# No. 24-1716

# In the United States Court of Appeals for the Third Circuit

DAWN KEEFER, ET AL.,

*Appellants*

v.

PRESIDENT UNITED STATES OF AMERICA, ET AL.,

*Appellees*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA, HONORABLE JENNIFER P. WILSON, CASE NO. 1-24-cv-00147

## BRIEF OF *AMICI CURIAE* MEMBERS OF THE UNITED STATES CONGRESS IN SUPPORT OF APPELLANTS AND REVERSAL



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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and L.A.R. 26.1.0, all *Amici Curiae* are individuals, and they certify, to the best of their knowledge and belief, that there is no publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome.

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## STATEMENT OF IDENTITY AND INTERESTS OF *AMICI CURIAE*

Pursuant to Rule 29 of the Federal Rules of Appellate Procedure, *Amici Curiae* Members of the United States Congress Senator Kevin Cramer, Congresswoman Claudia Tenney, Congressman Dan Meuser, Congressman Randy K. Weber, Congressman Glenn "GT" Thompson, Congressman John Joyce, Congressman Andy Ogles, Congressman Lloyd Smucker, Congressman Brian Babin, Congressman Rich McCormick, MD, MBA, Congressman Guy Reschenthaler, Congresswoman Nicole Malliotakis, Congressman Scott Perry, Congresswoman Stephanie Bice, Congressman Barry Loudermilk, Congresswoman Elise Stefanik, Congresswoman Ashley Hinson, Congressman Alex X. Mooney, Congressman Keith Self, and Congressman Mike Kelly ("*Amici*") submit this brief.[1] All parties have consented to the filing of this brief. Fed. R. App. P. 29(a)(2).



Fair elections are the lifeblood of our constitutional republic. As elected members of Congress, *Amici* have a special interest in ensuring that partisan politics do not undermine this basic principle. When the executive branch of government seeks to unilaterally abuse its authority and power, as well as misuse taxpayer funds, to influence an election to the advantage of one political party, such *ultra vires* actions

[1] No counsel for any party authored this brief in whole or in part, and no party or counsel for any party made a monetary contribution intended to fund the preparation or submission of this brief. Funding for this brief was provided by the American Freedom Law Center, a nonprofit organization. Fed. R. App. P. 29(a)(4)(E).

have the capacity to corrupt the entire electoral process and thus undermine our system of government.

The Elections Clause of the United States Constitution places primary responsibility for deciding "Times, Places and Manner of Holding Elections" squarely within the authority of the state legislatures with limited oversight from Congress. This is yet another way in which our Founding Fathers sought to restrict the power of the federal government. The diffusion of power and the checks and balances imposed by our Constitution are all designed to protect the liberty of the People and to prevent the tyranny of government. And this is particularly true when it comes to elections as elections are the primary way in which government officials obtain and retain their power.



On March 7, 2021, President Biden signed EO14019, titled "Promoting Access to Voting." The EO commands the heads of every federal agency to submit to the Domestic Policy Advisor, Susan Rice, a plan outlining the steps their agency will take to "promote voter registration and voter participation."

The President has no authority to order all federal agencies to engage in voter registration, nor does he have authority to order any federal agency to engage in efforts to promote voter participation. Yet, that is precisely what he is doing pursuant to the EO.

The threat to the fairness of our elections by the exercise of such illicit authority

is patent. And with a general election slated for this upcoming November (and sooner in light of the early voting permitted in many states, including Pennsylvania), the urgency of this legal action is evident, and prompt consideration by the Court is appropriate and necessary.

Allowing the executive branch and its political appointees to operate a "get out the vote" program on the national level and with the assistance of federal authority and funding threatens to convert the White House into a partisan political campaign headquarters. This *ultra vires* action allows one political party, for example, to target key demographics and to use federal authority to shape elections to favor the party and its candidates. Accordingly, Appellants raise serious and important questions of substantive law that must be resolved immediately. Time is of the essence as the general election is only months away.



The U.S. District Court for the Middle District of Pennsylvania dismissed Appellants' amended complaint for lack of standing. As a result, the court never addressed the merits of the important legal claims raised in the litigation.

This appeal raises important questions regarding whether individual state legislators have standing to sue if their votes to defeat or enact specific legislation regulating federal elections have been nullified by unilateral executive action.

Appellants amended complaint raises claims under the Elections Clause and the Electors Clause, challenging the actions of members of the executive branch who

made (and continue to make) changes to the "manner" of Pennsylvania's elections without the involvement of the state legislators.

When executive officials make unilateral changes to the manner of elections, those legislators who are politically aligned and thus support the changes are not harmed by the unlawful action. In comparison, the legislators who oppose such unlawful executive changes to the manner of elections do suffer injury. As a result, challenges to executive action that results in the nullification of the votes of some legislators should not be dismissed simply as an "institutional injury" as the challenged executive actions do not damage all members of the legislative branch, in this case the Pennsylvania General Assembly, equally. Indeed, in this case, the law-making process has been usurped by executive action that is contrary to the Constitution. And in addition to being a direct attack on the constitutional authority of the state legislators, the injury suffered here is unique and particularized as it will have a direct effect on elections, thereby causing harm to the legislators as they are elected officials who will suffer directly from the unlawful executive action. The district court's suggestion that the legislators should attempt a new law-making process to regain the power usurped would be futile, and this is particularly true as elections are the way in which the legislators obtain and retain their legislative authority in the first instance.

The district court's decision not only poses a severe, immediate, and on-going

threat to the orderly conduct of the upcoming general election in Pennsylvania, where early voting will begin in September, but permitting the EO to have the full force and effect of law threatens the fairness of our elections throughout the nation. As elected members of Congress, many of whom will also be candidates in the upcoming general election and thus harmed by the executive action of the President, *Amici* implore the Court to summarily reverse the lower court as its decision cannot stand. The state legislators, who are granted express power by the Constitution to regulate the "manner" of elections, have had their power stripped by the unilateral actions of the executive branch. Appellants have no recourse but to ask the judicial branch to curtail the unconstitutional overreach of the executive branch in order to restore the balance of power. The district court's decision on standing prevents Appellants from doing so. This decision must be promptly and summarily reversed.



The urgency of this matter is further fueled by the fact that we have an unprecedented number of illegal immigrants currently in the United States and by the fact that there has been a significant proliferation of mail-in voting permitted throughout the states.[2] It is well documented that mail-in voting is the method of voting that is most susceptible to fraud. Consequently, the challenged EO creates an even greater threat to the fairness of our elections as it will be a catalyst for

[2] Mississippi Secretary of State Michael Watson recently (March 6, 2024) sent a letter to Attorney General Merrick Garland expressing valid concerns regarding the use of the EO to register ineligible voters, including ineligible non-citizens and felons. A copy of this letter is attached as an Addendum to this brief.

government-funded and government-directed ballot chasing and ballot harvesting by partisan, third-party organizations in ways that are designed to favor a particular political party, and this is in addition to the fact that the EO will be used to target demographics more favorable to a particular political party. In short, the challenged EO will be its own unique form of gerrymandering designed to alter and persuade the outcome of an election through the misuse of government authority and funding.

Appellants bring to this Court an important issue for the Court's review: "Whether individual legislators have Article III standing to sue state and federal executive officials for altering the manner of federal elections in conflict with the individual legislators' successful votes to regulate the manner of federal elections in Pennsylvania pursuant to Article I's Elections Clause and Article II's Electors Clause." Appellants' Br. at 2.



Unquestionably, this is an important issue for the Court to resolve. And the nature and timing of this case compel the Court to take prompt action. Fairness in our elections will be irreparably undermined and the confidence of the American electorate in the fairness of our elections will be eroded should this legal challenge be short-circuited on standing grounds. The Court should promptly reverse the adverse ruling below, and remand the case so that it may proceed on the merits of the individual claims advanced.

## SUMMARY OF THE ARGUMENT

The question of standing is essentially whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues. Appellants satisfy this requirement.

The individual legislator plaintiffs (Appellants) have standing to prevent nullification of their legislative authority (*i.e.*, to prevent "vote nullification") and to prevent usurpation of their legislative authority by the executive branch, including the President of the United States, with regard to the manner in which elections operate within their state—authority granted them by the Constitution.

The importance of the issues raised in light of the impact the challenged actions will have on the upcoming general election, the fairness of that election, and the confidence the American people will have in the legitimacy of that election all counsel the Court to find that Appellants have standing, and thus reverse the lower court and remand the case to proceed on the merits of Appellants' claims.



## ARGUMENT

### I. Appellants Have Standing to Advance Their Claims.

Article III of the Constitution confines federal courts to adjudicating actual "cases" or "controversies." U.S. Const. art. III, § 2. To give meaning to Article III's "case" or "controversy" requirement, the courts have developed several justiciability doctrines, including standing. *Susan B. Anthony List v. Driehaus,* 573 U.S. 149, 157

(2014). "The doctrine of standing gives meaning to these constitutional limits by identifying those disputes which are appropriately resolved through the judicial process." *Id.* (internal quotations and citation omitted). "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). Appellants meet this standard.

*Raines v. Byrd*, 521 U.S. 811 (1997), is not dispositive on the question of whether any of the plaintiff legislators (Appellants) have standing in this case. *Raines* involved a constitutional challenge to an Act passed by Congress—the Line Item Veto Act. Congress itself could vote to repeal this Act. Nothing about the Act itself, unlike the challenged executive actions in this case, effectively nullified any vote by any legislator. *See, e.g.*, *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm.*, 576 U.S. 787, 804 (2015) (concluding that the Arizona Legislature had standing when the disputed proposition and the state constitution "would 'nullif[y]' any vote by the Legislature, now or 'in the future,' purporting to adopt a redistricting plan'"). This case is not *Raines*. Indeed, this case is unique in that the challenged executive actions effectively nullified the vote of every Pennsylvania legislator who not only passed legislation that has been undermined by the challenged executive actions but who want to legislate in this area in the future. In other words, there is no magic number of legislators who could vote to repeal the challenged executive actions, and this is

particularly true of the EO as Appellants have no congressional authority whatsoever. *Compare Baird v. Norton*, 266 F.3d 408, 411 (6th Cir. 2001) (concluding that the legislators "have not suffered a vote-nullification injury sufficient to give them standing in the present case"). In short, numbers do not matter in this case. It is without question that in addition to the usurpation of their authority expressly granted them in the Constitution to legislate the "manner" of elections, Appellants have in fact suffered a "vote-nullification injury" as a result of the challenged executive action. Appellants have standing to advance their claims.



## II. The Impact of the EO on the General Election Compels Immediate Reversal.

The EO requires all federal agencies to identify and partner with partisan third-party organizations chosen by the Biden administration whose names and roles are not transparent but are purposefully withheld from the public and from the Secretaries of State, who are the chief election officers for the states. Under the EO, taxpayer resources can be used to support the efforts of the third-party partners (of the President's choosing) to do voter registration drives and get-out-the vote activities, using this authority and federal resources to focus on demographics that are favorable to the President's party and his re-election campaign.

Additionally, pursuant to the EO, government officials will assist individuals who interact with their federal agency with completing voter registration and mail-in ballot application forms despite the fact that the Pennsylvania legislature has not

authorized the federal agencies to perform these tasks.

Precisely what the legislators sought to prevent by way of state law[3] has now been facilitated by an executive order of the President, who is also a candidate in the 2024 election and thus stands to benefit personally from his executive action.

Make no mistake, election fraud is real, and it is very much a public concern. As Justice Stevens noted, "flagrant examples of [voter] fraud . . . have been documented throughout this Nation's history by respected historians and journalists," and "the risk of voter fraud" is "real" and "could affect the outcome of a close election." *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 195-96 (2008) (plurality op. of Stevens, J.) (collecting examples). Here, the EO is catalyst for voter fraud. This adverse effect of the EO is exacerbated by the fact that mail-in ballots are exceedingly susceptible to fraud. *Griffin v. Roupas,* 385 F.3d 1128, 1130-31 (7th Cir. 2004) (voting fraud is a "serious problem" and is "facilitated by absentee voting"); *Veasey v. Abbott,* 830 F.3d 216, 239, 256 (5th Cir. 2016) (en banc) (stating that "mail-in ballot fraud is a significant threat"—so much so that "the potential and reality of fraud is much greater in the mail-in ballot context than with in-person voting"); *see also id.* at 263 (recognizing "the far more prevalent issue of fraudulent absentee ballots"). Couple this fact (an increase in mail-in ballots) with the incentive created



[3] Appellants passed legislation to prevent public officials from partnering with third-party, non-governmental organizations "for the registration of voters or the preparation, administration or conducting of an election in [Pennsylvania]." Appellants' Br. at 5, 28.

by the EO to grow the voter rolls for the purpose of increasing the number of mail-in ballots for a particular party (and thereby incentivizing the collection of questionable names to be added to the voter rolls), and you have a recipe for disaster as the EO will create an environment for widespread voter fraud. The Pennsylvania legislator prudently passed legislation to stop such practices in order to protect the integrity of the electoral process. Those efforts have now been erased by the stroke of the President's pen. This Court must step in and grant review.

## CONCLUSION

To ensure fair elections and confidence among the American electorate that government officials will not abuse their authority to alter the outcome of an election, the Court should promptly reverse the adverse ruling below and remand the case so that it can be decided expeditiously on its merits. Our Constitution demands it.



Respectfully submitted,

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## COMBINED CERTIFICATIONS

### Certification of Bar Membership

I hereby certify that I am admitted to and a member in good standing of the Bar of the United States Court of Appeals for the Third Circuit. I was admitted on January 22, 2001.

### Certification of Word Count

I certify that pursuant to Fed. R. App. P. 32 that the foregoing Brief is proportionally spaced, has a typeface of 14 points Times New Roman, and contains 2,601 words, excluding those sections identified in Fed. R. App. P. 32(f).



### Certificate of Service

I hereby certify that on July 3, 2024, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that all of the participants in this case are registered CM/ECF users.

### Certification of Identical Compliance

I hereby certify that the text of the electronic brief is identical to the text in the paper copies.

**Certification of Virus Check**

The electronic version of the brief and addendum have been scanned for viruses and are virus-free. This scan was completed by McAfee VirusScan version 24.0.

THE MUISE LAW GROUP, PLLC

/s/ *Robert J. Muise*
Robert J. Muise, Esq.

# ADDENDUM

Michael Watson
SECRETARY OF STATE

Attorney General Merrick B. Garland
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

March 6, 2024

Re: Executive Order No. 14019

Dear Attorney General Garland,

As you are aware, on March 7, 2021, President Biden issued Executive Order No. 14019 which sought to turn the Department of Justice agencies from their historical missions of law enforcement to voter registration and get out the vote operations.[1] These efforts are an intrusion into state matters and are a misuse of federal revenue and resources. In addition, it appears that these efforts have led to agencies under your charge attempting to register people to vote, including potentially ineligible felons and to coopt state and local officials into accomplishing this goal. We ask that you cease these operations unless and until we can ensure only eligible voters receive voter registration information. We also request you provide the procedures established by the Department of Justice under Section 9 of the Executive Order so my office can evaluate what damage may have been done to the integrity of Mississippi voter rolls.



Among other things, President Biden's order forces the U.S. Marshals Service to modify agreements with jails requiring them to provide voter registration materials and facilitate voting by mail. According to the Marshals Service, they are modifying 936 contracts or intergovernmental agreements to require state and local government complicity in the potential registration of ineligible prisoners to vote.[2] It further requires the Department of Justice to facilitate voter registration and mail voting for individuals in the custody of the Bureau of Prisons.

This program creates numerous opportunities for ineligible prisoners to be registered to vote in Mississippi. The program provides prisoners with misleading information concerning their right to both register and vote in Mississippi – a right which they may not have. For example, many of the people in the custody of the Marshals are convicted felons whom Mississippi law deems ineligible to vote.[3] Additionally, many of those in custody only have fleeting ties to Mississippi and do not meet the residency requirements necessary to be a Mississippi voter.[4]

Just as concerning, these intergovernmental agreements prompt Mississippi jails to, "work with other reliable sources of voter information to assist federal prisoners with voter registration, voting by mail, and notification of upcoming elections."[5] We are unaware of any contact with our Office, which begs the question, which organizations are the Marshals using to accomplish this demand? Many outside groups performing voter

[1] https://www.whitehouse.gov/briefing-room/presidential-actions/2021/03/07/executive-order-on-promoting-access-to-voting/
[2] https://www.usmarshals.gov/sites/default/files/media/document/PUB-2-2022-Annual-Report.pdf
[3] MS Code § 23-15-19 (2020)
[4] MS Code § 23-15-11 (2020)
[5] *See e.g.* https://elpaso.novusagenda.com/AgendaPublic/CoverSheet.aspx?ItemID=37700&MeetingID=1182

registration and vote harvesting services are partisan entities with a history of being unreliable.[6] There have been documented instances of these groups providing incorrect directions to voters.[7] It is not proper for the Federal government to push partisan groups into the voting process in Mississippi or any other state.

Finally, we are also concerned this program could lead to the registration of illegal aliens in Mississippi. Due to the Biden Administration's border policies, millions of illegal aliens have not only been allowed into this country during the last three years, but they have also been allowed to stay. Many of these aliens have been in the custody of an agency of the Department of Justice including the Marshals. Our understanding is that everyone in the Marshals' custody is given a form advising them of their right to register and vote. Providing ineligible non-citizens with information on how to register to vote undoubtedly encourages them to illegally register to vote, exposing them to legal jeopardy beyond their immigration status.

It is quite shocking, in the midst of a crisis at our southern border[8] and an unprecedented crime wave[9], that the Biden administration has chosen to expend tax dollars and vital law enforcement resources on a program that risks bloating state voter rolls with ineligible and non-citizen voters.

As the Chief Election Officer for the state of Mississippi, it is my duty to maintain secure elections. The Biden Administration's Executive Order makes our job more difficult and presents clear threats to the security of Mississippi's elections. I again ask you provide all information regarding your department's activities pursuant to the Biden Administration's Executive Order so that we can determine the scope of the damage that has been done. (See attached FOIA requests). We also request you provide us with the name and identifying information of all people who have received Mississippi voter registration materials under this program. Finally, we ask that you cease the program immediately.



Sincerely,

**Michael Watson**
Secretary of State
State of Mississippi

Attachments

cc: Governor Tate Reeves
Lieutenant Governor Delbert Hosemann
Attorney General Lynn Fitch
Speaker Jason White
Speaker of the House Mike Johnson
Minority Leader Mitch McConnell
Chairman Jim Jordan

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[6] *See e.g.* https://www.foxnews.com/politics/nonprofit-raises-eyebrows-with-mailings-seeking-to-increase-voter-registration
[7] https://www.cbsnews.com/colorado/news/colorado-voter-registrations-invalid/
[8] https://www.pewresearch.org/short-reads/2024/02/15/migrant-encounters-at-the-us-mexico-border-hit-a-record-high-at-the-end-of-2023/
[9] https://apnews.com/article/mississippi-capitol-crime-5957ddea7d015b8d0bf1f77dc6540b84