No. 21-1271

IN THE
Supreme Court of the United States

TIMOTHY K. MOORE, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES, *ET AL.*, *Petitioners*,

v.

REBECCA HARPER, *ET AL.*, *Respondents*.

On Writ of Certiorari
to the Supreme Court of North Carolina

Brief *Amicus Curiae* of America's Future, Inc. in Support of Petitioners

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MISCELLANEOUS

INTEREST OF THE *AMICUS CURIAE*[1]

America's Future, Inc. is a nonprofit educational and legal organization, exempt from federal income tax under Internal Revenue Code section 501(c)(3), established in 1946, *inter alia*, for the purpose of participating in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law.

STATEMENT OF THE CASE

Following the 2020 decennial census, the North Carolina General Assembly redrew that state's congressional districts. That redistricting plan was challenged in state court, which culminated with a decision of the North Carolina Supreme Court discarding the state legislature's map and substituting a map which had been drawn by three Special Masters appointed by the trial court based on a purported violation of the North Carolina Constitution. *Harper v. Hall*, 868 S.E.2d 499 (N.C. 2022) and Order on Remedial Plans, *Harper v. Hall*, Nos. 21 CVS 015426, 21 CVS 500085 (N.C. Super. Ct. Feb. 23, 2022) Pet.App.269a.

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[1] It is hereby certified that counsel for Petitioners and for Respondents have consented to the filing of this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than this *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

Petitioners, who are leaders and members of the North Carolina General Assembly, sought a stay from this Court, which was denied, with Justice Alito, joined by Justices Thomas and Gorsuch, dissenting from the denial of the stay, noting that "This case presents an exceptionally important and recurring question of constitutional law.... There can be no doubt that this question is of great national importance." *Moore v. Harper*, 142 S. Ct. 1089 (2022) (Alito, J., dissenting from denial of application for stay). Justice Kavanaugh concurred with the denial of the stay but "agree[d] with Justice Alito that the underlying Elections Clause question raised in the emergency application is important, and that both sides have advanced serious arguments on the merits." *Id*. at 1089 (Kavanaugh, J., concurring in denial of application for stay).

Petitioners then filed a petition for writ of certiorari, which was granted on June 30, 2022, to address the question:

> Whether a State's judicial branch may nullify the regulations governing the "Manner of holding Elections for Senators and Representatives ... prescribed ... by the Legislature thereof," U.S. Const. art. I, § 4, cl. 1, and replace them with regulations of the state courts' own devising, based on vague state constitutional provisions purportedly vesting the state judiciary with power to prescribe whatever rules it deems appropriate to ensure a "fair" or "free" election.

SUMMARY OF ARGUMENT

The first principle of interpretation set out in Justice Scalia's Treatise Reading Law is: "Every application of a text to particular circumstances entails interpretation." Rarely does a case come to this Court that requires less interpretation than the issue presented here. Petitioners ask this Court to apply the text of Article I, Sec. 4, cl. 1 in a straightforward manner — that when the Framers vested the power to prescribe the regulations governing Congressional elections in the Legislature of a state, they actually meant the Legislature. Respondents take the position that this specific governing language should be interpreted in light of general principles of constitutional law, to the end that state courts become empowered to overturn the regulations prescribed by the Legislature. That leads to the question: "if the Framers had actually intended to vest this power exclusively in state Legislatures, what words should they have used?"

This *amicus* supports Petitioners' effort to reaffirm the primacy of state Legislatures, but urges this Court to take a somewhat different path to that end. This *amicus* believes that viewing the act of a state Legislature prescribing regulations pursuant to the Elections Clause as a legislative act creates unnecessary confusion. The better view is that in prescribing regulations, a state Legislature is not exercising legislative power — but exercising a power directly vested in it by the federal Constitution. Here, the text is significant, as the Constitution describes the act of the Legislature to be "prescribing" not

"legislating," to create "regulations," not "laws." While this Court may believe it unnecessary to overrule this Court's 2015 decision in *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, this *amicus* believes it should be overruled for all the reasons set in Chief Justice Roberts' dissent in that case.

The similarity between the Elections Clause in (Article I, Sec. 4, cl. 1) and the Electors Clause (Article II, Sec. 1, cl. 2) cannot be missed. In both cases, the Framers invested exclusive authority in state Legislatures. The reasons that the President was to be chosen by a body of electors, and that the manner by which those electors would be "appointed" was vested exclusively in the state Legislatures, was described in Federalist No. 68. Those reasons include "to avoid cabal, intrigue, and corruption" and prevent "foreign powers" from gaining influence. Those reasons undergirding the drafting of the Electors Clause are informative with respect to understanding the Elections Clause.

When redistricting choices of state Legislatures are allowed to be overridden after prolonged litigation by state courts, elections are held before this Court has the opportunity to issue a definitive ruling. The 2020 election illustrates what can happen when the regulations prescribed by state Legislatures are overturned by state courts, by settlement agreements between plaintiff lawyers and state officials of the same party, and in many other ways. The rules governing voter registration, absentee ballots, when ballots must be returned, signature requirements, are all thrown into a state of flux. By just one measure of

validity, this usurpation of state Legislative power led to millions more Americans who voted via a process — absentee ballots, including mail-in ballots — that the bipartisan Jimmy Carter-James Baker commission identified as "the largest source of potential voter fraud" in the wake of the contested 2000 election. If such chaos is allowed to continue, it will effectively transfer electoral power from the People's elected representatives to political lawyers and state judges, undermining public confidence in elections.

ARGUMENT

I. NORTH CAROLINA STATE COURTS LACKED JURISDICTION TO ENTERTAIN STATE CONSTITUTIONAL CHALLENGES.

A. The North Carolina Courts Usurped the Role of the North Carolina Legislature.

The U.S. Constitution places the authority for prescribing regulations for the conduct of congressional elections in each state's Legislature, subject to override by Congress in certain matters:

> The 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. [Art. I, § 4, cl. 1 (emphasis added).]

Respondents take the position that this vesting of power in state legislatures should not be understood as written, because to do so would violate general principles that they draw from other federal or state constitutions. Respondents elevate those perceived general principles over the specific governing constitutional text, using a method of textual interpretation that is not just wrong as applied here, but also fraught with danger whenever used.

"The framers of the Constitution employed words in their natural sense; and where they are plain and clear, resort to collateral aids to interpretation is unnecessary and cannot be indulged in to narrow or enlarge the text." *McPherson v. Blacker*, 146 U.S. 1, 27 (1892). "The prescription of the written law cannot be overthrown because the States have latterly exercised in a particular way a power which they might have exercised in some other way." *Id*. at 36.

Respondents read the Elections Clause as if it specified that regulations for federal elections "shall be prescribed by each State"[2] — rather than "in each State by the Legislature thereof...." Such a reading would violate the Surplusage Canon, which requires, "[i]f possible," that "every word and every provision is

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[2] The opening sentence of the dissent in a decision of this Court involving a similar constitutional provision (Article II, Sec. 1, cl. 2) made just this misreading of the text. *See Bush v. Gore*, 531 U.S. 98, 123 (2000) (Stevens, J., dissenting) ("The Constitution assigns to the **States** the primary responsibility for determining the manner of selecting the Presidential electors." (Emphasis added).)

to be given effect." A. Scalia & B. Garner, Reading Law at 174 (Thomas/West: 2012). The words "by the Legislature" must be given effect — as they specify which component of state government has responsibility to prescribe those regulations. Or, one could say Respondents read the Elections Clause as if it specified "by the Legislature subject to review by such State's courts for compliance with state constitutional and statutory provisions." Since those words are nowhere to be found in the text, Respondents, in effect, ask this Court to read them into the Constitution.

Enforcing the Constitution's allocation of power "does not imply a disrespect for state *courts* but rather a respect for the constitutionally prescribed role of state *legislatures*." *Bush v. Gore* at 115 (Rehnquist, C.J., concurring).

Critics of Petitioners' view claim that the "legislature [referred to in Article I, Section 4 of the U.S. Constitution] is an entity that itself is created and confined by the state constitution." *See* R. Blaustein, "Fringe No More? Independent-State-Legislature Theory," *Washington Lawyer* (Sept./Oct. 2022) (quoting R. Zagarri, The Politics of Size: Representation in the United States, 1776-1850) (Cornell Univ. Press: 2010). A caustic take on this Court's *Bush v. Gore* decision argues that "a state legislature is properly defined and bounded by the state constitution that gives the legislature life. When state jurists attend to the state constitution in interpreting state election statutes, these judges are enforcing Article II, not undermining it." V. Amar & A. Amar, "Eradicating Bush-League

Arguments Root and Branch: The Article II Independent-State-Legislature Notion and Related Rubbish," 2021 SUP. CT. REV. 1, 8 (2021). These authors react to the constitutional text as Dracula to the Cross. The authors of this article view the simple, textual argument that when the Framers used the phrase "by the Legislature thereof," they meant exactly that, as "self-refuting," "rubbish," an argument that "not only fails, it implodes. It self-contradicts." *Id.* at 8-9. Searching for the logic behind this rhetorical excess, these authors must conclude that it would be unconstitutional under state law for the federal constitution to vest any power exclusively in a state legislature. How these authors would view the application of the Supremacy Clause to their own argument is unknown.

The fact that a state legislature exists under the authority of a state constitution, and that state constitution constrains a state legislature under normal circumstances, is irrelevant here. Any such constraints governing the enactment of legislation cannot apply when the state legislature performs its constitutional duty to "prescribe" "regulations" to govern a federal election.

B. In Prescribing Election Regulations, State Legislatures Are Not Exercising a Legislative Function.

This *amicus* reaches the same conclusion as Petitioners, in that it views the action of the state legislature to be unreviewable by state courts for violation of the state's constitution. However, this

amicus reaches that result in a manner different from Petitioners, who view the act redistricting by the North Carolina General Assembly to be a state legislative act. Petitioners describe redistricting as "a quintessentially legislative one," and an "*inherently legislative* decision[]," and describe it as "this legislative power." Brief for Petitioners ("Pet. Br.") at 4, 12. Petitioners argue that if a state governor is involved in the making of state laws through the veto power, that governor is performing a legislative function. Pet. Br. at 39-40.

However, this *amicus* believes the better view is that in setting rules for federal elections, a state Legislature is not performing a **legislative** function at all. Article I does not by its terms empower the Legislature to "**enact**" a "**law**." Rather, the state Legislature is empowered by Article I to "**prescribe**" the "**Regulations**" by which the Congressional elections are to be administered (subject only to Congressional override on the times and manner of those elections).

The position of this *amicus* is fully consistent with the North Carolina Constitution. That Constitution requires that bills be presented to the Governor before becoming a law (N.C. Const. Art. II, Sec. 22(1)), but provides an exception from this presentment requirement for bills "Revising the districts for the election of members of the House of Representatives of the Congress of the United States...." *Id*. at Sec. 22(5)(d). If the North Carolina Constitution viewed redistricting as an exercise of the legislative power, it is likely it would have required presentment to the

Governor. By omitting the requirement of presentment for redistricting, the Constitution recognizes that redistricting is not a legislative act. However, even if the state Constitution required presentment of redistricting or any other federal election requirement, it would not diminish the authority of the state legislature to act alone.

No doubt one of the reasons Petitioners argue as they do is this Court's decision in *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787 (2015), where it strayed from a textually faithful application of the Elections Clause by approving a state Proposition. "In 2000, Arizona voters adopted an initiative, Proposition 106, aimed at 'ending the practice of gerrymandering and improving voter and candidate participation in elections.' Proposition 106 amended Arizona's Constitution to remove redistricting authority from the Arizona Legislature and vest that authority in an independent commission...." *Id.* at 792. Chief Justice Roberts' dissent exposed that decision's weakness:

> Just over a century ago, Arizona became the second State in the Union to ratify the Seventeenth Amendment. That Amendment transferred power to choose United States Senators from "the Legislature" of each State, Art. I, §3, to "the people thereof...."
>
> 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....

> The Court's position has no basis in the text, structure, or history of the Constitution, and it contradicts precedents from both Congress and this Court....
>
> The majority largely ignores this evidence, relying instead on **disconnected observations about direct democracy**, a contorted interpretation of an irrelevant statute, and **naked appeals to public policy**. **Nowhere does the majority explain how a constitutional provision that vests redistricting authority in "the Legislature" permits a State to wholly exclude "the Legislature" from redistricting**. Arizona's Commission might be a noble endeavor—although it does not seem so "independent" in practice—but the "fact that a given law or procedure is efficient, convenient, and useful ... will not save it if it is contrary to the Constitution." *INS v. Chadha*, 462 U.S. 919, 944 (1983). **No matter how concerned we may be about partisanship in redistricting, this Court has no power to gerrymander the Constitution**. [*Arizona State Legislature* at 824-26 (Roberts, C.J., dissenting) (emphasis added).]

This *amicus* does not disagree that this Court could rule for Petitioners without upending *Arizona State Legislature* (Pet. Br. at 40), but it would be much preferable if it took that further step to clean up its redistricting jurisprudence. Chief Justice Roberts' dissent was entirely correct and directly on point here.

II. LIKE THE ELECTORS CLAUSE, THE ELECTIONS CLAUSE ENTRUSTS POWER TO STATE LEGISLATURES TO MINIMIZE THE RISK OF CORRUPTION.

As Chief Justice Rehnquist explained, Article I, Sec. 4, cl. 1, is one of "a few exceptional cases in which the Constitution imposes a duty or confers a power on a **particular branch of a State's government**.... Thus, **the text** of the election law itself, and not just its interpretation by the courts of the States, takes on **independent significance**." *Bush v. Gore* at 112-13 (Rehnquist, C.J., concurring) (emphasis added). Indeed, "the text" alone should be sufficient to resolve this case.

> The 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. [Article I, Sec. 4, cl. 1 (emphasis added).]

Another of these "exceptional cases" conferring a power on a particular branch of state government is the Electors Clause.

> **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: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector. [Article II, Sec. 1, cl. 2 (emphasis added).]

The reasons that state Legislatures were entrusted by the Framers with authority to select electors in the Electors Clause is instructive as to why state Legislatures were entrusted by the Framers with authority to prescribe the regulations for elections in the Elections Clause.

In short, the Framers of the Constitution believed that the Legislature was the body that could best be trusted to determine the manner of appointing Electors. Federalist Paper No. 68 reveals the deep concerns based on corruption and foreign intrigue that were weighed by the Framers in fashioning the Electors Clause.

> Nothing was more to be desired than that every practicable obstacle should be opposed to **cabal, intrigue, and corruption**. These most deadly adversaries of republican government might naturally have been expected to make their approaches from more than one quarter, but chiefly from the desire in **foreign powers** to gain an improper ascendant in our councils. How could they better gratify this, than by raising a creature of their own to the chief magistracy of the Union? But the convention have guarded against all danger of this sort, with the most

> provident and judicious attention. [G. Carey & J. McClellan, The Federalist No. 68 (Liberty Fund: 2001) (emphasis added).]

Thus, it was the conviction of the Framers that, to guard against these threats to the Republic, the authority to determine the Means of an Election must be vested exclusively in state legislatures, subject to no constraint other than the Constitution.[3]

The Framers had long experience with legislative bodies during the colonial period. They knew the strengths of such bodies and their weaknesses. They knew that state legislatures can be frustrating in causing delay and even gridlock, but they knew that state legislatures conducted open debate with the transparency that deliberation requires. State legislators would likely include persons from all walks of life — farmers, merchants, persons with military background, physicians, and even lawyers. They would come from rural portions of each state and more densely populated areas. They would be of different ages and different temperaments. They would likely be drawn from different religious backgrounds. And they would regularly stand for election within a House or Senate district sufficiently small that the person would be reasonably well known and respected by the electorate. When this mix of persons who exhibited leadership skills would assemble, the result would

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[3] *See Leser v. Garnett*, 258 U.S. 130, 137 (1922) (function of state legislature in carrying out a federal function derived from the U.S. Constitution "transcends any limitations sought to be imposed by the people of a State").

likely reflect the will of the people. Such a deliberative body could only rarely be captured by narrow factional interests, and if it were to occur, likely would not last long.

The Framers did not entrust the responsibility to select electors to governors, secretaries of state, judges, election officials, or anyone else. While the passions of assisting one's own political party could cloud the judgment of a governor or other individual to skew the system and invite fraud that helps his personal ambitions and those of his friends, a deliberative body is highly unlikely to be controlled by a majority of both chambers who are dominated by the same impulses. Although that certainly could happen, political power must be vested somewhere, and the state legislatures were deemed by the Framers to be the most reliable.

The duty of this Court to enforce the Framers' entrustment of power to state Legislatures under the Elections Clause (and also the Electors Clause) is of the highest order, for in many cases the rules can determine the outcome of elections. If this were not so, political parties would not expend a lion's share of their campaign budget on litigation and other approaches to change those rules after they are set by the Legislature, but before elections are held. *See* section III, *infra*.

Allowing just one large swing state to violate the Elections Clause can result in a massive shift of national political power affecting every state and every American. If the state courts of just one state engage in an unconstitutional rewriting of election regulations

on the eve of an election, causing the election of candidates who otherwise would have lost, what happens in that state can affect who controls the House and who controls the Senate, and thereby everyone who lives in America. (The same is true for the violations of the Electors Clause, as casting a large swing state's electors to a candidate who should have lost, can determine who is President and who is Vice President, and that affects the lives of every American.) Thus, each state had and still has a reciprocal duty to follow this delegation of power so that the Congress has legitimacy.

Each state[4] depends on other states to adhere to minimum constitutional standards in areas where it ceded its sovereignty to the union — and now it is the duty of this Court to reaffirm the role of state Legislatures and ensure that their role not again be usurped in the future.

[4] These mutual responsibilities of the states to follow in their state the rules specified in the Constitution for federal elections were agreed to by each state when the Constitution was ratified (including North Carolina). Thereafter, each state came into the Union on an "equal footing" (such as Michigan and Wisconsin), accepting the constitutional process by which federal elections would be run. *See Coyle v. Smith*, 221 U.S. 559 (1911).

III. CHAOTIC RULE CHANGES IN RECENT ELECTIONS DEMONSTRATE THE WISDOM OF THE ELECTIONS CLAUSE VESTING RULEMAKING ONLY TO LEGISLATURES.

In many states, the times, places, and manner by which the November 2020 federal election took place did not at all resemble the manner in which state legislatures had determined it would. State courts, secretaries of state, election officials, and even private parties usurped the authority of state legislatures, resulting in electoral chaos which, no doubt, affected the results. Indeed, the chaotic, ever-changing state of the rules governing the 2020 election demonstrates the Framers' wisdom in leaving the "times, places and manner" of congressional elections to Legislatures alone, lest elections be decided not by the people — but by lawyers and judges.

What was the result? By just one measure of validity, millions more Americans voted via a process — absentee ballots, including mail-in ballots — that the bipartisan Jimmy Carter-James Baker commission identified as "the largest source of potential voter fraud" in the wake of the contested 2000 election. Building Confidence in U.S. Elections: Report of the Commission on Federal Election Reform at 46 (Sept. 2005).

The Framers envisioned an election process governed by the people's elected representatives, under democratically achieved and clearly understood rules. Instead, the 2020 election disintegrated into a battle of highly paid attorneys, forum-shopping for friendly

judges to impose desired election policies, on *ad hoc* and even openly contradictory bases, for partisan political advantage, as described *infra*. Far from their claims of defending democracy, these partisan attorneys brought strategically chosen litigation to challenge unfavorable election laws to make them more favorable to their candidates.

A. The 2020 Federal Election Devolved into a Battle for Court Decisions to Overrule Legislatively Prescribed Regulations.

In 2020, a single election law firm was "paid more than $49 million.... Most, if not all, of those payouts are from Democrats or groups with ties to Democrat causes."[5] "Republican lawyers say that is likely just a fraction of what Perkins Coie[6] has received, because it doesn't include legal work for many left-wing nonprofits."[7] Meanwhile, "Jones Day has billed the Republican Party $12.1 million since 2019."[8]

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[5] C. Spiezio, "Tight election keeps spotlight on Perkins Coie's political law team," *Reuters* (Nov. 4, 2020).

[6] The law firm Perkins Coie has since spun its political law division off into a new firm, Elias Law Group, to "engag[e] more directly in the political and electoral process." *See* Perkins Coie press release (Aug. 22, 2021).

[7] R. Mills & T. Hoonhout, "Democratic Legal Activist Marc Elias Has Spent a Career Preparing for the 2020 Election Fight," *National Review* (Nov. 3, 2020).

[8] D. Jackson & D. Roe, "Big Firms Bring in Millions as Hundreds of Election Lawsuits Rage Across the Country," *The American Lawyer* (Oct. 15, 2020).

> [Perkins Coie,] once best known for representing tech companies in the Pacific Northwest, **has established itself as a key player on the national political scene**, with the Democratic National Committee and other Democratic Party groups and candidates as core clients.
>
> The leader of its political law group, Marc Elias, has become a quasi-celebrity among Democrats, with more than 180,000 Twitter followers. This election cycle, he has represented Democrats in litigation over voting rights in more than two dozen states, notching a number of successes.[9]

Each of these lawsuits in "more than two dozen states" occurred **before** Election Day. And the vast majority sought exactly the same effect as in the instant case — judicial "legislation" overturning the settled election laws passed by democratically elected state legislatures. The lawsuits often targeted Regulations designed to curb abuse of absentee voting and "ballot harvesting" by politicized interest groups.[10]

It is reported that Elias himself brought "more than 200 pre-election lawsuits."[11]

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[9] *See* C. Spiezio, *supra* (emphasis added).

[10] E. Felten, "The Left's legal top gun Marc Elias isn't finished with democracy yet," *RealClear Investigations* (Mar. 24, 2021).

[11] *Id*.

One early lawsuit was filed in 2016 against Alabama, challenging the state's requirement of a photo ID to vote. The case took nearly five years to litigate, and the Eleventh Circuit eventually upheld the Alabama law, but only after the 2020 election concluded. *See Greater Birmingham Ministries v. Sec'y of Ala.*, 992 F.3d 1299, 1337 (11th Cir. 2021)).

The pace of court challenges to state election laws exploded in 2019 and 2020.

> The pandemic accelerated this process in 2020. Through settlements and litigation, Mr. Elias and his colleagues wielded a massive budget to sustain a campaign of litigation that forced states to adopt Democratic election-law priorities against the will of the legislature. Covid became an excuse to upend the law, but the end result was widespread chaos driven by ever-shifting rules intended to benefit one side. [D. Rivkin & J. Snead, "Moore v. Harper and Marc Elias's Curious Idea of 'Democracy'," *Wall Street Journal* (Aug. 1, 2022).]

Elias and his colleagues sued Michigan over its law requiring voters seeking absentee ballots to apply in-person or by mail. Michigan also requires absentee ballots to be delivered in-person, by mail, or by an immediate family member, to prevent "ballot harvesting" by political parties and interest groups. The district court denied an injunction with regard to absentee ballot harvesting. *Priorities USA v. Nessel*, 487 F. Supp. 3d 599, 620 (E.D. Mich. 2020).

Partisan lawyers attacked long-standing state laws requiring all absentee ballots to be received by the close of the polls on Election Day in Oklahoma,[12] Texas,[13] South Carolina,[14] Arizona,[15]

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[12] *DCCC v. Ziriax*, 487 F. Supp. 3d 1207, 1215 (N.D. Okla. 2020). The District Court denied the request for an injunction. *Id*. at 1237.

[13] In *Richardson v. Flores*, 28 F.4th 649 (5th Cir. 2022), a district court required Texas to accept tardy ballots, but long after the election, the Fifth Circuit reversed and remanded with instructions to dismiss the case.

[14] In *Middleton v. Andino*, 488 F. Supp. 3d 261, 307 (D. S.C. 2020), the district judge J. Michelle Childs (since elevated to the D.C. Circuit) enjoined South Carolina's witness signature requirement for absentee ballots, which was upheld by the Fourth Circuit, with a blistering dissent which asserted: "The Constitution makes it clear that the principal responsibility for setting the ground rules for elections lies with the state legislatures.... The majority's disregard for the Supreme Court is palpable. The Supreme Court has repeatedly cautioned us not to interfere with state election laws in the 'weeks before an election.'" *Middleton v. Andino*, 990 F.3d 768, 771-772 (4th Cir. 2020) (Wilkinson & Agee, J.J., dissenting). The Supreme Court reversed, with a concurrence from Justice Kavanaugh. "[T]his Court has repeatedly emphasized that federal courts ordinarily should not alter state election rules in the period close to an election. By enjoining South Carolina's witness requirement shortly before the election, the District Court defied that principle and this Court's precedents." *Andino v. Middleton*, 141 S. Ct. 9, *10 (2020) (Kavanaugh, J., concurring) (internal citation omitted).

[15] *Voto Latino Foundation v. Hobbs*, 2020 U.S. Dist. LEXIS 108435 (D. Ariz. 2020). The suit was eventually settled by Democrat Secretary of State Katie Hobbs.

Wisconsin,[16] Minnesota,[17] and Georgia,[18] among others.

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[16] On appeal, the Seventh Circuit reversed the district court's grant of an "extra" week for tardy ballots, noting that "For many years the Supreme Court has insisted that federal courts not change electoral rules close to an election date.... The Supreme Court has held that the design of electoral procedures is a legislative task...." *Democratic Nat'l Comm. v. Bostelmann*, 977 F.3d 639, 641-42 (7th Cir. 2020).

[17] *Carson v. Simon*, 494 F. Supp. 3d 589, 592 (D. Minn. 2020). On appeal, the Eighth Circuit reversed in part a dismissal on standing grounds, holding that "the extension of the deadline likely violates Article II, Section 1 of the Constitution because the Secretary extended the deadline for receipt of ballots without legislative authorization." *Carson v. Simon*, 978 F.3d 1051, 1054 (8th Cir. 2020).

> By its plain terms, the Electors Clause vests the power to determine the manner of selecting electors exclusively in the "Legislature" of each state.... Simply put, the Secretary has no power to override the Minnesota Legislature. 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; see also *Palm Beach*, 531 U.S at 76-77. Thus, the Secretary's attempt to re-write the laws governing the deadlines for mail-in ballots in the 2020 Minnesota presidential election is invalid.... There is no pandemic exception to the Constitution. [*Id.* at 1059-1060.]

[18] Georgia's law clearly required all ballots to be received by 7:00 p.m. on Election Day in order to be counted. O.C.G.A. § 21-2-386(a)(1)(F). The Eleventh Circuit overturned an injunction from the district court requiring counting of ballots received up to three days after the election. "The United States Constitution still gives States the power to set the 'Times, Places and Manner of holding Elections for Senators and Representatives.' U.S. Const. art. I, § 4, cl. 1.... Instead, the district court manufactured its own ballot deadline." *New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1279-80 (11th Cir. 2020).

Elias sued Texas over legislation ending the practice of operating "mobile voting location" vehicles. *Gilby v. Hughs*, 2020 U.S. Dist. LEXIS 178465, at **3-4 (W.D. Tex. 2020). On appeal, the Fifth Circuit sustained the sovereign immunity defense, and remanded to the district court with instructions to dismiss. *Texas Democratic Party v. Hughs*, 997 F.3d 288, 291 (5th Cir. 2021).

The Texas Democratic Party filed suit against Texas over its law allowing senior citizens 65 and older to obtain a "no-excuse" absentee ballot, while requiring younger voters to show a need for the absentee ballot. The district court granted an injunction requiring Texas to allow "no-excuse" absentee voting to all voters. *Texas Democratic Party v. Abbott*, 461 F. Supp. 3d 406 (W.D. Tex. 2020). On appeal, the Fifth Circuit reversed and remanded. *Texas Democratic Party v. Abbott*, 978 F.3d 168, 194 (5th Cir. 2020).

B. Election Lawfare Does Not Seek Principled, Consistent Outcomes, Damaging Confidence in Elections.

Amidst a confusing tangle of attacks on state election laws in the weeks leading up to an election, perhaps the most stunning effort was Elias' attack on state laws determining which political party would receive top placement on the Election Day ballot.

Elias attacked a Texas law providing that the party in control of the governorship would receive the top line on the ballot. The court held that "[n]o judicially discernable and manageable standards exist

to determine what constitutes a 'fair' allocation of the top ballot position, and picking among the competing visions of fairness poses basic questions that are political, not legal." *Miller v. Hughs*, 471 F. Supp. 3d 768, 779 (W.D. Tex. 2020) (quoting from *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1242 (11th Cir. N2020) (internal quotations omitted). The case was decided against Elias on July 10, 2020.

While litigating the Texas case, Elias was simultaneously suing Minnesota over its law, which was directly opposite that of Texas. Minnesota law actually gives ballot placement to all major parties, in reverse order of their respective votes in the last governor's election, in a system reminiscent of the NFL draft attempt to achieve parity by rewarding last-place teams with highest draft picks. Since Minnesota had a Democrat governor, this gave Republicans favorable ballot position.

In Texas, Elias argued that the Constitution forbade the state from granting favorable ballot position to the party in power. In Minnesota he argued that the Constitution forbade the state from granting favorable ballot position to the party **out** of power. But the Eighth Circuit held that the law "does not in any way restrict voting or ballot access," and dismissed Elias' challenge. *Pavek v. Simon*, 967 F.3d 905, 908 (8th Cir. 2020). The dismissal came on July 31, 2020, exactly three weeks after Texas dismissed his lawsuit arguing the exact opposite position.

Elias also sued Arizona, which provides that ballot placement is determined on a county-by-county basis,

with top placement in each county going to the party capturing a majority of votes in that county in the previous governor's election. The case received a stipulated dismissal without prejudice from the district court in June 2022. *See Mecinas v. Hobbs*, 2022 U.S. Dist. LEXIS 98610 (D. Ariz. 2022).

New York also determines ballot placement in favor of the party in control of the governorship. N.Y. Elec. Law 7-116. New York has long had Democrat governors. Democrats have not challenged New York's statute.

Inconsistent positions were also taken on issues other than ballot placement. Just three months after the 2020 election, Elias represented New York Rep. Anthony Brindisi in a lawsuit challenging his loss to Republican Claudia Tenney. Despite widespread denunciations by Democrats of Donald Trump's "false" and "baseless" claims of voting machine error in 2020, that suit alleged faulty voting machines and "complained about procedural faults with the conduct of the voting process, alleging **failures to comply with New York State election law**..." (emphasis added).[19]

> 'In this case, there is **reason to believe that voting tabulation machines misread *hundreds* if not *thousands* of valid votes** as undervotes, (*supra* at 4), and that these tabulation machine errors disproportionately

[19] J. Pollak, "Democrat Lawyer Marc Elias Claims Faulty Voting Machines in New York Race," *Breitbart* (Feb. 3, 2021).

> affected Brindisi, (*id.*). In addition, Oswego County admitted in a sworn statement to this Court that **its tabulation machines were not tested and calibrated in the days leading up to the November 3, 2020 General Election as required by state law** and necessary to ensure that the counts generated by tabulation machines are accurate. [*Id.* (bold added)].

Elias demanded a hand count of the ballots. *Id.* Tenney was eventually declared the winner.

C. Upholding the Elections Clause Is Inherently Democratic, Not "Un-democratic."

The Framers viewed the legislative branch to function as "the grand depository of the democratic principle." Max Farrand, ed., I The Records of the Federal Convention of 1787 (Yale Univ. Press: 1911) at 48. Yet, the critics of the Elections Clause often cloak their criticisms as being in defense of "democracy," preventing "disenfranchisement," and in favor of "everyone voting."

The "democracy" argument fails on careful review. Too often, for those who make the word "democracy" a primary weapon in their political arsenal, democracy is just in the eye of the beholder. When this Court granted the petition in this case, even former presidential candidate Hillary Clinton asserted that "The Supreme Court's decision to hear a case next term that would give state legislatures huge power

over elections is the biggest threat to our democracy since January 6," linking to an article loaded with all the standard catchphrases and cliches.[20]

Elias, for example, has "said that the election laws he supports are part of a 'democracy agenda,'" and he accuses state legislatures of "an effort to suppress the vote."[21] Other critics call a textualist reading of the Elections Clause "going rogue to subvert the popular vote," which "could radically reshape American democracy in the years to come.[22]

Yet the critics of the Elections Clause miss the fact that the Legislatures the Constitution tasks with the "time, place and manner" responsibility for federal elections are themselves democratically elected and subject to replacement if their voters disapprove.

Professor Tyler Cowen recently wrote:

> One of the most disturbing trends in current discourse is the misuse of the term "anti-democratic." It has become a kind of all-purpose insult, used as a cudgel to criticize political and intellectual opponents. Not only is this practice intellectually lazy, but it

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[20] Hillary Clinton, Tweet (July 1, 2022).

[21] *See* E. Felten, *supra.*

[22] *See* R. Blaustein, *supra.*

> threatens to distort the meaning and obscure the value of democracy.[23]

"The danger," Cowen warns, "is that 'stuff I agree with' will increasingly be labeled as 'democratic,' while anything someone opposes will be called 'anti-democratic.' Democracy thus comes to be seen as a way to enact a series of personal preferences rather than a (mostly) beneficial impersonal mechanism for making collective decisions." *Id.*

But "the American system of government has many non-democratic (or imperfectly democratic) elements at its heart — the Supreme Court itself, for example, or the Senate, which gives less populous states outsized influence." *Id.*

> If you attribute the failure of your views to prevail to "non-democratic" or "anti-democratic" forces, you might conclude the world simply needs more majoritarianism, more referenda, more voting. Those may or may not be correct conclusions. But they should be judged empirically, rather than following from people's idiosyncratic terminology about what they mean by "democracy" — and, by extension, "anti-democratic." [*Id.*]

This Court's obligation is not to any political party's self-serving definition of "democracy," but to

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[23] T. Cowen, "Stop calling everything you disagree with 'anti-democratic," *Bloomberg News* (Aug. 29, 2022).

the representative system which was democratically approved by the people through their ratification of the Constitution.

D. Allowing State Courts to Usurp the Duty of State Legislatures Establishes an Oligarchy, Not a Democracy.

What the North Carolina court has done is as clear a case of the judicial branch arrogating power expressly assigned to another branch as can be imagined. If this Court does not step in with a clear defense of the Constitution's textual requirement, it instead sends a clear signal to highly paid partisan lawyers that elections are more about the wishes of these lawyers than the will of the voters — and that would do the greatest harm imaginable to our constitutional republic and voter confidence in elections. Justice Gorsuch's fear would prove justified. "A widely shared state policy seeking to make election day real would give way to a Babel of decrees.... It does damage to faith in the written Constitution as law, to the power of the people to oversee their own government, and to the authority of legislatures." *Democratic National Comm. v. Wis. State Legis.*, 141 S. Ct. 28-30 (2020) (Gorsuch, J., concurring in denial of application to vacate stay). Legislation by courts, and elections by lawfare, is in reality an oligarchy, and is an attack on the very "democracy" they claim to defend.

In his concurrence in *Democratic National Comm. v. Wis. State Legis.*, Justice Gorsuch highlighted the glaring problems — for both democracy and

constitutional governance — when courts overstep clear constitutional lines. Citing the Wisconsin court's decision to add six days to the statutory Election Day deadline to receive absentee ballots, Justice Gorsuch explained:

> Then there's the question what these new ad hoc deadlines should be. The judge in this case tacked 6 days onto the State's election deadline, but what about 3 or 7 or 10, and what's to stop different judges choosing (as they surely would) different deadlines in different jurisdictions? ...
>
> The Constitution dictates a different approach to these how-much-is-enough questions. 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. Art. I, §4, cl. 1.... Nothing in our founding document contemplates the kind of judicial intervention that took place here....
>
> It does damage to faith in the written Constitution as law, to the power of the people to oversee their own government, and to the authority of legislatures, for the more we assume their duties the less incentive they have to discharge them. [*Id.* at 29-30 (Gorsuch, J., concurring in denial of application to vacate stay) (emphasis added).]

In ratifying the Constitution, the people of the United States agreed that it was to be the state

legislatures to determine rules for elections. No one asked the people if they wanted to transfer that decision-making power to the courts. Surely, they would not want to do that, because as Justice Levi Woodbury warned:

> And if the people, in the distribution of powers under the constitution, should ever think of **making judges supreme arbiters in political controversies**, when not selected by nor, frequently, amenable to them, nor at liberty to follow such various considerations in their judgments as belong to mere political questions, they will **dethrone themselves and lose one of their own invaluable birthrights**; building up in this way — slowly, but surely — a new sovereign power in the republic, in most respects irresponsible and unchangeable for life, and one **more dangerous, in theory at least, than the worst elective oligarchy** in the worst of times. [*Luther v. Borden*, 48 U.S. 1, 52-53 (1849) (emphasis added).]

CONCLUSION

For the foregoing reasons, the decision of the North Carolina Supreme Court should be reversed.

Respectfully submitted,

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September 6, 2022