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 BRIEF OF *AMICI CURIAE* MEMBERS MICHIGAN FAIR ELECTIONS AND WISCONSIN VOTER ALLIANCE IN SUPPORT OF PETITIONERS WITHOUT 10 DAYS' NOTICE AND BRIEF OF *AMICI CURIAE* MEMBERS MICHIGAN FAIR ELECTIONS AND WISCONSIN VOTER ALLIANCE IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* MEMBERS MICHIGAN FAIR ELECTIONS AND WISCONSIN VOTER ALLIANCE IN SUPPORT OF PETITIONERS WITHOUT 10 DAYS' NOTICE

Amici Curiae ("Amici") Michigan Fair Elections Institute d/b/a Michigan Fair Elections ("MFE") and Wisconsin Voter Alliance ("WVA") respectfully move for leave to file the accompanying brief in support of Petitioners without 10 days' advance notice to the parties of *Amici's* intent to file as ordinarily required by Sup. Ct. R. 37.2.

On May 24, 2024, *Amici* provided notice of their intent to file this brief to counsel of record for Petitioners and Respondents. While *Amici* provided 5 days' notice rather than the required 10 days' notice, there is no real prejudice as *Amici*'s brief will be filed on or before the date Respondents' brief is due regardless of the notice requirement. Counsel of record for Petitioners and the Pennsylvania Respondents have consented to this motion and the filing of this brief. As of this filing, no counsel for the Federal Respondents have expressed an objection to the motion or the brief.

As explained in *Amici*'s brief, as state-based non-profits focused on maintaining fair and honest elections, MFE and WVA have a special interest in ensuring that state legislatures maintain their prerogative regarding the "Time, Place, and Manner" of elections. Where the executive branch seeks to abuse its power through executive fiat, here in the

form of an executive order, its actions can negatively impact the entire electoral process. *Amici*'s brief includes important arguments not raised by the parties that may be of considerable assistance to the Court. *See* Sup. Ct. R. 37.1. Accordingly, *Amici* seek leave to file this brief in support of Petitioners.

Respectfully,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Executive Orders

STATEMENT OF IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

Michigan Fair Elections Institute d/b/a Michigan Fair Elections ("MFE") is a Michigan-based, non-profit Rule 501(c)(3) non-partisan organization. MFE started in July 2022 with a handful of concerned citizens and has grown to more than 3,500 volunteers across the state. Its local task forces are dedicated to restoring fair and honest elections through education, local citizen participation in elections, and litigation when necessary. MFE is at the forefront of working for election integrity.

MFE helps to investigate Michigan's elections to ensure legal compliance (both at the state and federal level), and it communicates the results of its investigations to educate the public about ways to improve Michigan's elections. MFE analyzes bills and laws with an eye toward closing gaps and opportunities for abuse by any who might undermine free and fair elections. MFE is an issues-based, educational organization that serves the community and welcomes all who support election integrity and who support both the Michigan and United States Constitutions.

Wisconsin Voter Alliance ("WVA") is a Wisconsin non-profit corporation. WVA seeks to

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[1] Pursuant to S. Ct. Rule 37.6, no counsel for a party authored this brief in whole or in part and no person or entity other than *Amici*, its members, or counsel made a monetary contribution to its preparation or submission.

facilitate and coordinate the restoration of voting integrity in Wisconsin. WVA's mission is to effect change to law and policies surrounding elections by creating multi-faceted objectives to restore voter confidence and integrity in the election process. WVA educates the public and elected officials, works to establish best election practices, identifies and encourages debate on election policy and law, and encourages fairness during elections.

Because the decision below presents an imminent threat to bedrock constitutional principles, especially the right for state legislatures to direct the "Time, Place, and Manner" of elections, *Amici* respectfully submit this brief in support of Petitioners and urge the Court to grant their Petition.

SUMMARY OF THE ARGUMENT

Protecting the constitutional rights of individual legislators protects election integrity. In March of 2021, President Biden issued Executive Order EO 14019 ("EO"). The EO generally requires federal agencies (i.e., not the states) to use government funds and resources for voter registration drives and Get-Out-The-Vote activities and commands federal agencies to expend government resources to work with non-governmental third-party organizations. *See generally* Pet. at 6-7.

MFE and WVA submit this brief in support of Petitioners, 27 Pennsylvania state legislators (the "Keefer Legislators") who are uniquely positioned to enforce their constitutional rights and should have standing to protect the Time, Place, and Manner of Pennsylvania's elections. *See* U.S. Const. art. I, § 4. As a group of legislators who are particularly concerned about election integrity, they seek to challenge what they believe to be executive overreach and encroachment on the constitutional prerogatives of state legislatures. Petitioners present a narrow and distinct argument that distinguishes this case from prior cases that have denied standing to legislators.

Finding that the Keefer Legislators lack standing to challenge usurpations of the "Time, Place, and Manner" of Elections under the Elections Clause—as the district court did—denies citizens who voted for these legislators their right to participate in the electoral process. This is a fundamental question that impacts the separation of powers the Founding

Fathers established. The Keefer Legislators should be allowed to exercise their constitutional duties, rights, and responsibilities and have standing to challenge EO 14019.

The Court's ruling as to whether the Keefer Legislators have standing will have far-reaching consequences. If they have standing, states will continue to be able to exercise their constitutionally-granted rights to direct the Time, Place, and Manner of elections and thus preserve election integrity. If they do not have standing, the Elections Clause will essentially be rendered null and void, and all election issues may ultimately be decided by executive order.

ARGUMENT

When legislators believe the executive branch's actions usurp their constitutional duties, they are the ones who are directly and uniquely affected.[2]

The individual legislators should have standing to sue under the U.S. Constitution's Election Clause for three principle reasons:

1) Finding the Keefer Legislators lack standing could render the Election Clause unenforceable and, therefore, meaningless.

2) The fundamental subject of election integrity renders this case uniquely appropriate for legislator standing. In other distinguishable independent state legislator cases, the issue has concerned spending provisions or other run-of-the-mill issues. By contrast, the Keefer Legislators seek to protect the very fabric of this country: free and fair elections. They are protecting the future of the country.

3) Each legislator has approximately 60,000 constituents whom he or she represents, so depriving these legislators of standing in reality deprives thousands of constituents of their constitutional rights to a pivotal layer of election integrity.

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[2] The legislators are not challenging executive veto power over election laws or the presidential power to issue executive orders. Rather, they are simply challenging the content of the specific EO at issue.

I. The Duty to Determine How Elections Are Run Is an Important Constitutional Question, and the Keefer Legislators Are Uniquely Positioned to Vindicate Their Constitutional Duties.

Executive orders can be politically partisan, overreaching, and unchecked. Executive orders regarding elections are particularly suspect and could result in several problematic outcomes, including potentially allowing one party to remain in power in perpetuity.

The Keefer Legislators are a particular group of legislators who are uniquely harmed by EO 14019 and should have standing, so they can prove that the EO is doing just that. Because other legislators might understand that enforcing EO 14019 has the ability to keep them (or members of their political party) in office, they may suffer no harm. But the Keefer Legislators stand on the precipice of suffering unique, direct harm. They should at least have standing, so they can vindicate their and their constituents' rights.

The test for legislator standing largely comes from *Raines v. Byrd*, 521 U.S. 811 (1997). *See id.* at 820 (noting that the Court "never had occasion to rule on the question of legislative standing presented here."). In *Raines*, for standing purposes, the Court emphasized the importance of injuries being "concrete and particularized." *Id.* at 819.

Here, the harm to the Keefer Legislators is particularized to them. Legislators took an oath and have a duty as public servants to uphold the Constitution, which specifically prescribes the setting of the "Time, Place and Manner" of elections to them. U.S. Const. art. I § 4. Their constituents rely upon the legislators' authority. While EO 14019 generally affects all legislators, the Keefer Legislators uniquely understand how it usurps their Constitutional duty to uphold the integrity of elections. Unfortunately, even elections are now a partisan issue. That is largely why a large portion of the entire Pennsylvania legislature did not challenge this authority, and the legislators who have particularized harm and who champion election integrity are attempting to raise these issues. Where, as here, election integrity becomes partisan, only one political party can be harmed, potentially in perpetuity, by an executive order that usurps authority for elections.

Although *Raines* is instructive, its circumstances are easily distinguishable from that here, and the outcome should be different. In *Raines*, the Court denied standing to six Members of Congress (four Senators and two Congressmen) because they based their claim on a "loss of political power." 521 U.S. at 812. Certain legislators filed suit after Congress as a whole passed the Line Item Veto Act, which gave authority to the President to cancel certain spending and tax benefit measures after the President had signed them into law. *Id.* at 814. The dissenting legislators, however, were simply outvoted. This Court found that if the legislators who had brought the case

"retire[d] tomorrow," the claim would simply move to their successor. *Id.* at 821.

The Keefer Legislators, by contrast, are not basing their claim on a mere loss of political power from an act of the legislature. Rather, the challenged action here is an executive order in which no vote was taken, and the Keefer Legislators had no voice at all. The Keefer Legislators filed this case as a check on the executive branch's power grab, so they can enforce their particularized Constitutional duties as prescribed regarding elections.

In other words, the Keefer Legislators base their claim on a loss and deprivation of their Constitutional rights, namely their inability to determine the "Time, Place, and Manner" of elections. Constitutional rights such as these are personal rights. To be deprived of a personal right, in whatever capacity, is a violation of one's liberty which is guaranteed by the Fourteenth Amendment to the U.S. Constitution. *See* U.S. Const. amend. XIV. The Keefer Legislators are uniquely positioned to enforce their constitutional duties and should have standing to do so.

II. EO 14019 May Permanently Deprive State Legislators of Their Constitutional Duty to Determine the Time, Place, and Manner of Elections.

Individual legislators are the only parties who can challenge a deprivation of protections and rights granted to them under the Elections Clause. To deprive legislators of the ability to challenge their

rights to enforce election integrity in their states (by "Time, Place, and Manner") is to deprive them of their ability to uphold their Constitutional oaths.

If the Keefer Legislators do not have standing under the Elections Clause, this would raise the question: Who could be granted standing? Who would be the proper party? Who other than a legislator could demonstrate personal, particularized injury under the Elections Clause? Unlike *Raines*, if this Court determines the Keefer Legislators have no standing, there might be no successors who could ultimately prevail in an election because of the failure of EO 14019 to protect election integrity. Legislators here claim that their ability to perform what they have taken an oath to uphold has been denied them by the executive branch. There is no other party that can vindicate these Constitutional rights.

The Keefer Legislators believe EO 14019 is a "power grab." The Founding Fathers knew all too well that governments had traditionally and naturally worked that way, so they designed the constitutional structure to guard against that tendency. As Federalist Paper No. 48 states: "It will not be denied, that power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it." The Federalist No. 48 (James Madison). The Keefer Legislators should have standing to argue that EO 14019 encroaches upon powers Constitutionally granted to state legislatures, and that the executive branch's power grab should be restrained.

This is of particular importance because the Keefer Legislators, as members of the minority political party, might be seen as held captive by EO 14019. They are unable to perform their Constitutional duties because of the oppressive and partisan executive order.

In *Raines*, this Court concluded that denying the Congressmen standing "neither deprive[d] members of Congress of any adequate remedy (may repeal) . . . , nor foreclose[d] the Act from constitutional challenge." 521 U.S. at 829. While the *Raines* legislators may not have been deprived of an adequate remedy in those particular circumstances, that is not what is most likely to occur to the Keefer Legislators if they cannot vindicate their Constitutional rights. Whereas the Line Item Veto Act that the *Raines* legislators challenged could ultimately be repealed or changed when a new Congress was seated, the Keefer Legislators are challenging an executive order which, if left unchallenged and unchecked, might permanently dismantle what is supposed to be a permanent governmental constitutional protection: election integrity. *See* The Federalist No. 59 (Alexander Hamilton) ("Every government ought to contain in itself the means of its own preservation."). Preserving the structure of government envisioned by the Founders means that the checks and balances given to state legislatures to regulate the "Time, Place, and Manner" of elections must not be dismantled and stripped by executive branch mandates, and individual legislators have a constitutional duty to exert checks on the executive branch.

Federalist No. 59 discusses that one of the key debates that ensued in 1787 related to which jurisdiction was to handle elections—federal or state. After much deliberation, the Founders decided not to grant the right to oversee elections to the federal government. Instead, the states were expressly granted this right. *See* U.S. Const. art. I § 4. In this country's constitutional structure, there is no reason to think that what was specifically not given to the federal government should be allowed to be grabbed by the federal government in an executive order and via fiat. *See* U.S. Const. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.").

Similarly, in the debates of the state conventions regarding the adoption of the U.S. Constitution, there was discussion that the State of Rhode Island was not giving its citizens the ability to elect representatives. Elliot's Debate, Vol. IV, p. 66.[3] The Founding Fathers had to consider whether the national government or the states should have this power. One framer asked, "[D]oes that gentleman [referring to the gentleman who opined that the national government should be given this right], or any other gentleman, who has the smallest acquaintance with human nature or the spirit of America, support that people will passively relinquish privileges or suffer the usurpation of powers unwarranted by the Constitution?" *Id.*

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[3] The Debates in the Several State Conventions of the Adoption of the Federal Constitution, J. Fed. Convention, Vol. IV, available at https://tile.loc.gov/storage-services/service/ll/llscd/lled004/lled004.pdf (last accessed May 28, 2024).

The Keefer Legislators here are unwilling to "passively relinquish their Constitutional privileges or suffer the usurpation of powers by the executive branch that are unwarranted by the Constitution." *See id.* Recognizing that they have standing will give them the opportunity to aggressively defend their Constitutional privilege and, by extension, the voting rights of their constituents. This matter is of utmost importance and goes to the very fabric of the country's founding.

III. This Court's Jurisprudence on Elections and Voting Demonstrates the Proper Role State Legislatures Have to Play.

This Court's election cases reinforce the role state legislatures should play in the Time, Place, and Manner of elections, and why Petitioners here should have standing.

Reynolds v. Sims, 377 U.S. 533 (1964) is informative. There, certain voters challenged the apportionment of the Alabama state legislature. The apportionment, they claimed, deprived them of their constitutional rights to participate in a free and fair society. *Id.* at 537. This Court recognized that "the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights." *Id.* at 562. Here, the Keefer Legislators assert that EO 14019 undermines their constituents' rights to elect representatives who can exercise their franchise in a free and unimpaired manner. EO 14019 undermines legislators' ability to protect the franchise in Pennsylvania.

Just as the *Reynolds* Court held that "any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized" (*id.*), MFE and WVA respectfully urge this Court to scrutinize the urgent need for Keefer Legislators, whose duty it is to work for election integrity, to have standing to challenge EO 14019. The federal government "can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given or given by necessary implication." *Newberry v. United States*, 256 U.S. 232, 249 (1921). EO 14019 does not involve powers "expressly given or given by necessary implication" to the federal executive branch.

Similarly, in *Bush v. Gore*, 531 U.S. 98 (2001), which involved the integrity of ballots for an election, this Court noted that the "right to vote ***as the legislature has prescribed*** is fundamental." *Id.* at 104 (emphasis added). This is particularly important in presidential elections, in which "state-imposed restrictions implicate a uniquely important national interest." *Anderson v. Celebrezze*, 460 U.S. 780, 794-95 (1983). The Keefer Legislators should be able to prove that EO 14019 overrides legislative protections and undermines the national interest of state-imposed restrictions. The order fails to honor and show "respect for the constitutionally-prescribed role of state *legislatures*" (*Bush*, 531 U.S. at 115 (Rehnquist, Scalia, Thomas, J., concurring), which is a fundamental aspect of national elections.

The Founders recognized that there needed to be a "necessary precaution against an abuse of power." The

Federalist No. 61 (Alexander Hamilton). There could hardly be a greater example than an executive order taken by one man with one pen stroke and by fiat to alter election issues across all 50 states. Conferring standing to the Keefer Legislators is the only way to stop the abuse of power that the Founding Fathers feared and took steps to address over 200 years ago.

The Framers could have given the federal, national government the power over elections. They could have given the executive branch power over elections. Nevertheless, during their sage deliberations, they determined that the best method for curbing any abuse of power in elections was to leave the determination of "Time, Place, and Manner" of elections to the states' elected legislatures.

This is an important constitutional issue that needs to be addressed. MFE and WVA believe that because voting is a fundamental right, and protections in all elections need to be to preserved and protected in order to ensure the ongoing structure of our government and the future of our republic, the Keefer Legislators should have standing to vindicate their Constitutional duties.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition.

Respectfully submitted,

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