No. 23-1162

In the

Supreme Court of the United States

DAWN KEEFER, ET AL.,
Petitioners,

v.

JOSEPH R. BIDEN, JR.,
PRESIDENT OF THE UNITED STATES, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE AMICUS BRIEF AND BRIEF OF *AMICUS CURIAE* CLAREMONT INSTITUTE'S CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Amicus, Claremont Institute's Center for Constitutional Jurisprudence respectfully moves this Court for leave to file the attached Amicus Curiae brief.

Amicus gave the required notice to counsel for petitioner and the Solicitor General, but missed the contact information for the counsel for the state respondents since they had not yet entered an appearance in this Court and were not listed on the docket. As a result, Amicus provided late notice to those respondents (five days, rather than ten).

Counsel for amicus has attempted to contact the counsel for state respondents to see if they would waive the ten day notice but was unable to reach them before the printer deadline. Amicus believes that respondents suffer no prejudice from this late notice since other amici gave appropriate notice, so respondents knew that there would be amicus support for the petition.

WHEREFORE, Claremont Institute's Center for Constitutional Jurisprudence seeks leave to file the accompanying amicus brief in support of the petition notwithstanding the late notice to state respondents.

May 2024 Respectfully submitted,

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INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life, including upholding the original understanding of the Constitution that the Elections Clause delegates powers to state legislatures. The Center has participated in a number of cases before this Court raising the argument that the Constitution should be interpreted according to its original understanding including *Trump v. Anderson*, 601 U.S. 100 (2024); *Moore v. Harper*, 143 S.Ct. 2065 (2023); and *Arizona v. The Inter Tribal Council of Arizona*, 570 U.S. 1 (2013).

SUMMARY OF ARGUMENT

The petition concerns issues of standing for state legislators and amicus fully supports the arguments in the petition. Rather than repeating those arguments, amicus submits this brief to note the vital importance of the underlying issues in this case and the critical need to resolve them now. Failure to do so risks allowing another presidential election to devolve into chaos.

President Biden has issued an Executive Order, without any supporting legislation from Congress,

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[1] Petitioners and federal respondents received timely notice of the filing of this brief. State respondents received five-day notice necessitating the preceding motion. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus* made a monetary contribution to fund the preparation and submission of this brief.

that commands federal agencies to work with nongovernmental organizations that finance and operate voter registration and get-out-the-vote efforts. Executive Order 14019, 86 Fed. Reg. 13623 (2021). Although the Order specifies that agencies are to work with "nonpartisan" private organizations, that does not mean that these organizations do not have a preference for a candidate. In the 2020 election, for example, the Center for Tech and Civic Life funneled grants funded by the Chan Zuckerberg Initiative to focus voter registration in areas that were likely to benefit one presidential candidate at the expense of the other.[2]

Voter registration for federal congressional elections is an area of regulation that is textually committed first to State Legislatures and second to Congress, and it is up to those State Legislatures (or Congress) to decide whether private funding and operation of registration and election activities ought to be allowed. There is no role for the President other than his ordinary role of approving or vetoing legislation presented to him. This Executive Order conflicts with Pennsylvania law that prohibits public officials from partnering with third-party nongovernmental organizations (or allowing such organizations to fund operations) for registration of voters. Simply put, the Order is beyond the President's power and it invades the rights of state legislators to whom this question has been vested by the Constitution.

Registration of voters for federal congressional elections is governed by the Elections Clause of Article

[2] *See* Mollie Hemingway, *"Zuckerbucks" and the 2020 Election*, Imprimis (October 2021) (https://imprimis.hillsdale.edu/zuckerbucks-2020-election/) (last visited May 23, 2024).

I, § 4 of the Constitution. *Arizona*, 570 U.S. at 9; *Smiley v. Holm*, 285 U.S. 355, 366 (1932).[3] This provision of the Constitution assigns to the Legislature of each State the duty to set the time, place, and manner for election of Senators and Representatives. That provision also gives *Congress* the power to override those state regulations. The constitutional scheme does not, however, empower the President to override state choices or to legislate his own election code. It is the President's interference with the States Legislatures' constitutional duty under the Elections Clause that lies at the foundation of this case.

Pennsylvania lawmakers were concerned that outside funding and participation by nongovernmental organizations in voter registration has the potential to unduly influence an election and that nonpublic funding for such activities erodes public trust in the election process. Whatever the merits of this concern, the Constitution assigns this decision to the State Legislature in the first instance and only allows Congress – not the President – to override state regulation on the "manner" of federal congressional elections.

[3] Amicus notes that this case does not involve the questions addressed in this Court's decisions in *State of Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916), *Smiley v. Holm*, 285 U.S. 355 (1932), and *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787 (2015), as to what the Framers meant by the term "Legislature." The Framers that included a guarantee of representative government (U.S. Const. Art. IV, § 4), rather than direct democracy, for the States would surely have been more than a little surprised that their choice of the word "Legislature" would be interpreted to include a direct democracy process. Nonetheless, the issue here is the much simpler question of whether "State Legislature" or "Congress" can be read to mean "the President."

This is an issue that should be resolved before the 2024 presidential elections in order to avoid the chaos the nation experienced with the 2020 election cycle. During that election, different state agencies altered state statutes governing the manner of the selection of presidential electors – another matter that is textually committed to the Legislatures of the States by the Constitution. This led to significant questions concerning the validity of the selection of electors in several states and spawned uncertainty and litigation that is ongoing today. The Court should grant review in this case and resolve the issues without delay in order to avoid a repeat of that chaos.

REASONS FOR GRANTING THE WRIT

I. The Constitution Vests Power to Regulate the Manner of Federal Congressional Elections on State Legislatures and Congress, Not the President.

The Elections Clause, U.S. Const. Art. I, § 4, cl. 1, assigns to the "Legislature" of each State the power to direct the "time, place, and manner" for conducting elections for members of the Senate and the House of Representatives. This Court in *Arizona*, 570 U.S. at 9, and *Smiley*, 285 U.S. at 366, ruled that the "time, place, and manner" of federal elections includes the process for registration of voters. As this Court in *Arizona* noted, the Elections Clause imposes a *duty* on State Legislatures to enact the necessary regulations. While Congress has the power to override state regulations enacted pursuant to Elections Clause, the initial power to enact those regulations rests in the hands of State legislators.

No part of this power to specify the "time, place, and manner" of holding federal congressional elections is granted to the President, however. The legislators here are challenging an Executive Order that interferes with their right and obligation under the Constitution to regulate federal elections.

There can be no serious debate that the Constitution assigns the regulation of federal congressional elections exclusively to the Legislatures of the States and to Congress. The Elections Clause is an express textual commitment of this regulation to the Legislature of the State.

As noted, the Elections Clause also provides that Congress can override the regulations enacted by a State Legislature. But to do so, Congress must enact a law according to the procedures set down in the Constitution. *See INS v. Chadha*, 462 U.S. 919, 951 (1983). Since this is a matter of legislation, it is no surprise that the Constitution assigns no role in creating these regulations to the President. *Compare* U.S. Const. Art. I, § 1 *with* Art. II, §§ 1, 3.

II. The President's Attempt to Legislate a Regulation Relating to the Time, Place, or Manner of a Federal Congressional Election Violates the Separation of Powers.

The President's attempt to usurp the role of the State Legislature and the role of Congress under the Elections Clause raises serious issues for Separation of Powers.

Separation of powers is the design of the Constitution, not simply an abstract idea. It protects individual liberty more surely than the Bill of Rights. *See e.g.*, *Ass'n of American Railroads*, 575 U.S. 43, 61

(Alito, J. concurring); *Stern v. Marshall*, 564 U.S. 462, 483 (2011); *Bond v. United States*, 564 U.S. 211, 222 (2011); *see also Gundy v. United States*, 588 U.S. 128, 154 (2019) (Gorsuch, J., dissenting); *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring). The notion that separation of powers lies at the core of the Constitution is not a modern judicial invention.

The Framers and Ratifiers of the Constitution understood that separation of powers was necessary to protect individual liberty. *Ass'n of Am. Railroads*, 575 U.S. at 75 (Thomas, J., concurring). In this, the founding generation relied on the works of Montesquieu, Blackstone, and Locke for the proposition that institutional separation of powers was an essential protection against arbitrary government. *See, e.g.*, Montesquieu, THE SPIRIT OF THE LAWS 152 (Franz Neumann ed., Thomas Nugent trans., Hafner Publ'g Co. 1949) (1748); 1 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 150-51 (William S. Hein & Co., Inc. 1992) (1765); John Locke, THE SECOND TREATISE OF GOVERNMENT 82 (Thomas P. Reardon ed., Prentice-Hall, Inc. 1997) (1690).

These warnings against consolidated power resulted in structural separation of power protections in the design of the federal government. *See* FEDERALIST NO. 51, at 321-22 (James Madison) (Clinton Rossiter, ed., 1961); FEDERALIST NO. 47, *supra*, at 301-02 (James Madison); FEDERALIST NO. 9, *supra*, at 72 (Alexander Hamilton); *see also* Letter from Thomas Jefferson to John Adams (Sept. 28, 1787), in 1 THE ADAMS-JEFFERSON LETTERS 199 (Lester J. Cappon ed., 1959). That design divided the power of the national government into three distinct branches, vesting the

legislative authority in Congress, the executive power in the President, and the judicial responsibilities in the Supreme Court and lower federal courts. *Chadha*, 462 U.S. at 951.

The ratification debates demonstrate the importance of this separation to the founding generation. The argument was not whether to separate power, but whether the proposed constitution separated power enough. FEDERALIST NO. 48, *supra* at 308 (James Madison). Fearing that the mere prohibition of one branch exercising the powers of another was insufficient, the Framers designed a system that vested each branch with the power necessary to resist encroachment by another. *Id*.

Under the Constitution, the executive branch has no authority to enact laws. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 655 (1952) (Jackson, J., concurring). That is doubly true when the law the President attempts to enact is a regulation of federal congressional elections. The Constitution expressly assigns this regulatory power first to state legislators and second to Congress.

Congress can exercise its power to override state regulation of elections only through its vested power of legislation. As this Court noted in *Chadha*, Congress may only exercise its power under the Constitution in accordance with "a single, finely wrought and exhaustively considered, procedure." *Chadha*, 462 U.S. at 951. The President has a role in that procedure, but it is Congress that has to act first by approving legislation and presenting it to him.

The Court should grant review so that judicial review of this Executive Order that trenches on the

rights of state legislators and usurps the legislative power of Congress can be had before the election.

III. The Underlying Issue in this Case is of Nationwide Importance and Resolution before the Election is Necessary to Prevent further Erosion of Public Confidence.

Interference with the State Legislatures' power to direct the "manner" of choosing presidential electors (U.S. Const. Art. II, §1, cl. 2) during the 2020 presidential election caused substantial confusion and chaos. Questions were raised regarding the validity of the elections in Pennsylvania, Georgia, Michigan, and Wisconsin. *State of Texas v. Commonwealth of Pennsylvania*, No. 22O155 Motion to File Bill of Complaint (2020). State executives changed voting procedures in a manner that raised questions as to ballot integrity not to mention usurpation of the role of State Legislatures that is expressly set out in the Constitution.

In Pennsylvania, the state court altered statutory deadlines for the receipt of ballots based on its view that the court-adopted deadline satisfied the state constitutional "free and fair elections" clause while the legislatively adopted deadline did not. *Republican Party of Pennsylvania v. Boockvar*, No. 20-542 (2020) (Statement of Alito, J. on Motion to Expedite Consideration of the Petition for Writ of Certiorari). Further, the Secretary of State created new procedures for examination of mail-in ballots and curing of errors in those ballots without legislative authority. *State of Texas*, No. 22O155 at ¶44-46.

In Wisconsin, state executive officials authorized the use of unattended ballot dropboxes for receipt of

ballots in direct violation of state law. *Id*. at ¶107-10. The Georgia Secretary of State abrogated the state legislature's mandated system for verifying signatures on absentee ballots. *Id*. at ¶66-71. Similarly, the Michigan Secretary of State changed the state statutorily mandated procedure for absentee ballot applications and signature verification. *Id.*at 79-84.

These challenges raised serious questions of constitutional law regarding usurpation of the textually explicit assignment of duties to the State Legislature that have not yet been resolved. The problem is that the Constitution assigns the question of the manner of selecting presidential electors exclusively to State Legislatures. When someone other than the State Legislature alters those rules, seemingly in violation of the text of the Constitution, voters are right to question to the integrity of the election process and the validity of the results reported by state executive officials. The constitutional issue at the heart of those questions regarding the 2020 election remain unanswered. Instead of resolving those questions, prosecutors in Arizona and Georgia and a purported "special prosecutor" for the United States is prosecuting criminal charges against those who raised questions concerning the validity of the changes to the election process.

This case involves a different kind of interference with the constitutional authority of State Legislatures. It is the authority of the State Legislature to regulate the manner of federal congressional elections. The Constitution expressly delegates this duty to State Legislatures and the members of those legislatures have an interest in protecting that express constitutional authority.

Early resolution of the questions raised in this case is especially critical where the Legislature acted out of concern for election integrity and public perception of the legitimacy of the election outcome. The State Legislature here enacted a ban on private funding of voter registration and private operation of voter registration specifically because it was concerned about the integrity of the election process.

The state lawmakers would have no cause for complaint had Congress stepped in an enacted legislation to override the state regulatory scheme. That is the design of the Constitution. However, that is not what happened here. The challenge in this case is to an Executive Order. The Constitution nowhere vests power in the President to create his own scheme of federal election regulation. That he did so for an election in which he is himself a candidate is a matter bound to raise questions of election integrity in the minds of the public and further diminish faith in our democratic process. This is a vitally important issue that requires action of this Court sooner rather than later.

CONCLUSION

As Justice Thomas noted, election rule changes by officials who have no authority to make such changes is not a "prescription for confidence." *Republican Party of Pennsylvania v. Degraffenreid*, 142 S.Ct. 732, 735 (2021) (Thomas, J., dissenting from denial of certiorari). Here, the President's Executive Order interferes with the Constitution's express textual commitment of regulating the manner of federal congressional elections to the Legislatures of the States in the first instance and then to Congress. The Court should grant the petition for writ of certiorari.

May 2024 Respectfully submitted,

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