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.

and

TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of Representatives, *et al.*,

Petitioners,

—v.—

NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, INC., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE NORTH CAROLINA SUPREME COURT

BRIEF OF *AMICI CURIAE* CAROLYN SHAPIRO, NICHOLAS O. STEPHANOPOULOS, AND DANIEL P. TOKAJI IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are law professors who research and write about election law and/or about the federal courts.

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[1] No parties or their counsel had any role in authoring or made any monetary contribution to fund the preparation or submission of this brief. All parties entered blanket consent for the filing of *amicus* briefs.

[2] Institutional affiliation provided for identification purposes.

SUMMARY OF THE ARGUMENT

Petitioners ask this Court to unmoor state legislatures from the very state constitutions that create them, insisting on a reading of the Elections Clause, U.S. Const. art. IV, § 1, referred to herein as the independent state legislature theory ("ISLT"). As Respondents and other *amici* show, original public meaning and practice weigh against ISLT. Because of this longstanding tradition, state law generally does not distinguish between state and federal elections. Petitioners and many of their *amici* focus exclusively on congressional redistricting and so fail to grapple with the implications of ISLT for the myriad other laws governing elections in this country. For these reasons, *Amici* explore the multitude of doctrinal and practical problems adoption of ISLT would likely cause in all aspects of American elections.

I. Petitioners' gloss on ISLT provides courts with no manageable standards. Petitioners propose a version of ISLT that limits the application of what they describe as "vague" constitutional provisions. But they offer no clear guidance for how to tell when a constitutional provision is so vague, such that state courts are prevented from ordinary judicial review. The best attempts of their *amici* to identify a clear statement rule are similarly opaque and would disrupt centuries of state constitutional law.

ISLT is not just a matter of the allocation of power within a state, instead it effects a massive shift from state to federal courts. It undermines the ordinary processes of judicial review and reallocates questions

of state law into the federal courts, implicating concerns key to *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), particularly forum-shopping and the inconsistent administration of state law.

II. ISLT threatens to decimate the conduct of elections across the country by effectively creating two sets of rules for administering elections and by destroying legislative delegation. ISLT could even render inoperable the very functioning of election administration systems nationwide.

III. Finally, ISLT also threatens to federalize election disputes, overburdening the federal judiciary and potentially upending approaches to state statutory interpretation without a clear replacement. And ISLT creates questions about a state legislature's ability to bind its own hands in regulating federal elections. These ambiguities risk involving the federal courts in fundamental questions of state governmental design—questions that the federal Constitution leaves to the states.

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As Respondents and other *amici* show, original public meaning and practice both weigh against ISLT. So do two-and-a-half centuries of subsequent practice. As a result of this longstanding tradition, state law rarely distinguishes between state and federal elections. Indeed, "'[l]ong settled and established practice' may have 'great weight in a proper interpretation of constitutional provisions.'" *Chiafalo v. Washington*, 140 S. Ct. 2316, 2326 (2020) (quoting *The Pocket Veto Case*, 279 U.S. 655, 689 (1929)). As the primary

drafter of our Constitution recognized, "'a regular course of practice' can 'liquidate & settle the meaning of' disputed or indeterminate 'terms & phrases.'" *Id.* (quoting *Letter of James Madison to Spencer Roan*e (Sept. 2, 1819), in 8 *Writings of James Madison* 450 (Gaillard Hunt ed., 1908)); *see also* William Baude, *Constitutional Liquidation*, 71 Stan. L. Rev. 1, 10-11 (2019). Here, *Amici* explore the multitude of doctrinal and administrative problems that ignoring these centuries of practice and adopting ISLT threaten to cause.

Adopting ISLT has the potential to disrupt both settled structures for review of election law questions and the administration of elections, throwing doctrine and the conduct of elections into disarray. While Petitioners and many of their *amici* focus exclusively on congressional redistricting, ISLT threatens to sow chaos for election-related statutes of all kinds. And their characterization of what is at issue disguises the underlying shift that ISLT effects: one from state courts to federal courts. By abrogating the power of state courts to review state law regulation of federal elections, ISLT will likely force more cases into federal courts. A system where federal courts interpret and create a separate body of law for federal elections will have states running two sets of elections despite having a single statute. ISLT could also hobble the decentralized way that states conduct elections, creating confusion for voters and imposing crippling administrative burdens on legislatures and election administrators. And it would create uncertainty about which law applies by throwing past executive or

judicial action into question. ISLT spells confusion and disarray for federal courts, state governments, and voters across the country.

This is true no matter what version of ISLT is considered. At the most basic level, proponents of ISLT argue that the Elections Clause's reference to the "Legislature" restricts the power to regulate federal elections *only* to the state's legislative body, "rather than the state as an entity." Michael T. Morley, *The Independent State Legislature Doctrine*, 90 Fordham L. Rev. 501, 503 (2021) (Morley, *ISLD*). In this view, the other branches of state government are deprived of their ordinary power to check the state legislature's regulation of federal elections.

All forms of ISLT raise varying questions about constitutional structure and historical support. *See Hearing on "The Independent State Legislature Theory and its Potential to Disrupt our Democracy" Before the H. Comm. on Administration*, 117th Cong. 1 (2022) (testimony of Richard H. Pildes, Sudler Family Professor of Constitutional Law). While Petitioners advance a maximalist version that objects to the North Carolina Supreme Court's exercise of legislatively authorized power, any version of ISLT will likely produce doctrinal and administrative problems, disrupting both the way states run elections and how courts adjudicate disputes.

I. ISLT undermines the normal operation of judicial review.

Fixating on the allocation of power within a state, *see* Pet. Br. 18, Petitioners seemingly ignore that the

need for judicial review and statutory interpretation remains and so advance a position that upends long-settled practice and the very nature of our federalist system, *see id.* at 11.

A. Petitioners' focus on "vague" constitutional provisions avoids no doctrinal pitfalls and creates additional ones.

1. Petitioners warn that state courts interpreting "vague[]" constitutional provisions pose a special threat. Pet. Br. 2. They contend that North Carolina's Free Elections Clause, N.C. Const. art. I, § 10, contains no judicially manageable standards and is so broad that the state court's application of it is equivalent to legislating. *Id.* at 46-47. Yet Petitioners create their own unmanageable requirement that courts distinguish between vague and non-vague constitutional provisions.

Accepting Petitioners' view of ISLT risks opening an entirely new area of federal judicial interpretation as to whether a state constitutional provision is too vague, such that it violates the federal Constitution for the state supreme court to find that a statute violates that provision in the context of federal elections. But state courts, like federal courts, often give further clarity to constitutional provisions over time. How much attention should the federal courts give to state court development of state constitutional law and judicial decisions that have elaborated the meaning of provisions? Would they be binding or merely persuasive? Petitioners do not tell us, nor do they explain why any

particular constitutional provisions are too vague. This framework leaves federal courts to make guesses about unfamiliar state law and practice.

Moreover, Petitioners' focus on "vague" constitutional provisions does not avoid any doctrinal difficulties addressed below. While a number of states have specific constitutional provisions addressing districting, *see* Ariz. Const. art. IV, § 1; Ohio Const. art. XI, § 6; Fla. Const. art. III, § 16; NY Const. art. III, §§ 4-5, and a smaller number contain highly specific rights related to voting in addition to broad protection of the right to vote, *see, e.g.*, Mich. Const. art. II, § 4, state courts are routinely called upon to review election statutes outside of these contexts. *See, e.g.*, *Mont. Democratic Party v. Jacobsen*, 2022 MT 184, ¶¶ 19, 35-36 (2022) (reviewing voting statutes under Montana constitution's guarantee of "free and open" elections). Petitioners' gloss does not save the federal courts from the morass of interpretive problems or state and local officials from the host of administrative burdens that ISLT would cause.

2. Two of Petitioners' *amici* attempt to offer their own approach to "vague" state constitutional provisions and statutes, which are equally unavailing. *See* NY Voters Br. 4; States' Br. 11-12.

First, neither explains why either North Carolina's Free Elections Clause or its legislative authorization of judicial review violates their rule.[3] The New York

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[3] The *amici* states point out that courts in some states have interpreted their constitutions' "free" elections clauses more narrowly than the North Carolina Supreme Court, and they hint

voters instead praise New York's constitutional amendment barring partisan gerrymandering. New York's constitution does indeed now prohibit drawing districts to favor or disfavor political parties, N.Y. Const. art. III, § 4(c)(5), but that does not mean North Carolina must mimic this provision to achieve the same end. Indeed, neither New York's nor North Carolina's constitutions provide specific guidelines to apply in the case of partisan gerrymandering. Accordingly, the supreme courts in both states are called upon to conduct the same assessment as to whether a map violates their constitutional protections.

Second, limiting state courts to applying only "clear" provisions to state laws governing federal elections would undermine normal processes of judicial review and constitutional interpretation. Many constitutional provisions can be characterized as "vague" and cover a broad range of guarantees. Consider the Equal Protection Clause and its state analogues. Their language is *intentionally* broad, for it aims to cover a broad range of contexts. Indeed, just because states could pass an amendment to prohibit racial gerrymandering does not mean that state equal protection clauses do not also prohibit racial gerrymandering. *Contra* Pet. Br. 46 (arguing that since

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that such courts are acting more appropriately. States' Br. 9-10. This argument flies in the face of federalism. State courts are under no obligation to interpret similar or identical constitutional language in lockstep with each other. *See* Sutton, *supra*, at 20. To the contrary, if that were the case, states would be unable to fulfill their important roles as laboratories of democracy. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

state equal protection provisions do not explicitly mention elections, they cannot be read to cover partisan gerrymandering). And state courts routinely interpret broad state constitutional provisions in contexts beyond election law, guided by their knowledge of state custom and history, and kept accountable to the people through measures like judicial elections and the relative ease of amending state constitutions. *See* Jeffrey S. Sutton, *51 Imperfect Solutions* 18 (2018). Petitioners' and *amici*'s approaches to constitutional interpretation cannot be squared with the normal application of broad constitutional provisions to a variety of contexts.

Third, *amici*'s arguments exemplify the danger of importing federal law approaches to state contexts. They praise clear statement rules for promoting constitutional protections like federalism, *see* NY Voters Br. 11, but they ignore context. Clear statement rules as a *federal* law interpretive matter often apply to laws involving federal/state relationships. Such rules exist in these contexts *because of* the federal structure that ISLT undermines. By contrast, state courts have applied clear statement rules in extremely narrow circumstances and in a minority of states. *See, e.g.*, *Cal. Cannabis Coal. v. City of Upland*, 401 P.3d 49, 64 (Cal. 2017) (initiative power); *S.C. v. M.B.*, 650 S.W.3d 428, 436 (Tex. 2022) (jurisdiction stripping). Imposing such a rule on state courts would fly in the face of federalism's respect for and protection of state law from undue federal interference.

B. ISLT would create new substantive and procedural complications while undermining ordinary processes of judicial review.

ISLT involves more than just the allocation of power within the state. It necessarily implicates the process and structure of judicial review. Petitioners offer no guidance about how judicial review proceeds under ISLT. Ordinarily, state law claims cannot be removed to federal court unless the federal court could already exercise subject matter jurisdiction on the face of the complaint. *See* 28 U.S.C. § 1441(a). It is common in election law litigation for plaintiffs to challenge state laws regulating elections and plead only state law claims. Any assertion of an Elections Clause problem would come only in the hypothetical defendant's *defenses*, not on the face of the complaint, barring removal. Litigants would go through the state court process and then seek review in this Court, drawing out the process of rendering judgment.

Now imagine a second hypothetical lawsuit about the same law, but the plaintiffs file in federal court and plead the Elections Clause issue in the complaint. This raises two problems. First, litigants could circumvent the *Pennhurst* bar and bring cases in federal court, creating a risk of forum shopping and inconsistent results. *See* Morley, *ISLD*, *supra*, at 503. Second, ISLT would call upon federal courts to act contrary to the long-accepted abstention standards of both *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941), and *Colorado River Water Conservation District v. United States*, 424 U.S. 800

(1976). And this Court has recognized the applicability of *Pullman* abstention in the districting context where the state, "through its legislative *or judicial branch*," has already begun to address the dispute. *Growe v. Emison*, 507 U.S. 25, 33 (1993) (emphasis added).

Adopting ISLT threatens inconsistency with the principles underlying the *Erie* doctrine. As every first-year law student learns, *Erie* is foundational to federal court jurisdiction. *See, e.g.*, Erwin Chemerinsky, *Federal Court Jurisdiction* § 5.3.5 (7th ed. 2016). *Erie* constrains the rules of decision that federal courts apply when exercising jurisdiction. This doctrine, as John Hart Ely noted, "implicates . . . the very essence of our federalism." John Hart Ely, *The Irrepressible Myth of* Erie, 87 Harv. L. Rev. 693, 695 (1974). The problems ISLT creates implicate the same concerns at *Erie*'s core: "discouragement of forum-shopping and avoidance of inequitable administration of the laws." *Hanna v. Plumer*, 380 U.S. 460, 468 (1965). These concerns limit federal court jurisdiction and protect the power of state institutions—courts included—to determine state law. *See* Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After* Erie, 145 U. Pa. L. Rev. 1459, 1472 (1997). But divergence between state and federal courts on state election law interpretation becomes likelier under ISLT, creating incentives for litigants to "couch . . . state law violations in terms of the Elections Clause" in order to forum-shop. Morley, *ISLD*, *supra*, at 513; *see also* Shapiro, *supra* (manuscript at 58). Nor can challenges to state

election laws that govern federal elections simply be declared federal questions because, as explained in more detail *infra* Part II, when—as is almost always the case—the laws govern both state and federal elections, state courts continue to have the authoritative final say on the meaning of state law for state elections.

ISLT also portends the "inequitable administration of the laws." *Hanna*, 380 U.S. at 468. Federal courts interpreting state law have the option to certify questions to state supreme courts but are under no obligation to do so. As a result, certification varies court-by-court, circuit-by-circuit. *See* Connor Shaull, *An* Erie *Silence:* Erie *Guesses and Their Effects on State Courts, Common Law, and Jurisdictional Federalism*, 104 Minn. L. Rev. 1133, 1155 (2019).

Certification is a poor solution for election litigation for two additional reasons. ISLT could be understood to *prohibit* federal courts certifying questions to state supreme courts. This would only exacerbate differences between state and federal court interpretations of the same state law. But if federal courts *can* certify questions, having to do so for election laws could well be unworkable. Election-related litigation often happens on a condensed timeline. Yet answering a certified question can take, on average, between six to seven months and the process can cause delays in litigation longer than a year. *See* Haley N. Schaffer & David F. Herr, *Why Guess?* Erie *Guesses and the Eighth Circuit*, 36 Wm. Mitchell L. Rev. 1625, 1635 (2010).

The time pressures of election litigation will only exacerbate the confusion ISLT will likely cause. Such

uncertainty will lead to forum-shopping, confusion for voters and election administrators, and could lead to inequitable protection of state constitutional rights.

II. ISLT will create numerous practical problems for election administration.

A. ISLT may disrupt the legislative delegation of administrative decisions and the conduct of elections.

1. Any version of ISLT threatens to disrupt the way states across the country conduct elections, and the version that Petitioners advance appears to prohibit any assignment of elections-related authority to nonlegislative bodies.

North Carolina's legislature expressly assigned review to North Carolina's courts. *See* N.C. Gen. Stat. §§ 1-267.1(a), 120-2.3, 120-2.4(a1). Petitioners attempt to mask the extreme result of their argument as a mere objection to the way in which judicial review functioned, *see* Pet. Br. 1, 48, but any fair reading of the related statutes and procedural history of the case belies this contention. The statute places review in the hands of the North Carolina courts, expressly affording them jurisdiction over a specific area of law, i.e., districting. There is no clear line between assignment of judicial review and delegation of authority to nonlegislative actors to regulate elections. Thus, if this Court embraces Petitioners' version of ISLT, it opens the door to myriad challenges to states' structures of election governance. *See* Shapiro, *supra* (manuscript at 55).

2. This view of ISLT thus has the potential to create chaos in election administration. Election administration is a "decentralized" process, "primarily administered by thousands of state and local systems rather than a single, unified national system." Karen L. Shanton, Cong. Rsch. Serv., R45549, *The State and Local Role in Election Administration* 1 (2019). Nonlegislative actors make crucial decisions for the regulation and administration of elections. Florida's state legislature has delegated creation and maintenance of voter registration to the Secretary of State. Fla. Stat. § 98.035(1). In Georgia, the legislature has delegated the ability to select and fix polling place precincts to county officials. Ga. Code Ann. § 21-2-265(a). North Carolina's General Assembly has created a State Board of Elections with the power of general supervision and the authority to regulate elections. N.C. Gen. Stat. § 163-22(a). In Ohio, the legislature has delegated to the Secretary of State the power to appoint the Board of Electors, which in turn exercises the delegated power to carry out a variety of duties related to the conduct of elections. Ohio Rev. Code Ann. §§ 3501.05, 3501.011. These are but a small sampling of the myriad delegations of authority embedded in the operation of American elections.

ISLT would, at a minimum, invite new and widespread challenges to longstanding election systems. Ultimately, it could undermine the delegation of authority those systems depend on. State legislatures, suddenly independent and unable to delegate, could be forced to make hundreds of miniscule decisions related to election administration. Legislators would be forced

to choose between continuing their normal legislative business or spending months administering elections. This situation is unworkable and is unnecessary as a matter of constitutional interpretation.

B. ISLT will likely lead to many states having two different sets of rules for state and federal elections, confusing voters and burdening election administrators.

1. Most state election laws apply to state and federal elections without distinction. *See* Shapiro, *supra* (manuscript at 6-7). And despite Petitioners' focus on congressional districting, their theory reaches all manner of election laws. Under ISLT, if a state court finds an election statute unconstitutional under the state constitution, the statute would remain in force for federal elections, leading to two different sets of election rules. This would cause administrative burdens and chaos by forcing election administrators to run concurrent state and federal elections under different rules.

For instance, the Delaware Supreme Court recently determined that new statutory provisions authorizing vote-by-mail and same-day voter registration violated the state constitution. *Albence v. Higgin*, No. 342, 2022 WL 5333790, at *1 (Del. Oct. 7, 2022). ISLT would require election administrators to keep vote-by-mail and same-day voter registration systems in place for federal, but not state, elections. Such an outcome would lead to administrative chaos as the Board of Elections would have to permit same-day registration and send mail ballots to voters for federal races alone. Administering separate registration deadlines and vote-by-mail

schemes would burden election administrators and sow confusion among voters.

Think also of Arkansas's Act 595, a law designed to implement a photo voter ID mandate, which was struck down as violating the state constitution by imposing an additional qualification on voting that would make it harder for Arkansas voters to exercise the franchise. *Martin v. Kohls*, 44 S.W.3d 844, 852-53 (Ark. 2014). Arkansas election officials would still be prohibited from enforcing the voter ID mandate for state elections. But ISLT would nevertheless require the state to keep Act 595's requirements in force for federal elections. This dual system would require additional staff training and costly duplicative administrative investment, while creating confusion for voters and election officials alike.[4]

As courts routinely consider the constitutionality and meaning of election laws, it is not difficult to foresee other instances where the conduct of state and federal elections under different rules would lead to an administrative morass, difficulties for election workers, and confused and frustrated voters. For instance, in most states, the hours that the polls are open are set by statute, but a problem with a particular polling place opening late can lead to a court order extending

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[4] Occasionally, states choose to have a dual system, with different requirements for state and federal elections. *See* Ariz. Rev. Stat. § 16-121.01. But in those situations, the decision is made by the legislature, not by the interaction of judicial review with the esoteric ISLT. Moreover, the legislature can provide time (and funding) for election administrators to prepare. Dual systems created as a byproduct of state judicial review would not have those features.

the hours of that polling location.[5] If a state court issued such an order on state constitutional grounds, ISLT appears to require that voters casting ballots after the statutory closing time would only be allowed to vote for state and local offices. This would be virtually impossible for poll workers to administer, as ballots contain all of the contested offices in an election, and doubtlessly lead to voter confusion and upset.

2. Such a two-tiered election system leads to even more disarray when considered against the federal constitutional requirement that electors for the House and Senate have the same qualifications as those for state houses. U.S. Const. art. I, § 2, cl. 1; U.S. Const. amend. XVII, § 1. Under these clauses, voters for state legislature are also eligible to vote for members of Congress. *See* The Federalist No. 57, at 349 (James Madison) (Clinton Rossiter ed., 2003) ("The electors . . . are to be the same who exercise the right in every State of electing the corresponding branch of the legislature of the State.").

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[5] Others have suggested that state courts, rather than having their review constrained, simply lack the power to draw remedial maps. *See* William Baude & Michael W. McConnell, *SCOTUS Must Reject the Independent-State-Legislature Doctrine*, The Atlantic (Oct. 11, 2022). While acknowledging state courts power to interpret and apply their constitutions and to issue prohibitory injunctions, this position again misses the broader impacts of ISLT beyond districting and is inconsistent with the remedial power of courts. Extensions of polling hours, just like the entry of remedial maps in districting cases, are forms of relief "'fashioned in the light of well-known principles of equity.'" *North Carolina v. Covington*, 137 S. Ct. 1624, 1625 (2017) (quoting *Reynolds v. Sims*, 377 U.S. 533, 585 (1964)).

Under ISLT, if a state court finds an election statute governing voter qualifications unconstitutional under the state constitution, at first blush, the provision would appear to still be in force for all federal elections. But courts would then have to determine whether the federal Constitution also demands that voters eligible to vote in the state legislative election be able to vote in congressional elections as well.

For instance, in Maryland, the state supreme court struck down a statutory scheme that created a list of inactive voters and allowed for their removal from the voter registration rolls as creating an additional qualification to vote in violation of the Maryland Constitution. *Md. Green Party v. Md. Bd. of Elections*, 832 A.2d 214, 229 (Md. 2003). Voters could not be made inactive for state elections, but with ISLT, at first glance, would be for federal elections. But the federal Qualifications Clauses add an extra wrinkle to this two-tiered system. It is unclear how this list maintenance system would operate for U.S. House and Senate elections. For those elections, would the eligible voters be the same as those for state elections, where infrequent voters remain registered, or would it match presidential elections, where, under ISLT, such voters would be removed? *See* U.S. Const. art. II, § 1, cl. 3. Indeed, courts and litigants would be forced to assess whether state court decisions on contested election provisions affect voter qualifications as envisioned in Article I and the 17th Amendment to begin with, before attempting to sort whether congressional elector qualifications must align with those for the state legislature.

C. ISLT will likely create confusion about which laws apply, further contributing to chaos.

1. ISLT may also create confusion about which laws apply by throwing into question the scope of past decisions of state courts. Where a state court has previously enjoined an election law, ISLT creates a question as to which rules govern federal elections. *See* Shapiro, *supra* (manuscript at 52); Maureen E. Brady, *Zombie State Constitutional Provisions*, 2021 Wis. L. Rev. 1063, 1081-82.

Take Missouri, for example. In 2006, the Missouri Supreme Court struck down a voter ID law, SB 1014, on the ground that it "impose[d] a severe burden" on the "fundamental right to vote" protected by the state constitution. *Weinschenk v. State*, 203 S.W.3d 201, 213, 217 (Mo. 2006) (en banc) (per curiam). In 2016, the Missouri legislature enacted a new voter ID law. *See* Mo. Rev. Stat. § 115.427 (2016). The Supreme Court of Missouri permanently blocked a central portion of the 2016 law in October 2020 because it required a "misleading" and "contradictory" sworn statement from people lacking a photo ID. *Priorities USA v. State*, 591 S.W.3d 448, 452 (Mo. 2020) (en banc). And in September 2022, Missouri passed HB 1878, a new law requiring voters to use a government-issued photo ID to vote. *See* Mo. Rev. Stat § 115.427 (2022). Under ISLT, both the enjoined 2006 law and the permanently blocked affidavit requirement of the 2016 law would arguably still be in effect for federal elections, creating confusion about which of these

three versions of § 115.427 governs voter ID and affidavit requirements.

Missouri's SB 1014 is already more than fifteen years old. The same retroactive application ISLT appears to demand would arguably apply to much older legislative enactments, state court rulings, and gubernatorial vetoes. Piecing together the alternate history ISLT demands would prove difficult for state officials, election administrators, voters, litigants, and the federal courts, underscoring the importance of long-standing practice to constitutional meaning. *See Chiafalo*, 140 S. Ct. at 2326.

In cases where state supreme courts have used the constitutional avoidance canon in interpreting election laws to avoid striking them down under the state constitution, the retroactive application ISLT likely demands may become even more confusing. In Alaska, for example, the state supreme court employed a saving construction to keep a ballot-counting statute in line with the state constitution. Applying a long-standing Alaskan interpretive principle, the court read the law to not invalidate ballots where voters made small errors or variations when voting for write-in candidates. *Miller v. Treadwell*, 245 P.3d 867, 868-69 (Alaska 2010). Under ISLT, the most literal reading of the statute might well take precedence over any saving constructions applied by the Alaska state court, leading to the invalidation of votes for minor errors. The retroactive application of ISLT threatens to create confusion for voters and state officials alike about what law applies after previously enjoined or interpreted laws are resuscitated. Indeed, it calls into question

longstanding state law precedent, like that discussed in *Miller*. *Id.* at 869 & n.14 (relying on case law establishing that Alaska courts are "reluctant to permit a wholesale disfranchisement of qualified electors through no fault of their own, and '[w]here any reasonable construction of the statute can be found which will avoid such a result, [we] should and will favor it'").

2. Taken to its logical conclusion, ISLT could also create confusion about what law applies in the context of previously vetoed laws.[6] In New Jersey, for example, Governor Christie vetoed a 2013 law expanding early voting. New Jersey has since passed different

[6] Though this Court has upheld the role of governors in the enactment of election related legislation, *see Smiley v. Holm*, 285 U.S. 355, 368 (1932), it is unclear that this holding would be undisturbed if the Court now adopts ISLT, *see* Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, 55 Ga. L. Rev. 1, 90 (2020) (admitting that ISLT could "require overturning . . . *Smiley*"). Indeed, at both the federal level and in every state, our government is one of tripartite and *coequal* branches. *See, e.g.*, *United States v. Nixon*, 418 U.S. 683, 707 (1974) ("In designing the structure of our Government and dividing and allocating the sovereign power among three co-equal branches, the Framers of the Constitution sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence."); *Bush v. Schiavo*, 885 So. 2d 321, 330 (Fla. 2004) ("Under the express separation of powers provision in our state constitution, 'the judiciary is a coequal branch of the Florida government vested with the sole authority to exercise the judicial power.'" (quoting *Chiles v. Children A, B, C, D, E, & F*, 589 So. 2d 260, 268 (1991))). In fact, the Framers agreed that separation of powers was essential for a republican form of government, which the Constitution expressly guarantees at the state level. U.S. Const. art. IV, § 4; William M. Wiecek, *The Guarantee Clause of the U.S. Constitution* 68 (1972).

regulations of early voting, as recently as 2022. If Governor Christie's veto does not stand, then does the 2013 law apply to federal elections? Or do both the 2013 and 2022 laws apply to those elections?

III. ISLT could lead to federal courts disrupting ordinary state statutory interpretation doctrines and practices.

A. The federalization of election disputes puts state law questions solely in the hands of federal judges and flouts federalism values.

1. Petitioners frame the stakes of this case around the allocation of power between the state legislature and state courts. Pet. Br. 18. This characterization disguises the underlying shift that ISLT effects: one from state courts to federal courts. Should this Court adopt a version of ISLT, federal courts will increasingly be called upon to intervene in state election disputes that deal with matters of state law about which they are "inexpert." *Brillhart v. Excess Ins. Co.*, 316 U.S. 491, 496 (1942); *see also, e.g.*, *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 577 (1996) (recognizing "of course" that "only state courts may authoritatively construe state statutes"); *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974).

Federal judges are often unfamiliar with questions of state law. Vesting sole judicial review and interpretation of state regulation over federal elections in federal courts invites "invasive federal examination" of state law election disputes. Samuel Issacharoff, *Political Judgments*, 68 U. Chi. L. Rev. 637, 647

(2001). And it "federalizes" both the "interpretation and application of state election law." Shapiro, *supra* (manuscript at 57).

2. Ordinarily, when a federal court resolves a state law question without direct input from the relevant state judiciary, the federal court looks—and is obligated by *Erie*, to look—to existing state court holdings relevant to the question at issue. *See* Jonathan Remy Nash, *Resuscitating Deference to Lower Federal Court Judges' Interpretations of State Law*, 77 S. Cal. L. Rev. 975, 978 (2004). Under the best of circumstances, federal and state courts can sometimes come to different interpretations of the same law, as a state court can "later decide the same issue differently." Schaffer & Herr, *supra*, at 1626; *see also, e.g.*, *Kaiser Steel Corp. v. W.S. Ranch Co.*, 467 P.2d 986, 990-91 (N.M. 1970) (disagreeing with the Tenth Circuit on question of state statutory interpretation); *United States v. Buras*, 475 F.2d 1370, 1373 n.5 (5th Cir. 1972) (Brown, J., dissenting) (listing state court decisions rejecting federal court readings of state law).

This uncertainty would likely be worse in a world with ISLT because federal courts might not even be expected to consider how state courts would rule, making it all the more likely that the same law would have two definitive but different interpretations—one for state elections and one for federal elections. The resulting confusion and uncertainty could deter people from voting and generally create opportunities for disinformation about voting.

3. Finally, federalizing election disputes may increase burdens on the federal courts. The number of election cases filed in federal courts steadily increases each election cycle. *See More Voting Rights Lawsuits Filed in 2020 than in 2016*, TRACReports (Sept. 21, 2020). Should Petitioners prevail, this number will only rise, in no small part because of the novel and complicated legal questions that would have to be resolved. *See* Morley, *ISLD*, *supra*, at 513.

B. Federalizing state law election issues threatens to produce confusion in state law interpretation.

1. ISLT may upend the current state-by-state approach to state statutory interpretation without a clear replacement, *see* Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 Yale L.J. 1750, 1786 (2010), as some versions of ISLT seem to vest de novo authority in the federal courts to interpret state laws governing federal elections. This shift of authority would likely lead to interpretations of state law that are inconsistent both with state court decisions interpreting the same laws and with the expectations and understandings of the legislature itself.

This version of ISLT calls into question the applicability of state statutes governing methods of judicial interpretation. In Texas, for example, the state Code Construction Act indicates that a court construing a state statute may consider legislative history, common law, and the statutory goal, among

other factors, "whether or not the statute is considered ambiguous on its face." Tex. Gov't Code Ann. § 311.023. Other states have adopted statutes that establish interpretive guidelines, including ones that apply specifically to election laws. *See, e.g.*, Colo. Rev. Stat. § 1-1-103(1), (3) (election code "shall be liberally construed" and "substantial compliance with the provisions or intent of this code shall be all that is required"); Nev. Rev. Stat. § 293.127(1) (election laws should be "liberally construed"). Under ISLT, it is unclear whether a federal court interpreting state election law would be bound by state interpretive statutes or instead by federal interpretive doctrine, which generally disfavors extrinsic aids in the face of unambiguous text. *See, e.g.*, *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1749 (2020) (rejecting the use of legislative history when the statutory text is unambiguous).

This uncertainty may also exist absent a state interpretive statute where the state court's interpretive approach deviates from that of the federal judiciary. The New Mexico Supreme Court, for example, considers "the plain language of the statute as well as the context in which it was promulgated, including the history of the statute and the object and purpose the Legislature sought to accomplish" when engaging in statutory interpretation. *State v. Off. of Pub. Def. ex rel. Muqqddin*, 285 P.3d 622, 626 (N.M. 2012) (quoting *State v. Nick R.*, 218 P.3d 868, 870-71 (N.M. 2009)). The Pennsylvania Supreme Court "liberally construe[s] [the election code] to protect a candidate's right to run for office and the voters' right to elect the candidate of

their choice." *In re Nomination Petition of Beyer*, 115 A.3d 835, 838 (Pa. 2015) (quoting *In re Nomination Petition of Driscoll*, 847 A.2d 44, 49 (Pa. 2004)). Under ISLT, federal courts would have to contend with the possibility of reaching opposite results under state court interpretive approaches and the federal text-first approach. Further complications may arise if federal courts differ as to the respect they give to state interpretive statutes as compared to state court interpretive approaches. ISLT denies the lower federal courts the guidance they normally have in construing state law.

It is unlikely that state legislatures passed laws expecting them to be construed without reference to state statutes and precedents governing statutory interpretation. Nor is it likely that they expected the same statutes to have two definitive interpretations. But if federal courts cannot or do not follow state interpretative statutes and precedents, it is that much more likely that federal and state courts will reach different interpretations of the same election statutes. If so, state statutes might carry two different meanings: one, determined by federal courts, as to its application in federal elections, and another, determined by state courts, as to its application in state elections. *Cf. BMW of N. Am.*, 517 U.S. at 577.

Apart from the likely flouting of the background principles against which state legislatures acted and the substantive problems this might create for election administrators, the possibility of competing conclusions in statutory interpretation introduces ambiguity even before litigation begins. Election administrators, campaigns, and voters would all be denied the ability

to predict how statutes would be interpreted. Our federalist governance structure would ordinarily require fidelity to each state's determinations. *See id.*; *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984) ("[I]t is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law."). ISLT muddies what would be expected from the courts by moving judicial interpretation from state courts to federal courts and, through that move, confusing what interpretive methods should be applied.

2. Federalizing state law election issues might also force the federal courts to become arbiters of the myriad administrative delegation schemes inherent to state election systems. As part of this role, federal courts might again be forced to choose between state and federal doctrine, here regarding administrative deference. Like their approaches to statutory interpretation more broadly, state court standards governing deference to administrative actors in construing relevant statutes vary among the states.

For example, Alabama courts "give great weight to any reasonable construction of a regulatory statute adopted by the agency charged with the enforcement of that statute." *Ex parte Sacred Heart Health Sys., Inc.*, 155 So. 3d 980, 986 (Ala. 2012) (citation omitted). In contrast, Iowa courts do not defer to agency interpretations unless the agency has been statutorily granted specific interpretive power. *See Irving v. Emp. Appeal Bd.*, 883 N.W.2d 179, 185 (Iowa 2016).

State-by-state differences like these mean that federal courts might have to choose between applying federal doctrine, governed by the *Chevron* framework, or a potentially divergent state doctrine that preferences *de novo* review or some intermediate standard. If federal courts choose the former, they will undermine state court approaches that both implicitly and explicitly reject *Chevron*. *See, e.g.*, *Nieto v. Clark's Mkt., Inc.*, 488 P.3d 1140, 1149 (Colo. 2021) (Colorado Supreme Court explicitly rejecting *Chevron* deference).

While Petitioners make mention of the major-question doctrine, they ignore the actual likely impacts of importing that federal standard into state election administration. Pet. Br. 47. Both the outcomes of elections, which are governed by state administrative activities, and election administration itself, represent matters of "political significance," *West Virginia v. EPA*, 142 S. Ct. 2587, 2608 (2022) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159-160 (2000)), as they directly bear on the results of congressional and presidential elections. If federal courts considering administrative delegations in state election law pursuant to ISLT incorporate the major questions doctrine, they risk upending the American system of election administration, which has always relied on delegation to function.[7] *See* Mark S. Krass,

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[7] Scholars disagree as to whether nondelegation has any applicability in the Elections Clause context. *Compare* Krass, *supra*, at 1112-29 (arguing that Founding-era state legislatures regularly delegated Elections Clause powers), *with* Derek T. Muller, *Legislative Delegations and the Elections Clause*, 43 Fla. State L. Rev. 717, 736-39 (2016) (noting two Reconstruction-era cases weighing against delegation).

Debunking the Nondelegation Doctrine for State Regulation of Federal Elections, 108 Va. L. Rev. 1091, 1112-29 (2022). State courts are more intimately familiar both with maintaining the balance of power within their states, protecting state citizens' individual liberty from state actors, and divining state legislative expectations related to delegation. Federal courts confronting these tensions may be faced with a choice between ignoring federal law's nondelegation concerns or upending the state-based system of election administration.

C. ISLT raises new questions about whether and to what extent state legislatures can cabin their own decisionmaking.

1. ISLT may also require federal courts to contend with the indeterminate implications of the various ways in which state legislatures bind themselves. Petitioners seem to argue that federal courts can ignore state legislation assigning judicial review of election matters to state courts. In North Carolina, the state legislature regulated the review of elections through a statute requiring, "[a]ny action challenging the validity of any act of the General Assembly that apportions or redistricts . . . congressional districts shall be filed in the Superior Court of Wake County and shall be heard and determined by a three-judge panel of the Superior Court of Wake County." N.C. Gen. Stat. § 1-267.1(a). Similarly, in Michigan, state law dictates "[t]he supreme court has original and exclusive state jurisdiction to hear and decide all cases . . . involving a congressional redistricting plan." Mich. Comp. Laws § 3.71. Through provisions like

these, state court review is part of the legislative prescription for the manner in which elections are conducted, but ISLT and Petitioners appear to demand a contrary conclusion.

2. ISLT also calls into question the relationship between statutory oaths of office and state legislative actors. For example, in Wisconsin, as in many states, a state statute requires that state legislators swear an oath of office to support "the constitution of the state of Wisconsin." Wis. Stat. § 19.01. As this oath of office is an act of the state legislature, one might expect that it would be binding on the legislature even under ISLT. If that is the case, then federal courts would be required to consider the legislature's faithfulness to the state constitution during their review. If this is not the case, the federal courts will be faced with a host of questions regarding which general state legislative enactments apply in the Elections Clause context. Moreover, questions would arise as to whether state legislators violate these statutory oaths when they enact legislation contrary to the state constitution. While they employ federal power under the Elections Clause, state legislators remain state actors existing pursuant to state constitutions. State legislators do not hold two concurrent offices, one for Elections Clause purposes and another for state issues. Thus, if state legislators have bound themselves to the state constitution through statutory oaths they themselves enacted, violations of the state constitution may disqualify them from serving as members of the legislature for all purposes. Under ISLT, federal

courts may be forced to adjudicate these intimate, unfamiliar questions of state law.

3. Under ISLT it is unclear if a legislatively referred ballot referendum subsequently approved by a state's voters qualifies as an act of the legislature for purposes of the Elections Clause.[8] Such referenda, which produce both state statutes and state constitutional amendments, frequently address issues bearing on federal elections. For example, in 1996, the South Carolina Legislature referred to the ballot, and the voters approved, a constitutional amendment that removed precinct requirements for voters who moved within thirty days of the election. *See* S.C. Const. art. II, § 4. Under ISLT, the South Carolina Legislature might argue this amendment is not binding as to federal elections and enact a statute reinstating the precinct requirement. Federal courts would be left to determine if the legislatively referred ballot referendum constitutes permissible legislative action under ISLT, such that the state constitutional provision is binding. If such referenda qualify as legislative action, then legislatures would be bound by state constitutional provisions whose content has been so edited. This would in turn require federal courts to interpret unfamiliar state constitutional provisions.

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[8] Though this Court upheld Arizona's redistricting commission established by citizen ballot initiative without originating in the state legislature in *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787 (2015), ISLT threatens to upend not only that precedent and others, *see Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565, 568 (1916), but also the various ways in which legislatures bind themselves.

4. Finally, ISLT may raise questions about the federal courts' duty to apply provisions of state constitutions to state legislation regulating elections when the state legislature played a role in developing and ratifying the state constitution as a whole. Unlike the federal Constitution, states have frequently revised their entire state constitutions. Voters ratified Georgia's current state constitution in 1983, following development by the state government and citizens. *See* George D. Busbee, *An Overview of the New Georgia Constitution*, 35 Mercer L. Rev. 1, 3-7 (1983). The state legislature approved this new constitution before sending it to the ballot for voter ratification in 1982. *See id.* at 6. The state legislature's involvement in the drafting and approval of the entire state constitution raises the issue of whether, under ISLT, this involvement qualifies as legislative action pursuant to the Elections Clause. If so, federal courts might have to consider the entire state constitution's applicability to state legislation regarding federal elections, requiring federal courts to apply state constitutional provisions with which they are unfamiliar or expend time certifying questions back to state supreme courts. If not, federal courts will again be faced with the task of delineating the relationship between past and present state legislative action, an area foreign to them. ISLT may force federal courts to adjudicate these complex issues of state constitutional design without any guidance.

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Adopting ISLT creates chaos, upending long-standing practices of election administration and constitutional design. It may render inoperable the

very functioning of our election systems and threatens to disrupt settled expectations of the relationship between federal and state sovereignty.

CONCLUSION

This Court should reject Petitioners' attempt to upend more than 200 years of practice and governmental design.

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Respectfully submitted,

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