FROM: Rep. Liz Cheney (R-WY)
TO: House Republican Colleagues
DATE: January 3, 2021
RE: 2020 Presidential Election Challenges in Arizona, Georgia, Michigan, Nevada, Pennsylvania and Wisconsin, and Our Constitutional Process

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2020 Presidential Election Challenges in Arizona, Georgia, Michigan, Nevada, Pennsylvania and Wisconsin, and Our Constitutional Process

In connection with our recent Conference meeting, a number of members have requested further information on how precisely Article II and the 12th Amendment to our Constitution address Congress' role and responsibilities in counting electoral votes. Others have sought additional information on the election challenges in each of the six states at issue, and how the judges hearing these cases have ruled. The following summary begins by addressing the Constitutional issues, then provides excerpts from and a description of the principal judicial decisions in each of the states. As you will see, there is substantial reason for concern about the precedent Congressional objections will set here. By objecting to electoral slates, members are unavoidably asserting that Congress has the authority to overturn elections and overrule state and federal courts. Such objections set an exceptionally dangerous precedent, threatening to steal states' explicit constitutional responsibility for choosing the President and bestowing it instead on Congress. This is directly at odds with the Constitution's clear text and our core beliefs as Republicans. Democrats have long attempted, unconstitutionally, to federalize every element of our nation—including elections. Republicans should not embrace Democrats' unconstitutional position on these issues.

The recent proposal for a new "Commission" is even more problematic. It is not reasonable to anticipate that any commission so formed could wrap up its work in 10 days; indeed, the subsequent debate at both the state and federal level would likely require months. Did those proposing a new commission realize that they were in essence proposing to delay the inaugural? Did they mean to set up a new future precedent where the inaugural is delayed and we have an "Acting President?" For how long? Who decides when that process is over? Will that require another Act of Congress? Could the Acting President veto any such future Congressional action? If Congress has authority to create such a commission now, are state elections, recounts and state law legal challenges just "make-work" until Congress gets around to investigating and deciding who should be President? Members who support the new commission proposal may need to answer each of these questions. And in particular, Members should be prepared to answer how such a commission would be justified by the actual text of our founding documents.

Article II and the 12th Amendment

Article II and the 12th Amendment to our Constitution govern how our Republic selects the President of the United States. Although the Framers considered whether to confer the power to select the President upon the Congress of the United States, that proposal was specifically rejected. Instead, the Framers conferred that specific power upon the States and the People. Article II creates the Electoral College, and provides that "[e]ach 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." "The person having the greatest Number of [Electoral College] votes for President, *shall be the President*."

In accordance with Article II, every State Legislature has enacted a set of rules governing the manner in which the election of the President in that State will be conducted and how electors will be selected. Those laws not only instruct state election officials how to conduct elections (and explicitly delegate authority to those officials for that purpose), but also set forth a state law process for challenging an election when problems arise. The legal processes for challenging the election vary state to state, but generally provide a procedure for recounts and audits, and an opportunity to litigate disputed issues in state court. In certain circumstances, it may be possible to bring an appropriate claim in Federal Court as well (for example, if a State has violated the U.S. Constitution or federal law), but Federal Courts are bound to observe the Constitutional limits on their jurisdiction (under Article III).

Because Article II commits to the States the authority and responsibility to conduct the election for President, and because State Legislatures have (consistent with Article II) provided a specific manner for challenging a Presidential election, allegations of election irregularities, fraud or other illegality must be resolved in accordance with those state laws. This is our Constitutional process and the rule of law. To date, dozens of cases challenging the 2020 Presidential election have been litigated in the six states at issue. Many judges (including multiple federal judges appointed by President Trump himself), have already directly addressed the subject matter of objections members intend to make. For instance, multiple judges have ruled state election officials *were not* acting contrary to state election laws. And multiple judges have found that allegations about Dominion voting machines and other issues *are not* supported by evidence. (See the excerpts and summaries in Sections I and II below.)

In addition to committing the power and responsibility for selecting the President to the People of the States, Article II and the 12th Amendment also explicitly identify the exceptionally limited role of Congress in this process. First, "the President of the Senate shall receive certified copies of the electoral votes from each state" and "in the presence of the Senate and House of Representatives, open all the certificates." The votes "shall then be counted." Nothing in Article II, the 12th Amendment or any other Constitutional text provides for any debate, objection or discretionary judgments by Congress in performing the ministerial task of counting the votes. Nothing in the Constitution remotely says that Congress is the court of last resort, with the authority to second-guess and invalidate state and federal court judicial rulings in election challenges. Indeed, the Constitutional text reads: "The person having the greatest Number of [Electoral College] votes for President, shall be the President." It does not say: "The person having the greatest Number of [Electoral College] votes for President, shall be the President, *unless Congress objects or Congress wants to investigate*." The Constitution identifies specifically the *only* occasions when Congress can take any non-ministerial action – when no Presidential candidate has a majority of the electoral votes: "[I]f no person have such majority [of the electoral votes counted], 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….." Thus, the Constitutional text tells us very clearly what Congress' role is and is not.

For most of our nation's history, the Framers' straight-forward instructions regarding selection of the President prevailed. In the aftermath of our nation's Civil War, officials in certain Reconstruction Era state governments submitted competing slates of electors. In 1887, Congress sought to resolve those issues by enacting the Electoral Count Act. A principal provision of that Act instructs that a certificate identifying the Electoral College electors and their votes received from the Governor of a state shall be regarded as "conclusive." 3. U.S.C. § 5. 6. Although the Constitutionality of that Act has been the subject of substantial debate, here there is no dispute that each Governor of the six states at issue submitted an official certification of the election, and those electors' votes have been transmitted to this Congress. Thus, under the Electoral Count Act, those certificates are conclusive and must be counted. There is no discretion to do otherwise under that Act. Accordingly, both the clear text of the Constitution and the Electoral Count Act compel the same conclusion – there is no appropriate basis to object to the electors from any of the six states at issue.

Section I below identifies the conclusions reached by the courts hearing the principal election challenges in the six states at issue. Section II provides more detailed descriptions of the cases, and further excerpts of the judges' reasoning.

SECTION I: <u>Conclusions Reached by State and Federal Judges in the Six States</u>:

Arizona State Trial Court:

"There is no evidence that the manner in which signatures were reviewed was designed to benefit one candidate or another, or that there was any misconduct, impropriety, or violation of Arizona law with respect to the review of mail-in ballots."

Arizona Supreme Court:

"[T]he 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 …."

Federal Courts in Arizona:

"The allegations they put forth to support their claims of fraud fail in their particularity and plausibility. Plaintiffs append over three hundred pages of attachments, which are only impressive for their volume. The various affidavits and expert reports are largely based on anonymous witnesses, hearsay, and irrelevant analysis of unrelated elections."

"The Complaint is equally void of plausible allegations that Dominion voting machines were actually hacked or compromised in Arizona during the 2020 General Election….. Rather, what is present is a lengthy collection of phrases beginning with the words "could have, possibly, might," and "may have."

"Plaintiffs next argue that they have expert witnesses who can attest to widespread voter fraud in Arizona…. These innuendoes fail to meet Rule 9(b) standards. But perhaps more concerning to the Court is that the 'expert reports' reach implausible conclusions, often because they are derived from wholly unreliable sources."

"Allegations that find favor in the public sphere of gossip and innuendo cannot be a substitute for earnest pleadings and procedure in federal court. They most certainly cannot be the basis for upending Arizona's 2020 General Election. The Court is left with no alternative but to dismiss this matter in its entirety."

State Courts in Georgia:

"[T]he Complaint's factual allegations do not plausibly support his claims. The allegations in the Complaint rest on speculation rather than duly pled facts."

"[Georgia law] provides that a petition for an election contest must set for the grounds for the election context. [Georgia law] further provides that it must set forth such facts as are necessary to 'provide a full particular and explicit statement of the cause of contest.' Georgia's Supreme Court has interpreted this to require a contestant to allege and prove a factual basis showing grounds for an election contest and to prohibit a contestant from basing a contest on a mere speculative belief that an error has occurred. *See Ellis v. Johnson*, 263 Ga. 514 (1993). Plaintiffs' Complaint does not meet this requirement as it does not recite facts or evidence but relies on speculation as to this belief that an error in the election has occurred. Therefore, his complaint is dismissed for failure to state a claim."

Federal Courts in Georgia (Trump-appointed Federal Judge Grimberg, affirmed by panel including Trump-appointed Federal Appellate Judge Lagoa)

"Even assuming Wood possessed standing, and assuming Counts I and II are not barred by laches, the Court nonetheless finds Wood would not be entitled to the relief he seeks."

"[Plaintiffs'] argument is that the procedures in the Settlement Agreement regarding information and signature match so overwhelmed ballot clerks that the rate of rejection plummeted and, *ergo*, invalid ballots were passed over and counted. This argument is belied by the record; the percentage of absentee ballots rejected for missing or mismatched information and signature is the exact same for the 2018 election and the General Election (.15%)."

Electors Clause: "Wood argues Defendants violated the Elections and Electors Clauses because the 'procedures set forth in the [Settlement Agreement] for the handling of defective absentee ballots is not consistent with the laws of the State of Georgia, and thus, Defendants' actions . . . exceed their authority.' … State legislatures—such as the Georgia General Assembly—possess the authority to delegate their authority over elections to state officials in conformity with the Elections and Electors Clauses. Recognizing that Secretary Raffensperger is "the state's chief election official," the General Assembly enacted legislation permitting him (in his official capacity) to "formulate, adopt, and promulgate such rules and regulations, consistent with law, as will be conducive to the fair, legal, and orderly conduct of primaries and elections." O.C.G.A. § 21-2-31(2). The Settlement Agreement is a manifestation of Secretary Raffensperger's statutorily granted authority. It does not override or rewrite state law."

Federal Court in Michigan:

Ruling in Case Brought by Sidney Powell: "With nothing but speculation and conjecture that votes for President Trump were destroyed, discarded or switched to votes for Vice President Biden, Plaintiffs'equal protection claim fails. . . . [T]o be perfectly clear, Plaintiffs' equal protection claim is not supported by any allegation that Defendants' alleged schemes caused votes for President Trump to be changed to votes for Vice President Biden. For example, the closest Plaintiffs get to alleging that physical ballots were altered in such a way is the following statement in an election challenger's sworn affidavit: "I believe some of these workers were changing votes that had been cast for Donald Trump and other Republican candidates." (ECF No. 6 at Pg ID 902 ¶ 91 (citing Aff. Articia Bomer, ECF No. 6-3 at Pg ID 1008-1010).) But of course, "[a] belief is not evidence" and falls far short of what is required to obtain any relief, much less the extraordinary relief Plaintiffs request."

State Courts in Nevada (Extensive evidentiary analysis following a hearing and multiple depositions). The President's spokesperson, Kayleigh McEnany stated on television (Hannity, Dec. 2, 2020) that this was the "most important case" and would finally vet the Trump legal claims. The Court did indeed vet all the legal claims, including allegations regarding Dominion voting machines, and issued a detailed ruling that the evidence presented did not support the President's claims.

"The Contestants failed to meet their burden to prove credible and relevant evidence to substantiate any of the grounds set forth in NRS 293.410 to contest the November 3, 2020 General Election." The Court assessed evidence submitted regarding the Dominion voting machine allegations specifically and concluded the evidence was not credible.

President Trump's legal team appealed each of the issues up through the Nevada Supreme Court. That Court unanimously affirmed the ruling of the trial court judge, explaining: "Despite our earlier order asking appellants to identify specific findings with which they take issue, appellants have not pointed to any unsupported factual findings, and we have identified none."

Federal Courts in Pennsylvania (including decision written by Trump-Appointed Federal Appellate Judge):

"One might expect that when seeking such a startling outcome, a plaintiff would come formidably armed with compelling legal arguments and factual proof of rampant corruption, such that this Court would have no option but to regrettably grant the proposed injunctive relief despite the impact it would have on such a large group of citizens. That has not happened. Instead, this Court has been presented with strained legal arguments without merit and speculative accusations, unpled in the operative complaint and unsupported by evidence. In the United States of America, this cannot justify the disenfranchisement of a single voter, let alone all the voters of its sixth most populated state."

"Free, fair elections are the lifeblood of our democracy. Charges of unfairness are serious. But calling an election unfair does not make it so. Charges require specific allegations and then proof. We have neither here. … 'While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations.' Iqbal, 556 U.S. at 679. Yet the Campaign offers no specific facts to back up these claims."

"The Campaign's claims have no merit. The number of ballots it specifically challenges is far smaller than the roughly 81,000-vote margin of victory. And it never claims fraud or that any votes were cast by illegal voters. Plus, tossing out millions of mail-in ballots would be drastic and unprecedented, disenfranchising a huge swath of the electorate and upsetting all down-ballot races too."

State Supreme Court in Pennsylvania:

"Petitioners' challenge violates the doctrine of laches given their complete failure to act with due diligence in commencing their facial constitutional challenge, which was ascertainable upon Act 77's enactment. It is well-established that "[l]aches is an equitable doctrine that bars relief when a complaining party is guilty of want of due diligence in failing to promptly institute an action to the prejudice of another." *Stilp v. Hafer*, 718 A.2d 290, 292 (Pa. 1998). … The want of due diligence demonstrated in this matter is unmistakable. Petitioners filed this facial challenge to the mail-in voting statutory provisions more than one year after the enactment of Act 77. At the time this action was filed on November 21, 2020, millions of Pennsylvania voters had already expressed their will in both the June 2020 Primary Election and the November 2020 General Election and the final ballots in the 2020 General Election were being tallied, with the results becoming seemingly apparent. . . . Thus, it is beyond cavil that Petitioners failed to act with due diligence in presenting the instant claim."

Federal Courts reviewing Wisconsin election allegations (Decisions written by two Trump-appointed Federal Judges):

"And, on the merits of plaintiff's claims, the Court now further concludes that plaintiff has not proved that defendants violated his rights under the Electors Clause. To the contrary, the record shows Wisconsin's Presidential Electors are being determined in the very manner directed by the Legislature, as required by Article II, Section 1 of the Constitution."

"In sum, far from defying the will of the Wisconsin Legislature in issuing the challenged guidance, the [Wisconsin Election Commission] was in fact acting pursuant to the legislature's express directives. … Thus, the guidance that plaintiff claims constitutes an unconstitutional deviation from the Wisconsin Legislature's direction, is, to the contrary, the direct consequence of legislature's express command."

"In his concurring opinion in *Bush v. Gore*, Chief Justice Rehnquist suggested that the proper inquiry under the Electors Clause is to ask whether a state conducted the election in a manner substantially consistent with the "legislative scheme" for appointing electors. 531 U.S. 98, 113 (2000) (Rehnquist, C.J., concurring). . . . Whatever actions the Commission took here, it took under color of authority expressly granted to it by the Legislature."

State Supreme Court in Wisconsin

"We conclude the Campaign is not entitled to the relief it seeks. The challenge to the indefinitely confined voter ballots is meritless on its face, and the other three categories of ballots challenged fail under the doctrine of laches."

SECTION II: Description and Excerpts of Principal Cases in all Six States

I. **Arizona**

A. Litigation in Arizona State Court

Multiple challenges to the Arizona Presidential election were filed, litigated and resolved with no change to the election outcome. In the principal case (which ultimately reached the Arizona Supreme Court), the trial judge allowed the challengers to engage in inspection of mail-in and "duplicate" ballots, conduct multiple depositions, and present their evidence at a hearing. In response to allegations about allegedly forged signatures on mail-in ballots, the court found:

> "There is no evidence that the manner in which signatures were reviewed was designed to benefit one candidate or another, or that there was any misconduct, impropriety, or violation of Arizona law with respect to the review of mail-in ballots."

As the Court also explained, neither the plaintiffs nor the defense experts found evidence of "forgery or simulation" as to the examined mail-in ballots. Addressing the *process* for reviewing mail-in ballots under Arizona law, the trial court explained:

> "Under Arizona law, voters who vote by mail submit their ballot inside an envelope that is also an affidavit signed by the voter. Election officials review all mail-in envelope/affidavits to compare the signature on them with the signature in voter registration records. If the official is "satisfied that the signatures correspond," the unopened envelope is held until the time for counting votes. If not, officials attempt to contact the voter to validate the ballot. A.R.S. § 16-550(A). This legislatively-prescribed process is elaborated on in the Secretary of State's Election Procedures Manual. . . . Maricopa County election officials followed this process faithfully in 2020."

The Court also allowed inspection of a sample of "duplicate ballots." Such duplicates must be made for overseas military voters and in cases when ballots cannot be properly read by a tabulation machine. As to that evidence, the Court found:

> "The duplication process prescribed by the Legislature necessarily requires manual action and human judgment, which entail a risk of human error. Despite that, the duplication process for the presidential election was 99.45% accurate. And there is no evidence that the inaccuracies were intentional or part of a fraudulent scheme. They were mistakes. And given both the small number of duplicate ballots and the low error rate, the evidence does not show any impact on the outcome."

The trial court concluded that "Plaintiff has not proven that the Biden/Harris ticket did not receive the highest number of votes." The Arizona Supreme Court then unanimously affirmed that ruling, explaining as follows:

> "The validity of an election is not voided by honest mistakes or omissions unless they affect the result, or at least render it uncertain. *Findley v. Sorenson*, 35Ariz. 265, 269 (1929). Where an election is contested on the ground of illegal voting, the contestant has the burden of showing that sufficient illegal votes were cast to change the result, *Morgan v.Board of Sup'rs*, 67 Ariz. 133 (1948). The legislature has expressly delegated to the

Secretary the authority to promulgate rules and instructions for early voting. A.R.S. § 16-452(A). After consulting with county boards and election officials, the Secretary is directed to compile the rules "in an official instructions and procedures manual." The Election Procedures Manual or "EPM," has the force of law. The Court recently considered a challenge to an election process and granted relief where the county recorder adopted a practice contrary to the EPM.... *Here, however, there are no allegations of any violation of the EPM or any Arizona law."*

"Because 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, the Court need not decide if the challenge was in fact authorized under A.R.S. § 16-672 or if the federal "safe harbor" deadline applies to this contest. **IT IS ORDERED** affirming the trial court decision and confirming the election of the Biden Electors under A.R.S. § 16-676(B)."

B. Litigation in Federal Court in Arizona

Tyler Bowyer, et al., v. Doug Ducey, et al., Federal District Court, Arizona, CV-20- 02321-PHX-DJH, 12/09/20. Judge Diana Humetewa.

In addition to litigating in the Arizona state judicial system, plaintiffs supporting President Trump also attempted to bring multiple claims in Federal District Court for the District of Arizona, with factual allegations addressing "destruction of absentee ballots," Dominion voting machines, voting fraud and manipulation, problems with the election observer process, and alleged "dilution of lawful votes." The Court explained why several of the allegations were insufficient to state a federal Constitutional claim, including because the plaintiffs lacked standing under Article III of the Constitution. The Court also addressed plaintiffs' allegations of fraud specifically. Below is a selection of excerpts from the Judge's opinion on those issues:

"The allegations they put forth to support their claims of fraud fail in their particularity and plausibility. Plaintiffs append over three hundred pages of attachments, which are only impressive for their volume. The various affidavits and expert reports are largely based on anonymous witnesses, hearsay, and irrelevant analysis of unrelated elections."

"The Complaint is equally void of plausible allegations that Dominion voting machines were actually hacked or compromised in Arizona during the 2020 General Election. Plaintiffs are clearly concerned about the vulnerabilities of voting machines used in some counties across Arizona and in other states. They cite sources that attest to knowledge of 'well-known' vulnerabilities, have included letters from concerned citizens, Arizona elected officials, and United States senators. Plaintiffs even attach an affidavit of an anonymous witness with connections to the late Venezuelan dictator Hugo Chavez claiming to be privy as to how officials in Venezuela rigged their elections with the help of a voting systems company whose software "DNA" is now used in voting machines in the United States. (Doc. 1-1, Ex. 1). These concerns and stated vulnerabilities, however, do not sufficiently allege that any voting machine used in Arizona was in fact hacked or compromised in the 2020 General Election. Rather, what is present is a lengthy collection of phrases beginning with the words "could have, possibly, might," and "may have."

"Plaintiffs next argue that they have expert witnesses who can attest to widespread voter fraud in Arizona. As an initial matter, none of Plaintiffs' witnesses identify Defendants as committing the alleged fraud, or state what their participation in the alleged fraudulent scheme was. Instead, they allege that, absentee ballots "could have been filled out by

anyone and then submitted in the name of another voter," "could be filled in by third parties to shift the election to Joe Biden," or that ballots were destroyed or replaced "with blank ballots filled out by election workers, Dominion or other third parties." (Doc. 1 ¶¶54–58) (emphasis added). These innuendoes fail to meet Rule 9(b) standards. But perhaps more concerning to the Court is that the 'expert reports' reach implausible conclusions, often because they are derived from wholly unreliable sources."

"Not only have Plaintiffs failed to provide the Court with factual support for their extraordinary claims, but they have wholly failed to establish that they have standing for the Court to consider them. ***Allegations that find favor in the public sphere of gossip and innuendo cannot be a substitute for earnest pleadings and procedure in federal court.*** They most certainly cannot be the basis for upending Arizona's 2020 General Election. The Court is left with no alternative but to dismiss this matter in its entirety."

II. Georgia

A. Cases litigated in Georgia State Court

Multiple plaintiffs filed cases challenged the Georgia election in Georgia State Courts. The Georgia legislature has enacted a detailed series of laws governing elections. Those laws provide specific remedies to address election related concerns (including post-election audits). The Georgia code also specifically provides for election challenges to be filed before Georgia state courts. In certain of the cases filed, the litigants supporting President Trump made fundamental errors by, for example, failing to sue the appropriate Georgia officials as required by Georgia law, failing to serve the defendants in the case with process, and other routine filing errors delaying the cases. A summary of the issues appears in a brief filed in the U.S. Supreme Court by the Attorney General of the State of Georgia (a Republican appointee).[1]

"Since the November election, there have been at least six Georgia cases alleging that state election officials violated the law by acting in accordance with the State's settlement agreement or by adopting State Rule 183-1-14-0.9-.15. *See*, *e.g.*, *Wood v. Raffensperger*, No. 1:20-cv-04651-SDG (N.D. Ga.); *Pearson et al. v. Kemp et al.*, No. 1:20-cv-04809-TCB (N.D. Ga.); *Wood v. Raffensperger et al.*, No. 2020-CV-342959 (Fulton Cnty. Sup. Ct.); *Boland v. Raffensperger*, No. 2020-CV-343018 (Fulton Cnty. Sup. Ct.); *Della Polla v. Raffensperger*, No. 20-1-7490 (Cobb Cnty. Sup. Ct); *Trump et al. v. Raffensperger et al.*, No. 2020-CV-343255 (Fulton Cnty. Sup. Ct.). And none of that litigation has gone anywhere. The Eleventh Circuit, the Northern District of Georgia, and the Superior Courts of Fulton County and Cobb County, Georgia have rejected all the claims except for in one case, which was filed just this week and is thus still winding through Georgia's courts just as the Georgia Legislature envisioned."

The Georgia Attorney General also described how Georgia's legislature enacted measures for election recounts (and state court election challenges) in accordance with Article II of our Constitution, and how those measures were implemented in 2020.

"Georgia's legislature enacted laws governing elections and election disputes, and the State and its officers have implemented and followed those laws. To ensure the accuracy of the results of that process, it has completed three total counts of the vote for its presidential electors, including a historic 100 percent manual recount—all in accordance with state law. It has, consistent with its authority under 3 U.S.C. § 5 [the Electoral Count

[1] Among the attorneys joining the Attorney General on that brief was Jody Hunt, President Trump's former appointee as Assistant Attorney General for the U.S. Department of Justice's Civil Division.

> Act], authorized its courts to resolve election disputes…. The Legislature has given the Election Board express authority to "promulgate rules and regulations" to ensure "uniformity" among election officials and a "fair, legal, and orderly" election. O.C.G.A. § 21-2-31….First, in accordance with O.C.G.A. § 21-2-498, Georgia completed a risk-limiting audit…. The audit resulted in a manual count of nearly 5 million ballots cast—a process that lasted the better part of a week and required the State to deploy immense human and financial resources. Ultimately, the audit confirmed the initial election results, and Secretary Raffensperger certified the results on November 20, 2020. That was not all. Responding to the Trump Campaign's request, Georgia undertook a machine tabulation recount of the nearly 5 million ballots. Again, the recount confirmed the initial election results."

Georgia state courts have specifically addressed allegations of election irregularities. In *Boland v. Raffensperger*, for example, a Georgia State Court evaluated a range of allegations about misconduct by election officials and related matters. The Court described the plaintiffs' case as follows:

> "Even if credited, the Complaint's factual allegations do not plausibly support his claims. The allegations in the Complaint rest on speculation rather than duly pled facts. They cannot, as a matter of law, sustain this contest. Count I, which alleges that 20,312 people may have voted illegally in Georgia, relies upon a YouTube video which purportedly is based upon United States Postal Service mail forwarding information. Pet. ¶ 1. Count II alleges that the signature-matching process resulting from a Settlement Agreement entered into by the State nine months ago is inconsistent with Georgia's election code, and allegedly violates the federal Constitution.3 Pet. ¶ 17. The Court finds that Plaintiff's allegations, as pled, do not support an allegation of impropriety or a conclusion that sufficient illegal votes were cast to change or place in doubt the result of the election. These arguments have been offered and rejected in other courts. *See Wood*, 2020 WL 6817513, at *10. Furthermore, the statutory changes put in place by the General Assembly permitting voters to cure signature issues on their ballot as a result of 2019 legislation, as well as regulatory changes adopted by the State Election Board contemporaneous with execution of the Settlement Agreement, would be expected to result in fewer signature rejections. This would not be because illegal votes are somehow evading review, but because subjecting signatures to more thorough verification and permitting voters to cure suspected errors should reduce the number of lawful ballots that are improperly thrown out."

Likewise, in the *Della Polla* case, a Georgia State Court Judge concluded as follows:

> "[Georgia law] provides that a petition for an election contest must set forth the grounds for the election context. [Georgia law] further provides that it must set forth such facts as are necessary to 'provide a full particular and explicit statement of the cause of contest.' Georgia's Supreme Court has interpreted this to require a contestant to allege and prove a factual basis showing grounds for an election contest and to prohibit a contestant from basing a contest on a mere speculative belief that an error has occurred. *See Ellis v. Johnson*, 263 Ga. 514 (1993). Plaintiffs' Complaint does not meet this requirement as it does not recite facts or evidence but relies on speculation as to this belief that an error in the election has occurred. Therefore, his complaint is dismissed for failure to state a claim."

In one remaining state court case, *Trump et al. v. Raffensperger et al.*, No. 2020-CV-343255, counsel for President Trump initially sought an emergency hearing to address his claims of fraud and

illegality, but then withdrew that emergency motion on December 8, 2020, canceling the imminent hearing and delaying the case. This has slowed the ultimate resolution of that action.

B. Principal Cases litigated in Federal Court in Georgia

Lin Wood v. Raffensperger, Federal District Court for the Northern District of Georgia, Atlanta Division, Judge Stephen Grimburg (appointed by President Trump.)

The plaintiff in this Federal District Court case argued that Georgia officials took unauthorized actions and treated absentee ballots in a manner that favored candidate Biden. Plaintiff also asked the Court to order a "second recount" of Georgia ballots. The absentee ballot allegations related in part to a settlement in March 2020 by Georgia of a prior lawsuit. Plaintiff also argued that designated Republican monitors did not have proper access to an audit conducted by Georgia state officials in the days after the election.

Judge Grimberg, a Trump appointee, conducted a hearing with live witness testimony before issuing his ruling. His opinion begins by describing the foundational Constitutional problems with Plaintiff Wood's federal suit, including that Wood lacked standing and noting that Wood was relying upon a 1993 11th Circuit precedent that is "no longer good law." Judge Grimberg also explained why courts require the type of challenge Plaintiff brought to be made pre-election, before millions of voters cast their ballots.[2] After addressing those issues, the Court turned to the substance of Wood's legal and factual arguments, explaining as follows:

> "Even assuming Wood possessed standing, and assuming Counts I and II are not barred by laches, the Court nonetheless finds Wood would not be entitled to the relief he seeks."
>
> *Allegations about Absentee Ballots*: "Wood's argument is that the procedures in the Settlement Agreement regarding information and signature match so overwhelmed ballot clerks that the rate of rejection plummeted and, ergo, invalid ballots were passed over and counted. This argument is belied by the record; the percentage of absentee ballots rejected for missing or mismatched information and signature is the exact same for the 2018 election and the General Election (.15%). This is despite a substantial increase in the total number of absentee ballots submitted by voters during the General Election as compared to the 2018 election."
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> *Elections and Electors Clauses*: "In relevant part, the Constitution states: 'The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof." U.S. Const. art. I, § 4, cl. 1. This provision—colloquially known as the Elections Clause—vests authority in the states to regulate the mechanics of federal elections. *Foster v. Love*, 522 U.S. 67, 69 (1997). The 'Electors Clause' of the Constitution similarly states that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of [Presidential] Electors." U.S. Const. art. II, § 1, cl. 2. Wood argues Defendants violated the Elections and Electors Clauses because the 'procedures set forth in the [Settlement Agreement] for the handling of defective absentee ballots is not consistent with the laws of the State of Georgia, and thus, Defendants' actions . . . exceed their authority.' Put another way, Wood argues Defendants usurped

[2] Judge Grimberg cited Justice Kavanaugh's concurrence in a recent election suit filed by the Democratic National Committee. *See Democratic Nat'l Comm. v. Wisc. State Legislature*, No. 20A66,2020 WL 6275871, at *4 (U.S. Oct. 26, 2020) (Kavanaugh, J., concurring in denial of application to vacate stay) ("The principle [of judicial restraint] also discourages last-minute litigation and instead encourages litigants to bring any substantial challenges to election rules ahead of time, in the ordinary litigation process.")

> the role of the Georgia General Assembly—and thereby violated the United States Constitution—by enacting additional safeguards regarding absentee ballots not found in the Georgia Election Code…. State legislatures—such as the Georgia General Assembly—possess the authority to delegate their authority over elections to state officials in conformity with the Elections and Electors Clauses. [*Citing* U.S. Supreme Court precedent.] *Ariz. State Legislature*, 576 U.S. at 816 ("The Elections Clause [ ] is not reasonably read to disarm States from adopting modes of legislation that place the lead rein in the people's hands . . . it is characteristic of our federal system that States retain autonomy to establish their own governmental processes."). *See also Corman v. Torres*, 287 F. Supp. 3d 558, 573 (M.D. Pa. 2018) ("The Elections Clause, therefore, affirmatively grants rights to state legislatures, and under Supreme Court precedent, to other entities to which a state may, consistent with the Constitution, delegate lawmaking authority.")… Recognizing that Secretary Raffensperger is "the state's chief election official," the General Assembly enacted legislation permitting him (in his official capacity) to "formulate, adopt, and promulgate such rules and regulations, consistent with law, as will be conducive to the fair, legal, and orderly conduct of primaries and elections." O.C.G.A. § 21-2-31(2). ***The Settlement Agreement is a manifestation of Secretary Raffensperger's statutorily granted authority. It does not override or rewrite state law***. It simply adds an additional safeguard to ensure election security by having more than one individual review an absentee ballot's information and signature for accuracy before the ballot is rejected. Wood does not articulate how the Settlement Agreement is not "consistent with law" other than it not being a verbatim recitation of the statutory code. Taking Wood's argument at face value renders O.C.G.A. § 21-2-31(2) superfluous. A state official—such as Secretary Raffensperger—could never wield his or her authority to make rules for conducting elections that had not otherwise already been adopted by the Georgia General Assembly. The record in this case demonstrates that, if anything, Defendants' actions in entering into the Settlement Agreement sought to achieve consistency among the county election officials in Georgia, which furthers Wood's stated goals of conducting "[f]ree, fair, and transparent public elections."

Judge Grimberg's Conclusion: "Granting injunctive relief here would breed confusion, undermine the public's trust in the election, and potentially disenfranchise over one million Georgia voters. Viewed in comparison to the lack of any demonstrable harm to Wood, this Court finds no basis in fact or in law to grant him the relief he seeks."

On appeal, a three judge panel of the Federal Circuit Court of Appeals for the 11th Circuit affirmed Judge Grimberg's ruling unanimously. The panel included Judge Lagoa (a Trump appointee who was considered by the President for the recent Supreme Court vacancy, and Judge William Pryor, a Bush appointee.)

Finally, in the *Pearson* litigation filed by Sidney Powell in Federal District Court in Atlanta, Judge Batten (a Bush appointee) reviewed all the pleadings and held an argument on a motion for an injunction. Judge Batten concluded as follows:

> "Finally, in their complaint, the Plaintiffs essentially ask the Court for perhaps the most extraordinary relief ever sought in any Federal Court in connection with an election. They want this Court to substitute its judgment for that of two-and-a-half million Georgia voters who voted for Joe Biden, and this I am unwilling to do."

III. Michigan

A number of cases were launched in Federal and State Courts in Michigan challenging different elements of the Michigan election. Certain of the cases were summarily dismissed by the courts for a range of pleading or procedural errors – including suing the wrong state official. Certain other cases were voluntarily dismissed by those litigants who brought them after the election was certified under Michigan law. The evidence supporting various arguments was assessed in certain of the cases. For example, Judge Stephens of the Court of Claims for Michigan described one set of evidentiary issues this way:

> "This 'supplemental evidence' is inadmissible as hearsay. The assertion that Connarn was informed by an unknown individual what "other hired poll workers at her table" had been told is inadmissible hearsay within hearsay, and plaintiffs have provided no hearsay exception for either level of hearsay that would warrant consideration of the evidence. See MRE 801(c). The note—which is vague and equivocal—is likewise hearsay. And again, plaintiffs have not presented an argument as to why the Court could consider the same, given the general prohibitions against hearsay evidence. *See Ykimoff v Foote Mem Hosp*, 285 Mich App 80, 105; 776 NW2d 114 (2009). Moreover, even overlooking the evidentiary issues, the Court notes that there are still no allegations implicating the Secretary of State's general supervisory control over the conduct of elections. . . . Not only can the relief requested not issue against the Secretary of State, who is the only named defendant in this action, but the factual record does not support the relief requested."

Another Federal District Court case brought by attorney Sidney Powell in the Eastern District of Michigan alleged many of the same irregularities publicized in the press, such as voting machines allegedly corrupted or hijacked in the same manner used in Venezuela by former President Hugo Chavez. Federal District Court Judge Parker systematically reviewed the evidence Powell submitted explained why the relief sought by Powell could not be granted. For example, Judge Parker wrote:

> "With nothing but speculation and conjecture that votes for President Trump were destroyed, discarded or switched to votes for Vice President Biden, Plaintiffs'equal protection claim fails."
>
> "[T]o be perfectly clear, Plaintiffs' equal protection claim is not supported by any allegation that Defendants' alleged schemes caused votes for President Trump to be changed to votes for Vice President Biden. For example, the closest Plaintiffs get to alleging that physical ballots were altered in such a way is the following statement in an election challenger's sworn affidavit: "I believe some of these workers were changing votes that had been cast for Donald Trump and other Republican candidates." (ECF No. 6 at Pg ID 902 ¶ 91 (citing Aff. Articia Bomer, ECF No. 6-3 at Pg ID 1008-1010).) But of course, "[a] belief is not evidence" and falls far short of what is required to obtain any relief, much less the extraordinary relief Plaintiffs request."
>
> "The closest Plaintiffs get to alleging that election machines and software changed votes for President Trump to Vice President Biden in Wayne County is an amalgamation of theories, conjecture, and speculation that such alterations were *possible*."
>
> "As Defendants aptly describe, Plaintiffs' requested injunction would "upend the statutory process for election certification and the selection of Presidential Electors. Moreover, it w[ould] disenfranchise millions of Michigan voters in favor [of] the preferences of a handful of people who [are] disappointed with the official results." (ECF No. 31 at Pg ID 2227.) In short, none of the remaining factors weigh in favor of granting Plaintiffs' request for an injunction."

In the wake of Judge Parker's ruling, defense counsel has filed a motion seeking sanctions against Powell and others on her legal team: "Plaintiffs' egregious conduct and frivolous and fraudulent filings clearly warrant sanctions under 28 U.S.C. §1927."

IV. Nevada

In Nevada, as in other states, several election challenges were filed pursuant to state law. The principal case was filed before …. The Court allowed multiple depositions to be taken, considered all the affidavits presented, and issued a lengthy evidentiary ruling following a hearing. This is the case that President Trump's legal team called, "the most important case" [Kayleigh McEnany Dec 2 Hannity] that would finally fully vet the factual basis for their election fraud claims. The Court did indeed conduct a full hearing vetting the factual basis for each legal claim. He ruled against the plaintiffs, and was affirmed unanimously by the Nevada Supreme Court.

Nevada District Judge Russell allowed each party to conduct 15 depositions, considered all the evidence from those depositions and all submitted affidavits in detail. His 34 page opinion is highly detailed and addresses all the principal allegations. He explained as follows:

> *Dominion Voting Machines*: "Clark County, along with 15 other counties in Nevada uses Dominion Voting Systems to conduct in person voting…. These voting systems are subject to extensive testing and certification before each election and are audited after each election. For example, the electronic voting systems used by Clark County were certified by the federal government when they were first brought on the market, as well as any time a hardware or software component is upgraded. This certification is done by a voting system test laboratory. The electronic voting machines are also tested and certified by the Secretary. … These voting machines are also audited against a paper trail that is generated … when voters make their selections. A Clark County voting machine will not operate unless it is connected to a printer … which creates a paper record that voters can review. … After each election, Clark County, like Nevada's other counties, conducts a random audit of its voting machines. Specifically, it compares the paper trail created by the printer against the results recorded by the voting machine to ensure they match. … Clark County conducted this audit following the November election and there were no discrepancies between the paper audit trail created by the printer and the data from the voting machine."
>
> "Contestants' evidence does not establish by clear and convincing proof, or under any standard of evidence, that 'there was a malfunction of any voting device or electronic tabulator, counting device or computer in a manner sufficient to raise reasonable doubt as to the outcome of the election."
>
> *Affidavits/Declarations from Non-Testifying Witnesses*: "Much of Contestants' evidence consists of non-deposition evidence in the form of witness declarations. These declarations fall outside the scope of the contest statute, which provides that election contests 'shall be tried and submitted so far as may be possible upon depositions and written or oral argument as the court may order. … The reason for this is to allow for the cross-examination of the deponent under oath. … These declarations also constitute hearsay, as they are out-of-court statements offered in evidence to prove the truth of the matters asserted. Most of these declarations were self serving statements of little or no evidentiary value. The Court nonetheless considers the totality of evidence provided by Contestants in reaching and ruling upon the merits of their claims."

Plaintiffs' Expert Evidence: The Court heard expert testimony from three individuals who sought to use telephone surveys and statistical information to infer that the vote tallies must be incorrect, and to opine upon the administration of mail in voting. He found each proffered expert unreliable.

"The Court questions Mr. Baselice's methodology because he was unable to identify the source of the data for his survey and conducted no quality control of the data he received."

"The Court questions Mr. Kamzol's methodology because he had little to no information about or supervision over the origins of his data, the manner in which it had been matched and what the rate of false positives would be. Additionally, there was little to no verification of his numbers."

"Mr. Gessler's report lacked citations to facts and evidence that he used to come to his conclusions and did not include a single exhibit to support any of his conclusions. The Court finds that Mr. Gessler's methodology is unsound because he based nearly all of his opinions on a handful of affidavits that he took no steps to corroborate through independent investigation."

"As reflected herein, the Court finds that the expert testimony provided by Contestants was of little or no value. The Court did not exclude consideration of this evidence, which it could have, but gave it very little weight."

Illegal or Improper Votes: "Contestants allege that fraud occurred at multiple points in the voting process in Nevada that exceed the margin of victory in the presidential race. … The Court finds there is no evidence that voter fraud rates associated with mail in voting are systematically higher than voter fraud rates associated with other forms of voting. …. [T]he illegal vote rate totaled at most only 0.00054 percent."

Provisional Ballots, *Mismatched Signatures*, *Illegal Votes from In-Person Voting Technology*, *Ineligible Voters and Double Voting*, *Deceased Voters*, *Voter Impersonation*, *Untimely Ballots*: The court made detailed findings rebutting each of plaintiffs' claims about illegality on each of these topics.

Judge Russell concluded: "The Contestants failed to meet their burden to prove credible and relevant evidence to substantiate any of the grounds set forth in NRS 293.410 to contest the November 3, 2020 General Election." President Trump's legal team appealed each of the issues up through the Nevada Supreme Court. That Court unanimously affirmed the ruling of the trial court judge, explaining:

"Despite our earlier order asking appellants to identify specific findings with which they take issue, appellants have not pointed to any unsupported factual findings, and we have identified none."

V. <u>Pennsylvania</u>

A. Cases Filed in State Court

In *Kelly et al. v. Commonwealth of Pennsylvania et al.*, a group of plaintiffs challenged the mail-in ballot measures enacted by the Pennsylvania legislature in Act 77 (Act of October 31, 2019, P.L. 552, No. 77; *see also* 25 Pa. Stat. xx 3146.6(c)). The case began in Pennsylvania state court, reached the Pennsylvania Supreme Court, and then was the subject of a petition for emergency injunctive relief to the U.S. Supreme Court.

The principal allegation in the case was that Pennsylvania's "mail-in ballot" law violated the Pennsylvania state Constitution's provision on absentee voting. The plaintiffs claimed that the state constitution's provision is a restriction on all forms of remote voting, *i.e.* other than in-person voting. But Pennsylvania does not interpret its own Constitution that way. Instead, the Pennsylvania legislature understood the absentee voting provision to require that the Legislature *provide an avenue for absentee*

voting for anyone who will not vote in person because they will be out of town on business, are prevented from voting in person by illness, are physically disabled, are observing a religious holiday or are serving as poll workers that day. As Pennsylvania explains in its brief to the U.S. Supreme Court, the absentee voting provision ensures that people in those categories will be able to vote absentee, but does not prevent the legislature from going further and providing a broader provision for mail-in ballots:

> "Petitioners contend that by requiring the General Assembly to allow certain voters to cast absentee ballots, Article VII, § 14 somehow forbids the General Assembly from allowing others to vote by mail. But the inclusion of a particular legislative duty in the Pennsylvania Constitution does not prevent the General Assembly from crafting other legislation on that topic. In fact, the Pennsylvania Constitution originally said "may" and now says "shall" in Article VII, § 14—a change meant to further clarify that this provision provides a floor, not a ceiling, for absentee voting in Pennsylvania. *See*, *e.g.*, *Mathews v. Paynter*, 752 F. App'x 740, 744 (11th Cir. 2018) (distinguishing "shall" from "may" and noting that former term does not impliedly limit government authority). Thus, the Pennsylvania Constitution provides that the General Assembly must allow voters in the enumerated four categories to cast absentee ballots, but may also go further—by exercising its broad power to "prescribe[]" the permissible "method[s]" of voting, PA. CONST. art. VII, § 4—and allow other categories of voters to vote by mail, including by allowing any voter to opt to cast a mail-in ballot."

When this issue reached the Pennsylvania Supreme Court, the court ruled against plaintiffs based on the state law doctrine of "laches" – explaining that the plaintiffs waited too long to bring their claims, and could have brought their claims before the November election. Pennsylvania also explained that multiple state elections have already been conducted under the "mail-in" ballot law. Pennsylvania's brief in the U.S. Supreme Court and characterized the argument this way:

> "Petitioners maintain that the doctrine of laches must yield because they "are not lawyers," and could not have "been reasonably expected to know[] that they had viable legal claims well-before the election occurred." App. at 37. This assertion of ignorance is implausible, given that several Petitioners are current legislators or candidates for legislative office. *See* Compl. ¶¶ 3-4. In any event, '[l]aches is not excused by simply saying, 'I did not know.' If by diligence a fact can be ascertained, the want of knowledge so caused is no excuse for a stale claim. The test is not what the plaintiff knows, 'but what he might have known by the use of the means of information within his reach with the vigilance the law requires of him.'"

As noted, after the Pennsylvania Supreme Court ruled, the plaintiffs in the case filed a request with the U.S. Supreme Court for an emergency injunction. The Supreme Court denied that request on December 8, 2020. No U.S. Supreme Court Justice dissented from that denial.

In addition to the *Kelly* case, several other state court cases have been unsuccessfully pursued. One such case, *Metcalf*, was brought 11 days after the state law deadline, and was dismissed on that basis. In another matter, *IN RE: CANVASS OF ABSENTEE AND MAIL-IN BALLOTS OF NOVEMBER 3, 2020 GENERAL ELECTION*, 8,329 votes were challenged because the voters failed to properly print their names, addresses and the date in full on the ballot envelope. The Pennsylvania Supreme Court applied state law and ruled as follows:

> "Here we conclude that while failures to include a handwritten name, address or date in the voter declaration on the back of the outer envelope, while constituting technical violations of the Election Code, do not warrant the wholesale disenfranchisement of thousands of Pennsylvania voters."

B. Cases Filed in Federal Court

In *Donald J. Trump for President, Inc., et al v. Boockvar*, the Federal District Court for the Middle District of Pennsylvania addressed plaintiffs' concerns with what is known as a "notice and cure" policy. Under that policy Pennsylvania State election officials allowed Pennsylvania county officials to provide notice to voters who had not properly filled out mail in or absentee ballots, so that the voters could correct them. Some of the counties in the state exercised this authority and others did not. Plaintiffs argued that the unequal application of this policy across the state required the Court to throw out the election result state-wide. The Court responded as follows:

> "One might expect that when seeking such a startling outcome, a plaintiff would come formidably armed with compelling legal arguments and factual proof of rampant corruption, such that this Court would have no option but to regrettably grant the proposed injunctive relief despite the impact it would have on such a large group of citizens. That has not happened. Instead, this Court has been presented with strained legal arguments without merit and speculative accusations, unpled in the operative complaint and unsupported by evidence. In the United States of America, this cannot justify the disenfranchisement of a single voter, let alone all the voters of its sixth most populated state."
>
> "Plaintiffs' claims fail because it is perfectly rational for a state to provide counties discretion to notify voters that they may cure procedurally defective mail-in ballots. Though states may not discriminatorily sanction procedures that are likely to burden some persons' right to vote more than others, they need not expand the right to vote in perfect uniformity. All Plaintiffs have alleged is that Secretary Boockvar allowed counties to choose whether or not they wished to use the notice-and-cure procedure. No county was forced to adopt notice-and-cure; each county made a choice to do so, or not. Because it is not irrational or arbitrary for a state to allow counties to expand the right to vote if they so choose, Individual Plaintiffs fail to state an equal-protection claim."
>
> "Crucially, Plaintiffs fail to understand the relationship between right and remedy. Though every injury must have its proper redress, a court may not prescribe a remedy unhinged from the underlying right being asserted. By seeking injunctive relief preventing certification of the Pennsylvania election results, Plaintiffs ask this Court to do exactly that. Even assuming that they can establish that their right to vote has been denied, which they cannot, Plaintiffs seek to remedy the denial of their votes by invalidating the votes of millions of others. Rather than requesting that their votes be counted, they seek to discredit scores of other votes, but only for one race. This is simply not how the Constitution works."

The Federal Court of Appeals for the Third Circuit affirmed the District Court ruling. Judge Bibas, *another nominee of President Trump*, wrote the extensive opinion:

> "Free, fair elections are the lifeblood of our democracy. Charges of unfairness are serious. But calling an election unfair does not make it so. Charges require specific allegations and then proof. We have neither here. The Trump Presidential Campaign asserts that Pennsylvania's 2020 election was unfair. But as lawyer Rudolph Giuliani stressed, the Campaign "doesn't plead fraud. . . . [T]his is not a fraud case." Mot. to Dismiss Hr'g Tr. 118:19–20, 137:18. Instead, it objects that Pennsylvania's Secretary of State and some counties restricted poll watchers and let voters fix technical defects in their mail-in ballots. It offers nothing more."
>
> "So is the claim that, "[u]pon information and belief, a substantial portion of the approximately 1.5 million absentee and mail votes in Defendant Counties should not have

been counted." Id. ¶¶ 168, 194, 223, 253. 'Upon information and belief' is a lawyerly way of saying that the Campaign does not know that something is a fact but just suspects it or has heard it. 'While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations.' *Iqbal*, 556 U.S. at 679. Yet the Campaign offers no specific facts to back up these claims."

"The Campaign's claims have no merit. The number of ballots it specifically challenges is far smaller than the roughly 81,000-vote margin of victory. And it never claims fraud or that any votes were cast by illegal voters. Plus, tossing out millions of mail-in ballots would be drastic and unprecedented, disenfranchising a huge swath of the electorate *and upsetting all down-ballot races too*."

Another case filed in Federal District Court addressed the State law deadline for *receipt of mailed ballots*. This case has now been the subject of multiple filings at the U.S. Supreme Court but addresses only a relatively small number of ballots – approximately 9400 votes, far short of the Biden margin of victory in Pennsylvania. The matter relates to a Pennsylvania State Court ruling extending the Pennsylvania statue's deadline for receipt of mailed ballots by a number of days because COVID-19 apparently threatened delays in mail delivery. On November 6, 2020, Justice Alito entered a brief order, requiring that:

"All [Pennsylvania] county boards of election are hereby ordered, pending further order of the Court, to comply with the following guidance provided by the Secretary of the Commonwealth on October 28 and November 1, namely, (1) that all ballots received by mail after 8:00 p.m. on November 3 be segregated and kept "in a secure, safe and sealed container separate from other voted ballots," and (2) that all such ballots, if counted, be counted separately. Pa. Dep't of State, Pennsylvania Guidance for Mail-in and Absentee Ballots Received From the United States Postal Service After 8:00 p.m. on Tuesday, November 3, 2020 (Oct. 28, 2020); Pa. Dep't of State, Canvassing Segregated Mail-in and Civilian Absentee Ballots Received by Mail After 8:00 p.m. on Tuesday, November 3, 2020 and Before 5:00 p.m. on Friday, November 6, 2020 (Nov. 1, 2020)."

The procedural history in this matter is complicated, and multiple courts have ruled in various contexts. But the principal remaining issue pending before the Supreme Court is this: "Do State courts and executive officials have authority to alter legislatively established election rules, despite the U.S. Constitution's vesting of authority to set the rules for federal elections in State legislatures?" Briefing on a petition for certiorari seeking Supreme Court review is complete now, and the Court could issue its decision on the petition at any time. But to be clear, *the parties involved in this case know that the matter being addressed will not impact the outcome of the Presidential Election in Pennsylvania or any other state*. Indeed, the Petitioner, who supports President Trump's position in this case has argued in a recent brief: "In reality, however, this case is an ideal vehicle [for Supreme Court review], in part precisely *because it will not affect the outcome of this election*."

VI. <u>Wisconsin</u>

A. Cases litigated in Federal Court

Donald J. Trump v. Wisconsin Elections Commission, et al.

In Federal District Court for the Eastern District of Wisconsin, and then on appeal in the Seventh Circuit, *two Trump appointees*, Judges Ludwig and Scudder, ruled against the President. The case addressed a series of issues relating to Wisconsin Election Commission procedures for addressing absentee ballots during the pandemic. The President's counsel argued that those procedures were at

odds with Wisconsin Legislative enactments and thus unconstitutional under the Electors Clause of Article II of our federal Constitution.

At the District Court, Judge Ludwig concluded that the President had standing and presented federal claims. He conducted an expedited hearing *on the merits of the President's claims* before ruling. Judge Ludwig summarized his conclusion as follows:

> "And, on the merits of plaintiff's claims, the Court now further concludes that plaintiff has not proved that defendants violated his rights under the Electors Clause. To the contrary, the record shows Wisconsin's Presidential Electors are being determined in the very manner directed by the Legislature, as required by Article II, Section 1 of the Constitution."

Judge Ludwig also explained how the Wisconsin Legislature specifically created the Wisconsin Election Commission (WEC) to carry out the election, and delegated to the Commission specific authority to create procedures for addressing election related issues (including absentee balloting) and created a right to seek relief in state court to remedy any "alleged irregularity, defect or mistake" related to the election:

> "The Wisconsin Legislature has also established laws detailing the particulars of election administration; these details are set forth in Chapters 5 to 12 of the Wisconsin Statutes. For the last five years, responsibility for the administration of Wisconsin elections has rested with the WEC. The Wisconsin Legislature created the WEC in 2015 specifically to "have the responsibility for the administration of … laws relating to elections and election campaigns." 2015 Wis. Act 118 §4; Wis. Stat. §5.05. The Wisconsin Legislature has also assigned powers and duties under the state election laws to municipal and county clerks, municipal and county boards of canvassers, and in Milwaukee, the municipal and county boards of election commissioners. Wis. Stat. §§7.10, 7.15,7.21. The Wisconsin Legislature has directed that these officials, along with the WEC, administer elections in Wisconsin. See Wis. Stat. chs. 5 to 10 and 12. To carry out these duties, the legislature has delegated significant authority to the WEC. … For the determination of Presidential Electors, the Wisconsin Legislature has directed the WEC to "prepare a certificate showing the determination of the results of the canvass and the names of the persons elected." Wis. Stat. §7.70(5)(b). The legislature has further directed that "the governor shall sign [the certificate], affix the great seal of the state, and transmit the certificate by registered mail to the U.S. administrator of general services." *Id.* … In addition to logistically administering the election, the Wisconsin Legislature has directed the WEC to issue advisory opinions, Wis. Stat. §5.05(6a), and "[p]romulgate rules …applicable to all jurisdictions for the purpose of interpreting or implementing the laws regulating the conduct of elections or election campaigns. Wis. Stat. §5.05(1)(f). The WEC is to"conduct or prescribe requirements for educational programs to inform electors about voting procedures, voting rights, and voting technology." Wis. Stat. §5.05(12). Finally, the Wisconsin Legislature has provided detailed recount procedures. Wis. Stat. §9.01. After requesting a recount, "any candidate … may appeal to circuit court." Wis. Stat. §9.01(6). The legislature has also directed that "[Wis. Stat. §9.01] constitutes the exclusive judicial remedy for testing the right to hold an elective office as the result of an alleged irregularity, defect or mistake committed during the voting or canvassing process." Wis. Stat. §9.01(11)."

Judge Ludwig then concluded that the WEC did not act inconsistently with the manner provided by the Wisconsin Legislature for conducting the election and selecting a slate for the Electoral College:

> "The approach, form, method, or mode the Wisconsin Legislature has set for appointing Presidential electors is by "general ballot at the general election. Wis. Stat. §8.25(1). There

> is no dispute that this is precisely how Wisconsin election officials, including all the defendants, determined the appointment of Wisconsin's Presidential Electors in the latest election. They used "general ballot[s] at the general election for choosing the president and vice president of the United States" and treated a "vote for the president and vice president nominations of any party is a vote for the electors of the nominees." Absent proof that defendants failed to follow this "Manner" of determining the state's Presidential Electors, plaintiff has not and cannot show a violation of the Electors Clause."

And Judge Ludwig also explained explicitly why the WEC actions regarding absentee ballots were consistent with the enactments of the Wisconsin Legislature:

> "These issues are ones the Wisconsin Legislature has expressly entrusted to the WEC. Wis. Stat. §5.05(2w) ("The elections commission has the responsibility for the administration of chs. 5 to 10 and 12."). When the legislature created the WEC, it authorized the commission to issue guidance to help election officials statewide interpret the Wisconsin election statutes and new binding court decisions. Wis. Stat. §5.05(5t). The WEC is also expressly authorized to issue advisory opinions, Wis. Stat. §5.05(6a), and to "[p]romulgate rules … applicable to all jurisdictions for the purpose of interpreting or implementing the laws regulating the conduct of elections or election campaigns." Wis. Stat. §5.05(1)(f). The Wisconsin Legislature also directed that the WEC would have "responsibility for the administration of … laws relating to elections and election campaigns." Wis. Stat. §5.05(1). In sum, far from defying the will of the Wisconsin Legislature in issuing the challenged guidance, the WEC was in fact acting pursuant to the legislature's express directives. … Thus, the guidance that plaintiff claims constitutes an unconstitutional deviation from the Wisconsin Legislature's direction, is, to the contrary, the direct consequence of legislature's express *command*. And, defendants have acted consistent with the "Manner" of election administration prescribed by the legislature."
>
> "Because plaintiff has failed to show a clear departure from the Wisconsin Legislature's directives, his complaint must be dismissed. As Chief Justice Rehnquist stated, "in a Presidential election the clearly expressed intent of the legislature must prevail." Bush v. Gore, 531 U.S. 98, 120 (2000) (Rehnquist, C.J., concurring). That is what occurred here. There has been no violation of the Constitution."

As noted, the United States Court of Appeals for the Seventh Circuit affirmed Judge Ludwig's ruling, and addressed the issues in additional detail. Judge Scudder, *also a Trump appointee*, wrote for the unanimous three judge panel, explaining:

> "We agree that Wisconsin lawfully appointed its electors in the manner directed by its Legislature and add that the President's claim also fails because of the unreasonable delay that accompanied the challenges the President now wishes to advance against Wisconsin's election procedures."
>
> "On the merits, the district court was right to enter judgment for the defendants. We reach this conclusion in no small part because of the President's delay in bringing the challenges to Wisconsin law that provide the foundation for the alleged constitutional violation. Even apart from the delay, the claims fail under the Electors Clause."
>
> "In his concurring opinion in Bush v. Gore, Chief Justice Rehnquist suggested that the proper inquiry under the Electors Clause is to ask whether a state conducted the election in a manner substantially consistent with the "legislative scheme" for appointing electors. 531 U.S. 98, 113 (2000) (Rehnquist, C.J., concurring). . . . Whatever actions the

Commission took here, it took under color of authority expressly granted to it by the Legislature."

B. Principal Case in State Court

After a recount conducted in Wisconsin increased candidate Biden's lead, President Trump's campaign filed suit in State Court in Wisconsin arguing that the absentee voting procedures in two specific heavily democratic Wisconsin counties violated Wisconsin law. A Wisconsin state court trial judge conducted a hearing and then on December 11, 2020 entered findings against the President. The matter then reached the Wisconsin Supreme Court on appeal. That court again ruled against the President 4-3, which multiple concurrences and dissents.

The issues litigated related to absentee ballot procedures during the pandemic in the two specific heavily democratic counties selected by the President's counsel. The case did not address similar issues state-wide, or in other counties with vote totals predominantly favoring the President. One issue related to a county determination that, pursuant to the Governor's "Safer at Home" pandemic order, voters could qualify as "indefinitely confined" due to illness, and thus vote by mail or drop box without showing identification in person. The President's counsel sought to disqualify every absentee ballot in the two counties of an "indefinitely confined" person regardless of whether that "confinement" related to the pandemic or not. Another issue related to ballots collected by volunteers at various events in Madison, Wisconsin named "Democracy in the Park."

Judge Hagedorn, appointed by former Republican Governor Scott Walker, wrote the majority opinion. The majority first ruled against the Plaintiff as to the application of the definition of "indefinitely confined" – "The challenge to the indefinitely confined voter ballots is meritless on its face." As a concurrence explained:

> "Although the number of individuals claiming indefinitely confined status has increased throughout the state, the Campaign asks us to apply this blanket invalidation of indefinitely confined voters only to ballots cast in Dane and Milwaukee Counties . . . . The Campaign's request to strike indefinitely confined voters in Dane and Milwaukee Counties as a class without regard to whether any individual voter was in fact indefinitely confined has no basis in reason or law; it is wholly without merit."

Next, the Court declined to address the merits of other claims, explaining that the doctrine of "laches" applied:

> "Such doctrine is applied because the efficient use of public resources demands that a court not allow persons to gamble on the outcome of an election contest and then challenge it when dissatisfied with the results, especially when the same challenge could have been made before the public is put through the time and expense of the entire election process. Thus if a party seeking extraordinary relief in an election-related matter fails to exercise the requisite diligence, laches will bar the action. … Although it disagrees the elements were satisfied here,the Campaign does not dispute the proposition that laches may bar an untimely election challenge. This principle appears to be recognized and applied universally. … The relevant election officials, as well as Vice President Biden and Senator Harris, had no knowledge a claim to these broad categories of challenges would occur. The Campaign's delay in raising these issues was unreasonable in the extreme, and the resulting prejudice to the election officials, other candidates, voters of the affected counties, and to voters statewide, is obvious and immense."

Addressing the "Democracy in the Park" events specifically, the majority explained:

> “When the events were announced, an attorney for the Wisconsin Legislature sent a warning letter to the City of Madison suggesting the events were illegal. The City of Madison responded that the events were legally compliant, offering reasons why. Although these events and the legislature's concerns were widely publicized, the Campaign never challenged these events, nor did any other tribunal determine they were unlawful. The Campaign now asks us to determine that all 17,271 absentee ballots collected during the "Democracy in the Park"events were illegally cast. Once again, when the events were announced, the Campaign could have challenged its legality. It did not.”

The Majority concluded:

> “Our laws allow the challenge flag to be thrown regarding various aspects of election administration. The challenges raised by the Campaign in this case, however, come long after the last play or even the last game; the Campaign is challenging the rulebook adopted before the season began. Election claims of this type must be brought expeditiously. The Campaign waited until after the election to raise selective challenges that could have been raised long before the election. We conclude the challenge to indefinitely confined voter ballots is without merit, and that laches bars relief on the remaining three categories of challenged ballots.”

And the concurring justices added:

> “As acknowledged by the President's counsel at oral argument, the President would have the people of this country believe that fraud took place in Wisconsin during the November 3, 2020 election. Nothing could be further from the truth. The President failed to point to even one vote cast in this election by an ineligible voter; yet he asks this court to disenfranchise over 220,000 voters. The circuit court, whose decision we affirm, found no evidence of any fraud.”

The three dissenting members of the Wisconsin Supreme Court each opposed application of the doctrine of laches, explaining that the people of Wisconsin deserved clarity on the law applicable for each of the circumstances identified:

> “Our constitutional responsibility is to analyze the law and determine if it was followed regardless of whether any remedy might be available. In this way future elections benefit from our analysis.”

> “Petitioners assert troubling allegations of noncompliance with Wisconsin's election laws by public officials on whom the voters rely to ensure free and fair elections. It is our solemn judicial duty to say what the law is. The majority's failure to discharge its duty perpetuates violations of the law by those entrusted to administer it. I dissent.”

Finally, one dissenter declined to reach a conclusion as to the “indefinite confinement” issue with absentee ballots, noting that the court lacked “sufficient information … to determine whether they lawfully asserted that they were indefinitely confined prior to receiving an absentee ballot.” And multiple dissenters questioned the legality of the “Democracy in the Park” events. None of the dissenters explained whether or how a contrary ruling on the subject issues could change the outcome of the election.