Texas v. Pennsylvania, 22O155 (12/12/2020).

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On 12/8/2020, Texas Sued Commonwealth of Pennsylvania, State of Georgia, State of Michigan, and State of Wisconsin (herein after "defendant" states) in the Supreme Court. The Supreme Court has original and exclusive jurisdiction over all controversies between states. Constitution, Article III, Section 2, second paragraph; 28 USC 1251(a). On 12/11/2020, the Court dismissed the case for lack of standing.

Legal issue: Standing under the Electors Clause of the United States Constitution.

Generally speaking, the Supreme Court held that a state lacks standing to complain about irregularities in mechanisms other states use for appointing those other states' presidential electors.

A summary of the action, which provides reasons supporting the Court's dismissal, follows.

On 12/8/2020, Texas moved for a stay to enjoin the defendant States (Georgia, Michigan, Wisconsin, and Pennsylvania), from certifying their presidential electors to the electoral college. In its stay motion, Texas argued that it would suffer irreparable harm unless the Court granted a stay:

> **A. Plaintiff State will suffer irreparable harm if the Defendant States' unconstitutional presidential electors vote in the Electoral College. Allowing the unconstitutional election.** Allowing the unconstitutional election results in Defendant States to proceed would irreparably harm Plaintiff State and the Republic both by denying representation in the presidency and in the Senate in the near term and by permanently sowing distrust in federal elections. This Court has found such threats to constitute irreparable harm on numerous occasions. See note 2, supra (collecting cases). The stakes in this case are too high to ignore. [Texas.]

In its stay motion, Texas argued that the defendant States had violated the Electors Clause of the Constitution by having state judges and executive offers change state election laws, and that made the election less secure:

> As set forth in the Complaint, executive and judicial officials made significant changes to the legislatively defined election laws in the Defendant States. *See* Compl. at ¶¶ 29-134. Taken together, these non-legislative changes did away with statutory ballot-security measures for absentee and mail-in ballots such as signature verification, witness requirements, and statutorily authorized secure ballot drop-off locations. Citing the COVID-19 pandemic, Defendant States gutted the safeguards for absentee ballots through non-legislative actions, despite knowledge that absentee ballots are "the largest source of potential voter fraud," BUILDING CONFIDENCE IN U.S. ELECTIONS: REPORT OF THE COMMISSION ON FEDERAL ELECTION REFORM, at 46 (Sept. 2005) (hereinafter, "CARTER-BAKER"), which is magnified when absentee balloting is shorn of ballot-integrity measures such as signature verification, witness

> requirements, or outer-envelope protections, or when absentee ballots are processed and tabulated without bipartisan observation by poll watchers. [Texas.]

In its stay motion, Texas also argued that the defendant States had violated the Equal Protection Clause of the Constitution by modifying the legal standard for the election in various counties:

> Regardless of whether the modification of legal standards in some counties in Defendant States tilted the election outcome in those States, it is clear that the standards for determining what is a legal vote varied greatly from county to county. That constitutes a clear violation of the Equal Protection Clause; and it calls into question the constitutionality of any Electors appointed by Defendant States based on such an unconstitutional election. [Texas.]

In its stay motion, Texas also argued that the defendant States had violated the Fourteenth Amendment to the Constitution's due process clause by failing to follow procedural requirements for amending election standards:

> Similarly, failing to follow procedural requirements for amending election standards violates procedural due process. *Brown v. O'Brien*, 469 F.2d 563, 567 (D.C. Cir.), *vacated as moot*, 409 U.S. 816 (1972). Under this Court's precedents on procedural due process, not only intentional failure to follow election law as enacted by a State's legislature but also random and unauthorized acts by state election officials and their designees in local government can violate the Due Process Clause. *Parratt v. Taylor*, 451 U.S. 527, 537-41 (1981), *overruled in part on other grounds by Daniels v. Williams*, 474 U.S. 327, 330-31 (1986); *Hudson v. Palmer*, 468 U.S. 517, 532 (1984). Here, the violations all were intentional, even if done for the reason of addressing the COVID-19 pandemic. [Texas.]

On 12/11/2020, the Court denied Texas' law suit, stating only that:

> The State of Texas's motion for leave to file a bill of complaint is denied for lack of standing under Article III of the Constitution. Texas has not demonstrated a judicially cognizable interest in the manner in which another State conducts its elections. All other pending motions are dismissed as moot. Statement of Justice Alito, with whom Justice Thomas joins: In my view, we do not have discretion to deny the filing of a bill of complaint in a case that falls within our original jurisdiction. *See Arizona v. California*, 589 U. S. ___ (Feb. 24, 2020) (Thomas, J., dissenting). I would therefore grant the motion to file the bill of complaint but would not grant other relief, and I express no view on any other issue. [Texas v. Pennsylvania, 22O155 (12/12/2020).]

The parties oppositions to the stay motion provide reasons why Texas lacked standing.

In its opposition, Pennsylvania provided reasons why Texas lacked standing. Pennsylvania argued the following:

A. Texas lacks standing to bring this action Article III, Section 2 of the United States Constitution limits the jurisdiction of the federal courts to resolving "cases" and "controversies." U.S. CONST. art. III, § 2; *Raines v. Byrd*, 521 U.S. 811, 818 (1997). That same jurisdictional limitation applies to actions sought to be commenced in the Court's original jurisdiction. *Maryland v. Louisiana*, 451 U.S. 725, 735-36 (1981). To establish standing, the demanding party must establish a "triad of injury in fact, causation, and redressability." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 103 (1998). More specifically, that the plaintiff has suffered injury to a legally protected interest, which injury is "fairly traceable to the challenged action and redressable by a favorable ruling." *AIRC*, 576 U.S. at 800; *see also Maryland*, 451 U.S. at 736. This Court has "always insisted on strict compliance with this jurisdictional standing requirement." *Raines*, 521 U.S. at819. For invocation of the Court's original jurisdiction, this burden is even greater: "[t]he threatened invasion of rights must be of serious magnitude and it must be established by clear and convincing evidence." *People of the State of N.Y. v. New Jersey*, 256 U.S. 296, 309 (1921). Texas fails to carry this heavy burden. [Pennsylvania.]

First, Texas cannot establish it suffered an injury in fact. An injury in fact requires a plaintiff to show the "invasion of a legally protected interest"; that the injury is both "concrete and particularized"; and that the injury is "actual or imminent, not conjectural or hypothetical." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016). According to Texas, the alleged violations of Pennsylvania's Election Code undermined the authority granted to the Pennsylvania General Assembly under the Electors Clause.[8] Motion at 3, 10-11, 13-15. But as the text of the Electors Clause itself makes clear, the injury caused by the alleged usurpation of the General Assembly's constitutional authority belongs to that institution. *AIRC*,576 U.S. at 800 (legislature claimed that it was stripped of its responsibility for redistricting vested in it by the Elections Clause). The State of Texas is not the Pennsylvania General Assembly. *See Virginia House of Delegates v. Bethune-Hill*, __ U.S. __, 139 S.Ct. 1945, 1953 (2019)(noting the "mismatch between the body seeking to litigate [the Virginia House of Delegates] and the body to which the relevant constitutional provision allegedly assigned exclusive redistricting authority [the General Assembly]"). [Pennsylvania.]

Second, Texas's claimed injury is not fairly traceable to a violation of the Electors Clause. As discussed above, each of Texas's allegations of violations of Pennsylvania law has been rejected by state and federal courts. [Pennsylvania.]

Third, Texas fares no better in relying on *parens patriae* for standing. It is settled law that "a State has standing to sue only when its sovereign or quasi-sovereign interests are implicated and it is not merely litigating as a volunteer the personal claims of its citizens." *Pennsylvania*, 426 U.S. at 665. The state, thus, must "articulate an interest apart from the interests of particular private parties." *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Baez*, 458 U.S. 592, 607 (1982). In other words, "the State must be more than a nominal party." *Ibid.*

That, however, is exactly what Texas is here. Texas seeks to "assert *parens patriae* standing for [its] citizens who are Presidential Electors." [Pennsylvania.]

At bottom, Texas seeks to invoke this Court's original jurisdiction to achieve the extraordinary relief of disenfranchising all Pennsylvanians who voted and one-tenth of the voters in the entire Nation. Such relief would, of course, be "drastic and unprecedented, disenfranchising a huge swath of the electorate." Donald J. Trump for President, Inc., 2020 WL 7012522, at *7. In support of such a request, Texas brings to the Court only discredited allegations and conspiracy theories that have no basis in fact. And Texas asks this Court to contort its original jurisdiction jurisprudence in an election where millions of people cast ballots under truly extraordinary circumstances, sometimes risking heir very health and safety to do so. Accepting Texas's view would do violence to the Constitution and the Framers' vision, and would plunge this Court into"one of the most intensely partisan aspects of American political life." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019). [Pennsylvania.]

Wisconsin also opposed. Wisconsin argued that Texas failed to state a claim under the Electors Clause:

A. Texas's allegations of Wisconsin state election law violations fail to state an Electors Clause claim. Contrary to Texas' hyperbolic rhetoric, it is well established that allegations of a violation of state law, including even a deliberate violation of state election laws by state election officials, do not state a claim under the U. S. Constitution. *See Shipley v. Chicago Bd. of Election Comm'rs*, 947 F.3d 1056, 1062 (7th Cir. 2020) (citation omitted); *see also Bognet v. Sec'y of the Comm. of Pennsylvania*, __ F.3d. __, 2020 WL 6686120, *6 (3d Cir., Nov. 13, 2020); ("[F]ederal courts are not venues for plaintiffs to assert a bare right 'to have the Government act in accordance with law.") (citation omitted); *Martinez v. Colon*, 54 F.3d 980, 989 (1st Cir. 1995) ("[T]he Constitution is not an empty ledger awaiting the entry of an aggrieved litigant's recitation of alleged state law violations—no matter how egregious those violations may appear within the local legal framework."). [Wisconsin.]

B. Texas states no claim under due process or equal protection. For similar reasons, Texas's equal protection and due process claims fail, as well. Even assuming Texas can stand in the shoes of voters, it merely asserts state-law claims that are fully addressable through state procedures. The federal "Constitution is not an election fraud statute." *Bodine*, 788 F.2d at 1271. The federal constitution "is implicated only when there is 'willful conduct which undermines the organic processes by which candidates are elected.'" *Id*.(citation omitted). Therefore, "garden variety election irregularities that could have been adequately dealt with through the procedures set forth in [state] law" do not support constitutional due process claims. *Id*.; *see also Bennett v. Yoshina*, 140 F.3d 1218, 1226 (9th Cir. 1998). [Wisconsin.]

Michigan also opposed. Michigan also argued that Texas failed to state a claim upon which relief could be granted, stating that:

> In Count I, Texas claims that the Electors Clause grants it a right to have Michigan conduct its elections in conformity with Michigan state law. But the only injury Texas has alleged is that the Electors Clause has not been followed. This is no more than an undifferentiated, generalized grievance about the conduct of government. *See Lance v. Coffman*, 549 U.S. 437, 442 (2007). Texas fails to establish an injury-in-fact and thus standing to bring its Electors Clause claims. *** The State of Texas has no role in, or connection to, Michigan's legislature or Michigan's elections. Accordingly, it lacks standing to raise claims on behalf of the Michigan legislature under the Electors Clause. [Michigan.]

Regarding equal protection, Michigan argued the following:

> Here, no group has been given preference or advantage. Texas fails to identify by name a single Michigan voter who voted when they should not have—let alone anything resembling widespread election fraud. Similarly, Texas has not identified any election workers who supposedly engaged in misconduct or malfeasance. Upon information and belief, none of the affiants or witnesses suggested by Texas (largely from other federal cases) have submitted any complaints of election fraud to a Michigan law enforcement agency. [Michigan.]
>
> Moreover, there has been no valuation of any person's—or group of persons'—votes as being more valuable than that of others. There has been no disparate treatment, and so nothing to violate "one-person, one-vote jurisprudence." Bush, 531 U.S. at 107. While Texas appears to believe that some poll challengers were treated inappropriately, even if true, that has no bearing on the validity or integrity of any votes. The penalty for interfering with a poll challenger is to punish the person who violated the law—not to punish voters by invalidating their votes for reasons over which they had no control. *See* Mich. Comp. Laws § 168.733(4). [Michigan.]
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> Texas also fails to establish that the alleged injury of "vote dilution" can be redressed by a favorable determination by this Court. Texas asks this Court to set aside the results of Michigan's election and have the state legislature make a new selection of electors. But an order negating the votes of over 5.5 million people would not reverse the alleged dilution of Texas's votes. As this Court has held, standing is not "dispensed in gross: A plaintiff's remedy must be tailored to redress the particular plaintiff's injury." *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018). Texas's alleged injury does not entitle it to the requested remedy because the harm of having one's vote diluted is not remedied by denying millions of others *their* right to vote. Texas lacks standing on this claim. [Michigan.]

Regarding due process, Michigan argued that:

Texas alleges that the Defendant States "acted unconstitutionally to lower [its] election standards—including to allow invalid ballots to be counted and valid ballots not to be counted—with the express intent to favor their candidate for President and to alter the outcome of the 2020 election." (Complaint, ¶143.) *** This Court, however, has not recognized the right to vote as a right qualifying for substantive due process protection. *See, e.g., San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35, n.78 (1973). Instead, his Court has held that "[w]here a particular Amendment provides an explicit source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims." *Albright v. Oliver*, 510 U.S. 266, 273 (1994). Vote-dilution claims are typically analyzed under the Equal Protection Clause. For the reasons stated in the argument above, there is no violation of the Equal Protection Clause. Consequently, there is also no violation of substantive due process. [Michigan.]

Georgia also opposed on standing grounds. On that issue, Georgia argued that:

I. Texas lacks standing. *** A. Texas argues that it has suffered a direct injury because "the States have a distinct interest in who is elected Vice President and thus who can cast the tie-breaking vote in the Senate." *** But Texas has no cognizable interest specific to Texas in how the Vice President votes. Texas's interest is in its own representation in the Senate; Georgia has not impaired that interest. Texas still has two Senators, and those Senators may represent Texas's interests however they choose. Even by its own logic, Texas has suffered no injury. [Georgia.]

Texas's alleged injury is also not cognizable because it is a generalized grievance—the kind of injury "that is 'plainly undifferentiated and common to all members of the public.'" *Lance v. Coffman*, 549 U.S. 437, 440– 41 (2007) (quoting *United States v. Richardson*, 418 U.S. 166, 176–77 (1974)); *id.* (The only injury plaintiffs allege is that the law—specifically the Elections Clause—has not been followed. This injury is precisely the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past."); *see also Gill v. Whitford*, 138 S. Ct. 1916, 1923 (2018) (the alleged injury must be "distinct from a 'generally available grievance about government'" (quoting *Lance*, 549 U.S. at 439)). [Georgia.]

The injuries that Texas alleges on behalf of its citizens are injuries that would be common to not only every citizen of Texas, but also every citizen of every state. *** An injury unique to no one is not an injury in fact. [Georgia.]

B. Nor does Texas have standing to raise claims for its electors in a parens patriae capacity (cf. Mot. for TRO 15). *** Here, Texas purports to represent the interests of only thirty-eight people (its Electors). *** Under our federalist system, Texas could never "address through its sovereign lawmaking

powers" how another State elects its Electors. Texas lacks *parens patriae* standing. [Georgia.]

C. Texas also lacks standing because it asserts the rights of third parties. *** In substance, Texas tries to assert claims that are at least three steps removed from the arguably proper plaintiff: Texas seeks to assert its citizens' rights to representation, which seek to assert Georgia's citizens' voting rights, which really seek to assert the Georgia Legislature's rights to have its plenary authority over voting procedures followed. [1] This Court has held that derivative or attenuated injuries of that sort are not enough for standing. [Georgia.]