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 DEMOCRACY AND RACE SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae are law professors who specialize in election law, the law of democracy, and the intersection of law and race.[2] They have studied the history of state legislatures and their roles in redistricting, especially the structure and tradition of redistricting. *Amici* submit this brief to help the Court understand the historically hollow foundation of the Independent State Legislature Theory ("ISLT"), and to explain why Petitioners' arguments supporting the ISLT are fundamentally flawed.

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[1] No counsel for any party authored this brief in whole or in part. No entity or person other than *amici curiae* or their counsel made any monetary contribution toward the preparation and submission of this brief. All parties have given blanket consent the participation of *amicus curiae*.

[2] University affiliation is provided for identification purposes only; all *amici* are participating in their individual capacities and not on behalf of their institutions.

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SUMMARY OF ARGUMENT

The Independent State Legislature Theory ("ISLT"), which Petitioners press this Court to adopt, would undermine our constitutional system of checks and balances by stripping away state courts' authority to review state election laws and regulations for compliance with state constitutions for congressional elections. Eliminating state judicial review of Elections Clause cases would give political actors—some of whom will do anything to acquire and maintain political power—judicially unreviewable, and thus functionally unchecked, power over election laws. This would leave the liberty protected by the right to vote at the whim of the state legislatures.

Petitioners' argument is contrary to our constitutional structure and the Framers' intent. Indeed, it defies everything we know about the Framers' distrust of state legislatures and goes against foundational principles of separation of powers and federalism that have long guided our constitutional system. Moreover, the ISLT's practical effects demonstrate its infeasibility. It would require this Court to arbitrate a conflagration of election administration disputes that would threaten our fragile democracy and further risk this Court's precious and necessary legitimacy.

This Court should reject the ISLT for two reasons. First, the ISLT would unconstitutionally free state legislatures from the fundamental structural checks and balances and federalism built into our constitutional system, defying the history and tradition of state-court judicial review. Second, despite Petitioners' assertion that their version of the

ISLT is limited in scope and applies only to state-court review of time, place, and manner regulations in federal elections, the lines Petitioners draw are arbitrary and have no limiting principle. In practice, the ISLT would throw election regulation and administration into chaos. The ISLT naïvely relies on the idea that some other entity would step in to fill the void created by jettisoning state-court adjudication of electoral disputes. But there is no indication Congress would step in, or that federal courts have the capacity to handle an explosion of electoral disputes on their dockets. In fact, this Court has already concluded federal courts are ill-equipped to resolve these issues. *See generally Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).

Given the long-standing, important role state courts have played in protecting the right to vote, this Court should not divest state courts of the authority to review election laws and regulations. Doing so would undermine the fundamental right to vote in America.

ARGUMENT

I. The Elections Clause Does Not Free State Legislatures from the Fundamental Structural Check and Balance of State-Court Review.

A. State Courts Have General Jurisdiction Regardless of the Elections Clause.

The American constitutional system is built upon the twin pillars of separation of powers and federalism, which together protect liberty through a "diffusion" of powers. *See Bond v. United States*, 564 U.S. 211, 221–22 (2011); *see also State ex rel. Wallace v. Bone*, 304 N.C. 591, 598 (1982) ("In the compound republic of America, the power surrendered by the people, is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments." (quoting THE FEDERALIST, No. 51)).

The ISLT implicates both pillars. Separation of powers is as important at the state level as the federal level. The Constitution has left the exact allocation of powers between the branches to state governments to determine. *See Wolfe v. McCaull*, 76 Va. 876, 880 (1882) ("It is one of the fundamental principles of our government, State and Federal, that the legislative power should be separate from the judicial."); *State v. Nichols*, 26 Ark. 74, 77 (1870) ("[T]he people . . . are fully authorized to deposit power in such branches as to them may seem best."). The ISLT demands that the Court step in and disrupt the allocation of power at the state level in the regulation of the time, place, and manner of federal elections.

Separation of powers as defined in the U.S. Constitution and many states' constitutions "has been deemed . . . essential to liberty." *Ogden v. Witherspoon*, 3 N.C. 227 (1802); *see Bank Markazi v. Peterson*, 578 U.S. 212, 238 (2016) (Roberts, C.J., dissenting) ("As Hamilton wrote, quoting Montesquieu, 'there is no liberty if the power of judging be not separated from the legislative and executive powers.'" (quoting THE FEDERALIST No. 78)); *Bond*, 564 U.S. at 222 ("The structural principles secured by the separation of powers protect the individual[.]"). Since the early days of our country, the notion that powers could be concentrated under one branch was seen as a road to tyranny. *See, e.g.*, *Woart v. Winnick*, 3 N.H. 473, 481 (1826) ("[T]he union of the legislative and judicial power in the same branch of the government is, in its very essence, tyranny."); *see also State v. Brill*, 100 Minn. 499, 504 (1907) ("[C]oncentrating [legislative, executive, and judicial power] in the same hands is the precise definition of a despotic government. It will be no alleviation that these powers will be exercised by a plurality of hands and not a single one." (quoting Jefferson, Notes on Virginia, p. 195; Story, Const. Law, vol. 1, § 525)).

This was because of the deep fear that joining legislative and judicial power together would expose citizens "to arbitrary control, for the judge would be the legislator." *Woart*, 3 N.H. at 503–04. And if the legislature was "permitted to exercise judicial power also, or control the action of the judges within their peculiar sphere, the liberty of the citizens, under the government of good legislators, would be in imminent peril, and under bad ones would be entirely

destroyed." *Fisher's Negroes v. Dabbs*, 14 Tenn. 119, 138 (1834). Thus, the legislature was given the power to make laws, while the judicial branch was given the power interpret those laws. *See Respublica v. Oswald*, 1 U.S. 319 (Pa. 1788). Under this system, courts served as a check on arbitrary legislative action by ensuring legislatures acted within the powers granted to them by the people through state constitutions. *See Rison v. Farr*, 24 Ark. 161, 168 (1865) ("The constitution is the fortification within which the people have entrenched themselves for the preservation of their rights and privileges, and every act of the legislature . . . , which infringes upon any right declared in the constitution, . . . is absolutely void."); *Kamper v. Hawkins*, 3 Va. 20, 28–32 (Va. Gen. Ct. 1793).

Given the importance of separation of powers, it is the default rule, unless it has been explicitly usurped. *Dearborn Twp. v. Dail*, 334 Mich. 673, 683 (1952) ("That the rule favoring strict separation of powers prevails throughout the United States need merely be mentioned in passing."). This default rule exists at both the federal and state levels. In fact, the U.S. Constitution recognizes the importance of state courts in this system by allotting general jurisdiction to state courts, but not to federal courts. *See Aldinger v. Howard*, 427 U.S. 1, 15 (1976); ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 5.1 (8th ed. 2021). Indeed, federal courts did not become widely available to address federal questions in the first instance until after Reconstruction. State courts' general jurisdiction "can be overcome [only] 'by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility

between state-court jurisdiction and federal interests.'" *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 378 (2012) (quoting *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981)).

Petitioners argue the Elections Clause explicitly strips state courts of their general jurisdiction. They are wrong. To conclude the Elections Clause strips state courts of their jurisdiction, this Court would need to conclude that "Legislature" in that Clause means only the state legislature and the not the state legislative *process*, which includes amendments by the people through referenda, exercise of the executive's veto, and state judicial review. This Court rejected such a narrow reading of the Elections Clause in other cases. *See, e.g.*, *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787 (2015) ("*AIRC*") (upholding citizen referenda changing state redistricting process); *Smiley v. Holm*, 285 U.S. 355 (1932) (upholding executive veto of time, place, and manner restrictions); *see also State ex rel. Davis v. Hildebrant*, 114 N.E. 55, 58 (Ohio 1916) (interpreting "Legislature" under the Elections Clause to be broader than "the members of the bicameral body"), *aff'd sub nom. State of Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916) .

Petitioners point to no evidence that state courts have ever operated as if they lacked jurisdiction to adjudicate disputes regarding federal elections. On the contrary, caselaw demonstrates that state courts have historically adjudicated time, place, and manner regulations by applying the provisions of their state's constitution. This history, discussed below, supports a broader reading of the Elections Clause that is inconsistent with the ISLT. It also supports the

conclusion that the Framers never intended the word "Legislature" to be read as narrowly as Petitioners demand.

B. The ISLT Would Upend Deeply Rooted Principles of Federalism.

The ISLT poses a grave affront to deeply rooted principles of federalism. "[B]oth bedrock theory and longstanding practice dictate that (1) the citizens of each state are entitled to establish their own state's constitution and (2) it is the task of state courts, which operate on behalf of the state's citizens, to interpret state law, including state constitutional law." Dan T. Coenen, *Constitutional Text, Founding-Era History, and the Independent-State-Legislature Theory*, 57 GA. L. REV. (forthcoming 2023) (draft at 34) draft available at https://ssrn.com/abstract=4223731. The ISLT demolishes both bedrock principles. It inverts these principles by first finding that federal courts are superior to state courts in reviewing state election laws, and second, in doing so, stripping citizens of the choice to enable their state court to invalidate state legislation. *Id.* at 35.

This outcome directly conflicts with the axiom that "state courts rather than federal courts are the ultimate interpreters of state law[.]" Vikram David Amar & Akhil Reed Amar, *Eradicating Bush-League Arguments Root and Branch: The Article II Independent-State-Legislature Notion and Related Rubbish*, 2021 S. CT. REV. 1, 43 (2021). This axiom is apparent both in fundamental federalism principles and in longstanding doctrines. *See* Leah M. Litman & Katherine Shaw, *Textualism Judicial Supremacy, and the Independent State Legislature Theory*, 2022 WIS. L. REV. (forthcoming 2022) (draft at 22), draft

available at https://ssrn.com/abstract=4141535. State laws are better understood—and therefore better addressed—by state courts due to their "understanding of and immersion in their states' legal culture, precedent and constitutions." Carolyn Shapiro, *The Independent State Legislature Theory, Federal Courts, and State Law*, 90 U. CHI. L. REV. (forthcoming 2023) (draft at 54), draft available at https://ssrn.com/abstract=4047322. For example, the abstention doctrine permits federal courts to decline to hear cases of unsettled questions concerning state law. *See, e.g.*, *Green v. Lesse of Neal*, 31 U.S. (6 Pet) 293 (1832) (state courts' interpretations of state legislative enactments must be respected by federal courts); *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496, 500 (1941) (explaining "the last word on the statutory authority . . . belongs neither to us nor to the district court but to the [state] supreme court."). In applying this doctrine, federal courts recognize they cannot decide what state law is or ought to be. Amar & Amar, *supra*, at 44.

Petitioners brush this history aside by arguing that respecting traditional views of federalism and separation of powers "would empty [the Elections Clause's] assignment of election-regulating authority to *state legislatures* of all meaning." Pet'rs Br. at 21 (emphasis in original). Petitioners suggest that state courts should be stripped of their authority to review state laws because, "[u]nlike ordinary state legislation, regulating elections to federal office is a power governed, defined, and limited by the federal Constitution." *Id.* at 22. But this Court has explained that state courts should be given deference when it comes to matters involving federal elections. For

example, in *Growe v. Emison*, the Court held that "reapportionment is primarily the duty and responsibility of the State through its legislature or other body," which includes state courts. 507 U.S. 25, 34 (1993).

Eliminating a state court's authority to interpret a state election law also intrudes on democracy. Indeed, the states are the laboratories of democracy. *New State Ice Co. v. Leibmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); *see also Evenwel v. Abbott*, 578 U.S. 54, 89 (2016) (Thomas, J., concurring) ("States are free to serve as laboratories of democracy. That 'laboratory' extends to experimenting about the nature of democracy itself." (cleaned up)). Recent scholarship has also highlighted that state governments have also been forces against democracy—*e.g.*, by allowing voter suppression, gerrymandering, state legislatures to take power from incoming opposing-party governors, and use of police power against vulnerable communities. *See, e.g.*, Jacob M. Grumbach, *Laboratories of Democratic Backsliding*, Working Paper (2022), available at https://csap.yale.edu/sites/default/files/files/grumbach-apppw-4-20-22.pdf. Some state actors will do whatever they can, including rewriting the rules, to hold onto power. By vitiating state courts' authority to serve as a check on state legislatures, the ISLT ensures these laboratories will have a higher likelihood of achieving anti-democratic results.

C. The Long-Standing Role of State Courts in Reviewing Election Laws Lays Bare the Lack of Historical Support for the ISLT.

To properly interpret the Elections Clause, this Court must consider the Clause against the backdrop of the long historical practice of state-court judicial review of election laws, including state election laws enacted pursuant to the U.S. Constitution. As this Court recently observed, "where a governmental practice has been open, widespread, and unchallenged since the early days of the Republic, the practice should guide our interpretation" of the constitutional provision at issue. *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2137 (2022) (citations omitted); *see also* Guy-Uriel E. Charles & Luis Fuentes-Rohwer, Chiafalo*: Constitutionalizing Historical Gloss in Law and Democratic Politics*, 15 HARV. L. & POL'Y REV. 15, 30 (2020) ("[H]istorical practice since the founding offered a practical interpretation of the constitution.").

Using practice and tradition as a tool to understand the Constitution's meaning is one that James Madison endorsed. *See generally* William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 16–17 (2019) (giving examples from Madison's writings, including "the uniform & practical sanction given . . . by every . . . Branch of the Genl. Govt. for nearly 40 years; with a concurrence or acquiescence of every State Govt. in all its Branches, throughout the same period; and it may be added thro' all the vicissitudes of party, which marked the period." (quoting Letter from James Madison to Joseph C. Cabell (Sept. 18, 1828)). Further, the people also have a role in determining whether practice has been

established that reflects "the acquiescence of the people at large." *Id.* at 19 (quoting Letter from James Madison to Lafayette (Nov. 1826)) (citations omitted).

Moreover, this Court recognized three decades ago that it "has required federal judges to defer consideration of disputes involving redistricting where the State, through its legislative ***or*** judicial branch, has begun to address that highly political task itself." *Growe*, 507 U.S. at 33 (emphasis in original).

State-court judicial review of election-related enactments by a state legislature pursuant to Article I and other similar articles of the U.S. Constitution is an "open, widespread, and unchallenged" practice. *Bruen*, 142 S. Ct. at 2137. This remained true even after the explosion of redistricting litigation following this Court's invocation, in the 1960s, of the one-person, one-vote principle.

i. Historically, State Courts Exercised Judicial Authority in the Election Law Context.

In America's early years, elections were subject to significantly less regulation than they are today. *See generally* Tabatha Abu El-Haj, *Changing the People: Legal Regulation and American Democracy*, 86 N.Y.U. L. REV. 1 (2011). Nevertheless, even in this less-regulated period, state courts exercised jurisdiction over federal, state, and local elections. The distinction between federal-election administration and state-election administration, like the concept of increased regulation more broadly, is a modern invention.

For example, several cases during the Civil War considered whether soldiers could vote in elections, including congressional elections, if they were not physically present in the state at the time of the election. *See, e.g.*, *People ex rel. Twitchell v. Blodgett*, 13 Mich. 127, 147–48 (1865); *Bourland v. Hildreth*, 26 Cal. 161, 172–73 (1864). Cases continued after the Civil War. In particular, the Ohio Supreme Court found unconstitutional—as a matter of state law—a state statute impeding the voting rights of men with "a distinct and visible admixture of African blood." *Monroe v. Collins*, 17 Ohio St. 665, 684–85, 692 (1867). The court concluded that the state legislature cannot "unreasonably . . . abridge or impede [that right's] enjoyment by laws professing to be merely remedial." *Id.* at 685. The Ohio court explained that "[t]he power of the legislature in such cases is limited to laws regulating the enjoyment of the right, by facilitating its lawful exercise, and by preventing its abuse." *Id.* at 685–86. Ultimately, the court ruled that the law, which limited registration for all elections, was void under the state constitution. *Id.* at 692.

Three decades later, in *Gentsch v. State ex rel. McGorray*, 72 N.E. 900 (Ohio 1904), the court ruled that an Ohio law limiting election day hours from 5:30 am to 9:00 am passed muster under Ohio's constitution. *Id.* at 901. This law concerned voting on general-election day—November 8, 1904—and therefore applied equally to federal, state, and local elections. *Id.* at 900. Just a few years later, in *State ex rel. Webber v. Felton*, 84 N.E. 85 (Ohio 1908), the Ohio court upheld a state law requiring voters to be members of a state-recognized political party to

participate in primary elections. *Id.* at 90. And in 1920, the court upheld a voter registration law requiring registrants to state their age in terms of years and months, concluding that the law did not violate either the Ohio or federal constitutions. *State ex rel. Klein v. Hillenbrand*, 131 N.E. 29, 32 (Ohio 1920).

Massachusetts' Supreme Judicial Court similarly reviewed election laws and regulations as early as 1887. That year, Massachusetts' high court considered the constitutionality of a state law providing that naturalized citizens could not register to vote within 30 days of naturalization. *Kinneen v. Wells*, 11 N.E. 916, 918 (Mass. 1887). Although *Wells* is facially a voter-qualification case and not a time, place, and manner case, the Massachusetts court established principles for judicial review of *all* laws governing *any* elections held in Massachusetts. The court acknowledged the legislature has the authority to regulate election matters, "[h]owever unwise, unjust, or even tyrannical [those] regulations may be." *Id.* at 919. However, "[t]o the provisions of the constitution all legislation is thus made subordinate[.]" *Id.* at 920 (citing *Blanchard v. Stearns*, 46 Mass. 298, 301 (1842); *Williams v. Whiting*, 11 Mass. 424 (1814)).

Wisconsin's highest court also has opined on state-court authority to review election laws. In 1880, the Wisconsin Supreme Court found a state law requiring prior registration to vote unconstitutional under the state constitution because it disenfranchised a constitutionally qualified elector. *Dells v. Kennedy*, 6 N.W. 246 (Wis. 1880). Nearly 20 years later, the court further explained the source of its judicial review

authority: "[I]f the legislature proceeds beyond the limits indicated, so as to leave no reasonable doubt on the question, then the bar of the constitution, as *maintained by that branch of the government with which such maintenance is specially intrusted*, will not hesitate to nullify its act." *State ex rel. Runge v. Anderson*, 76 N.W. 482, 486 (Wis. 1898) (emphasis added). Using these principles as guidance, the court found constitutional an 1897 election law, which applied to *all* elections in Wisconsin and mandated a candidate's name appear only once on the ballot. *Id.* at 483, 487. The court used similar reasoning to uphold the legislature's primary election law in 1910. *See State ex rel. McGrael v. Phelps*, 128 N.W. 1041 (Wis. 1910).

The highest courts of other states similarly have reviewed the constitutionality of state legislative enactments related to *all* elections in a state, including federal elections. Like North Carolina, Kentucky's constitution also has a Free Elections Clause. Section 6 of Kentucky's constitution provides that "[a]ll elections shall be free and equal." KY CONST. § 6. In *City of Owensboro v. Hickman*, the Supreme Court of Kentucky struck down a registration law because it violated Kentucky's Free and Equal Elections Clause by applying to voters in different locations in a discriminatory manner. 14 S.W. 688, 689–90 (Ky. 1890).

Over a century ago, in *State v. Jefferson Cnty. Comm'rs*, the Florida Supreme Court invalidated a provision of a Florida law requiring a prospective voter to:

> produce two qualified electors of the election district in which he offers to vote, who shall be personally known to at least two of the inspectors, and who shall each declare under oath, that such person does live in the election district in which he offers to vote, and has resided to their knowledge in Florida one year and in the county six months next preceding the election[.]

17 Fla. 707, 718 (1880). This Florida law applied to *all* elections in Florida, including federal elections. The court noted that the voters already possessed the state-required qualifications to vote, and the additional requirements violated Florida's constitutional provision protecting the right to vote. *Id.* at 716, 721.

Also in 1890, the Supreme Court of Indiana, in *Morris v. Powell*, invalidated residency qualifications for voter registration established by the General Assembly under the state constitution. 25 N.E. 221, 222, 226 (Ind. 1890) (citing Indiana's free and equal election clause, IND. CONST. art 2, § 1). And in 1892, the Supreme Court of Pennsylvania upheld a regulation passed by the legislature providing for secret ballots, emphasizing its "harmony with article 1, § 5 [of its] Const[itution], which declares that 'elections shall be free and equal'" and noting that the

"right to cast a free ballot [is one] no legislature can interfere with." *De Walt v. Bartley*, 24 A. 185, 186 (Pa. 1892).

This tradition of judicial review continued into the twentieth century. *See, e.g.*, *State ex rel. Ellis v. Brown*, 33 S.W.2d 104, 108 (Mo. 1930) (construing Missouri's in-person voting statute for any election); *Perkins v. Luca*, 246 S.W. 150, 153, 156–57 (Ky. 1922) (holding registration law void under state's free and equal election clause); *Walbrecht v. Ingram*, 175 S.W. 1022, 1025 (Ky. 1915) (holding election was not "free and equal" under Kentucky's constitution because of a requirement to print ballots based on number of voters in last election).

These illustrative examples, along with those that follow, show that review of state legislative enactments regulating elections were unquestionably the province of state courts, which ruled under the provisions of both state and federal constitutions—including state constitutional provisions ensuring free and fair elections.

ii. The Historical Exercise of Judicial Review of Congressional Elections Before One-Person, One-Vote Confirms the Invalidity of the ISLT.

Even before this Court's invocation of the one-person, one-vote principle, *see, e.g.*, *Baker v. Carr*, 369 U.S. 186 (1962) and *Reynolds v. Sims*, 377 U.S. 533 (1964), state courts were deciding cases concerning congressional elections. One of the first cases involving the redistricting of congressional districts was in Massachusetts in 1854. *Warren v. City of Charlestown*, 68 Mass. 84 (1854). There, the

Massachusetts Supreme Judicial Court found void a redistricting effort by the state legislature because the effort would not preserve voters' "rights to elect representatives and senators in the general court, and representatives in congress." *Id.* at 84; *see also Bourland*, 26 Cal. at 169.

Consider also two cases from 1932. That year, the Illinois Supreme Court struck down a congressional map as unconstitutional under the state constitution. *Moran v. Bowley*, 179 N.E. 526 (Ill. 1932). In so ruling, the court explained that "[t]he people of Illinois have by their Constitution of 1870 reserved to themselves the ultimate sovereignty to be exercised by means of the ballot. To protect and preserve that sovereignty they declared that all elections shall be free and equal . . . ." *Id.* at 531. The court further explained that "[t]he Legislature is not permitted to flagrantly violate this section the bill of rights and bestow upon classes or sections of voters a greater power and influence in elections than upon other like groups . . . ." *Id.* at 532. That same year, Virginia's highest court struck down a congressional map as violating its state constitution. *Brown v. Saunders*, 166 S.E. 105, 111 (Va. 1932). The court held that "[w]hen a State legislature passes an apportionment bill, it must conform to [state] constitutional provisions prescribed for enacting any other law, and whether such requirements have been fulfilled is a question to be determined by the court when properly raised." *Id.* at 107 (citations omitted).

State courts have also supervised congressional election administration and ballot access. For example, in 1881, the South Carolina Supreme Court heard a mandamus case involving the congressional

election of 1880, where the petitioners sought to require the Election Commission to count certain votes. *Ex parte Mackey*, 15 S.C. 322 (1881). The court held that the U.S. Constitution's provision that "each house shall be the judge of the election returns and qualifications of its own members" did not constitute "another remedy in the sense necessary to exclude the right to mandamus." *Id.* at 335–36. In 1896, the Kentucky high court affirmed a denial of a Kentucky citizen's request to have his name listed under the People's Party ticket for a congressional election. *Southall v. Griffith*, 37 S.W. 577 (Ky. 1896). A year later, the New York Court of Appeals ruled on which delegate was properly selected for the Republican ticket for a Congressional seat. *In re Fairchild*, 45 N.E. 943, 944–46 (N.Y. 1897). Similarly, in 1898, the Michigan Supreme Court determined which candidates should appear on the Republican ticket for Congress after a dispute involving the party nomination convention. *Stephenson v. Boards of Election Comm'rs*, 76 N.W. 914, 914 (Mich. 1898).

These state-court decisions on issues relating to the manner of congressional elections before the one-person, one-vote era exemplify the long-standing role of state courts in this area.

iii. The Historical Exercise of Judicial Authority Over Congressional Elections Since One-Person, One-Vote Confirms the ISLT's Invalidity.

After *Baker* and *Reynolds*, state courts increasingly exercised their authority over congressional redistricting. For example, in a case contemporaneous with *Baker*, the Supreme Court of Kentucky upheld a 1962 congressional map, noting

the court could find flagrantly disproportionate representation to be unconstitutional under the state's free and equal election clause. *Watts v. Carter*, 355 S.W. 2d 657 (Ky. 1962). Two years later, the Supreme Court of New Hampshire, in upholding congressional maps adopted by the legislature, explicitly asserted its authority to review congressional maps. *Levitt v. Maynard*, 202 A.2d 478, 481 (N.H. 1964), *overruled on other grounds by Norelli v. Sec'y of State*, No. 2022-0184, 2022 WL 1498345, at *6 (N.H. May 12, 2022). Similarly, in 1965, the Supreme Court of Virginia invalidated a malapportioned congressional redistricting plan under both state and federal constitutional provisions. *Wilkins v. Davis*, 139 S.E.2d 849 (Va. 1965).

The practice of state courts reviewing disputes concerning congressional districts has continued, particularly when the legislative process has broken down and failed to produce a map. *See, e.g.*, *Wattson v. Simon*, 970 N.W.2d 56, 66 (Minn. 2022) (holding current congressional districts unconstitutional and adopting new district boundaries); *In re Reapportionment Comm'n*, 268 A.3d 1185 (Conn. 2022) (adopting special master's congressional plan after commission failed to produce a map); *Johnson v. Wis. Elections Comm'n*, 967 N.W.2d 469 (Wis. 2021) (drawing congressional districts after legislature was unable to overcome governor's veto); *Hall v. Moreno*, 270 P.3d 961 (Colo. 2012) (upholding trial court's adoption of a congressional map after state legislature was unable to adopt one); *Jepsen v. Vigil-Giron*, No. D0101 CV 2001 02177, 2002 WL 35459960 (N.M. 1st Jud. Dist. Jan. 4, 2002) (explaining court was "required to redraw congressional districts due to an

impasse between legislative and executive branches of government"); *Perry v. Del Rio*, 67 S.W.3d 85 (Tex. 2001) ("[C]ourts must resolve redistricting controversies when the legislature does not do so."). Without state-court intervention, there likely would have been no properly drawn congressional maps in these states, which would have led to uncertainty for both election officials and voters.

Additionally, accepting this Court's invitation in *Rucho*, and responding to citizens' concerns regarding political entrenchment, state courts have addressed excessive partisanship in the redistricting process. *Rucho*, 139 S. Ct. at 2507 ("Provisions in state statutes and state constitutions can provide standards and guidance for state courts to apply."); *see, e.g.*, *Harkenrider v. Hochul*, No. 60, --- N.E.3d ---, 2022 WL 1236822, at *13 (N.Y. Apr. 27, 2022) (striking congressional map under the court's duty to "uphold those constitutional standards by adhering to the will of the People of this State and giving meaningful effect to" the state constitution); *Adams v. DeWine*, 195 N.E.3d 74 (Ohio 2022) (invalidating congressional district plan under the Ohio constitution); *cf. League of Women Voters of Pa. v. Commw. of Pa.*, 178 A.3d 737 (Pa. 2018) (invalidating congressional map under state's free and equal elections clause); *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 414 (Fla. 2015).

Judicial oversight of the redistricting process is in accordance with tradition and prior practice, as well as the will of the people. In several states, citizens have voiced their concern about overly politicized redistricting processes through either direct amendment of state constitutions or their duly elected

legislatures enacting a series of statutory and constitutional changes, which explicitly recognize state-court power to adjudicate disputes involving constitutional mandates for redistricting. For example, in 1976, the people of Connecticut passed a ballot measure vesting original jurisdiction in the state supreme court to hear challenges to a redistricting plan or rectify inaction. CONN. CONST. art. III, § 6(d). In 1983, Washington adopted a constitutional amendment giving its Supreme Court original jurisdiction to hear challenges to both state legislative and congressional maps. WASH. CONST. art. II, § 43. Similarly, in 1995, voters adopted a constitutional amendment giving the Supreme Court of New Jersey jurisdiction over disputes arising from the congressional map-drawing process. NJ CONST. art. II § 2, ¶¶ 7, 9. In 2010, voters passed the Fair Districts Amendment to the Florida constitution to create redistricting principles, and the Florida Supreme Court found that it has the authority to hear disputes arising under that amendment. *See Detzner*, 172 So. 3d at 370 (discussing the Fair Districts Amendment). And in 2014, New York voters passed a set of constitutional amendments permitting state-court review of any legislative redistricting, including congressional redistricting. *See* N.Y. CONST. art. III, §§ 4-5.

Interest in state-court judicial review of redistricting has increased in the past five years across the country and across partisan divides. In 2018, Colorado voters passed Amendment Y, granting the Colorado Supreme Court jurisdiction to review and ultimately accept or reject the constitutionality of congressional maps drawn by an independent

commission. *See, e.g.*, COLO. CONST. art. V. § 44.4(5)(b). That same year, Ohio voters adopted a constitutional amendment establishing a process and standards for congressional redistricting, which gave the Supreme Court of Ohio original jurisdiction in all cases arising under the article. OHIO CONST. art. XIX, §3. In 2020, Virginia's Constitution was amended by popular vote to grant state courts the express power to step in if the newly created (as of 2020) districting commission fails to draw district lines. *See* VA. CONST. art. II, § 6-A; *see also* VA. CODE ANN. § 30-399. And, just last year, Tennessee enacted a law under which a three-judge panel may hear any civil action that challenges the constitutionality of a statute that apportions or redistricts state congressional districts. TENN. CODE. ANN. §20-18-101.

A review of caselaw and legislative action over the past 150 years clearly demonstrates a long-standing practice of state courts reviewing the "times, places, and manner" of congressional elections under state constitutions. This practice is consistent with the text and structure of the Constitution. Endorsing the ISLT would upend this firmly rooted practice and cause chaos in the federal courts and state systems.

II. Petitioners' Articulation of the ISLT Lacks a Limiting Principle and Would Lead to Chaos.

A. Petitioners Fail to Provide a Limiting Principle and Require the Court to Overrule Precedent.

Despite protestations to the contrary, Petitioners fail to provide a limiting principle for the ISLT. Accepting Petitioners' reasoning would necessarily require the Court either to overrule its precedent in

other election-legislation cases, including *Smiley* and *AIRC*, or draw arbitrary and untenable distinctions. Petitioners read the word "exclusively" into the Elections Clause to modify "by the Legislature thereof." U.S. CONST. art. I, § 4, cl. 1. If Petitioners are correct, then both citizen referenda and executive vetoes also would violate the Elections Clause. Petitioners argue that they are not asking for *Smiley* and *AIRC* to be overruled, but they have no principled way of distinguishing those cases.

Ninety years ago, in *Smiley*, this Court concluded that lawmaking by the state legislature in connection with the Elections Clause must be in accordance with the method that the state has prescribed for legislative enactments, which in Minnesota (and virtually every other state) included the governor's veto. This Court explained that nothing in the Elections Clause "attempt[ed] to endow the Legislature of the state with power to enact laws in any manner other than that in which the Constitution of the state ha[d] provided that laws shall be enacted." *Smiley*, 285 U.S. at 368; *see also id.* at 369 ("General acquiescence cannot justify departure from the law, but long and continuous interpretation in the course of official action under the law may aid in removing doubts as to its meaning [and] [t]his is especially true in the case of constitutional provisions governing the exercise of political rights, and hence subject to constant and careful scrutiny."); *Koenig v. Flynn*, 285 U.S. 375, 379 (1932) (holding, for the reasons stated in *Smiley*, a concurrent resolution of the senate and assembly in New York establishing new congressional districts was ineffective because it had not been

submitted to the governor for approval as state law required).

Numerous courts have agreed that governors have veto power over election legislation in accordance with state law. *See, e.g.*, *Johnson*, 967 N.W.2d at 488 (explaining that Wisconsin's "precedent declares that the legislature's enactment of a redistricting plan is subject to presentment and a gubernatorial veto."); *Carstens v. Lamm*, 543 F. Supp. 68, 79 (D. Colo. 1982) (concluding that in creating congressional districts, court should afford no preference to plan approved by legislature but vetoed by governor); *Williams v. Kerner*, 195 N.E.2d 680, 683 (Ill. 1963) (concluding that "past practice, by authority, and by contemporaneous construction" showed the governor did not exceed his authority in exercising his veto power and vetoing *legislative* redistricting maps proposed by legislature).

Veto power does not rest with the executive alone but includes "a veto power lodged in the people." *AIRC*, 576 U.S. at 805 (citing *Hildebrant*, 241 U.S. at 569). More than a century ago, this Court explained in *Hildebrant* that the Elections Clause does not bar "treating the referendum [disapproving the legislation creating congressional districts] as a part of the legislative power for the purpose of apportionment, where so ordained by the state Constitutions and laws." 241 U.S. at 569. As a result, "for redistricting purposes, *Hildebrant* thus established, 'the Legislature' did not mean the representative body alone." *AIRC*, 576 U.S. at 805.

In *AIRC*, this Court considered the constitutionality of an initiative, adopted by Arizona voters, which "amended Arizona's Constitution to

remove redistricting authority from the Arizona Legislature and vest that authority in an independent commission." 576 U.S. at 792. In challenging this reallocation of redistricting authority from the legislature to the independent commission, the Arizona legislature effectively made the same unsupported argument Petitioners make here: the word "Legislature" in the Elections Clause refers specifically and only to the representative body that makes the laws for the people of a state. *Id.*

While reaffirming the use of independent commissions for redistricting, this Court disagreed with the Arizona legislature for the same reason it should disagree with Petitioners: "the people themselves are the originating source of all the powers of government." *Id.* at 813. To be certain, "[n]othing in [the Elections] Clause instructs, nor has this Court ever held, that a state legislature may prescribe regulations on the time, place, and manner of holding federal elections in defiance of provisions of the State's constitution." *Id.* at 817–18.

Petitioners' logic would invalidate all citizen initiatives concerning the administration of federal elections because those efforts are not part of the Petitioners' narrowly defined "Legislature." *See, e.g.*, Franita Tolson, *The "Independent" State Legislature in Republican Theory*, (2022) at 22, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4226098 ("[ISLT] allows the state legislature to disregard the preferences of the people right at the juncture in which they are exercising the oversight and accountability at the core of the majoritarian principles underlying our system of republicanism: during the election of federal officials.").

B. Adopting the ISLT Would Lead to Chaos in the Administration of, and Litigation Surrounding, Elections.

Perhaps the most concerning pragmatic problem the ISLT would create is dueling election regulations for state-level and federal-level offices. "Under the ISLT, if a state court finds some or all of a statute unconstitutional under the state constitution, the statute would still apply to federal elections." C. Shapiro, *supra*, (draft at 52). Or a federal court may disagree with a state court about how the state constitution's provision applies to federal elections under the Elections Clause. In both cases, the result would be different sets of rules for state-level and federal-level elections.[3]

Two simple examples warrant consideration. First, consider a state's authority to require voter identification. Utah, for example, requires voters to "present valid voter identification to one of the poll workers" before casting a ballot. UTAH CODE ANN. § 20A-3a-203(2)(b). Assume a voter challenges the voter identification requirement, complaining it violates the Utah constitution's free elections clause, which states that "[a]ll elections shall be free, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage."

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[3] Although the National Voter Registration Act of 1993 only applies to federal elections, states typically apply the same registration rules to state and federal elections, in large part due to difficulty in having two different sets of rules. *See* Estelle H. Rogers, *The National Voter Registration Act Reconsidered*, AM. CONST. SOC'Y FOR L. & POL'Y, at 2 (Nov. 2011), https://www.acslaw.org/wp-content/uploads/2018/04/Rogers_-_NVRA_Reconsidered_1.pdf.

UTAH CONST. art. I, § 17. If the Utah Supreme Court agreed and struck down the voter identification requirement, the ISLT would dictate that ruling could only apply to elections for state candidates and not for federal candidates. Accordingly, Utah voters could not be required to produce identification to vote for their state senator but would be required to produce identification to vote for their U.S. senator.

Next, consider a state's authority to delegate certain responsibilities for election management. In 2020, during the COVID-19 pandemic, elections officials in states like Michigan mailed every registered voter an absentee ballot application. *See, e.g.*, Todd Spangler, *Secretary of State: All Michigan voters will get absentee ballot applications at home*, DETROIT FREE PRESS (May 20, 2020, 7:15 AM), https://www.freep.com/story/news/politics/elections/2020/05/19/all-michigan-voters-get-absentee-ballot-applications-in-mail/5218266002/. But Michigan law does not provide for the mass distribution of absentee ballot applications; it merely lays out the processes by which Michiganders may request an absentee ballot. *See* MICH. COMP. LAWS ANN. § 168.759 *et seq.* The Secretary of State's decision to mail 7.7 million absentee ballot applications to Michiganders was not specifically authorized by statute.

Assume Michiganders then completed their absentee ballot applications, received their ballots, and voted. Should their votes be counted? The ISLT would suggest that absentee ballots submitted by voters who received applications automatically should be excluded with respect to federal candidates because voters improperly obtained those ballots, and the Michigan Secretary of State acted improperly because

only the Michigan Legislature could decide to mail absentee ballot applications to every Michigander. Those same ballots, however, would remain valid for state candidates. Would the elections officials tabulate the results of the "illegal" ballots as to the state candidates but not the federal candidates? Would those ballots be invalidated entirely?

Such inconsistency "would, at a minimum, require costly administrative duplication and create confusion for election officials and voters alike." C. Shapiro, *supra*, (draft at 52). And these are but two examples. The ISLT, taken to its logical extreme, implicates *all* time, place, and manner restrictions a legislature may enact. This "growing complexity of, and frequent changes in, federal, state, and local election laws adds to the likelihood that poll workers will err." Judith Shulevitz, *An Election Without Chaos Will Be a Miracle*, THE ATLANTIC, Oct. 15, 2020, https://www.theatlantic.com/ideas/archive/2020/10/five-hours-training-and-285-guard-democracy/616719/. And all this will lead to an explosion in litigation, uncertainty for elections officials, and voter confusion.

The ISLT would not only create major federalism concerns from doctrinal and prudential perspectives but also would lead to seismic practical challenges in election litigation. Under a maximalist view of the ISLT, *no* court could review *any* time, place, or manner restrictions because the Constitution provides that state legislatures enact those restrictions, while "the Congress may at any time by law make or alter such Regulations[.]" U.S. CONST. art. I, § 4. Taken on its face and to its extreme, only (a) state legislatures and (b) the United States Congress have a role in prescribing time, place, or

manner restrictions for federal-candidate elections. But this cannot be so: the Framers "did not—to say the least—believe that legislative bodies should be independent. Instead, they believed that legislatures needed to be made subject to a multiplicity of checks and balances within a system of separated government powers." D. Coenen, *supra*, (draft at 16). Against that backdrop, "it would be misguided—and, indeed, anomalous—to conclude that, by referring without more to 'the Legislature' in the Elections Clause, the Framers meant to put in place an independent-state-legislature doctrine that would nullify the check provided by 'the firmness of the judicial magistracy' in 'confining the operation . . . of laws' enacted by state legislatures." *Id.* (draft at 20) (internal quotation omitted).

Further, the argument that Congress will wade in and resolve time, manner, or place disputes is at best misguided and at worst disingenuous. Although the Elections Clause empowers the U.S. Congress to intercede, it rarely has done so. Election processes are not "an area where elected officials are likely to intercede. The one unassailable generalization that can be made about elected officials is that they were all elected. Once elections end and public attention fades, there is rarely any incentive for those who have succeeded in the electoral arena to alter the rules and procedures that put them in office." SAMUEL ISSACHAROFF, PAMELA S. KARLAN, RICHARD H. PILDES, NATHANIEL PERSILY & FRANITA TOLSON, THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 1077 (6th ed. 2022). Accordingly, Congress serving as a check on, or reviewing body responding to, state legislatures' time, place, and manner

restrictions is not a realistic option. And even if Congress were interested in tackling the peculiarities of state election regulations, under the ISLT, Congress could review only *federal* election regulations, not state regulations.

That leaves the courts. If state courts are suddenly told they are not permitted to review their state legislature's elections laws, then necessarily the federal courts will become inundated with emergency motions, requests for temporary restraining orders and injunctive relief, and lawsuits challenging every election administration action a state takes. By barring state courts from reviewing state election laws under state constitutions, "[f]ederal constitutional law would then be turned into a detailed election code for state elections." ISSACHAROFF ET AL., *supra*, at 1115. Historically, "federal courts have . . . declined to transform most issues of the regulation of state elections into federal constitutional matters. The question then becomes where, precisely, the boundary line between state and federal interests ought to be drawn." *Id.* And, of course, the federalization of some, but not all, aspects of state-level election administration will lead to dual systems and the resulting problems discussed above.

* * *

"[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer v. Brown*, 415 U.S. 724, 730 (1974). The ISLT, however, would plunge the democratic processes into chaos. States could enact legislation without checks and balances from other branches of the state,

including the state courts and governor. Dueling regulations for state-level and federal-level elections in the same state would create confusion and inflate administrative costs and burdens. Federal courts, or Congress (if it so chose), would become the arbiters of minute details of 50 sets of election codes. Endless ping-ponging litigation would overwhelm courts, particularly after redistricting and every two years leading up to, and immediately following, federal elections. And the respect that federal courts traditionally accord to their state counterparts would vanish. Such chaos would overwhelm the democratic processes in this country should the ISLT take hold and state courts be barred from exercising their proper function.

CONCLUSION

For the foregoing reasons, *amici curiae* request that this Court affirm the decision of the Supreme Court of North Carolina.

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