346, at *20 (3d Cir. Nov. 27, 2020) (candidate suffers generalized grievance from Elections Clause violations) *with LULAC v. City of Boerne*, 659 F.3d 421, 430 (5th Cir. 2011) (Rep. Gohmert has standing to vote for President under the Twelfth Amendment if the contested states' voters are constitutionally compromised); *cf. Heckler v. Mathews*, 465 U.S. 728, 739-40 (1984) (Plaintiff Arizona Electors have standing

[8] "The existence of the jurisdiction creates an implication of duty to exercise it." *Howlett v. Rose*, 496 U.S. 356, 369-70 (1990) (interior quotations omitted).

either to void the rival Arizona electors' votes or to count the Plaintiff Arizona Electors' votes in their place because the latter's votes are constitutionally compromised under the Elections Clause).

While Article III jurisdiction most often involves standing—*i.e.*, a plaintiff's injury in fact, the defendant's causation or traceability, and the court's power to redress, *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561-62 (1992)—the scope of Article III extends to other overlapping issues:

> "All of the doctrines that cluster about Article III—not only standing but mootness, ripeness, political question, and the like—relate in part, and in different though overlapping ways, to … the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government."

Allen v. Wright, 468 U.S. 737, 750 (1984) (quoting *Vander Jagt v. O'Neill,* 699 F.2d 1166, 1178-79 (D.C. Cir. 1983) (Bork, J., concurring)). As explained in the following eight subsections, all of these Article III gate-keeping tests are met here.

a) <u>The parties seek different relief.</u>

The Defendant argues that "Plaintiffs' suit seeks to empower the Vice President to unilaterally and unreviewably decide objections to the validity of electoral votes" such that "Plaintiffs are … not sufficiently adverse to the legal interests of the Vice President." Def's Opp'n at 3. But the Defendant seeks dismissal, whereas Plaintiffs seek declaratory and injunctive relief. Moreover, Plaintiffs express no opinion on whether Defendant's actions would be unreviewable, Instead, Plaintiffs merely seek declaratory and injunctive relief against an unconstitutional statute.

This is not an instance where "the parties desire precisely the same result" so that there is no Article III case or controversy. *GTE Sylvania, Inc. v. Consumers Union of the United States, Inc.*, 445 U.S. 375, 383 (1980) (interior quotations omitted); *Moore v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 47, 47-48 (1971) (*per curiam*). The Defendant seeks the dismissal of this action, and Plaintiffs ask this Court to enter a judgment in their favor. Even if one Plaintiff and the

Defendant were "friendly" in the sense of wanting the same thing, "[o]nly one plaintiff is needed to establish standing for each form of requested relief." *Pool v. City of Houston*, 978 F.3d 307, 312 n.7 (5th Cir. 2020) (citing *Town of Chester v. Laroe Estates, Inc.*, 137 S.Ct. 1645, 1651 (2017)). Whatever public statement one plaintiff made is not binding on the other plaintiffs, especially not a statement by one of the Arizona Electors on Rep. Gohmert.

b) <u>This Court must assume Plaintiffs' merits views to assess Plaintiffs' standing to sue.</u>

All of the briefs opposed to Plaintiffs' claims make the mistake of disputing Plaintiffs on the merits to attack Plaintiffs' standing. If that were how it works, every losing plaintiff would lose for lack of standing.

Put simply, that "confuses standing with the merits." *Initiative & Referendum Institute v. Walker*, 450 F.3d 1082, 1092 (10th Cir. 2006); *Adar v. Smith*, 639 F.3d 146, 150 (5th Cir. 2011) ("standing does not depend upon ultimate success on the merits"); *accord Lac du Flambeau Band of Lake Superior Chippewa Indians v. Norton*, 422 F.3d 490, 501 (7th Cir. 2005); *In re Columbia Gas Systems Inc.*, 33 F.3d 294, 298 (3d Cir. 1994); *cf. Cantrell v. City of Long Beach*, 241 F.3d 674, 682 (9th Cir. 2001). Instead, federal courts have jurisdiction over a case if "the right of [plaintiffs] to recover under [their] complaint will be sustained if the ... laws of the United States are given one construction," even if the plaintiffs' rights "will be defeated if [those federal laws] are given another." *Wheeldin v. Wheeler*, 373 U.S. 647, 649 (1963) (interior quotations omitted). Accordingly, federal courts should assume *the plaintiff's* merits views in evaluating their jurisdiction to hear the plaintiff's claims: "standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal." *Warth v. Seldin*, 422 U.S. 490, 500 (1975); *City of Waukesha v. EPA*, 320 F.3d 228, 235 (D.C. Cir. 2003) ("one must assume the validity of a plaintiff's substantive claim at the standing inquiry"); *Adar v. Smith*, *supra* (*en banc*).

With the idea in mind that this Court should assume Plaintiffs' merits views in evaluating standing, the need to contest this election should become apparent. The Constitution's Elections Clause and Electors Clause give state legislatures the plenary power to set election provisions, and yet—citing the COVID pandemic as either a reason or as an excuse—non-legislative actors in all the contested states systematically eroded ballot-integrity measures like signature or witness requirements and registration or mail-in deadlines to the point where Plaintiffs respectfully submit it is impossible to state who won from the mail-in votes because legal ones have been commingled with illegal ones.

Moreover, although ostensibly a question of state election law, these questions are federal the state election laws apply "not only to elections to state offices, but also to the election of Presidential electors," meaning that state law operates, in part, "by virtue of a direct grant of authority made under Art. II, § 1, cl. 2, of the United States Constitution." *Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70, 76 (2000). Logically, "any state authority to regulate election to [federal] offices could not precede their very creation by the Constitution," meaning that any "such power had to be delegated to, rather than reserved by, the States." *Cook v. Gralike*, 531 U.S. 510, 522 (2001) (internal quotations omitted). "It is no original prerogative of State power to appoint a representative, a senator, or President for the Union." J. Story, 1 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 627 (3d ed. 1858). For these reasons, any "significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question." *Bush v. Gore*, 531 U.S. 98, 113 (2000) (Rehnquist, C.J., concurring).

c) <u>Plaintiffs suffer an injury in fact.</u>

The briefs opposed to Plaintiffs argue that Plaintiffs' claimed injuries are generalized grievances insufficient for Article III. As indicated, however, Plaintiffs here assert particularized injuries under this Circuit's Article III decisions and these Plaintiffs claims. *See* Section I.C.1,

supra. First, Rep. Gohmert has standing to challenge unconstitutional elector slates and to vote for President under the Twelfth Amendment as opposed to voting for objections under the Electoral Count Act. *See LULAC v. City of Boerne*, 659 F.3d at 430; *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 845 (5th Cir. 1993) (*en banc*).

This voting injury also answers BLAG's attempt to classify Rep. Gohmert's injuries under the rubric of legislative standing under *Raines v. Byrd*, 521 U.S. 811, 819-20 (1997). Under those decisions, a legislator or legislative body would only have standing for issues within their power (*e.g.*, information to be gotten by subpoena) or if they had a working majority of the relevant number of houses to enact or block legislation. *Va. House of Delegates v. Bethune-Hill*, 139 S.Ct. 1945, 1955 n.6 (2019); *Coleman v. Miller*, 307 U. S. 433, 446 (1939). Here, Rep. Gohmert seeks to vote for President under the Twelfth Amendment rather than in dispute-resolution proceedings for rival voter slates when the states in question have impossibly commingled the legal and illegal ballots so that it is impossible to know the result. As indicated in this section, this Circuit's voting-rights cases make clear that that is not a generalized grievance.

d) Plaintiffs' injuries are traceable to Defendant.

Defendant cites *Common Cause v. Biden*, 748 F.3d 1280, 1285 (D.C. Cir. 2014), and *CastaÑon v. United States*, 444 F. Supp. 3d 118, 133 (D.D.C. 2020), for the proposition that the House and the Senate—not the Vice President—caused Plaintiffs' injuries. *See* Def.'s Opp'n at 4. Along the same lines, Defendant deems it "a walking legal contradiction" to sue "the Vice President [to establish his] discretion over the count." *Id.* Defendant's false contradiction is readily set right.

First, *Common Cause* concerned the Senate filibuster rule's blocking immigration reform sought by the plaintiffs there (*i.e.*, legislation), and *CastaÑon* sought voting rights for District of Columbia residents (*i.e.*, also a legislative issue, as well as a constitutional issue in light of the

District's unique role under the Constitution). In those circumstances, the Vice President was not the party denying the plaintiffs' alleged rights. Here, by contrast, Vice President Pence is the presiding officer who will invoke the constitutional Twelfth Amendment process or the statutory Electoral Count Act process. As the presiding officer under both alternate paths, Defendant is an entirely reasonable person to seek to enjoin. *See, e.g.*, *Beeman v. Mays*, 163 S.W. 358, 358 (Tex. Civ. App. 1914) ("suit against appellant to enjoin him, as presiding officer, from holding an election"); 42 U.S.C. § 1988(a) (civil rights actions can incorporate state law that is not inconsistent with federal law).[9]

Second, Defendants' "walking legal contradiction" is no contradiction at all. Through declaratory and injunctive relief, Plaintiffs ask this Court to prevent Defendant from invoking the unconstitutional Electoral Count Act. As in *OCA-Greater Houston v. Texas*, 867 F.3d 604, 613-14 (5th Cir. 2017), Defendant cannot rely on this Circuit's *en banc* decision in *Okpalobi v. Foster* because—unlike in *Okpalobi*[10]—Plaintiffs have sued someone who implements the statute that Plaintiffs challenge. *Compare OCA-Greater Houston*, 867 F.3d at 613-14 *with Okpalobi v. Foster*, 244 F.3d 405, 415 (5th Cir. 2001) (*en banc*). (defendants had no "enforcement connection with the challenged statute"). Here, Defendant is the presiding officer of the process that Plaintiffs seek to enjoin and declare unconstitutional. Under that circumstance, Plaintiffs have "met [the] burden under *Lujan* to show that [their] injury is fairly traceable to and redressable by the defendant[]." *OCA-Greater Houston*, 867 F.3d at 614; *see also* Pls.' Mot at 7-9 (discussing traceability).

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[9] While § 1988(a) most typically imports state-law procedures for survivorship or statutes of limitations for federal civil-rights claims, *see, e.g., Jefferson v. City of Tarrant*, 522 U.S. 75, 79 (1997), nothing prevents citing state common-law cases for the proper party to sue to enjoin the operation of an unconstitutional process.

[10] In *Okpalobi*, the plaintiffs had sued Louisiana's Governor and Attorney General to challenge a statute that empowered private parties and state courts to act. *See* 244 F.3d at 415.

e) This Court can redress Plaintiffs' injuries.

As indicated in the prior section, Plaintiffs injuries are traceable to Defendant and thus also redressable by the Court because Defendant is the presiding officer of the challenged statutory process. *OCA-Greater Houston*, 867 F.3d at 613-14; *see also* Pls.' Mot at 9-10 (discussing redressability).

f) Plaintiffs' procedural injuries lower the constitutional bar for immediacy and redressability.

Defendant and the amicus briefs do not dispute that the procedural injuries that Plaintiffs seek to press lower the Article III bar for immediacy of injury and redressability. *See* Pls.' Mot. at 11-12.

g) This action is not moot.

"A case becomes moot only when it is *impossible* for a court to grant any effectual relief whatever to the prevailing party." *Knox v. SEIU, Local 1000*, 567 U.S. 298, 307 (2012) (internal quotations omitted, emphasis added). The joint session will not meet until January 6, and Congress could extend its statutory deadlines, as it did in connection with the only other similarly contested election. Ch. 37, 19 Stat. 227 (1877). Indeed, even without a new statute, the January 6 joint session could be extended further into January.

Simply put, "it ain't over 'til it's over." Jeffrey W. Stempel, *Sanctions, Symmetry, and Safe Harbors: Limiting Misapplication of Rule 11 by Harmonizing It with Pre-Verdict Dismissal Devices*, 60 FORDHAM L. REV. 257, 260 (1991) (quoting Yogi Berra). It remains possible for this Court to enter a judgment that addresses the constitutionality of the Electoral Count Act and its application to the 2020 election.

h) This action is ripe.

It is undisputed that rival slates of electors have been submitted for an outcome-determinative number of electoral votes. It is indisputable that at least one Representative and one Senator will, or are likely to, object to the slates from these contested states.[11] *See* Ex. A-B (Sen. Hawley plans to object); Ex. C (Sen.-Elect Tuberville); Ex. D (140 Republican House Members). The timing of future events provides no barrier to justiciability: "Where the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect." *Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp.*, 559 U.S. 662, 670 n.2 (2010). Indeed, even without objecting Representatives and Senators, the presence of an outcome-determinative number of rival slates of electors guarantees the need for the joint session to engage in some form of dispute-resolution process, which squarely presents the question of whether that process lies under the Electoral Count Act that Plaintiffs challenge.

2. Prudential limits on Article III jurisdiction do not apply.

In addition to Article III's jurisdictional limits, the judiciary has adopted prudential limits on standing that bar judicial review even when the plaintiff meets Article III's minimum criteria. *See, e.g.*, *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982) (zone-of-interests test); *Secretary of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 955 (1984) (litigants must raise their own rights); *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 12 (2004) (litigants cannot sue over generalized grievances more

[11] The Senate.gov press release and the related news reports about objections next week when Congress convenes in joint session are judicially noticeable. *Concerned Citizens for Equal. v. McDonald*, 863 F. Supp. 393, 394 (E.D. Tex. 1994) (newspapers); *Kitty Hawk Aircargo, Inc. v. Chao*, 418 F.3d 453, 457 (5th Cir. 2005) (government website).

appropriately addressed in the representative branches). Prudential issues are non-jurisdictional and can be waived. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014). In any event, none of those prudential limits apply here.[12]

a) Plaintiffs are within the relevant zones of interests.

The zone-of-interests test requires that a plaintiffs' claims be "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Ass'n of Data Processing Serv. Org., Inc. v. Camp*, 397 U.S. 150, 153 (1970). Here, Rep. Gohmert will proceed as a Member of the House of Representatives in the joint session, and he asks this Court to resolve whether the extant statutory procedure is unconstitutional (*i.e.*, he asks whether the Electoral Count Act is viable under the Twelfth Amendment and the rest of the Constitution). That claim is squarely within the zone of the constitutional provisions that he invokes. Similarly, the Plaintiff Arizona Electors ask to be treated fairly in the joint session, *vis-à-vis* their relative merits with the rival slate of Arizona electors. Under the constitutional process that the Plaintiff Arizona Electors invoke, they have a chance to be counted. Under the Electoral Count Act, the Democrat majority in the House has made clear it will vote for Mr. Biden, and the Governor of Arizona has supported that position (*i.e.*, the Plaintiff Arizona Electors will not be counted under the Electoral Count Act). The Plaintiff Arizona Electors' claims thus also fall within the zone of interests of the constitutional provisions that Plaintiffs invoke.

[12] Arguments not pressed by an actual party (*e.g.*, if raised solely by an *amicus*) are waived. *Christopher M. v. Corpus Christi Indep. Sch. Dist.*, 933 F.2d 1285, 1293 (5th Cir. 1991) ("an issue waived by appellant cannot be raised by *amicus curiae*"); *cf. Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 97 n.4 (1991) (distinguishing jurisdictional arguments raised solely by *amicus*).]

b) Rep. Gohmert can press the interests of his constituents and of himself as a Texas voter.

In addition to his own standing as a Texas voter in the election and as a Member of Congress in the procedures under the Electoral Count Act and Twelfth Amendment, Rep. Gohmert has standing to raise his constituents' rights under the prudential test for third-party standing. *See Kowalski v. Tesmer*, 543 U.S. 125, 128-30 (2004) (requiring the plaintiff to have its own Article III standing, a relationship with the rights holder, and that some hindrance keeps the rights holder from asserting its own rights). The only *constitutional* and jurisdictional requirements are the Article III requirements, with the others being prudential. *Caplin & Drysdale v. U.S.*, 491 U.S. 617, 623 n.3 (1989). Prudential limits are generally waivable by a party, " *Bd. of Miss. Levee Comm'rs v. EPA*, 674 F.3d 409, 417-18 (5th Cir. 2012) ("[u]nlike constitutional standing, prudential standing arguments may be waived"); *June Med. Servs. L.L.C. v. Russo*, 140 S.Ct. 2103, 2117 (2020) ("the rule that a party cannot ordinarily rest his claim to relief on the legal rights or interests of third parties … does not involve the Constitution's case-or-controversy requirement … [a]nd so … it can be forfeited or waived") (interior quotations and citations omitted), and the Defendant has waived all non-jurisdictional arguments not raised in his opposition.

c) This suit is not prudentially improper as a "friendly" suit.

Citing a public statement by one plaintiff, the Defendant and his *amici* argue that that this is a "friendly suit" that the Court should dismiss. Any bar against friendly suits in prudential, not *jurisdictional*. *New York City Transit Authority v. Beazer*, 440 U.S. 568, 583 (1979). As indicated in Section II.C.1, *supra*, this action is not "friendly" in the Article III sense. To the extent that the "friendly" remark refers to personal relationships, it would be irrelevant to this official-capacity action: "while friendship is a ground for recusal of a Justice where the personal fortune or the personal freedom of the friend is at issue, it has traditionally not been a ground for recusal where

official action is at issue, no matter how important the *official action* was to the ambitions or the reputation of the Government officer." *Cheney v. United States Dist. Court*, 541 U.S. 913, 916 (2004) (Scalia, J., in chambers) (emphasis in original). But Plaintiffs seek relief that Defendant opposes, which is not "friendly" in the prudential sense.

3. <u>The Speech or Debate Clause does not insulate the Vice President.</u>

Defendant does not dispute that the Speech or Debate Clause provides him no protection.

4. <u>Sovereign immunity does not bar this action.</u>

Amicus BLAG argues that Plaintiffs have named the wrong defendant and instead should have named the House and Senate as the parties that injured Plaintiffs. For the reasons set forth in their motion and not directly disputed by Defendant or his *amici*, *see* Pls.' Mot. at 13-14, Plaintiffs respectfully submit that they have properly invoked an *Ex parte Young* officer suit against the Vice President for the unconstitutional application of the Electoral Count Act. To the extent that this Court disagrees, however, denial of relief or dismissal would be inappropriate. Instead, the Court should allow Plaintiffs to amend their complaint to name alternate officers such as the House and Senate parliamentarians

First, the United States has waived sovereign immunity for

> An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States[.]

5 U.S.C. § 702.

Second, "[d]efective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts." 28 U.S.C. § 1653. If the Court finds the pleadings inadequate as the Vice

President Pence, Plaintiffs could amend their pleadings to include the United States as a defendant. *See also* FED. R. CIV. P. 15(a)(1)(B).

5. The political-question doctrine does not bar this suit.

Defendant does not dispute that the political question doctrine provides him no protection.

6. This case presents a federal question.

Defendant does not dispute that this case raises a federal question within this Court's original jurisdiction under 28 U.S.C. §§ 1331 and 1343(3).

7. No abstention principles apply.

Defendant does not dispute that no abstention the political question doctrine provides him no protection.

III. PLAINTIFFS ARE ENTITLED TO EMERGENCY INJUNCTIVE RELIEF.

Neither Defendant nor his *amici* dispute that the remaining *Winter* factors support the entry of interim relief.

CONCLUSION

For the reasons set forth in their Motion and this reply, Plaintiffs respectfully request that the Court grant the requested relief.

Dated: January 1, 2021

Respectfully submitted,

/s/ William Lewis Sessions

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CERTIFICATE OF SERVICE

I hereby certify that on the date specified below, I electronically filed the foregoing motion (together with its accompanying proposed order) with the Clerk of the Court using the CM/ECF system, which I understand to have caused the service of all parties' counsel of record.

Dated: January 1, 2021

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Sen. Hawley Will Object During Electoral College Certification Process On Jan 6

Wednesday, December 30, 2020

Today U.S. Senator Josh Hawley (R-Mo.) announced he will object during the Electoral College certification process on January 6, 2021. Senator Hawley will object to highlight the failure of some states, including notably Pennsylvania, to follow their own election laws as well as the unprecedented interference of Big Tech monopolies in the election. He will call for Congress to launch a full investigation of potential fraud and election irregularities and enact election integrity measures.

Democrats have previously objected during the certification process for the 2004 and 2016 Presidential elections.

Senator Hawley said, "Following both the 2004 and 2016 elections, Democrats in Congress objected during the certification of electoral votes in order to raise concerns about election integrity. They were praised by Democratic leadership and the media when they did. And they were entitled to do so. But now those of us concerned about the integrity of this election are entitled to do the same.

"I cannot vote to certify the electoral college results on January 6 without raising the fact that some states, particularly Pennsylvania, failed to follow their own state election laws. And I cannot vote to certify without pointing out the unprecedented effort of mega corporations, including Facebook and Twitter, to interfere in this election, in support of Joe Biden. At the very least, Congress should investigate allegations of voter fraud and adopt measures to secure the integrity of our elections. But Congress has so far failed to act.

"For these reasons, I will follow the same practice Democrat members of Congress have in years past and object during the certification process on January 6 to raise these critical issues."

Background On Previous Objections to Electoral College Vote Certification

In 2005, Senator Barbara Boxer and Representative Stephanie Tubbs Jones Objected to the Electoral College Votes from Ohio.

Stephanie Tubs-Jones Said, "I Raise This Objection Because I Am Convinced That We As A Body Must Conduct A Formal And Legitimate Debate About Election Irregularities." (C-SPAN (https://outreach.senate.gov/iqextranet/iqClickTrk.aspx?&cid=SenHawley&crop=14310.6298941.5866468.7119050&report_id=&redirect=https%3a%2f%2fwww.c-span.org%2fvideo%2f%3f185005-2%2fdebate-ohio-electoral-vote-objection&redir_log=266954022449514), 1/6/05, 3:10-3:20)

EXHIBIT A

Boxer views her 2005 objection as "her proudest moment on the Senate floor," according to CNN. (CNN (https://outreach.senate.gov/iqextranet/iqClickTrk.aspx?&cid=SenHawley&crop=14310.6298941.5866468.7119050&report_id=&redirect=https%3a%2f%2fwww.cnn.com%2f20: college-objection-bush-boxer%2findex.html&redir_log=628933907465617), 12/27/2020)

In January 2005, 31 Congressional Democrats Voted To Reject Ohio's Electoral Votes. (CNN (applewebdata://849C88A2-A8F5-4FBA-9175-C87F69402B4D/Bush%20carries%20Electoral%20College%20after%20delay), 1/6/05)

Nancy Pelosi Praised The 2005 Objections, Saying Democrats Were "Speaking Up For Their Aggrieved Constituents" During "Their Only Opportunity To Have This Debate While The Country Is Listening"

Nancy Pelosi Said "We Are Witnessing Democracy At Work" And "This Debate Is Fundamental To Our Democracy." " [T]oday we are witnessing democracy at work. This is not, as some of our Republican colleagues have referred to it, sadly, frivolous. This debate is fundamental to our democracy." (C-SPAN (https://outreach.senate.gov/iqextranet/iqClickTrk.aspx?&cid=SenHawley&crop=14310.6298941.5866468.7119050&report_id=&redirect=https%3a%2f%2fwww.c-span.org%2fvideo%2f%3f185005-2%2fdebate-ohio-electoral-vote-objection&redir_log=266954022449514), 1/6/05, 32:49-33:08)

Pelosi Said Democrats Were "Speaking Up For Their Aggrieved Constituents, Many Of Whom May Have Been Disenfranchised In This Process." "The Members of Congress who have brought this challenge are speaking up for their aggrieved constituents, many of whom may have been disenfranchised in this process. This is their only opportunity to have this debate while the country is listening, and it is appropriate to do so. If there were other venues of this caliber, we would have taken that opportunity. But this is the opportunity. We have a responsibility to take advantage of it." (C-SPAN (https://outreach.senate.gov/iqextranet/iqClickTrk.aspx?&cid=SenHawley&crop=14310.6298941.5866468.7119050&report_id=&redirect=https%3a%2f%2fwww.c-span.org%2fvideo%2f%3f185005-2%2fdebate-ohio-electoral-vote-objection&redir_log=266954022449514), 1/6/05, 34:14-34:45)

- **Pelosi Said "This Is Their Only Opportunity To Have This Debate While The Country Is Listening" And "We Have A Responsibility To Take Advantage Of It."** (C-SPAN (https://outreach.senate.gov/iqextranet/iqClickTrk.aspx?&cid=SenHawley&crop=14310.6298941.5866468.7119050&report_id=&redirect=https%3a%2f%2fwww.c-span.org%2fvideo%2f%3f185005-2%2fdebate-ohio-electoral-vote-objection&redir_log=266954022449514), 1/6/05, 34:14-34:45)

Pelosi Said "Do Not Talk About This As A 'Conspiracy Theory.'" "[P]lease do not talk about this as a 'conspiracy theory.' It is not about that. It is not about conspiracy; it is about the Constitution of the United States." (C-SPAN (https://outreach.senate.gov/iqextranet/iqClickTrk.aspx?&cid=SenHawley&crop=14310.6298941.5866468.7119050&report_id=&redirect=https%3a%2f%2fwww.c-span.org%2fvideo%2f%3f185005-2%2fdebate-ohio-electoral-vote-objection&redir_log=266954022449514), 1/6/05, 39:50-40:03)

In 2017, At Least Seven House Democrats Sought To Object To Electoral Votes In Favor Of President Trump:

- **Jim McGovern Said "The Electors Were Not Lawfully Certified, Especially Given The Confirmed And Illegal Activities Engaged By The Government Of Russia."** (CNN (https://outreach.senate.gov/iqextranet/iqClickTrk.aspx?&cid=SenHawley&crop=14310.6298941.5866468.7119050&report_id=&redirect=https%3a%2f%2fwww.cnn.com%2college-vote-count-objections%2findex.html&redir_log=106450293475627), 1/6/17)
- **Raul Grijalva Objected After North Carolina's Tally.** (CNN (https://outreach.senate.gov/iqextranet/iqClickTrk.aspx?&cid=SenHawley&crop=14310.6298941.5866468.7119050&report_id=&redirect=https%3a%2f%2fwww.cnn.com%2college-vote-count-objections%2findex.html&redir_log=106450293475627), 1/6/17)
- **Pramila Jayapal Objected To Georgia's Vote Certificate.** (CNN (https://outreach.senate.gov/iqextranet/iqClickTrk.aspx?&cid=SenHawley&crop=14310.6298941.5866468.7119050&report_id=&redirect=https%3a%2f%2fwww.cnn.com%2college-vote-count-objections%2findex.html&redir_log=106450293475627), 1/6/17)
- **Jamie Raskin Objected To 10 Of Florida's 29 Electoral Votes, Saying "They Violated Florida's Prohibition Against Dual Office Holders."** (CNN (https://outreach.senate.gov/iqextranet/iqClickTrk.aspx?&cid=SenHawley&crop=14310.6298941.5866468.7119050&report_id=&redirect=https%3a%2f%2fwww.cnn.com%2college-vote-count-objections%2findex.html&redir_log=106450293475627), 1/6/17)
- **Maxine Waters Objected.** (CNN (https://outreach.senate.gov/iqextranet/iqClickTrk.aspx?&cid=SenHawley&crop=14310.6298941.5866468.7119050&report_id=&redirect=https%3a%2f%2fwww.cnn.com%2college-vote-count-objections%2findex.html&redir_log=106450293475627), 1/6/17)

Issues

General (/issues/general)

< PREVIOUS (/HAWLEY-WONT-CONSENT-NDAA-VOTE-WITHOUT-VOTE-2000-DIRECT-ASSISTANCE)

(https://www.facebook.com/SenatorHawley/) (https://twitter.com/SenHawleyPress)

(https://www.youtube.com/channel/UCMzt8xq6qQ3XQ_DINfJx0-w)

(https://www.instagram.com/senatorhawley/)

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EXHIBIT B

The Washington Post
Democracy Dies in Darkness

Sen. Hawley announces he will contest certification of electoral college vote

By **John Wagner**

Dec. 30, 2020 at 11:24 a.m. EST

Sen. Josh Hawley (R-Mo.) announced Wednesday that he would object next week when Congress convenes to certify the electoral college vote, a move that all but ensures at least a short delay in cementing President-elect Joe Biden's victory.

President Trump has repeatedly suggested congressional intervention as a last-ditch way to reverse the election results, despite opposition from Senate Majority Leader Mitch McConnell (R-Ky.) and other leading Republicans, who have conceded it is bound to fail and will put their members in an awkward position.

In a statement, Hawley said he feels compelled to put a spotlight on purported election irregularities.

"At the very least, Congress should investigate allegations of voter fraud and adopt measures to secure the integrity of our elections. But Congress has so far failed to act," Hawley said.

Any member of the House, joined by a member of the Senate, can contest the electoral votes on Jan. 6. The challenge prompts a floor debate followed by a vote in each chamber.

Trump will inevitably lose that vote, given that Democrats control the House and a number of Senate Republicans have publicly recognized Biden's victory, including Sen. Mitt Romney (Utah), who has called Trump's refusal to accept the election dangerous.

Even in the unlikely event that Trump were to prevail in the Senate, where Vice President Pence would be in position to cast a tie-breaking vote if needed, the challenge still would fail given the House vote.

Still, a number of Republican members of the House, led by Rep. Mo Brooks (R-Ala.) and encouraged by the president, have said they plan to challenge votes in swing states where they have made unfounded allegations that the vote was marred by fraud.

Prior to Hawley's announcement, one incoming Republican senator, newly elected Tommy Tuberville of Alabama, has said he is considering signing on, as well.

Hawley has been mentioned as a potential 2024 presidential candidate, and his move is certain to appeal to Trump supporters and parts of the Republican base.

EXHIBIT C

Trump, nevertheless, has played up what is usually a ceremonial milestone as a potential turning point in his quest to reverse the election results.

"See you in Washington, DC, on January 6th. Don't miss it," Trump tweeted Sunday.

Meanwhile, a lawsuit filed Sunday by U.S. Rep. Louie Gohmert (R-Tex.) and several Arizona Republicans against Pence attempts to get a federal judge to expand Pence's power to affect the outcome.

Rosalind S. Helderman and Tom Hamburger contributed to this report.

Sen.-elect Tuberville suggests back effort on challenge Electo College vote

BY TAL AXELROD - 12/17/20 01:41 PM EST

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NEWS

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HEALTHCARE

GOP lawmaker criticizes Trump,

Sen.-elect Tommy Tuberville (R-Ala.) indicated in a video that surfaced Thursday that that he thinks the Senate should support a challenge to the results of the Electoral College, which certified President-elect Joe Biden's victory this week.

Tuberville suggested he would back a challenge Rep. Mo Brooks (R-Ala.) has vowed to bring against the vote. If a senator joins Brooks, it would require the House and Senate to debate and then vote on the issue.

"You see what's coming. You've been reading about it in the House. We're going to have to do it in the Senate," Tuberville said in the video taken by liberal activist Lauren Windsor at a rally for Sens. Kelly Loeffler (R-Ga.) and David Perdue (R-Ga.) in Georgia.

It appeared that Tuberville believed he was speaking with another rallygoer rather than a liberal activist, and Windsor asked the senator-elect what he could do to "fight to make this election right." The video was taken Wednesday night.

Lauren Windsor
@lawindsor

BREAKING: Defying McConnell, Sen-elect Tuberville suggests he will challenge Electoral College, while stumping in Georgia

EXHIBIT D

colleagues for 'trying to discredit' the election

NEWS

VIEW ALL

9:38 AM · Dec 17, 2020

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Tuberville's campaign did not immediately respond to a request from comment from The Hill, but earlier this week Tuberville's campaign chairman had said that the senator-elect might back the Brooks effort.

"I think that he [Tuberville] and Ted Cruz are the two best candidates to do this," said Stan McDonald, Tuberville's campaign chairman, during an interview on WVNN-radio in Huntsville on Tuesday. "I don't know yet if or when he will do this. He's very seriously considering it."

Senate Majority Leader Mitch McConnell (R-Ky.) pleaded with Republican senators this week to dismiss the drive to challenge the results, which has been spearheaded by Brooks. McConnell indicated that forcing a debate would ultimately lead to a contentious vote to swat away the challenge, which would divide Republicans from President Trump, who remains wildly popular with the GOP base despite his loss.

"I think that there was encouragement on the phone for us to accept the result, as much as it's not what we, you know, would have envisioned for the next four years, and to try to do what's best for American people, which is to look forward," Sen. Shelley Moore Capito (R-W.Va.) said after a conference call with McConnell.

If the vote took place, it would not change the outcome of the election as there is not enough support in the House or Senate for it to be successful.

Trump and his allies have launched a sprawling legal campaign to overturn the election results on claims that widespread voter fraud cost him reelection. But virtually all of the lawsuits have been thrown out, at times by Trump-appointed judges, for lack of evidence or standing.

"We got to grab a hold and hold on. We have no choice. Listen to me now, we have no choice but to win this election. They're going to try to steal it, they're going to try to buy it, they're going to do everything they can, lie, cheat, steal to win this election, like they did in the presidential election," Tuberville told the rally crowd in Georgia.

GOP senator criticizes 'ambitious politicians' for 'dangerous'...

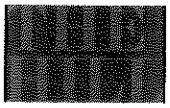
Hawley jams GOP with Electoral College fight

Sen. John Thune (S.D.), the No. 2 Senate Republican, told reporters Thursday he hopes Tuberville does not vote to have a debate on the Electoral College, saying, "it's time ... to move on."

"The fact of the matter is that's been litigated over and over... it's time to be done with this," Thune said. "I would hope that we wouldn't have members of the Senate who would decide that that makes sense. I don't think it's a good decision right now and I don't think it's good for the country."

Jordain Carney contributed to this report.

TAGS SHELLEY MOORE CAPITO MITCH MCCONNELL KELLY LOEFFLER DAVID PERDUE DONALD TRUMP JOHN THUNE JOE BIDEN MO BROOKS TED CRUZ TOMMY TUBERVILLE

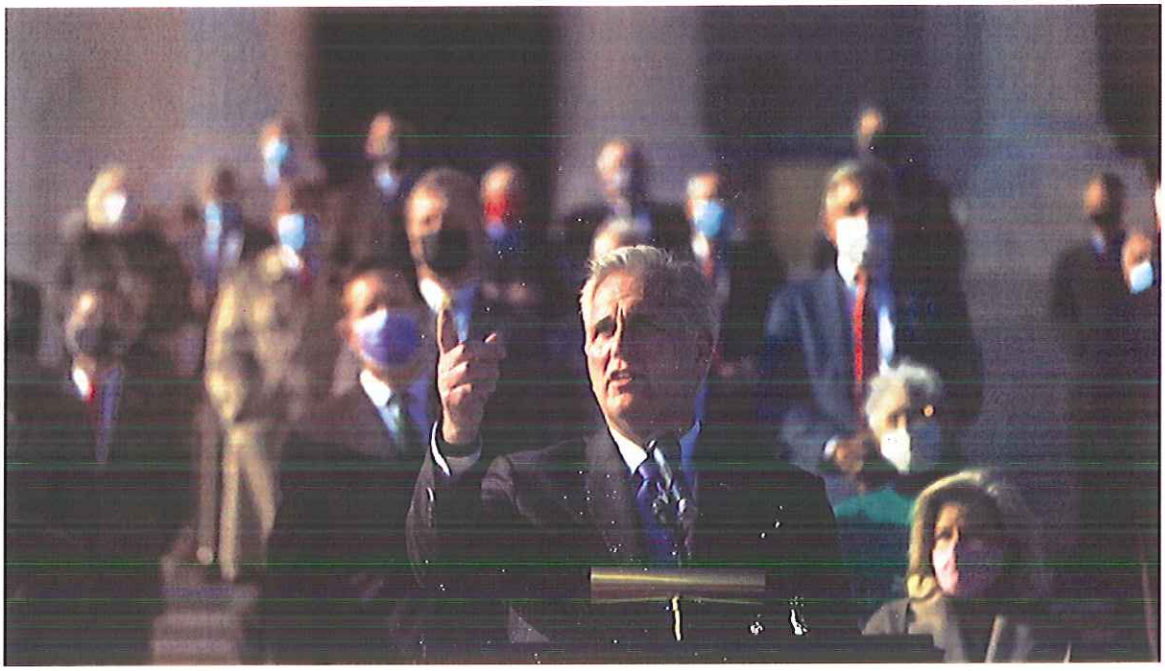


ELECTION 2020 | Dec 31, 2020, 05:31pm EST | 32,917 views

At Least 140 House Republicans Expected To Challenge Electoral College Result

Andrew Solender Forbes Staff
Business
I write about politics and the Biden transition.

TOPLINE As many as 140 Republican House members are expected to object to certification of President-elect Joe Biden's Electoral College victory as part of President Donald Trump's continued efforts to overturn his reelection loss.



WASHINGTON, DC - DECEMBER 10: House Minority Leader Kevin McCarthy (R-CA), surrounded fellow

EXHIBIT E

- "2 House Republicans tell me they expect as of now that at least 140 Republican Members of the House will on Jan. 6 object to and vote against the Electoral College results," tweeted CNN host Jake Tapper on Thursday.

- Rep. Denver Riggleman (R-Va.) told *Forbes* a "staggering number" of his Republican House colleagues will likely object, adding, "140 certainly seems possible... I wouldn't be surprised if it were a little higher."

- Riggleman said he initially expected around a hundred objections but that "pressure [is] being exerted" on House Republicans – as evidenced by state delegations putting out joint statements vowing to object to the vote.

- "I would be getting pressure right now," said Riggleman – who lost renomination to a right-wing challenger in June – adding that the vote to object "keeps their base happy, they know it'll keep the conference happy and they know it's not gonna win anyway."

- Riggleman said there is "not a whole lot of excitement for that vote" because most of his colleagues don't believe in the systemic fraud Trump has alleged, echoing Sen. Ben Sasse, who said, "When we talk in private, I haven't heard a single Congressional Republican allege that the election results were fraudulent – not one."

- Just one senator has confirmed they will join the effort: Sen. Josh Hawley (R-Mo.) said Wednesday he plans to object because "some states, particularly Pennsylvania, failed to follow their own state election laws" –

Hawley's plan to object is in defiance of Senate Majority Leader Mitch McConnell, who has instructed members of his caucus not to object to the electoral college because the eventual vote on whether to sustain objections would put Republican senators in a difficult position. Hawley was absent from a call with Republican senators Thursday morning in which McConnell hoped to challenge him on his position, according to *Politico* and *Axios*. Sen. Pat Toomey (R-Pa.) also opposes Hawley's move.

TANGENT

Just 49 Republican members of Congress have publicly acknowledged Biden as president-elect – 25 House members and 24 senators, including McConnell and Toomey. Biden said during an interview with Stephen Colbert earlier this month that several Republicans called him to ask for time to recognize his victory because they are in a "tough spot" politically.

BIG NUMBER

9. That's how many objections Biden himself – as President of the Senate – shut down during certification of Trump's victory at a joint session of Congress in 2017. All the objections came from House Democrats alleging Russian meddling, voter suppression and civil rights violations, but because none had a senator backing them, Biden repeatedly said the objections "cannot be entertained" and that there was "no debate."

KEY BACKGROUND

The last time a senator and a House member teamed up to challenge an electoral college vote was 2005, when Sen. Barbara Boxer and Rep. Stephanie Tubbs Jones challenged President George W. Bush's 2004 victory in Ohio on the basis of civil rights violations. The objections precipitated two hours of debate in the House and one hour in the Senate before being rejected by wide margins in both chambers.

in debate but will undoubtedly be rejected by the Democrat-controlled House – and, likely, the Republican-controlled Senate. Thus, certification of the result will be delayed but not thwarted.

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Andrew Solender

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I am a news reporter covering politics and the Biden transition. I have previously worked for MSNBC and Chronogram Magazine. I attended Vassar College and the London... **Read More**

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

THE HONORABLE LOUIE GOHMERT, et al.,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	Case No. 6:20-cv-660-JDK
	§	
THE HONORABLE MICHAEL R. PENCE, in his official capacity as Vice President of the United States,	§	
	§	
Defendant.	§	

ORDER OF DISMISSAL

This case challenges the constitutionality of the Electoral Count Act of 1887, as codified at 3 U.S.C. §§ 5, 15. The Court cannot address that question, however, without ensuring that it has jurisdiction. *See, e.g.*, U.S. CONST. art. III, § 2; *Cary v. Curtis*, 44 U.S. 236, 245 (1845). One crucial component of jurisdiction is that the plaintiffs have standing. This requires the plaintiffs to show a personal injury that is fairly traceable to the defendant's allegedly unlawful conduct and is likely to be redressed by the requested relief. *See, e.g.*, U.S. CONST. art. III, § 2; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). Requiring plaintiffs to make this showing helps enforce the limited role of federal courts in our constitutional system.

The problem for Plaintiffs here is that they lack standing. Plaintiff Louie Gohmert, the United States Representative for Texas's First Congressional District, alleges at most an institutional injury to the House of Representatives. Under well-settled Supreme Court authority, that is insufficient to support standing. *Raines v.*

Byrd, 521 U.S. 811, 829 (1997).

The other Plaintiffs, the slate of Republican Presidential Electors for the State of Arizona (the "Nominee-Electors"), allege an injury that is not fairly traceable to the Defendant, the Vice President of the United States, and is unlikely to be redressed by the requested relief.

Accordingly, as explained below, the Court lacks subject matter jurisdiction over this case and must dismiss the action.

I.

A.

The Electors Clause of the U.S. Constitution requires that each state appoint, in the manner directed by the state's legislature, the number of presidential electors to which it is constitutionally entitled. U.S. CONST. art. II, § 1, cl. 2. Under the Twelfth Amendment, each state's electors meet in their respective states and vote for the President and Vice President. U.S. CONST. amend XII. The electors then certify the list of their votes and transmit the sealed lists to the President of the United States Senate—that is, the Vice President of the United States. The Twelfth Amendment then provides that, "[t]he President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted." *Id.* A candidate winning a majority of the electoral votes wins the Presidency. However, if no candidate obtains a majority of the electoral votes, the House of Representatives is to choose the President—with each state delegation having one vote. *Id.*

The Electoral Count Act, informed by the Hayes-Tilden dispute of 1876, sought to standardize the counting of electoral votes in Congress. Stephen A. Siegel, *The Conscientious Congressman's Guide to the Electoral Count Act of 1887*, 56 FLA. L. REV. 541, 547–50 (2004). Section 5 makes states' determinations as to their electors, under certain circumstances, "conclusive" and provides that these determinations govern the counting of electoral votes. 3 U.S.C. § 5. Section 15 requires a joint session of Congress to count the electoral votes on January 6, with the President of the Senate presiding. *Id.* § 15.

During that session, the President of the Senate calls for objections on the electoral votes. Written objections submitted by at least one Senator and at least one Member of the House of Representatives trigger a detailed dispute-resolution procedure. *Id.* Most relevant here, Section 15 requires both the House of Representatives and the Senate—by votes of their full membership rather than by state delegations—to decide any objection. The Electoral Count Act also gives the state governor a role in certifying the state's electors, which Section 15 considers in resolving objections. *Id.* § 6.

It is these dispute-resolution procedures that Plaintiffs challenge in this case.

B.

On December 14, 2020, electors convened in each state to cast their electoral votes. *Id.* § 7; Docket No. 1 ¶ 5. In Arizona, the Democratic Party's slate of eleven electors voted for Joseph R. Biden and Kamala D. Harris. These votes were certified by Arizona Governor Doug Ducey and Arizona Secretary of State Katie Hobbs and submitted as required under the Electoral Count Act. Docket No. 1 ¶ 22. That same

day, the Nominee-Electors state that they also convened in Arizona and voted for Donald J. Trump and Michael R. Pence. *Id.* ¶ 20. Similar actions took place in Georgia, Pennsylvania, Wisconsin, and Michigan (with Arizona, the "Contested States"). *Id.* ¶ 20–21. Combined, the Contested States represent seventy-three electoral votes. *See id.* ¶ 23.

On December 27, Plaintiffs filed this lawsuit, alleging that there are now "competing slates" of electors from the Contested States and asking the Court to declare that the Electoral Count Act is unconstitutional and that the Vice President has the "exclusive authority and sole discretion" to determine which electoral votes should count. *Id.* ¶ 73. They also ask for a declaration that "the Twelfth Amendment contains the exclusive dispute resolution mechanisms" for determining an objection raised by a Member of Congress to any slate of electors and an injunction barring the Vice President from following the Electoral Count Act. *Id.* On December 28, Plaintiffs filed an Emergency Motion for Expedited Declaratory Judgment and Emergency Injunctive Relief ("Emergency Motion"). Docket No. 2. Plaintiffs request "an expedited summary proceeding" under Federal Rule of Civil Procedure 57. *Id.*

On December 31, the Vice President opposed Plaintiffs' motion. Docket No. 18.

II.

As mentioned above, before the Court can address the merits of Plaintiff's Emergency Motion, it must ensure that it has subject matter jurisdiction. *See, e.g.*, *Cary*, 44 U.S. at 245 ("The courts of the United States are all limited in their nature and constitution, and have not the powers inherent in courts existing by prescription or by the common law."); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 340–41 (2006)

("If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so."). Article III of the U.S. Constitution limits federal courts to deciding only "cases" or "controversies," which ensures that the judiciary "respects 'the proper—and properly limited—role of the courts in a democratic society.'" *DaimlerChrysler*, 547 U.S. at 341 (quoting *Allen v. Wright*, 468 U.S. 737, 750 (1984)); *see also Raines*, 521 U.S. at 828 (quoting *United States v. Richardson*, 418 U.S. 166, 192 (1974)) ("Our regime contemplates a more restricted role for Article III courts . . . 'not some amorphous general supervision of the operations of government.'").

"[A]n essential and unchanging part of the case-or-controversy requirement of Article III" is that the plaintiff has standing. *Lujan*, 504 U.S. at 560. The standing requirement is not subject to waiver and requires strict compliance. *E.g.*, *Lewis v. Casey*, 518 U.S. 343, 349 n.1 (1996); *Raines*, 521 U.S. at 819. A standing inquiry is "especially rigorous" where the merits of the dispute would require the Court to determine whether an action taken by one of the other two branches of the Federal Government is unconstitutional. *Raines*, 521 U.S. at 819–20 (citing *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 542 (1986), and *Valley Forge Christian Coll. v. Ams. United for Separation of Church & St., Inc.*, 454 U.S. 464, 473–74 (1982)). This is because "the law of Art. III standing is built on a single basic idea—the idea of separation of powers." *Allen*, 468 U.S. at 752, *abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 (2014). Article III standing "enforces the Constitution's case-or-controversy requirement."

DaimlerChrysler Corp., 547 U.S. at 342 (quoting *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004)). And "[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Raines,* 521 U.S. at 818.

Article III standing requires a plaintiff to show: (1) that he "has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical"; (2) that "the injury is fairly traceable to the challenged action of the defendant"; and (3) that "it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *El Paso Cnty. v. Trump*, 982 F.3d 332, 336 (5th Cir. 2020) (quoting *Friends of the Earth, Inc. v. Laidlaw Env't. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000)). "The party invoking federal jurisdiction bears the burden of establishing these elements," and "each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.,* with the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S. at 561. "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice." *Id.*

III.

Here, Plaintiffs have failed to demonstrate that they have standing to bring the claim alleged in Count I of their complaint.

A.

The first Plaintiff is the Representative for Texas's First Congressional District, the Honorable Louie Gohmert. Congressman Gohmert argues that he will

be injured because "he will not be able to vote as a Congressional Representative in accordance with the Twelfth Amendment." Docket No. 2 at 4. Specifically, Congressman Gohmert argues that on January 6, 2021, when Congress convenes to count the electoral votes for President and Vice President, he "will object to the counting of the Arizona slate of electors voting for Biden and to the Biden slates from the remaining Contested States." Docket No. 1 ¶ 6. If a member of the Senate likewise objects, then under Section 15 of the Electoral Count Act, each member of the House and Senate is entitled to vote to resolve the objections, which Congressman Gohmert argues is inconsistent with the state-by-state voting required under the Twelfth Amendment. Docket No. 2 at 5. Congressmen Gohmert argues that the Vice President's compliance with the procedures of the Electoral Count Act will directly cause his alleged injury. *Id.* at 7. And he argues that a declaration that Sections 5 and 15 of the Electoral Count Act are unconstitutional would redress his alleged injury. *Id.* at 9–10.

Congressman Gohmert's argument is foreclosed by *Raines v. Byrd*, which squarely held that Members of Congress lack standing to bring a claim for an injury suffered "solely because they are Members of Congress." 521 U.S. at 821. And that is all Congressman Gohmert is alleging here. He does not identify any injury to himself as an individual, but rather a "wholly abstract and widely dispersed" institutional injury to the House of Representatives. *Id.* at 829. Congressman Gohmert does not allege that he was "singled out for specially unfavorable treatment as opposed to other Members of their respective bodies," does not claim that he has

"been deprived of something to which [he] *personally* [is] entitled," and does not allege a "loss of any private right, which would make the injury more concrete." *Id.* at 821 (emphasis in original). Congressman Gohmert's alleged injury is "a type of institutional injury (the diminution of legislative power), which necessarily damages all Members of Congress." *Id.* Under these circumstances, the Supreme Court held in *Raines*, a Member of Congress does not have "a sufficient 'personal stake'" in the dispute and lacks "a sufficiently concrete injury to have established Article III standing." *Id.* at 830.

For the first time in their reply brief, Plaintiffs assert that Congressman Gohmert has standing as a Texas voter, relying on *League of United Latin Am. Citizens, Dist. 19 v. City of Boerne*, 659 F.3d 421, 430 (5th Cir. 2011). Docket No. 30 at 30, 33–34. The Court disagrees. In *LULAC*, the Fifth Circuit held that an individual voter had standing to challenge amendments to the City of Boerne's city council election scheme that would allegedly deprive him of a "pre-existing right to vote for certain offices." 659 F.3d at 430. That is not the case here. Congressman Gohmert does not allege that he was denied the right to vote in the 2020 presidential election. Rather, he asserts that under the Electoral Count Act, "he will not be able to vote *as a Congressional Representative* in accordance with the Twelfth Amendment." Docket No. 2 at 4 (emphasis added). Because Congressman Gohmert is asserting an injury in his role as a Member of Congress rather than as an individual voter, *Raines* controls.

Further weighing against Congressman Gohmert's standing here is the speculative nature of the alleged injury. "To establish Article III standing, an injury must be 'concrete, particularized, and actual or imminent.'" *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (quoting *Monsanto Co. v. Geertson Seed Farms,* 561 U.S. 139, 149 (2010)); *see also Lujan*, 504 U.S. at 560 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)) (alleged injury cannot be "conjectural" or "hypothetical"). "Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is *certainly* impending." *Clapper*, 568 U.S. at 409 (quoting *Lujan*, 504 U.S. at 565 n.2).

Here, Congressman Gohmert's alleged injury requires a series of hypothetical—but by no means certain—events. Plaintiffs presuppose what the Vice President will do on January 6, which electoral votes the Vice President will count or reject from contested states, whether a Representative and a Senator will object under Section 15 of the Electoral Count Act, how each member of the House and Senate will vote on any such objections, and how each state delegation in the House would potentially vote under the Twelfth Amendment absent a majority electoral vote. All that makes Congressman Gohmert's alleged injury far too uncertain to support standing under Article III. *Id.* at 414 ("We decline to abandon our usual reluctance to endorse standing theories that rest on speculation about the decisions of independent actors.").

Accordingly, the Court finds that Congressman Gohmert lacks standing to bring the claim alleged here.

B.

The Nominee-Electors argue that they have standing under the Electors Clause "as candidates for the office of Presidential Elector because, under Arizona law, a vote cast for the Republican Party's President and Vice President is cast for the Republican Presidential Electors." Docket No. 2 at 6 (citing ARIZ. REV. STAT. § 16-212). The Nominee-Electors were injured, Plaintiffs contend, when Governor Ducey unlawfully certified and transmitted the "competing slate of Biden electors" to be counted in the Electoral College. *Id.* at 7.

This alleged injury, however, is not fairly traceable to any act of the Vice President. Nor is it an injury likely to be redressed by a favorable decision here. *See Friends of the Earth*, 528 U.S. at 180–81.[1] Plaintiffs do not allege that the Vice President had any involvement in the "certification and transmission of a competing

[1] The Court need not decide whether the Nominee-Electors were "candidates" under Arizona law. Plaintiffs cite *Carson v. Simon*, in which the Eighth Circuit held that prospective presidential electors are "candidates" under Minnesota law and have standing to challenge how votes are tallied in Minnesota. 978 F.3d 1051, 1057 (8th Cir. 2020). But the U.S. District Court for the District of Arizona has distinguished *Carson*, holding that presidential electors in Arizona are ministerial and are "not candidates for office as the term is generally understood" under Arizona law. *Bowyer v. Ducey*, — F. Supp. 3d —, 2020 WL 7238261, at *4 (D. Ariz. Dec. 9, 2020); *see also Feehan v. Wis. Elections Comm'n*, No. 20-CV-1771-PP, 2020 WL 7250219, at *12 (E.D. Wis. Dec. 9, 2020) (nominee-elector is not a candidate under Wisconsin law). "Arizona law makes clear that the duty of an Elector is to fulfill a ministerial function, which is extremely limited in scope and duration, and that they have no discretion to deviate at all from the duties imposed by the statute." *Bowyer*, 2020 WL 7238261, at *4 (citing ARIZ. REV. STAT. § 16-212(c)). Arizona voters, moreover, vote "for their preferred presidential candidate," not any single elector listed next to the presidential candidates' names. *Id.* (citing ARIZ. REV. STAT. § 16-507(b)). The court in *Bowyer* therefore held that nominee-electors in Arizona lacked standing to sue state officials for alleged voting irregularities. *See id.* In any event, even if the Nominee-Electors had standing to sue state officials to redress the injury alleged here, they have not done so. Plaintiffs have named only the Vice President, and they have not shown "a fairly traceable connection between [their] injury and the complained-of conduct of defendant." *E.g.*, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998).

slate of Biden electors." Docket No. 2 at 7. Nor could they. *See* 3 U.S.C. § 6. That act is performed solely by the Arizona Governor, who is a "third party not before the court." *Lujan*, 504 U.S. at 560–61 (quoting *Simon v. Eastern Ky. Welfare Rts. Org.*, 426 U.S. 26, 41–42 (1976)). Indeed, Plaintiffs acknowledge that their injury was caused by Arizona officials in Arizona, the "Vice President did not cause [their] injury," and their "unlawful injuries [were] suffered in Arizona." Docket No. 2 at 7.

The Nominee-Electors argue that their injury is nevertheless fairly traceable to the Vice President because he will "ratify and purport to make lawful the unlawful injuries that Plaintiffs suffered in Arizona." *Id.* For support, Plaintiffs cite *Sierra Club v. Glickman*, in which the Fifth Circuit held that an environmental injury was fairly traceable to the Department of Agriculture, even though the injury was directly caused by third-party farmers, because the Department had "the ability through various programs to affect the pumping decisions of those third party farmers to such an extent that the plaintiff's injury could be relieved." 156 F.3d 606, 614 (5th Cir. 1998). Nothing like that is alleged here. The Vice President's anticipated actions on January 6 will not affect the decision of Governor Ducey regarding the certification of presidential electors—which occurred more than two weeks ago on December 14. Even "ratifying" or "making lawful" the Governor's decision, as Plaintiffs argue will occur here, will not have any "coercive effect" on Arizona's certification of electoral votes. *See Bennett v. Spear*, 520 U.S. 154, 168–69 (1997).

For similar reasons, the Nominee-Electors' claimed injury is not likely to be redressed here. To satisfy redressability, Plaintiffs must show that it is "likely" their

alleged injury will be "redressed by a favorable decision." *Lujan*, 504 U.S. at 561. But here, Plaintiffs seek declaratory and injunctive relief as to the manner of the Vice President's electoral vote *count*. *See* Docket No. 1 ¶ 73. Such relief will not resolve their alleged harm with respect to Governor Ducey's electoral vote *certification*. *See* Docket No. 2 at 7. As the Supreme Court has long held, "a federal court can act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court." *Simon*, 426 U.S. at 41–42; *see also El Paso Cnty.*, 982 F.3d at 343 (plaintiff lacks standing where an order granting the requested relief "would not rescind," and "accordingly would not redress," the allegedly harmful act).

Even if their injury were the loss of the right to vote in the Electoral College, *see* Docket No. 2 at 6, Plaintiffs' requested relief would not redress that injury. Plaintiffs are not asking the Court to order the Vice President to count the Nominee-Electors' votes, but rather that the Vice President "exercise the exclusive authority and sole discretion in determining which electoral votes to count for a given State," or alternatively, to decide that no Arizona electoral votes should count. *See* Docket No. 1 ¶ 73. It is well established that a plaintiff lacks standing where it is "uncertain that granting [the plaintiff] the relief it wants would remedy its injuries." *Inclusive Comtys. Project, Inc. v. Dep't of Treasury*, 946 F.3d 649, 657–58 (5th Cir. 2019).

Accordingly, the Court finds that the Nominee-Electors lack standing.[2]

[2] Plaintiffs Hoffman and Kern claim without supporting argument that they have standing as members of the Arizona legislature. Docket No. 2 at 4. This claim fails for the reasons Congressman Gohmert's standing argument fails. *See supra* Part III.A.

IV.

Because neither Congressman Gohmert nor the Nominee-Electors have standing here, the Court is without subject matter jurisdiction to address Plaintiffs' Emergency Motion or the merits of their claim. *HSBC Bank USA, N.A. as Tr. for Merrill Lynch Mortg. Loan v. Crum*, 907 F.3d 199, 202 (5th Cir. 2018). The Court therefore **DISMISSES** the case without prejudice.

So **ORDERED** and **SIGNED** this **1st** day of **January, 2021.**

JEREMY D. KERNODLE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

THE HONORABLE LOUIE GOHMERT, et al.,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	Case No. 6:20-cv-660-JDK
	§	
THE HONORABLE MICHAEL R. PENCE, IN HIS OFFICIAL CAPACITY AS VICE PRESIDENT OF THE UNITED STATES,	§	
	§	
Defendant.	§	

FINAL JUDGMENT

The Court, having considered Plaintiffs' case and rendered its decision by opinion issued this same date, hereby enters **FINAL JUDGMENT**.

It is **ORDERED** that Plaintiff's case is **DISMISSED WITHOUT PREJUDICE** for lack of subject matter jurisdiction. All pending motions are **DENIED** as **MOOT**.[1]

The Clerk of the Court is instructed to close this case.

So **ORDERED** and **SIGNED** this **1st** day of **January, 2021.**

JEREMY D. KERNODLE
UNITED STATES DISTRICT JUDGE

[1] The Court notes that there are several pending motions to intervene. *See* Docket Nos. 15, 19, 25, 36. "An existing suit within the court's jurisdiction is a prerequisite of an intervention." *Kendrick v. Kendrick*, 16 F.2d 744, 745 (5th Cir. 1926). Because the Court lacks subject matter jurisdiction over this case, there is no live case or controversy in which the interested parties can intervene.