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.

&

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 FOR THE WISCONSIN VOTER ALLIANCE AND PURE INTEGRITY MICHIGAN ELECTIONS AS AMICI CURIAE SUPPORTING NEITHER PARTY

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INTEREST OF THE AMICI CURIAE[1]

Wisconsin Voter Alliance (WVA) is a Wisconsin non-profit corporation. Ron Heuer is its President. WVA's vision statement is "[t]o facilitate and coordinate restoration of voting integrity in the State of Wisconsin." WVA's mission statement is "to effect change to law and policies surrounding elections. We will accomplish this goal by creating multi-faceted objectives to restore voter confidence, and integrity in the election process." WVA uses the following means to accomplish its goals: educating the public and elected officials; working to establish best election practices; identifying and encouraging debate on election policy and law; and encouraging fairness during elections.

Pure Integrity Michigan Elections (PIME) is an unincorporated association in Michigan. Patrice Johnson is its President. PIME engages in investigations of Michigan's elections to ensure legal compliance. PIME uses the results of its investigations to message to the public about improving Michigan's elections.

The WVA and PIME have an interest in the policy and legal implications regarding the application of the independent state legislature doctrine as implicated in the petitioners question presented. The WVA and PIME, as amici curiae, file this brief on behalf of

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[1] Pursuant to S. Ct. Rule 37.6, counsel for all parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part and no person or entity other than amicus, its members, or counsel made a monetary contribution to its preparation or submission.

neither party. However, the disposition of the question has far-reaching affect. The examination of the independent state legislature doctrine (doctrine) from a perspective of its origination and the current debate of its meaning in the Elections Clause, has potential ramifications to the election process which may affect the very foundation and core of democracy. The doctrine can serve the people well or change the course of history and the meaning of democracy to generations to come affecting the integrity of elections and the electors' confidence and acceptance of election outcomes (including the candidates themselves). Moreover, the application of the doctrine can also affect existing understanding of the legalities of other federal election laws, Executive Orders or future laws.

SUMMARY OF THE ARGUMENT

This amici curiae brief is filed in support of neither party. The petitioners seek review of whether state courts can review state regulations governing congressional elections based upon state constitutional provisions. In so doing, they invoke the Elections Clause governing the "Manner of holding Elections for Senators and Representatives . . . prescribed . . . by the Legislature thereof." U.S. Const. art. I, § 4, cl. 1. In so doing, the petitioners have brought to the forefront the issue of the proper allocation of authority in the federal election process.

Here, the petitioners bring this Court onto the cusp of constitutional peril as it relates to the application of the independent state legislature theory,[2] to the election process under the Elections Clause and Electors Clause of the U.S. Constitution. The issues have certainly come to a head in academia since the 2020 presidential election. But, as partisan politics seek to change the election landscape, for better or for worse, how the theory is interpreted and potentially becomes legal doctrine will either strengthen or weaken our democracy for generations. Regardless, any interpretation cannot be made in a vacuum. And the key is interpreting the phrase "state legislature." Whether textualists or origninalists, right or left, there lies an existing jurisprudential concern for the public in how or where the legal theory lies in the election process.

In brief, the independent state legislature theory holds that the federal Constitution in Article I's Elections Clause and Article II's Presidential Electors Clause, gives to state legislatures the power to exclusively regulate federal elections, excluding state executive branch and judicial branch officials. This Court is familiar with the theory's most recent discourse in *Bush v. Gore*, 531 U.S. 98, 103 (2000), when the Court didn't answer the first question on which it granted

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[2] At this stage, referring to "independent state legislature" as a "doctrine" is pre-mature. "Doctrine" is defined as "a principle, esp. a legal principle, that is widely adhered to." Black's Law Dictionary 518 (Bryan A. Garner, ed. 8th ed. West 2004). Because the independent state legislature is not a widely adhered to legal principle, "theory" or "theory of law" is a more appropriate descriptive term.

certiorari.[3] While the majority, in a per curiam opinion, found "standardless manual recounts" in Florida as violating the Equal Protection Clause, the majority found no need to reach the first question implicating the independent state legislature theory put before the Court. However, Chief Justice Rehnquist did address it in a concurring opinion, joined by Justice Scalia and Justice Thomas.

The concurrence concluded that "A significant departure from the legislative scheme for appointing Presidential electors presents a federal question." *Id.* at 113. The concurrence reasoned that the question presented a rare instance in which "the Constitution imposes a duty or confers a power on a particular branch of a State's government"—that is, the state legislature—"the text of the election law itself, and not just its interpretation by the courts of the States, takes an independent significance." *Id.* Although the Court believed at the time that the *Bush* decision was good for only *that* case, "Our consideration is limited to the present circumstance," *id.* at 109, the theory has been revived because of events relating to the last presidential election.

Historically, there is no conclusive evidence that the Founding Fathers, in presenting the Elections

[3] "[W]hether the Florida Supreme Court established new standards for resolving Presidential election contests, thereby violating U.S. Const. art. II, § 1, cl. 2, of the United States Constitution [which provides that electors shall be appointed by each State 'in such Manner as the Legislature thereof may direct'] and failing to comply with 3 U.S.C. § 5." *Bush*, 531 U.S. at 103.

Clause or Electors Clause, embraced a theory of a state legislature without limitations, but, instead, a state legislature with constitutional restraints and inter-branch checks and balances. Meanwhile, if stare decisis plays a role, this Court in *Arizona State Legislature*, affirmed that "legislature" as defined in the federal Constitution, extends beyond the institutional body itself, referring to the state's legislative powers. *Arizona State Legis. v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787 (2015). Hence, the legislature is subject to the checks and balances of the state court, the state constitution, and where applicable, a governor's veto. *Id.* at 813–15; *see id.* at 808 (versus the ratifying role legislatures play in constitutional amendments).

Whichever way this Court approaches the disposition or resolution of the applicability of the independent state legislature theory to this case, it must consider its foundational context either in history or existing law. Any confidence in this discourse and disposition rests on identifying and considering the potential consequences of the result to the election process, if not existing law. That is why this amici curiae brief addresses two related areas of law which involve potential federal encroachments under the independent state legislature theory: Presidential Executive Order No. 14019 and the Electoral Counting Act. Regardless, the issue of the independent state legislature theory is squarely before the Court for the controversy to be decided.

STATEMENT

The petitioners seek review to resolve an issue regarding state congressional redistricting under the U.S. Constitution, article I, § 4, clause 1, as to the manner of federal elections "prescribed by each State by the Legislature thereof." Pet. at 1. The North Carolina Supreme Court found the State's legislature redistricting map as unconstitutional gerrymandering under four provisions of the State's constitution. *Id.* at 9. The state supreme court provided the State legislature an opportunity to submit a remedial congressional redistricting map to the trial court. *Id.* at 9–11.

The trial court appointed Special Masters to evaluate the proposed remedial map, including one of their own. *Id.* at 12. The trial court rejected the legislature's remedial congressional map and adopted the map created by the Special Masters. *Id.* The petitioners then sought from the state supreme court a stay or writ of supersedeas arguing that the actions of the trial court violated the Elections Clause. *Id.* at 13. The state supreme court denied the petitioners' requests without analysis. *Id.*

ARGUMENT

I. The independent state legislature theory requires the resolution of the meaning of "legislature" as applied to the Elections Clause, but in the context of either historical or legal precedent.

Under the constitutional arguments called the "independent state legislature" theory, which is disputed, certain provisions in the U.S. Constitution may grant each respective state legislature with sole plenary authority over subject matters in their respective states which federal and state law cannot abridge. The proposed independent state legislature theory basically provides that when the U.S. Constitution grants federal authority to "state legislatures," no other body or law can interfere with the state legislature's authority. For example, the Constitution delegates to "state legislatures" power over federal elections, Presidential electors and constitutional amendments. In turn, the President, Congress, and the federal agencies cannot interfere with the state legislature's constitutionally-delegated power. And, additionally, the state's own constitution, the state's courts, nor the state's governor can interfere with the state legislature's authority. The U.S. Supreme Court cases cited for the independent state legislature theory include *McPherson v. Blacker*, 146 U.S. 1, 27 (1892) ("The constitution. . . . leaves it to the legislature exclusively[.]") and *Bush v. Palm Beach Cnty. Canvassing Bd.*, 531 U.S. 70, 76 (2000) (concurring opinion).

More recently, a Supreme Court dissenting opinion discussed the independent state legislature theory in *Arizona State Legis. v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787, 824–25 (2015). In *Arizona State Legislature*, the U.S. Constitution requires the "state legislature" to draw up new congressional districts in each state every ten years after the completion of the census. The State of Arizona by popular referendum created an independent commission to draw up new congressional districts every year rather than the state legislature. The Arizona State Legislature sued claiming the independent state legislature theory prohibited the new independent commission from drawing these new districts as opposed to the Arizona State Legislature.

This Court disagreed in a 5-4 decision. The dissent pointed out that the majority must not believe in the necessity of the Seventeenth Amendment that transferred the power to choose U.S. Senators from "the Legislature" from each State to "the people thereof." According to the majority's view, the Seventeenth Amendment must have been unnecessary because the term "Legislature" actually means "the people":

> What chumps! Didn't they realize that all they had to do was interpret the constitutional term "the Legislature" to mean "the people"? The Court today performs just such a magic trick with the Elections Clause. Art. I, § 4. That Clause vests congressional redistricting authority in "the Legislature" of each State. An Arizona ballot initiative transferred

> that authority from "the Legislature" to an "Independent Redistricting Commission." The majority approves this deliberate constitutional evasion by doing what the proponents of the Seventeenth Amendment dared not: revising "the Legislature" to mean "the people."

Arizona State Legis., 576 U.S. at 824–25.

Chief Justice Roberts, cited this Court's decision in *McPherson v. Blacker*, 146 U.S. 1 (1892) in his dissent in *Arizona State Legislature* to conclude that "state legislature" meant the legislature itself and subject to no other authority. The Court upheld the law and emphasized that the plain text of the Presidential Electors Clause vests the power to determine the manner of appointment in "the Legislature" of the State. That power, the Court explained, "*can neither be taken away nor abdicated*." *Arizona State Legis.*, 576 U.S. at 840 (Roberts, C.J., dissenting), *quoting McPherson*, 146 U.S. at 35 (emphasis added). But, he also explained that there is "a critical difference between allowing a State to *supplement* the legislature's role in the legislative process and permitting the State to *supplant* the legislature altogether" and that "imposing some restraints on the legislature "does not "justif[y] deposing it entirely." *Arizona State Legis.*, 576 U.S. at 841 (original emphasis).

Just two years ago, the U.S. Court of Appeals for the Eighth Circuit, relying on *McPherson* and *Bush v. Palm Beach Cnty. Canvassing Bd.*, 531 U.S. 70 (2000), applied the independent state legislature theory to the Electors Clause under Article II. The appellate court,

determined that an injunction be issued against the Minnesota Secretary of State enjoining the Secretary from changing election mail-in ballot deadlines due to the COVID pandemic. The court concluded that the Secretary had no authority to override exclusive legislative authority regarding the manner of conducting presidential elections regarding the selection of electors finding the analysis relatively straight forward: "By its plain terms, the Electors Clause vests the power to determine the manner of selecting electors exclusively in the 'Legislature' of each state. U.S. Const. art. II, § 1, cl. 2; *McPherson v. Blacker*, 146 U.S. 1, 27, 13 S.Ct. 3, 36 L.Ed. 869 (1892) ('The constitution. . . . leaves it to the legislature exclusively[.]')." *Carson*, 978 F.3d at 1059–60. "[W]hen a state legislature enacts statutes governing presidential elections, it operates "by virtue of a direct grant of authority" under the United States Constitution. *Bush v. Palm Beach Cnty. Canvassing Bd.*, 531 U.S. 70, 76, 121 S.Ct. 471, 148 L.Ed.2d 366 (2000). In fact, a legislature's power in this area is such that it "cannot be taken from them or modified" even through "their state constitutions." *McPherson*, 146 U.S. at 35, 13 S.Ct. 3; *see also Palm Beach*, 531 U.S. at 76–77, 121 S.Ct. 471." *Id.*, 978 F.3d at 1060.

However, there appears to be at least some contrary historical evidence. The Founding generation may have intended, based upon the experience derived from the Articles of Confederation, that the word "legislatures" found in the Elections Clause or Electors Clause was not to be so "exclusive," but would be

subject to "substantive state constitutional restrictions as well as constitutionally-mandated lawmaking procedures." Hayward H. Smith, *Revisiting the History of the Independent State Legislature Doctrine*, 53 ST. MARY'S L. J. 445, 447 (2022). In fact, some later-adopted state constitutions do contain restrictions on election laws, including federal elections, as well as that of the general populace. *See*, *e.g.*, *id.* at 485–91. "[U]nder the Articles of Confederation, it was understood that "legislatures' were normal legislatures, subject to substantive regulation by state constitutions. The Framers knew this when they gathered in 1787." *Id.* at 482, 484–85.

In other words, the independent state legislature theory is disputed as an unequivocal part of the Founding of this nation through the adoption of the U.S. Constitution. *See also* Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, 55 GA. L. REV. 1, 27–37 (2020) (discussing that the Framers neither expressly considered the independent state legislature theory nor addressed the potential significance of the term "legislature" in either the Elections Clause or the Electors Clause). So, academia remains in conflict on the theory and its originations. *See*, *e.g.*, Robert A. Schapiro, *Conceptions and Misconceptions of State Constitutional Law in Bush v. Gore*, 29 Fla. St. U.L. Rev. 661, 672 (2001) (doctrine "does not rest on firm foundations of text, precedent, or history."); Hayward H. Smith, *History of Article II Independent State Legislature Doctrine*, 29 Fla. St. U.L. Rev. 731, 764–75 (2001) (arguing lack of historical

foundation for the independent state legislature theory); *see also* Richard H. Pildes, *Judging "New Law" in Election Disputes*, 29 Fla. St. U.L. Rev. 691, 727–28 (2001) (accepting Smith's conclusion that, "as a matter of historical practice, state legislatures were not understood at the time to be more 'independent'."); *State Constitutions*, 55 Ga. L. Rev. 1, 27–32 (2020). (Because the history of the Elections *Clause* of Article II of the constraints and conditions on their power than they were when acting pursuant to any other source of authority"); *see contra* Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and Electors Clause* (the Electors Clause is "silent" regarding whether state constitutions can limit the authority of state legislatures over federal elections, "[t]he only definitive conclusion that can be drawn is that the Framers specifically chose to vest power over federal elections with institutional state legislatures, rather than the people themselves"); Michael T. Morley, *The Intratextual Independent "Legislature" and the Elections Clause*, 109 Northwestern U.L. Rev. 847, 863–65 (2015) (providing for an intratextual interpretation of the term "legislature" as understood during the Founding Era).

Regardless, in 1932, this Court in *Smily v. Holm*, 285 U.S. 355 (1932), found the Elections Clause did not confer legislative authority to enact "manner" legislation "independently of the participation of the Governor as required by the state constitution with respect to the enactment of laws." *Id.* at 373. As Justice Ginsburg wrote in *Arizona State Legislature* as referenced

above, "[n]othing in [the Elections] Clause instructs, nor has this Court ever held, that a state legislature may prescribe regulations . . . in defiance of provisions of the State's constitution." *Arizona State Legis.*, 576 U.S. at 791.

However, this Court has signaled its willingness to reconsider precedent in this historical context. As Justice Gorsuch wrote in *Democratic Nat'l Comm. v. Wisconsin State Legislature*, 141 S.Ct. 28, 29 (2020) (Gorsuch, J., concurring), "The Constitution provides that *state legislatures*—not federal judges, not state judges, not state governors, *not other state officials*—bear primary responsibility for setting election rules." And in a concurring opinion, Justice Kavanuagh, favorably citing Chief Justice Rehnquist's concurrence in *Bush v. Gore*, wrote, "[T]he text of the Constitution requires federal courts to ensure that state courts do not rewrite state election laws." *Id.* at 34 n.1 (Kavanaugh, J., concurring).

However this Court resolves the present dispute, the interpretation of "legislature" within the meaning of the Elections Clause will reverberate throughout the country and affect the "manner" in which federal elections will be conducted under state election laws. Is the state legislature an entity unto itself under the Elections Clause? Is there oversight of a state constitution or other legal processes? Is the state legislature's authority subject to checks and balances of the court? Is the state legislature's authority subject to a governor's veto? By answering these questions, the

Court will resolve whether the legal theory of independent state legislature theory is a doctrine.

II. If the Independent State Legislature applies, Executive Order No. 14019 is constitutionally suspect as the President has encroached on state legislative prerogatives.

If this Court adopts the independent state legislature theory as doctrine, Executive Order No. 14019 of March 7, 2021 (EO) is constitutionally suspect. The Elections and Electors Clause of the United States Constitution delegates the authority over election administration, inclusive of voter registration, in federal elections to the Legislatures of the States subject to Congressionally-enacted laws relating to Congressional elections. Contrary to this constitutional delegation, the EO authorized the federal agencies to engage in election administration, including voter registration, within the states without a specific Congressionally-enacted law to do so. Therefore, under the independent state legislature theory, a state legislature may bring an action in federal court requesting the Court to (a) declare that the EO is unconstitutional to the extent it removes authority from the state legislature over election administration, including voter registration, in federal elections within the boundaries of the state, and (b) enjoin the prospective defendant-parties from enforcing or implementing any aspect of the EO within the boundaries of the state.

The United States Constitution mandates that the times, places, and manner of congressional elections "shall be prescribed in each State by the Legislature thereof but the Congress may at any time by Law make or alter such Regulations . . . " U.S. Const. art. I, § 4, cl. 1 (the "Elections Clause"). The United States Constitution mandates that Presidential Electors are appointed at the direction of the Legislature: "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress. . . ." U.S. Const. art. II, § 1, cl. 2 (the "Electors Clause").

President Biden signed Executive Order ("EO") 14019 of March 7, 2021, titled "Promoting Access to Voting." 86 FR 13623. Under the proposed independent state legislature theory, the EO raises serious constitutional concerns for state legislatures. First, the EO commands the head of every federal agency to submit to the President's Domestic Policy Advisor, a plan outlining the steps their agency will take to "promote voter registration and voter participation." Second, the EO mandates that all federal agencies support "approved" third-party organizations to provide voter registration services on federal agency premises located in states across the nation. So, the federal agencies are to provide financial and logistical assistance to "approved" nonpartisan third-party organizations engaging in get-out-the-vote efforts. Third, the EO reflects a planning initiative for "increasing voter . . . turnout in Native American communities." Notably, no

communities other than Native American communities are targeted in the EO for increasing "voter turnout."

Under the EO, federal agencies are instructed to use their current infrastructure, activities, services, and resources to help distribute voter registration and vote-by-mail application forms, assist applicants in filling out those forms, and invite and support approved third-party organizations to provide voter services on federal agency premises. Distributing forms and helping voters may sound benign, but if the service and support is not provided equitably to all legal voters across the political spectrum, then the government is tilting the election in favor of the President and his incumbent party—something the Elections Clause and Electors Clause was intended to prevent and something the Equal Protection Clause prohibits.

Despite the EO's position to the contrary, current Congressional enactments only authorize certain federal agencies such as the Department of Justice to enforce federal voting laws and to engage in election-related activities. Otherwise, federal agencies do not have Congressional enactments authorizing engagement to enforce federal voting laws or to engage in election-related activities. Therefore, the EO commanding every federal agency to develop a plan to engage in these kinds of election-related activities, without a Congressional enactment specifically authorizing such agencies to engage in such election-related activities, is a possible violation of the Elections Clause and

Electors Clause—if the independent state legislature theory is adopted by this Court.

III. If the independent state legislature theory applies, the Electoral Count Act is constitutionally suspect.

If this Court adopts the independent state legislature theory as doctrine, the Electoral Count Act, specifically 3 U.S.C. § 15, is constitutionally suspect. Under the constitutional arguments called the "independent state legislature doctrine," Article II grants each respective state legislature with sole plenary authority to determine the appointment of Presidential Electors which federal and state law cannot abridge. The independent state legislature doctrine basically provides that when the U.S. Constitution grants authority to "state legislatures," no other body or law can interfere with the state legislature's authority. Neither the state's own constitution, the state's courts, nor the state's governor can interfere with state legislature's authority under Article II. The U.S. Supreme Court cases cited for the independent state legislature doctrine to apply to Article II include *McPherson v. Blacker*, 146 U.S. 1, 27 (1892) ("The constitution. . . . leaves it to the legislature exclusively[.]") and *Bush v. Palm Beach Cnty. Canvassing Bd.*, 531 U.S. 70, 76 (2000) in the concurring opinion.

Statute 3 U.S.C. § 15 authorizes Congress to do more than count the electoral votes as Article II requires. Rather, the Electoral Count Act authorizes

Congress to object, debate, and reject votes of a State's Presidential Electors. To date, there has been no court decision upholding the constitutionality of 3 U.S.C. § 15. Consistently, the U.S. Supreme Court cases of *McPherson* ("The constitution. . . . leaves it to the legislature exclusively[.]") and *Bush*, and the Eighth Circuit decision in *Carson* support that 3 U.S.C. § 15 is unconstitutional as violating the state legislatures' Article II prerogatives over Presidential Electors. *See* Vasen Kesavan, *Is the Electoral Count Act Unconstitutional*, 80 N.C. L. Rev. 1653 (2002) (reaching the conclusion of unconstitutionality of the statute based upon the history of the electoral college and other legal authorities, particularly Article II of the U.S. Constitution). The following cases support textual and structural arguments that the state legislatures have plenary authority regarding Presidential Electors: *McPherson*, 146 U.S. at 27 ("The constitution. . . . leaves it to the legislature exclusively[.]"); *Bush*, 531 U.S. at 76; and *Carson*. Additionally, the dissenting opinion in *Arizona State Legis.*, 135 S.Ct. at 268 supports the independent state legislature doctrine applying in an Article II context.

Two legal standards cover cases challenging Congress' constitutional authority to enact statutes. The first legal standard is that Congress can only enact laws which are constitutionally authorized. This legal standard applies when the party claims an act of Congress is not constitutionally authorized by one of the powers delegated to Congress in Article I of the

Constitution. *See*, *e.g.*, *Perez v. United States*, 402 U.S. 146 (1971); *McCulloch v. Maryland*, 17 U.S. 316 (1819).

The second legal standard is that Congress cannot enact laws which violate state sovereignty preserved in the Constitution. This legal standard applies when the party claims an act of Congress invades the province of state sovereignty granted by an express constitutional provision or reserved by the Tenth Amendment. "If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress." *New York v. U.S.*, 505 U.S. 144, 156 (1992) (citations omitted). It is in this sense that the Tenth Amendment "states but a truism that all is retained which has not been surrendered." *United States v. Darby*, 312 U.S. 100, 124 (1941).

Hence, under the independent state legislature theory, 3 U.S.C. § 15 is both constitutionally unauthorized and invades each respective state legislature's power to certify Presidential votes and Presidential Electors granted by Article II and reserved by the Tenth Amendment:

> . . . the two Houses [of Congress] concurrently may reject the vote or votes when they agree that such vote or votes have not been so

> regularly given by electors whose appointment has been so certified. . . .

3 U.S.C. § 15.

Because Article II grants the state legislature the sole and plenary power to direct the appointment of Presidential Electors, Congress has no constitutional authority to enact 3 U.S.C. § 15 depriving the state legislature of the constitutionally-granted authority to approve the Presidential Electors. Second, 3 U.S.C. § 15 authorizes the "two Houses" to invade the state legislatures' exclusive power to appoint Presidential Electors by allowing individual congresspersons to object to a State's Presidential Electors and allowing Congress to actually reject a State's Presidential Electors.

The textualist argument in support of the state legislature's plenary authority over approval of Presidential Electors is based on the following one sentence in Article II of the U.S. Constitution:

> Each state shall appoint, in such manner as the Legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress. . . .

The key clause empowering state legislatures to "appoint" Presidential Electors is "in such manner as the Legislature thereof may direct." Supporters of the independent state legislature theory claim, based on this clause, that approval of Presidential votes and approval of Presidential Electors are exclusively state

legislative decisions. In turn, the independent state legislature theory supporters would claim that 3 U.S.C. § 15 and related laws encroaching, every four years, on these state legislative prerogatives are unconstitutional.

The plain meaning of the text is consistent with their arguments. The constitutional phrase is an imperative: the state legislatures has the power to direct the appointment of Presidential Electors. The "state" appoints the Presidential Electors and "the legislature may "direct" the "manner" of the appointment. Supporters of the independent state legislature theory would claim that it is this aspect of the constitutional text that is violated when the challenged federal and state laws legally preclude state legislative approval of Presidential votes and of Presidential Electors. In other words, every four years, "the legislature must be involved in such approvals so that it may 'direct' the 'manner' of 'appoint[ing]' of the Presidential Electors—as the constitutional imperative sentence requires."

Moreover, under a textualist's reading, the Constitution's text supports the unconstitutionality of 3 U.S.C. § 15 because it fails to guarantee voter's rights to their respective states' approvals of Presidential votes and of Presidential Electors to vote for President and Vice President. Congress neither has express constitutional authority nor implied constitutional authority to enact 3 U.S.C. § 15. Article II puts state appointment of Presidential Electors in the exclusive hands of the state legislatures every four years, "[e]ach

state shall appoint, in such manner as the Legislature thereof may direct." By contrast, Article II lacks the express grant of authority to Congress found in Article I's Elections Clause for Congressional elections. Article I thus grants great power to Congress with respect to the elections of congressional representatives and senators—i.e., the Constitution provides a power to Congress "to make or alter such [state] Regulations." However, this Constitutionally-conferred power to Congress is absent in Article II.

Similarly, Article I, section 5 also establishes that Congress shall be the judge of the elections of its own members: "Each House shall be the judge of the elections, returns and qualifications of its own members. . . ." Article II lacks a similar clause empowering Congress to be the "judge" of state appointment of Presidential Electors. Further, Article II excludes the Senate from any role in the Presidential election process. Article II does not authorize Congress to include the Senate in the Presidential election process under 3 U.S.C. § 15.

Lacking express constitutional authority in Article II's imperative sentence regarding Presidential elections, the only alternative for Congressional authority is an implied constitutional authority. However, such implied authority is also lacking. The only candidates for the government's implied constitutional authority would be Article I's Necessary and Proper Clause and Article II itself. As to the Necessary and Proper Clause, "Congress possesses only limited powers; the States and the people retain the remainder.

The States have broad authority to enact legislation for the public good—what we have often called a 'police power.'" *Bond v. U.S.*, 134 S.Ct. 2077, 2086 (2014). Congress, by contrast, has no such general authority and "can exercise only the powers granted to it," *McCulloch*, 17 U.S. at 405, including the power to make "all Laws which shall be necessary and proper for carrying into Execution" the enumerated powers, U.S. Const. art. I, § 8, cl. 18. "Of course, as Chief Justice Marshall stated, a federal statute, in addition to being authorized by art. I, § 8, must also 'not [be] prohibited' by the Constitution." *U.S. v. Comstock*, 130 S.Ct. 1949, 1957 (2010), *quoting McCulloch, supra*, at 421.

Article II itself also fails to support a constitutional authority for Congress to enact 3 U.S.C. § 15. Article II states that it is the state legislatures' exclusive constitutional prerogative to determine the state's appointment of Presidential Electors, including approval of the Presidential Electors to vote for President and Vice President. Article II's imperative sentence regarding Presidential elections and the Twelfth Amendment do not grant Congress any "power" over the state legislatures' constitutional prerogatives over Presidential Electors. Instead, these constitutional texts define a very limited and specific role for the Vice President, U.S. Senate and U.S. House of Representatives.

For example, Congress' enactment of 3 U.S.C. § 15, creating a process for Congressional objections to reject a State's Presidential Elector votes, goes far beyond the constitutionally-prescribed roles for Vice President, U.S. Senate and the U.S. House of

Representatives in Article II and the Twelfth Amendment. In violation of Article II, 3 U.S.C. § 15 sets up a process for Congress to object and reject Presidential Elector votes—which is more than just counting the legislatively-approved Presidential Electors wherein, "the two Houses concurrently may reject the vote or votes when they agree that such vote or votes have not been so regularly given by electors whose appointment has been so certified." Congress' statutory enactment of this process for objecting-and-rejecting a State's Presidential Electors is inconsistent with Article II and any implied constitutional authority thereunder.

Additionally, there is a textualist argument based on the negative implication. When the Constitution provides Congressional power regarding the Presidency, it says so—twice. First, Article II, Section 1, Clause 4 which provides that "[t]he Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States." Second, the Presidential Succession Clause of Article II provides for the removal of the President from office, death, resignation, or inability to discharge his or her powers in which Congress may provide by law for such instances and whom shall take his or her place if either act occurs.

In both of these instances, the Constitution provides Congress with express authority over a limited, narrowly-prescribed aspect of the Presidency. By negative implication, Article II's imperative sentence regarding Presidential elections and selection of

Presidential Electors every four years does not provide implied constitutional authority for Congress to object-and-reject the state legislatures' approvals of Presidential votes and of Presidential Electors.

Finally, the text of the Constitution also provides an intertextual argument. When the Constitution provides a Congressional role in election, the Constitution says so. First, Article I's Elections Clause provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." Second, The House Judging Clause provides that "[e]ach House shall be the Judge of the Elections, Returns and Qualifications of its own Members." In both instances, the Constitution provides Congress with express constitutional authority regarding elections involving Congress. However, regarding Presidential Electors, there is constitutional silence—no express power is granted to Congress—because Article II empowers the state legislatures, exclusively, to govern the states' appointments of Presidential Electors.

The interpretivist's structuralist arguments also support the unconstitutionality of 3 U.S.C. § 15. *See generally* Kesavan at 1759–93. Under this approach, interpretation requires drawing inferences from the design and structure of the Constitution:

> Another mode of constitutional interpretation draws inferences from the design of the

> Constitution: the relationships among the three branches of the federal government (commonly called separation of powers); the relationship between the federal and state governments (known as federalism); and the relationship between the government and the people.

Ex. O, Brandon J. Murrill, *Modes of Constitutional Interpretation*, Congressional Research Service (Mar. 15, 2018) at 2. The structure of Article II is to empower the state legislatures, not Congress or the state's Governors, to appoint the Presidential Electors. 3 U.S.C. § 15 violates Article II's structure because 3 U.S.C. § 15 empowers Congress and the state's Governors in the Presidential Elector process—excluding the state legislatures, in large part, from the Presidential Elector approval process.

The structure of the Article II for Presidential elections solely empowers state legislatures and not Congress, its members or state Governors. Article II's imperative sentence regarding Presidential elections puts the state legislatures in exclusive control of a state's appointment of Presidential Electors. The state legislatures, who enact the state elections law applicable to federal elections, are identified to choose the manner of appointment of the Presidential Electors.

Under Article II, Congress and the Governors are to have no substantive role in the procedures of approving Presidential Electors to vote for President and Vice President. Under Article II, the Federal Defendants are just there to count the Presidential

Electors' votes of the Presidential Electors who have received state legislative certification; 3 U.S.C. § 15 and related federal law authorizing Congress to object and reject a State's Presidential Elector votes violate Article II.

The Constitution mistrusts Congress in Presidential elections. This is the anti-Congress/anti-Senate principles of Article II. Congress is to have a limited, narrowly-prescribed role in Presidential elections. Congress is not to interfere with the state legislature directing the appointment of Presidential Electors. Congress is not trusted in Article II.

Article II's electoral college method of selecting a President and Vice President is a rejection of Congressional decision-making. The Constitution replaced the Articles of Confederation which authorized Congress to elect a President of the United States in Congress Assembled—parliamentary style. Under the Articles of Confederation, John Hanson was the first President of the United States in Congress Assembled and served from November 5, 1781 to November 4, 1782. The Constitution replaced that parliamentary system with the Electoral College in Article II which gives Congress no role in selecting the President. Alexander Hamilton in Federalist Papers, No. 68, on "The Mode of Electing the President" (1788) referred to this as a "sinister bias."

Similarly, Joseph Story in his Commentaries on the Constitution (1833) stated that Article II was to protect against Congressional dangers of cabal, intrigue and corruption and against pre-existing bodies

being tampered with beforehand to prostitute their vote: "The same circumstances would naturally lessen the dangers of cabal, intrigue and corruption, especially if congress, should, as they undoubtedly would, prescribe the same day for the choice of electors, and for giving their votes throughout the United States. The scheme, indeed, presents every reasonable guard against these fatal evils to republican governments. The appointment of the president is not to depend upon any pre-existing body of Men, who might be tampered with beforehand to prostitute their votes, but is delegated to persons chosen by the immediate act of the people, for that sole and temporary purpose." Commentaries on the Constitution, §1451.

The Senate was to have no role in the selection of the President whatsoever. In Federalist No. 66, Alexander Hamilton explained that the House received powers related to Presidential elections in the event of a candidate does not receive a majority of the votes of the Presidential electors because the Senate received other powers: "The same house will be the umpire in all elections of the President which do not unite the suffrages of a majority of the whole number of electors; a case which it cannot be doubted will sometimes, if not frequently, happen. The constant possibility of the thing must be a fruitful source of influence to that body." Federalist No. 66.

St. George Tucker, in his "American Blackstone," explained the rationale for excluding the Senate from the Presidential election process as "founded upon the wisest policy" as concerns lie with presumption of

undue influence, "where the contest might be between a president in office, and any other person, would be altogether unavoidable." *See* St. George Tucker, Blackstone's Commentaries with notes of reference to the Constitution and Laws of the Federal Government of the United States and of the Commonwealth of Virginia at 328 (1803).

Article II's Elector Incompatibility Clause, stating that "no Senator or Representative, or Person holding an Office or Trust of Profit under the United States, shall be appointed as an Elector," is also a rejection of Congressional decision-making. The relevant purpose of the Elector Incompatibility Clause is to absolutely separate the Presidential Electors from Congress. The Presidential Electors are to be independent from Congress. Joseph Story stated that this Elector Incompatibility Clause was intended to preclude Congressional members from exerting official influence on the electoral college and to avoid any Congressional bias or impartiality on the electoral college, Commentaries § 1467. One cannot imagine any greater influence than the power to reject electors.

The Constitution mistrusts Governors and state executive branch officials in Presidential elections. The state's executive branch officials are to have no role in Presidential selection. Article II's electoral college method of selecting a President and Vice President empowers the state legislatures, not the state's executive branch officials. As the Eighth Circuit recently held under Article II that a state executive branch official cannot take away a state legislature's power over

Presidential elections. *Carson v. Simon*, 978 F.3d 1051, 1059–60 (8th Cir. 2020).

Further, Article II's imperative sentence regarding Presidential elections specifies "state legislatures"—not Governors nor "state executives"—to have the power over the appointment of Electors, "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress. . . ."

Thus, one of the purposes of Article II's imperative sentence regarding Presidential elections was to exclude the states' Governors from having a role in Presidential elections—including approving the Presidential Electors.

Further, the Electors Clause specifies that the Presidential Electors are to vote in their states and the Vice President and Congress, not the State's Governors, would open and count the Presidential Electors' ballots for President and Vice President.

The Constitution trusts state legislatures in Presidential elections. The state legislatures, not Congress nor the states' Governors, are to direct the selection of Presidential Electors. Article II trusts state legislatures to choose Presidential Electors—even trusting them to directly elect them as was done by some state in the 1800s. *See*, *e.g.*, Georgia Constitution of 1798, Art. IV, § 2 at 12. Article II empowers "state legislatures"—regarding Presidential elections not Congress,

nor the States' executives—to have the power over the appointment of Presidential Electors.

Likewise, the Electors Clause specifies that the Presidential Electors are to vote in their states and specifies the Vice President and Congress will have limited, defined roles of opening and counting the Presidential Electors' ballots for the election of President and Vice President.

Hence, one of the purposes of the Electors Clause was to limit and define the Vice President's and Congress' role in the Electoral College process to ensure that the state legislature, not Congress, would have the exclusive power to appoint the Presidential Electors. In short, structuralist arguments under the independent state legislature theory, based on Article II, show the unconstitutionality of 3 U.S.C. § 15. Article II contains an anti-Congress/anti-Senate principle, an anti-Governors principle and a pro-state legislature principle. The structure of Article II is to empower the state legislatures, not Congress, nor the Governors (or other state executive branch officials), to appoint or approve the Presidential Electors. Therefore, 3 U.S.C. § 15 violates Article II's structure because it unconstitutionally empowers Congress, includes the Senate, and involves the state's executives in the Presidential Elector approval and counting process—every four years. The result is unconstitutional because it cancels the state legislatures out of the Presidential Elector approval process.

CONCLUSION

The Court's decision in resolving the applicability of the independent state legislature theory has consequences beyond this case. The resolution of the question presented should take into account the theory's effect on related subject areas including purported federal encroachments. The purported federal encroachments examined here, under the independent state legislature theory are Presidential Executive Order No. 14019 and the Electoral Count Act.

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