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 *AMICI CURIAE* OF CURRENT AND FORMER ELECTION ADMINISTRATORS IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*[1]

The question before the Court is whether the Constitution vests exclusive authority to set the rules for federal elections in state legislatures, subject to Congress's power to "make or alter such Regulations." U.S. Const. art. I, § 4, cl. 1. The question arises in this case in the context of Congressional redistricting, but it also is important for the full spectrum of state rules governing the "Times, Places and Manner" of conducting federal elections. *Id.* This brief seeks to bring to the Court's attention the practical implications of its decision for election administration throughout the country.

The *amici curiae* are current and former election administrators with long experience in conducting concurrent federal-state elections:

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[1] No counsel for a party authored this brief in whole or in part. No counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Other than *amici* and their counsel, the only person or entity to have made a monetary contribution to this brief's preparation or submission is the Democracy Protection Fund in Seattle, Washington. Both petitioners and respondents have given blanket consents to the filing of *amicus* briefs.

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If this Court were to decide that state legislatures have exclusive authority to set the rules in federal elections, and that federal courts are the arbiters of what those state rules mean and how they apply in federal races, the consequences would be profound. State and local election administrators need a single authoritative interpretation of state election law. Yet under petitioners' "independent state legislature" (ISL) claim, the same state statute could be construed and enforced in three different ways—one by state courts subject to state constitutional constraints (for state elections); the next by federal courts applying their own views on what the statute means and how it should apply (for federal elections); and finally (and definitively) by a House of Congress in resolving a federal election contest. But these are the *same* concurrent federal-state elections governed by the *same*

rules administered by the *same* officials with respect to the *same* ballots cast by the *same* voters. Embracing petitioners' claim would wreak havoc on concurrent federal-state elections and could result in States having to conduct federal and state elections separately under different rules.

A broad ISL ruling also inevitably would produce "a flood of new claims about the enforcement of state laws governing federal elections," resulting in "repetitive, burdensome, high stakes and expedited litigation" in the period leading up to, during, and after federal elections. Brief of *Amicus Curiae* Conference of Chief Justices at 27. This brief will employ examples drawn from *amici*'s experience and knowledge to illustrate what petitioners' ISL claim might produce in the real world of election administration and litigation.

SUMMARY OF ARGUMENT

1. As the Framers anticipated, federal and state legislative elections are nearly always conducted on the same dates by the same state and local officials using a common set of detailed rules and procedures governing all aspects of the "manner" of voting. This concurrent federal-state election system requires "cooperative federalism." *See Ex parte Siebold*, 100 U.S. 371, 383 (1880) (Elections Clause envisions "a necessary co-operation of the two governments in regulating the subject"). Attempts at "dual" federal-state systems have been few and far between and nearly al-

ways have failed for various legal and practical reasons. Most importantly, dual systems disserve the voters.

2. Election administrators need clear and stable rules to properly conduct an election. Clarity and uniformity are particularly necessary in a highly decentralized system relying on a legion of local officials and temporary workers. Competing and inconsistent interpretations of the same rules would introduce chaos into the conduct of the election, thereby undermining confidence in our electoral process.

3. Petitioners' ISL claim is antithetical to the "cooperative federalism" envisioned under the Elections Clause and to the clarity and stability of state election law needed to carry out concurrent federal-state elections. Federal courts could adopt and enforce their own readings of state election statutes even in the face of contrary state-court interpretations, and even if the statutes had been declared to violate state constitutional guarantees. Voting rights and procedures that had been adopted through state initiatives or referenda might apply to state but not federal races. State voter ID laws that had been struck down under state constitutions might be enforced in federal elections; absentee-ballot restrictions and deadlines that had been invalidated by state courts might be enforced by federal courts in the State's federal races. Uniform registration systems would unravel if States were compelled to apply different standards and procedures to federal and state registrants. Election administrators would have to attempt to devise convoluted systems based on different standards for federal and state elections while striving to explain this incomprehensible complexity to voters.

Simply put, attempting to administer concurrent federal-state elections under different rulebooks along with the inevitable increases in litigation would be an election administrator's nightmare. Errors would be inevitable, administrative and training costs would soar, and the public's confidence in our elections would dive.

4. Federal courts are particularly ill-suited to make the judgments and contain the consequences that would flow from accepting petitioners' ISL claim. There is no body of law that federal judges could fall back on in deciding the ISL cases that would arrive at their courthouses. There would be no ready means for courts to reconcile inconsistent decisions in federal district and circuit courts interpreting distinctly worded and structured election laws of different States. Upon decision federal courts would then be saddled with supervising the implementation of their decisions. Heaped upon the administrative challenges of managing a dual system of elections, election administrators would be further burdened by the prospect of federal court supervision of their operations.

5. Untimely, unpredictable, and inconsistent resolutions of federal election disputes in federal courts not only would strain the federal judiciary and unsettle joint federal-state election administration, they *also* would disrupt the normal operations of Congress. Moreover, each House is the final "Judge" of the "Elections" and "Returns" of its own members, U.S. Const. art. I, § 5, cl. 1, and renders a "judgment which is beyond the authority of any other tribunal to review." *Barry v. United States ex rel. Cunningham,* 279 U.S. 597, 613 (1929). Although Congress is not bound by state law in judging election disputes, it takes state

courts at their word on what state statutes and constitutions mean and how they apply in any given dispute. Congress also applies rigorous rules against disqualifying ballots in races for federal office based on inconsequential errors by voters or election clerks. Petitioners' ISL claim thus invites not only federal-state conflict, but conflict among branches of the federal government.

ARGUMENT

I. As the Framers anticipated, federal and state elections are generally administered concurrently through the same election systems subject to the same rules.

"In practice, the [Elections] Clause functions as a 'default provision; it invests the States with responsibility for the mechanics of congressional elections, but only so far as Congress declines to preempt state legislative choices.'" *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 9 (2013) (citing *Foster v. Love*, 522 U.S. 67, 69 (1997)). The Clause "conscripts" and "commandeers" state and local election systems and personnel for use in conducting federal elections, while granting state legislatures authority to craft comprehensive election codes governing federal elections absent Congressional action to the contrary.[2]

[2] *See Gonzalez v. Arizona*, 677 F.3d 383, 391 (9th Cir. 2012) ("conscript"), *aff'd sub nom. Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1 (2013); Michael T. Morley, *The New Elections Clause*, 91 Notre Dame L. Rev. Online 79, 101-02 (2016) ("commandeer").

This Court has long recognized that the Elections Clause envisions "concurrent authority of the two sovereignties, State and National," over federal elections, requiring "a necessary co-operation of the two governments in regulating" elections for federal office:

> If Congress does not interfere [with state election regulations], of course they may be made wholly by the State; but if it chooses to interfere, there is nothing in the words to prevent its doing so, either wholly or partially. ... If it only alters, leaving, as manifest convenience requires, the general organization of the polls to the State, there results a necessary co-operation of the two governments in regulating the subject.

Ex parte Siebold, 100 U.S. at 383. "[T]he framers of the Constitution foresaw a federal-state partnership in the administration of federal elections, and delegated to the states a substantial role in the conduct of those elections." National Commission on Federal Election Reform, *To Assure Pride and Confidence in the Electoral Process* at 22 (Aug. 2001) (Ford-Carter Report); *see id.* at 25 ("the states are vital partners to the federal government" and "a necessary bridge between federal policy and local administration" of elections). States have exercised their "default" responsibilities under the Elections Clause to develop "comprehensive, and in many respects complex, election codes regulating in most substantial ways, *with respect to both federal and state elections*, the time, place, and manner of holding primary and general elections, the registration and qualifications of voters, and the selection and qualification of candidates."

Storer v. Brown, 415 U.S. 724, 730 (1974) (emphasis added).

The detail and complexity of these state codes (together with their implementing regulations and guidance) "cannot be doubted." *Smiley v. Holm*, 285 U.S. 355, 366 (1932). These "complete code[s] for congressional elections," *id.*, that States may prescribe (subject to Congressional override) cover the full spectrum of procedural and regulatory nuts and bolts governing all stages of the election process. They include primaries as well as general elections. *See Foster*, 522 U.S. at 71 n.2; *United States v. Classic*, 313 U.S. 299, 320 (1941). They also include post-election provisions for "verification of the accuracy of election results," such as recounts or election contests. *Roudebush v. Hartke*, 405 U.S. 15, 25 (1972) ("A recount is an integral part of the Indiana electoral process and is within the ambit of the broad powers delegated to the States by Art. I, § 4."). The Elections Clause authorizes state "procedural regulations" protecting the public's strong interests in "having orderly, fair, and honest elections 'rather than chaos'"; "maintaining the integrity of the political process"; "avoiding 'voter confusion'"; "'seeking to assure that elections are operated equitably and efficiently'"; and "'guarding against irregularity and error in the tabulation of votes.'" *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 834-35 (1995) (citations omitted).

The Framers fully anticipated that the "cooperative federalism" established through the Elections Clause would lead to the concurrent administration of federal and state legislative elections. Alexander Hamilton, for example, predicted the "several States" would take advantage of "the convenience of having

the elections for their own governments and for the national government at the same epoch [i.e., fixed time]." The Federalist No. 61, at 376 (C. Rossiter ed. 1961); *see also id.* No. 44, at 287 (James Madison) (predicting that House elections "will, probably, forever be conducted by the officers and according to the laws of the States," thus helping to provide "[t]he members and officers of the State governments … an essential agency in giving effect to the federal Constitution").

Thus it should come as no surprise that 45 of the 50 States conduct their elections for executive and legislative offices by the same calendar used in elections for federal executive and legislative offices. And the five other States that hold their statewide executive and legislative elections in odd-numbered years (Kentucky, Louisiana, Mississippi, New Jersey, and Virginia) all conduct those off-year state elections and even-year federal elections under the same comprehensive statewide election codes carried out in the same manner by the same state and local election personnel.

The practical result of this "cooperative federalism" is that federal and state elections are fused together. As the Ford-Carter Commission summarized in 2001:

> [F]ederal elections are, as a practical matter, conducted in conjunction with a vast array of state and local elections across widely varying conditions. The [2000] presidential election involved more than 100 million voters casting ballots at more than 190,000 polling places, staffed by more than 1.4 million regular

> or temporary administrators and poll workers. The original constitutional premise, that state governments should oversee the conduct of elections, subject only to limited and necessary federal intervention, remains sound.

Ford-Carter Report at 25. Our concurrent federal-state elections are even more intertwined today. *See* Kathleen Hale & Mitchell Brown, *How We Vote: Innovation in American Elections* at 19-44 (2020).

Neither the Elections Clause nor federal election statutes categorically forbid States from conducting federal and state elections through separate rules and systems if they so choose. *See, e.g.*, *Young v. Fordice*, 520 U.S. 273, 290 (1997); *Kobach v. U.S. Election Assistance Comm'n*, 772 F.3d 1183, 1198 (10th Cir. 2014). Despite this theoretical "possibility of dual voting systems"—one for federal elections and another for state races—"States have generally avoided this approach because of the huge administrative burden it would entail." Kathleen Hale *et al.*, *Administering Elections: How American Elections Work* at 55 (2015); *id.* at 75 (*re* "burdens of running dual systems"). Efforts to establish and administer "dual" systems have been few and far between, and largely unsuccessful. *See* Ford-Carter Report at 22 ("Though in theory, and occasionally even in practice, states have tried to … set[] up separate systems for federal and state elections, none has found such bifurcated systems sustainable.").[3]

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[3] *See generally* Nat'l Conf. of State Legislatures, *Dual Voting Systems in Three States*, Canvass (Nov. 2013); Chelsea A. Priest, *Dual Registration Voting Systems: Safer and Fairer?*, 67 Stan. L.

Some attempted dual systems have been struck down on federal equal protection grounds or under the Voting Rights Act. *See, e.g., Haskins v. Davis*, 253 F. Supp. 642, 643 (E.D. Va. 1966) (three-judge court); *Young*, 520 U.S. at 290-91. Other such efforts have failed on both state constitutional and statutory grounds. In *Orr v. Edgar*, 670 N.E.2d 1243, 1246 (Ill. App. Ct. 1996), for example, the State of Illinois responded to the National Voter Registration Act (NVRA) by adopting "a two-tier system of voter registration, creating dual and separate electorates for state and federal elections." The Illinois Appellate Court held that "defendants' creation of a confusing system of dual and separate electorates" violated the Illinois Constitution's guarantees of "free and equal" elections as well as equal protection. *Id.* at 1252.

A long-running effort by the Kansas Secretary of State to create a "partial registration" system in which NVRA "Federal Form" registrants were allowed to vote in federal but not state elections was struck down as *ultra vires* under the Kansas election code. "There is no such thing as 'partial registration' to be found in the Kansas statute books"; "a person is either registered to vote or he or she is not." *Belenky v. Kobach*, No. 2013CV1331, 2016 WL 8293871, at *4 (Kan. Dist. Ct. Jan. 15, 2016). The Secretary could not proceed with any bifurcated registration system "until the Kansas legislature acts, consistent with the Kansas Constitution and Federal law, to so permit." *Id.* at *6. That has never happened.

Rev. Online 101 (2015); Michael T. Morley, *Dismantling the Unitary Electoral System? Uncooperative Federalism in State and Local Elections*, 111 Nw. U. L. Rev. Online 103 (2017).

Arizona's Attorney General opined in 2013 that state law allows "separate voter rolls"—one for voters who register without providing proof of citizenship, who may vote only in federal races; the other for those providing such proof, who may vote in all races. *Re: Voter Registration*, Ariz. Att'y Gen. Op. No. I13-011 (R13-016) (Oct. 7, 2013). Arizona's implementation of a "dual-form registration system" was promptly challenged, and the State agreed in 2018 to abandon its use of separate forms and to rely on a single form to register voters for federal and state elections, with the State then seeking to verify citizenship through driver's license records. *See* Consent Decree, *League of United Latin American Citizens Arizona v. Reagan*, No. CV 17-4102 (D. Ariz. June 18, 2018); Brad Poole, *Arizona Agrees to Simplify Voter Registration*, Courthouse News Service (June 5, 2018). Arizona continues its efforts to restrict "full ballot" access to voters presenting proof of citizenship. *See* Katie Hobbs, Arizona Secretary of State, *2021 Elections Procedures Manual*, at 6-9 (2021) ("'full-ballot' voter designation" vs. "'federal-only' voter designation").

States have overwhelmingly steered clear of these kinds of experiments with dual election systems. Such systems are not "sustainable." Ford-Carter Report at 22. Conducting concurrent federal and state elections under a common set of rules is vastly more efficient and cost-effective, and far less prone to error and confusion. As discussed in Part III, concurrent federal-state elections also increase voter participation and promote confidence in the outcome at all levels. Petitioners' ISL claim would threaten the ability of state and local governments to run concurrent federal-state

elections because of the chaos, uncertainty, and expense of being subjected to conflicting federal and state judicial instructions about the meaning and scope of the identical state statutes.

II. Election administrators need clear, stable "rules of the road."

This Court repeatedly has emphasized the need for clear, stable rules in conducting elections, not just for the sake of the voters but for the election administrators who are charged with the daunting task of running concurrent federal-state elections. These interests are served through the *Purcell* principle, *see Purcell v. Gonzalez*, 549 U.S. 1 (2006), as well as through a variety of other rules requiring that disputes over state law be resolved by state rather than federal courts. Petitioners' ISL claim conflicts with all these rules.

Justice Kavanaugh has stressed *Purcell*'s importance to stable election administration:

> The Court's precedents recognize a basic tenet of election law: When an election is close at hand, the rules of the road should be clear and settled. That is because running a statewide election is a complicated endeavor. Lawmakers initially must make a host of difficult decisions about how best to structure and conduct the election. Then, thousands of state and local officials and volunteers must participate in a massive coordinated effort to implement the lawmakers' policy choices on the ground before and during the election, and again in

> counting the votes afterwards. And at every step, state and local officials must communicate to voters how, when, and where they may cast their ballots through in-person voting on election day, absentee voting, or early voting. Even seemingly innocuous late-in-the-day judicial alterations to state election laws can interfere with administration of an election and cause unanticipated consequences.

Democratic Nat'l Comm. v. Wis. State Legislature, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J., concurring) (cleaned up). "The principle also discourages last-minute litigation and instead encourages litigants to bring any substantial challenges to election rules ahead of time, in the ordinary litigation process." *Id.*; *see also Merrill v. Milligan*, 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurring in grant of stay applications); *Williams v. Rhodes*, 393 U.S. 23, 35 (1968).

These practical considerations carry even greater force in the ISL context. Late changes always pose challenges, but imagine if those changes were applied to some races on the ballot but not others. If election administrators were presented with dueling federal and state court orders on how to apply state statutory signature-verification requirements, voter ID laws, absentee-ballot witness requirements, ballot-return laws, and a host of other nuts-and-bolts issues, it is difficult to imagine how concurrent federal-state elections could ever be carried out.

Petitioners' ISL claim also inherently conflicts with the *Pullman* abstention doctrine, certification

procedures, and other mechanisms that federal courts use in seeking definitive rulings from state courts about the meaning and validity of state election laws. These mechanisms help "avoid federal-court error in deciding state-law questions" by "plac[ing] state-law questions in courts equipped to rule authoritatively on them"—namely, *state* courts. *Arizonans for Off. Eng. v. Arizona,* 520 U.S. 43, 75-76 (1997); *see also Lehman Bros. v. Schein,* 416 U.S. 386, 391 (1974) (certification "helps build a cooperative judicial federalism" in obtaining definitive state court rulings on state law).[4]

Rather than deferring to state high courts as the "authoritative" expositors of state law, *Arizonans for Off. Eng.,* 520 U.S. at 76, petitioners' ISL claim treats them as, at best, advisors to federal courts on how state statutes should be applied in federal elections administered by the States. If that claim were accepted, state and local election systems would increasingly be subject to federal judicial superintendence over their compliance with state election statutes in conducting federal elections.

Petitioners' ISL claim also runs headlong into the doctrine of laches, which requires litigants to raise all potential challenges to the "rules of the road" *before* the election, rather than once it is underway or even over. One recent example is *Trump v. Wisconsin Elections Commission*, 983 F.3d 919 (7th Cir. 2020), *cert. denied*, 141 S. Ct. 1516 (2021). Following Wisconsin's

[4] For recent examples of federal courts using *Pullman* abstention or certification to obtain definitive state court rulings on state election law, *see, e.g.*, *Wise v. Circosta*, 978 F.3d 93, 101 (4th Cir. 2020) (*Pullman* abstention); *Barr v. Galvin*, 626 F.3d 99, 107 (1st Cir. 2010) (same); *Ohioans Against Corp. Bailouts, LLC v. LaRose*, 417 F. Supp. 3d 962, 981 (S.D. Ohio 2019) (certification).

certification of President Biden's victory, President Trump brought suit in federal court challenging "three pieces of guidance issued by the [Wisconsin Elections] Commission well in advance of the 2020 election" that local clerks and voters had followed in carrying out the absentee-voting process, arguing the guidance was "contrary to Wisconsin statutory law" and violated the Wisconsin Legislature's authority to direct the "Manner" for choosing Electors. *Id.* at 923. The Seventh Circuit affirmed the dismissal of this challenge on multiple grounds, including "because of the unreasonable delay that accompanied the challenges the President now wishes to advance against Wisconsin's election procedures." *Id.* at 922. Just as *Purcell* bars "late claims brought too close in time *before* an election occurs," the "same imperative of timing and the exercise of judicial review applies with much more force on the back end of elections." *Id.* at 925. Allowing post-election challenges in these circumstances would inflict "unquestionable harm" on voters who had "cast ballots in reliance on the [challenged] guidance, procedures, and practices." *Id.* at 926.

How would federal ISL claims fit within the laches doctrine? Would they, too, need to be brought well in advance of an election for all the reasons emphasized in *Purcell* and related decisions? Would they be subject to *Pullman* abstention or certification procedures so that state high courts could at least offer their views on what their own States' laws mean, or would federal district courts be able to charge ahead and render their own decisions about the meaning and proper application of state election statutes? Given the press-

ing deadlines and expedited nature of election disputes, it is difficult to envision how federal and state courts would be able to coordinate their dual reviews of the same statutory provisions, simply adding to electoral disruption and delay.

III. Petitioners' claim invites chaos and would subject state and local election administrators to conflicting pronouncements about the same state laws in the same elections.

Petitioners' claim would open up a vast range of state law (constitutional, statutory, administrative, and municipal) governing state elections to federal judicial challenge under the Elections Clause. Every dispute over the meaning or application of a state election statute, no matter how obscure, would instantly become fodder for a potential federal constitutional challenge. Joint administration of elections would be increasingly difficult, fraught with risk, and subject to partisan manipulation.

A broad ISL ruling would weaponize election law, generating new litigation leading up to, during, and in the aftermath of closely contested federal elections. The result would be "a flood of new claims about the enforcement of state laws governing federal elections." Brief of *Amicus Curiae* Conference of Chief Justices at 27. And in most instances, it would be state and local election administrators who would be drowned in that flood of litigation. It is rather naïve to assure that recognizing ISL claims "does not alter election officials' obligations or responsibilities" in any respect, but instead "simply opens up a federal forum

for enforcing them." Michael T. Morley, *The Independent State Legislature Doctrine*, 90 Fordham L. Rev. 501, 515 (2021).

That's *precisely* what *amici* fear. State and local election administrators need a single authoritative interpretation of state election law. Subjecting them to the risk of competing state and federal court orders regarding the interpretation and enforcement of the *same* state laws in the *same* elections involving the *same* ballots cast by the *same* voters would make a difficult job into a near-impossible one. Unable to rely on the judgments of their own courts when controversies arose over the application of state laws in federal elections, where would they turn?

A. State "manner" requirements under state constitutions.

Most state constitutions have long required that elections be "free," and most of those constitutions also require that elections be "open" or "equal" in addition to being "free." *See* Joshua A. Douglas, *The Right to Vote Under State Constitutions,* 67 Vand. L. Rev. 89, 144-49 (2014) (appendix of relevant state constitutional provisions). Petitioners' ISL claim would effectively nullify these state constitutional protections as applied to federal elections and make it difficult if not impossible for state and local governments to administer concurrent federal-state elections. Examples abound.

Voter ID laws. Several state voter ID statutes have been struck down or significantly narrowed by state supreme courts enforcing state constitutional protections, typically under free and equal voting guarantees. *See, e.g.*, *Weinschenk v. State*, 203 S.W.3d

201, 210-19, 221-22 (Mo. 2006) (invalidating Missouri voter ID statute under state constitutional "free and open" elections and equal protection guarantees); *Mont. Democratic Party v. Jacobsen*, No. DA 22-0172, 2022 WL 4362513, at *8-10 (Mont. July 13, 2022) (affirming preliminary injunction against statutory elimination of student ID as valid voter ID pursuant to Montana's "free and open" constitutional guarantees).

Petitioners' claim logically would require federal courts to *enforce* state voter ID statutes in *federal* elections (because that's what the state legislatures enacted) even where such enactments have been struck down by state courts under state constitutions and *cannot* be applied in state elections. But how would that work in the real world? Would there be two separate ballots, one limited to federal races and accessible only with the statutorily prescribed ID, and the other limited to state races and available without an ID? This could only lead to greater delays, confusion, and expense. And what if state authorities understandably failed to undertake all the bureaucratic tasks necessary to implement and administer a voter ID statute that had been struck down by state courts on state-law grounds? Could a federal court order compliance with the ID statute, thereby commandeering state personnel and resources to implement an (invalidated) state ID law so that it could be enforced as enacted in federal (but not state) elections?

Ballot-return statutes. Some States impose special restrictions on who may return absentee ballots on behalf of other voters. Montana enacted a statute several years ago limiting who could receive and de-

liver such ballots and requiring them to "sign a registry upon delivery of the ballots" and provide various identifying information about themselves and the voters whose ballots they delivered. *Driscoll v. Stapleton*, 473 P.3d 386, 389 (Mont. 2020). Violation of these statutory restrictions "carrie[d] a fine of $500 for each ballot collected unlawfully." *Id.* The Montana Supreme Court upheld a preliminary injunction against enforcement of this statute as unconstitutionally burdening "the free exercise of the right of suffrage" guaranteed in the Montana Constitution, particularly with respect to rural Native American communities. *Id.* at 392-94.

Under an ISL claim, could a federal district court have then issued a ruling that, with respect to *federal* races on the ballot, the enjoined state ballot-return statute must be enforced irrespective of the Montana Constitution and Montana Supreme Court? But we are talking about return of the *same* absentee ballots by the *same* people. Could someone have a state constitutional right to return a ballot while at the same time being subject to a $500 state fine for returning that ballot, even though the state statute imposing that fine had been enjoined by the state courts? Could a federal court command state and local officials to operate the ballot registry and impose the fines because that's what the Montana Legislature "prescribed," even though enforcement had been enjoined by the State's highest court?

Voter registration laws. As discussed in Part I *supra*, the relatively few attempts to create dual federal and state voter registration systems have largely either failed, been struck down, or been abandoned be-

cause they were simply too difficult to run. Recognizing respondent's ISL claim would open the floodgates to more such dual federal-state registration systems. Many state registration laws have been struck down by state courts under state constitutional voting guarantees. *See, e.g.*, *N.H. Democratic Party v. Sec'y of State*, 262 A.3d 366, 379-82 (N.H. 2021); *Md. Green Party v. Md. Bd. of Elections*, 832 A.2d 214, 225-29 (Md. Ct. App. 2003); *Mont. Democratic Party*, 2022 WL 4362513, at *10-11.

Petitioners' ISL claim logically would require the continued enforcement of these state-barred registration statutes in federal elections. Consider the Montana Legislature's enactment of a statute eliminating "Election Day Registration" (EDR) which was enjoined under the Montana Constitution, thus leaving EDR in place. But couldn't a federal litigant argue that the Montana Legislature's elimination of EDR must be enforced with respect to federal races under the Elections Clause? Might a voter showing up to register at the polls be allowed to vote in the state races but not the federal races? How would that be administered? Could an election observer challenge EDR voters' ballots and require they be set aside for a potential recount?

Felon disenfranchisement laws. Some state statutes restricting the ability of certain ex-felons to register and vote have been struck down under state constitutional "free and equal" voting guarantees. *See, e.g., Mixon v. Commonwealth*, 759 A.2d 442, 451-52 (Pa. Commw. Ct. 2000), *aff'd without opinion*, 783 A.2d 763 (Pa. 2001); *Gaskin v. Collins*, 661 S.W.2d 865, 866-68 (Tenn. 1983). Under the logic of petitioners' ISL claim, a statutory ex-felon law that is illegal

under a state constitution, and thus unenforceable in state elections, might nevertheless be enforced in *federal* elections because that is what the Legislature "prescribed," even though the "prescribed" rule is illegal under the state constitution.

Ballot-access restrictions. State courts also have struck down or modified state ballot-access laws under state constitutional guarantees. Early in the COVID-19 pandemic, for example, the Supreme Judicial Court of Massachusetts held that certain ballot-access signature requirements and deadlines violated the fundamental rights to vote and seek office guaranteed under the Massachusetts Declaration of Rights as applied in the "extraordinary" circumstances of the pandemic. *Goldstein v. Sec'y of Commw.*, 142 N.E.3d 560, 564 (Mass. 2020). The court ordered the Commonwealth, among other things, to develop an "electronic signature collection process" for use in the upcoming federal and state primary elections (but not beyond) to "alleviate the need for, and the risk associated with, obtaining 'wet' signatures" through in-person contact. *Id.* at 574-75.

Under the logic of petitioners' ISL claim, every such ballot-access adjustment would present a federal claim under the Elections Clause, with opposition candidates and parties rushing to obtain federal injunctive relief *enforcing* state statutory requirements in *federal* races that had been held to violate state constitutional guarantees and prohibited in *state* races. What would election administrators do in these circumstances? After *Goldstein*, would Massachusetts officials be required to accept electronic petition signatures for state races but required to accept only "wet" signatures for federal races?

B. State "manner" regulations imposed through state initiatives and referenda.

Voters in many States may override legislative action or inaction through state initiatives and referenda. In June 2011, for example, the Maine Legislature passed, and its Governor approved, legislation repealing Maine's long-standing same-day voter registration system. *See* H.P. 1015, 125th Leg., 1st Reg. Sess. (Me. 2011). The voters promptly rejected that repeal in a November 2011 statewide referendum.[5] Similarly, a grassroots initiative process in Michigan led to the adoption in November 2018 of a constitutional amendment guaranteeing a broad range of voter registration and absentee-voting safeguards.[6]

What would be the fate of these voter initiatives under petitioners' ISL claim? On the one hand, this Court held long ago that the Elections Clause does not bar "treating the referendum as a part of the legislative power for the purpose of apportionment, where so ordained by the state Constitutions and laws." *Ohio ex rel. Davis v. Hildebrant,* 241 U.S. 565, 569 (1916). That logic should apply to all state "Manner" regulations embraced by the Elections Clause, but the majority and dissent took different views of *Hildebrant*

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[5] *See Maine Same-Day Registration Veto Referendum, Question 1 (2011)*, Ballotpedia, https://ballotpedia.org/Maine_Same-Day_Registration_Veto_Referendum,_Question_1_(2011) (last visited Oct. 25, 2022).

[6] *See Michigan Proposal 3, Voting Policies in State Constitution Initiative (2018)*, Ballotpedia, https://ballotpedia.org/Michigan_Proposal_3,_Voting_Policies_in_State_Constitution_Initiative_(2018) (last visited Oct. 25, 2022).

in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. 787 (2015), and it is unclear to *amici* how an ISL claim might apply today to direct voter overrides of "Manner" regulations enacted by state legislatures. *Compare id.* at 805-06, 808, *with id.* at 840-41 (Roberts, C.J., dissenting).

If election statutes adopted by state legislatures were immune from challenge here as well, the difficulties of attempting to administer concurrent federal-state elections would simply multiply. In Maine, for example, would the statutory repeal of same-day registration be enforced (like the Legislature and Governor said) or disregarded (like the voters said)? Would there be a basis for contesting a federal election because of unqualified individuals voting? Should precinct workers put aside these ballots from same-day registrants until the law is clarified? Whether using voting machines or paper ballots, if precinct workers mistakenly allowed same-day registrants to cast a full ballot, would it be possible to correct that error? How would election workers maintain order in a precinct when trying to enforce a rule that makes no sense to typical voters (allowing them to vote for Governor but not President, State Senator but not U.S. Senator)?

C. Delegations of authority to election officials and state courts.

The legislatures of all 50 States have "prescribed" the "Manner" of conducting federal elections, U.S. Const. art. I, § 4, cl. 1, not only by spelling out various standards and rules, but by creating administrative machinery to implement these requirements along with state judicial review procedures to ensure the

fair administration of elections and resolution of election disputes. All of these matters fall within the scope of what the legislatures have "prescribed," yet petitioners' ISL claim threatens to undermine longstanding delegations of authority, robbing elections commissions and secretaries of state of the power to make decisions, and to disrupt carefully crafted state judicial review procedures for handling recounts and other election disputes.

This goes far beyond what Chief Justice Rehnquist meant in writing that "[a] significant departure from the *legislative scheme* for appointing Presidential electors presents a federal constitutional question." *Bush v. Gore*, 531 U.S. 98, 113 (2000) (Rehnquist, C.J., concurring) (emphasis added). Under the word "Manner" in both the Electors and Elections Clauses, the "legislative scheme" includes not just the isolated words of the election code itself, but the legislature's "delegat[ion] of authority to run the elections and to oversee election disputes to the Secretary of State … and to state circuit courts," subject to judicial review in state appellate courts. *Id.* at 113-14. Federal courts must not look only to particular words and phrases in isolation, but be "deferential to those bodies *expressly empowered by the legislature to carry out its constitutional mandate*." *Id.* at 114 (emphasis added).

The decisions in *Trump v. Wisconsin Elections Commission* illustrate the proper application of these principles in an ISL challenge to administrative guidance about absentee voting. As discussed in Part II above, the case challenged "three pieces of guidance issued by the Commission well in advance of the 2020 election" on the grounds that they violated governing

state election statutes. 983 F.3d at 923. The Seventh Circuit rejected the post-election claim on laches grounds, but it joined the district court in rejecting the merits of President Trump's claims as well. As the district court reasoned, the ISL arguments "consist[ed] of little more than ordinary disputes over statutory construction," which were matters "expressly entrusted" by the Wisconsin Legislature to the Commission—the entity with the responsibility for administering state elections, and for issuing advisory opinions, guidance, and rules subject to state court review. *Trump v. Wis. Elections Comm'n,* 506 F. Supp. 3d 620, 638-39 (E.D. Wis. 2020). "In sum, far from defying the will of the Wisconsin Legislature in issuing the challenged guidance, the WEC was in fact acting pursuant to the legislature's express directives." *Id.* at 638.

> If "Manner" in the Electors Clause is read to include legislative enactments concerning election administration, the term necessarily also encompasses the Wisconsin Legislature's statutory choice to empower the WEC to perform the very roles that plaintiff now condemns. Thus, the guidance that plaintiff claims constitutes an unconstitutional deviation from the Wisconsin Legislature's direction, is, to the contrary, the direct consequence of legislature's express command.

Id. at 638-39. The Seventh Circuit affirmed in all respects, emphasizing that, "whatever actions the Commission took here, it took under color of authority expressly granted to it by the Legislature." 983 F.3d at 927. Whether the Commission "erred in its exercise" of that authority was a question of state, not federal

law. "We are not the ultimate authority on Wisconsin law. That responsibility rests with the State's Supreme Court," where "the President had an opportunity to raise his concerns." *Id.*

In the same way that the Wisconsin Legislature "prescribed" the WEC's authority to issue guidance and provided special mechanisms for state judicial review of that guidance, the North Carolina Legislature in this case "prescribed" the participation by state courts in reviewing its redistricting efforts for compliance with state constitutional requirements. Both sorts of legislative "prescriptions" fully comply with the Elections Clause.

D. State remedial schemes.

A State's "legislative scheme" propounded under the Elections and Electors Clauses, *Bush*, 531 U.S. at 113 (Rehnquist, C.J., concurring), typically includes provisions regarding how to interpret statutory terms, how and when to challenge alleged violations of those terms, special avenues for appeals, the consequences of violations of the rules, and the application of severability provisions. All of these are essential components of a State's "legislative scheme." Will they also be enforced if a federal court steps in under the Elections Clause to interpret and enforce specific state election statutes?

For example, many States apply election rules in a "directory" rather than "mandatory" manner, excusing minor errors and mistakes when the voter's intent can be ascertained and there is no reason to suspect fraud or other wrongdoing. The Florida Supreme Court forcefully advanced this approach nearly half a century ago:

> The right to vote is the right to participate; it is also the right to speak, but more importantly the right to be heard. We must tread carefully on that right or we risk the unnecessary and unjustified muting of the public voice. By refusing to recognize an otherwise valid exercise of the right to a citizen to vote for the sake of sacred, unyielding adherence to statutory scripture, we would in effect nullify that right.

Boardman v. Esteva, 323 So.2d 259, 263 (Fla.1975), *appeal dismissed*, 425 U.S. 967 (1976); *see also Erickson v. Blair*, 670 P.2d 749, 754 (Colo. 1983) (en banc) (adopting "substantial compliance, rather than strict compliance, [as] the appropriate standard for evaluating the validity of absentee ballots").

If federal courts now assert authority to construe state election statutes, will they do so in a "directory" manner, requiring "substantial" compliance," or in a "mandatory" manner that demands "strict" compliance instead? Will federal courts look to the relevant State's laws on these points, *see Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938), or instead develop a federal common law for construing state statutes under the Elections Clause? Or will federal courts defer to Congressional elections precedent and excuse inconsequential errors and omissions by election officials and/or voters themselves where the voters' intent can be discerned and there is no reason to suspect fraud? *See* Part III-F *infra.*

Consider also the extensive involvement of state courts in post-election canvassing, recounts, election

contests, and certifications. State courts repeatedly are called on to oversee canvassing boards, state elections officers, and local clerks in their application of state election laws, and state courts hear and determine election contests over how those rules have been applied to particular ballots in particular races. *See, e.g.*, *In re Contest of Gen. Election Held on Nov. 8, 2008, for Purpose of Electing a U.S. Senator from Minnesota*, 767 N.W.2d 453 (Minn. 2009); *Wash. State Republican Party v. King Cnty. Div. of Recs.*, 103 P.3d 725 (Wash. 2004). All of this granular state judicial oversight is "prescribed" in the relevant state codes. Petitioners' ISL claim threatens to federalize these post-election dispute resolution mechanisms, which operate on tight deadlines. Would recounts and election contests need to be stayed while disputants sought "definitive" word from federal courts about the meaning and application of selected state statutory provisions, or would the entire state process take place first and then be followed by another tier of federal Elections Clause review?

E. Recognizing petitioners' ISL claim would threaten to undermine all the benefits of concurrent federal-state election administration.

Our nation's long tradition of concurrent federal-state elections conducted under a common set of rules serves many imperative public interests, including making the election process as easy, efficient, and inexpensive as feasible; maximizing voter participation in all elections; and promoting election integrity and voter confidence. *Amici* fear the litigation unleashed if petitioners' claim were recognized would eat away

at these fundamental interests and make it increasingly difficult, if not impossible, to run concurrent federal-state elections.

Expense and duplication. Estimates range widely, but state and local election administration expenses for conducting all federal, state, and local elections likely exceed $5 billion annually, and may be much greater. Charles Stewart III, *The Cost of Conducting Elections* at 3 & nn. 6-7, MIT Election Data + Science Lab (2022). Imposing dual interpretations of state election law—one for federal elections, the other for state races—inevitably would drive these expenses through the roof as state and local officials scrambled to adapt to an increasingly fractured election system. Studies of the isolated experiments with dual registration systems have emphasized the inevitably increased costs, complexity, and confusion at the grassroots level. *See* n.3 *supra.*

Diminishment of voter turnout. The inevitable result of voter and election administrator confusion over conflicting rules would be a "consequent incentive to remain away from the polls," a risk that would increase "[a]s an election dr[ew] closer." *Purcell,* 549 U.S. at 4-5. Moreover, the experience of the five States that conduct statewide elections in odd-numbered years demonstrates that decoupling federal and state elections results in dramatic declines in voter turnout in the off-year state races. *See* Stewart, *supra*, at 9-10.

Undermining election integrity and voter confidence. Voters' confidence is rooted in the belief that the rules are applied impartially and are not the product of seemingly arbitrary or conflicting judgments about the meaning of a statute or regulation.

To deprive voters of the protections of their state constitutions, as understood by their state courts, would be to remove the checks and balances that serve the liberty interests of all a State's citizens. State judicial review assures voters that they cannot be deprived of their right to vote without access to their state courts and the full protections of their constitutions and state laws as interpreted by their courts whether the source of the deprivation is legislative, executive, or administrative action.

If ISL claims were allowed to erode States' ability to conduct concurrent federal-state elections, citizens also would lose an important "yardstick" that helps ensure election integrity and voter confidence. Concurrent elections conducted through a single ballot judged under one set of rules by the same local election officials help build trust and respect in the final outcomes of all races. Under a concurrent system and a single ballot, if one party's candidate wins a precinct's Presidential vote but the other party's candidate for state assembly wins, that tends to undermine claims of fraud and to show that voters simply split their ballots. Multiple federal and state races on the same ballot serve as yardsticks in judging electoral integrity.

F. The lack of finality in a federal court's decision further cautions against adopting petitioners' ISL claim.

In deciding whether the Elections Clause vests exclusive authority to set the rules for federal elections in state legislatures, the Court should follow the approach of the one branch of the federal government to

which the Elections Clause delegates power—Congress, which has express authority to "make or alter" the election regulations prescribed by those individual legislatures. What is more, Article I separately provides that "[e]ach House shall be the Judge of the Elections, Returns and Qualifications of its own Members[.]" Art. I, § 5, cl. 1. Each House "necessarily" exercises "judicial authority" in reviewing election disputes involving its members, and each has the final constitutional power to render "a judgment which is beyond the authority of any other tribunal to review." *Barry*, 279 U.S. at 613, 616. It is each House of Congress, not the federal courts, that has the power to make "an unconditional and final judgment." *Roudebush,* 405 U.S. at 19.

In exercising its "judicial authority" to resolve election contests, Congress has long followed the "well-established and most salutary rule" in election contests that, "where the proper authorities of the State government have given a construction to their own constitution or statutes, that construction will be followed by the Federal authorities"—a rule that is "absolutely necessary to the harmonious working of our complex Government, State and national." *Hinds' Precedents of the House of Representatives* § 645, at 859-60 (1907) (citation omitted). Of course, the Houses of Congress are not bound by state law in judging the elections of their members, but they defer to state courts and state constitutions in their understanding of what state law means. *See, e.g.*, 2 *Deschler's Precedents of the House of Representatives*, ch. 9, §§ 5.13-5.14, 7.4, 47.2, 56.4, 57.3 (1977).

Second, the "House has chosen overwhelmingly in election cases throughout its history not to penalize

voters for errors and mistakes" either by election officials or by voters themselves where their "obvious intent" may be discerned and there is no reason to suspect fraud. Congr. Rsch. Serv., RL33780, *Procedures for Contested Election Cases in the House of Representatives* at 16 (2016); *see id.* at 15-16 (discussing House precedent prohibiting "mere technicalities of state law or regulation" from overriding "the will of the voters").

If this Court accepted petitioners' ISL claim, any given state statute would thus potentially be subject to conflicting constructions by state courts, federal courts, *and* the relevant House of Congress. These conflicting readings of state law would only undermine citizens' trust in the system and the people who run our elections. Indeed, federal courts could find themselves casting doubt not only on the integrity of state court decisions but of Congress's decisions too, which would only further undermine faith in our entire government.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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