

**Engel, Steven A. (OLC)**

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**From:** Engel, Steven A. (OLC)  
**Sent:** Thursday, December 31, 2020 9:02 AM  
**To:** Donoghue, Richard (ODAG)  
**Subject:** one pager  
**Attachments:** US v. Penn OJ suit.docx

## Evaluation of Potential Original-Jurisdiction Suit in the Supreme Court

- There is no legal basis to bring this lawsuit. We cannot ethically file a suit without a legal basis, and we are certain that if we did so, the Justices would promptly dismiss it. Anyone who thinks otherwise simply does not know the law, much less the Supreme Court. If there were a legal mechanism available, we would pursue it. But there is not. And this case is definitely not it.
- This is very much my own view, but I wanted to make that I had the benefit of the views of the best lawyers at the Department. I asked Rich, I asked the Acting Solicitor General, and I asked Steve Engel to review this closely and let me know if there were anything we could do. They were unanimous in their conviction that this suit cannot be brought.
- US can't sue. The United States, as a government, does not have any standing to challenge whether the States complied with their state electoral procedures. The Trump campaign or the candidate plainly does. A would-be presidential elector who wants to vote likely would. But the United States, as a government, does not have a legal stake in the winner of the presidential election or whether individual states comply with their own laws.
- There is no “parens patriae” basis for the lawsuit. The drafters of the complaint could not identify a single case—in the history of the Supreme Court—where the United States ever brought a case like this. There is no legal doctrine that says that the United States may bring a lawsuit whenever it believes there has been a legal violation by a State.
- The lawsuit does not ask for relief that could make any difference. The lawsuit would be brought against the States, but there is no longer any role left for the States in the presidential election. They have appointed their electors, and the electors have now cast their votes and sent them to Congress. There is nothing that the States could lawfully do now to stop Congress from opening and counting those votes next Wednesday, and therefore, the time to challenge the States has passed.
- The Supreme Court won't hear the case. The Supreme Court rarely hears cases that are exclusively in its original jurisdiction—as we saw with *United States v. Texas*. But this case is not even within its original jurisdiction. This case could have been brought in federal district court months ago, and that makes it certain that the Court would not even hear it.