Eighteen state governments urge Supreme Court to overturn Biden victory

Patrick Martin
11 December 2020

In an extraordinary scene of political warfare, a total of 44 of the 50 states have filed briefs with the US Supreme Court arguing for and against honoring the results of the 2020 presidential election won by Democrat Joe Biden over President Donald Trump. Only six states did not file briefs by the 3 p.m. Thursday deadline set by the high court.

The state of Texas filed the first brief Monday, directed against four "battleground" states won by Biden over Trump: Georgia, Michigan, Pennsylvania, and Wisconsin. The brief asked the Supreme Court to overturn the results of the vote in those four states and to refer the appointment of electors to the state legislatures, which are Republican-controlled in each state.

The Supreme Court is being asked to suppress the votes of nearly 20 million people in the four states. The effect would be to shift 62 electoral votes from Biden to Trump and reverse the overall result in the Electoral College. Instead of Biden defeating Trump by 306 to 232, a margin that Trump termed a landslide when he achieved it in 2016, Trump would be victorious by a somewhat smaller margin, 294 to 244.

Seventeen states with Republican attorneys general have joined in an amicus brief supporting the Texas suit, including Florida, Indiana, Missouri and Tennessee. The combined population of the 18 pro-Trump states, all carried by him in the presidential election, is 107 million people.

Another pro-Trump amicus brief was filed by 106 Republican members of the House of Representatives. Half of the entire Republican caucus is thus calling on the Supreme Court to overturn the result of an election in which they won their own seats. Apparently, voters are to be allowed to elect Republicans to Congress, but not to put a Democrat in the White House.

The states of Georgia, Michigan, Pennsylvania and Wisconsin all filed rebuttal briefs by the 3 p.m. Thursday deadline set by the Supreme Court, harshly criticizing the Texas suit and calling on the high court to flatly reject it. An amicus brief was filed by the District of Columbia, which was joined by 20 states, including California, New York, Illinois, Massachusetts, North Carolina and Virginia. The combined population of the 24 states and the District of Columbia, all of which voted for Biden except North Carolina, is nearly 190 million people.

Separate briefs were filed by Republican attorneys-general in Arizona and Ohio, generally defending the outcome of the election in their own states—one carried by Biden, the other by Trump—but side-stepping the broader issues. These two states have a combined population of 19 million.

Only six states, Alaska, Idaho, Iowa, Kentucky, New Hampshire, and Wyoming, with only 12 million people, did not seek to intervene in the Texas suit. Biden carried New Hampshire, but the state government there is Republican. Trump carried the other five states.

Quite apart from the substance of the issues—on which the Texas suit is entirely false and politically provocative—it is historically unprecedented that 18 of the 50 states are openly flouting the result of 2020 election and demanding that the Supreme Court overturn the will of the people. The line-up of states for and against the recognition of the 2020 elections suggests that the United States is on the brink of a political break-up.

President Trump also filed an amicus brief in support of Texas, which asserted, in perhaps its only true statement, "Our Country is deeply divided in ways that it arguably has not been seen since the election of 1860." This was the election won by Abraham Lincoln, which precipitated the secession of the Southern states, the formation of the Confederacy, and the assault on Fort Sumter that triggered the American Civil War.

Members of the Electoral College are to meet Monday, December 14, in the capitals of the 50 states and in Washington DC to cast their votes, 306 for Biden and 232 for Trump, unless the Supreme Court intervenes along the lines demanded by Texas. The justices are set to meet on Friday to discuss pending motions, and could well issue a ruling on Saturday, December 12, which is the 20th anniversary of the notorious decision in *Bush v. Gore* that awarded Florida's electoral votes and the presidency to George W. Bush.

It is noteworthy that the Texas lawsuit cites the reactionary *Bush v. Gore* precedent at several points, suggesting that today's Supreme Court employ the same specious arguments devised by the arch-reactionary Antonin Scalia 20 years ago to suppress vote counting and award the presidency to the loser in the popular vote. The abrogation of democratic principles is infinitely greater, however. While Bush lost the popular vote by

500,000 to Al Gore in 2000, Trump lost the popular vote to Biden by more than 7 million.

The Texas brief actually cites as its first legal basis the declaration by Scalia in *Bush v. Gore*: "The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the electoral college."

The argument then proceeds through a tendentious interpretation of the "Elector's clause" in the US constitution, which reads, "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors."

Because the Constitution assigns this power to the state legislatures, the Texas brief argues, any change in the conduct of the presidential election in any state, including the shift to mail ballots because of the coronavirus pandemic, is illegitimate if the changes were carried out by the executive branch or the courts rather than by the legislature.

For example, Michigan Secretary of State Jocelyn Benson sent out applications for mail-in ballots to every registered voter to give them the opportunity to vote more safely. The Texas brief denounces this decision repeatedly as a violation of the Constitution because it was initiated by the executive branch rather than the legislature. Virtually every action taken by the four states along these lines—establishing drop boxes for turning in absentee ballots, expanding early voting, extending the period for receiving mail ballots as long as they were sent by Election Day—was similarly condemned as unconstitutional.

The cynicism of this argument is demonstrated by the fact that Texas Attorney General Ken Paxton challenged only the changes in election procedures in four states that would shift the outcome of the vote from Biden to Trump, ignoring similar actions taken in nearly every other state because of the pandemic, including many of those carried by Trump.

In relation to each of the four states, the supposed violations in election procedures have already been litigated repeatedly by the Trump campaign and other Republicans, and the efforts of state governments to accommodate voters under conditions of the pandemic have been upheld by local, state and federal courts. There is literally nothing new, of a factual character, in the Texas brief.

As the Michigan rebuttal brief points out: "The base of Texas's claims rests on an assertion that Michigan has violated its own election laws. Not true. That claim has been rejected in the federal and state courts in Michigan, and just yesterday the Michigan Supreme Court rejected a last-ditch effort to request an audit."

As for the legal and constitutional basis of the suit, the briefs by the four battleground states make a properly scathing and convincing rebuttal. Nothing in the Constitution or 230 years of US history gives one state government the right to pass judgment on the electoral policies of another. Nor can the executive of one state—in this case Texas—assert and defend the supposed rights of the legislature of another state—the four in question—when the legislatures themselves have declined to take such a position.

Michigan Attorney General Dana Nessel said Wednesday, "Nobody in Michigan elected AG Paxton to intervene in our electoral systems or processes here." Pennsylvania Attorney General Josh Shapiro argued, "Texas's effort to get this Court to pick the next President has no basis in law or fact," calling the suit a "seditious abuse of the judicial process," and urging the justices to "send a clear and unmistakable signal that such abuse must never be replicated."

The Georgia brief, written under the direction of the state's Republican attorney general, declared, "The novel and far-reaching claims that Texas asserts, and the breathtaking remedies it seeks, are impossible to ground in legal principles and unmanageable … This Court has never allowed one state to co-opt the legislative authority of another state..."

Two additional aspects of the Texas brief deserve attention, because they demonstrate the completely fraudulent, even provocative, character of the argument.

The lawsuit cites a supposed statistical argument against Biden's victory, pointing out that he was trailing in the vote counting through the night of the election, only to overtake Trump the next day, or several days later, as mail ballots were counted. The brief goes so far as to claim that the possibility of Biden overtaking Trump was a quadrillion to one.

The basis of the statistical argument is the claim that ballots were "randomly drawn" to be counted. But this is completely false: all four states had legal restrictions on the counting of mail ballots before Election Day. Democrats disproportionately cast mail ballots, while Republicans mainly went to the polls November 3, responding to ultra-right claims that there was no significant danger from coronavirus. Hence the pattern, in many states, of an early Trump lead subsequently overtaken by Biden.

Finally, as noted by several legal analysts, the Texas brief actually admits that there is no evidence of fraud, and argues instead the changes in election laws were such that "fraud becomes undetectable." The brief actually states: "The unlawful actions of election officials effectively destroy the evidence by which the fraud may be detected…" In this demented and upside-down world, the absence of evidence is now to be treated as proof!