No. 21-1271

IN THE
Supreme Court of the United States

TIMOTHY K. MOORE, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES, ET AL.,
Petitioners,
v.

REBECCA HARPER, ET AL.,
Respondents.

On Writ of Certiorari to the Supreme Court of North Carolina

BRIEF OF *AMICI CURIAE* LOCAL GOVERNMENT LAW PROFESSORS IN SUPPORT OF RESPONDENTS

JOSHUA A. ROSENTHAL
Counsel of Record
JONATHAN B. MILLER
MICHAEL ADAME
MARISSA ROY
PUBLIC RIGHTS PROJECT
490 43rd Street #115
Oakland, CA 94609
(330) 607-0730
josh@publicrightsproject.org
Counsel for Amici Curiae

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Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION AND STATUTES

OTHER AUTHORITIES

STATEMENT OF INTEREST[1]

Amici are law professors who research and teach local government law and related fields in states around the country. They have professional interest and expertise regarding issues of local government, specifically in the areas of election administration and state preemption. Accordingly, they have an interest in ensuring that the Federal Constitution is interpreted in a manner consistent with its founding principles and the ability to administer free, fair, and functional elections. A list of Amici is attached as Appendix A.

[1] All parties provided written consent to the filing of this brief by blanket consent. Amici state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from amici, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Local election officials ("LEOs") make our democracy work across the country's thousands of election jurisdictions. They bring years of experience and are well-versed in the administration of elections pursuant to state election law, which varies widely from one state and locality to another. Accordingly, state laws often vest LEOs with the broad discretionary authority necessary to respond to the inevitable practical challenges that arise during even the most ordinary election.

Petitioners' theory, however, threatens to undermine the critical role LEOs play in administering elections. Petitioners ask this Court to accept the principle that "the power to regulate federal elections lies with State legislatures alone, and the [Elections C]lause does not allow state courts, or any other organ of state government" any role in administering federal elections that is not expressly sanctioned by the state legislature. Pet. Br. 39. This theory disregards the practical discretion that state constitutions and laws have accorded to LEOs. Instead, federal courts would be called in to interpret state election laws—a new breed of federal claim under the Elections Clause.

The proposed federal role of second-guessing state election law also threatens the unified administration of elections. States overwhelmingly hold federal and state elections together, following the same rules. But Petitioners' theory would create two separate rulebooks for each state's LEOs. Federal elections would be subject to a distinct body of federal-

judge-made law, exempt from the state constitutional provisions and state-court precedent that would still govern elections for state and local offices. However LEOs resolve the inevitable conflicts, having two bodies of election law would impose enormous practical challenges and invite further federal lawsuits.

Burdening LEOs with federal lawsuits, undermining the discretion afforded to them by state law, and disrupting the ways in which they administer elections would cast our electoral system into disarray. LEOs call on their discretion to respond to unpredictable events, from hurricanes to the COVID-19 pandemic. Across the country, LEOs have risen to these challenges—implementing state laws to ensure the safe continuity of in-person voting operations, establishing appropriate remote voting operations, and processing millions of mail ballots fairly.

Petitioners' theory invites federal courts to usurp state courts' authority to interpret state law, and instead impose their own election rules. This runs counter to our constitutional design, displacing state-court practices and interpretive methodologies that reflect the legal and constitutional traditions of individual states. What is more, such federal interference in state-law disputes over LEOs' exercise of authority is unnecessary. Time and time again—including in the charged context of 2020's presidential election—state courts have proven highly capable of adjudicating disputes concerning state-law limitations on LEOs' exercise of discretion.

ARGUMENT

I. LOCAL ELECTION OFFICIALS PLAY A VITAL, AND VARIED, ROLE IN MAINTAINING AMERICAN DEMOCRACY

Local election officials ("LEOs") are the key administrators of federal, state, and local elections in most jurisdictions. Every state but Alaska and Delaware entrusts its state and federal elections to LEOs. Karen Shanton, Cong. Research Serv., R45549, *The State and Local Role in Election Administration: Duties and Structures* 7 (2019). Across nearly 8,000 jurisdictions, LEOs register voters; design ballots; process absentee applications; train poll workers; and select, maintain, and operate polling places and machinery. Richard Briffault, *Election Law Localism and Democracy*, 100 N.C. L. Rev. 1421, 1423 (2022). Indeed, as Justices of this Court have observed, "running a statewide election is a complicated endeavor" that involves "thousands of state and local officials" participating in a "massive coordinated effort" during which, "at every step, state and local officials must communicate to voters how, when, and where they may cast their ballots." *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S.Ct. 28, 31 (2020) (Kavanaugh, J., concurring in denial of application to vacate stay).

States, and even local governments, allocate LEOs' powers and roles differently. In twenty-two states, a single, often popularly elected, official administers elections within local jurisdictions. In ten states, commissions or multi-member appointed boards with professional staff administer elections.

These multi-member bodies are typically bipartisan by regulation or practice. Eighteen states further divide different election administration functions across a number of offices (both single- and multi-member, appointed and elected). Kathleen Hale et al., *Administering Elections: How American Elections Work* 38–40 (2015).[2] Even within one state, such as California, counties may allocate LEO responsibilities to different officials to reflect varied locality sizes and needs. *Id.* at 40–41. Not a single state makes its legislature solely responsible for crafting election administration rules. Resp. Br. 55.

LEOs generally are highly experienced and capable, motivated by their regular contact with voters. A 2021 nationwide survey of LEOs found that the median LEO "has been working in elections for over 12 years . . . [with] less than 5 percent of survey respondents . . . working in election administration less than a year, and just over 10 percent . . . in their current position for a year or less." Paul Gronke et al., *Understanding the Career Journeys of Today's Local Election Officials and Anticipating Tomorrow's Potential Shortage*, Democracy Fund (Apr. 20, 2021), https://perma.cc/JU6S-JLKA.

In fact, LEOs have often been on the front line of promoting voter participation throughout history. Many LEOs limited exclusionary property requirements before their states did, and New Jersey LEOs exercised discretion to allow women to vote prior to ratification of the Nineteenth Amendment. Alec C. Ewald, *The Way We Vote: The Local Dimension*

[2] The states in each category are collected in Appendix B.

of American Suffrage 130–31 (2009). More recently, the Clerk and Recorder for Colorado's Larimer County acted amid ambiguous legislative direction to develop the country's first "Vote Centers" for early voting in 2003. These Vote Centers—primarily located along Interstate 25, the county's main highway—allowed voters from any precinct to vote in centralized locations. This streamlined the early voting process for voters, while allowing the County to provide accessible voting systems more efficiently. *Vote Center History*, Larimer County, https://perma.cc/2RVH-TZH7; *see also* Leonard Shambon & Keith Abouchar, *Trapped by Precincts? The Help America Vote Act's Provisional Ballots and the Problem of Precincts*, 10 N.Y.U. J. Legis. & Pub. Pol'y 133, 183-84 (2006). The state legislature soon codified this innovation, *see* Act of May 27, 2004, ch. 296 Colo. Sess. Laws 1104, and it has quickly spread across the country. *See Vote Centers*, Nat'l Conf. of State Legislators (Nov. 2, 2021), https://perma.cc/ATP5-DGDG (collecting legislative authorizations for vote centers). Because LEOs are so critical to the administration of federal and state elections, any consideration of the constitutional structure of election administration, such as this case, must take them into account.

II. PETITIONERS' THEORY WOULD UNDERMINE AND UNNECESSARILY COMPLICATE THE ROLE OF LEOS IN ADMINISTERING FEDERAL AND STATE ELECTIONS

Petitioners ask this Court to break from well-established constitutional interpretation to accept the principle that "the power to regulate federal elections lies with State legislatures alone, and the [Elections C]lause does not allow the state courts, or any other organ of state government" any role in regulating or administering federal elections not expressly articulated by the state legislature. Pet. Br. 39.

In addition to significant constitutional and democracy implications raised by Respondents as well as other *amici*, it would wreak havoc on LEOs' administration of federal and state elections.[3] Petitioners' theory disregards the traditional discretion that LEOs need—and are currently afforded by state law—to successfully administer fair elections. By imposing a strict reading of each state's statutory delegation to LEOs, Petitioners' theory invites federal lawsuits over the exercise of that discretion. What is more, Petitioners' theory would create separate sets of rules for federal and state elections, complicating efforts to administer elections that are commonly held on the same day and with a single ballot. The adoption of Petitioners' idiosyncratic

[3] This theory originally drew on the Presidential Electors Clause, U.S. Const. art. II, § 1, cl. 2; *Bush v. Gore*, 531 U.S. 98, 112 (2000) (Rehnquist, C.J., concurring). However, Petitioners presuppose that similar language in the Elections Clause applies similarly, U.S. Const. art. I, § 4, cl. 1. *See* Pet. Br. 17–18. For the sake of argument, we accept this presupposition.

interpretation of the Elections Clause would thus unmoor a longstanding foundation of American election administration, disrupting LEOs' common-sense administration of federal and state elections.

A. Adopting Petitioners' Theory Would Harm LEOs' Ability to Use the Discretion Granted by State Law

State legislatures grant state election officials and LEOs significant discretion to implement fair and effective election procedures. Because even the most specific legislative grant of authority to LEOs could never be specific enough to address every practical eventuality, states frequently give election officials wide latitude to do their jobs. This has been the case since the Founding: from 1788 to 1839, nine of the original thirteen states delegated significant authority to LEOs to administer elections, permitting "local election officials to pick where the polls would be located, open and close them at will, and make critical decisions about how voting would unfold." Mark S. Krass, *Debunking the Nondelegation Doctrine for State Regulation of Federal Elections*, 108 Va. L. Rev. 1091, 1113 (2022). Today, states continue to delegate significant powers to LEOs. *See, e.g.*, *Wise v. Circosta*, 978 F.3d 93, 97 n.2 (4th Cir. 2020) (noting that North Carolina's bipartisan Board of Elections "regularly" uses its statutory emergency powers to manage elections during natural disasters such as hurricanes); Ala. Code § 17-11-2 (designating county clerks as "absentee election manager[s]"); Mo. Ann. Stat. § 115.141 (giving local election authorities the power to supervise registration).

Yet Petitioners insist that the federal Constitution "place[s] the regulation of federal elections in the hands of state legislatures, Congress, and no one else." Pet. Br. 4. Under this approach, any non-ministerial act by an LEO in the administration of a federal election, even under an apparent grant of discretion from the state legislature, would be open to federal challenge. Elections Clause litigation in Texas in advance of the 2020 election showcases the chilling effect that such federal lawsuits can have on LEOs' administration of elections, even when their actions are valid under state law. When the Harris County Clerk received unanimous approval from the county's bipartisan Commissioner's Court to set up ten "drive-thru" early voting locations, plaintiffs brought both state and federal lawsuits—the latter on Elections Clause grounds—to enjoin the practice and invalidate the votes cast at these locations. *Recent Case: Hotze v. Hollins*, Harv. L. Rev. Blog (Nov. 14, 2020), https://perma.cc/XM22-X7N2. Even though the Texas Supreme Court ruled that early drive-thru voting was permissible under state law, and the federal court dismissed the case for lack of standing, the threat of an appeal in the federal case nonetheless compelled Harris County to shutter nine of the ten drive-thru voting sites on Election Day. *Id.*[4]

[4] Although the majority of federal courts to consider Petitioners' argument have rejected it, some have broken with precedent and tradition to create a freestanding cause of action to challenge state officials' exercise of their state law powers. *See, e.g.*, *Carson v. Simon*, 978 F.3d 1051, 1058–1060 (8th Cir. 2020) (per curiam) (holding, over a dissent, that plaintiffs may invoke the Electors clause to interfere with the Secretary of State's ability to extend

Inviting federal challenges to LEOs under Petitioners' reading of the Elections Clause would thus sweep LEOs up in a new wave of burdensome and unnecessary federal litigation—especially during election season—by opening any discretionary action to a federal constitutional challenge, no matter how quotidian or benign.[5] Even as the courts of appeals have repeatedly rejected plaintiffs' arguments posing such questions as inappropriate for federal court review, these arguments already regularly appear in the federal courts.[6] Petitioners seek to open the floodgates for even more federal litigation.

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ballot receipt deadlines); *Libertarian Party v. Dardenne*, No. 08-582-JJB, 2008 WL 11351516, at *3 (M.D. La. Sept. 25, 2008) (rejecting, in an order that never took effect, Secretary of State's authority to change ballot-access deadlines for presidential candidates on federal constitutional grounds).

[5] To be clear, LEOs occasionally exceed their state-granted authority when administering elections. But when they do, states already have a well-tested constitutional tool for addressing challenges: review of LEO actions under state law by state courts. See *infra* Part IV.B.

[6] *See*, *e.g.*, *Wise v. Circosta*, 978 F.3d 93, 101 (2020) (emphasizing the inappropriateness of a federal court deciding a "close issue" of state election law); *but see Republican Party of Pa. v. Boockvar*, 141 S.Ct. 1 (statement of Alito, J.) (2020) (entertaining Elections Clause challenge to state supreme court decision); *Texas League of United Latin Am. Citizens v. Hughs*, 978 F.3d 136, 150–51 (5th Cir. 2020) (Ho, J., concurring) (proposing Elections Clause challenge to governor's executive orders); *Wise v. Circosta*, 978 F.3d 93, 104 (4th Cir. 2020) (Wilkinson, J., dissenting) (entertaining Elections Clause challenge to state election board's actions); *Hotze v. Hudspeth*, 16 F.4th 1121, 1128 (5th Cir. 2021)

Even more troublingly, these new lawsuits would be based not on federal statutory or constitutional questions, but solely on the basis of an alleged conflict between an LEO's actions and state law. Federal courts would directly interpret state election law and relevant constitutional provisions, potentially superseding state court interpretations of state law—a proposition that strikes at the heart of our federalism and the election systems that states and LEOs have devised. *See Minnesota v. National Tea Co.*, 309 U.S. 551, 557 (1940); *Green v. Neal's Lessee*, 31 U.S. 291, 292 (1832). Petitioners' theory would thus impose a burdensome and unnecessary superstructure of federalized review that would undermine LEOs' ability to use the discretion granted to them under state election law.

B. Adopting Petitioners' Theory Would Dramatically Complicate LEOs' Administration of Elections

Under Petitioners' theory, federal elections would be governed by federal court interpretations of state election law, regardless of state constitutional requirements. State and local elections, however, would remain governed by state court interpretations of state election law and state constitutions. Imposition of Petitioners' theory would therefore create two distinct bodies of election law within each state: one for federal elections, the other for state elections, based on differing interpretations of the same state laws. This dual-track election code would

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(Oldham, J., dissenting) (entertaining Elections Clause challenge to county election official's actions).

require LEOs to administer federal and state elections—typically held together—according to two different rulebooks. This would present an enormous practical challenge for the orderly administration of elections, and would confuse both local election workers and ordinary voters. *Cf. Democratic Nat'l Comm.*, 141 S.Ct. at 31 (Kavanaugh, J., concurring in denial of application to vacate stay) (noting the importance of judicial restraint in preventing "voter confusion" and "election administrator confusion" to protect "the State's interest in running an orderly, efficient election").

Petitioners' theory would undermine the ability of states to apply state constitutional law to federal elections. Pet. Br. 22–23. But at the same time, Petitioners freely admit that states "*obviously* ha[ve] authority to impose" state constitutional limits on the administration of "*state* elections." *Id.* at 36 (emphasis in original). The tension inherent in these propositions is acknowledged even by the theory's supporters, who recognize that it "may require courts to interpret laws governing federal elections using a different methodology than those courts apply to the rest of the election code, potentially leading to inconsistent and unpredictable results." Michael T. Morley, *The Independent State Legislature Doctrine*, 90 Fordham L. Rev. 501, 526 (2021).

This would wreak havoc with LEOs' administration of elections. As expressly contemplated by the Founders, states have embraced the "convenience of having the elections for their own governments and for the national government at the same epochs." The Federalist No. 61, at 374 (C.

Rossiter ed. 1961). In other words, most states hold state and federal elections at the same time, in the same place, and in the same manner to ease the burden of administering and voting in elections. There is not one election code for federal elections and one election code for state elections. But Petitioners' theory would inevitably impose just such a dual-track election code.

As they juggle varying regulations for federal and state elections, LEOs would be forced into impossible situations. Because some procedural aspects of elections simply "must be unitary" for practical reasons, such as the hours polling places are open, voter identification procedures, and the ballots and voting machinery itself, following two divergent rulebooks would create an administrative nightmare guaranteed to confuse LEOs, poll workers, and voters. Robert A. Schapiro, *Article II as Interpretive Theory:* Bush v. Gore *and the Retreat from* Erie, 34 Loy. U. Chi. L.J. 89, 116 (2002). Alternatively, LEOs could hold state and federal elections on different days, effectively doubling the cost of administering elections, ballooning their already strained budgets, and further overworking their staff and volunteers. This course of action would further burden voters with the task of finding time to vote on two different days and might require states to change their election laws to authorize separate election days.

For example, consider Pennsylvania, where a state appellate court has held that the legislature's voter identification requirement violated the state's constitution. *See Applewhite v. Pennsylvania*, No. 330 M.D.2012, 2014 WL 184988, at *18 (Pa. Commw. Ct.

Jan. 17, 2014); *but see Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008) (holding that voter ID requirement did not violate federal Constitution). Accordingly, the voter identification requirement does not apply to any elections in Pennsylvania—state or federal. Under Petitioners' theory, however, the Pennsylvania state legislature could revive the identification requirement to apply to federal elections, even as its use in state and local elections would continue to be barred by the state constitution. In this event, its LEOs would be faced with a range of unenviable choices. Should they identify ballots submitted without identification as countable for state purposes but not for federal purposes? Should they shoulder the financial and practical burden of administering two separate elections? Should they require ID for all voters, thereby complying with a reading of the federal Constitution, but violating the command of their state's highest law (exposing themselves to state litigation)? Should they choose not to require ID at all (exposing themselves to federal litigation for violating the legislature's command)? Each approach would substantially complicate the election.

Similarly, a Tennessee statute imposes a five-minute time limit on voting, which state courts have held to be inoperable as such technicalities must not void a vote. *See Stuart v. Anderson Cnty. Election Comm'n*, 300 S.W.3d 683, 689–90 (Tenn. Ct. App. 2009) (quoting *Forbes v. Bell*, 816 S.W.2d 716, 721 (Tenn. 1991)) ("Invalidating an election solely on the basis of technical omissions . . . would effectively disenfranchise voters."). Currently, the invalid

statutory time limit presents no challenge to LEOs. But if it were revived by a federal court's insistence on enforcing the statute in federal elections, Tennessee LEOs would be forced to devise new procedures implementing time limits for voting in federal, but not state, elections; hold separate elections; craft separate ballots and use different voting booths for state and federal ballots; or choose not to comply with either the federal court's order or their own court's.

The multiple Catch-22s that Petitioners' theory would impose on LEOs exposes how practically untenable it would be. In both the courts and the polling place, Petitioners' theory would disrupt decades of practice and precedent that states have used to administer free, fair, and functional elections.

III. LEOS ARE BEST POSITIONED TO RESPOND TO THE PRACTICAL REALITIES OF ELECTION ADMINISTRATION IN THEIR COMMUNITIES

The disruption that Petitioners' theory would cause is especially alarming in light of LEOs' role to ensure the basic processes of our democracy. At every stage in the process—from registering voters, to locating polling places, designing ballots, recruiting poll workers, and processing ballots—LEOs protect our most fundamental democratic guarantee: that "eligible electors will be able to cast ballots and have them counted" in an orderly, secure, and impartial manner. Briffault, *supra*, at 1423.

This central role may be clearest when they must manage unpredictable contingencies that affect the administration of elections. At no time was this

clearer than in 2020. In the face of a once-in-a-century pandemic that wrought havoc on election administration—depending as it does on crowded polling places staffed by disproportionately elderly poll workers—LEOs responded capably, administering a presidential election in which 20 million more ballots were cast than in 2016, as turnout increased in every state. Nathaniel Persily & Charles Stewart III, *The Virus and the Vote: Administering the 2020 Election in a Pandemic*, Stan.-MIT Healthy Elections Proj. 10 (2021), https://perma.cc/7BPP-WSXW. LEOs frequently relied on their discretionary powers, their knowledge of their role in their state's elections system, and their intimate familiarity with their local conditions to ensure that voters had safe and secure access to the franchise notwithstanding the myriad practical challenges posed by the pandemic. The adoption of Petitioners' theory by this Court would hamper such innovation and resourcefulness in the future as every decision made by LEOs could be subject to federal court review.

Michigan's experience in 2020 highlights the central role of LEOs in administering safe and secure elections in the most difficult of circumstances. Michigan relies on 83 county clerks, 280 city clerks, and 1,240 township clerks to run its elections, making it the most decentralized election system in the country. Persily & Stewart III, *supra*, at 90. In 2020, these LEOs used their powers under state law to "tailor the location and procedures of polling places" and operationalize their jurisdictions' resources to manage "the unique needs of their own counties" during the pandemic to facilitate in-person voting. *Id.*

at 93. In Detroit, the state's most populous city, the City Clerk responded to citizen concerns about the virus's spread in crowded polling places by partnering with the Secretary of State and Detroit's professional sports teams to designate arenas as satellite voting centers, voter registration locations, and clearinghouses for election equipment. In total, the city set up 23 satellite voting centers for Election Day and early voting. Persily & Stewart III, *supra*, at 90–94; Craig Mauger, *Detroit, Michigan Secretary of State Partner to Ensure Integrity of November Election*, Det. News (Sept. 2, 2020, 10:07 AM), https://perma.cc/TJ79-FZZ6.

Michigan LEOs took Covid safety precautions throughout the state, including installing floor stickers to enforce social distancing, providing free masks, conducting frequent sanitizing of surfaces, and, in Detroit, requiring Covid testing for poll workers. Laura Herberg, *How Michigan Clerks Are Keeping In-Person Voters Safe During a Pandemic*, WDET (Oct. 28, 2020), https://perma.cc/9DGY-KFKR. Statewide, jurisdictions permitted people with physical disabilities and people with Covid symptoms on election day to vote from their cars, curbside, or in isolated polling booths. *Michigan - Fall 2020 Frequently Asked Questions*, Laws.' Comm. for C.R. 13-14 (2020), https://perma.cc/AP6G-3WXZ. Across Michigan, LEOs used their discretionary powers, flexibility, and expertise to ensure that "polling places were adequately staffed" while taking "numerous precautions to protect voter health" in an election with record-breaking turnout. Persily & Stewart III, *supra*, at 101.

Michigan LEOs were also instrumental in ensuring the security and fairness of the 2020 election's other great administrative challenge: mail-in voting. As voters across the country turned to mail-in voting in response to the pandemic, state and LEO efforts to safely expand access to the mail ballot highlighted "the creative ability of LEOs to use their traditional powers . . . under difficult circumstances." Briffault, *supra*, at 1436. In addition to facilitating the expanded use of mail-in voting, LEOs also had to contend with the processing and tabulation of mail ballots with additional security features.

In Michigan, the challenge was particularly acute: 2020 saw the first slate of federal elections held after a 2018 state constitutional amendment granted universal access to mail ballots, and Election Day arrived just a month after the legislature passed a new law creating a process by which LEOs could "cure" defective mail ballots. Persily & Stewart III, *supra*, at 81. Additionally, despite an expected surge in mail-in-voting in an election where rapid tabulation of votes would be paramount, the legislature's refusal to permit the early processing of mail ballots more than 10 hours before Election Day sparked anxieties in the Secretary of State's Office that it would be days before Michigan's election results were determined. Jonathan Oosting, *Michigan Vote Tally May Take Days, Benson Warns. Others Expect Faster Results.*, Bridge Mich. (Nov. 2, 2020), https://perma.cc/22WX-VJDR. But these fears turned out to be unwarranted: the quick work of Michigan's LEOs enabled the race to be called the day after the election with a record-low ballot rejection rate, notwithstanding the influx of two

million more mail ballots over the previous presidential election. Persily & Stewart III, *supra*, at 85, 87.

The example of Michigan in 2020 highlights the critical function that LEOs embedded within individual states' election law systems serve to ensure that the basic machinery of our democracy operates smoothly.[7] A new layer of federal court litigation to interpret state election law would undermine this critical function.

[7] This exemplary flexibility in the face of the pandemic's challenges was not confined to Michigan: LEOs in Georgia, Pennsylvania, and Wisconsin all bounced back from spring 2020 primaries beset by staffing and ballot return and processing challenges by recruiting poll workers to adequately staff general election polling places, expanding opportunities for early voting, handling huge influxes in mail ballots, and quickly processing ballots on Election Day with low rejection rates. Persily & Stewart III, *supra*, at 138–40, 141, 145–46, 150–51, 158–61, 163, 166–68, 170–72, 205–10, 213.

IV. STATE COURTS ARE THE APPROPRIATE FORA FOR RESOLVING DISPUTES REGARDING LEOS' EXERCISE OF DISCRETIONARY AUTHORITY

Routine federal judicial interpretation of state election laws would be an inappropriate and unnecessary intrusion of federal courts. Where a party believes LEOs' actions exceed the authority granted to them by state law, state courts have proven to be effective fora in resolving fact-specific disputes over the scope of LEOs' powers.[8]

A. Federal Court Review of State Election Laws Would Pose Serious Problems

American federalism reserves questions of pure state election law for the states and their institutions (especially courts), recognizing that the federalization of state law questions creates the risk of federal-court interference with activities best left to the states. *See Democratic Nat'l Comm.*, 141 S.Ct. at 28 (Roberts, C.J., concurring in denial of application to vacate stay); *Wise v. Circosta*, 978 F.3d 93, 101-102 (4th Cir. 2020) (abstaining from considering plaintiff's claims, including Elections Clause challenge, that turned on interpretations of state election law); *cf. Growe v. Emison*, 507 U.S. 25, 34 (1993) (chastising federal court for "ignoring the possibility and legitimacy of state judicial redistricting," noting instead that such

[8] As a general rule, state court judges are also more democratically responsive than their federal counterparts. *See* Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 199 Mich. L. Rev. 859, 872, 876–79 (2021).

judicial intervention, "far from being a federally enjoinable 'interference,' was precisely the sort of state judicial supervision of redistricting we have encouraged"). By constructing a novel Constitutional framework for state elections, Petitioners' theory would invite just such federal meddling, creating a new "federal common law that limits state court power directly . . . [and] applies in state courts, not just in federal courts sitting in diversity." Schapiro, *supra*, at 117. Contrary to our federal constitutional design, Petitioners' theory would guarantee that rules for elections would often be determined by federal judges rather than by state voters, their judiciaries, or their constitutions.

This is not a hypothetical concern: application of Petitioners' theory by lower federal courts has already led federal judges to create new rules for administering elections that were never contemplated by the legislature, state and local election officials, or state courts. For instance, when Hurricane Gustav struck Louisiana in September of 2008, the Secretary of State's office was rendered incapable of accepting candidate filings by the statutory deadline of September 2nd. *Libertarian Party v. Dardenne*, No. 08-582-JJB, 2008 WL 11351516, at *1 (M.D. La. Sept. 25, 2008). When the office reopened and extended the deadline to September 8th, two candidates who failed to file their papers by that date filed suit in federal court in order to have the court create a more favorable deadline, alleging that the Electors Clause prohibited the Secretary of State from extending the deadline due to lack of legislative authorization. *Id.* The federal district court accepted plaintiffs'

invitation to "intercede and use a balancing test" in the absence of a "constitutionally enforceable deadline" and thus created its own deadline of September 10th. *Id.* at *1, *3–*4. Although the Fifth Circuit prevented this order from taking effect,[9] Petitioners' theory would invite a proliferation of such federal trespasses into state law.

Such unilateral, late-breaking federal court revisioning of state election rules—a natural consequence of Petitioners' theory—has been noted with alarm by Justices of this Court in recent years, even in instances where federal courts purport to further well-established constitutional guarantees. *Democratic Nat'l Comm.*, 141 S.Ct. at 29 (2020) (Gorsuch, J., concurring in denial of application to vacate stay) ("[I]t's not hard to imagine other judges accepting invitations to unfurl the precinct maps and decide whether States should add polling places, revise their hours, [or] rearrange the voting booths within them"); *see also id.* at 31 (Kavanaugh, J., concurring in denial of application to vacate stay) ("It is one thing for state legislatures to alter their own election rules in the late innings . . . It is quite another thing for a federal district court to swoop in and alter carefully considered and democratically enacted state election rules."). By giving plaintiffs a novel basis for federal courts to interpret state election laws, Petitioners' theory would only exacerbate the

[9] *See Libertarian Party v. Dardenne*, 294 F. App'x. 142 (5th Cir. 2008) (staying the order) and 308 F. App'x 861 (5th Cir. 2009) (vacating the order as moot).

temptation for federal courts to impose their own election rules on states.[10]

Inviting federal courts to impose their own election rules pursuant to the Elections Clause would improperly expand their traditional role in adjudicating election law claims and facilitate the creation of arbitrary rules of state election law by federal judges. Federal courts already have a well-established role in adjudicating challenges to state and local election procedures that infringe on federal voting rights. *See, e.g.*, *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966). But these legitimate concerns about violations of federal protections do not justify granting federal courts the unrestrained authority to interpret for themselves provisions of

[10] Petitioners' theory would also upset state courts' state-specific practices for interpreting state-specific election codes and state constitutional precedent. Under Petitioners' theory, when interpreting state laws that govern federal elections, "courts may have to avoid considering . . . the state constitution or substantive canons of construction, that may ordinarily guide their interpretation of state statutes." Morley, *supra*, at 515. This would further trench on the traditional roles of states, their constitutions, and their courts by imposing federal interpretive canons that may be alien to a state's particular constitutional culture and the legal context that surrounded the adoption of a given law. *See* Brief of *Amicus Curiae* Conference of Chief Justices at 21–22 ("[S]tate courts differ with respect to their willingness to discover the intent of their legislatures or the framers of their constitutions in other sources, such as legislative history or statements of purpose. Some state legislatures instruct their courts to use particular interpretative approaches. Some states have particular histories and traditions that support some approaches to statutory interpretation or constitutional adjudication over others.").

state constitutional or statutory law. Existing cases illustrate how variable federal court interpretations of state election law can be, including their assessments of whether state law grants sufficiently explicit legislative delegation to various election officials. *Compare Baldwin v. Cortes*, 378 F. App'x 135, 138–39 (3d Cir. 2010) (holding that legislative delegation of authority to Secretary of State to, in the court's words, "administer the state election scheme" was sufficiently explicit to permit her to enter into consent decree changing election procedures), *with Carson v. Simon*, 978 F.3d 1051, 1060 (8th Cir. 2020) (per curiam) (holding that statutory language instructing Secretary of State to "adopt alternative election procedures" when election law provisions "cannot be implemented as a result of an order of a state or federal court" was *not* sufficiently explicit to permit her to enter into consent decree changing election procedures, where decree did not satisfy court-created requirements). As existing examples show, Petitioners' theory would invite federal courts to create their own idiosyncratic interpretations of state election law, usurping the roles that our constitutional system reserves for the states' institutions.

B. State Courts Have Repeatedly Demonstrated Their Ability to Apply Their Election Laws to Address LEOs' Discretionary Authority

Petitioners' proposed new role for federal courts is unnecessary, as state courts have a long history of balancing state and local considerations as they evaluate election cases. The 2020 election highlighted state courts' ability to apply their election codes in

cases involving challenges to LEO actions. These state court decisions demonstrated "the unwillingness of the courts, even as they recognized the key operational role of local election administrators, to allow [LEOs] to pursue policies opposed by their states." Briffault, *supra*, at 1437. In many of these cases, state high courts "repeatedly focused on the limited nature of local authority, the hierarchical superiority of state officers, and the asserted value of statewide uniformity in the application of state election laws." *Id.* at 1452. These examples highlight the effectiveness of state courts in enforcing state laws, even in the highly-charged context of 2020's federal elections.

In Iowa, for example, state courts resolved a state-local dispute concerning the scope of LEO authority under state law. Iowa's election code had undergone significant legislative changes in the months leading up to the 2020 election as the state prepared for the challenges of administering elections in the teeth of the pandemic. In June, the legislature passed a law prohibiting LEOs from pre-filling or correcting absentee ballot applications, as had been their practice. *Democratic Senatorial Campaign Comm. v. Pate*, 950 N.W.2d 1, 4 (Iowa 2020). When three LEOs began mailing pre-filled applications, the Secretary of State issued a directive to LEOs to refrain from doing so. *Id.* at 3. Subsequently, private plaintiffs—basing their challenge on state law and the Secretary's directive—successfully sued in county court to enjoin the mailing of pre-filled applications. *Id* at 3. Turning back a separate challenge to the Secretary's directive, the Iowa Supreme Court found

that the directive was lawful and reflected the Secretary's authority to "take prompt action when [LEOs] in specific counties are not following state election laws." *Id.* at 5. The Iowa example illustrates the adequacy of state courts to effectively reinforce the structures established by their state's election code.[11]

In Texas, too, the state high court enforced state law in litigation arising from the administration of the 2020 elections. The court held that LEOs lacked statutory authority to mail absentee ballot applications to all voters due to the pandemic (rather than just those over 65 with a qualifying disability under state law). *In re State*, 602 S.W.3d 549, 550 (Tex. 2020). At the same time, however, the court took pains to fairly assess the LEOs' arguments, beating back any implication that these officials had gone rogue. The court's opinion also gave due consideration to LEOs' pragmatic interpretation of the governing statute and their role in expressing concerns voiced by their jurisdictions' voters, and confirmed the position of the LEOs that they had no duty to probe a voter's disability claim. *Id.* at 560-61. The court subsequently rebuffed the effort of a county election official to

[11] Ohio state courts also balanced competing claims of local and state authority under state election law during the 2020 elections. When LEOs sought to provide multiple ballot drop boxes in their counties, the Secretary of State issued a directive forbidding them from doing so pursuant to his interpretation of state law limiting drop boxes to one per county. When voters challenged the Secretary's directive, a state appeals court held that, while Ohio law did not forbid more than one drop box per county, the Secretary's directive was nonetheless valid and binding on LEOs. *Ohio Democratic Party v. LaRose*, 159 N.E.3d 1241, 1249–57 (Ohio Ct. App. 2020); Briffault, *supra*, at 1444–45.

provide every local registered voter with an absentee ballot application. *State v. Hollins*, 620 S.W.3d 400, 403 (Tex. 2020).[12]

These examples showcase the effectiveness of state courts in resolving the scope of LEO authority under state laws. Such opinions illustrate state high courts' ability to use state law to address competing election law claims. There is no need for federal intervention to defend the integrity of state election laws.

* * *

As this brief is filed, thousands of Local Election Officials around the country are making the day-to-day decisions necessary to administer a Congressional election. Petitioners would interject the federal courts into each decision, as new arbiters of state election law. Nothing in the Constitution requires this novel and unnecessary federal review, nor the unprecedented disruption that would result.

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[12] In Arizona, too, state courts responded quickly to claims of LEO overreach in similar circumstances. When Maricopa County's LEO attempted to mail ballots to every registered voter in the county in advance of the 2020 primaries—treating a state law allowing LEOs to mail ballots to voters who had opted to receive them as a floor rather than a ceiling—the state Attorney General sued on the grounds that state law in fact imposed a ceiling, and the Maricopa County Superior Court agreed, issuing a temporary restraining order. *State of Ariz. ex rel. Brnovich v. Fontes*, No. CV2020-003477 (Ariz. Super. Ct. Mar. 13, 2020); Briffault, *supra*, at 1438–39.

CONCLUSION

For the foregoing reasons, the decision of the North Carolina Supreme Court should be affirmed.

Respectfully submitted,

JOSHUA A. ROSENTHAL
Counsel of Record
JONATHAN B. MILLER
MICHAEL ADAME
MARISSA ROY
PUBLIC RIGHTS PROJECT
490 43rd Street #115
Oakland, CA 94609
(330) 607-0730
josh@publicrightsproject.org

Counsel for Amici Curiae

October 25, 2022

APPENDIX A
List of Amici Curiae[1]

1. Richard Briffault
   Columbia Law School

2. Nestor M. Davidson
   Fordham University School of Law

3. Daniel Farbman
   Boston College Law School

4. Steven Nelson
   University of Nevada, Las Vegas

5. Erin Scharff
   Arizona State University's Sandra Day O'Connor College of Law

6. Richard C. Schragger
   University of Virginia School of Law

7. Rick Su
   University of North Carolina School of Law

[1] University affiliations are noted for identification purposes only.

APPENDIX B

Configuration of Local Election Offices[2]

Single Official	**Board**	**Divided Duties**
Alaska, California, Colorado, Florida, Hawaii, Idaho, Illinois, Iowa, Kansas, Minnesota, Missouri, Montana, Nebraska, North Dakota, Oregon, South Dakota, Utah, Vermont, Washington, West Virginia, Wisconsin, Wyoming	Delaware, Kentucky, Maryland, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, Tennessee	Alabama, Arizona, Arkansas, Connecticut, Georgia, Indiana, Louisiana, Maine, Massachusetts, Michigan, Mississippi, Nevada, New Hampshire, New Jersey, New Mexico, South Carolina, Texas, Virginia

[1] Hale, *supra*, at 40.