No. 24-1716

In The
United States Court of Appeals
for the Third Circuit

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, Robert Leadbeter, Daniel Moul, Thomas Jones, David Maloney, Timothy Twardzik, David Rowe, Joanne Stehr, Aaron Bernstine, Kathy Rapp, Jill Cooper, Marla Brown, Mark Gillen And Senator Cris Dush—All Pennsylvania Legislators,

Plaintiffs–Appellants,

v.

Joseph R. Biden, In His Official Capacity As The President Of The United States, Or His Successor; United States; U.S. Department Of Agriculture; Tom Vilsack, In His Official Capacity As Secretary Of Agriculture; U.S. Department Of Health And Human Services; Xavier Becerra, In His Official Capacity As Secretary Of Health And Human Services; U.S. Department Of State; Antony Blinken, In His Official Capacity As Secretary Of State; U.S. Department Of Housing And Urban Development; Marcia Fudge, In Her Official Capacity As Secretary Of Housing And Urban Development; U.S. Department Of Energy; Jennifer Granholm, In Her Official Capacity As Secretary Of Energy; U.S. Department Of Education; Dr. Miguel Cardona, In His Official Capacity As Secretary Of Education; Josh Shapiro, In His Official Capacity As Governor Of Pennsylvania, Or His Successor; Al Schmidt, In His Official Capacity As Secretary Of The Commonwealth, Or His Successor; Jonathan Marks, In His Official Capacity As The Deputy Secretary For Elections And Commissions, Or His Successor,

Defendants–Appellees.

On appeal from the United States District Court for the Middle District of Pennsylvania, docket no. 1:24-CV-00147

Brief of Plaintiffs-Appellants

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SUMMARY OF THE CASE

Twenty-seven Pennsylvania Legislators seek reversal of a lower court decision granting a motion to dismiss their complaint alleging executive branch official actions have usurped individual legislator rights and duties to regulate time, place, and manner of federal elections. The dismissed allegations revealed how executive actions unilaterally contradicted state election laws, including individual legislator acts specifically rejecting the undertakings of executive officials. As in *Coleman v. Miller,* 307 U.S. 433 (1939) and *Dennis v. Luis,* 741 F.2d 628 (3d Cir. 1984), the executive undertakings nullified the legislators' votes that were sufficient to enact and defeat specific state legislation regulating the manner of federal elections. Under these circumstances, contrary to the district court's ruling, the Legislator-Appellants do have standing for declaratory and injunctive relief.

STATEMENT OF JURISDICTION

Plaintiff-Appellant Legislators challenged Executive Order 14019 issued by President Biden, an announcement by Governor Shapiro, and a "directive" issued by Pennsylvania Department of State executive officials, all regarding aspects of voter registration. App.31-69 (Amended Complaint); App.70-263 (Complaint Exhibits). The Legislator-Appellants brought claims under the Electors and Elections Clauses of the United States Constitution art. II, § 1, cl. 2 and art. I, § 4, cl. 1, respectively seeking equitable relief. The U.S. District Court for the Middle District of Pennsylvania had jurisdiction over this action pursuant to Article III of the United States Constitution,

5 U.S.C. § 701, et seq. (the Administrative Procedures Act), 28 U.S.C. § 1331, 28 U.S.C. § 1343(a)(3), 28 U.S.C. § 1346(a)(2), and 42 U.S.C. § 1983. The District Court dismissed the Amended Complaint under F.R.C.P. 12(b)(1) of the Federal Rules of Civil Procedure, ruling that the Legislator-Appellants lack Article III standing. App.3; 29-30. The Court did not address the merits of the remaining legal claims.

The District Court entered final judgment on March 26, 2024. The decision in *Keefer v. Biden*, No. 1:24-CV-00147, 2024 WL 1285538 (M.D. Pa. Mar. 26, 2024), is reproduced at App.3 (Order) and App.4-30 (Memorandum). The Notice of Appeal was timely filed on April 18, 2024, reproduced at App.1-2. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 as this is an appeal from a final decision of a district court.

STATEMENT OF THE ISSUES

1. 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. App.29-30; 57-59.

STATEMENT OF RELATED CASES AND PROCEEDINGS

The District Court entered final judgment in *Keefer v. Biden*, No. 1:24-CV-00147, 2024 WL 1285538 (M.D. Pa. Mar. 26, 2024) on March 26, 2024.

Plaintiffs-Appellants petitioned the United States Supreme Court for Writ of Certiorari Before Judgment on April 23, 2024 with assigned case number 23-1162. On June 12, 2024, Plaintiffs-Appellants' petition was distributed for the conference of September 30, 2024.

STATEMENT OF THE CASE

I. Legislator-appellants have the individual opportunity and responsibility to vote to regulate the manner of federal elections in Pennsylvania.

Plaintiffs-Appellants (Legislator-Appellants) are twenty-seven state legislators of the Commonwealth of Pennsylvania. App.33 ¶¶ 7-10. As 27 of the 253 real persons who make up the legislative branch of the Commonwealth's government, *id.*, they have specific duties under the U.S. Constitution to appoint Electors, who, in turn, elect the President and Vice President under Article II's "Electors Clause," and to regulate the times, places, and manner of federal elections under Article I's Elections Clause. App.36-37 ¶¶30–41. The Legislator-Appellants each took an oath to support, obey, and defend the Constitution of the United States and the Constitution of the Commonwealth. *E.g.*, App.321 (Decl. of Representative Charity Grimm Krupa, ¶ 5).

Under the State's Constitution, the Commonwealth of Pennsylvania has three branches of government, the Executive, Legislative, and Judicial. Pa. Const. arts. II–V. The Legislative Branch—also known as the General Assembly—is composed of the House of Representatives and the Senate, and has the sole legislative power to pass laws. Pa. Const. arts. II §1, III. § 1. As members of the state House and Senate, individual legislators have the opportunity to vote yea or nay regarding proposed laws (bills). Pa. Const. art. III § 4.

II. Pennsylvania legislators successfully voted for legislation prohibiting third-party involvement in elections.

A Pennsylvania law enacted after the 2020 election (App.113-16, Senate Bill 982 [SB982], 2022 Pa. Legis. Serv. Act 2022-88, now at 25 Pa. Stat. § 2607) prohibits the use of private resources for voter registration or for preparation or administration of conducting elections in the Commonwealth. App.40-41, 113-16. For example, Legislator-Appellant Representative Joseph Hamm, successfully voted to have SB982 enacted. App.316-18 (Declaration of Joseph Hamm). The law specifically states that any election costs incurred "shall be funded only upon lawful appropriation of the Federal, State and local governments, and the source of funding shall be limited to money derived from taxes, fees and other sources of public revenue." App.41, 113; Pa. St. 25 P.S. § 2607.

The law does not authorize the type of election activities called for by President Biden's EO14019. In contrast, through EO14019, President Biden and his political appointees, including the named federal appellees as federal department heads, issued directives to solicit for, and facilitate use of private, non-governmental third-party resources for voter registration services. App.34-35, 117-121.

Pennsylvania Statute, 25 P.S. § 2607, originally known as SB982, became law on July 11, 2022. The underlying policy rationale for the law's enactment was the need 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 this Commonwealth." 25 P.S. § 2607(b). As one of the chief authors of the law explained, the concern regarding outside support involved in the election process required action to prevent potential undue influence in those elections procedures or processes:

> No matter how well-intended, such outside support has the potential to unduly influence election procedures, policies, staffing, and purchasing, which in turn may unfairly alter election outcomes. Even more importantly, it stands to erode voter confidence in a pillar of our beloved democracy…The 2020 Presidential Election saw non-governmental entities contribute hundreds of millions of dollars…Further, it has been reported that this funding was only secretly vetted by certain high-ranking officials from the executive branch who identified which counties should be invited to apply.[1]

For over thirty years since Congress passed the federal National Voter Registration Act, 52 U.S.C. § 20901 et seq., the Pennsylvania legislative branch has had the opportunity to authorize federal agencies to perform voter registration, but they have declined to do so. App.39-40 (25 Pa C.S.A. §1321).

A. Biden's Executive Order 14019 solicits nongovernmental third-party involvement in the manner of elections—that is, the registration process.

In the aftermath of the 2020 Election, 28 states, including Pennsylvania, enacted laws prohibiting the influence of third-party non-governmental organizations

[1] Memorandum from Senators Lisa Baker and Kristin Phillips-Hall to All Senate Members (Oct.20, 2021) (available at https://www.legis.state.pa.us//cfdocs/Legis/CSM/showMemoPublic.cfm?chamber=S&SPick=20210&cosponId=36370)

in election operations.[2] This was largely in response to the more than $400 million dollars in donations from the Chan Zuckerberg Initiative (a foundation) selectively distributed by what has been described as partisan third-party non-governmental organizations, such as the Center for Tech and Civic Life ("CTCL"). Recently, U.S. House of Representatives, Committee of House Administration Chairman Bryan Steil explained how private third-party involvement in election processes may sow public distrust in the election process:

> Publicly, CTCL said these funds were intended to support poll worker recruitment efforts or the purchase of new equipment. But in reality, some of these funds were used primarily for voter registration events and get-out-the-vote efforts in Democrat-leaning cities and counties.[3]

On March 7, 2021, President Biden issued Executive Order No. 14019 "Promoting Access to Voting" (EO14019) applying to all 50 states. App.117-21 (86 Fed. Reg. 13,623). EO14019 commanded the heads of the Appellee federal departments, sued in their official capacities, to develop plans to use the agencies to

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[2] The 28 states are: Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, and Wisconsin (state-legislature-approved constitutional amendment). *States Banning or Restricting "Zuck Bucks"*, Capital Rsrch. Ctr. https://capitalresearch.org/article/states-banning-zuck-bucks/ (last updated April 10, 2024).

[3] *American Confidence in Elections: Confronting Zuckerbucks, Private Funding of Election Administration: Hearing before the Committee on House Admin.*, 118 Cong. (2024) (opening remarks of Rep. Bryan Stiel), https://cha.house.gov/2024/2/chairman-steil-delivers-opening-remarks-at-zuckerbucks-hearing.

conduct get-out-the-vote activities and voter registration drives in partnership with Biden administration approved third-party non-governmental organizations. App.117-18 (Sec. 3(a)(iii)(C)), App.34-34 (¶¶ 13-24). There is no evidence Congress authorized the executive action nor appropriated funding for Executive agencies to engage in the election activities under the Executive Order. App.41-48 (¶¶ 67-108). Notably, Pennsylvania has also not appropriated funds to support EO14019. App.41 ¶ 65.

B. State Secretaries of State, Attorneys General, and members of Congress asked Biden to rescind EO 14019 and explain its implementation.

Despite numerous requests from agencies and elected officials, the Biden Administration has neither rescinded EO14019, nor offered transparency regarding the Order's implementation.

In August 2022, 15 State Secretaries of State wrote to President Biden requesting that EO14019 be rescinded.[4] The Secretaries expressed concern that involving Federal agencies in the registration process "will produce duplicate registrations, confuse citizens, and complicate the jobs of our county clerks and election officials."[5] They explained that their respective state legislative branch is solely authorized to prescribe the way elections are run, and should alterations in the

[4] Joint Letter from Secretaries of State of Alabama, Arkansas, Florida, Georgia, Idaho, Indiana, Louisiana, Mississippi, Montana, Nebraska, Ohio, South Dakota, Tennessee, West Virginia, and Wyoming to President Joe Biden, (Aug. 3, 2022) (publicly available at https://sos.wyo.gov/Media/2022/Joint_SOS_Letter-Biden_EO_14019.pdf).
[5] *Id.*

election process be needed, that would be the province of the legislative branch of *their* state government and not the federal executive branch.[6] Finally, the Secretaries warned that "[i]f implemented, [EO14019] would also erode the responsibility and duties of the state legislatures to their constitutional duty within the Election Clause."[7]

Likewise, in September 2022, 13 State Attorneys General wrote a letter to President Biden asking him to rescind EO14019 explaining their view that the Executive Order as unconstitutional and potentially designed to benefit the President's own political party.[8]

Then again, in October 2022, nine members of the U.S. House of Representatives sent a letter to the U.S. Attorney General asking him to turn over the strategic plans for the Department of Justice's implementation of EO14019.[9]

In May 2023, 14 U.S. Senators sent a letter to President Biden complaining about the secrecy of EO14019 agency plans and partisan motives and tactics.[10] No

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[6] *Id.*
[7] *Id.*
[8] Multistate Letter from Attorneys General of Louisiana, Alabama, Arizona, Arkansas, Montana, Nebraska, Oklahoma, Indiana, Kentucky, Mississippi, South Carolina, Texas, and Utah to Joseph R. Biden, Jr., President of the United States (Sept. 28, 2022) (publicly available at https://attorneygeneral.utah.gov/wp-content/uploads/2022/09/EO-14019-Multistate-letter-FINAL.pdf).
[9] Letter from Congress Members: Ralph Norman, Mary E. Miller, Bill Posey, Louis Gohmert, Ben Cline, Randy K. Weber, Fred Keller, Chip Roy, and Andy Briggs to Merrick Garland, Attorney General of the United States (Oct. 18, 2022) (publicly available at https://norman.house.gov/uploadedfiles/letter-to-ag-garland-re-eo-14019-final.pdf).
[10] Letter from Senators Bill Hagerty, Mitch McConnell, Deb Fischer, Ted Budd, Rick Scott, Mike Braun, Mike Lee, Cindy Hyde-Smith, Shelley Moore Capito, Roger F.

evidence of any response was received. In that light, months later, in November 2023, 23 U.S. Senators sent another letter to President Biden reminding him: (1) the Executive Order directed federal agencies to engage in voter activities without Congressional approval; (2) using funds for the Order objectives not intended for such use by Congress is a violation of law; and (3) that the White House is avoiding Congressional oversight as the Executive election plans remained undisclosed despite repeated requests:

> Executive Order 14019 directs more than 600 federal agencies to engage in voter-related activities without congressional approval…[u]sing appropriated funds for a purpose that Congress did not expressly authorize would constitute a violation of [law]…Unfortunately, the White House has kept these plans hidden despite numerous requests from Congress.[11]

Recognizing that EO14019 would not be rescinded and after the repeated refusal to disclose the scope of agency plans or the identity of the "approved" third-party non-governmental organizations, the Appellant-Legislators were forced to take action. *E.g.*, App.60. In January 2024, the Legislators commenced a federal action in

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Wicker, James Lankford, Ted Cruz, Ron Johnson, and Katie Boyd Britt to President Joseph R. Biden, Jr. (May 10, 2023) (publicly available at https://www.lankford.senate.gov/wp-content/uploads/media/doc/lankford_hagerty_letter_on-eo-14019.pdf).

[11]Letter from Senators Bill Hagerty, Mitch McConnell, Deb Fischer, Cynthia Lummis, Ron Johnson, Ted Budd, Shelley Moore Capito, Ted Cruz, Katie Boyd Britt, Roger F. Wicker, Mike Lee, Mike Braun, Rick Scott, JD Vance, James Lankford, Bill Cassidy, Roger Marshall, Tom Cotton, Kevin Cramer, Cindy Hyde-Smith, Jim Risch, Steve Daines, and Mike Crapo to President Joseph R. Biden, Jr. (Nov. 28, 2023) (publicly available at https://www.hagerty.senate.gov/wp-content/uploads/2023/11/FINAL-EO-14019-Letter-to-POTUS.pdf).

the U.S. District Court for the Middle District of Pennsylvania seeking to enjoin the unlawful overreach of the federal and state executive branches. App.31-69 (Amended Complaint); App.70-263 (Complaint Exhibits).

III. Pennsylvania Governor Shapiro changed the manner of federal elections by unilaterally proclaiming automatic voter registration that is contrary to the state's election law.

On September 19, 2023, Governor Shapiro proclaimed through a press release that Pennsylvania had implemented Automatic Voter Registration (AVR). App.48-49 (¶¶ 109-111); App.111-12. However, AVR is not part of Pennsylvania's election code. App.53. While Pennsylvania's election code provides for individual voter registration, it does so without mentioning automatic voter registration. 25 Pa.C.S.A. § 1321 (2002).

In recent legislative sessions, bills were introduced that would have made AVR legal. App.52, 79 (Memorandum regarding reintroducing proposed AVR legislation); App.80-110 (SB40 of 2023, Proposed AVR Amendment to Pennsylvania Election Code). However, every AVR bill introduced was defeated in the legislative law-making process reflecting the intent of legislators, not to support AVR, including the Appellant-Legislators. App.52-53 (¶¶ 132-33).

Despite the lack of legislator support to legalize AVR, Governor Shapiro took executive action to legalize automatic voter registration contrary to existing law, and specifically, contrary to the individual legislators who successfully defeated AVR bills. App.52-53.

IV. Pennsylvania executive officials changed the manner of federal elections through directives that contradict legislation.

The U.S. Congress and the Pennsylvania legislature have enacted laws regarding verification of identity and eligibility of applicants for voter registration, in portions of the "Help America Vote Act" (HAVA) at 52 U.S.C. § 21083 and 25 Pa.C.S.A. § 1328(a) and (b), respectively. Meanwhile, the Pennsylvania Department of State has issued directives "Directive Concerning HAVA-Matching Drivers' Licenses or Social Security Numbers For Voter Registration Applications." App.53, 73. This directive instructs counties to register applicants even if an applicant provides invalid identification on their voter registration application. App.53-57, 73.

The Legislator-Appellants' amended complaint alleged that the directive contradicts laws enacted by both Congress and Pennsylvania. App.53-55. (¶¶ 139-146). The amended complaint alleges that invalid driver's license numbers and invalid social security numbers on an application make it "incomplete" and "inconsistent;" conditions that existing election laws describe as reasons to reject an application. App.65-67. The amended complaint further claims that the directive also violates federal law, specifically HAVA's requirement to verify the identity of applicants for voter registration. App.66.

In 2005, the U.S. Election Assistance Commission issued guidance that States must give individuals who provided invalid or mismatched information "an

opportunity to correct the information at issue."[12] The guidance further stated that the opportunity to correct the information "does not mean that States should accept or add unverified registration applications to the statewide list." *Id.*

In 2020, Pennsylvania legislators, including several of the Legislator-Appellants, voted to amend 25 Pa. Stat. § 1328, but that 2020 amendment did not change or remove the language of the statute related to the reasons to reject incomplete and inconsistent voter registration applications.[13]

To stop the overreach of federal and state executive officials as it relates to the times, places, and manner of federal elections that is within the exclusive purview of the legislative branch, the Legislator-Appellants who specifically voted against such executive actions being taken commenced this federal lawsuit. App.31-69 (Amended Complaint). The amended complaint alleges that President Biden's EO14019, Pennsylvania Governor Shapiro's AVR edict, and the Pennsylvania Department of State's directive to counties not to verify the identification of voters, usurped or nullified the legislators' duties and rights related to Pennsylvania federal election laws. 25 Pa. Stat. § 2607, and 25 Pa.C.S.A. §§ 1321, 1328(a), (b), respectively. App.67-68.

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[12] *Voluntary Guidance on Implementation of Statewide Voter Registration Lists*, U.S. Election Assistance Commission (July, 2005), https://www.eac.gov/sites/default/files/eac_assets/1/1/Implementing%20Statewide%20Voter%20Registration%20Lists.pdf.

[13] House Roll Call: Details for House RCS No. 1139, Pa. House Reps. (Mar. 25, 2020) (available at https://www.legis.state.pa.us/CFDOCS/Legis/RC/Public/rc_view_action2.cfm?sess_yr=2019&sess_ind=0&rc_body=H&rc_nbr=1139).

In part because of the urgency to ensure the upcoming 2024 elections take place under lawful parameters, the Legislator-Appellants additionally filed a motion for preliminary injunction, seeking to enjoin the continued implementation of President Biden's, Governor Shapiro's, and the Pennsylvania Department of State's executive actions. *See id.* On March 26, 2024, the district court denied the Legislator-Appellants' motion and dismissed their amended complaint for lack of jurisdiction, specifically holding a lack of individual legislator standing. App.3 (Order), 4-30 (Memorandum). The lower court did not reach the merits on the remaining claims. *Id.*

SUMMARY OF THE ARGUMENT

The 27 individual Pennsylvania state legislators ("Legislator-Appellants") have standing to sue federal and state executive officials for violations of the U.S. Constitution's Elections Clause and Electors Clause—a specific and unique designation of duty and authority to them to prescribe the times, places, and manner of federal elections. The district court erred by characterizing the Legislator-Appellants' injuries as merely institutional, foreclosing this lawsuit to enjoin rogue executive branch actions which usurp or nullify the Legislator-Appellants' votes on legislation regulating federal elections.

Pennsylvania governor Josh Shapiro had no lawful authority to implement Automatic Voter Registration (AVR) in 2023 when he proclaimed AVR as a method to register. While bills that could have authorized "automatic" voter registration were considered, these bills were out-right rejected in legislative committee votes in both 2021 and 2023. The Legislator-Appellants in both the state House and Senate successfully defeated those bills in committee. The Governor's lawless action both had the effect of amending the election laws governing registration and of nullifying the successful votes of Legislator-Appellants. The Legislator-Appellants' exercise of their unique constitutional authority to legislate the manner of federal elections was futile.

Meanwhile, the Commonwealth's Department of State (the "Department") only has legal authority to take actions that are necessary to ensure county election

commissions comply and participate with Pennsylvania's election code. But, when the Department promulgates directives that are inconsistent and contrary to election laws, individual legislator rights and duties are nullified. While the Help America Vote Act, (HAVA) at 52 U.S.C. § 21083, and Pennsylvania election code in 25 PaC.S.A. § 1328(a) and (b) outline the requirements for voter registration applicants, and provides for rejecting incomplete applications, the Department issued a "Directive Concerning HAVA-Matching Drivers' Licenses or Social Security Numbers For Voter Registration Applications," which directs commissions to register applicants, even if an applicant provides invalid identification on their voter registration application.

President Biden acted without Article II authority and without Congressional authorization when he issued Executive Order 14019 (EO14019) in 2021. President Biden's EO14019 directs heads of executive branch agencies to develop plans to use federal agencies to conduct get-out-the-vote activities and voter registration drives in partnership with Biden administration approved third-party non-governmental organizations. In 2022, Legislator-Appellants successfully voted to amend Pennsylvania law to forbid third-party involvement in voter registration in the state. With the times, places, and manner of federal elections being within the purview of state legislators' rights and duties, the conflict and nullification of their votes caused by these federal executive branch actions were immediate.

The district court's dismissal of the underlying amended complaint for lack of individual legislator standing is in error. The court failed to apply the standard for

individual legislator standing in instances of specific, unique constitutional violations of legislators' authority established in *Coleman v. Miller,* 307 U.S. 433 (1939). The district court, instead, dismissed individual arguments for standing, characterizing the claims as an institutional injury by relying on *Raines v. Byrd*, 521 U.S 811 (1997). But, *Raines* and its progeny, *e.g.*, *Yaw v. Delaware River Basin Commission*, 49 F.4th 302 (3rd Cir. 2022) (finding two senators claimed only an institutional injury lacked standing for their general ability to pass fracking legislation), are distinguishable from *Coleman*, and inapposite to Legislator-Appellants' claimed individual constitutional injuries.

Like other rights, individual Legislators-Appellants can be injured as members of the discrete class of beneficiaries provided with the constitutional right and duty to regulate the manner of federal elections. *Coleman* held that individual state legislators standing exists, concerning individual state legislators rights under the Article V constitutional amendment process, because state "senators have a plain, direct and adequate interest in maintaining the effectiveness of their votes." 307 U.S. at 438. The U.S. Constitution gives the legislatures plenary legislative power, even if it can be constrained somewhat by a state constitution, *Moore v. Harper*, 600 U.S. 1, 28 (2023), and there is no authority for the President or the Governor to usurp those powers. Yet, federal and state executive actions have nullified the legislators' votes that were sufficient to enact or defeat specific state election laws—specifically SB40, 25 Pa. Stat. § 2607 (2022) and 25 Pa.C.S.A. §§ 1321, 1328(a), (b) (2002 and altered 2020).

ARGUMENT

Standard of Review

This Court reviews a district court's dismissal of a complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of standing *de novo*. *In re Horizon Healthcare Services, Inc. Data Breach Litigation*, 846 F.3d 625, 632 (3rd Cir. 2017). "In reviewing challenges to standing, we apply the same standard as review of a motion to dismiss under Rule 12(b)(6)…Consequently, we accept the Plaintiffs' well-pleaded factual allegations as true and draw all reasonable inferences from those allegations in the Plaintiffs' favor." *Id.* at 633 (internal citations omitted).

I. Legislators have the exclusive authority to enact legislation regarding times, places, and manner of federal elections.

A. Pennsylvania Governor Shapiro cannot "amend" state laws governing federal elections enacted by the legislature.

During recent Pennsylvania legislative sessions, attempts were made to enact laws to make automatic voter registration legal. App.52, 79 (Memorandum regarding reintroducing proposed AVR legislation); App.80-110 (SB40 of 2023, Proposed AVR Amendment to Pennsylvania Election Code). However, those efforts failed in committee. And, the Legislator-Appellants never amended the Election Code to legalize automatic voter registration. App.52-53 (¶¶ 132-33).

Instead of recognizing or accepting the failed attempt to legalize automatic voter registration, the Governor, through an executive proclamation, effectively amended existing law that directly affects the manner in which voter registration is to

occur in Pennsylvania. Automatic voter registration is not legal as an accepted manner for federal elections. To begin, there should be little doubt that the Governor has no authority to change or amend state law because that authority is exclusively that of the legislature:

> A governor lacks the authority to change or amend state law since such power falls exclusively to the legislative branch. Although the power to make rules and regulations carrying out the provisions of a statute is not an exclusively legislative power and is also administrative in nature, the discretion of a legislative body, because of its formal role as a formulator of public policy, is much broader than that of an administrative board. An administrative agency does not have any broad authority to make laws; it only possesses the power to adopt regulations carrying into effect the will of the legislature, and if an administrative rule exceeds the statutory authority established by the legislature, the agency has usurped the legislative function thereby violating the separation of powers.

16 C.J.S. Constitutional Law § 456 (citations omitted).

Article III, A, 1, of the Pennsylvania Constitution explicitly states the legislature has the exclusive authority regarding the passage of laws:

> No law shall be passed except by bill, and no bill shall be so altered or amended, on its passage through either House, as to change its original purpose.

Article IV, § 2 of the Pennsylvania Constitution explicitly states how the Governor is to ensure the laws of the state are faithfully executed:

> The supreme executive power shall be vested in the Governor, who shall take care that the laws be faithfully executed….

Nowhere does the Pennsylvania Constitution provide the Governor the authority to alter, amend, or otherwise fail to ensure the laws of the State are faithfully

executed. Here, because the Governor proclaimed to provide for *automatic* voter registration, as a manner to register, where bills were not only considered but rejected — bills of which the Legislator-Appellants successfully rejected— the Governor exceeded his authority and usurped the votes of the Legislator-Appellants in this case governing the times, places, and manner of federal elections.

Certainly, this is not a situation in which the Governor attempted to create a set of executive rules with the benefit of legislative guidance, something akin to filling in the details of broad legislation that describes overall policies. The election laws specific to the situation *omitted* the word "automatic." And, the Governor made voter registration "automatic" anyway.

Moreover, the actions of the Governor were not those instituted because of a natural disaster or other emergency. Generally, a Proclamation has "the force of law." *See* 35 Pa.C.S. § 7301(b) ("[T]he Governor may issue, amend and rescind executive orders, proclamations, and regulations which shall have the force and effect of law."). Executive orders or an administrative regulation promulgated by an executive agency would have the "force of law" that affects individuals outside the executive branch to "implement existing constitutional or statutory law." *Markham v. Wolf*, 647 Pa. 642, 190 A.3d 1175, 1183 (2018) (citing *Shapp v. Butera*, 22 Pa.Cmmw. 229, 348 A.2d 910, 913 (1975)). But here, the Governor's actions do not implement an existing election law. "Automatic" is not in the law governing voter registrations. The omission of a

word in existing law means something and by the Governor's actions, he seeks to play mischief with the existing intent of the law.

The Governor's proclamation is not to construe, but to amend the election law, which is within the exclusive province of the legislative branch. *See*, *Com. v. Gouger*, 21 Pa. Super. 217 (Pa. Super. 1902). *See e.g.*, *In re Est. of Kerstetter,* 808 A.2d 344, 347 (Pa. Cmmw. 2002) citing *Vlasic Farms, Inc. v. Pennsylvania Labor Relations Board*, 734 A.2d 487 (Pa.Cmmw. 1999), *affirmed,* 565 Pa. 555, 777 A.2d 80 (2001). Notably, "[t]he law is well settled that a court has no power to insert a word into a statute if the legislature has failed to supply it." 808 A.2d at 347. Certainly, if courts cannot insert a word into an enacted state law the legislature omitted, the Governor, limited in his authority through the State Constitution, lacks that authority as well under the circumstances of this case.

Indeed, the legislative branch of government *sets* the times, places, and manner of federal elections (which covers the subject of voter registration), and it excluded *automatic* registration despite attempts to change existing election law. In *Smiley v. Holm,* 285 U.S. 355 (1932), the U.S. Supreme Court recognized that the authority of Congress to regulate voter registration procedures falls within the virtue of its power to control the "manner" of holding elections. The Court explained that the power to control the "times, places, and manner" necessarily included such election processes as registering to vote:

> [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.

Id. at 366.

Similarly, the same principle would apply to state legislative branches of government. "Manner" includes voter registration. In *Storer v. Brown*, 415 U.S. 724 (1974), the Supreme Court opined that states may regulate "the time, place, and manner of holding primary and general elections, [as well as] the registration and qualifications of voters, and the selection and qualification of candidates." *Storer*, 415 U.S. at 730. Here, Legislator-Appellants did not amend the law to implement AVR, and individual legislators acted against it in committee. The Governor simply did not have the constitutional authority—under the federal nor the state constitution—to change existing election law by issuance of the executive order or proclamation, nullifying the Legislator-Appellants' votes against automatic voter registration. App.52-53.

On September 19, 2023, Governor Shapiro proclaimed that Pennsylvania had implemented Automatic Voter Registration (AVR). App.48-49 (¶¶ 109-111); App.111-12. However, AVR had not been added to Pennsylvania's election code by legislative votes of the Commonwealth's legislators. App.53. Pennsylvania's election code, promulgated by the votes of individual Pennsylvania legislators, using their respective

federal authority under the Elections Clause or Electors Clause or both, and their state constitutional opportunity to vote to pass bills into laws, successfully passed a law articulating that individuals "may apply to register," *without* authorizing automatic voter registration. 25 Pa.C.S.A. § 1321 (2002).

In recent legislative sessions, Pennsylvania legislators (not including Legislator-Appellants) introduced bills that would have made AVR legal. App.52, 79 (Memorandum regarding reintroducing proposed AVR legislation); App.80-110 (SB40 of 2023, Proposed AVR Amendment to Pennsylvania Election Code). However, each AVR bill was defeated through the legislature's law-making process because there was no tally of the legislators' votes (including votes of Legislator-Appellants) to support AVR. App.52-53 (¶¶ 132-33).

Although AVR bills failed as legislators intended, Governor Shapiro's executive proclamation effectively amended existing election law governing federal elections. Simply, the Governor acted contrary to the will and intent of individual legislators who successfully voted in committee not to pass AVR bills. App.52-53.

B. Pennsylvania Department of State executive officials cannot promulgate directives that "amend" state laws governing federal elections enacted by the legislature.

The Pennsylvania Department of State (Department) has limited enforcement authority under 25 Pa.C.S. § 1803(a):

> The department shall have the authority to take any actions, including the authority to audit the registration records of a

> commission, which are necessary to ensure compliance and participation by the commissions.

The Department's executory authority is narrowly tailored to actions "which are necessary to ensure compliance." Any unnecessary action, or an action that exceeds ensuring compliance and participation with the law is not authorized under Pennsylvania law.

Pennsylvania election laws require the verification of the identity and eligibility of applicants for voter registration. State law, regarding the approval or rejection of voter registration applications, 25 Pa.C.S.A. § 1328(a) & (b), states:

> (a) Examination.—Upon receiving a voter registration application, a commissioner, clerk or registrar of a commission shall do all of the following:
>
> (1) Initial and date the receipt of the application.
>
> (2) Examine the application to determine all of the:
>
> (i) whether the application is complete.
>
> (ii) whether the applicant is a qualified elector.
>
> (b) Decision.—A commission shall do one of the following:
>
> (1) Record and forward a voter registration application to the proper commission if the commission finds during its examination under subsection (a) that the applicant does not reside within the commission's county but resides elsewhere in this Commonwealth.
>
> (2) Reject a voter registration application, indicate the rejection and the reasons for the rejection on the application and notify the applicant by first class nonforwardable mail, return postage guaranteed of the rejection and the reason if the commission finds during its examination under subsection (a) any of the following:
>
> (i) the application was not properly completed and after reasonable efforts by the commission to ascertain the necessary information, the application remains incomplete or inconsistent.
>
> (ii) The applicant is not a qualified elector. …

App.54-55. While 25 Pa.C.S.A. § 1328(b) requires commissions to reject voter registration applications that are incomplete or for unqualified applicants, Congress has also passed the "Help America Vote Act" (HAVA), which at 52 U.S.C. § 21083 also lists requirements for voter registration lists and identification. To help states implement HAVA's requirements, in 2005, the U.S. Election Assistance Commission issued guidance that States must give individuals who provided invalid or mismatched information "an opportunity to correct the information at issue."[14] The guidance further stated that the opportunity to correct the information "does not mean that States should accept or add unverified registration applications to the statewide list." *Id.* 25 Pa. C.S.A. § 1328(a) and (b) align with the Election Assistance Commission Guidance.

Yet, the Department has issued a "Directive Concerning HAVA-Matching Drivers' Licenses or Social Security Numbers For Voter Registration Applications," directing commissioners to register applicants, even if an applicant provides invalid identification on their voter registration application. App.73. The Department thereby exceeds its delegated authority and nullifies existing election law requirements of 25 Pa. C.S.A. § 1328(a) and (b). Invalid driver's license numbers and invalid social security numbers on an application make the application "incomplete" and

[14] *Voluntary Guidance on Implementation of Statewide Voter Registration Lists*, U.S. Election Assistance Commission (July, 2005), https://www.eac.gov/sites/default/files/eac_assets/1/1/Implementing%20Statewide%20Voter%20Registration%20Lists.pdf.

"inconsistent," conditions that require the registration to be rejected. The Department's executive action circumvents the election law and effectively 'repeals' or 'amends' existing law. 25 Pa.C.S.A. § 1328(a) and (b).

In 2020, legislators, including several Legislator-Appellants, voted to amend § 1328, but declined to change language related to rejecting incomplete and inconsistent voter registration applications.[15] The Department of State's directive to register applicants even if an applicant provides invalid identification nullifies the intent of the Legislator-Appellants who voted in opposition to amending 25 Pa.C.S.A. § 1328 (a) and (b).

C. President Biden cannot "amend" state election laws governing federal elections.

President Biden's March 7, 2021 Executive Order No. 14019 "Promoting Access to Voting" (EO14019) applies to all 50 states. EO14019 commands the political appointees who head federal agencies to develop plans to use federal agencies to conduct get-out-the-vote activities and voter registration drives in partnership with Biden administration approved third-party non-governmental organizations. While Presidential executive orders have the force of law, valid orders issue only pursuant to one of the President's sources of power—that is—Article II of the U.S. Constitution or by Congress's delegation. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952).

[15] See note 13, House Roll Call.

Article II of the U.S. Constitution does not grant the President authority over the times, places, or manner of federal elections. The closest mention of federal elections in Article II is the Electors Clause regarding the election of the President and Vice President, which directs: "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors…" Moreover, Congress did not authorize EO14019 as a means to alter the conduct of federal elections, nor did Congress appropriate funding for executive agencies to engage in the election activities as directed by EO14019.

Further, the President has refused to rescind EO14019 despite requests from state Attorneys General, Secretaries of State, and members of Congress who recognized the questionable legality of the Order in the first instance. Equally frustrating is the lack of transparency to explain or identify the third-parties that executive officials are to partner with. Although that issue is not for this case, the federal executive branch's lack of transparency shows complete disregard and disrespect for the state legislators' authority and their role regulating federal elections.

The President's EO14019 regulates voter registration, which is encompassed within the "manner" of federal elections. Because the President has no authority under the U.S. Constitution to regulate the manner of elections, which is a power specifically allocated to the legislative branch of government, EO14019 is constitutionally invalid.

For Legislator-Appellants, EO14019 nullifies the votes of the individual legislators by usurping the law-making process that led to their successful state enactment of Act 88 of 2022 (25 Pa. Stat. § 2607). Introduced as Senate Bill 982 (SB982), it was enacted into law on July 11, 2022. When SB982 legislation was introduced, the sponsor's memorandum explained the need 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 this Commonwealth." 25 Pa. Stat. § 2607(b). The memorandum explained:

> No matter how well-intended, such outside support has the potential to unduly influence election procedures, policies, staffing, and purchasing, which in turn may unfairly alter election outcomes. Even more importantly, it stands to erode voter confidence in a pillar of our beloved democracy…The 2020 Presidential Election saw non-governmental entities contribute hundreds of millions of dollars…Further, it has been reported that this funding was only secretly vetted by certain high-ranking officials from the executive branch who identified which counties should be invited to apply.[16]

The public policy against potential corrupt practices the Legislator-Appellants sought to prevent through their successful votes in the law-making process, paradoxically, are now being promoted by the President and his federal agencies under EO14019. The President's action, as an incumbent seeking re-election, is benefitting from the voter registration processes embedded within federal agencies

[16] Memorandum from Senators Lisa Baker and Kristin Phillips-Hall to All Senate Members (Oct.20, 2021) (available at https://www.legis.state.pa.us//cfdocs/Legis/CSM/showMemoPublic.cfm?chamber=S&SPick=20210&cosponId=36370)

and connections with third-party entities. President Biden's executive action deprives the individual state legislators of their federal rights [under the Elections Clause or Electors Clause], which is, a legally cognizable injury under Article III under *Coleman*.

II. Individual legislators have cognizable individual injuries when the executive branch unconstitutionally exceeds its authority that is contrary to legislator votes affecting state federal election laws.

The federal judiciary has the authority to enjoin unlawful executive actions of both the federal and state Appellees as identified in the underlying Legislator-Appellants' amended complaint. The state courts of the Commonwealth of Pennsylvania would not have efficacious jurisdiction to stop unlawful actions of the federal defendants, but for over a century, the U.S. Supreme Court has recognized the ability to seek injunctive relief in federal court for violations of the Constitution. *Ex Parte Young*, 209 U.S. 123 (1908); *Trump v. Hawaii*, 138 S.Ct. 2392, 2407 (2018). Writing for the Court in *Armstrong v. Exceptional Child Ctr., Inc.*, Justice Scalia observed that "we have long held that federal courts may in some circumstances grant injunctive relief… with respect to violations of federal law by state officials, but also with respect to violations of federal law by federal officials." 575 U.S. 320, 326 (2015) (internal citations omitted). The authority of courts to "enjoin unconstitutional actions by state and federal officers" is a longstanding judicial remedy derived from a court's inherent equity powers. *Id.* at 327.

In addition to equitable relief, the Legislator-Appellants' amended complaint sought redressable relief under the Administrative Procedures Act (APA). App.62-64

(Counts II and III). Under 5 U.S.C. § 706, APA claims can be based on agency actions that are "contrary to constitutional right, power, privilege, or immunity." Here, the state Legislators-Appellants claim their federal constitutional rights under the Elections or the Electors Clauses were deprived or usurped by EO14019.

However, the issue presented here on appeal is standing. Generally, a plaintiff must establish three elements to have standing in federal court: (1) an injury in-fact which is "(a) concrete and particularized;" and "(b) actual or imminent, not 'conjectural or hypothetical;" (2) a causal connection between the injury and the conduct complained of; and (3) the injury must be redressable by a favorable court decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal citations omitted).

In this case, when a legislator votes against the ratification of a law are overridden and virtually held for naught due to an act of the executive branch regarding federal election laws, individual legislators have "a plain, direct and adequate interest in maintaining the effectiveness of their votes." *See, Coleman v. Miller,* 307 U.S. 433 (1939). Under such circumstances, individual legislators have standing to sue in federal court. *Id.*

To address the injury element at issue in this part, section A, *infra*, distinguishes between categories of cases addressing legislator standing and demonstrates the circumstances of Legislator-Appellants align with the *Coleman* standard for nullification of legislator votes in an area where the U.S. Constitution has specifically

conveyed a unique right to legislators. The role, duties, votes, and powers of individual legislators that are injured by executive overreach are discussed in section B. Section C examines the alleged injury through the lens of § 1983-enforceable rights. Finally, section D explains how the individual Legislator-Appellants have sustained an injury that is different from others in the General Assembly.

A. *Coleman v. Miller* provides the applicable "vote nullification" precedent test for finding the individual Legislator-Appellants have standing.

The Supreme Court has recognized individual legislator standing, under Article V of the U.S. Constitution, for state legislative ratification of federal constitutional amendments. *Coleman v. Miller,* 307 U.S. 433 (1939), distinguished in *Arizona State Legislature v. Arizona Independent Redistricting Comm.*, 576 U.S. 787, 803 (2015) (finding standing for the entire Arizona State legislature as a whole), and *Virginia House of Delegates v. Bethune-Hill*, 587 U.S. 658, 668 (2019) (holding no standing in circumstances where the Virginia house continued alone without the state senate). The same *Coleman* principle is applicable in this case under the described circumstances relating to state election laws governing federal elections.

In *Coleman*, twenty Kansas state senators challenged the state legislature's ratification of a proposed amendment to the U.S. Constitution. The state senate had deadlocked on the amendment by a vote, and the lieutenant governor cast a tie-breaking vote in favor of ratification. *Id.* at 436. The claim of the objecting state legislators rested on the argument that the lieutenant governor did not have the power

to break the tie in relation to proposed Article V federal constitutional amendments. *Id.* at 436. The Supreme Court held that the legislators had a plain, direct and adequate interest in the effectiveness of their votes as a right and privilege under the U.S. Constitution:

> Here, the plaintiffs include twenty senators, whose votes against ratification have been overridden and virtually held for naught…We think that these senators have a plain, direct and adequate interest in maintaining the effectiveness of their votes. Petitioners come directly within the provisions of the statute governing our appellate jurisdiction. They have set up and claimed a right and privilege under the Constitution of the United States to have their votes given effect.

Id. at 438. *Coleman* has been distinguished, but not overturned, and similar to this case, deals with constitutionally-delegated powers. For example, when the Pennsylvania Governor uses his so-called "executive powers" to effectively amend existing election law to allow for automatic voter registration, and when legislators, including some of the Legislator-Appellants, successfully defeated bills in committee amending election laws to authorize automatic registration, the individual effectiveness of their committee votes have been nullified. Here, the Legislator-Appellants have a plain, direct and adequate interest in maintaining the effectiveness of their votes. *See e.g., id.*

The same is true regarding President Biden's EO14019. As previously demonstrated, EO14019 is contrary to state election laws that have rejected third-party entity involvement in the election process for federal elections. The Appellant-

Legislators votes were nullified or usurped by the federal executive branch officials who have no authority to do so under the Elections Clause.

Generally, cases about individual state legislator standing fall into three general categories: "lost political battles, nullification of votes and usurpation of power." *Silver v. Pataki*, 755 N.E.2d 842, 847 (NY. Ct. App. 2001) (categorizing legislative standing case fact patterns). Indeed, there is no standing for individual legislators' lost political battles. But, standing may exist for the nullification or usurpation of legislator votes. *See, id.* (citing *Coleman*, 307 U.S. regarding vote nullification; *Dodak v. State Admin. Bd.,* 495 N.W.2d 539 (Mich. 1993) for an example of legislative usurpation; *Raines v. Byrd*, 521 U.S 811 (1997) for lost political battles.)

Silver involved a single New York Assembly member, after voting and winning the passage of a bill, sued to claim a veto had unconstitutionally nullified his vote. The New York appellate court, using the reasoning of *Coleman*, found he had standing to challenge nullification of his personal vote. *Silver*, 755 N.E.2d at 847–48.

The U.S. Court of Appeals for the Third Circuit has similarly recognized individual legislator standing when lawmakers seek to exercise unique powers vested only with state legislators. In *Dennis v. Luis*, 741 F.2d 628 (3d Cir. 1984), the Third Circuit concluded eight state lawmakers had standing in federal court to challenge the

usurpation of their legislative authority by an executive official when the Governor flouted an enacted law:

> Thus, our problem involves determining the court's role when these separate, independent branches of government – the executive and the legislative – clash and cannot resolve their differences on their own political turfs. Should legislators be allowed to use the judicial process to force the executive branch to comply with "the law of the land?" Or, phrased differently, should legislators be able to use the court to implement a victory that was won in the legislative hall and ignored in the executive mansion?" …In short, this case concerns a flouting by the Governor of a law that has been in fact enacted. Consequently, we believe it appropriate for us to consider the case."

Id. at 632-34.

Individual legislator standing in *Dennis* was predicated on the "personal and legally cognizable interest peculiar to the legislators," their "right to advise and consent," regarding appointments of officers, which was "vested only in members of the legislature" and was "sufficiently personal to constitute an injury in fact thus satisfying the minimum constitutional requirements of standing." *Id.,* at 631. *Goode v. City of Philadelphia*, 539 F.3d 311, 318-19 (3d Cir. 2008). In *Goode*, this Court distinguished its denial of standing to city council members challenging their city solicitor's ability to make a settlement agreement from findings of individual legislator standing in *Dennis* and *Silver,* because City Council appellants did not claim that they have been deprived of meaningful participation in the legislative process, or that they have been unable to exercise their rights as legislators. *Id.* at 318–319).

Although not precentral to this Court, the Pennsylvania Supreme Court's rationale in *Fumo v. City of Philadelphia*, 972 A.2d 487, 502 (Pa. 2009) is helpful. In *Fumo,* the State Supreme Court recognized individual legislator standing when members of the General Assembly "aim to vindicate a power that only the General Assembly has" using language found in *Coleman,* regarding interests in maintaining the effectiveness of individual legislator authority and vote:

> We conclude that the state legislators have legislative standing…The state legislators seek redress for an alleged usurpation of their authority as members of the General Assembly; aim to vindicate a power that only the General Assembly allegedly has; and ask that the Court uphold their right as legislators to cast a vote…Thus, the claim reflects the state legislators' interest in maintaining the effectiveness of their legislative authority and their vote, and for this reason, falls within the realm of the type of claim that legislators, *qua* legislators….

Fumo, 972 A.2d at 502; *see id.* at 343, n.5 (acknowledging that state and federal standing may be different, but nevertheless helpful).

Similarly, the Legislator-Appellants claim that executive officials—both federal and state—are circumventing the legislative process, by unilaterally creating and amending election laws in Pennsylvania thus "'distorti[ng]…the process by which a bill becomes law' by nullifying a legislator's vote or depriving a legislator of an opportunity to vote – which is an injury in fact." *See Russell v. DeJongh, Jr.*, 491 F.3d 130, 135 (3d Cir. 2007) (discussing *Coleman* and *Dennis* and drawing a distinction between an official's disobedience of a law and the injury to the legislator from nullifying a legislator's vote) (internal citations omitted).

The *Coleman* Court recognized individual legislator standing when executives outside of the legislative branch attempted to insert themselves into the constitutionally-directed legislative realm, thereby circumventing the authority and duty granted to individual legislators. *Coleman*, 307 U.S. at 438. Likewise, the Third Circuit recognized individual legislator standing when suffering personal injury when rights vested "only in members of the legislature" have been usurped. *Dennis*, 741 F.2d at 632-34. The U.S. Constitution's Elections Clause specifically and uniquely vests and directs that state legislatures shall prescribe the manner of federal elections. Legislatures are defined under each state's constitution. And, here, the state constitution vests the authority to individual legislators to vote on bills, including, as authorized under the Elections Clause, the times, places, and manner of federal elections. In short, under the constitutional vote nullification circumstances raised by Legislator-Appellants in this case, *Coleman* provides the appropriate legal precedent for standing.

1. The district court's reliance on *Raines v. Byrd* is misplaced because the asserted injury was not inflicted by the state legislature itself, but by the actions of the executive branch of government.

The district court decision's reliance on *Raines v. Byrd,* 521 U.S. 811 (1997) and *Yaw v. Delaware River Basin Comm'n*, 49 F.4th 302 (3d Cir. 2022) was misplaced. The facts presented by Legislator-Appellants here are aligned with *Coleman* and *Fumo* and not *Raines* nor *Yaw*. Moreover, the district court also disregarded Third Circuit

decisions recognizing individual legislator standing. By every measure from the persuasive *Fumo* decision and precedential *Dennis*, and *Coleman*, the Legislator-Appellants have federal court standing to prevent nullification and usurpation of their legislative authority to regulate the manner of elections in Pennsylvania.

In *Raines*, six disgruntled members of Congress who had voted against the Line Item Veto Act, which was enacted and signed into law, filed suit seeking a declaratory judgment that the Act was unconstitutional. *Raines,* 521 U.S. at 814–17. In denying standing, the Supreme Court noted that the plaintiffs' asserted injury to their legislative power was, in a real sense, inflicted by Congress upon itself. Indeed, the *Raines* plaintiffs had tried and failed to persuade Congress not to pass the Act. When Congress considered the Line Item Veto Act, the plaintiffs' votes "were given full effect. [Plaintiffs] simply lost that vote." *Id.* at 824. In other words, their loss was a political one derived from losing the legislative vote as part of the legislative process, duly separated from other branches of government.

The *Raines* Court expressed doubts that individual legislators who had lost a legislative battle could ever establish standing to assert a resulting injury on behalf of either their chamber or Congress itself. In such a case, the Court stated, the plaintiffs' quarrel was with their colleagues in Congress and not with the executive branch. *Id.* at 830, n.11. The Court expressed a deep reluctance to let members who had lost a battle in the legislative process seek judicial intervention by invoking an injury to Congress as a whole. This difference of opinion between the plaintiffs and their respective

chambers was not speculative; the Senate, together with the House leadership had filed an amicus brief urging that the law be upheld. *See Id.* at 818, n. 2. Plaintiffs' allegations were, the Court held, insufficient to establish a judicially cognizable vote nullification injury of the type at issue in *Coleman*. *Id.* at 824.

The *Raines* Court suggested individual legislator standing can be established when individual legislators show vote nullification of the sort at issue in *Coleman*: that a specific legislative vote was "completely nullified" by executive action despite a legislator-plaintiff having cast a vote that was "sufficient to defeat (or enact)" the act. *Id.* at 823.

Similar to *Raines*, *Yaw v. Delaware River Basin Commission*, 49 F.4th 302 (3rd Cir. 2022) involved two senator plaintiffs, who among others, alleged the Delaware River Basin Commission's ban on fracking deprived them of their lawmaking authority to pass legislation that would allow fracking. This Court found those legislators alleged only an institutional injury. However, because *Yaw* involved deprivation of a general right to pass legislation, the injury alleged by the senator plaintiffs in *Yaw* is distinct from the Legislator-Appellants' alleged injury, which claims deprivation of a specific, explicit, and unique Article I Constitutional duty and right to regulate the manner of federal elections.

In this case, Legislator-Appellants' quarrel is not with their colleagues in the Commonwealth General Assembly as a result of a vote, but with the federal and state executive branches whose actions nullified their votes. Unlike *Raines*, this case does

not involve legislators who voted, "simply lost that vote," and then sought in court to have the law invalidated. Just as in *Coleman*, the legislators' votes have been overridden and held for naught through unlawful executive actions. Just as in *Coleman*, the Legislator-Appellants votes have been "stripped of their validity," and "denied [their] full validity in relation to the votes of their colleagues." *Id.* at 824 n. 7. And, just as in *Coleman,* Legislator-Appellants seek recovery based upon rights and privileges granted to them, and a duty charged to them through the U.S. Constitution. *Coleman*, 307 U.S. at 438.

The Legislator-Appellants have not lost a battle in the legislative process, but in fact, have succeeded in voting for and passing enacted legislation, as well as precluding undesired legislation in committee, as part of the legislative process. President Biden's EO14019, particularly, nullifies and strips the Legislator-Appellants' votes of their validity by purporting to regulate the manner of federal elections, when for example, the Legislator-Appellants have successfully voted to pass legislation prohibiting third-party involvement in Pennsylvania elections.

Likewise, Legislator-Appellants did not lose the battle to vote down proposed legislation that would have implemented automatic voter registration in Pennsylvania. Instead, their legislative actions in opposition to proposed bills, resulted in automatic voter registration bills, being defeated and never reaching the floor of the General Assembly. But, because of the executive branch governmental official acts, such as

Governor Shapiro's acts, the Appellant-Legislators' votes and actions were nullified and stripped of their validity.

Significantly, Legislator-Appellants did not enact new laws authorizing Commonwealth Department of State officials to promulgate directives contrary to existing Pennsylvania election code regarding the manner of federal elections.

Raines only contemplated the standing of members of Congress who lost a legislative vote to colleagues. *Raines* remained silent on standing of state legislators who prevailed in legislative votes, but whose votes were ignored or supplanted by executive action. Moreover, *Raines* and its progeny are silent on the preemptive effect of executive actions that constitutionally belong to the legislative branch of government.

2. *Coleman* remains the law of the land even with regard to recent Supreme Court decisions such as *Virginia House of Delegates*.

The U.S. Supreme Court recently provided guidance on who can litigate on behalf of a state or institution in *Virginia House of Delegates*, in which the Court held, "Virginia, had it so chosen, could have authorized the House to litigate on the State's behalf, either generally or in a defined class of cases." *Virginia House of Delegates v. Bethune-Hill*, 587 U.S. 658, 664 (2019). The *Virginia* decision descends from, but is also distinct from *Arizona State Legis. v. Arizona Indep. Redistricting Commn.*, 576 U.S. 787, 804 (2015). The Supreme Court in *Arizona* held that the entire legislature had standing to sue, using the logic of *Coleman* that granted individual legislator standing, to the entire

legislature because "the Arizona Constitution's ban on efforts to undermine the purposes of an initiative…. would "completely nullif[y]" any vote by the Legislature, now or "in the future…."

In *Virginia*, both houses of the bicameral legislature had started the lawsuit together, but the House proceeded to appeal on behalf of the state without its Senate partner in the legislative process, which negated its original standing basis. 587 U.S. at 665. Neither *Arizona*, nor *Virgina,* overruled or cabined *Coleman*, nor did either decision foreclose individual legislator standing.

B. The district court's narrowed construction of the phrase "sufficient to defeat or enact" referenced in *Coleman* to only final legislative votes is misplaced.

The district court denied standing noting that "should the Pennsylvania General Assembly, as a whole, wish to challenge these executive actions as contrary to law and usurping its authority, the General Assembly may do so." (App.26). The court cited *Arizona State Legislature v. Arizona Independent Redistricting Comm.*, 576 U.S. 787, 792 (2015), in which the Arizona legislature was found to have standing to assert an institutional injury.

However, Legislator-Appellants here have raised circumstances much closer to those in *Coleman*, which does not require an "institutional" injury that would necessitate the entire General Assembly to challenge the objectionable executive actions. A key example comes from the *Silver* decision in the New York Court of Appeals, which in reviewing the holding of *Coleman*, explained that a specific number

of legislators is not a prerequisite for individual legislator standing, at least with regard to New York state law. Explaining their interpretation of *Coleman,* the New York Court of Appeals held that each individual legislator had standing to protect the effectiveness of his or her vote:

> Nor is a controlling bloc of legislators (a number sufficient to enact or defeat legislation)) a prerequisite to plaintiff's standing as a Member of the Assembly. The *Coleman* Court did not rely on the fact that all Senators casting votes against the amendment were plaintiffs in the action…we think the better reasoned view*** is that an individual legislator has standing to protect the effectiveness of his vote with or without the concurrence of other members of the majority…Moreover, plaintiff's injury in the nullification of his personal vote continues to exist whether or not other legislators who have suffered the same injury decide to join in the suit.

Silver, 755 N.E.2d at 848-49. This must be the proper interpretation because otherwise, by requiring a specific number of legislators, "a suit could be blocked by one legislator who chose, for whatever reason, not to join in the litigation. Such a result would place too high a bar on judicial resolution of constitutional claims." *Id.* at 854, n.7.

Moreover, the legislative process has multiple stages that produce different answers to the question of how many legislators would be "sufficient to defeat (or enact) a specific legislative Act." Only one individual legislator is required to introduce a bill. Once introduced, the individual legislator's bill is sent to an appropriate committee. Typically, in Pennsylvania, proposed legislation regarding the manner of

elections is sent to the State Government Committees in both the House[17] and the Senate.[18] In the committee, one legislator, the Chairman, can defeat the bill by simply refusing to bring it to a vote in the committee. When a Committee votes on a bill, only 4 or 5 individual legislators create a majority "sufficient to defeat a specific legislative Act."

To construe *Coleman* so narrowly as to require "a controlling bloc" in just a final vote, ignores the complexity of the legislative process. Legislation can be defeated in various stages by a single legislator or a group of just four or five Pennsylvania legislators. Notably, the 27 Legislator-Appellants, serving individually on various committees are sufficient to enact or defeat legislation at some stages of the lawmaking process in the General Assembly.

The intent of the individual legislators manifested through their duty and opportunity to vote and enact a final legislative action, here 25 Pa. Stat. § 2607, was nullified though President Biden's EO14019 as the legislators were deprived of the intended legal effects of their successful vote on 25 Pa. Stat. § 2607—a legally cognizable injury under Article III per *Coleman.*

[17] General Operating Rules of the House of Representatives (2023-24) (available at https://www.house.state.pa.us/rules.cfm).
[18] Rules of the Senate of Pennsylvania, (2023-24), (available at https://www.pasen.gov/rules.cfm).

C. The Elections Clause or the Electors Clause create § 1983-enforcable individual rights for Legislator-Appellants.

Another way to examine the alleged injury for individual legislator standing as asserted in the amended complaint, is to examine whether the Elections Clause, or Electors Clause, or both, create enforceable federal rights in favor of individual state legislators through a private cause of action under 42 U.S.C. § 1983. *City of Racho Palos Verdes v. Abrams*, 544 U.S. 113, 119–121(2005).

The U.S. Supreme Court requires an "unambiguously conferred right to support a cause of action brought under § 1983." *Id.* Courts consider three factors to determine whether such a right exists:

> First, Congress must have intended that the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so "vague and amorphous" that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms.

Colon-Marrero v. Velez, 813 F.3d 1, 17 (1st Cir. 2016), quoting *Blessing v. Freestone*, 520 U.S. 329 (1997) (citations omitted). Here, the Legislator-Appellants contend that their asserted rights to regulate the times, places, and manner of federal elections and any violation of that right, is not vague. The right arises from both the Elections Clause of Article I and Electors Clause of Article II because the constitutional provisions use mandatory language directing that the legislature "shall" perform its constitutional

duties. But, the first factor raises the question of whether the rights provided under Article I and Article II were to benefit individual legislators.

Applying the first factor—the intent to benefit the plaintiffs—requires showing Legislator-Appellants belong to the intended class of beneficiaries of the law. *Rancho Palos Verdes,* 544 U.S. at 120; *see also, Gonzaga Univ.* 536 U.S. 273, 281 (2002) (discussing the need for individuals to assert the violation of a federal right). The Elections Clause and Electors Clause fit comfortably among federal legal provisions found to create individually enforceable rights because of their "'unmistakable focus on the benefited class.'" *Colon-Marrero,* 813 F.3d at 17, quoting *Gonzaga Uvir.* 536 U.S. at 28.

The Elections Clause text specifies the "Legislature" as a discrete class of beneficiaries and provides to them a specific power of regulating federal elections to them: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof." U.S. Const, art. I § 4. As previously mentioned, a state "Legislature" is defined by the state's constitution. Within the Pennsylvania Constitution, it is the individual state legislator who exercises a "vote" unique unto them—not otherwise granted to any other person in the State who is not elected to the legislature. From that, it is the individual legislator who determines, by the authority granted to him or her, through the Elections Clause, to determine the manner of federal elections within the state. In

other words, the constitutionally-created rights are the individual state legislators' federal rights to prescribe the manner of federal elections.

Pennsylvania's Constitution describes the General Assembly as an entity with particular legislative authority made up of "Members" who "shall be chosen at the general election." Pa. Const. art. II, § 2. The real persons who make up the entity are the individuals elected as state legislators. Historically, "the relevant citizens" for jurisdictional purposes in a suit involving a "mere legal entity" were that entity's "members," or the "real persons who come into court." *Americold Realty Tr. v. Conagra Foods, Inc.*, 577 U.S. 378, 381 (2016) (citations omitted). Here, the legislators as individuals, are the real persons who come into court.

Similarly, the Electors Clause authorizes the state legislators to act, also creating federal rights for state legislators: "Each State shall appoint, in such Manner as the Legislature thereof may direct…" U.S. Const. art. II, § 1, cl. 2. Again, within the Pennsylvania Constitution, which defines the state "Legislature," it is the individual state legislator who exercises a "vote" unique unto them—not otherwise granted to any other person in the State who is not elected to the legislature. From that, it is the individual legislator who determines, by the authority granted to him or her, through the Electors Clause, to determine the manner of how electors are chosen within the state. "This Court has described that clause as 'conveying the broadest power of determination' over who becomes an elector. *McPherson v. Blacker*, 146 U.S. 1,

27(1892). And the power to appoint an elector (in any manner) includes power to condition the appointment[.]) See *Chiafalo v. Washington*, 591 U.S. 578, 589 (2020).

So, the Elections Clause and the Electors Clause specify the same discrete class of beneficiaries—those who, by the state constitution put in effect the Election and Elector Clauses, the state legislators—and commands the legislators to prescribe the manner of federal elections and the method of appointment of presidential electors. In *Moore v. Harper*, 600 U.S. 1 (2023), the U.S. Supreme Court clarified that whenever the state legislature carries out its constitutional power, it is acting as the "entity assigned particular authority by the Federal Constitution." *Id.* at 27. Another way to look at it is, without individual state legislators under the state constitution, there is no "legislature."

Legislator-Appellants suffer individual injuries under § 1983 because similar to constitutional rights extended to corporations, the purpose of the right is to protect the individual people. Legislator-Appellants alleged that they suffered individual injuries because like constitutional rights extended to corporations, the purpose of a constitutional right is to protect the rights of the individual people. While acknowledging Legislator-Appellants made this argument, the district court did not address it. App.15. The "usual demands of Article III, requir[e] a real controversy with real impact on real persons to make a federal case out of it." *Am. Legion v. Am. Humanist Ass'n*, 588 U.S. 29, 34 (2019). Similar to the rights extended to corporations, characterized as protecting the rights of the people of those corporations, the

Legislator-Appellants have individual rights under the Elections Clause, and have each suffered a personal injury because they have been denied rights and privileges secured by the U.S. Constitution. "When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people." *Burwell v. Hobby Lobby Stores, Inc.,* 573 U.S. 682, 706–07 (2014). So, at a conceptual level, the Legislator-Appellants have been individually injured by the executives' constitutional violations of the rights of the "legislature," which protects the legislators.

1. Legislator-Appellants suffer individual injuries because under provisions of the U.S. Constitution, § 1983-enforcable rights are for the individuals, even when groups are named.

Similar to constitutionally-described entities that have secured constitutional "right[s] of the people," such as the "Militia" mentioned in the Second Amendment, and the "Press" in the First Amendment, the Elections Clause's identification of "legislature" prescribes duties to and rights for individual legislators who are the real persons comprising the entity "legislature." For example, the Second Amendment identifies the Militia as an entity "comprised all males physically capable of acting in concert for the common defense." *D.C. v. Heller*, 554 U.S. 570, 580 (2008). But, individual people make up the militia. "[T]he "militia" in colonial America consisted of a subset of "the people"—those who were male, able bodied, and within a certain age range." *Id.* at 580. The individual members of the militia carried their guns just as

the individual members of the legislature cast their votes. An entity cannot bear arms–only the people who are members of the entity bear guns.

Similarly, there is no "press" without individuals who are writing and editing and publishing. The Press is also an entity comprised of individual people:

> The freedom of "the press" was widely understood to protect the publishing activities of individual editors and printers…Their activities were not stripped of First Amendment protection simply because they were carried out under the banner of an artificial legal entity. And the notion which follows from the dissent's view, that modern newspapers, since they are incorporated, have free-speech rights only at the sufferance of Congress, boggles the mind.

Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 390 (2010).

Similar to a corporation, a "Militia," or "the Press," state legislators, including Legislator-Appellants, are a small, particular class of elected citizens who make up the entity, the legislature. Only 253 of Pennsylvania's 13 million citizens are members of the state legislature. The Elections and the Electors Clauses grant these 253 state legislators unique, constitutional rights to determine the times, places, and manner of elections.

As alleged in the amended complaint, the Pennsylvania Constitution vests the Elections Clause's legislative power in individual state legislators as part of their respective "senate" and "house" associations. App.38 (¶ 46). Therefore, under the Elections Clause and the Pennsylvania Constitution, the Pennsylvania state legislators, as part of two associations called the Senate and House of Representatives, shall vote

to enact laws, subject to the Governor's veto, to regulate the times, places, and manner of federal elections subject only to Congressional enactments.

Legislator-Appellants' amended complaint alleges that the Elections and Electors Clauses' references to "legislature" confer rights onto the individual state legislators. *E.g.*, App.38, 57-59. The Pennsylvania state legislature is not a state agency with a governor-appointed Commissioner and employees. Instead, the Pennsylvania state legislature consists of elected senators and representatives who organize their respective legislative bodies at the first meeting after the general election. In this way, the individual state legislators, with their newly-printed election certificates, precede and constitute the legislative body, as it is with any association. In fact, the legislative body would be nothing without the elected legislators.

D. Legislator-Appellants suffered an injury different than other members of the Pennsylvania General Assembly.

By characterizing Legislator-Appellants' injuries as institutional and asserting the Legislator-Appellants have not "suffered an injury that is any different than any other member of the Pennsylvania General Assembly," App.25, the District Court ignores the disparate effect of the illegal executive actions taken. Indeed, those lawmakers who were not in favor of legislation passed by the Pennsylvania General Assembly have reaped the benefit of the nullification of those statutory regimes while the winning votes were overridden by executive fiat. In sum, those who voted for the

successfully-passed legislation, including Legislator-Appellants, have had their votes nullified.

Under the Elections Clause and Electors Clause, the references to the word "legislature" triggers federal court remedies for individual state legislators against federal executive and state executive usurpations of state legislative law-making under the Elections and Electors Clause. This case involves matters of exceptional importance as applied to a narrow category of cases involving implementation of state election laws.

III. It is prudential to acknowledge Legislator-Appellants' standing to protect separation and balance of powers.

In *Moore v. Harper*, the Supreme Court held that when state legislatures enact laws governing federal elections, those laws are subject to state judicial review to ensure compliance with state constitutions, "[b]ut federal courts must not abandon their duty to exercise judicial review." *Moore*, 600 U.S. at 29-30.

In *Moore*, the U.S. Supreme Court stated that "the Elections Clause expressly vests power to carry out its provisions in "the Legislature"… a "deliberate choice that this Court must respect." *Moore*, 600 U.S. at 26-27.

> When legislatures make laws, they are bound by the provisions of the very documents that give them life. Thus, when a state legislature carries out its federal constitutional power to prescribe rules regulating federal elections it acts both as a lawmaking body created and bound by its state constitution, and as the entity assigned particular authority by the Federal Constitution. Both constitutions restrain the state legislature's exercise of power."

Moore, 600 U.S. at 4 (emphasis added). Per *Moore*, "[a] state legislature's "exercise of … authority" under the Elections Clause…" must be in accordance with the method which the State has prescribed for legislative enactments." *Moore*, 600 U.S. at 16. (citations omitted).

Pennsylvania's Constitution, Art. II, Sec. 1, provides that the legislative power is vested in the Senate and House of Representatives which are two associations of elected legislators who enact laws. The executive branch has a limited role to play in this process as the Governor has the opportunity to veto proposed legislation.

Article VII, Sec. 1 of the PA Constitution places the duty of passing laws involving the registration Pennsylvania electors on the state legislators:

> Every citizen…possessing the following qualifications, shall be entitled to vote at all elections subject, however, to such laws requiring and regulating the registration of electors **as the General Assembly may enact**.

(Emphasis added).

The Supreme Court in *Moore* also articulated what is meant by "crafting" the rules:

> By fulfilling their constitutional duty to craft the rules governing federal elections, state legislatures do not consent, ratify, or elect – they make laws. Elections are complex affairs, demanding rules that dictate everything from the date on which voters will go to the polls to the dimensions and font of individual ballots. Legislatures must "provide a complete code for congressional elections," **including regulations "relati[ng] to** notices, **registrations**, 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…"

Moore, 600 U.S. at 21-22. (citing *Smiley*, 285 U.S. at 366) (emphasis added).

By directing and effectuating their respective executive actions, each federal and state defendant has established, operated, and enforced non-legislated election policy. Correspondingly, each Legislator-Appellant has been denied the opportunity to exercise their constitutionally vested authority to cast their legislative vote on affirming or rejecting those new executive actions.

In summary, the amended complaint alleged that President Biden's EO14019, Pennsylvania Governor Shapiro's automatic voter registration edict and the Pennsylvania Department of State's directive to counties not to verify the identification of voters, usurp legislatively-enacted Pennsylvania state laws, 25 Pa. Stat. § 2607 and 25 Pa.C.S.A. §§ 1321, 1328(a) and (b), respectively. The separation and balance of powers essential to the framework of the Constitution has been jeopardized.

Mistakenly relying on *Raines* and *Yaw,* the District Court denied standing to Legislator-Appellants, thereby emboldening executive officials in a presidential election year, and depriving the lawmakers of their constitutional right and duty to regulate the manner of federal elections. Without this Court's intervention "officials who…lack the authority" to establish election law will continue to "chang[e] the rules in the middle of the game." *Republican Party of Pennsylvania*, 141 S.Ct. 732, 735 (2021) (Thomas, J., Dissenting from the Denial of Certiorari). As it is, with the district court

denying the preliminary injunction requested by Legislator-Appellants, the manner of the upcoming 2024 federal elections will occur under conditions that do not comport with the Elections Clause's delegation of duties and rights to the individual state legislators.

Under the facts alleged, *Coleman* provides the precedential avenue for this Court to find individual legislator standing exists because the subject executive actions nullified Legislator-Appellants' votes which were sufficient to enact or prevent specific state laws. As to whether "a controlling bloc of legislators (a number sufficient to enact or defeat legislation) [is] a prerequisite to plaintiff's standing as a Member of the Assembly," Legislator-Appellants' injuries in the nullification of their personal votes in this lawsuit continue to exist whether or not other legislators who suffered the same injury decide to join in this lawsuit. *Silver v. Pataki*, 755 N.E.2d at 848-49. Legislator-Appellants ask this Court to re-affirm individual state legislator standing in this case, consistent with *Coleman*, so they can continue adhering to their oath to uphold the Constitutions of the United States and of the Commonwealth of Pennsylvania.

CONCLUSION

For the reasons stated, the 27 Pennsylvania Legislator-Appellants request this Court to reverse the district court's dismissal of the amended complaint and remand the case for further proceedings.

Respectfully submitted,

Dated: June 26, 2024

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CERTIFICATE OF COMPLIANCE

I certify that I am a current member of this Bar in good standing.

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B).

> The brief contains 12,525 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii)

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6).

> The brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point Garamond Font.

This brief has been scanned for viruses and malware and the best of my knowledge are free from viruses or malware.

I hereby certify that on June 26, 2024, I electronically filed the Appellants' Principal Brief, with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I hereby certify that the electronic version is identical to the paper copies.

Dated: June 26, 2024.

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USE OF AI TECHNOLOGY CERTIFICATION

Counsel attests to the best of counsel's ability that appropriate steps to verify whether AI technology systems have been used in preparation of this submission, and if used, appropriate steps were taken to verify the truthfulness and accuracy of facts and citations of that content before submission to this Court. This submission did rely upon the ordinary or customary research tools and other available research sources such as, but not limited to, Westlaw or Lexis.

Dated: June 26, 2024

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In The
United States Court of Appeals
for the Third Circuit

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, Robert 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,

Plaintiffs–Appellants,

v.

Joseph R. Biden, In His Official Capacity As The President Of The United States, Or His Successor; United States; U.S. Department Of Agriculture; Tom Vilsack, In His Official Capacity As Secretary Of Agriculture; U.S. Department Of Health And Human Services; Xavier Becerra, In His Official Capacity As Secretary Of Health And Human Services; U.S. Department Of State; Antony Blinken, In His Official Capacity As Secretary Of State; U.S. Department Of Housing And Urban Development; Marcia Fudge, In Her Official Capacity As Secretary Of Housing And Urban Development; U.S. Department Of Energy; Jennifer Granholm, In Her Official Capacity As Secretary Of Energy; U.S. Department Of Education; Dr. Miguel Cardona, In His Official Capacity As Secretary Of Education; Josh Shapiro, In His Official Capacity As Governor Of Pennsylvania, Or His Successor; Al Schmidt, In His Official Capacity As Secretary Of The Commonwealth, Or His Successor; Jonathan Marks, In His Official Capacity As The Deputy Secretary For Elections And Commissions, Or His Successor,

Defendants–Appellees.

On appeal from the United States District Court for the Middle District of Pennsylvania, docket no. 1:24-CV-00147

Appendix
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Appendix Index

Volume I

Volume II

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

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, Robert 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,

Plaintiffs,

v.

Joseph R. Biden, In His Official Capacity As The President Of The United States, Or His Successor; United States; U.S. Department Of Agriculture; Tom Vilsack, In His Official Capacity As Secretary Of Agriculture; U.S. Department Of Health And Human Services; Xavier Becerra, In His Official Capacity As Secretary Of Health And Human Services; U.S. Department Of State; Antony Blinken, In His Official Capacity As Secretary Of State; U.S. Department Of Housing And Urban Development; Marcia Fudge, In Her Official Capacity As Secretary Of Housing And Urban Development; U.S. Department Of Energy; Jennifer Granholm, In Her Official Capacity As Secretary Of Energy; U.S. Department Of Education; Dr. Miguel Cardona, In His Official Capacity As Secretary Of Education; Josh Shapiro, In His Official Capacity As Governor Of Pennsylvania, Or His Successor; Al Schmidt, In His Official Capacity As Secretary Of The Commonwealth, Or His Successor; Jonathan Marks, In His Official

Civil Case No. 1:24-CV-00147

Judge Jennifer P. Wilson

NOTICE OF APPEAL

Capacity As The Deputy Secretary For Elections And Commissions, Or His Successor,

Defendants.

Notice is given that the Plaintiffs 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, Robert 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, appeal to the United States Court of Appeals for the Third Circuit from the district court's Memorandum filed on March 26, 2024 (Doc No. 48) and Order filed on March 26, 2024 (Doc. No. 49), granting the Defendants' motion to dismiss (March 20, 2024 (Doc. No. 46)). The Memorandum, Decision, and Order and judgment adjudicated all claims as to all parties.

Dated: April 18, 2024

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

DAWN KEEFER, *et al.*,	:	Civil No. 1:24-CV-00147
Plaintiffs,	:	
v.	:	
JOSEPH R. BIDEN, *et al.*,	:	
Defendants.	:	Judge Jennifer P. Wilson

ORDER

AND NOW, on this 26th day of March, 2024, in accordance with the accompanying memorandum, **IT IS ORDERED THAT**:

1. Federal Defendants' motion to dismiss for lack of jurisdiction, Doc. 40, is **GRANTED**.
2. State Defendants' motion to dismiss for lack of jurisdiction, Doc. 46, is **GRANTED**.
3. Plaintiffs' motion for preliminary injunction, Doc. 19, is **DENIED**.
4. Plaintiffs' amended complaint, Doc. 18, is **DISMISSED**.
5. The Clerk of Courts is directed to close this case.

s/Jennifer P. Wilson
JENNIFER P. WILSON
United States District Judge
Middle District of Pennsylvania

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

DAWN KEEFER, *et al.*,	:	Civil No. 1:24-CV-00147
Plaintiffs,	:	
v.	:	
JOSEPH R. BIDEN, *et al.*,	:	
Defendants.	:	Judge Jennifer P. Wilson

MEMORANDUM

This lawsuit, brought by twenty-six Pennsylvania State Representatives and one Pennsylvania Senator,[1] challenges certain executive actions regarding voter registration taken by both United States President Joseph R. Biden and various federal officials[2] and Pennsylvania Governor Joshua Shapiro and various state

[1] The Plaintiffs in this matter are 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, Robert Leadbetter, Daniel Moul, Thomas Jones, David Maloney, Timothy Twardzik, David Rose, Joanne Stehr, Aaron Berstine, Kathy Rapp, Jill Cooper, Marla Brown, Mark Gillen, and Senator Cris Dush. They are referred to collectively as "Plaintiffs."

[2] The individual federal government Defendants, all sued in their official capacity, are as follows: President Joseph R. Biden, Secretary of Agriculture Tom Vilsack, Secretary of Health and Human Services Xavier Becerra, Secretary of State Antony Blinken, Secretary of Department of Housing and Urban Development Marcia Fudge, Secretary of Energy Jennifer Granholm, and Secretary of Education Dr. Miguel Cardona. Plaintiffs also name the United States, U.S. Department of Agriculture ("USDA"), U.S. Department of Health and Human Services ("HHS"), U.S. Department of State ("State Department"), U.S. Department of Housing and Urban Development ("HUD"), U.S. Department of Energy, and U.S. Department of Education as defendants. Collectively, the foregoing people and entities will be referred to as "Federal Defendants."

officials[3] on the ground that these executive actions violate both the Electors and Elections Clauses of the United States Constitution. (Doc. 18.) Before the court are the motions to dismiss for failure to state a claim and lack of jurisdiction filed by the Federal and State Defendants. (Docs. 40, 46.)[4] The motions to dismiss will be granted because this court does not have subject matter jurisdiction due to Plaintiffs' lack of standing to raise the claims at issue.[5]

BACKGROUND AND PROCEDURAL HISTORY

Plaintiffs challenge an Executive Order issued by President Biden, an announcement by Governor Josh Shapiro, and a "directive" issued by Former Pennsylvania Governor Tom Wolf, all regarding various aspects of voter registration. (Doc. 18.) Plaintiffs allege that these three executive actions have violated their individual Constitutional rights under the Electors and Elections Clauses of the United States Constitution. (*Id.* at ¶67.)

The Electors Clause provides as follows:

[3] The individual state government Defendants, all sued in their official capacities, are Governor Joshua Shapiro, Secretary of the Commonwealth Al Schmidt, and Deputy Secretary for Elections and Commissions Jonathan Marks. They are referred to collectively as "State Defendants."

[4] State Defendants filed their motion to dismiss on March 20, 2024. (Doc. 46.) Although this motion is not fully briefed, the issue of standing has been fully addressed in the context of Plaintiffs' motion for injunctive relief, such that the court can address the issue of standing with no further briefing.

[5] The court also notes that Plaintiffs filed a motion for preliminary injunction on February 16, 2024. (Doc. 19.) Because Plaintiffs do not have standing to bring the claims asserted in this lawsuit, the motion for preliminary injunction will be denied as moot in a separate order.

> Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

U.S. CONST. art. II, § 1, cl. 2. The Elections Clause provides: "The 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, except as to the Places of chusing Senators." U.S. CONST. art. I, § 4, cl. 1.

Plaintiffs allege that:

> [U]nder the Electors Clause, the Elections Clause and the Pennsylvania Constitution, the Pennsylvania state legislators, as part of two associations called the senate and the house of representatives respectively, may enact laws, subject to the Governor's veto, to regulate the times, places, and manner of Presidential and Congressional elections. Thus, Plaintiffs, as individual state legislators, have federal rights under the Elections Clause and the Electors Clause to oversee and participate in making legislative decisions regulating the times, places, and manner of federal actions.

(Doc. 18, ¶¶ 49, 50.)

Regarding the Federal Defendants, Plaintiffs challenge Executive Order 14019 ("EO 14019"),[6] which, they allege "requires all federal agencies to develop a plan to increase voter registration, and increase voter participation, or get out the vote . . . efforts." (*Id.* at ¶ 70.) Plaintiffs allege that HHS, HUD, Department of

[6] EO 14019 went into effect on March 7, 2021.

Energy, USDA, and U.S. General Services Administration "GSA"),[7] have implemented voter registration plans in accordance with EO 14019 and have registered voters in Pennsylvania in accordance with these plans. (*Id.* at ¶¶ 72–84.) Plaintiffs contend that EO 14019

> directs *all* non-independent executive agencies to engage in voter registration and to solicit and facilitate third-party organizations to conduct voter registration on agency premises, including those located in the state of Pennsylvania, so it is certain that other agencies are carrying out similar efforts without disclosing their unlawful activities to the public or to the Pennsylvania Legislature.

(*Id.* at ¶ 85.) Plaintiffs allege that EO 14019 requires all federal agencies to "identify and partner with specified partisan third party organizations[,]" "distribute voter registration and vote-by-mail ballot application forms[,]" "assist applicants in completing voter registration and vote-by-mail ballot application forms[,]" "solicit third-party organizations and directs state officials to provide voter registration services on agency premises." (*Id.* at ¶¶ 86–90.)

Plaintiffs contend that "all agency action in conformity with [EO] 14019 is without congressional delegation or funding, and conducted merely by executive fiat[,]" and that "all federal agency actions in conformity with [EO] 14019 are unauthorized by law." (*Id.* at ¶¶ 102, 103.) Plaintiffs further allege that EO 14019

[7] GSA is not a named defendant in this action.

is not in conformity with Pennsylvania's voter registration scheme, as provided by Pennsylvania law. (*Id.* at ¶¶ 107, 108.)

In Count I, Plaintiffs request a declaratory judgment that EO 14019 is unconstitutional because it "nullifies the votes of the individual legislators, nullifies the enactment of the Legislature, violates the Electors Clause, violates the Elections Clause, deprives the legislators of their particular rights, and jeopardizes candidates' rights to an election free from fraud and abuse." (*Id.* at ¶ 178.) Plaintiffs also allege that they are suffering "an injury-in-fact because the Executive Order denies them a voting opportunity to which the Constitution entitles them." (*Id.* at ¶ 179.) In sum, the Plaintiffs allege that EO 14019 unlawfully attempts to regulate the registration of Pennsylvania electors and, thus, "[t]he order should not be permitted to nullify the state legislators' power to enact laws, subject to the Governor's veto power, regarding the regulation of the times, places, and manner of federal elections." (*Id.* at ¶ 186.) In Count II, Plaintiffs challenge EO 14019 under the Administration[8] Procedure Act ("APA") as substantively arbitrary and capricious and contrary to Constitution or statute. (*Id.* at ¶¶ 194–201.) In Count III, Plaintiffs challenge EO 14019 as procedurally

[8] The court notes that 5 U.S.C. § 706 is more commonly referred to as the Administrative Procedure Act.

arbitrary and capricious for failing to comply with notice and comment procedures under the APA. (*Id.* at ¶¶ 202–21.)

Regarding the State Defendants, Plaintiffs challenge two executive actions. First, Plaintiffs challenge Governor Shapiro's 2023 announcement that "he was unilaterally implementing automatic voter registration in Pennsylvania." (*Id.* at ¶ 109.) Plaintiffs allege that "[b]eginning on September 19, 2023, Commonwealth residents obtaining new or renewed driver licenses and ID cards have been and continue to be automatically registered to vote by the Pennsylvania Department of Transportation unless they opt out of doing so." (*Id.* at ¶ 110.) Plaintiffs allege that the "regulatory schema of elections" set forth by the legislature requires an "application" to register to vote, which requires an overt action by the applicant. (*Id.* at ¶¶ 115–119.) In sum, Plaintiffs argue that Governor Shapiro's directive to the Department of Transportation to change the process for applying to vote in conjunction with applying for a driver's license violates Pennsylvania's established procedures, codified at 25 PA. CON. STAT. ANN. §§ 1321, 1323, 1327. Plaintiffs allege that "Governor Shapiro's directive to the Pennsylvania Department of Transportation, and its implementation, is inconsistent with existing laws, and as such, is not legally authorized." (*Id.* at ¶ 128.)[9]

[9] Plaintiffs also allege that the state legislature has previously declined to pass automatic voter registration laws, most recently in January 2023, as support for their claim that this action by the Governor nullifies their votes. (*Id.* at ¶¶ 132, 133.)

In Count IV, Plaintiffs bring a claim under 42 U.S.C. § 1983 against Governor Shapiro seeking an injunction "enjoining and prohibiting [his] automatic voter registration regime" as unconstitutional because it nullifies the legislators' vote and the enactments of the State Legislature, violates the Electors and Elections Clauses, "diminishes the influence of the individual legislators," and "deprives [them] of their particular rights in exercising constitutional powers specifically delegated to them, and jeopardizes candidates' rights to an elections free from fraud and abuse." (Doc. 18, ¶ 215.) Plaintiffs also allege that the announcement "denies Plaintiffs a voting opportunity to the acceptance [or] rejection of a voter registration schema, that under the U.S. and Pennsylvania Constitutions can only originate in the Pennsylvania legislature or U.S. Congress." (*Id.* at ¶ 216.)

The second state executive action that Plaintiffs challenge is a 2018 "Directive Concerning HAVA-Matching Drivers' Licenses or Social Security Numbers for Voter Registration Applications" ("2018 Directive") issued under former Governor Tom Wolf. (*Id.* at ¶ 139.) This challenge is brought against Secretary of the Commonwealth Al Schmidt and Deputy Secretary for Elections Jonathan Marks. (*Id.*) The 2018 Directive "directs Pennsylvania counties to register applicants even if an applicant provides invalid identification." (*Id.* at ¶ 140.) Plaintiffs allege that this directive violates Pennsylvania law, specifically 25

PA. CONS. STAT. ANN § 1328. (*Id.* at ¶¶ 144–46.) Further, Plaintiffs allege that the directive, which "direct[s] the counties to process incomplete or inconsistent voter applications like all other applications violates clear provisions of Pennsylvania law[,]" and as such, "undermines the state legislature as the 'entity assigned particular authority by the Federal Constitution' to regulate the times, places, and manner of Presidential and Congressional elections." (*Id.* at ¶¶ 154, 155.)

In Count V, Plaintiffs bring a claim under 42 U.S.C. § 1983, asking the court to enjoin and prohibit the 2018 Directive "and similar guidance" as unconstitutional because it nullifies the legislators' vote and the enactments of the State Legislature, violates the Electors and Elections Clauses, "diminishes the influence of the individual legislators" and "deprives [them] of their particular rights in exercising constitutional powers specifically delegated to them, and jeopardizes candidates' rights to an elections free from fraud and abuse." (Doc. 18, ¶ 223.) Plaintiffs also allege that the 2018 Directive denied them "their U.S. constitutional right to vote on and direct election policy, established under both the Elections Clause and Electors Clause." (*Id.* at ¶ 226.)

Underlying all counts, Plaintiffs allege they have standing as state legislators because they "are injured by Defendants when [Defendants] exercise positive regulatory authority over election practices that circumvent or usurp the authority of the legislature." (*Id.* at ¶ 160.) Specifically, Plaintiffs allege they have "been

denied the opportunity to exercise their constitutionally vested authority to cast their legislative vote on affirming or rejecting those new regulatory regimes." (*Id.* at ¶ 162.) Plaintiffs also allege they have standing as candidates who will suffer the harm of having to compete in "elections [that] have been interfered with by unlawful regulations" and "where their opponents have been provided an unlawful advantage." (*Id.* at ¶¶ 171, 172.) Finally, Plaintiffs allege they have standing as citizens, taxpayers, and voters. (*Id.* at ¶¶ 174, 175.)

Plaintiffs initiated this lawsuit by filing a complaint on January 25, 2024. (Doc. 1.) Thereafter, they filed the operative amended complaint and simultaneously filed a motion for preliminary injunction. (Docs. 18, 19.)[10] Federal Defendants filed a motion to dismiss for failure to state a claim and lack of jurisdiction on March 1, 2024. (Doc. 40.) Federal Defendants also filed a brief in opposition to the motion for preliminary injunction on the same date. (Doc. 41.) State Defendants filed a brief in opposition to the motion for preliminary injunction on March 1, 2024. (Doc. 42.) Plaintiffs filed reply briefs to State Defendants and Federal Defendants briefs in opposition on March 15, 2024. (Docs. 44, 45.) On March 20, 2024, State Defendants filed a motion to dismiss

[10] On February 23, 2024, the Foundation for Government Accountability filed a motion for leave to file an amicus brief, which was granted on February 26, 2024. (Docs. 29, 33.) The amicus brief was filed on February 26, 2024, and the court reviewed the amicus brief in considering the motions to dismiss. (Doc. 34.)

and brief in support. (Docs. 46, 47.) Accordingly, the issue of standing is ripe for review.

STANDARD OF REVIEW

Defendants seek dismissal of the complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject-matter jurisdiction. The court, in determining whether it has subject-matter jurisdiction, must decide "whether the allegations on the face of the complaint, taken as true, allege facts sufficient to invoke the jurisdiction of the district court." *Taliaferro v. Darby Twp. Zoning Bd.*, 458 F.3d 181, 188 (3d Cir. 2006) (quoting *Licata v. U.S. Postal Serv.*, 33 F.3d 259, 260 (3d Cir. 1994)). Rule 12(b)(1) challenges may be "facial" or "factual." *See Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977). A facial attack challenges whether jurisdiction has been properly pled and requires the court to "only consider the allegations of the complaint and documents referenced therein and attached thereto, in the light most favorable to the plaintiff." *Gould Elecs., Inc. v. United States*, 220 F.3d 169, 176 (3d Cir. 2000) (citing *Mortensen*, 549 F.2d at 891.) Conversely, when a defendant sets forth a factual attack on subject-matter jurisdiction, "the Court is free to weigh the evidence and satisfy itself whether it has power to hear the case. . . . 'no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional

claims.'" *Carpet Group Int'l v. Oriental Rug Importers Ass'n, Inc.*, 227 F.3d 62, 69 (3d Cir. 2000) (quoting *Mortensen*, 549 F.2d at 891).

In this instance, Defendants argue Plaintiffs do not have standing and present the court with a facial attack on subject matter jurisdiction. As a result, the court will "only consider the allegations of the complaint and documents referenced therein and attached thereto, in the light most favorable to the plaintiff." *Gould Elecs. Inc.*, 220 F.3d at 176 (citing *Mortensen*, 549 F.2d at 891.)

DISCUSSION

Both the Federal and State Defendants argue that the amended complaint must be dismissed for lack of subject matter jurisdiction because Plaintiffs lack standing to pursue their claims. Plaintiffs argue they have standing because the complaint alleges "that the Elections and Electors' Clauses' references to 'legislature' confer rights onto the individual state legislators." (Doc. 21, p. 10.) On this basis, Plaintiffs contend that their individual rights as state legislators are injured by the executive actions at issue because those actions are an "exercise [of] positive regulatory authority over election practices that circumvent[s] or usurp[s] the authority of the legislature." (Doc. 18, ¶ 160.) Essentially, Plaintiffs argue they have each been injured individually because they have "been denied the opportunity to exercise their constitutionally vested authority to cast their

legislative vote on affirming or rejecting those new regulatory regimes." (*Id.* at ¶ 162.)

Plaintiffs present various arguments to support their theory of individual legislator standing. First, Plaintiffs analogize their membership in the legislature to various other types of entities, such as a corporation, arguing that as "the purpose of extending rights to corporations is to protect the rights of the people associated with the corporation[,]" so too the "purpose of the Elections Clause and Electors Clause . . . is to protect the privileges and rights of the individual state legislators." (Doc. 21, p. 9.) Plaintiffs also analogize a state legislature to a militia and the press, as "entities" made up of real persons who have the right to defend their participation in the entity. (Doc. 44, pp. 10, 11.)

Second, Plaintiffs rely on *Coleman v. Miller*, 307 U.S. 433 (1939), *Moore v. Harper*, 600 U.S. 1, 27 (2023),[11] and their assertion that the Pennsylvania Supreme Court has authorized "individual state legislators to bring legislative usurpation claims." (Doc. 21, p. 10.) (citing *Fumo v. City of Phila.*, 972 A.2d 487, 491 (Pa. 2009)). Plaintiffs also argue that they have standing as candidates for office who

[11] Plaintiffs' reliance on *Moore v. Harper* consists of quoting the language from the decision stating: "[t]he legislature acts both as a lawmaking body created and bound by its state constitution, and as the entity assigned particular authority by the Federal Constitution." 600 U.S. at 27. Plaintiffs rely on this quotation to support their theory that because they are members of "the entity assigned particular authority by the Federal Constitution [,]" they possess an individual right that gives them standing to vindicate that right in the federal courts. (Doc. 21, p. 10.)

potentially may run in an unlawfully-operated election. (*Id.* at 12.) Plaintiffs argue that they are injured by the executive actions because "it results in the registration of voters outside of [Pennsylvania's] carefully constructed and constitutionally-authorized registration regime." (Doc. 45, p. 14.) Finally, Plaintiffs argue they have standing as citizens, taxpayers, and voters. (Doc. 21, p. 13.)

In response, Federal Defendants argue that, under Supreme Court case law, "individual members [of a legislature] lack standing to assert the institutional interests of a legislature." (Doc. 41, p. 11.) (citing *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1954 (2019)). In support of this argument, Federal Defendants contend that Plaintiffs' alleged injury, usurpation of the authority to regulate elections conferred upon state legislatures, is not meaningfully distinguishable from the institutional injuries alleged in *Raines v. Byrd*, 521 U.S. 811 (1997), *Goode v. City of Phila.*, 539 F.3d 311 (3d Cir. 2008), and *Yaw v. Delaware River Basin Comm.*, 49 F.4th 301 (3d Cir. 2022). In each of these cases, the Supreme Court and Third Circuit, respectively, found that individual legislators did not have standing to bring a challenge to an action that allegedly injured the legislature as a whole. (Doc. 41, pp. 11–13.) In sum, Federal Defendants argue that the alleged injury "concerns the right to vote of '*all Members* of' the Pennsylvania Legislature 'equally,' and so it is precisely the type of non-

particularized, 'institutional injury' that is insufficient for legislator standing." (*Id.* at 13) (emphasis in original)).[12]

In response to Plaintiffs' argument regarding their potential standing as candidates, Federal Defendants argue that the amended complaint "contains no concrete allegations establishing that the EO will have a material impact on the votes cast in Plaintiffs' particular districts, and that this impact will harm Plaintiffs' electoral prospects." (*Id.* at 15.)

State Defendants' arguments regarding institutional injury and legislative standing largely mirror those of Federal Defendants and rely on the same body of case law. (*See* Doc. 42, pp. 12–19.) State Defendants additionally note that the declarations attached to the amended complaint simply state that Defendants have violated the law and provide no individualized allegation of injury, the amended complaint contains no allegation of "how any Plaintiff is affected by the conduct challenged in this case in a way that is any different from any other member of Pennsylvania's General Assembly [,]" and the amended complaint contains no allegation that "legislative powers have been usurped" because "[n]either changes to a registration application nor instructions to counties–both done under statutorily

[12] Both Plaintiffs and Federal Defendants address standing globally and make no separate arguments based on the cause of action. Therefore, the court will do the same.

assigned authority–stops the General Assembly from passing any laws regarding either topic." (*Id.* at 17–19.)

A. Article III Standing

Pursuant to Article III of the United States Constitution, federal courts are constrained to resolve only "Cases" and "Controversies." U.S. CONST. art. III, § 2, cl. 1. "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Raines*, 521 U.S. at 818 (quoting *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 37 (1976)). Ensuring that a plaintiff has Article III standing "'serves to prevent the judicial process from being used to usurp the powers of the political branches,' and confines the federal courts to a properly judicial role." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (citations omitted).

Article III standing requires that the plaintiff, who bears the burden of establishing these elements, prove: (1) an injury-in-fact; (2) that is fairly traceable to the defendant's conduct; and (3) that is likely to be redressed by a favorable decision. *Id.* (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)). When standing is challenged at the pleading stage, "the plaintiff must 'clearly . . . allege facts demonstrating' each element." *Id.* (quoting *Warth v. Seldin*, 422 U.S. 490, 518 (1975)).

As to the first element, an injury-in-fact must be "'an invasion of a legally protected interest' that is 'concrete and particularized,' and 'actual or imminent, not conjectural or hypothetical.'" *Id.* (quoting *Lujan*, 504 U.S. at 560). A particularized injury must "affect the plaintiff in a personal and individual way." *Lujan*, 504 U.S. at 560 n.1. Further, any threatened injury must be "certainly impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013).

1. Plaintiffs Lack Standing as Legislators

The seminal case regarding legislative standing is the Supreme Court's decision in *Raines v. Byrd*, 521 U.S. 811 (1997). There, members of the U.S. Congress who voted against the Line Item Veto Act sued the Secretary of the Treasury and the Director of the Office of Management and Budget, asserting that the Line Item Veto Act was unconstitutional because it altered "the legal and practical effect of all votes [the members] may cast on bills[,]" divested the members "of their constitutional role in the repeal of legislation," and altered "the constitutional balance of powers between the Legislative and Executive branches[.]" *Id.* at 816.

The Supreme Court held that the members who filed suit did not have standing because they did not allege any "injury to themselves as individuals," rather "the institutional injury they allege is wholly abstract and widely dispersed, and their attempt to litigate this dispute at this time and in this form is contrary to

historical experience." *Id.* at 829 (citations omitted). The Court held that the members who filed suit failed to allege an injury to themselves as individuals because they had "not been singled out for specially unfavorable treatment as opposed to other Members of their respective bodies[,]" and they only alleged that the Act caused "a type of institutional injury (the diminution of legislative power), which necessarily damages all Members of Congress and both House of Congress equally." *Id.* at 821. Further, the Court noted that the members did not allege a deprivation of "something to which they *personally* are entitled–such as their seats as Members of Congress after their constituents had elected *them*." *Id.*

The Court also distinguished one prior case that addressed the issue of legislator standing, *Coleman v. Miller*, 307 U.S. 433 (1939). In *Coleman*, the Kansas State Senate was split twenty to twenty on the passage of the child labor amendment to the federal constitution. *Id.* at 436. The Lieutenant Governor then cast a tie-breaking vote, and the twenty losing Senators sued to challenge "the right of the Lieutenant Governor to cast the deciding vote in the Senate." *Id.* The Supreme Court held that the twenty senators who voted against ratification had standing to sue because they had "a plain, direct and adequate interest in maintaining the effectiveness of their votes." *Id.* at 438. The *Coleman* Court further explained that the Kansas senators had "set up and claimed a right and

privilege under the Constitution of the United States to have their votes given effect and the state court has denied that right and privilege." *Id.*

The *Raines* Court limited the holding and application of *Coleman*, stating that *Coleman* stands "for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified." *Raines*, 521 U.S. at 823. Thus, the *Raines* court held that the members in that case did not have standing under *Coleman* because they did not allege "that they voted for a specific bill, that there were sufficient votes to pass the bill, and that the bill was nonetheless deemed defeated." *Id.* at 824.

The Supreme Court has considered legislator standing twice since *Raines*. In *Arizona State Legislature v. Arizona Independent Redistricting Comm.*, 576 U.S. 787, 792 (2015), the entire Arizona State Legislature sued to challenge the constitutionality of a voter-adopted initiative which established an independent commission charged with drawing and adopting redistricting maps, arguing that giving this authority to an independent commission is contrary to the Elections Clause's directive that the legislature of each state shall determine the times, places, and manner of elections. In *Arizona*, the defendants challenged the plaintiffs' standing under *Raines*, but the Supreme Court held that the legislature,

as a whole and authorized by an internal vote, had standing to redress the alleged institutional injury suffered by the legislature as a whole. *Id.* at 802. Ultimately, the court held that the voter initiative at issue "would 'completely nullif[y]' any vote by the Legislature, now or 'in the future,' purporting to adopt a redistricting plan." *Id.* at 804 (citing *Raines*, 521 U.S. at 823–24).[13]

Conversely, in *Va. House of Delegates*, the Supreme Court held that only one house of a bicameral state legislature did not have standing to sue on behalf of the legislature as a whole. *Va. House of Delegates*, 139 S. Ct. at 1952. First, the Court noted that it is possible for a state to designate its House of Representatives as its agent, which would be sufficient to confer standing to vindicate the state's interests. *Id.* at 1951–52. Per the *Va. House of Delegates* Court, a state may authorize the "House to litigate on the State's behalf, either generally or in a defined class of cases." *Id.* at 1952. The Court held that Virginia had not done so in that case. *Id.* Second, the Court considered whether the House of Representatives had legislator standing under *Raines*. The Court held that the "Virginia constitutional provision the House [challenges] allocates redistricting authority to the 'General Assembly,' of which the House constitutes only a part." *Id.* at 1953. Thus, the Court held the case was more similar to *Raines* because

[13] On the merits in *Arizona*, the Supreme Court held that "the Elections Clause permits the people of Arizona to provide for redistricting by independent commission[,]" and denied the Legislature's appeal. *Id.* at 813.

"[j]ust as individual members lack standing to assert the institutional interests of a legislature, a single House of a bicameral legislature lacks capacity to assert interests belonging to the legislature as a whole." *Id.* at 1953–54 (citations omitted).

The Third Circuit has decided cases in line with *Raines*, most recently in *Yaw v. Delaware River Basin Comm'n*, 49 F.4th 302 (3d Cir. 2022). In *Yaw*, a group of Pennsylvania Senators sued the Delaware River Basin Commission, arguing that the ban on fracking at issue in that case "deprived [them] of their lawmaking authority relative to millions of Pennsylvanians residing within the 6,000 square miles of Sovereign territory subsumed by the Basin and any legislation, now or in the future, on this subject has been nullified." *Id.* at 311. Relying on a review of the same cases discussed above, the Third Circuit held that "this argument runs headlong into the well-established principle that individual legislators lack standing to assert institutional injuries belonging to the legislature as a whole." *Id.* The Third Circuit held that the alleged injuries were "classic examples of institutional injuries because they sound in a general loss of legislative power that is 'widely dispersed' and 'necessarily damages all [members of the General Assembly] ... equally.'"[14] *Id.* at 314 (citing *Raines*, 521 U.S. at 821)

[14] The alleged injuries in *Yaw* included suspending law in the Commonwealth, displacing/suspending the Commonwealth's "comprehensive statutory scheme," attempting to "exercise legislative authority exclusively vested in the General Assembly," wholly nullifying

(alterations in original). The Third Circuit noted that the plaintiffs "alleged no injury to themselves as individuals[,]" and had not "been authorized to represent the interests of these institutions in court." *Id.* at 314. Finally, the Third Circuit noted that, under the theory presented by plaintiffs, "*any* individual legislator would have standing to challenge *any* federal statute or regulation . . . that, under the Constitution's Supremacy Clause, has a preemptive effect on state lawmaking. Article III does not sweep so broadly." *Id.* at 315 (citation omitted).

Here, Plaintiffs attempt to circumvent the institutional injury issue by asserting that the Elections and Electors Clauses give them an "individual" right which they are seeking to vindicate. However, as the descriptions of their alleged injuries make clear, they are seeking to vindicate injuries that would be suffered by the Legislature as a whole.[15] Just as in the binding precedent described above,

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"any present or future legislative action," depriving Commonwealth citizens of the "right to be governed by their duly-elected representatives," diluting the rights of the citizens of the Commonwealth "to choose their own officers for governmental administration," and diminishing the "legislative powers of the Senate Plaintiffs." *Id.* at 313–14.

[15] For example, Plaintiffs allege that EO 14019 "nullifies the votes of the individual legislators, nullifies the enactment of the Legislature, violates the Electors Clause, violates the Elections Clause, deprives the legislators of their particular rights, and jeopardizes candidates' rights to an election free from fraud and abuse." (Doc. 18, ¶ 178.) They allege the automatic voter registration announcement by Governor Shapiro "nullifies the votes and diminishes the influence of the individual legislators, nullifies the enactments of the State Legislature, violates the Electors Clause, violates the Elections Clause, deprives the legislators of their particular rights in exercising constitutional powers specifically delegated to them, and jeopardizes candidates' rights to an election free from fraud and abuse." (*Id.* at ¶ 215.) And, they allege the HAVA directive by Secretary Schmidt "nullifies the votes and diminishes the influence of the individual legislators, nullifies the enactments of the State Legislature, violates the Electors Clause, violates the Elections Clause, deprives the legislators of their particular rights in exercising constitutional

Plaintiffs here do not allege that they specifically, as individuals, are suffering a harm because of the executive actions at issue. Rather, the harm is to the authority of the Pennsylvania General Assembly to establish the times, places, and manner of elections as provided by the Constitution. Moreover, Plaintiffs claim that they, as "real persons who are part of an exclusive entity, the state legislature of Pennsylvania[, . . . have] a right to protect [their] individual [] constitutional rights and privileges to participate in making laws regarding the manner of elections []." (Doc. 44, p. 7.) Just as the Third Circuit concluded in *Yaw*, this claim sweeps too broadly. If every state legislator has an individual right to vindicate their right to "participate in making laws," then the standing requirement of a particularized injury would be rendered meaningless because *every* legislator would suffer an injury in the same way. *See Yaw*, 49 F.4th at 314.

Further, there is no allegation that these specific Plaintiffs have suffered an injury that is any different than any other member of the Pennsylvania General Assembly. Thus, Plaintiffs have alleged only an institutional injury resulting from "a general loss of legislative power[.]" *Yaw*, 49 F.4th at 314. Additionally, unlike in *Coleman*, Plaintiffs here have not suffered a complete nullification of their vote, such that they no longer can legislate in the election field. Plaintiffs' argument that

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powers specifically delegated to them, and jeopardizes candidates' rights to an election free from fraud and abuse." (*Id.* at ¶ 223.)

they "have no ability to undo the executive actions through ordinary legislation[,]" and that the laws they already have passed "have been nullified and overridden by the executive actions[,]" overstates the matter, as none of the executive actions challenged in this case remove or divest any authority from the legislature in creating voting regulations within the state, such as in *Arizona*. Should the General Assembly wish to counter any of the alleged effects of the challenged executive actions, the executive actions do not constrain them from doing so. Moreover, as in *Arizona*, should the Pennsylvania General Assembly, as a whole, wish to challenge these executive actions as contrary to law and usurping its authority, the General Assembly may do so. However, these twenty-seven Plaintiffs, may not seek to vindicate that institutional injury without the approval of the institution. Therefore, Plaintiffs are seeking to assert an injury to the institutional rights of the Pennsylvania General Assembly, which they cannot do as individual legislators.[16]

[16] The court notes that there is no allegation that they have been authorized to undertake this action on behalf of the General Assembly as a whole. Plaintiffs argue that they have been "authorized' by the State to undertake litigation in a "class of cases" under *Va. House of Delegates*. (Doc. 45, p. 11.) Plaintiffs claim that Pennsylvania case law holding that legislators "are granted standing to challenge executive actions when specific powers unique to their functions under the constitution are diminished or interfered with[,]" shows that they have been authorized to litigate on the state's behalf in "a defined class of cases." (*Id.* (citing *Wilt v. Beal*, 363 A.2d 876, 881 (Pa. Commw. Ct. 1976) and *Va. House of Delegates*, 139 S. Ct. at 1952)). This is incorrect. The Supreme Court in *Va. House of Delegates* pointed to state statutes, such as in Indiana, where the legislature, through statute, had authorized itself to "employ attorneys other than the Attorney General to defend any law enacted creating legislative or congressional districts for the State of Indiana." 139 S. Ct. at 1952 (citing Ind. Code § 2-3-8-1 (2011)). Holding that a certain party has standing to pursue a certain case does not equate to the state authorizing that party to bring all actions on its behalf.

The court recognizes that Plaintiffs rely on *Kerr v. Hickenlooper*, 744 F.3d 1156 (10th Cir. 2014) ("*Kerr I*") to support their argument that an individual legislator has standing to challenge a specific law that "has stripped the legislature of its rightful power." *Id.* at 1167. However, as noted by State Defendants, although Plaintiffs state that the judgment in *Kerr I* was "vacated on other grounds," it was, in fact, vacated on the issue of standing after the Supreme Court decided *Arizona*. *See Hickenlooper v. Kerr*, 576 U.S. 1079 (2015). On remand, the Tenth Circuit looked again at the issue of whether individual legislator plaintiffs had standing to claim that a state constitutional amendment "deprive[d] them of their ability to perform the 'legislative core functions of taxation and appropriation.'" *Kerr v. Hickenlooper II*, 824 F.3d 1207, 1215 (10th Cir. 2016) ("*Kerr II*"). In *Kerr II*, the Tenth Circuit explicitly held that "the legislator-plaintiffs assert only an institutional injury, and thus lack standing to bring this action." Accordingly, the decision in *Kerr II* provides no support to Plaintiffs.

Finally, to the extent that Plaintiffs argue they have standing based on Pennsylvania law, this same argument was dismissed by the Third Circuit in *Yaw*. Whether it is true or not that individual legislators have standing under Pennsylvania law, the *Yaw* court held that "[t]he fact that a party has standing in state court does not mean that they have standing in federal court. . . . Article III standing 'limits the power of *federal* courts and is a matter of *federal* law. It does

not turn on state law, which obviously cannot alter the scope of the federal judicial power.'" *Yaw*, 49 F.4th at 316 (citing *Protect Our Parks, Inc. v. Chi. Park Dist.*, 971 F.3d 722, 730–31 (7th Cir. 2020)).

Accordingly, the court concludes that, in reality, Plaintiffs allege an institutional injury to the power of the Pennsylvania General Assembly as a whole to legislate the times, places, and manner of elections. As such, Plaintiffs, as individual legislators, do not have standing because they have not alleged any particular injury that is not also suffered by each member of the Pennsylvania General Assembly.

B. Plaintiffs Lack Standing as Candidates

Plaintiffs also argue they have standing as candidates. (Doc. 18, ¶¶ 169–173; Doc. 21, pp. 11, 12; Doc. 45, pp. 12–15). Plaintiffs argue that "Defendants' actions collectively undermine the integrity of Pennsylvania's elections by introducing procedures that were not provided by the Legislature." (Doc. 21, p. 12.) They further argue that implementation of these executive actions results in "the pool of Pennsylvania voters [being] manipulated by legally unauthorized, deceptive practices, undermining the integrity of elections across the Commonwealth." (Doc. 45, p. 15.)

Federal Defendants argue that this injury is not "certainly impending[,]" as required by Article III and *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 401

(2013), and the "Complaint contains no allegations describing how Plaintiffs' candidacies will 'certainly' be harmed by the EO." (Doc. 41, p. 15.) State Defendants argue that "Plaintiffs fail to identify any concrete or particularized way that eligible electors registering to vote injures them in any of these [candidates, citizens, taxpayers, and voters] capacities." (Doc. 42, p. 19 n.6)

The court agrees with the Federal and State Defendants that Plaintiffs have not alleged any particular harm to their candidacies as a result of any executive actions taken by any defendant. A vague, generalized allegation that elections, generally, will be undermined, is not the type of case or controversy that this court may rule on under Article III. *See Toth v. Chapman*, 2022 WL 821175, at * 7 (M.D. Pa. March 16, 2022.) Accordingly, Plaintiffs do not have standing as candidates.[17]

CONCLUSION

Plaintiffs do not have standing to assert the institutional injuries they raise here. Plaintiffs argue they have been granted an "individual" right in the Electors and Elections Clauses of the U.S. Constitution, but binding precedent obligates this court to reject this argument. The injuries that Plaintiffs allege are suffered equally

[17] Plaintiffs also alleged they have standing as citizens, taxpayers, and voters. (Doc. 18, p. 29.) As noted by both Defendants, these claims are entirely speculative, and Plaintiff does not argue these bases of standing beyond their motion in support of preliminary injunction. (Doc. 41, p. 16; Doc. 47, p. 22 n.4.) Accordingly, the court concludes that Plaintiffs have not established standings on any of these grounds either.

by each Pennsylvania legislator. As such, Plaintiffs have not alleged any individualized and particularized harm. Accordingly, Plaintiffs do not have standing to pursue their challenges to the executive actions at issue in this lawsuit, and their amended complaint is dismissed. An order follows.

s/Jennifer P. Wilson
JENNIFER P. WILSON
United States District Judge
Middle District of Pennsylvania

Dated: March 26, 2024

CERTIFICATE OF COMPLIANCE

This appendix has been scanned for viruses and malware and the best of my knowledge are free from viruses or malware.

I hereby certify that on June 26, 2024, I electronically filed the Appellants' Appendix, with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I hereby certify that the electronic version is identical to the paper copies.

Dated: June 26, 2024.

s/Erick G. Kaardal
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