

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 A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

**MOTION FOR LEAVE TO FILE
AND BRIEF OF *AMICI CURIAE*
SECRETARIES OF STATE OF WEST
VIRGINIA, ARKANSAS, INDIANA,
LOUISIANA, MISSISSIPPI, MONTANA,
NEW HAMPSHIRE, TENNESSEE, AND
WYOMING IN SUPPORT OF PETITIONERS**

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**MOTION FOR LEAVE TO FILE BRIEF OF
AMICI CURIAE SECRETARIES OF STATE
OF WEST VIRGINIA, ARKANSAS, INDIANA,
LOUISIANA, MISSISSIPPI, MONTANA,
NEW HAMPSHIRE, TENNESSEE, AND
WYOMING IN SUPPORT OF PETITIONERS
WITHOUT 10 DAYS' NOTICE**

Amici Curiae, the Secretaries of State of West Virginia, Arkansas, Indiana, Louisiana, Mississippi, Montana, New Hampshire, Tennessee, and Wyoming respectfully move for leave to file the accompanying brief in support of Petitioners Representatives Dawn Keefer, Timothy Bonner, Barry Jozwiak, Barbara Gleim, Joseph Hamm, Wendy Fink, Robert Kauffman, Stephanie Borowicz, Donald (Bud) Cook, Paul (Mike) Jones, Joseph D'orsie, Charity Krupa, Leslie Rossi, David Zimmerman, Rober Leadbeter, Daniel Moul, Thomas Jones, David Maloney, Timothy Twardzik, David Rowe, Joanne Stehr, Aaron Berstine, Kathy Rapp, Jill Cooper, Marla Brown, Mark Gillen and Senator Cris Dush—all Pennsylvania Legislators, 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 23, 2024, *amici* Secretaries of State provided notice of their intent to file this brief to counsel of record for both Petitioners and Respondents. While *amici* provided 6 days' notice rather than the required 10 days' notice, Respondents are not prejudiced insofar as *amici's* brief will be filed on or before the date that Respondents' brief is due. Counsel for the Petitioners has expressed consent for this motion, and counsel for the Respondents has not expressed an objection to this motion.

As set forth in the enclosed brief, as the chief election officers in their respective states, *amici* are responsible for protecting and securing the integrity of state and federal elections. *Amici* have a strong interest in Petitioners' challenge of Executive Order No. 14019 which directs federal agencies to consider ways and means to expand and promote voter registration thereby usurping the authority granted to the states by the United States Constitution.

Amici's brief includes relevant material not brought to the attention of the Court by the parties that may be of considerable assistance to the Court. *See* Sup. Ct. R. 37.1.

Amici therefore seek leave to file this brief in support of Petitioners.

Respectfully submitted,

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INTEREST OF THE *AMICI CURIAE*¹

Amici are chief election officers in their respective states who are responsible for protecting and securing the integrity of state and federal elections. They administer the states' election processes, which include voter registration, certifying election results, and applying and enforcing election laws enacted by state legislatures.

On March 7, 2021, President Biden issued Executive Order No. 14019 which directs federal agencies to consider ways and means to expand and promote voter registration thereby usurping the authority granted to the states by the United States Constitution. The Elections Clause of the Constitution, Art. I, § 4, cl. 1, provides that “[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each state by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations.” Accordingly, states are given the task of providing a permanent and uniform system for the registration of voters, provided that Congress may override state regulations by implementing rules for federal elections. No power is vested in the President to direct federal resources towards supplanting a state’s jurisdiction to determine and implement laws to secure its voter rolls. *Amici* submit this brief because the merits of this case directly relate to the federal government overreach without state consent.

1. As required by Supreme Court Rule (SCR) 37.6, no counsel for any party authored this brief in whole or in part. Further, no person or entity other than *amici* and their counsel funded its preparation and submission. Pursuant to SCR 37.2, untimely notice was provided to all parties without objection.

SUMMARY OF ARGUMENT

Amici administer voter registration procedures to maintain accurate rolls to protect election integrity. States, through the power invested to them by the United States Constitution, have promulgated election codes to regulate voter registration processes with respect to both federal and state elections. Only the Congress may at any time by law make or alter such election codes. Executive Order No. 14019 directs federal agencies to promote voter registration with the support of third-party entities through the use of unappropriated federal resources. Executive Order 14019 violates the Elections Clause of the Constitution and the authority granted to the states as set forth in the National Voter Registration Act. *Amici* have general supervision of voter registration procedures and practices at agencies and locations providing services in their respective states. Insofar as they are charged with protecting the reliability of the electoral process, *amici* beseech the Court to exercise its discretion to rule on the underlying merits and set aside Executive Order 14019 thereby finding it unconstitutional and enjoining any efforts to enforce said Order.

ARGUMENT

On March 7, 2021, President Biden issued Executive Order No. 14019 to expand access to voter registration and election information. That Order, among other things, directs federal agencies to evaluate ways to provide access to voter registration services and vote-by-mail ballot applications in the course of activities or services that directly engage with the public, including: (A) distributing voter registration and vote-by-mail ballot application

forms, and providing access to applicable state online systems for individuals who can take advantage of those systems; (B) assisting applicants in completing voter registration and vote-by-mail ballot application form in a manner consistent with all relevant state laws; and (C) soliciting and facilitating approved, nonpartisan third-party organizations and state officials to provide voter registration services on agency premises. 86 Fed. Reg. 13,623 (March 10, 2021). Further, within 200 days of the date of said Order, the head of each federal agency shall submit a strategic plan outlining the ways that the agency can promote voter registration and voter participation. *Id.*

Executive Order 14019 purports to protect a state's Constitutionally delegated responsibility to regulate voter registration processes with respect to both federal and state elections by citing to section 7(a)(3)(B)(ii) of the National Voter Registration Act. However, the context of a designation of a voter registration agency is limited to acceptance of that designation. The mandates of Executive Order 14019 are broader and designed to usurp a state's authority to govern how elections will operate. To date, federal agencies, under the auspices of the directive set forth in Executive Order 14019, have engaged in voter registration drives without seeking a designation under the National Voter Registration Act—one of two federally enacted laws that supersedes and regulates state voter-registration systems.

For instance, the following are just some of the ways federal agencies have attempted to bypass state sovereignty through the Executive Order directives:

- The United States Department of Agriculture's Rural Housing Service will encourage the

provision of nonpartisan voter information through its borrowers and guaranteed lenders and Rural Development agencies will take steps to promote access to voter registration forms and other pertinent nonpartisan election information among their patrons. *See* White House “Fact Sheet: Biden Administration Promotes Voter Participation with New Agency Steps” (September 28, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/09/28/fact-sheet-biden-administration-promotes-voter-participation-with-new-agency-steps/>.

- The United States Department of Justice will provide information about voting to individuals in federal custody, facilitate voting by those who remain eligible to do so while in federal custody, and educate individuals before reentry about voting rules and voting rights in their states. *Id.*
- The United States Department of Veterans Affairs will provide assistance in registering and voting for inpatients and residents, including VA Medical Center inpatients and residents of VA nursing homes and treatment centers for homeless veterans. The Department will also facilitate assistance in registering and voting for homebound veterans and their caregivers through VA’s home-based and telehealth teams. *Id.*
- The United States Department of Education directed eligible postsecondary institutions to use Federal Work Study funds to support

voter registration activities. *See* “Requirements for Distribution of Voter Registration Forms” (GEN-22-05) (April 21, 2022), <https://fsapartners.ed.gov/knowledge-center/library/dear-colleague-letters/2022-04-21/requirements-distribution-voter-registration-forms>; *See also* “U.S. Department of Education Toolkit for the Promotion of Voter Participation for Students”, <https://www2.ed.gov/documents/press-releases/student-voter-toolkit.pdf>.

- With United States Treasury Department and Internal Revenue Service support, Volunteer Income Tax Assistance (“VITA”) sites throughout the country are assisting taxpayers with access to voting opportunities. Over 450 VITA centers in 40 states have reported that they will provide information about voting opportunities. *See* White House “Fact Sheet: Biden-Harris Administration Releases Report on Native American Voting Rights” (March 24, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/03/24/fact-sheet-biden-harris-administration-releases-report-on-native-american-voting-rights/>.
- The United States Department of Housing and Urban Development, Office of Field Policy and Management, connected with local election officers and placed voter registration materials in all ten HUD Regional Offices across the country. *Id.*
- The United States Department of Agriculture Food and Nutrition Service issued letters to

state SNAP and WIC agencies to encourage the promotion of President Biden's voter registration drive. *Id.*

- The United States Department of Homeland Security, U.S. Citizenship and Immigration Services issued updated policy guidelines regarding access to voter registration services during administrative naturalization ceremonies. *See* "USCIS Updates Voter Registration Guidance for Naturalization Ceremonies" (August 25, 2023), <https://www.uscis.gov/newsroom/alerts/uscis-updates-voter-registration-guidance-for-naturalization-ceremonies>.

More troubling is the administration's lack of transparency regarding the implementation of Executive Order No. 14019. According to the Executive Order, each federal agency shall submit a strategic plan outlining the ways that the agency can promote voter registration and voter participation. Moreover, as shown above, upon information and belief, non-appropriated federal funding is being used to fulfill the directives set forth in the Executive Order. Despite multiple requests for the strategic plans, the executive branch has, in some cases, simply not responded to the requests or, in other cases, has claimed that the requests are overly broad or restricting access to the records by way of Exemption 5 to the Freedom of Information Act: *See*: (1) March 29, 2022, Letter From Congress of the United States House of Representatives to Ambassador Rice and Director Young, https://smallbusiness.house.gov/uploadedfiles/3-29-2022_-_letter_biden_admin_-_eo_promoting_access_to_voting.pdf; (2) May 10, 2023, Letter

From United States Senate to President Biden, <https://www.ronjohnson.senate.gov/services/files/4CA84F23-0A6B-4C34-B5DE-27CEAC92E813>; and (3) April 10, 2024, Press Release From Mississippi Secretary of State Michael Watson, “A republic, if you can keep it”, <https://www.sos.ms.gov/press/opinion-column-republic-if-you-can-keep-it>.

The President’s use of executive action to convert federal agencies into get-out-the-vote operations is prohibited by the United States Constitution. The Elections Clause of the Constitution empowers the states to regulate elections subject to Congresses’ pre-emption power. No such authority is granted to the executive branch. Congress, through its Constitutional pre-emption power, has enacted laws setting forth certain voter registration requirements related to federal elections. Neither the National Voter Registration Act nor the Help America Vote Act allows the President to designate federal agencies as voter registration agencies without the agreement of the state where those agencies are located.

The constitutions of each state prescribe the qualifications for those that shall be entitled to vote, and the legislatures of each respective state enact laws regulating the registration of voters subject to any pre-emption law enacted by Congress. These laws promote the sovereign duties of states to ensure the integrity of free and fair elections. Executive Order 14019 attempts to supplant authority invested in the states to regulate the conduct of their elections. The Order is a prime example of partisan federal government overreach and *amicus* request the Court to set aside Executive Order 14019 thereby finding it unconstitutional and enjoining any efforts to enforce said Order.

I. Executive Order 14019 violates the Elections Clause

The Elections Clause provides for states, not the President of the United States, to regulate state voter registration systems and designation of other agencies to provide voter registration services.

The Elections Clause of the Constitution, Art. I, § 4, cl. 1, provides that “[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations.” It invests the states with the initial task of determining the qualifications of voters who will elect members of Congress. *Storer v. Brown*, 415 U.S. 724, 730 (1974).

It cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns—in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.

Smiley v. Holm, 285 U.S. 355, 366 (1932). The Court has further recognized the states’ ability to establish

sanctions for violating election laws as well as authority over recounts and primaries. *Id.* at 369.

As with the Electors Clause, which provides plenary power to state legislatures in the matter of the appointment of electors, the Elections Clause grants plenary power to state legislatures to regulate the time, places and manner of holding federal elections subject to Congress exercising its authority to make or alter such regulations. See generally, *McPherson v. Blacker*, 146 U.S. 1, 35 (1892); Art. II, § 1, cl. 2. Only Congress has the power to override state regulations by establishing uniform rules for federal elections. *U. S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 832-833 (1995). In *Thornton*, the Court stated:

[T]he Framers understood the Elections Clause as a grant of authority to issue procedural regulations, and not as a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints.

Id., 514 U.S. at 833-34.

In *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1 (2013), the Court stated “[t]he Clause’s substantive scope is broad. ‘Times, Places, and Manner,’ we have written, are ‘comprehensive words,’ which ‘embrace authority to provide a complete code for congressional elections,’ including, as relevant here and as petitioners do not contest, regulations relating to ‘registration.’” *Id.* at 8-9 (*quoting Smiley v. Holm*, 285 U.S. 355, 366 (1932)).

“The powers not delegated to the United States by the Constitution, nor prohibited to the States, are reserved to the States respectively, or to the people.” U.S. Const., Amdt. 10. The States retain a significant measure of sovereign authority, however, only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 549 (1985).

[T]he Constitution of the United States . . . recognizes and preserves the autonomy and independence of the States—independence in their legislative and independence in their judicial departments. [Federal] [s]upervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the State and, to that extent, a denial of its independence.

Garcia at 549-50 (quoting dissenting opinion in *Baltimore & Ohio R. Co. v. Baugh*, 149 U.S. 368, 401 (1893), a defense quoted with approval in *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78-79 (1938)) (brackets in original).

The Elections Clause enables state legislatures to enact statutes regarding voter registration subject to Congress making or altering such regulations. Again, no such authority is divested to the President of the United States. Congress, through its pre-emption power, enacted

two comprehensive codes related to voter registration for federal elections. The National Voter Registration Act (NVRA) “requires States to provide simplified systems for registering to vote in federal elections.” *Young v. Fordice*, 520 U.S. 273, 275 (1997). The Help America Vote Act (HAVA) summarily provides for states to secure and utilize accessible voting equipment and promote voter access to voting opportunities. 52 U.S.C. § 20901 *et seq.*

However, critically, neither act grants the executive branch or U.S. President any authority to designate other federal agencies or nongovernmental entities to conduct voter registration services. “[T]he Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections.” *Sugarman v. Dougall*, 413 U.S. 634 (1973). No such power is conferred to the executive branch.

The policies of Executive Order 14019 usurp the states’ and Congress’s legislative authority. “It is emphatically the duty of the Judicial Department to say what the law is.” *Marbury v. Madison*, 5 U.S. 137 (1803). The mandates of Executive Order 14019 are unconstitutional, and *amici* request this Court find so and enjoin any efforts by the executive branch to enforce that Order.

II. Executive Order 14019 violates the National Voter Registration Act of 1993.

Pursuant to 52 U.S.C. § 20503(a), in addition to any other method of voter registration provided for under state law, each state shall establish procedures to register to vote in elections for Federal office (1) by application made simultaneously with an application for a motor vehicle

driver's license; (2) by mail application in accordance with the standard federal registration form; and (3) by application in person. Application in person may occur at the appropriate registration site designated with respect to the residence of the applicant in accordance with state law; and at a Federal, state, or nongovernmental office designated under Section 20506 of the NVRA. 52 U.S.C. § 20503(a)(3).

The term “voter registration agency” means an office designated under section 20506(a)(1) to perform voter registration activities. 52 U.S.C. § 20502. The state designates agencies for the registration of voters in election for Federal office subject to the requirements of the NVRA which include: (1) all offices in the state that provide public assistance and (2) all offices in the state that provide state-funded programs primarily engaged in providing services to persons with disabilities. 52 U.S.C. § 20506(a)(2). Public assistance programs include the Supplemental Nutrition Assistance Program (SNAP), the Special Supplemental Nutrition Program for Women, Infants and Children (WIC), the Temporary Assistance for Needy Families (TANF), Medicaid, and the State Children's Health Insurance Program (SCHIP).

In addition to the voter registration agencies set forth above, Section 7 provides that “each State shall designate other offices within the State as voter registration agencies” which “*may* include . . . [f]ederal and nongovernmental offices” by agreement. 52 U.S.C. § 20506(a)(2). (emphasis added). The only Federal office required to serve as a voter registration agency designated under subsection (a)(2) are Armed Forces recruitment offices. 52 U.S.C. § 20506(c)(2). States—not the Chief Executive—are to designate other those agencies.

Section 7 requires designated offices to distribute information forms containing specific information concerning an individual's opportunity to vote, distribute voter registration application forms, assist applicants in completing voter registration forms (unless the applicant refuses such assistance), and accept completed voter registration application forms for transmittal to the appropriate state election official. 52 U.S.C. § 20506(a)(4) and 52 U.S.C. § 20506(a)(6).

The states, not the executive branch of the federal government, determine what offices it shall designate as a Section 7 voter registration agency. *Amici* state legislatures have enacted laws and designated agencies in conformance with Section 7 of the NVRA. Under no circumstances have those state legislatures voluntarily agreed to designate a federal office as a voter registration agency.

Executive Order 14019 demands federal agencies, to the greatest extent practicable, to formally notify the states in which the agency provides services that it would agree to a designation under the NVRA. However, this is not merely harmless outreach. President Biden's Order directs federal agencies to consider other ways to expand access to voter registration and election information "as appropriate and consistent with applicable law" to distribute voter information forms and to register persons to vote outside the confines of 52 U.S.C. § 20506(a)(2). To that end, the head of each federal agency shall submit to the Assistant to the President for Domestic Policy a strategic plan outlining the ways to circumvent NVRA regulations to promote voter registration and voter participation.

No allocation of funds has been appropriated by Congress towards that end. The President has refused to produce the state agency strategic plans implementing the Order's directive, rejecting requests for evidence that these plans are "consistent with applicable law." The President has refused to identify how federal agencies distribute funds to promote the Order's directive. This lack of transparency coupled with the "ways" federal agencies are enacting policies to sidestep the designation mandate, including the use of unknown third-party vendors, is a clear violation of the NVRA and 31 U.S.C. 1341(a). As such, Executive Order 14019, through federal agency actions to bypass voter registration agency designation under the NVRA, and by payments to third-party vendors in contravention of 31 U.S.C. 1341(a), is a violation of federal law. *Amici* request this Court find so and enjoin any efforts by the executive branch to enforce that Order.

CONCLUSION

In the interest of dangerous precedent and expedience with the 2024 election cycle under way, this Court is postured to exercise its discretion, rule on the underlying merits, and set aside Executive Order 14019 by finding it unconstitutional and enjoining any efforts to enforce said Order.

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