

No. 23-1162

In the Supreme Court of the United States

DAWN KEEFER, ET AL.,

Petitioners,

v.

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

Respondents.

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

**MOTION FOR LEAVE TO FILE BRIEF OF *AMICI
CURIAE* PA FAIR ELECTIONS IN SUPPORT OF
PETITIONERS WITHOUT 10 DAYS' NOTICE AND
BRIEF OF *AMICI CURIAE* PA FAIR ELECTIONS
IN SUPPORT OF PETITIONERS**

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**MOTION FOR LEAVE TO FILE BRIEF OF
AMICI CURIAE PA FAIR ELECTIONS IN
SUPPORT OF PETITIONERS WITHOUT 10
DAYS' NOTICE**

Amici Curiae Members of PA Fair Elections (“*Amici*”) respectfully move for leave to file the accompanying brief in support of Petitioners without 10 days’ advance notice to the parties of *Amici*’s intent to file as ordinarily required by Sup. Ct. R. 37.2.

On May 24, 2024, *Amici* provided notice of their intent to file this brief to counsel of record for both Petitioners and Respondents. Given the Court's denial of the Motion to Expedite was posted on May 20th, *Amici* were unable to provide notice within the 10 days ordinarily required. While *Amici* provided 5 days’ notice rather than the required 10 days’ notice, there is no prejudice as *Amici*’s brief will be filed on or before the date that Respondents’ brief is due regardless of the notice requirement. Counsel of Record for Petitioners and the Pennsylvania Respondents have consented to this motion and the filing of this brief. As of this filing, no counsel for the Federal Respondents have expressed an objection to the motion or the brief.

As set forth in the enclosed brief, members of PA Fair Elections, *Amici* have a special interest in ensuring that Pennsylvania’s elections system is free from partisan influence. Non-legislative entities have been changing the manner of PA elections without the authority to do so. In this case, officials from the executive branch of government have unilaterally

changed the law, abused their authority and are misusing taxpayer funds to influence elections. *Amici's* brief includes relevant material and expresses important views not brought to the attention of the Court by the parties that may be of considerable assistance to the Court. *See* Sup. Ct. R. 37.1. *Amici* therefore seek leave to file this brief in support of Petitioners.

Respectfully,

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TABLE OF CONTENTS

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* PA FAIR ELECTIONS IN SUPPORT OF PETITIONERS WITHOUT 10 DAYS' NOTICE i

TABLE OF AUTHORITIES..... iv

STATEMENT OF IDENTITY AND INTERESTS OF *AMICI CURIAE*..... 1

SUMMARY OF ARGUMENT 9

ARGUMENT..... 11

CONCLUSION 18

TABLE OF AUTHORITIES

Cases

<i>Alden v. Maine</i> , 527 U.S. 706 (1999).....	2
<i>Bond v. United States</i> , 564 U.S. 211 (2011).....	2, 7
<i>Bowsher v. Synar</i> , 478 U.S. 714 (1986).....	7
<i>Coleman v. Miller</i> , 307 U.S. 433 (1939).....	6
<i>Dennis v. Luis</i> , 741 F.2d 628 (3d Cir. 1984)	5, 16, 17
<i>FERC v. Mississippi</i> , 456 U.S. 742 (1982).....	2
<i>Hamm v. Boockvar</i> , 600 M.D. 2020 (Pa.Cmwltth)	12
<i>INS v. Chadha</i> , 462 U.S. 919 (1983).....	7
<i>In re November 3, 2020 Gen. Election</i> , 240 A.3d 591 (2020)	13
<i>Marbury v. Madison</i> , 5 U.S. 137 (1803).....	1, 2

<i>McPherson v. Blacker</i> , 146 U.S. 1 (1892).....	10
<i>Moore v. Harper</i> , 600 U.S. 1 (2023).....	10, 17
<i>New York v. United States</i> , 505 U.S. 144 (1992).....	2
<i>PA State Conference of NAACP Branches v. Secretary Commonwealth of Pennsylvania</i> , Docket No. 23-3166 (March 27, 2024).....	14
<i>Plaut v. Spendthrift Farm, Inc.</i> , 514 U.S. 211 (1995).....	3, 4, 7
<i>Republican Party of Pennsylvania v. DeGraffenreid</i> , 141 S.Ct. 732 (2021).....	3, 5, 13
<i>Reynolds v. Sims</i> , 377 U.S. 533 (1964).....	3, 17
<i>Russell v. DeJongh, Jr.</i> , 491 F.3d 130 (3d Cir. 2007).....	6
<i>Silver v. Pataki</i> , 755 N.E.2d 842 (N.Y. 2001).....	7, 10
<i>Youngstown Sheet & Tube Co. v. Sawyer</i> , 343 U.S. 579 (1952).....	7
<i>Zicarelli v. Allegheny Cty. Bd. of Elections</i> , 2021 WL 101683 (W.D.Pa., Jan. 12, 2021).....	14

Constitution and Statutes

U.S. Const. Art. I, Sec. 4, cl. 1.....	9
U.S. Const. Art. II, Sec. 1, cl. 2	9
Pa.Const. art. II, Sec. 1	10
Pa.Const. art. II, Sec. 11	10
Pa.Const. art. II, Sec. 16	10
Pa.Const. art. VII, Sec. 1.....	10
25 P.S. § 2607.....	9
25 P.S. § 3146.6(a)	14
25 P.S. § 3146.8.....	13
25 P.S. § 3150.16(a)	14

Rules

Sup. Ct. R. 37.1.....	ii
Sup. Ct. R. 37.2.....	i

Other Authorities

Executive Order 14019.....	8
The Federalist No. 78.....	7, 8

<https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/DOS%20Guidance%20Civilian%20Absentee%20and%20Mail-In%20Ballot%20Procedures.pdf> 12

<https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/Examination%20of%20Absentee%20and%20Mail-In%20Ballot%20Return%20Envelopes.pdf> 12

https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/PADOS_BallotReturn_Guidance_1.0.pdf 11

<https://www.pacourts.us/Storage/media/pdfs/20210604/023507-file-10365.pdf> 12

**STATEMENT OF IDENTITY
AND INTERESTS OF AMICI CURIAE¹**

Just as “[a]n act of congress repugnant to the constitution cannot become a law,” *Marbury v. Madison*, 5 U.S. 137, 138 (1803), the acts of executive officials, including the President, that usurp the power of the legislature are similarly repugnant. “The courts of the U. States are bound to take notice of the constitution.” *Id.*

The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection ... In the 3d vol. of his commentary, p. 23, Blackstone states two cases in which a remedy is afforded by mere operation of law. In all other cases, he says, it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded.

Id. at 163 (internal quotations omitted).

If the legislators cannot claim the protection of the Constitution, what will restrain the executive actions that impose changes to legislatively enacted election law in Pennsylvania?

¹ No counsel for any party authored this brief in whole or in part, and no party or counsel for any party made a monetary contribution intended to fund the preparation or submission of this brief.

“The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.” *Id.*

The principle of preserving liberty applies both to horizontal separation of powers among the branches of government, and the vertical separation of powers between the federal government and the States. “The federal system rests on what might at first seem a counterintuitive insight, that ‘freedom is enhanced by the creation of two governments, not one.’” *Bond v. United States*, 564 U.S. 211, 220-21 (2011)(quoting *Alden v. Maine*, 527 U.S. 706, 758 (1999)). “[F]ederalism secures to citizens the liberties that derive from the diffusion of sovereign power.” *Id.* at 221 (quoting *New York v. United States*, 505 U.S. 144, 181 (1992)). “Federalism also protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions. *Id.* at 222. Moreover, “federalism enhances the opportunity of all citizens to participate in representative government.” *FERC v. Mississippi*, 456 U.S. 742, 789 (1982)(O’Connor, J., concurring in part and dissenting in part).

Pennsylvania Fair Elections (“PAFE”) is a nonpartisan association comprised of Pennsylvania residents who are concerned about fair, secure elections. The Pennsylvania association was formed in the aftermath of the 2020 election, in a state in which numerous election law challenges were filed following that election. Allegations in many of these lawsuits

centered around claims that nonlegislative officials “[c]hang[ed] the rules in the middle of the game[.]” See *Republican Party of Pennsylvania v. DeGraffenreid*, 141 S.Ct. 732, 735 (2021)(Thomas, J., dissenting from denial of certiorari).

Since this case directly implicates PAFE’s core election-integrity mission, PAFE files this *amicus curiae* brief in support of the Pennsylvania lawmakers’ appeal. “Representative government” is “self-government through the medium of elected representatives of the people ... Most citizens can achieve this participation only as qualified voters through the election of legislators to represent them.” *Reynolds v. Sims*, 377 U.S. 533, 565 (1964).

The Constitution establishes a system of checks and balances among the three branches of government to prevent any one branch from becoming too powerful. “Separation of powers, a distinctively American political doctrine, profits from the advice authored by a distinctively American poet: Good fences make good neighbors.” *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 240 (1995). Executive officials have taken advantage of dilapidated fences in Pennsylvania to change the rules for federal elections for their own political benefit. The Constitution assigned that duty to state legislatures. The President, who has no constitutional role in regulating elections, has knocked down fences by using an executive order to usurp state legislators’ authority to determine the manner of elections.

Article III Courts are guardians of the Constitution to protect the “basic “separation-of-powers” principle—one intended to **protect individual liberty.**” *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 241 (1995)(Breyer, J., concurring)(emphasis added). Individual liberty is exercised through representation:

[T]he doctrine of separation of powers is a *structural safeguard* rather than a remedy to be applied only when specific harm, or risk of specific harm, can be identified. In its major features... it is a prophylactic device, establishing high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of **interbranch conflict.**

Id. at 239 (second emphasis added).

Removing this barrier and allowing one body to exert both powers subverts the fabric of this constitutional republic. Executive officials, including the President, must act within the constraints of the Constitution and federal statutes. The rule of law must be applied so that the representative voices of the people can be heard through the legislative members that they elect to represent them.

Indeed, “[t]he provisions of the Federal Constitution conferring on state legislatures, not state courts, the authority to make rules governing federal elections would be meaningless if a state court could override the rules adopted by the legislature simply

by claiming that a state constitutional provision gave the courts the authority to make whatever rules it thought appropriate for the conduct of a fair election.” *Republican Party of Pennsylvania*, 141 S. Ct. at 738 (Alito, J., dissenting from denial of certiorari)(citations omitted).

The voters of Pennsylvania can barely discern the three branches. The judicial-fences were knocked down by state courts veering out of the judicial lane “to make whatever rules it thought appropriate for the conduct of a fair election.” *Id.* Executive-fences are intentionally and repeatedly kicked down by members of the executive branch in Pennsylvania, who with seeming accountability to no one, unilaterally and regularly change the rules without regard to Pennsylvania’s election laws.

When one party controls the White House, the Governor’s mansion, and the state legislature – how are the legislators to preserve their role, to fulfill their function? Clearly individual “legislators [should] be allowed to use the judicial process to force the executive branch to comply with ‘the law of the land[.]’” *Dennis v. Luis*, 741 F.2d 628, 632 (3d Cir. 1984).

The judicial branch has a crucial role in this system by ensuring that the executive branch adheres to the limits set forth in the Constitution and laws passed by Congress. When executive officials act outside of the boundaries, the judicial branch cannot restore the balance of power if a case is not presented to them. This is precisely why courts have recognized

that an “injury in fact” exists for individual state legislators when executive officials distort “the process by which a bill becomes law” by “nullifying a legislator’s vote or depriving a legislator of an opportunity to vote”, with “no effective remedies in the political process.” See *Russell v. DeJongh, Jr.*, 491 F.3d 130, 135-36 (3d Cir. 2007).

Without this Court’s recognition of individual legislator standing, narrowly tailored to permit state legislators to preserve their constitutionally conferred duty to regulate federal elections, even in the most egregious cases of executive officials acting outside of Constitutional limitations, there is no remedy. The legislative branch cannot restore the balance of power when executive officials ignore the Constitution and the laws passed by the legislature. And, requiring every legislator, or even the majority of legislators to join in the action, ignores the personal nature of the injury, and places too high a barrier on judicial resolution of constitutional claims.

In reviewing the holding in *Coleman v. Miller*, 307 U.S. 433 (1939), the New York Court of Appeals explained the nature of the individual injury to lawmakers in this way:

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 v. Pataki, 755 N.E.2d 842, 848-49 (N.Y. 2001).

The separation of powers is designed to preserve the liberty of all people. See, e.g., *Bowsher v. Synar*, 478 U.S. 714, 730 (1986). The Constitution “diffuses power the better to secure liberty.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) **So whenever a separation-of-powers violation occurs, any aggrieved party with standing may file a constitutional challenge.** See *Bond*, 564 U.S. at 223 (2011); *INS v. Chadha*, 462 U.S. 919, 935–936 (1983).

The Court may invalidate executive actions that exceed constitutional or statutory authority, thereby maintaining the balance of powers. To ensure this political power is exercised for the good of the governed, those who wield it must remain accountable to those they serve. This is why lawmakers must convince their constituents that they should be reelected after their terms expire. None of this changes in the election-regulation context. If anything, the plain terms of Article I, Section 4 stand as a reminder from the Founders that designing election procedures and drawing electoral maps are, at their core, “prescri[ptions] [of] the rules by which the duties and rights of every” election is “to be regulated.” See *Plaut*, 514 U.S. at 222-23 (citing The

Federalist No. 78, pp. 523, 525). In other words, they are legislative acts that legislative bodies must undertake. If citizens do not approve of particular legislative acts, they retain the power to hold the architects of those legislative acts accountable at the ballot box. But voters do not vote for the legislature as a body—voters vote for individual legislators. When the executive officials nullify the votes of legislators, they take away the voice of every one of their constituents.

In this case, through Executive Order 14019, President Biden and several agencies led by his political appointees have unconstitutionally excluded the Petitioners – the elected representatives of the people – from the lawmaking process by regulating elections. In the aftermath of the 2020 election, 28 state legislatures, including Pennsylvania, passed laws prohibiting the influence of outside organizations in election operations. This was largely in response to the more than \$400 million dollars of Zuckerberg-Chan Foundation donations that were selectively distributed by partisan and third-party non-governmental organizations. Biden’s EO14019 commands the political appointees who lead all federal agencies to develop plans to use the agencies of the federal government to conduct get-out-the-vote activities and voter registration drives in partnership with Biden administration approved third party non-governmental organizations. Congress did not authorize this executive action and no funding has been appropriated for the agencies to engage in these election activities. In the wake of the November 2020 election, Pennsylvania passed a law prohibiting state

and local governments from such conduct with nongovernmental entities. See 25 P.S. § 2607.

Through a press release on September 19, 2023, Pennsylvania’s Governor established automatic voter registration – a change to the election law which had been proposed in the legislature and successfully defeated several times, through proper legislative action.

Through directives, the Department of State – led by political appointees – has repeatedly directed election offices to ignore provisions of Pennsylvania election law. In so doing, executive officials have unconstitutionally excluded Pennsylvania lawmakers from the process of regulating elections. Individual legislator standing must be recognized to allow our representative voices to be heard.

SUMMARY OF ARGUMENT

The Elections Clause provides that, “[t]he Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof...” U.S. Const. Art. I, Sec. 4, cl. 1. Thus, under the Constitution, only state legislatures may regulate elections, and only Congressional legislation may override that authority.

The Electors Clause states, “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. U.S. Const. Art. II, Sec. 1, cl. 2. Under the Electors Clause, the U.S.

Supreme Court has explained that “[t]he legislative power is the supreme authority except as limited by the constitution of the State.” *McPherson v. Blacker*, 146 U.S. 1, 25 (1892)(quoted in *Moore v. Harper*, 600 U.S. 1, 28 (2023)).

In Pennsylvania, the state constitution defines legislative power as vested in a General Assembly that consists of a Senate and a House of Representatives. Pa.Const. art. II, Sec. 1. The Senate has 50 Members and the House 203 members, each having the authority to vote yea or nay on questions brought before them. Pa.Const. art. II, Sections 11, 16. Article VII, Section 1 of the Pennsylvania Constitution provides:

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).

Elected members of the legislative branch have been deprived of the opportunity to vote on changes to Pennsylvania’s election laws. As such, each “legislator and the thousands of [Pennsylvanians] he or she represents” have been “unlawfully precluded from participating in the governmental process.” *Silver v. Pataki*, 755 N.E. 2d 842, 847 (N.Y. 2001).

ARGUMENT

The state legislators are elected by the citizens of Pennsylvania, including the members of Amici. They are the only voice the citizens have. In the run up to the November 2020 election, executive officials changed the way that elections were conducted in Pennsylvania **in multiple ways**. One change was with the use of drop boxes throughout the state.

Through a directive unilaterally issued by the Department of State on August 19, 2020, executive officials advised county boards of elections that they could “establish multiple ballot return locations” with access to “return receptacles for that purpose.”²

In September 2020, the Secretary of the Commonwealth issued two sets of guidance related to signature comparisons of mail-in and absentee ballot applications – essentially advising the county boards of elections not to compare the signatures of voters on the ballots with the signatures presented on the applications. The first directive, issued on September 11, 2020, was titled “Guidance Concerning Examination of Absentee and Mail-In Ballot Return Envelopes.” The guidance stated, the “Pennsylvania Election Code does not authorize the county board of elections to set aside returned absentee or mail-in

²https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/PADOS_BallotReturn_Guidance_1.0.pdf

ballots based solely on signature analysis by the county board of elections.”³

The second set of guidance, issued on September 28, 2020, was titled, “Guidance Concerning Civilian and Absentee and Mail-in Ballot Procedures.” This guidance stated, “The Election Code does not permit county election officials to reject applications or voted ballots based solely on signature analysis ... No challenges may be made to mail-in and absentee ballots at any time based on signature analysis.”⁴ Thus, as evidenced by these two sets of guidance, Secretary Boockvar unilaterally directed the county boards of elections not to engage in a signature-comparison analysis of voters’ signatures on ballots and applications for ballots in the November 2020 election.

Just hours before the November 2020 election, Jonathan Marks, a Defendant in the current action, sent an email to all county election directors entitled, “Important DOS Email – Clarification regarding Ballots Set Aside During Pre-canvass.” See *Hamm v. Boockvar*, 600 M.D. 2020 (Pa.Cmwlth) Exhibit A.⁵

³<https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/Examination%20of%20Absentee%20and%20Mail-In%20Ballot%20Return%20Envelopes.pdf>

⁴<https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/DOS%20Guidance%20Civilian%20Absentee%20and%20Mail-In%20Ballot%20Procedures.pdf>

⁵ <https://www.pacourts.us/Storage/media/pdfs/20210604/023507-file-10365.pdf>

The instructions were provided to allow curing of perceived defects in ballots, but this directive conflicted with statutory law, 25 P.S. § 3146.8 and the Pennsylvania’s Supreme Court decision in *In re November 3, 2020 Gen. Election*, 240 A.3d 591 (2020). Just weeks before Jonathan Marks sent this directive, the Pennsylvania Supreme Court stated, “mail-in ... voters are not provided any opportunity to cure perceived defects.” *Id.* 601. This confusing guidance resulted in **some** voters being permitted to cure ballots, while others were not; thus sowing confusion in the November 2020 election. This confusion was precisely the type of confusion contemplated by Justice Clarence Thomas when he stated:

An election system lacks clear rules when, as here, different officials dispute who has authority to set or change those rules. This kind of dispute brews confusion because voters may not know which rules to follow ... This is not a prescription for confidence. Changing the rules in the middle of the game is bad enough. Such rule changes by officials who may lack authority to do so is even worse. When those changes alter election results, they can severely damage the electoral system on which our self governance so heavily depends. If state officials have the authority they have claimed, we need to make it clear. If not, we need to put an end to this practice now before the consequences become catastrophic.

Republican Party of Pennsylvania, 141 S.Ct. at 734-35 (Thomas, J., dissenting).

Indeed, in *Zicarelli v. Allegheny Cty. Bd. of Elections*, 2021 WL 101683 (W.D.Pa., Jan. 12, 2021), a lawsuit was brought by a state senate candidate challenging the inclusion of undated ballots in certifying the election. The candidate's suit was based upon 25 P.S. § 3150.16(a) which states, "[t]he elector shall then fill out, date and sign the declaration..." and 25 P.S. § 3146.6(a) which similarly states that "the elector shall then fill out, date and sign the declaration..."

Applying the explicitly clear statutory provisions, the candidate would have won by 93 votes. A second candidate, however, was seated under a contrary rule announced by the Pennsylvania Supreme Court – a rule which nullified the legislative requirement that voters write the date on mail-in ballots. Ironically, in a decision reached just weeks ago, the Third Circuit Court of Appeals in *PA State Conference of NAACP Branches v. Secretary Commonwealth of Pennsylvania*, Docket No. 23-3166 (March 27, 2024) ruled that mailed ballots that arrive on time but in envelopes without handwritten dates or with incorrect dates should **not** be counted in Pennsylvania elections.

Petitioners seek to avoid the confusion that followed the November 2020 election when officials who did not have the authority to change the rules, did so. This has arguably contributed to a lack of confidence in Pennsylvania's elections. To restore trust, we need to establish clear rules. We need to end the

practice of nonlegislative officials usurping the authority of Pennsylvania lawmakers.

In this action filed by 27 Pennsylvania lawmakers, several have included personal declarations. House Representative Dawn Keefer stated, “In 2020, numerous election laws were ignored and changed through actions by the Executive Branch ... My rights as a legislator were violated over and over and the people of Pennsylvania suffered as a result. The ever-changing rules for the election created a lack of trust and confidence in the elections in PA...” (Doc. 22-3, ¶¶ 8-9). Senator Cris Dush stated, “As one who represents over a quarter million franchise owners in the Commonwealth, I experience the angst they feel daily. They want the rule of law to mean something. Increasing usurpations by those who are meant to execute the laws or referee them on the field of play is fueling an increase in that angst and it is becoming increasingly strident among those whom I serve.” (Doc. 22-1, ¶ 17).

House Representative Joe Hamm stated, “As State Representative, I am tasked with taking the voice of the people I represent to the State Capitol and fighting for their principles and values ... When an Executive exceeds his authority and begins trying to make law, the Executive violates our Constitution and takes the voice of the Legislative Branch away effectively leaving the people of Pennsylvania with no voice.” (Doc. 22-2, ¶¶ 10-12).

The Third Circuit Court of Appeals has recognized Article III standing for individual legislators when constitutional powers conferred upon the legislature are usurped by members of the executive branch. *Dennis v. Luis*, 741 F.2d 628 (3d Cir. 1984). Dennis involved a suit for injunctive and declaratory relief brought by eight members of the Virgin Islands Legislature. The legislators challenged the Governor's appointment of an "acting" Commissioner of Commerce, without the constitutionally prescribed power of the legislators to provide advice and consent prior to the appointment.

The issue in *Dennis* was characterized in this way:

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?

Id. at 632.

The Third Circuit concluded that the legislators alleged a "personal and legally cognizable interest peculiar to the legislators." In holding that the legislators had standing, the court held:

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 634.

Here, executive officials are flouting the law. Each individual legislator has a right to protect "their constitutional duty to craft the rules governing federal elections[.]" *Moore v. Harper*, 600 U.S. at 21-22. Members of the executive branch should not be permitted to strip them of their Constitutional rights; the sacred representative rights of the people.

The people do not vote for the “legislature” – they vote for individuals to represent them as their state legislators.

[R]epresentative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies. Most citizens can achieve this participation only as qualified voters through the election of legislators to represent them.

Reynolds v. Sims, 377 U.S. 533, 565 (1964).

CONCLUSION

For the foregoing reasons, Pennsylvania Fair Elections respectfully urges the Court to grant certiorari in this case, vacate the adverse ruling below, and remand the case so that it can be decided expeditiously on its merits.

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