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 North Carolina Supreme Court

BRIEF OF AMICI CURIAE LAW FORWARD AND HELEN HARRIS, MARY LYNNE DONOHUE, AND WILLIAM WHITFORD IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Other Authorities

INTEREST OF *AMICI CURIAE*[1]

Law Forward is a nonprofit, nonpartisan law firm that exists to advance democracy in Wisconsin. Law Forward works to promote fundamental democratic principles, to revive Wisconsin's traditional commitment to clean and open government, and to advance a progressive vision through impact litigation, administrative process, and public education. Law Forward has significant experience in cases involving election and constitutional issues, both as counsel and as an *amicus curiae*. Recent cases include *Fabick v. Wis. Elections Comm'n*, No. 2021AP428-OA (Wis. Jun. 25, 2021); *Waity v. Vos*, No. 2021CV589 (Dane Cnty. Cir. Ct. Apr. 29, 2021), *rev'd*, 2022 WI 6, 400 Wis. 2d 356, 969 N.W.2d 263; *Sewell v. Racine Unified Sch. Dist. Bd. of Canvassers*, 2022 WI 18, 401 Wis. 2d 58, 972 N.W.2d 155; *Johnson v. Wis. Elections Comm'n*, 2021 WI 87, 399 Wis. 2d 623, 967 N.W.2d 469, *followed by* 2022 WI 14, 400 Wis. 2d 626, 971 N.W.2d 402, v*acated and remanded sub nom. Wis. Legislature v. Wis. Elections Comm'n*, 142 S. Ct. 1245 (2022) (per curiam), *decided on remand*, 2022 WI 19, 401 Wis. 2d 198, 972 N.W.2d 559; *State ex rel. Kaul v. Prehn*, 2022 WI 50, 402 Wis. 2d 539, 976 N.W.2d 821; *Teigen v. Wis. Elections Comm'n*, No. 2021CV958 (Waukesha

[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties have filed blanket consents to the filing of briefs by *amici curiae*.

Cnty. Cir. Ct. Jan. 25, 2022), *aff'd as modified*, 2022 WI 64, 403 Wis. 2d 607, 976 N.W.2d 519; *Becker v. Dane Cnty.*, 2022 WI 63, 403 Wis. 2d 424, 977 N.W.2d 390; *League of Women Voters of Wis. v. Millis*, No. 21-cv-805 (W.D. Wis. Aug. 17, 2022); *Gableman v. Genrich*, No. 2021CV1710 (Waukesha Cnty. Cir. Ct. Aug. 29, 2022); *Wis. Elections Comm'n, et al., v. Wis. State Assembly, et al.*, No. 2021CV2552 (Dane Cnty. Cir. Ct. Aug. 29, 2022); *Carey v. Wis. Elections Comm'n*, No. 22-cv-402-jdp, 2022 WL 3910457 (W.D. Wis. Aug. 31, 2022); *White v. Wis. Elections Comm'n*, No. 2022CV1008 (Waukesha Cnty. Cir. Ct. Oct. 3, 2022); *League of Women Voters of Wis. v. Wis. Elections Comm'n*, No. 2022CV2472 (Dane Cnty. Cir. Ct.) (pending); *Wis. Justice Initiative, Inc. v. Wis. Elections Comm'n*, No. 2020AP2003 (Wis.) (pending).

Helen Harris, Mary Lynne Donohue, and William Whitford were plaintiffs in *Whitford v. Gill*, the case challenging partisan gerrymandering in Wisconsin that reached this Court as *Gill v. Whitford* in 2018. 138 S. Ct. 1916 (2018). That case was dismissed in the midst of remand proceedings, pursuant to *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019). All three are U.S. citizens and registered voters residing in Wisconsin.

SUMMARY OF ARGUMENT

Whether or not constitutional text and history support the novel independent state legislature theory (ISLT) that Petitioners and certain *amici*

envision, this much surely is true: adopting ISLT would open a Pandora's Box in the world of state election law. While it is impossible to predict all the ways which ISLT, if loosed, could wreak havoc, viewing the theory through the lens of Wisconsin elections provides some unsettling clarity.

First, the volume of election litigation in Wisconsin during (and after) the 2020 election cycle demonstrates the enormity of the task that ISLT would thrust upon the state's federal courts. While this particular case would apply ISLT to redistricting, versions of the theory have already arisen that would transform virtually every dispute about state election law—whether over its validity, interpretation, or anything else—into federal cases. During every heated election cycle to come, ISLT would enlist federal courts in Wisconsin to referee some of the most technical, yet impactful, issues of state election law. And not all such disputes would be technical or statutory ones; some could involve thorny issues of state constitutional law in which federal courts have no expertise. So, although ISLT ostensibly aims to empower state legislatures, adopting this theory would dynamite bedrock federalism principles.

Second, ISLT could throw a wrench into Wisconsin's complex, decentralized elections administration machinery. Unlike many other states, Wisconsin charges 1,850 municipal clerks—many of them part-time public servants working out of their homes—with the most important election

administration tasks. ISLT threatens to embroil those clerks in federal litigation whenever they make choices one candidate or another dislikes. Worse, the theory could conceivably lead to two bodies of election law that they would need to administer, one for state elections and another for federal ones. ISLT would make their already-demanding job impossibly complicated.

Third, Wisconsin voters remain at the mercy of one of the most extreme partisan gerrymanders in the nation. Despite this Court's assurance in *Rucho v. Common Cause* that their complaints would not be condemned to "echo into a void," 139 S. Ct. at 2507 (2019), that is precisely the fate they would suffer under ISLT. Absent the state law remedies that ISLT would demolish, Wisconsin voters would be left with no place to turn but a gerrymandered state legislature that surely has no interest in diminishing its own power.

ARGUMENT

I. ISLT would damage core federalism principles by usurping Wisconsin state courts' authority over state election law and transferring that authority to the federal courts.

It is a bedrock principle of federalism that federal courts must respect the primacy of state courts in interpreting and applying state law. Ever since

Green v. Neal's Lessee, federal courts have "adher[ed] ... to the exposition of the local law, as given by the courts of the state," an approach that "greatly tend[s] to preserve harmony in the exercise of the judicial power, in the state and federal tribunals." 31 U.S. 291, 301 (1832). This policy of deference recognizes that, in the federal courts, "[t]he process of examining state law is unsatisfactory because it requires [them] to interpret state laws with which [they] are generally unfamiliar." *Michigan v. Long*, 463 U.S. 1032, 1039 (1983). The *Erie* doctrine embodies this same idea, as it "recognizes and preserves the autonomy and independence of the states,—independence in their legislative and independence in their judicial departments." *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78–79 (1938). And this spirit of humility carries through cases like *Pennhurst State School & Hospital v. Halderman*, which observed that "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." 465 U.S. 89, 106 (1984).

ISLT would undermine these core federalism principles in at least three important ways, as shown by its hypothetical application to Wisconsin. First, if adopted, ISLT would interfere with state constitutional law, an area in which federal courts have no expertise. Second, it would transport a legion of garden-variety disputes over Wisconsin's election statutes into federal courts. Third, it would upend background rules of interpretation of state election

law that have prevailed in Wisconsin state courts for at least a century.

A. ISLT would prevent Wisconsin courts from enforcing its state constitution.

"It is fundamental that state courts be left free and unfettered by [federal courts] in interpreting their state constitutions." *Michigan*, 463 U.S. at 1041. This hands-off policy properly gives state courts the "opportunity to develop state jurisprudence unimpeded by federal interference." *Id.* But ISLT would accomplish precisely the opposite by strangling Wisconsin's long tradition of construing its own state constitution to develop a body of law that channels and constrains the exercise of legislative power, including in the electoral context. At minimum, Petitioners' (ironically vague) attack on "vague state constitutional provisions" and "open-ended guarantee[s]" (Pet. Br. I, 46) would create substantial uncertainty over who can interpret and apply Wisconsin's constitution at the worst possible moment—during heated election-season disputes when democratic legitimacy may be on the line.

Start with Article III, section 1 of the Wisconsin Constitution,[2] which the Wisconsin Supreme Court

[2] This provision reads: "Every United States citizen age 18 or older who is a resident of an election district in this state is a qualified elector of that district."

has long recognized protects the "right to vote." *State ex rel. McGrael v. Phelps,* 144 Wis. 1, 128 N.W. 1041, 1046 (1910); *see also Ollmann v. Kowalewski*, 238 Wis. 574, 300 N.W. 183, 185 (1941) ("[A]ny statute that denies a qualified elector the right to vote is unconstitutional and void."); *State ex rel. Wood v. Baker*, 38 Wis. 71, 89 (1875) ("[I]t would be monstrous in us to give such [disenfranchising] effect to the registry law, against its own spirit and in violation of the letter and spirit of the constitution."). Wisconsin law acknowledges that this provision permits the Legislature to regulate voting rights, so long as "the interference, from the standpoint of a legitimate purpose, can stand the test of reasonableness." *McGrael*, 128 N.W. at 1047. For example, the Wisconsin Supreme Court affirmed the validity of photo identification requirements for voting under this provision. *League of Women Voters of Wis. Educ. Network, Inc. v. Walker*, 2014 WI 97, 357 Wis. 2d 360, 851 N.W.2d 302.

Likewise, the Wisconsin Constitution's "declaration of rights" provision in Article I, section 1 has traditionally been understood to protect the electoral process.[3] The *McGrael* Court acknowledged that "electors holding certain political principles in common may fully assemble, organize themselves into

[3] Article I, section 1 of the Wisconsin Constitution reads: "All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed."

political parties and use all legitimate means to carry their principles of government into active operation through the suffrages of their fellows." 128 N.W. at 1046–47 (quoting *Britton v. Bd. of Election Comm'rs of City & Cnty. of San Francisco*, 129 Cal. 337, 61 P. 1115, 1117 (1900)). Accordingly, "[f]reedom to do those things reasonably appropriate to the effectual maintenance of party organizations; and use thereof to accomplish legitimate party ends,—cannot be abridged any more than can the right to vote." *Id.* at 1047.

Other provisions may also be brought to bear on elections. Modern litigants have typically pursued election-related due-process and equal-protection claims under the Fourteenth Amendment. But that recent history does not diminish Justice Brennan's observation that "[s]tate constitutions … are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law." William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 491 (1977); *see also PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980) (recognizing states' "sovereign right to adopt in [their] own Constitution[s] individual liberties more expansive than those conferred by the Federal Constitution").

The Wisconsin Supreme Court has thus rightly noted that "[f]ulfilling our duty to uphold the Wisconsin Constitution as written could yield

conclusions affording greater protections than those provided by the federal Constitution." *State v. Halverson*, 2021 WI 7, ¶23, 395 Wis. 2d 385, 953 N.W.2d 847; *see also State v. Knapp*, 2005 WI 127, ¶60, 285 Wis. 2d 86, 700 N.W.2d 899 ("While textual similarity or identity is important when determining when to depart from federal constitutional jurisprudence, it cannot be conclusive, lest this court forfeit its power to interpret its own constitution to the federal judiciary."). Given the significant textual differences between Article I, section 1 of the Wisconsin Constitution and the Fourteenth Amendment, there may be good reasons to find more expansive—or, at least, different—protections under the former. Wisconsin courts have simply not yet had occasion to fully consider, much less definitively answer, these questions.

Yet Petitioners' ISLT proposal would threaten to terminate or, at minimum, stunt the development of Wisconsin law regarding all these state constitutional provisions. Are they specific enough to govern state election law under Petitioners' nebulous "vagueness" test? Or are they too "open-ended"?[4]

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[4] These questions seem particularly absurd with respect to Wisconsin's due process and equal protection guarantees. As with all such provisions, they are, by design, worded broadly enough to cover the infinite factual scenarios that arise in running a government. Demanding greater specificity of such provisions before they can be applied to election statutes runs contrary to this basic purpose and to the federal analog on which Wisconsin's framers drew in drafting the provisions.

What standard should a federal court use to decide that question? And how should federal courts interpret state constitutional provisions when conducting this "vagueness" analysis? Wisconsin courts aim "to give effect to the intent of the framers [of the state's constitution] and of the people who adopted it," *State v. Cole*, 2003 WI 112, ¶10, 264 Wis. 2d 520, 665 N.W.2d 328 (cleaned up), by "focus[ing] on the language of the adopted text and historical evidence including the practices at the time the constitution was adopted, debates over adoption of a given provision, and early legislative interpretation as evidenced by the first laws passed following the adoption," *Halverson*, 2021 WI 7, ¶22 (cleaned up). There is scant reason to believe that the two federal courts in Wisconsin are prepared now to take on a task currently shouldered by Wisconsin's 72 circuit courts, four courts of appeal, and Supreme Court, and in their place become the experts in interpreting Wisconsin's constitution (and in the midst of heated election contests). Petitioners' ISLT would demand no less.

Of course, a categorical version of ISLT that does not turn on the vagueness of state constitutional provisions would be easier to administer, but that (presumably stricter) version would amputate vital pieces of Wisconsin's constitution by severing Wisconsin courts' "opportunity to develop state jurisprudence unimpeded by federal interference," *Michigan*, 463 U.S. at 1041. Wisconsin voters would lose whatever additional protections their state constitution grants them, as well as the ability to

amend that charter when and as the people see fit, and to elect judges that guard those rights. It is difficult to imagine a result more hostile to federalism than this.

B. Adopting ISLT would transfer from Wisconsin's state courts to its two federal district courts state election law disputes involving its 1,850 separately-administered voting jurisdictions.

Imposing ISLT would work an additional harm on Wisconsin law: it would transplant from Wisconsin's state to federal courts a legion of technical, statutory election-law disputes. Wisconsin's recent experience is illustrative.

From its articulation in Chief Justice Rehnquist's *Bush v. Gore* concurrence, ISLT has focused on whether state courts' interpretation of their own states' election laws "impermissibly distorted them beyond what a fair reading required" and thereby "departed from the statutory meaning." 531 U.S. 98, 115 (2000) (Rehnquist, C.J., concurring). Current members of this Court have suggested that the theory should pick up where Chief Justice Rehnquist left off and require state courts to use something like a strict textualist method of statutory interpretation for state election laws: "The text of Article II means that 'the clearly expressed intent of the legislature must prevail' and that a state court may not depart from the state election code enacted

by the legislature." *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 34 n.1 (2020) (Kavanaugh, J., concurring in denial of application to vacate stay) (cleaned up).

But a version of ISLT that "requires federal courts to ensure that state courts do not rewrite state election laws," *id.*, would threaten to flood federal courts with state-law voting disputes every election cycle. *Accord* Conference of Chief Justices Amicus Br. at 24 (ISLT would "invite litigation seeking federal court supervision over every state court decision reviewing the interpretation or application of a state election law"). A brief sampling of recent election litigation in Wisconsin illustrates the enormous task that ISLT would force upon federal courts nationwide.

Take the last-minute recount litigation that capped off the contentious 2020 general election in Wisconsin, *Trump v. Biden*, 2020 WI 91, 394 Wis. 2d 629, 951 N.W.2d 568.[5] Then-President Trump sought a recount of election results in two Wisconsin counties on the basis that local election officials wrongly counted absentee ballots that were purportedly cast in violation of state election law. The picayune details of the alleged state-law violations are, paradoxically,

[5] Mr. Trump filed a recount petition on November 18, 2020, and the Wisconsin Supreme Court issued its decision less than month later, on December 14, 2020.

both beside the point and the entire point.[6] Traditionally, federal courts would not (and could not) plunge into the finer points of state election law—state courts would resolve the dispute, as they did in *Trump*, and that would be that.

But a robust ISLT could have allowed Mr. Trump a second bite at the apple in federal court. He might have sought review of the Wisconsin Supreme Court's decision arguing that, by resolving the case on laches grounds, the Wisconsin Supreme Court "depart[ed] from the state election code enacted by the legislature." *Democratic Nat'l Comm.*, 141 S. Ct. at 34 n.1 (Kavanaugh, Jr., concurring). And, in fact, he *did* seek federal court review of his state law theories, invoking the parallel Electors Clause. The Seventh Circuit rightly rebuffed his effort in *Trump v. Wisconsin Elections Commission*, recognizing that it, as a federal court, was "not the ultimate authority on Wisconsin law" and therefore that Mr. Trump's state law claims "belong[ed], then, in state courts." 983 F.3d 919, 927 (7th Cir. 2020).

That deferential result was the right approach. Mr. Trump's request that federal courts intervene and

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[6] Generally speaking, they involved an absentee voting designation called "indefinite confinement," whether absentee voters had to fill out an application form separate from the absentee ballot itself, the sufficiency of addresses provided by absentee ballot witnesses, and whether a municipality could accept completed absentee ballots returned to election officials in a city park. *Trump v. Biden*, 2020 WI 91, ¶2.

set aside the results of Wisconsin's general election based on state election law was unprecedented. Yet it precisely illustrates ISLT's problem. In defiance of basic federalism principles, the theory would allow litigants to force Wisconsin's federal courts to resolve eleventh-hour disputes over hyper-technical, previously unadjudicated questions of state election law, all while staring down the highest possible stakes.

Other consequential 2020 general election state-law litigation in Wisconsin also may have landed in a federal court's lap. Consider the ballot access dispute in *Hawkins v. Wisconsin Elections Commission*, 2020 WI 75, 393 Wis. 2d 629, 948 N.W.2d 877 (per curiam). After Green Party candidates filed nomination papers for the 2020 general election, the Wisconsin Elections Commission did not approve enough petition signatures to qualify the candidates for inclusion on the ballot. *Id.* ¶2. When the candidates sued, the Wisconsin Supreme Court held that there was no relief available due to their delay in bringing suit. *Id.* ¶10.

Much like in *Trump*, the Green Party candidates might instead have invoked ISLT by arguing—as one Justice in *Hawkins* did—that the Wisconsin Elections Commission "had a statutory obligation to place [the candidates] on the ballot, which the Commission violated." *Id.* ¶48 (Ziegler, J., dissenting). Framing the issue as a state executive body usurping a state legislature's sole authority over

a federal election could have forced another difficult case, strictly turning on Wisconsin law, into federal court—and one that needed to resolved immediately, given that the candidates filed their ballot access challenge *after* ballots had been printed and many had been mailed to voters.

Other recent election disputes arising in Wisconsin state courts fit this pattern. In virtually all of them, challengers alleged that some election official or state election body failed to properly apply state election law and thereby usurped the Legislature's primacy over election policy. *See, e.g., Jefferson v. Dane Cnty.*, 2020 WI 90, 394 Wis. 2d 602, 951 N.W.2d 556 (state-law dispute over "indefinitely confined voter" designation); *State ex rel. Zignego v. Wis. Elections Comm'n*, 2021 WI 32, 396 Wis. 2d 391, 957 N.W.2d 208 (state-law dispute over voter rolls); *Teigen*, 2022 WI 64 (state-law dispute over absentee-ballot drop boxes); *Rise, Inc. v. Wis. Elections Comm'n*, No. 2022CV2446 (Dane Cnty. Cir. Ct.) (pending) (state-law dispute over definition of "address" for witnesses to absentee ballots); *League of Women Voters of Wis. v. Wis. Elections Comm'n*, No. 2022CV2472 (state-law dispute over definition of "missing" for witness addresses on absentee ballots). Just like with *Trump* and *Hawkins*, a robust version of ISLT could have transformed all these state election cases into federal contests.

It is worth emphasizing the incredibly tight timeframes in which these Wisconsin election cases

often arise. Because the cases frequently materialize in the weeks leading up to an election, federal courts would need to wrestle more often with the *Purcell* principle, through which "this Court has regularly cautioned that a federal court's last-minute interference with state election laws is ordinarily inappropriate." *Democratic Nat'l Comm.*, 141 S. Ct. at 31 (Kavanaugh, J., concurring in denial of application to vacate stay). As discussed in detail in Section II, *infra*, preventing last-minute changes is particularly important in Wisconsin due to the state's uniquely decentralized election system. By promoting disruptive, eleventh-hour federal litigation, ISLT could throw a monkey wrench into Wisconsin's delicate election machinery. That threat is particularly acute in Wisconsin, where elections are run not by state or even county-level officials, but by municipal clerks. So not only would federal courts need to wrestle with precise issues of Wisconsin law, but they would have to address the application of those laws across 1,850 jurisdictions.

As a final aside, the pattern of recent election litigation in Wisconsin belies the picture painted by certain *amici*, whereby ISLT could be wielded to combat a rising tide of partisan election litigation driven primarily by Democratic Party-aligned groups. *See* America's Future Amicus Br. at 17–31; Lawyers Democracy Fund Amicus Br. at 16–25. Wisconsin has indeed witnessed an avalanche of state-court litigation over the last two years, but mostly initiated by right-leaning organizations and plaintiffs targeting

common-sense and previously noncontroversial election practices.[7] By allowing these litigants to forum-shop between federal and state courts whenever they perceive a departure from the Wisconsin Legislature's enactments, ISLT would likely lead to even greater judicial intervention in the electoral process. That federal courts could soon find themselves sucked into countless state-law election disputes would be an ironic result of Petitioners' purported effort to empower state legislatures.

C. ISLT would create significant doubt over the proper method of interpreting Wisconsin's election statutes.

Finally, ISLT would threaten statutory interpretation principles developed over decades by the Wisconsin judiciary and that Wisconsin courts have long applied to election statutes. Consider again the notion that "[t]he text of Article II means that 'the clearly expressed intent of the legislature must prevail' and that 'a state court may not depart from the state election code enacted by the legislature.'" *Democratic Nat'l Comm.*, 141 S. Ct. at 34 n.1 (Kavanaugh, J., concurring).

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[7] Elizabeth Pierson & Nicole Safar, *Who's behind all the election administration lawsuits?*, Wisconsin Examiner (Oct. 17, 2022), https://wisconsinexaminer.com/2022/10/17/whos-behind-all-the-election-administration-lawsuits/.

This rule would override Wisconsin's express adoption of a different interpretive method for most of its election code. Under Wis. Stat. § 5.01(1), that code "shall be construed to give effect to the will of the electors, if that can be ascertained from the proceedings, notwithstanding informality or failure to fully comply with some of their provisions."[8] In other words, state courts must largely interpret Wisconsin's election laws as "directory rather than mandatory," *Logic v. City of S. Milwaukee Bd. of Canvassers*, 2004 WI App 219, ¶5, 277 Wis. 2d 421, 689 N.W.2d 692, which in practice turns on whether "substantial compliance" with the Legislature's enactments has occurred. *Clapp v. Joint Sch. Dist. No. 1 of Vills. of Hammond & Roberts*, 21 Wis. 2d 473, 479, 124 N.W.2d 678 (1963).

Unsurprisingly, this statute imposes on Wisconsin courts not just a "difficult task of construction" but also "the more difficult task of applying the statute as construed to the multitudinous situations which may arise under the election laws." *State ex rel. Pelishek v. Washburn*, 223 Wis. 595, 270 N.W. 541, 544 (1936). Wisconsin courts have shouldered this "difficult" burden, resulting in a "long history of construing [election statutes] to give effect to the ascertainable will of the voter, notwithstanding technical noncompliance with the

[8] There is one prominent exception to this provision: Wisconsin's absentee voting laws, which the Legislature has provided "shall be construed as mandatory." Wis. Stat. § 6.84(1).

statutes." *Trump*, 951 N.W.2d at 579 (Hagedorn, J., concurring); *see also Roth v. Lafarge Sch. Dist. Bd. of Canvassers*, 2004 WI 6, ¶¶19-25, 268 Wis. 2d 335, 677 N.W.2d 599 (collecting cases).

A federal court considering an ISLT case could thus be forced to choose between two competing interpretive methods. Should it adopt a strict textual reading of the election statute at issue, as Chief Justice Rehnquist suggested would be appropriate? Or should it grant the statute the more flexible construction prescribed by Wis. Stat. § 5.01(1), in which the same Legislature prescribed how those statutes should be interpreted and applied? Although ISLT might suggest that the Legislature's chosen interpretive method should be given effect, the answer is not at all clear.

And, ultimately, that is the problem. In all three areas discussed above, ISLT could devastate the traditional division of federal- and state-court authority in unpredictable ways. This Court should keep Pandora's Box shut, thereby "preserv[ing] harmony in the exercise of the judicial power, in the state and federal tribunals." *Green*, 31 U.S. at 295.

II. ISLT would render Wisconsin's election administration unworkable.

A. Wisconsin's election administration is uniquely decentralized.

Petitioners' ISLT proposal would also fundamentally disrupt Wisconsin's election administration, undermining the central role the state plays in regulating federal elections within its boundaries. U.S. Const. art. I, § 4, cl. 1; *Arizona v. Inter Tribal Council of Ariz.*, 570 U.S. 1, 15 (2013) (describing the states' role in regulating congressional elections as "weighty and worthy of respect"); *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) ("the Court therefore has recognized that States retain the power to regulate their own elections."). Not surprisingly, therefore, this Court has warned federal courts against diminishing "the integrity of the election process." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (per curiam).

Wisconsin has adopted, for all of its elections—local, state, and federal—a decentralized election-administration regime that invests municipal clerks throughout the state with the "charge and supervision of elections and registration within the municipality." Wis. Stat. § 7.15(1). There are approximately 1,850 municipal clerks[9] in Wisconsin—the most of any

[9] Jenny Peek, *From Kitchen Tables to Town Halls, How Municipal Clerks Power Wisconsin's Elections*, Wisconsin Public

state.[10] Some clerks work part-time, and some work out of their homes.[11] These clerks, with some assistance from county clerks and the Wisconsin Elections Commission, run 1,850 individual elections every cycle—one for each city, village, and town.

The municipal clerks perform nearly all critical election functions in Wisconsin, including but not limited to: purchasing and maintaining election equipment (Wis. Stat. § 7.15(1)(b)); processing in-person, by-mail, and certain aspects of electronic voter registrations (*id.* § 6.30); preparing and sending absentee ballots to absentee voters, including military and overseas voters (*id.* §§ 6.87(1)–(3), 7.15(1)(cm)); operating in-person absentee voting (*id.* § 6.86(1)(ar)); training and supervising the poll workers and chief inspectors who operate polling places in the municipality (*id.* §§ 7.15(1)(e)–(g), (11)); and often serving on the municipal board of canvass (*id.* § 7.53(2)(a)(1).

Wisconsin's uniquely decentralized elections administration permits municipalities, largely through the clerks, to be more responsive to the specific needs of the community in everything from

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Radio (Oct. 29, 2018), https://www.wpr.org/kitchen-tables-town-halls-how-municipal-clerks-power-wisconsins-elections.

[10] Jason Stein & Larry Sandler, *1,850 Municipal Clerks Another Complication*, Milwaukee Journal-Sentinel (Apr. 6, 2011), https://archive.jsonline.com/news/statepolitics/119373789.html/.

[11] *Peek*, supra.

polling locations (Wis. Stat. § 5.25) to the decision of whether to canvass absentee ballots at a central location (*id.* § 7.52). It means that chief inspectors are members of the communities they serve, and that poll workers live in the same county (and are hired by the municipality). Wis. Stat. § 7.30(2)(a). Voters with questions do not have to deal with large state or county bureaucracies; instead, they can contact their local clerks, who also assist with voter education. Wis. Stat. § 7.15(9). This structure increases election security, as it provides another layer of administration, in addition to federal, state, and county protections.[12]

Local election administration is also consistent with, and inherent in, Wisconsin's constitutional order over the past 111 years and its adoption of "home rule" by constitutional amendment. Wis. Const. art. XI, § 3(1). So, while the Wisconsin Legislature has passed much legislation setting statewide rules for election processes, considerable residual authority remains with municipal clerks. Under Wisconsin's constitutional order, the Legislature cannot act within the "field of local affairs of cities and villages." *State ex rel. Michalek v. LeGrand,* 77 Wis. 2d 520, 253 N.W.2d 505, 506–07 (1977) (cleaned up).

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[12] *See* Wisconsin Elections Commission, 2021 Election Security Report (Sept. 23, 2021) https://elections.wi.gov/resources/reports/election-security-planning-reports.

Wisconsin's decentralized election administration adheres to this basic structure: the Legislature—subject to gubernatorial veto—sets statewide standards and procedures for, *inter alia*, registration, voting, canvassing, and recounts. *See generally* Wis. Stat. ch. 5–10, 12. A state administrative agency, the Wisconsin Elections Commission, enforces and administers those statutes. Wis. Stat. § 5.05(1). Other actors, including the counties and their clerks, play certain roles (*see generally* Wis. Stat. §§ 7.10, 7.60), but the local operation of elections is conducted by the municipalities and, specifically, by the clerks. *Zignego*, 2021 WI 32, ¶13 ("Rather than a top-down arrangement with a central state entity or official controlling local actors, Wisconsin gives some power to its state election agency (the Commission) and places significant responsibility on a small army of local elections officials.").

B. Petitioners' proposed adoption of ISLT would fundamentally disrupt Wisconsin election administration.

"Change is a constant in Wisconsin's rules for holding elections," *Luft v. Evers*, 963 F.3d 665, 668 (7th Cir. 2020), a fact that already places significant stress on Wisconsin's decentralized election system. Over the past decade, this change often has been wrought through statutory changes, including the replacement of the Government Accountability Board with the Wisconsin Elections Commission. *Id.* at 668-

70 (listing statutory modifications to Wisconsin election procedure). Other changes come through federal litigation. *Id.* at 669-70 (listing federal cases from 2014 through 2016); *Dem. Nat'l Com. v. Bostelmann*, 451 F.Supp.3d 952, 982-83 (W.D. Wis. Apr. 2, 2020), *stayed in part*, 2020 WL 3619499 (7th Cir. Apr. 3, 2020), *stayed in part sub nom.*, *Rep. Nat'l Com. v. Dem. Nat'l Com.*, 140 S.Ct. 1205 (2020); *Carey v. Wis. Elec. Comm.*, No. 22-cv-402, 2022 WL 3910457 at *9. And state courts continue to play a major role in shaping Wisconsin's election administration, including redistricting. *Johnson*, 2022 WI 19; *see also Trump*, 2020 WI 91; *Teigen*, 2022 WI 64; *White*, No. 2022CV1008; *Kormanik v. Wis. Elec. Comm.*, No. 2022CV1395 (Waukesha Cnty. Cir. Ct.) (filed Sept. 23, 2022) (involving when electors may spoil their absentee ballots). Not surprisingly, Wisconsin judges and courts often look to the Wisconsin Constitution for guidance in resolving election disputes. *State ex rel. Bond v. French*, 2 Pin. 181, 182-83, 1 Chand. 130 (Wis. 1849); *State v. Kohler*, 200 Wis. 518, 228 N.W. 895, 905-06 (1930); *State ex rel. Wettengel v. Zimmerman*, 249 Wis. 237, 246-48, 24 N.W.2d 504 (1946) (dispute over primary winner for U.S. Senate). Again, these cases are often heard and decided in a matter of days and weeks, given the need for clarity in the lead-up to election day.[13]

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[13] Redistricting litigation, discussed in Section III, *infra*, likewise must be conducted on a short timeline in Wisconsin that would be unduly complicated and burdensome if congressional districts were required to be litigated separately. Wis. Stat. §§ 10.01(2)(a),

Any application of ISLT that resulted in different rules for state and federal elections would stress Wisconsin's system to the breaking point. Under Petitioners' formulation, Wisconsin courts can apply the Wisconsin Constitution to the former, but not the latter. (Pet. Br. I, 23) As a result, the rules may differ for the election of a governor compared to a U.S. Senator, though both positions serve the interests of all Wisconsinites and are chosen by statewide election, often on the same ballot, voted on in the same election process. See Dem. Nat'l Comm., 451 F.Supp.3d at 959-60 (noting that the April 7 election included a presidential primary, in addition to various state and local elections, including for a justice of the Wisconsin Supreme Court). This threat is particularly acute for Wisconsin, since it would go from having approximately 1,850 elections every cycle, to having approximately 3,700 for any election for both state (or local) and federal offices. If subsequent elections had to be administered under separate rules, due to differing state and federal interpretation of the same statute, that bifurcated system would crush municipal clerks. Ballots, voting procedures, counting procedures, and post-election canvasses could all be thrown into question by divergent rules.

10.06(1)(f) set the deadline for notices for primary and general elections, which must specify where district boundary information may be obtained (third Tuesday in March prior to those elections). In 2022, this was March 15; *cf. Johnson*, 2022 WI 19 (opinion filed April 15, 2022).

Moreover, prompt resolution of election disputes by Wisconsin's state courts is critical to clarify for the "small army of local election officials" the ground rules for any given election. Wisconsin's decentralized system necessarily relies on municipal clerks knowing and carrying out those rules. Many clerks, particularly in smaller municipalities, operate without the benefit of a law department or municipal attorney, or otherwise have limited access to legal counsel. They must rely on guidance, opinions, or decisions from the Wisconsin Elections Commission or, eventually, a decision from the courts. But by shuttling myriad election disputes instead to federal court on extremely tight timelines, and creating a risk of inconsistent rulings by separate courts, applicable to different elections on the same ballots, ISLT would significantly compound the difficulty Wisconsin's 1,850 clerks already face in determining how to properly administer elections.

C. ISLT would weaken Wisconsin's bipartisan election administration.

While municipal clerks generally run Wisconsin elections, they do so with help and input from other non-legislative actors. Wisconsin's Secretary of State is not involved in administering elections. Instead, the state authority is the bipartisan Wisconsin Elections Commission. It is the successor agency to the Government Accountability Board, which was acclaimed for its non-partisan structure and performance during its existence from

2007 to 2016. Daniel P. Tokaji, *America's Top Model: The Wisconsin Government Accountability Board*, 3 U.C. Irvine L. Rev. 575, 577 (2013). Unlike the Government Accountability Board, which was non-partisan, the Commission is a bipartisan body with members appointed by officials from both major parties. Wis. Stat. § 15.61(1)(a). The Legislature, through its leadership, is entitled to appoint four of the six commissioners. Wis. Stat. § 15.61(1)(a)1–4 (commissioners are appointed by the state senate majority leader, minority leader, the speaker of the assembly, and the assembly minority leader).

The Commission has statewide authority for the administration of Wisconsin's election laws. Wis. Stat. § 5.05(1). To that end, it is empowered to perform certain functions under the Wisconsin statutes and Constitution. The Commission adjudicates complaints that election officials have violated the election code. Wis. Stat. § 5.06(1). It can also investigate and make determinations regarding certain election-related crimes and civil violations. Wis. Stat. § 5.05(2m). It prescribes election forms, including registration forms, forms for hospitalized voters, and uniform absentee instructions. Wis. Stat. §§ 6.33(1), 6.86(3)(a)1, 6.869. And it may promulgate administrative rules and issue guidance documents and advisory opinions about Wisconsin's election statutes. Wis. Stat. §§ 5.05(1)(f), (6a), 227.01(3m).

Here, too, Petitioners' ISLT would endanger Wisconsin's system. Day-to-day statewide election

administration is not handled by the Secretary of State or other purely executive official or agency. *Compare* Mich. Comp. Laws § 168.31; 2022 Minn. Stat. §§ 204B.071, 204B.146, 204B.27 (duties of the Michigan and Minnesota Secretaries of State in election administration). Wisconsin's Legislature already plays a significant role, both through the appointment of most Commission members and through various oversight mechanisms in Wisconsin administrative law. *See* Wis. Stat. §§ 227.19, 227.26, 227.40(5).[14] ISLT would upend this balance for federal elections. The Commission performs critical functions in interpreting, implementing, and enforcing Wisconsin law. Under Petitioners' view, it is not clear that the Commission, part of Wisconsin's executive branch, could continue this work, resulting in uneven (and poorer) election administration state-wide.

For example, the Commission is required to establish and maintain a toll-free line at which electors can "report possible voting fraud and voting rights violations, to obtain general election information, and to access information concerning their registration status, current polling place

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[14] The Legislature also aggressively participates in litigation on its own behalf, including litigation around elections. *See Johnson*, 2022 WI 19; *Dem. Nat'l Com. v. Bostelmann*, 2020 WI 80, 394 Wis. 2d 33, 949 N.W.2d 423; *League of Women Voters of Wis. v. Evers*, 2019 WI 75, 387 Wis. 2d 511, 929 N.W.2d 209; *Kormanik.*, No. 2022CV1395; *Rise,* No. 2022CV2446; *League of Women Voters of Wis.*, No. 2022CV2472.

locations, and other information relevant to voting in elections." Wis. Stat. § 5.05(13)(a). Could the Commission continue to provide that type of authoritative information? What if the Legislature disagreed with its contents?[15] On whose guidance could voters rely, and would that change depending on whether it was a state or federal election? This additional layer of confusion would damage Wisconsin elections. Wisconsin has opted to resolve these issues through its bipartisan Commission, and this Court should reject efforts to overturn this policy decision.

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[15] For example, in 2020, the City of Madison received absentee ballots in parks throughout the City. The administrator of the Commission indicated that such events did not violate Wisconsin law. Legislative leaders disagreed. *See* JT Cestkowski, *City of Madison stands by 'Democracy in the Park' despite letter from Republicans*, WKOW (Oct. 1, 2020) https://www.wkow.com/news/politics/city-of-madison-stands-by-democracy-in-the-park-despite-letter-from-republicans/article_531e606c-b418-55d7-b68f-388a89a2db0b.html.

III. Adopting ISLT would eviscerate this Court's promise in Rucho v. Common Cause that state remedies may exist to address partisan gerrymandering and contravene Wisconsin's efforts to do so.

A. State-law remedies are all that stand between Wisconsin's political branches and irredeemable partisan gerrymandering of congressional districts.

While refusing to weigh the excesses of partisan gerrymandering under the federal constitution in *Rucho v. Common Cause*, this Court assured the plaintiffs—and Wisconsin voters—that all was not lost: "our conclusion [does not] condemn complaints about districting to echo into a void." 139 S. Ct. at 2507. Chief Justice Roberts expressly noted that "[t]he States … are actively addressing the issue on a number of fronts," including under their own constitutions. *Id. at* 2507–08. Now, petitioners ask this Court to trample those initiatives and nullify state-law protections against a practice the majority acknowledged has long frustrated Americans.

Partisan gerrymandering remains unaddressed in Wisconsin, four years after this Court vacated and remanded *Gill v. Whitford*.[16] *Amici*

[16] *Gill v. Whitford* dealt with a challenge to state legislative, not congressional districts. However, both types of districts are

include three of the original Wisconsin plaintiffs in that suit: Helen Harris of Milwaukee, Mary Lynne Donohue of Sheboygan, and William Whitford of Madison (collectively, the "*Whitford Amici*"). While their challenge to Wisconsin's maps was pending in the district court on remand, this Court issued *Rucho*, which ended the *Whitford Amici's* partisan gerrymandering claim in federal court. The *Whiford Amici* did not, however, abandon their work for fair maps for Wisconsin and vindication of their rights. They took this Court at its word when it pointed to state-law-based remedies while foreclosing federal claims.

Amici engaged in many activities aimed at ending partisan gerrymandering via state law: several *amici* participated in community organizing and public education campaigns through the Wisconsin Fair Maps Coalition and affiliated groups—an effort that has generated 55 county resolutions, 32 successful county referenda, and 21 successful municipal referenda in favor of fair maps.[17]

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created by the same actors in Wisconsin and have been historically subject to the same state constitutional limitations. Wisconsin is a politically divided state, and partisan incentives to tip the balance of the state's congressional delegation parallel those at play in state assembly and state senate districting.

[17] Matthew Rothschild, *Fair Maps Movement in Wisconsin Rolls On*, Wisc. Democracy Campaign (Apr. 7, 2021), https://www.wisdc.org/news/commentary/6791-fair-maps-movement-in-wisconsin-rolls-on.

All *amici* also submitted public comments to the Wisconsin Supreme Court when it considered a rule-making proposal filed in 2020 concerning redistricting litigation,[18] and participated in Wisconsin's most recent cycle of redistricting litigation[19] (discussed further below).

ISLT, by putting congressional districts beyond the reach of *any* relevant state constitutional standard, would pull the rug out from under *amici*, who have been actively pursuing state-law-based solutions in the wake of *Rucho*. This result would indelibly wound public trust in the judiciary and leave Wisconsinites without the tools required to enforce their state's republican form of government.

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[18] William Whitford *et al*, Comment on Rules Petition 20-03 (Nov. 24, 2020), https://www.wicourts.gov/supreme/docs/2003commentsjohnson.pdf; Comments from Law Forward, Inc. on Proposed Redistricting Procedures (Nov. 30, 2020), https://www.wicourts.gov/supreme/docs/2003commentslawforward.pdf

[19] Law Forward served as counsel in both state and federal litigation, Ms. Donohue and Mr. Whitford were amici in *Johnson*, and Ms. Harris was a plaintiff in the federal *BLOC* case. *Johnson*, 2022 WI 19; *Black Leaders Organizing for Communities v. Spindell*, 3:21-cv-00534-jdp-ajs-eec (May 5, 2022).

B. While Wisconsin has not yet heard a state-law partisan gerrymandering claim, there is reason to believe its courts will police the practice, absent this Court adopting ISLT.

No litigant has yet challenged districts (congressional or otherwise) as a partisan gerrymander in Wisconsin under the state's constitution or statutes. This is explained by two realities: the recency of *Rucho*'s deathblow to federal claims (now only three years old), and Wisconsin's impasse litigation during the 2020 redistricting cycle (which concluded only six months ago). The timing of *Rucho* left essentially no opportunity to challenge Wisconsin's 2010-cycle legislative maps in state court before new maps would be drawn as a matter of course. During the 2020 cycle, Wisconsin's redistricting did go to court. But this litigation arose out of the failure of the political branches to enact new maps through the legislative process, not via a challenge to a new enacted plan. Although some justices on the Wisconsin Supreme Court opined on partisanship and gerrymandering issues, they did so at a preliminary stage of impasse litigation where the court itself sat in the map-drawing seat. No Wisconsin court has yet entertained, much less resolved, a partisan gerrymandering challenge.

Leaving aside the recent impasse litigation, there are significant indications that Wisconsin's courts would police partisan gerrymandering. Since

early statehood, Wisconsin's Supreme Court has recognized the role of the state judiciary in holding the executive and legislative branches to the constraints of the constitution, from which all branches' powers derive. "It must be apparent from this view of the nature of the powers delegated to the various departments of the government, that none of them possess sovereignty; but, that they all have power granted to them, the nature and extent of which must be determined by the constitution which confers it." *Attorney Gen. ex rel. Bashford v. Barstow*, 4 Wis. 567, 661 (1855). The state judiciary's duty, which the Wisconsin Supreme Court shouldered in *Barstow* to remove a usurper from the office of governor, is to protect the rights of the people to be governed by the constitution they adopted: "[R]ights are fixed by the constitution, and the court … is the mere instrument provided by the constitution to ascertain and enforce their rights as fixed by that instrument." *Id.* at 659.

The Wisconsin Supreme Court has already embraced this rights-enforcing role against the political branches in the redistricting realm. Sixty years ago, that court stepped in to prevent an attempt by the Legislature to redistrict state legislative seats by joint resolution, without presentment to the governor. *State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 126 N.W.2d 551 (1964). (Reynolds, much like the present case, turned on the meaning of "the legislature" in the state constitutional provision directing reapportionment.) The court unanimously concluded:

> [W]e must construe sec. 3, art. IV, in the most reasonable manner in relation to the fundamental purpose of the constitution as a whole, to wit: to create and define the institutions whereby a representative democratic form of government may effectively function.
>
> … Since the constitution itself places such heavy emphasis on the requirement that the legislative districts be apportioned 'according to the number of inhabitants' it would be unreasonable to hold that the framers of the constitution intended to exclude from the reapportionment process the one institution guaranteed to represent the majority of the voting inhabitants of the state, the Governor.
>
> Both the governor and the legislature are indispensable parts of the legislative process.

Id. at 55-57.

In the same seminal case, the court observed the absurd consequences of withholding judicial enforcement of rights in such situations: "the fallacy of withdrawing affirmative judicial protection from voting rights lies in the self-perpetuating nature of the disenfranchisement. As recently noted: 'We are told ... that redress of the *Colegrove* wrong should be sought in the electoral process, but is this a

practicable suggestion, when the wrong complained of is the corruption of the electoral process.'" *Id.* at 562 (quoting C. L. Black, *Inequities in Districting for Congress:* Baker v. Carr *and* Colegrove v. Green, 72 Yale L. J. 13, 14 (1962)).

Perhaps most importantly, unlike its federal counterpart, Wisconsin's Constitution guarantees a judicial remedy for every wrong. Article I, section 9 proclaims: "Every person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character…." In *Rucho*, the Court recognized partisan gerrymandering as wrong but denied the existence of a federal remedy. 139 S. Ct. at 2509 ("For the first time ever, this Court refuses to remedy a constitutional violation because it thinks the task beyond judicial capabilities.") (Kagan, J. dissenting). But Wisconsin courts are bound by the state constitution to provide remedies in such cases. To prohibit state courts from applying this mandate in the partisan gerrymandering context would negate that promise made in the Wisconsin Constitution.

While statutory revisions prohibiting partisan gerrymandering are unlikely to pass Wisconsin's current Legislature (though over 15 bills and joint resolution on the topic have been introduced in the last seven legislative sessions, not one has received a

vote[20]), popular appetite for this type of reform is strong. Fifty-six of Wisconsin's 72 counties are on the record as favoring non-partisan redistricting reform and fair district maps.[21] Should other changes to state law (*e.g.,* a statute or constitutional amendment creating a vehicle for voter-initiated referendums) open the doors to direct democracy legislation through referenda on this issue, state courts could soon be tasked with applying statutory limits on partisan gerrymandering of congressional districts. The law is developing in Wisconsin, and adopting ISLT now would prematurely end this experiment in the laboratory of democracy via federal overreach.

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[20] Wisconsin Fair Maps Coalition, Gerrymandering in Wisconsin, *Bills or Resolutions Introduced to Reform Redistricting in Wisconsin in the Past Decade*, (Accessed Oct. 25, 2022), https://www.fairmapswi.com/wi-maps.

[21] Rothschild, *supra* at n.17.

CONCLUSION

The Court should affirm the holding of the North Carolina Supreme Court.

October 26, 2022. Respectfully submitted,

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