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 FOR FORMER REPUBLICAN ELECTED AND EXECUTIVE BRANCH OFFICIALS AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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BRIEF FOR FORMER REPUBLICAN ELECTED AND EXECUTIVE BRANCH OFFICIALS AS *AMICI CURIAE* SUPPORTING RESPONDENTS

INTEREST OF THE *AMICI CURIAE*[1]

Amici served in government as Republicans, in both elective and appointive office; they are listed in the appendix. They are deeply concerned about the implications of the "independent state legislature theory" (the "ISLT") for the functioning of our democracy, for reasons that transcend ideology and considerations of partisan advantage. *Amici* believe that the ISLT departs from the Framers' understanding of the constitutional text and purpose, undermining the checks and balances that are an essential component of American democracy. The experience of those *amici* who have served in Congress and other elective offices also gives them special insight into the radical ways in which the ISLT would disrupt the electoral process. Accordingly, *amici* submit this brief to assist the Court in the resolution of this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners advance the so-called independent state legislature theory, which posits that the Constitution's Elections Clause gives state legislatures sole and unreviewable responsibility for determining

[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. The parties have submitted blanket letters of consent to the filing of *amicus* briefs.

the state-law rules that govern federal elections. Although the precise contours of this theory are vague, its purest form maintains that only state legislatures may establish the state rules that govern the time, place, and manner of federal elections; the ISLT insists that these rules may not be constrained by state constitutions or state courts. Among its other implications, the ISLT would mandate that the people have no direct role in the formulation of election rules and that the legislature may not delegate responsibility for the formulation of those rules to executive branch officials.

This theory is novel, radical, and profoundly anti-democratic. The Court should reject it for several reasons.

A. The ISLT is inconsistent with the Constitution's text and history. The Elections Clause provides that "the Legislature" prescribes the rules for federal elections, but at the time of the Founding, state legislative authority was universally understood to be circumscribed by state constitutional provisions and subject to review by state courts. It is inconceivable that the Framers meant to displace this fundamental aspect of democracy. And in fact, the derivation of the constitutional text; the statements of the Framers themselves; immediate pre- and post-constitutional practice; subsequent practice in the first half of the nineteenth century; and—not least—the Framers' deep concern about the abuse of power by state legislatures all confirm that the Framers would have regarded the ISLT as preposterous.

B. This Court has consistently enforced state constitutional provisions that give authority over the processes of federal elections to state executive offi-

cials or to the people generally. Indeed, this Court recently supported its holding that federal courts lack the authority to review partisan gerrymanders by emphasizing that state courts *do* have that authority when applying state law.

C. The ISLT would have catastrophic effects on U.S. elections. If applied according to its terms, the theory would invalidate innumerable state constitutional provisions, while leaving uncertain the authority of state election officials to fill the resultant gaps. It would call into question the legality of the routine processes of state election administration. Inevitably, the ISLT would make federal courts the central players in elections, with responsibility for applying state law and determining electoral outcomes. That would frustrate essential principles of federalism, while undermining an already shaky public faith in the integrity of elections.

Of course, the full consequences of the ISLT are not entirely certain because the meaning of the theory itself is not certain. But that simply compounds the problems with the ISLT; this uncertainty would produce unending litigation and confusion. The Court should reject a theory that would lead to chaos in the U.S. electoral process.

ARGUMENT

I. The text and history of the Elections Clause demonstrate that state legislatures are constrained by state constitutions and courts when regulating congressional elections.

The question presented in this case is answered by the text and history of the Elections Clause. When the Framers wrote the Clause, "the Legislature" was

understood to mean a legislative body constrained by state constitutions and subject to the rulings of state courts. There is no reason that the Framers would have departed from that understanding; to the contrary, the Framers feared the prospect of unbridled state legislatures and sought to cabin their power. Petitioners' argument to the contrary is wrong.

A. "The Legislature" as used in the Elections Clause refers to state legislatures operating against the background of state constitutional constraints, which the Framers understood to include judicial review.

1. Petitioners' entire textual case hinges on the statement in the Elections Clause that "the Legislature" prescribes election rules. Pet. Br. 13. But that argument assumes its conclusion. Dating back to the Founding, state legislatures always have been thought to be circumscribed, both in procedure and substance, by their state constitutions. See Vikram David Amar & Akhil Reed Amar, *Eradicating Bush-League Arguments Root and Branch: The Article II Independent-State-Legislature Notion and Related Rubbish*, 2021 Sup. Ct. Rev. 1, 20. For example, at the time of the Founding, constitutions in at least five States explicitly provided voters with the power to instruct their state legislatures.[2]

It was also commonly understood at that time that state legislatures would be subject to judicial

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[2] See Pa. Const. of 1776, Art. XVI; N.C. Const. of 1776, Art. XVIII; Vt. Const. of 1777, Ch. 1, § XVIII; Mass. Const. of 1780, Pt. I, Art. XIX; N.H. Const. of 1784, Pt. I, Art. I, § XXXII; Vt. Const. of 1786, Ch. 1, § XXII.

review by state courts. As Alexander Hamilton explained, it could not be the "natural presumption" that "the legislative body are themselves the constitutional judges of their own powers." The Federalist No. 78, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Instead, "the courts were designed to be an intermediate body between the people and the legislature * * * to keep the latter within the limits assigned to their authority." *Ibid*. This theory of judicial review had been "of great importance in *all* the American constitutions," including those of the States. *Ibid.* (emphasis added).

It is hardly likely that the Framers would have meant to cast aside such foundational principles of American republicanism through the bald reference to "the Legislature" in the Elections Clause; in Justice Scalia's famous formulation, they would not have hidden an elephant in a mousehole. See *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). Had the Founders intended to work such a radical change, we would expect to see at least *some* debate on the point. Yet there is none. Even the most ardent proponents of the ISLT acknowledge that the constitutional history is "*silent* on whether state constitutions may impose substantive limits on the authority of state legislatures over federal elections." Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, 55 Ga. L. Rev. 1, 27 (2020) (emphasis added).

Indeed, throughout the debates over the Elections Clause, the term "legislature" was frequently used interchangeably with the terms "state" or "state government"—confirming that the Framers attributed no special significance to the term "legislature."

See Michael Weingartner, *Liquidating the Independent State Legislature Theory*, 46 Harv. J.L. & Pub. Pol'y (forthcoming 2023) (manuscript at 24), perma.cc/B39X-YR4Q.

2. Moreover, the textual history of the Elections Clause demonstrates that the Framers intended it to refer to state legislatures as constrained by their state constitutions and courts.

The text of the Elections Clause closely resembles Article V of the Articles of Confederation, which provided that "delegates [to Congress] shall be annually appointed in such manner as the legislature of each state shall direct." When the Articles came into effect, eight of ten state constitutions regulated the selection of delegates,[3] and three of the four state constitutions adopted after the Articles did the same.[4] The drafters of the Articles of Confederation thus could not have understood Article V's language to create independent state legislatures with respect to the appointment of delegates.

This understanding doubtless was carried over to the drafting of the Elections Clause (and its Article II counterpart, the Elector Appointment Clause). The Committees that drafted both Clauses at the Constitutional Convention contained members who had participated in drafting Article V of the Articles of Confederation and who subsequently helped write

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[3] See Del. Const. of 1776, Art. XI; Md. Const. of 1776, Art. XXVII; N.Y. Const. of 1777, Art. XXX; N.C. Const. of 1776, Art. XXXVII; Pa. Const. of 1776, § 11; S.C. Const. of 1776, Art. XV; Vt. Const. of 1777, Ch. 2, § X; Va. Const. of 1776.

[4] See Mass. Const. of 1780, Part 2, ch. 4; N.H. Const. of 1784, Part 2; S.C. Const. of 1778, Art. XXII.

state constitutions that regulated the appointment of delegates. See Hayward H. Smith, *Revisiting the History of the Independent State Legislature Doctrine*, 53 St. Mary's L.J. 445, 482-483 (2022). The Framers therefore could not have meant to establish independent state legislatures by using language that so closely resembled that of the Articles of Confederation, under which they knew state legislatures were *not* independent.

This textual history is further confirmed by the involvement of John Dickinson and James Madison in drafting state constitutions *after* the ratification of the Constitution. See Smith, *supra*, at 484. Dickinson both was the principal author of Article V of the Articles of Confederation and served on the committee that helped draft the Constitution's Elector Appointment Clause. *Id.* at 455. After the Constitutional Convention, he served as the president of Delaware's constitutional convention, which produced a constitutional provision regulating the place and manner of electing members of Congress. *Id.* at 484; see Del. Const. of 1792, Art. VIII, § 2.

Similarly, Madison helped draft the Elections Clause, and subsequently participated in the Virginia constitutional convention of 1829-1830, where he voted in favor of a proposal that would substantively regulate the apportionment of Virginia's congressional seats. See *Proceedings and Debates of the Virginia State Convention of 1829-30*, at 859 (Richmond, Samuel Shepherd & Co. 1830). The Framers with the most intimate knowledge of the drafting of the Elections Clause and Elector Appointment Clause thus evidently did not believe in the independence of state legislatures.

3. In addition, intratextual analysis undermines Petitioners' assertions. After its reference to state legislatures, the Elections Clause states that "the Congress may at any time by Law make or alter such Regulations." U.S. Const. Art. I, § 4, cl. 1. Yet no one suggests that, in doing so, Congress may act independently of the U.S. Constitution or federal courts. These parallel elements of the Elections Clause should be construed in a parallel manner. See Amar & Amar, *supra*, at 21. Thus, just as Congress is subject to the constraints of the U.S. Constitution and review by federal courts when regulating elections, so too should state legislatures be subject to the constraints of state constitutions and courts.

4. Petitioners argue that this reading would render the words "the Legislature" a surplusage in the Elections Clause. See Pet. Br. 15-17. Not so. The inclusion of those words signaled the Founders' intention that state legislatures determine election regulation "in the first instance." The Federalist No. 59, at 363 (Alexander Hamilton) (Clinton Rossiter ed., 1961). It also prevented a State from stripping the legislature of *any* role in determining election regulations by, for example, assigning the sole authority over elections to the governor or courts. The ISLT therefore is not necessary to give the words "the Legislature" an important role in the Elections Clause.

Petitioners get no further by analogizing the Elections Clause to constitutional provisions pertaining to the selection of senators and ratification of constitutional amendments. See Pet. Br. 30-31, 19; U.S. Const. Art. I, § 3, Cl. 1; *id.* Art. V. In the Elections Clause (and the Elector Appointment Clause), the Constitution uses the verbs "direct" and "pre-

scribe." Those are quintessentially verbs of lawmaking—the legislative function historically subject to judicial review.

State legislators who ratify amendments or select senators, in contrast, are not acting as lawmakers. It would therefore be erroneous to equate constitutional provisions addressing those functions with the Elections Clause. See *Smiley* v. *Holm*, 285 U.S. 355, 365-366 (1932); *Hawke* v. *Smith*, 253 U.S. 221, 228-231 (1920) (describing the powers assigned to state legislatures in ratifying constitutional amendments and selecting senators as "entirely different" from the lawmaking power addressed under the Elections Clause). In any event, the Constitution is the product of many "tradeoffs, political battles won and lost, and compromised ideals." Adrian Vermeule & Ernest A. Young, *Hercules, Herbert, and Amar: The Trouble with Intratextualism*, 113 Harv. L. Rev. 730, 742 (2000). The meaning of "Legislature" therefore must take account of the context in which the word is used—and that context makes clear that the Framers did not intend to invalidate state constitutional constraints and judicial review that were a long-settled limitation on legislative authority.

B. The ISLT is inconsistent with the Framers' concern about the dangers of overreaching state legislatures.

The ISLT is not only counter-textual and ahistorical; it also is fundamentally at odds with the system of checks and balances that is the fundamental feature of our Constitution. The Founders were deeply concerned about the danger that legislative bodies would abuse their authority, and especially recognized the threat posed by overreaching *state* legisla-

tures. Given these concerns, it would have been irrational for the Framers to give state legislatures authority that is unconstrained by state constitutions or courts—particularly when it came to regulating elections. After all, election law was one of the areas that the Founders recognized as *most* ripe for legislative manipulation.

When they drafted the Constitution, the Framers believed that the legislative branch would be the most dangerous branch of government. Madison warned of "the danger from legislative usurpations, which, by assembling all power in the same hands, must lead to the same tyranny as is threatened by executive usurpations." The Federalist No. 48, at 309 (James Madison) (Clinton Rossiter ed., 1961). Hamilton likewise cautioned that the legislative branch might attempt to aggrandize power at the expense of other departments of government. See*, e.g.*, The Federalist No. 73, at 442 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (describing "[t]he propensity of the legislative department to intrude upon the rights and to absorb the powers of the other departments"). The Framers also recognized that legislatures have "the propensity * * * to yield to the impulse of sudden and violent passions, and to be seduced by factious leaders into intemperate and pernicious resolutions." The Federalist No. 62, at 379 (James Madison) (Clinton Rossiter ed., 1961).

To counter these impulses, the Founders famously designed a robust system of checks and balances. See Dan T. Coenen, *Constitutional Text, Founding-Era History, and the Independent-State-Legislature Theory*, 57 Ga. L. Rev. (forthcoming Spring 2023) (manuscript at 16), perma.cc/8ZD2-PG6E. That goal

of checking legislative power is squarely inconsistent with the ISLT.

Hamilton recognized that the potential for legislative manipulation is especially acute in the electoral context. He identified the danger that "a predominant faction in a single State should, in order to maintain its superiority, incline to a preference of a particular class of electors." The Federalist No. 61, at 374 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

At the Constitutional Convention, Madison defended the Elections Clause on the grounds that

> the Legislatures of the States ought not to have the uncontrouled right of regulating the times places & manner of holding elections. * * * Whenever the State Legislatures had a favorite measure to carry, they would take care so to mould their regulations as to favor the candidates they wished to succeed. Besides, the inequality of the Representation in the Legislatures of particular States, would produce a like inequality in their representation in the Natl. Legislature, as it was presumable that the Counties having the power in the former case would secure it to themselves in the latter.

2 *The Records of the Federal Convention of 1787* 240-241 (Max Farrand ed., 1911).

The need to limit state legislatures persisted as a common theme during the debates over ratification. For example, one commentator at the Massachusetts ratifying convention remarked that a state legislature "might abuse the inhabitants, by appointing a

place for holding the elections, which would prevent some from attending, and burthen [*sic*] others with very great inconveniences." Remarker, Indep. Chron., Jan. 17, 1788, *reprinted in* 5 *Ratification of the Constitution by the States: Massachusetts* [2], at 738 (John P. Kaminski et al. eds., 1998).

In addition to constraining state legislatures, the Founders wished to ensure fair and accurate representation. See Eliza Sweren-Becker & Michael Waldman, *The Meaning, History, and Importance of the Elections Clause*, 96 Wash. L. Rev. 997, 1003 (2021). They were aware of malapportionment in England and knew that this same trend was beginning to creep across the Atlantic. South Carolina, for example, was "notoriously malapportioned." *Id.* at 1006. Malapportionment was commonly discussed during the ratification debates, with Madison highlighting how "[e]lections are regulated now unequally in some States." The Virginia Convention: Debates (June 14, 1788), *reprinted in* 10 *Ratification of the Constitution by the States: Virginia* [3], at 1260 (John P. Kaminski et al. eds., 1993).

Given these concerns about the potential for abuse and malapportionment, the Founders could not have intended to unleash state legislatures from state constitutional constraints on legislative authority.

C. State practice from the Founding era demonstrates that States understood their constitutions could substantively regulate federal elections and that legislatures were not "independent."

From the earliest days after the Founding, the actions of States confirm a widespread understand-

ing that state legislatures were bound by their state constitutions on electoral matters. State constitutions substantively regulated federal elections. State legislatures conformed to state constitutional procedures, such as presentment. And state legislatures aggressively delegated the power to determine the time, place, and manner of federal elections.

Four out of the six state constitutions that were implemented or revised after the ratification of the U.S. Constitution regulated elections. See Del. Const. of 1792, Art. VIII, § 2; Ga. Const. of 1789, Art. IV, § 2; Pa. Const. of 1790, Art. III, § 2; Ky. Const. of 1792, Art. III, § 2. Proponents of the ISLT note that some of these state constitutions did not expressly mention federal elections. But they did address "all elections," an even more inclusive term. See, *e.g.*, 14 Annals of Cong. 850 (1804) (William Findley, a delegate to the Pennsylvania constitutional convention, explaining that the Pennsylvania constitution, which used the all-elections language, "prescribes the manner that citizens shall vote" in federal elections).

ISLT proponents also contend that early state constitutions regulated only the procedures for enacting election laws and that any substantive electoral rules pertained only to voter qualifications. This misreads the history. The Delaware Constitution of 1792, for example, required that federal congressional elections be conducted at the same place and in the same manner as state elections. See Del. Const. of 1792, Art. VIII, § 2. The constitutions of Pennsylvania, Georgia, Kentucky, Tennessee, and Ohio required that voting be by ballot (as opposed to

viva voce).[5] The constitutions of Kentucky, Delaware, New Hampshire, Vermont, and Tennessee required that all elections be free and/or equal.[6] And four other state constitutions protected voters from arrest during elections unless they were committing treason, felony, or breach of the peace.[7] All of these are substantive regulations, and all do more than merely stipulate voter qualifications.

During the Founding Era, state legislatures also regularly complied with their state constitutions when enacting electoral regulations. Leading up to the first presidential election, Massachusetts presented its law for the selection of presidential electors to the governor for his signature or veto, thus satisfying the state constitution's requirements. See House and Senate Proceedings (Nov. 20, 1788), *reprinted in* 1 *The Documentary History of the First Federal Elections, 1788-1790*, at 506-507 (Merrill Jensen & Robert A. Becker eds., 1976). Similarly, New York presented its first law for congressional elections to its Council of Revision for approval. See Assembly and Senate Proceedings (Jan. 24, 1789), *reprinted in* 3 *The Documentary History of the First Federal Elections 1788-1790* at 344 (Gordon DenBoer

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[5] See Pa. Const. of 1790, Art. III, § 2; Ga. Const. of 1789, Art. IV, § 2; Ky. Const. of 1792, Art. III, § 2; Tenn. Const. of 1796, Art. III, § 3; Ohio Const. of 1803, Art. IV, § 2.

[6] See Ky. Const. of 1792, Art. XII, § 5; Del. Const. of 1792, Art. I, § 3; N.H. Const. of 1792, Art. XI; Vt. Const. of 1793, Ch. 1, Art. VIII; Vt. Const. of 1793, Ch. 2, § 34; Tenn. Const. of 1796, Art. XI, § 5.

[7] See Pa. Const. of 1790, Art. III, § 3; Ky. Const. of 1792, Art. III, § 3; Del. Const. of 1792, Art. IV, § 2; Tenn. Const. of 1796, Art. III, § 2.

ed., 1986). The legislatures in Massachusetts, New York, and New Hampshire also debated whether their constitutions required them to act via joint or concurrent session when passing laws regulating federal elections. See Weingartner, *supra* (manuscript at 44-45). If the state legislatures understood themselves to be independent, such debates would have been irrelevant.

Furthermore, in the first five decades following ratification, "state legislatures aggressively delegated authority to determine the times, places and manner of federal elections to local government officials." Mark S. Krass, *Debunking the Nondelegation Doctrine for State Regulation of Federal Elections*, 108 Va. L. Rev. 1091, 1112-1113 (2022). In nine out of the thirteen States, legislatures delegated authority to local officials. *Id.* at 113. For example, local officials could decide where polls would be located and when they would open and close. They could also make other key decisions about how elections would be conducted. *Ibid.* This directly undermines petitioners' claim that "the Elections Clause surely does not allow a state legislature to delegate away the authority assigned to it by the federal Constitution." Pet. Br. 44-45. And it once again reveals that state legislatures did not view themselves as independent bodies with exclusive control over regulating elections.

D. Nineteenth-century practice cited by Petitioners is unpersuasive.

Petitioners and other ISLT proponents point to nineteenth-century evidence as revealing a prevailing view in support of ISLT. Pet. Br. 43-44. That is incorrect.

During that time, numerous state constitutions contained provisions substantively regulating federal elections. Some discussed whether votes would be by ballot or *viva voce*.[8] One set the time for all elections.[9] Others regulated how representation would be apportioned.[10] And still others affirmed that elections could be decided by plurality rule.[11] This plethora of state constitutional provisions regulating elections demonstrates that ISLT was not the prevailing view.

Petitioners nevertheless point to Congress's decision in the contested-election case of *Baldwin* v. *Trowbridge*, which relied on a form of the ISLT to resolve a disputed congressional election. Pet. Br. 43-44. But a decision made by Congress in 1866, nearly 80 years after the Constitution was ratified, cannot shed light on the original understanding of the Elections Clause. See *District of Columbia* v. *Heller*, 554 U.S. 570, 614 (2008) ("Since those discussions took place 75 years after the ratification * * *, they do not

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[8] See R.I. Const. of 1842, Art. VIII, § 2; Oh. Const. of 1803, Art. IV, § 2; La. Const. of 1812, Art. VI, § 13; Ala. Const. of 1819, Art. III, § 7; Mich. Const. of 1835, Art. II, § 2; Tex. Const. of 1845, Art. VII, § 6; Cal. Const. of 1849, Art. II, § 6; Minn. Const. of 1857, Art. VII, § 6; N.Y. Const. of 1821, Art. II, § 4; Pa. Const. of 1838, Art. III, § 2; Ky. Const. of 1850, Art. VIII, § 15; Va. Const. of 1830, Art. III, § 15.

[9] See Ky. Const. of 1850, Art. VIII, § 16.

[10] See Va. Const. of 1830, Art. III, § 6; Iowa Const. of 1846, Art. IV, Legislative Department, § 32; Iowa Const. of 1857, Art. III, Legislative Department, § 37; Cal. Const. of 1849, Art. IV, § 30; Va. Const. of 1850, Art. IV, §§ 13-14.

[11] See Cal. Const. of 1849, Art. XI, § 20; Nev. Const. of 1864, Art. XV, § 14.

provide as much insight into its original meaning as earlier sources.").

In any event, contested-elections cases notoriously were decided by Congress based on partisan factors rather than serious constitutional interpretation. Newspapers at the time lambasted *Trowbridge* as "an illegal act" that was "justifiable by nothing better than an unscrupulous party necessity." *The Case of Representative Baldwin,* Det. Free Press, Feb. 28, 1866, at 2. Nine of the Republicans who voted in favor of ISLT in *Trowbridge* had voted against ISLT a mere five years earlier in *Shiel* v. *Thayer*; notably, Republicans had nothing to gain from application of the ISLT in *Shiel* but could win a seat by adopting the ISLT in *Trowbridge*. See Smith, *supra* at 566-568. These observations have been confirmed by recent quantitative analyses, which demonstrate the partisan underpinnings of such decisions. Jeffrey A. Jenkins, *Partisanship and Contested Election Cases in the House of Representatives, 1789–2002*, 18 Stud. Am. Pol. Dev. 112,123 (2004). They should not be relied on as any form of precedent.

II. Petitioners' interpretation of the Elections Clause is inconsistent with over a century of this Court's precedent.

The lessons of the constitutional history are reflected in this Court's decisions. Those holdings consistently recognize that state laws governing federal elections *are* constrained by state constitutions, which may give executive branch officials—or the people generally—a role in the creation of such laws.

In *Ohio ex rel. Davis* v. *Hildebrant*, the Court held that state legislatures' redistricting laws are subject to referenda authorized by state constitu-

tions. 241 U.S. 565 (1916*).* *Hildebrant* involved an Ohio state constitutional provision that vested legislative power not only in the state legislature but also "in the people, in whom a right was reserved by way of referendum to approve or disapprove by popular vote any law enacted by the general assembly." *Id.* at 566. The Court rejected arguments that such a provision was repugnant to the Elections Clause, holding that the Clause's reference to the "Legislature" was intended to encompass the broad "legislative power" of a state as described in "the state Constitution and laws." *Id.* at 568.

Similarly, in *Smiley* v. *Holm*, the Court held that state legislatures' redistricting laws are subject to the veto power of state governors if, under the state constitution, the governor has that power. 285 U.S. 355 (1932). Citing a provision in Minnesota's constitution requiring that any bill passed by the state Senate and House of Representatives "be presented to the governor of the state" before becoming law, the Court rejected ISLT arguments that redistricting requirements for congressional elections could be put into force by the legislature without the governor's participation. *Id.* at 363 (quoting Minn. Const. Art. 4, § 1). Echoing its reasoning from *Hildebrant*, the Court held that redistricting "must be in accordance with the method which the state has prescribed for legislative enactments," and such methods that act "as a check in the legislative process cannot be regarded as repugnant to the grant of legislative authority." *Id.* at 367-368.

In *Arizona State Legislature* v. *Arizona Indep. Redistricting Comm'n,* 576 U.S. 787 (2015) [hereinafter *AIRC*], the Court built upon *Hildebrant* and *Smi-*

ley in reiterating the permissibility of state constitutional provisions that designate other actors as checks on state legislature's rules for federal elections. *AIRC* addressed an initiative that amended Arizona's constitution to remove redistricting authority from the Arizona legislature and vest it in an independent commission, the Arizona Independent Redistricting Commission (AIRC).

In approving this regime, the Court adopted AIRC's argument—invoking *Hildebrant* and *Smiley*—that "for Elections Clause purposes, 'the Legislature' is not confined to the elected representatives; rather, the term encompasses all legislative authority conferred by the State Constitution, including initiatives adopted by the people themselves." *Id.* at 792-793. The Court added: "Nothing in th[e 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 817-818.

Finally, in *Rucho* v. *Common Cause*, the Court held that partisan gerrymandering claims present nonjusticiable political questions beyond the reach of *federal* courts—but indicated that *state* constitutional constraints could still be enforced by *state* courts. 139 S. Ct. 2484, 2507 (2019). The Court observed: "Provisions in state statutes and state constitutions can provide standards and guidance for state courts to apply" in cases addressing the justiciability of partisan gerrymandering claims in cases involving congressional redistricting. *Ibid.* To hold otherwise would be to "condone excessive partisan gerrymandering" and "condemn complaints about districting to

echo into a void"—a result that the Court unequivocally eschewed. *Ibid*. See also *Growe* v. *Emison*, 507 U.S. 25, 34 (1993) (noting that the Court has "encouraged" "state judicial supervision of redistricting").

Against this great weight of authority, petitioners invoke dicta from *McPherson* v. *Blacker*, 146 U.S. 1 (1892). See Pet. Br. 41. This reliance is untenable. Petitioners' preferred excerpt from that decision—positing that a state legislature's Presidential Electors Clause authority "cannot be taken from them or modified by their State constitutions any more than can their power to elect Senators of the United States"—is actually a quote from an 1874 Senate committee report, not an observation of the Court. *McPherson*, 146 U.S. at 35 (quoting S. Rep. No. 395, at 9 (1874)). The *McPherson* Court itself cast doubt on the report, stating: "What is forbidden or required to be done by a State is forbidden or required of the legislative power under state constitutions as they exist"; "[t]he legislative power is the supreme authority, *except as limited by the constitution of the State*." *McPherson*, 146 U.S. at 25 (emphasis added).

III. Any version of the ISLT would engender widespread disruption, encourage litigation, and reduce confidence in the election system.

Adoption of the ISLT would do more than depart from constitutional principles and this Court's prior holdings; it also would have disastrous practical effects on the administration of elections across the country—overturning state rules, undermining routine decision-making by state and local election officials, causing paralyzing confusion, and imposing a

chaotic dual-track election system for federal and state elections. Attempts to minimize these problems by adopting a limited variant of the ISLT, as Petitioners sometimes propose, would simply compound the confusion, generating unending litigation about the permissibility of state election practices.

And *any* version of the ISLT necessarily would involve federal courts in the administration of elections that historically have been conducted by the States, frustrating basic principles of federalism and fostering cynicism among voters. The Court should reject a theory that would have such destructive consequences.

A. The ISLT would invalidate innumerable state laws and practices, causing unprecedented electoral disruption.

1. The ISLT would overturn myriad state statutory and constitutional provisions.

At the outset, if applied to the limits of its logic the ISLT would displace innumerable state constitutional and statutory provisions governing federal elections, upending settled election practices. Consider the following examples:

a. The secret ballot. Forty-four States have constitutional provisions that guarantee the right to a secret ballot. Caitriona Fitzgerald et al., Elec. Priv. Info. Ctr., *The Secret Ballot at Risk: Recommendations for Protecting Democracy* 2 (Aug. 18, 2016), perma.cc/F7XQ-ED5H. The ISLT would invalidate those provisions, allowing state legislatures that do not reinstitute the secret ballot by statute to implement Gilded Age practices for federal elections—party-controlled ballots, voice voting, or ticket voting,

all traditional tools of political machines and voter intimidation. See Jamie L. Carson & Joel Sievert, *Electoral Reform and Changes in Legislative Behavior: Adoption of the Secret Ballot in Congressional Elections*, 40 Leg. Stud. Q. 83, 83, 85 (2015).

b. Voter ID requirements. Mississippi and Arizona have enacted voter ID laws, through constitutional amendment or ballot initiative,[12] that may not be repealed by the legislature alone. See Nathaniel Persily et al., *When Is a Legislature Not a Legislature? When Voters Regulate Elections by Initiative*, 77 Ohio State L.J. 689, 717 (2016). These laws, too, would be invalidated by the ISLT.

c. Independent redistricting commissions. Ten States use redistricting commissions as the primary means of drawing congressional districts. See Nat'l Conf. of State Legislatures, *Redistricting Commissions: Congressional Plans* (Dec. 10, 2021), perma.cc/BQL3-2VM7. The selection requirements for these commissions vary, but many of the States either ban public officials from serving on the commission or require that at least one citizen be appointed to the commission. *Ibid*.

Many other States make use of similar commission-like bodies. For instance, Connecticut, Indiana, and Ohio use backup commissions, which will step in if the legislature is unable to settle on a redistricting plan. *Redistricting Commissions: Congressional Plans, supra.* Maine, New Mexico, New York, and Utah rely on advisory commissions, which propose plans for the legislature to adopt or otherwise assist

[12] See Miss. Const. art. XII, § 249-A; Ariz. Rev. Stat. Ann. § 16-579 (2022).

the legislature in designing those plans. *Ibid.* Finally, Iowa employs nonpartisan legislative staff to draw lines; the legislature may not make substantive changes to their plan. See Nat'l Conf. of State Legislatures, *The "Iowa" Model for Redistricting* (Mar. 25, 2021), perma.cc/9FZF-JV7V. These commissions also all would be invalid under the ISLT.

d. Party-ticket voting, state residency requirements, and voter registration deadlines. State constitutions establish a miscellany of other election rules. For example, Ohio constitutional amendments ban party-ticket voting. Ohio Const. Art. V, §§ 1, 2a. The Oregon Constitution sets the voter registration deadline at twenty days before an election. Or. Const. Art. II, § 2(c); see also Persily, *supra*, at 716.

These examples offer just a small window into the state constitutional provisions that have long structured federal elections across the country. The ISLT, by overturning these provisions, would upset longstanding reliance interests—of state election officials and of voters themselves—while leaving uncertain how elections should be conducted with these rules rendered unenforceable.

2. The ISLT would preclude routine administrative and executive decision-making in election administration, opening vast gaps in state-election machinery.

The ISLT also would disrupt current approaches to the delegation of election authority from the state legislature to executive branch officials and other governmental bodies. The ISLT purports to preclude such delegation. But election officials now make numerous decisions about election administration—

some of them enormously consequential, and most of them essential for the workable operation of state election machinery.

These include decisions involving polling-place siting; voter-registration requirements; ballot design; voter education and information distribution; election-worker training; voting equipment maintenance; and ballot-counting rules. See U.S. Gov't Accountability Off., *2020 Elections: State and Local Perspectives on Election Administration During the COVID-19 Pandemic* 4-5 (July 11, 2022), perma.cc/PFS8-5G32. Allowing election officials to make these decisions benefits communities, as officials can "use their local expertise to tailor voting options to meet the needs of the communities they serve." Hannah Furstenberg-Beckman et al., Ash Ctr. for Democratic Governance & Innovation, Harv. Kennedy Sch., *Understanding the Role of Local Election Officials: How Local Autonomy Shapes U.S. Election Administration* 5 (Sept. 2021), perma.cc/QN7L-SG8N.

Furthermore, election administrators often must interpret unclear election laws, exercising discretion to ensure smooth and safe elections. For example, governors and state boards of elections are expressly or impliedly empowered in Florida, Michigan, North Carolina, Pennsylvania, and Texas to exercise discretionary authority in emergencies.[13] Thus, then-

[13] Fla. Stat. § 101.733(3) (prescribing the Division of Elections of the Department of State's duty to create statewide election emergency contingency plans); Fla. Stat. § 101.74 (granting permission to the supervisor of elections to change polling places in emergencies); 25 Pa. Stat. § 2726 (same); Fla. Stat. § 252.36(5) (granting the governor emergency powers); Mich. Comp. Laws § 30.405(1) (same); N.C. Gen. Stat. § 166A-19.30(a)

Florida Governor Rick Scott used his emergency power to permit eight counties particularly affected by Hurricane Michael to extend early voting days and designate more early-voting locations. See Fla. Exec. Order No. 18-283, § 1 (Oct. 22, 2018), perma.cc/VNL3-KUQ2. Just this year, Governor Ron DeSantis responded similarly to Hurricane Ian. See Fla. Exec. Order No. 22-234 (Sept. 28, 2022), perma.cc/VNL3-KUQ2.

In these instances, election administrators must make time-sensitive, often on-the-spot decisions about the application of election laws, with consequential effects. An election official, for example, may decide to extend voting hours at a polling location if confronted by long lines and wait times; or may need to decide whether to reject a mailed-in ballot for error; or may have to make a snap decision about whether a certain voter is eligible to vote.

Cabining the ability of state and local election officials to make these types of routine decisions would stifle efficient, fair, and safe election administration.

3. The ISLT would result in a bifurcated, dual-track system of election administration, with one set of rules for state elections and another for federal elections.

States generally have unified election systems that apply the same rules to both federal and state elections. But the ISLT would invalidate the elements of those systems that are grounded in state constitutions or administrative action as they apply to federal elections, requiring state and local election

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(same); 35 Pa. Stat. and Cons. Stat. § 7301 (same); and Tex. Gov't Code § 418.016 (same).

administrators to operate a bifurcated, dual-track system—to disastrous effect.

The problematic examples are myriad. Consider Florida's recently adopted state constitutional provision permitting certain citizens who were convicted of felony offenses to vote. Fla. Const., Art. VI, § 4; see also Fla. Div. of Elections, *Voting Restoration Amendment*, perma.cc/T22X-25YP. The ISLT would render that provision invalid as applied to federal elections—leaving unclear how elections are to be conducted. Must Florida now print separate state- and federal-election ballots for use by persons who were convicted of felonies?

Or imagine that a state court construed a statute limiting the time a voter may spend in the voting booth as merely hortatory. See, *e.g.*, *Stuart* v. *Anderson Cnty. Election Comm'n*, 300 S.W.3d 683, 689-690 (Tenn. Ct. App. 2009). Would election administrators have to enforce the law with respect to federal elections but not to state ones? How much discretion would administrators enjoy in interpreting that statute? And how could administrators enforce such a statute if voters cast ballots for state and federal office at the same time in the same booth?

Or what if a state court limits application of a state's voter-ID laws under the state constitution? *E.g.*, *Martin* v. *Kohls*, 444 S.W.3d 844, 852-853 (Ark. 2014); see also Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 Vand. L. Rev. 89, 92-93 (2014). Would that mean that a voter could vote only for state candidates, and not federal ones, if she forgot to bring a certain type of ID to the polls?

What if a state court extended voting hours on state-constitutional grounds due to a problem at a particular precinct? Would that extension apply only to elections for state office? Would election officials then have to provide separate state-only ballots for voters who arrive too late to vote in the federal election, even when the state has traditionally held those elections together?

Or consider absentee ballots. If a state court invalidated a portion of a state law restricting use of absentee ballots on state-constitutional grounds, would that mean that state elections may be decided by absentee ballot, while a voter must show up in person to cast a vote for her United States senator?

At best, the result of this ISLT-mandated divergence would be persistent confusion about election administration. In many cases, elections would simply grind to a halt; in others, the outcomes would be uncertain and subject to challenge.

B. Attempting to limit the ISLT would present additional legal and practical problems.

Evidently recognizing these problems with a principled application of the ISLT, Petitioners at points suggest a more limited application of their theory. But this stepped-back approach creates difficulties of its own, requiring federal courts to invent and apply novel rules governing state elections.

Consider a version of the ISLT that allows state courts to review election laws so long as the state-constitutional provisions relied upon are sufficiently specific. See Pet. Br. 2, 46 (critiquing "vaguely-worded state-constitutional clauses" and endorsing

"judicially manageable standards"). This approach would require federal judges to determine whether state-constitutional provisions *are* sufficiently specific—a line that is impossible to draw in a consistent and principled way.

For example, New York's constitution provides that "[d]istricts shall not be drawn to discourage competition or for the purposes of favoring or disfavoring incumbents or other particular candidates or political parties." N.Y. Const. Art. III, § 4(c)(5). Would this provision—already much more specific than most constitutional provisions, like those requiring the "equal protection of the laws"—be too general? What if the state has settled case law that fleshes out specific meanings for otherwise skeletal text? And on what grounds would federal courts make such determinations, especially about state matters on which they are not expert?

Or consider another potential variation of the ISLT that allows administrative interpretations of election statutes, so long as those interpretations do not stray "too far" from the statutory text. This limitation poses an obvious problem: how far is "too far"? Recall that in 2018, then-Florida Governor Scott used his emergency powers to permit eight counties affected by Hurricane Michael to extend early-voting days and designate more early-voting locations, even though no legislation expressly authorized him to do so. Did this executive action stray "too far" from the text of Florida's election laws? The Elections Clause provides no clear answer—meaning that similar cases will be decided differently, and voters will attribute the outcome to judges' perceived partisanship.

Reasonable yet inconsistent choices about interpretive methodologies would present additional issues. May administrators consult legislative history to determine when an interpretation strays "too far" from the text? How about appealing to longstanding common-law practices? Or substantive canons of interpretation? Federal courts across the country would likely disagree about both the substantive and the methodological elements of any proposed test. The resultant indeterminacy would prevent officials from reliably knowing the scope of their discretion as they administer elections.

These examples illustrate the general difficulties with attempting to limit the ISLT. Those limits would not only themselves create yet another mechanism for the federal courts to restrict state institutional design choices, but would also chart an uncertain path likely to wind its way back to this Court for future clarification. See Conference of Chief Justices Amicus Br. 23-24. Only rejecting the ISLT in all its forms could foreclose such destabilizing risks.

C. Any version of the ISLT would frustrate principles of federalism and decrease faith in elections.

Petitioners suggest that the ISLT would advance democratic values. In practice, it would have a very different effect: for all the reasons just noted, it would place federal courts at the center of the electoral process. Every legal question identified above—and many other questions that have not yet been anticipated—could produce a federal lawsuit, as unsuccessful candidates scrutinize state law and practice in search of provisions that could be argued to violate

the U.S. Constitution. The result would make federal judges the arbiters of electoral processes.

1. Excessive federal-court intervention frustrates principles of federalism.

The idea that state courts should authoritatively decide questions of state law is deeply rooted in American jurisprudence.[14] There are many compelling reasons for this practice.

States have made institutional-design choices that do not mirror those of the federal system. For example, many state constitutions allow voters to function as a check on state legislatures through ballot initiatives or referenda—the very types of measures that the ISLT would render invalid. Thirty-five state constitutions also contain explicit separation-of-powers clauses, which state courts have interpreted in ways that deviate significantly from the federal system's separation-of-powers jurisprudence. See Katherine Shaw, *Constitutional Nondefense in the States*, 114 Colum. L. Rev. 213, 230-31 (2014). And a majority of states elect the justices of their supreme courts, indicating that state judges have a different relationship with the general public and the other political branches than do federal judges. Brennan Ctr., *Judicial Selection: Significant Figures* (Oct. 11, 2022), perma.cc/9HH4-F4HZ.[15]

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[14] *E.g.*, *Murdock* v. *City of Memphis*, 87 U.S. (20 Wall.) 590, 626 (1874); *R.R. Comm'n of Tex.* v. *Pullman Co.*, 312 U.S. 496, 499-500 (1941).

[15] State-court jurisdiction also differs from federal-court jurisdiction. "To take just a few examples, some state courts routinely render advisory opinions; some state courts exercise enforcement discretion; and state courts serve a range of adminis-

These basic structural differences explain why state courts have special authority to interpret state laws. A state court's review of its own state's laws is part of the democratic process, enhancing state governments' ability to adapt to changing circumstances. And because state-court judges are more knowledgeable about local affairs and more accountable to voters than are federal judges, state courts' judgments about how best to resolve election disputes complement the powers of state legislatures, which may act too slowly to flexibly address time-sensitive challenges. See Jason Marisam, *The Dangerous Independent State Legislature Theory*, Mich. State L. Rev. (forthcoming 2022) (manuscript at 16-17), perma.cc/LXB4-FZV7.

That makes the ISLT self-defeating as an effort to protect democratic values. Rather than defer to state legislatures, federal courts—assuming the role long performed by their state counterparts—would be asked to determine whether states have excessively or permissibly restrained their own legislatures. The volume of litigation would skyrocket in response to pervasive uncertainty about the meaning of the new federal constitutional rules, while what had been state-law claims would be repleaded as actions grounded in the U.S. Constitution. It is difficult to imagine a regime that more completely transfers authority from the states to the federal government.

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trative and even quasi-legislative functions that would be unimaginable in the federal system." Leah M. Litman & Katherine Shaw, *Textualism, Judicial Supremacy, and the Independent State Legislature Theory*, 5 Wis. L. Rev. (forthcoming 2022) (manuscript at 14) (footnotes omitted), perma.cc/6YNY-HKCQ.

2. Excessive federal-court intervention delegitimizes electoral results.

Election integrity is critical to ensuring the legitimacy of our democratic system. But it is an unfortunate commonplace that Americans are losing faith in elections.[16]

Adopting any version of the ISLT would further exacerbate this distrust. The resultant chaos would encourage domestic and foreign election interference, as well as voter fraud. When voters and administrators alike do not understand what is required of them—a certainty, in the confusing dual-track system required by the ISLT—each step of the voting process introduces new risks. And even if, after the dust settles, the volume of actual wrongdoing is proved to be negligible, the perception of electoral misconduct would create lasting damage to the public's confidence.

The ISLT thus would frustrate constitutional values and achieve none of its purported goals: it contradicts constitutional text and history, runs counter to longstanding practice, and would wreak unparalleled havoc on the electoral landscape. The

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[16] See, *e.g.*, *Topline Results for the October 2022 Times/Sienna Poll of Registered Voters*, N.Y. Times (Oct. 18, 2022), perma.cc/7K2F-4XWT (almost 30 percent of registered voters do not trust that the results of the 2022 midterm elections will be accurate); Chris Jackson et al., Ipsos, *A Substantial Minority of Americans Think Election Fraud Could Be the Reason Why Their Party Doesn't Win Control of Congress*, (Oct. 10, 2022), perma.cc/WJH3-WWGE (39 percent of Republicans and 26 percent of Democrats feel it is likely that election fraud may be the reason their side does not win control of Congress).

Court should reject such an unfounded, unprecedented, and dangerous constitutional theory.

CONCLUSION

The judgment of the North Carolina Supreme Court should be affirmed.

Respectfully submitted.

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APPENDIX

Amici are the following:

Steve Bartlett; served in the U.S. House of Representatives from 1983-1991; and as Mayor of Dallas, Texas from 1991-1995.

Thomas Campbell; served in the U.S. House of Representatives from 1989-1993, and 1995-2001; and in the California State Senate from 1993-1995; currently Doy & Dee Henley Distinguished Professor of Jurisprudence, Fowler School of Law, Chapman University.

Tom Coleman; served in the U.S. House of Representatives from 1976-1993; and in the Missouri House of Representatives from 1972-1976.

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Claudine Schneider; served in the U.S. House of Representatives from 1981-1991.

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Christine Todd Whitman; served as Administrator of the U.S. Environmental Protection Agency from 2001-2003; as Governor of New Jersey from 1994-2001; as President of the New Jersey Board of Public Utilities from 1988-1990; and as a member of the Somerset County Board of County Commissioners from 1983-1988.