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 OF THE BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS



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## INTEREST OF *AMICUS CURIAE*[1]

The Brennan Center is a nonprofit, nonpartisan public policy and law institute that seeks to strengthen, revitalize, and defend our systems of democracy and justice. Founded in 1995, the Brennan Center seeks to honor the extraordinary contributions of U.S. Supreme Court Justice William J. Brennan, Jr. to American law and society. The Center regularly conducts widely cited research on election laws and practices and works closely with election administrators, lawmakers, and community groups nationwide to improve voting and registration systems, protect equal access to voting, and ensure the integrity and security of elections. The Center frequently appears as amicus before this Court on matters relating to elections and democracy.

The Brennan Center has a particular interest in this case given the far-reaching implications of the independent state legislature theory, which would upend election administration and threaten voting rights, election integrity, and election security across the country.



## SUMMARY OF ARGUMENT

The "independent state legislature theory" is radically at odds with how elections have been run in

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* state that no counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus curiae* made a monetary contribution intended to fund preparation or submission of this brief. This brief does not purport to convey the position of the New York University School of Law. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

the United States for centuries. It would exclude state constitutions, courts, governors, voters, executive officials, and election administrators from helping regulate federal elections, or at least throw into doubt their ability to do so. It would endanger or disrupt vast amounts of law, policy, and practice. And it would plunge elections nationwide into chaos.

Every state regulates elections through a dense collection of laws, rules, and practices developed much like any other body of law. Legislatures enact detailed codes to govern elections. These codes are constrained by state constitutions. Often, these constitutions contain detailed elections provisions as well as broad guarantees. Governors approve or veto these laws. Voters shape their constitutions and laws through direct democracy. State courts interpret and apply these constitutions and laws. Courts also exercise statutorily granted authority over other issues such as redistricting and election contests. State and local executive officials create rules and guidance to govern elections, all in support of the legislative and constitutional enactments that delegate that power to them.



The independent state legislature theory would upend all this. It would bar everyone except legislators from playing their traditional roles in regulating federal elections. It would upset long-standing allocations of power among the branches of state governments. It would replace the system of checks and balances with one in which the legislature is supreme and virtually unfettered.

This concern is far from theoretical. This theory, if implemented, would undo hundreds or even thousands of laws and policies around the country.

The Brennan Center has exhaustively researched state constitutions, election codes, ballot initiatives, state supreme court opinions, and many of the thousands of administrative regulations that govern elections in all fifty states. We found that the independent state legislature theory could affect: hundreds of state constitutional provisions, of which we catalogued roughly 170; hundreds of state court decisions, of which we catalogued 50; and over a thousand delegations of authority, of which we have catalogued roughly 650, and which have given rise to thousands of regulations and policies. These cover topics as diverse as precinct boundary-setting, voter registration, polling place siting and management, standards for and testing of election equipment, chain of ballot custody, vote counting processes, and audits.

This brief presents these endangered provisions to demonstrate how sweeping the independent state legislature theory's impact could be. The laws and practices it would endanger range from the right to a secret ballot in many state constitutions to independent redistricting commissions in Arizona and California, from ranked-choice voting in Alaska and Maine to automatic voter registration in Michigan and Nevada, from detailed regulations of voter list maintenance in Indiana and Iowa to voting machine testing procedures in Montana and Ohio. Constitutional provisions against gerrymandering and those protecting voting rights would lose force. And legislation previously vetoed or invalidated—going back a century or more—could spring back into effect.

Perhaps recognizing the theory's radical implications, Petitioners repeatedly scramble away

from them. But even if the Court accepted some of Petitioners' incoherent adjustments, much law and policy would still be invalidated in part or in whole.

The result would be chaos. The theory provides no mechanism for replacing the laws it negates—in fact, it eliminates most of the normal ways that would happen. No one would be able to discern definitively what the law is. State courts would be compromised in their ability to apply the law. Election officials would be unable to fill in the gaps in the law. Federal courts would be flooded with litigation. And the rules for state and federal elections will uncouple, forming a two-tier election system that officials will not be able to administer.

To avoid this turmoil, the Court need only endorse the status quo in all 50 states for the last 200 years and affirm the decision below.



## ARGUMENT

### I. THE INDEPENDENT STATE LEGISLATURE THEORY IS INCONSISTENT WITH HOW ELECTION LAW IS MADE AND PRACTICED NATIONWIDE.

Petitioners ask this Court to hold that, under the U.S. Constitution, "the power to regulate federal elections lies with state legislatures *exclusively*." Pet. Br. 11. But no state makes election law or runs elections in this manner. Like every other body of law, states' laws regulating federal elections are created by state legislatures, as well as state constitutions, state courts, governors, election officials, and voters.

Every state in the country has a detailed code regulating federal, state, and local elections. Those codes are explicitly shaped not just by legislatures, but also by governors, courts, and, in many cases, voters too. Governors in every state approve or nullify every piece of election legislation, except in rare instances when legislatures override their vetoes or state constitutions exclude governors from the redistricting process. When a governor vetoes an election bill, that legislation is not included in the election code. Courts in every state review election laws for their compliance with federal and state constitutional mandates. When a state court invalidates an unconstitutional election statute, that statute is functionally stricken from the code. Voters in at least twenty-one states have the authority to enact election laws through ballot initiatives without requiring the approval of the legislature, and voters in at least twenty-three states have the authority to approve or reject specific laws passed by the legislature, including election legislation. *See* National Conference of State Legislatures, *Initiative and Referendum States*, (Oct. 24, 2022), https://perma.cc/TN6X-QCA3. When such an initiative wins passage, it is added to the code like any other enacted law.

In addition to statutory election codes, every state in the country has constitutional provisions that regulate federal elections, see *infra* pp. 9–13. Those provisions originate at times from state legislatures and at times from state constitutional conventions and voters through direct democracy. In at least 18 states, voters have the authority to adopt constitutional measures applicable to federal elections via ballot initiative without requiring

approval from the legislature, and in 49 states with the legislature's involvement. Jonathan L. Marshfield, *Forgotten Limits on the Power to Amend State Constitutions*, 114 N.W. L. Rev. 65, 76–77 (2019). State constitutions do more than provide directly for some of the "Times, Places and Manner" of holding federal elections. They also establish state legislatures, courts, and executive offices and provide for their form, function, and limits. Constitutions thus provide not only a body of law, but also checks and balances that influence how state governments and elections function.

State courts "say what the law is," construing vague or ambiguous state election statutes and constitutional provisions. They also have both inherent and delegated authority over some election matters when crafting remedies for violations of law.

State and local election officials routinely create rules, regulations, and policies interpreting and fleshing out the details of election law to guide elections staff, poll workers, and others. Indeed, at least thirty-one states expressly grant the chief election official or entity broad power to make rules, regulations, standards, and policies that govern elections—including federal elections. *See* Eliza Sweren-Becker & Ethan Herenstein, Compilation of Laws Endangered by the Independent State Legislature Theory, Brennan Center for Justice § IV(A) (2022) (hereinafter, "BCJ Compilation"), https://tinyurl.com/445zjz4e.

These sources of law are mutually reinforcing and combine to ensure elections can function. Take, for example, Michigan's post-election vote-auditing

procedures—a process that experts consider essential to ensuring an accurate result.

Until recently, the state's election code was silent on whether and how tabulation audits should be conducted in connection with federal elections. But the legislature delegated authority over post-election procedures to the Secretary of State. Mich. Comp. Laws Ann. § 168.31a(2). The Secretary published guidance requiring local election jurisdictions to conduct post-election audits and detailing the necessary procedures. Michigan Department of State, Bureau of Elections, Post-Election Audit Manual, (2018) (on file with amicus). That guidance left room for local election officials to develop further audit procedures. In 2018, officials in three municipalities exercised their discretion to pilot a new form of audit—a risk limiting audit—that is hailed by election experts as the gold standard in vote count audit procedures. *See* Andrea Peck, *Rochester Hills to Conduct Post-Election Audit*, Oakland Press (Nov. 30, 2018), https://tinyurl.com/yc3crw8z. Michigan voters then overwhelmingly approved a ballot measure to amend the constitution to, among other things, establish "the right to have the results of statewide elections audited." Mich. Const. art. II, § 4(1)(h). As a result, the legislature amended state law to require the secretary to "prescribe the procedures for election audits that include . . .an audit of the results of at least 1 statewide race or statewide ballot question," and the secretary published a revised Audit Manual. *See* Mich. Comp. Laws Ann. § 168.31a(2); Michigan Department of State, Bureau of Elections, Post-Election Audit Manual (2020), https://perma.cc/C54H-RRN9.

The independent state legislature theory ignores each of these routine and deeply engrained sources of our nation's election law. In the process, it exposes a shocking notion at the core of Petitioners' appeal: they would have this Court dismantle a system of checks and balances, wherein numerous authorities shape election rules, and replace it with a system of legislative supremacy. Under this new system, state legislatures would be the one and only source of election law and regulations.

## II. THE INDEPENDENT STATE LEGISLATURE THEORY WOULD ENDANGER LARGE SWATHS OF LAWS AND POLICIES GOVERNING FEDERAL ELECTIONS.



Because it would change what counts as law and who makes it, the independent state legislature theory would endanger hundreds of state constitutional provisions, state court decisions, and delegations of authority, and thousands of policies, running the gamut of election-related matters. No state would be spared.

We present a mere fraction of this enormous set of endangered election rules and practices. The Brennan Center researched every state constitutional provision, every state election code, every ballot initiative, and virtually every state supreme court opinion expressly governing the time, place, and manner of elections. We also reviewed—although not exhaustively—a selection of gubernatorial vetoes and election regulations adopted by state election officials. We describe a selection of those sources of law covering a subset of topics. The full scope of relevant

law and policy spans an even broader array of sources—including advisory opinions by state attorneys general, lower state court decisions, and guidance adopted by local election officials—and topics that cannot be covered here. Even the following slice of laws demonstrates the massive scope of the disruption that the independent state legislature theory would cause.

Petitioners attempt to blunt this criticism of their theory by offering a series of compromise positions. These compromises, however, do not function as a matter of logic or doctrine. Even if the Court nonetheless embraced these compromises, intolerable volumes of election law touching many matters would still be undermined, wholly or partially. Walking through each of the major categories of election law we have collected helps illustrate why.



### A. The Independent State Legislature Theory Would Threaten or Undermine Hundreds of State Constitutional Provisions.

The constitutions of all 50 states contain provisions governing the times, places or manner of holding federal elections. These come both in the form of guarantees of individual rights as well as directions to the state legislature, executive, and judiciary.

Unlike the federal Constitution, all but one of the state constitutions include an explicit grant of the right to vote. See Joshua A. Douglass, *The Right to Vote Under State Constitutions*, 67 Vand. L. Rev. 89, 101 (2015). The only exception—Arizona's—nonetheless declares that "All elections shall be free and equal, and no power, civil or military, shall at any

time interfere to prevent the free exercise of the right of suffrage." Ariz. Const. art. II, § 21. In addition, at least twenty-seven state constitutions, including North Carolina's, provide for "free," "free and equal," or "free and open" elections. BCJ Compilation § I(A)(i).

Many state constitutions also impose quintessential "manner" regulations on elections, including federal elections. For example, at least twenty-four state constitutions provide for elections to be held by ballot or voting machine and thirty guarantee the right to cast a secret vote. *Id.* at § I(A)(ii)–(iii). Additionally, twenty-four require voter registration, *id.* at § I(D), while some—like Delaware, Michigan, and New York—provide detailed regulation of the manner of voter registration (Del. Const. art. V, § 4; Mich. Const. art. II, § 4(d)–(f); N.Y. Const. art. II, § 5). Sixteen guarantee absentee or mail voting. BCJ Compilation § I(C). By contrast, the constitutions of Connecticut and New York, for example, preclude no-excuse mail voting. Conn. Const. art. VI, § 7; N.Y. Const. art. II, § 2.



State constitutions also establish how winners are determined, require or regulate primary elections, determine the content of ballots, regulate the ballot-counting process, or require proof of identity or eligibility. BCJ Compilation § I(D). Some also expressly mandate that legislatures comply with the constitution when regulating elections. *See, e.g.*, Va. Const. art. 2, § 4.

Furthermore, state constitutions control crucial aspects of congressional map drawing. At least fourteen state constitutions expressly establish standards for drawing congressional districts, and thirteen vest the power to draw these districts in

commissions. BCJ Compilation §§ I(B)(i)–(ii). Some of these commissions are formally independent of the state legislature; others permit some role for the legislature or particular legislators. But none is the legislature. And at least eleven state constitutions expressly task state courts with reviewing congressional maps for constitutionality. *Id.* at § III(B).[2]

Eliminating these constitutional provisions will produce sweeping consequences. Voters around the country would lose their state-protected right to vote or right to a secret ballot for federal elections. Voters in New York would lose their constitutional protections against partisan gerrymandering. *See* N.Y. Const. art. III, § 4(c)(5). Michigan voters would lose straight-ticket voting, automatic voter registration, no-excuse absentee voting, same-day registration, and election audits. *See* Mich. Const. art. II, § 4(c), (d), (g), (f), (h). Voters in states that guarantee no-excuse absentee or universal access to mail voting would lose that right. *See* BCJ Compilation § I(C). This is particularly true in states like Alabama, Kansas, and South Carolina, where legislatures have enacted new voting laws in the last two years to make it more difficult to exercise this right. *See* Brennan Center, Voting Laws Roundup: October 2022 (Oct. 6, 2022), https://perma.cc/G5XA-WK4R; Brennan Center, Voting Laws Roundup: December 2021 (Jan. 12, 2022), https://perma.cc/VX6J-59TN.

Further, election officials could be forced to administer federal elections where basic rules are left



[2] Other state courts have relied on general grants of authority to review congressional maps. *See infra* p. 16.

undesignated. For example, Delaware's and New York's constitutions specify precise voter registration deadlines, while Arkansas's constitution outlines a detailed voter registration process. *See* Del. Const. art V, § 4; N.Y. Const. art. II, § 5; Ark. Const. amend. LI. These provisions, and others, could disappear.

This is merely a sample.

Perhaps unwilling to embrace the consequences of their theory, Petitioners backtrack.[3] Petitioners appear to concede that state constitutions *can* check state legislatures, at least where the constitutional provision is (1) "specific," rather than "open-ended," and/or (2) "procedural," rather than "substantive." Pet. Br. 24, 46.

As the Private Respondents correctly point out, these compromise positions are not grounded in the text of the Elections Clause and are unworkable. Pr. Resp. Br. 51–55. And beyond that, these positions would still condemn an intolerable amount of election law.

Start with the distinction between "specific" and "open-ended" constitutional provisions. Members of this Court have suggested that state constitutions' equal protection clauses, freedom of speech clauses, freedom of assembly clauses, and free elections



[3] The same cannot be said of some of their *amici*. *Cf.* Br. of Amicus Curiae The Claremont Institute's Center for Constitutional Jurisprudence at 2 (contending that state legislatures' power under the Elections Clause is plenary and that *State of Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916), *Smiley v. Holm*, 285 U.S. 355 (1932), and *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. 787 (2015), were wrongly decided).

clauses are unconstitutionally open-ended. *See Moore v. Harper*, 142 S. Ct. 1089, 1090, n.1 (2022) (Alito, J., dissenting from the denial of application for stay) (citing N.C. Const. art. I, §§ 10, 12, 14, 19). But this logic would threaten *hundreds* of constitutional provisions—and many more state court decisions applying them. *See infra* pp. 13–16. As mentioned, at least twenty-seven state constitutions provide for "free," "free and equal," or "free and open" elections. Virtually all guarantee equal protection, freedom of speech, and freedom of assembly. *See* 1 Jennifer Friesen, State Constitutional Law: Litigating Individual Rights, Claims, and Defenses, §§ 3.01[2], 5.01–5.12 (2006) (collecting contemporary examples); Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions when the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 Tex. L. Rev. 7, 23 (2008) (collecting historical examples circa 1866). Election laws and practices have been adopted and modified in light of those provisions.



The substance–procedure distinction that Petitioners posit does almost nothing to mitigate the harms of their theory. Virtually every constitutional provision that we have catalogued could be classified as substantive. As this Court has itself recognized, many rules are "rationally capable of classification as either." *Hanna v. Plumer*, 380 U.S. 460, 472 (1965).

### B. The Independent State Legislature Theory Would Threaten or Undermine Myriad Judicial Rulings.

The independent state legislature theory would disturb the decisions state courts make concerning

election law—whether the courts are undertaking constitutional review, statutory interpretation, or other functions.

The theory would call into question every state court decision invalidating on state constitutional grounds any statute that regulates, or arguably regulates, federal elections.

But, as the Brennan Center has catalogued, state courts in all fifty states have subjected state election laws that regulate the "Times," "Places" or "Manner" of holding federal elections to scrutiny under state constitutions. *See* BCJ Compilation § III(A). These decisions affect every aspect of federal elections, including: the deadlines for voter registration;[4] the accessibility of primary elections;[5] standards for congressional redistricting;[6] and the constitutionality of voting machines;[7] absentee voting;[8] early voting;[9] write-in voting;[10] voter identification laws;[11] voter



[4] *See, e.g.*, *Chelsea Collaborative,* Inc. *v. Sec'y of the Commonwealth*, 100 N.E.3d 326 (Mass. 2018).

[5] *See, e.g.*, *State v. Flaherty*, 136 N.W. 76 (N.D. 1912).

[6] *See, e.g.*, *Moran v. Bowley*, 179 N.E. 526 (Ill. 1932).

[7] *See, e.g.*, *State ex rel. Fenner v. Keating*, 163 P. 1156 (Mont. 1917).

[8] *See, e.g.*, *Gangemi v. Berry*, 134 A.2d 1 (N.J. 1957).

[9] *See, e.g.*, *Lamone v. Capozzi*, 912 A.2d 674 (Md. 2006).

[10] *See, e.g.*, *Burdick v. Takushi*, 776 P.2d 824 (Haw. 1989).

[11] *See, e.g.*, *Priorities USA v. State*, 591 S.W.3d 448 (Mo. 2020).

purge laws;[12] voter registration laws;[13] vote assistance laws;[14] and ballot access requirements.[15] These state court opinions span more than a hundred years, and the independent state legislature theory could mean the reinstatement of the myriad laws they struck down over that period.

The independent state legislature theory might also wipe out hundreds of state court interpretations of statutes that apply to federal elections. Judicial interpretations of state law designed to avoid conflicts with state constitutional mandates could be on especially shaky ground.

Consider, for example, the Pennsylvania Supreme Court's recent decision concerning "naked ballots." The court was asked to clarify whether "naked ballots" (that is, absentee or mail-in ballots not placed in an official secrecy envelope) may be counted. The court concluded that "the Legislature intended for the secrecy envelope provision to be mandatory," and thus naked ballots may not be counted. *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 378 (Pa. 2020), *cert. denied sub nom. Republican Party of Pennsylvania v. Degraffenreid*, 141 S. Ct. 732 (2021). Other recent decisions addressed the appropriate siting of drop boxes in Ohio, *Ohio Democratic Party v. LaRose*, 159 N.E.3d 1241 (Ohio Ct. App. 2020), and



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[12] *See, e.g.*, *Mich. State UAW Cmty. Action Program Council v. Austin*, 198 N.W.2d 385 (Mich. 1972).

[13] *See, e.g.*, *Perkins v. Lucas*, 246 S.W. 150 (Ky. 1922).

[14] *See, e.g., DSCC v. Simon*, 950 N.W.2d 280 (Minn. 2020).

[15] *See, e.g.*, *Patterson v. Padilla*, 451 P.3d 1171 (Cal. 2019).

the early counting of mail ballots in Maryland during "emergency circumstances." *In re Emergency Remedy by Maryland State Bd. of Elections*, 2022 WL 5403764 (Md. Oct. 7, 2022).

The independent state legislature theory could also prevent state courts from exercising their inherent or specially delegated authority over federal elections. For example, in states like Maine and North Carolina, courts are expressly empowered to draw congressional maps as a remedial matter where the primary map drawer's map is invalid, and in states like Washington, as a backstop where the primary map drawer is unable to draw a map. *See* N.C. Gen. Stat. § 120-2.4(a1); Me. Rev. Stat. tit. 21-A, § 1206(3); Wash. Rev. Code § 44.05.100(4).

In states like Minnesota, where the legislature has not been able to enact a map for decades, courts have had to provide remedies. The independent state legislature theory would transfer remedial map drawing power from state courts to federal courts—despite this Court's repeated admonitions that federal courts should defer to state courts in the map drawing process. *See, e.g.*, *Growe v. Emison*, 507 U.S. 25, 42 (1993).



### C. The Independent State Legislature Theory Would Threaten or Undermine Myriad Laws Enacted By Direct Democracy.

The independent state legislature theory also risks nullifying dozens of laws that voters have enacted—either by codifying statutes or amending constitutions—to regulate redistricting, primaries,

voter registration, absentee voting, and many other "Times, Places, and Manner" matters. This Court has already dismissed as "quite astonishing" the idea that "the validity of a state law under the Federal Constitution would depend at all on whether the state law was passed by the state legislature or by the people." *U.S. Term Limits v. Thornton*, 514 U.S. 779, 809, n.19 (1995). If the Court were to adopt the theory, however, the people would be able to change almost any state law or constitutional provision, *except* those governing when, where, or how they choose their federal representatives.

Many voter-enacted election reforms would disappear. At least eight states have modified their voter registration process through ballot initiatives. BCJ Compilation § II(B). At least five states have adopted policies that regulate congressional redistricting via direct democracy—four by creating redistricting commissions, and one by adopting substantive standards to guide redistricting. *Id.* at II(A). At least eight states have adopted or modified voting methods, including ranked choice voting or no-excuse absentee voting, by direct democracy. *Id.* at II(D). And at least five states have used ballot initiatives to make law related to primary elections. *Id.* at II(C).



The effect of nullifying one constitutional amendment in Michigan alone would be chaotic. In 2018, Michigan voters amended their constitution to guarantee the right to a secret ballot, authorize straight-party voting, institute automatic voter registration and same day voter registration, initiate no-excuse absentee voting, and require a post-election audit. Mich. Const. art. II, § 4 (as amended by

Proposal 3, 2018). The independent state legislature theory could negate or undermine all of these. To comply with just one of these provisions—the adoption of automatic voter registration—the election system in Michigan has been overhauled, including by modifying the voter registration process in every Department of Motor Vehicles office in the state and reprogramming both its driver database and voter database.

This could affect many other laws as well. Several statutes adopted via ballot initiative have since been codified or amended by the legislature. *See* BCJ Compilation § II. For example, Oregon voters adopted a statute via ballot initiative providing for all mail elections, including in federal elections. The legislature subsequently modified that statute and applied it to every election in the state. *See* Or. Stat. § 254.465. It is not clear how the independent state legislature theory would apply to such provisions.

Legislatively referred constitutional amendments could be endangered as well. We have not catalogued these, but they comprise the majority of recent constitutional amendments. *See* Jonathan L. Marshfield, *Improving Amendment*, 69 Ark. L. Rev. 477, 488–89 (2016). Petitioners suggest they, too, would be invalid under their theory because they are not "enacted by the legislature itself." Pet. Br. 48.

Petitioners contend that the validity of direct democracy is "not relevant here." Pet. Br. 40. But Petitioners go on (Pet Br. 40, n.9) to ask the Court to overrule *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. 787 (2015), which affirms that the people can make laws governing the times, places, and manner of holding

federal elections in accordance with "the State's prescriptions for lawmaking." *Id.* at 808. This is an express acknowledgment that voter-enacted election laws are indeed on the chopping block.

### D. The Independent State Legislature Theory Would Threaten or Undermine Thousands of Rules, Regulations, and Procedures Made by State and Local Officials.

The independent state legislature theory would likewise endanger the hundreds of state statutes that delegate responsibility over elections, including federal elections, to state and local officials. Similarly, the theory would invalidate the thousands of rules, regulations, policies, and guidance that collectively establish the detailed procedures necessary to administer the "Times, Places, and Manner" of elections.



*First*, every state election code delegates power to local officials over the times, places, or manner of federal elections. *See* BCJ Compilation § IV. As noted above, most states delegate broad power to chief election officials to make rules and regulations that govern elections. *Id.* at IV(A).

Additionally, state legislatures allocate authority over many specific subject matters. For example, most states delegate the power to make procedures relating to voter registration, including implementation of automatic voter registration and motor voter registration, the designation of voter registration agencies, voter list maintenance practices, and privacy and security rules. *Id.* at IV(E). In at least twenty-six states, state election officials are

empowered to create processes for absentee, early, or mail voting—including, in at least nineteen states, the authority to determine whether to use ballot drop boxes, or to determine the location or number of drop boxes. *Id.* at IV(F). In at least seven states, local or state officials decide whether to hold elections by mail in small counties or precincts. *Id.* at IV(F)(ii).

All but five states expressly delegate rule-making authority to state or local officials to set security standards for, grant approval of, and establish audit processes for voting systems. *Id.* at IV(G)(i). Administrative rules promulgated by secretaries of state in Colorado and Florida, for example, set forth standards for voting system security and detailed testing procedures. Colo. Code Regs. § 1505-1:11; Fla. Admin. Code Ann. r. 1S-2.0158. And many states give state or local election officials the power to make rules for the security of ballots and the privacy of voter information. BCJ Compilation § IV(G)(ii)–(iii). When exercising its superseding powers under the Elections Clause, Congress has mandated that states delegate regulatory authority to election officials, such as when it directed each state "to designate . . . [a] chief State election official to be responsible for coordination of State responsibilities" under the National Voter Registration Act of 1993, 52 U.S.C. § 20509.



In at least thirty states, various state actors can delay elections, move polling places, or alter election administration in the event of an emergency, with powers that range from general emergency authority to specific levers as to the time and places of holding elections. BCJ Compilation § IV(H). And forty-nine states delegate the power to draw precinct boundaries and the power to choose polling locations—

quintessential "manner" and "place" regulations. *Id.* at IV(B). In at least twenty-seven states, state and local election officials have the power to set polling hours on Election Day, polling hours during early voting periods, early voting days, or the dates of federal primary elections. *Id.* at IV(D). The independent state legislature theory threatens these and hundreds of other statutory delegations of authority over elections.

*Second*, state and local election officials in every state use this delegated power to make rules, regulations, and policies that govern federal elections. While the exercise of this power is too voluminous to catalogue, several illustrative examples demonstrate just how devastating the independent state legislature theory would be to election administration.

In many states, administrative regulations establish the procedure for voter registration,[16] the process for counting votes and determining voters' choices,[17] post-election audit procedures,[18] the procurement or approval process for voting



[16] *See, e.g.*, Ariz. Admin. Code R2-12-603–605; 31 La. Admin. Code Pt II, §§ 101–505; 950 Mass. Code Regs. 57.01–57.08; 1 Tex. Admin. Code §§ 81.1–81.29.

[17] *See, e.g.*, Fla. Admin. Code Ann. r. 1S-2.027; Iowa Admin. Code r. 721-26.10(50)–26.18(49); Code Me. R. tit. 29-250 Ch. 550, §§ 1–4; Mo. Code Regs. Ann. tit. 15, §§ 30-9.010–30-9.040.

[18] *See, e.g.*, Iowa Admin. Code r. 721-26.203(50); Wash. Admin. Code 434-261-114–434-261-130; Wyo. Admin. Code 002.0005.25 §§ 1–3.

machines,[19] and recount procedures[20]—to name just a few. These rules are essential to election administration. So too is the power to modify election practices in the event of an emergency, as demonstrated by the devastation wrought by Hurricane Ian in Florida just last month. In addition to promulgated rules and the exercise of emergency authority, chief elections officials routinely issue policy guidance that further specifies election procedure and practice. *See, e.g.*, Ohio Secretary of State, Ohio Election Official Manual (Feb. 2, 2022), https://tinyurl.com/56xbf2tw; Michigan Department of State, Bureau of Elections, Election Officials' Manual, Chapter 11: Election Day Issues (Oct. 2022), https://perma.cc/UTM6-RH44.

These delegations are necessary for elections to function. Take, for example, Georgia. The state's election code permits individuals to challenge the eligibility of other voters and requires local election officials to "immediately . . . determine whether probable cause exists to sustain such challenge." Ga. Code § 21-2-230(b). The code provides no standards for how election officials are to determine whether "probable cause" exists for any given challenge. The Georgia legislature amended the code last year to clarify that there is no limit on the number of voters an individual may challenge. 2021 Georgia Laws Act 9 §§ 15, 16



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[19] *See, e.g.*, Fla. Admin. Code Ann. r. 1S-2.004, Ill. Admin. Code tit. 26, §§ 204.10–204.160; Md. Code Regs. 33.09.01.01–33.09.07.08; Mont. Admin. R. 44.3.1701–44.3.2016; Ohio Admin. Code 111:3-9-01–111:3-9-18; 1 Tex. Admin. Code § 81.60.

[20] *See, e.g.*, Fla. Admin. Code Ann. r. 1S-2.031; Ga. Comp. R. & Regs. 183-1-15-.03; Code Me. R. tit. 29-250 Ch. 502, Pt. A, §§ 1–4, Pt. B, §§ 1–2; Mich. Admin. Code R 168.901–168.930.

(S.B. 202). Since then, the state has seen a surge in challenges, some questioning the qualifications of tens of thousands of voters. *See* Margaret Newkirk & Ryan Teague Beckwith, *Trump Allies Back Mass Challenge to Voter Eligibility in Georgia*, Bloomberg (Sept. 1, 2022), https://perma.cc/47L3-TSTS. As a result, Georgia's election officials must confront tens of thousands of challenges in the days leading up to and including Election Day.

Two weeks ago, Georgia's Secretary of State office issued guidance on what election officials should do when a challenged voter arrives to vote in-person. Official Election Bulletin from Blake Evans, State Elections Director, to County Elections Officials and County Registrars, "Managing Challenged Voters at In-Person Voting Locations," (Oct. 11, 2022), https://perma.cc/9R5F-RD5H. That guidance provides some statewide rules and examples of how challenges may be resolved, while it leaves discretion to each county to determine the "exact process" for resolving challenges. *Id.* This regulatory scheme promotes uniform election administration throughout Georgia, and provides counties with flexibility in a state where both the elections governance structure and the size of the electorate varies widely from county to county, causing the administrability of any particular process to vary as well. *See* Ga. Code § 21-2-40.



It simply would not have been possible for the Georgia legislature to take over these roles and try to pass legislation covering every situation that challenged voters may face in each of Georgia's 159 counties. That is why the legislature has delegated that power to state and local officials, whose guidance and discretionary decisions may be challenged and struck

down by state courts in the event they do not comply with Georgia (or federal) law.

Under Petitioners' theory, the Secretary of State's office would be forbidden to issue statewide guidance. Would local officials be able to establish *any* process to resolve mass challenges at the polls? What, then, should happen? What standard should be applied to determine if their ballots will count? If the challenge process established by county officials is inapplicable to federal races, would a challenged voter's ballot count only for state races?

In an effort to cabin the plainly destabilizing effects of their theory, Petitioners suggest that perhaps only "open-ended" delegations of authority would be impermissible. Pet. Br. 46. Beyond being logically incoherent, Petitioners' purported distinction between permissible and impermissible delegations is judicially inadministrable. Further, most states *have* expressly delegated broad, nonspecific authority to state and local officials to make policies for federal elections. In reliance on that power, those officials have adopted hundreds upon hundreds of rules and policies. The theory would endanger or undermine them all.

Petitioners also argue that certain rules governing federal elections are "quintessentially" or "inherently" legislative and therefore reserved to state legislatures. Pet. Br. 4. But the variability among states' laws reflects that there are no discernable "hallmarks of legislation." *Cf. Moore v. Harper*, 142 S. Ct. at 1091 (Alito. J., dissenting from the denial of application to stay). To take just one example, some states set forth the process for voter registration in great detail in their constitutions, *see e.g.*, Ark. Const. amend. LI, §§

1–15, others do so nearly entirely by statute, *see, e.g.*, Haw. Rev. Stat. Ann. §§ 11-11–11-26, while many others do so in administrative rules, *see supra* n. 16.

* * *

Petitioners claim in passing that gubernatorial vetoes would fall outside the theory's reach because they are "procedural," not "substantive." Pet. Br. 24. But the theory's logic—that "the [Elections] Clause *does not* allow the state courts, **or any other organ of state government,** to second-guess the legislature's determinations," Pet. Br. 39 (bold emphasis added)—would sweep up governors, too. They are organs of state governments and their vetoes by definition "second-guess the legislature's determinations."

Taking governors out of the lawmaking process would represent a significant escalation of the theory's damage. Their contributions to orderly elections are critical. For example, Maryland Governor Hogan vetoed bills last May that would have allowed election clerks to process mail-in ballots early, let voters correct mail-in ballots that would otherwise be rejected, and permitted precinct-level reporting of early voting, mail-in voting, and provisional ballots. Erin Cox, "Md. Gov. Larry Hogan Vetoes Bills Helping Unions, Tenants and Voters," Washington Post (May 27, 2022), https://perma.cc/T69L-U5LX. In Arizona, Governor Ducey vetoed a bill that would have required county recorders to investigate whenever someone claimed that another person's voter registration was invalid. "Gov. Ducey vetoes voter registration cancelation bill," A.P. (May 31, 2022), https://perma.cc/LSR3-9WKQ. And in Wisconsin, Governor Evers vetoed nine bills that would have

added more requirements for requesting absentee ballots and given the state legislature additional authority to block federal election guidance, among other things. Scott Bauer, "Wisconsin Governor Vetoes Republican Election Bills," A.P. (Apr. 8, 2022), https://perma.cc/3JDT-TVP3; *see, e.g.*, Veto Statement of Gov. Tony Evers (Apr. 8, 2022), https://perma.cc/A7X5-X2HJ (vetoing Senate Bill 939, which would have, *inter alia*, imposed new signature requirements for absentee ballot applications and a prohibition on sending absentee ballot applications before they are requested).

In any event, governors are only one of several "organ[s] of state government" who are involved in election regulation. Petitioners' gubernatorial carve out, such as it is, would throw election officials and courts—and the many laws and rules they have made—overboard.



## III. ADOPTING THE INDEPENDENT STATE LEGISLATURE THEORY WOULD CREATE CHAOS IN ELECTIONS.

By obliterating large swaths of existing law regulating elections, the independent state legislature theory would create chaos in American elections.

*Irreparable Gaps in Law.* First, by precluding state and local election officials, governors, and courts from playing their essential roles in federal elections, the independent state legislature theory would eliminate many of the normal mechanisms for making election law. For instance, the hundreds of administrative rules and regulations promulgated by chief state election officials are necessary to provide the detailed

guidance for local officials and poll workers to run elections. State legislatures have neither the expertise, nor the flexibility, nor the time to replace these detailed rules. Similarly, the emergency powers exercised by governors or chief election officials are necessary to respond to unpredictable events, like hurricanes or local power outages. State legislatures will be unable to fill this gap—they are typically not in session at the time of general elections and cannot act with the immediacy of executive officials.[21] And state court interpretations of state statutory and constitutional provisions are necessary to clarify the meaning of those provisions and to resolve ambiguities or conflicts. The same legislative bodies that drafted the relevant statutes will not be able to do so. The result would be a complete mess—no clarity or certainty as to the rules applicable to federal elections and potentially widespread non-uniformity of election practices across each state.

*Unclear Law*. Regardless of how much existing election law it sweeps away, the independent state legislature theory would generate substantial uncertainty over what the law *is*. Under the theory, every existing decision of a state court that has affected or may affect federal elections could be challenged as beyond the authority of the state courts to decide at all. It is unclear what the result would be if the theory reinstated laws struck down as violating state constitutions. Would voters in Delaware be



[21] For example, four state legislatures did not hold regular sessions in 2022, and forty others will not be in session on Election Day. *See* National Conference of State Legislatures, *2022 State Legislative Calendar* (Oct. 24, 2022), https://perma.cc/ENJ9-JZ8S.

entitled to same-day voter registration? *See Albence v. Higgin*, No. 342, 2022, 2022 WL 5333790 (Del. Oct. 7, 2022) (statute establishing same-day voter registration violated state constitution). Would previously discarded congressional maps be reinstated in Maryland and New York? *See Szeliga v. Lamone*, No. C-02-CV-21-001816 (Cir. Ct. for Anne Arundel Cnty, Md., Mar. 25, 2022) (congressional map violated state constitutional prohibition on partisan gerrymandering); *Harkenrider v. Hochul*, No. 60, 2022 WL 1236822 (N.Y. Apr. 27, 2022) (same). It is even less clear what would happen to statutes struck down long ago. Would fusion candidates and balloting be outlawed in New York? *See In re Callahan,* 200 N.Y. 59 (1910) (statute prohibiting the nomination of fusion or combination candidates violated state constitution); *Hopper v. Britt*, 203 N.Y. 144 (1911) (same). Would Nebraskans be limited to four days of voter registration a year? *See State ex rel. Stearns v. Corner*, 22 Neb. 265 (1887) (statute requiring that voters register on only four days per year violated state constitution). Nor is it clear what effect the theory would have on the many cases interpreting but upholding state elections laws—which state executives and election officials presently rely on to guide the performance of their duties.



These questions would continue *ad infinitum* in every state given the sheer number of issues that the theory would throw into doubt. And those questions would only be first order ones. After determining which rules disappeared, courts, officials, voters, and others would have to determine what ripple effects those disappearances would have on other, related rules.

*Unclear Decisionmakers.* The theory would also cause confusion about *who* gets to decide. Could redistricting commissions with members selected by the legislature draw congressional maps? If a legislature has authorized state court jurisdiction over elections issues, would courts be permitted to exercise that authority? After a state court decision, would state and local election officials be forced to determine for themselves whether that ruling applies to federal elections? If so, what would these officials consult in deciding whether a state court's ruling hewed closely enough to the legislature's intent? This is a task that election officials neither want nor have the capacity to undertake. Yet, they would be confronted with it for endless aspects of their job.

*Increased Federal Litigation.* Under these circumstances, only two actors would remain as obvious authorities on the law—state legislatures and federal courts. Indeed, while the independent state legislature theory would push state courts out of federal election disputes, it would usher federal courts in, producing "an unprecedented expansion of judicial power" into "one of the most intensely partisan aspects of American political life." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019). And, of course, Petitioners' unhelpful compromise positions would multiply these problems further by tasking federal courts with innumerable cases questioning constitutional provisions or delegations for being too "broad" or "open-ended."

This new, expansive federal role in monitoring elections would carry with it significant costs to popular perceptions of the legitimacy of both the courts and of election outcomes.

Indeed, this threatened uncertainty would be entirely new and break a longstanding tradition of judicial non-interference in elections. State courts have routinely construed or upheld election statutes and regulations promulgated by the political branches, providing certainty regarding the election process, and ruling to the contrary only in cases of clear impropriety. The fact that judicial abrogation of state election laws has been uncommon throughout U.S. history has maintained faith in our electoral system. This Court should hesitate before opening the door to a new series of challenges that would, inevitably, occur every two years at our country's most divided moments.

*Two-Tiered Elections.* As Private and State Respondents warn, the independent state legislature theory opens the possibility of a two-tiered system of election regulation. Pr. Resp. 4; State Resp. 56–57. State constitutions, judicial decisions, and executive rulemaking would continue to govern state elections, with substantial gaps in the policies and procedures that ordinarily structure federal elections.

This two-tiered election system would create mass confusion in every state.[22] Federal and state elections might be held in different locations, at different times, with different ballots, voting machines, and signage, and supervised by different poll workers. State candidates might be elected through open primaries or ranked-choice voting, while federal candidates

[22] In some states, the two-track election system would itself violate the state constitution, forcing state courts to choose which conflicting constitutional provisions to uphold. *See, e.g.*, *Orr v. Edgar*, 670 N.E.2d 1243 (Ill. App. Ct. 1996).

might compete in a different type of election. Voters might be able to register and vote in one set of elections but not the other. This possibility was raised by a recent ruling from the New York State Supreme Court invalidating the state's statutory process for canvassing absentee ballots. *See Amedure v. State of New York*, Sup. Ct. N.Y., Saratoga Cty., Index No. 2022-2145, Oct. 21, 2022 (Freestone, J.), https://perma.cc/7KHK-7RN5. If this decision stands, it would result in the same ballot being subject to different canvassing rules for federal and state elections.

In addition to general confusion, a two-tiered election system might give rise to conflicting rules for federal and state elections. For example, Tennessee has limited the time a voter can spend in a voting booth. *See* Tenn. Code § 2-7-118. A state court has ruled that this provision is merely suggestive. *See Stuart v. Anderson Cnty. Election Comm'n*, 300 S.W.3d 683, 689–92 (Tenn. Ct. App. 2009). How could that ruling apply *only* to state elections? Would voters have to apportion their time in the voting booth to state and federal elections? Would election administrators need to set up two separate polling booths? Even just a small number of problems like this would be enough to incapacitate a state's election system—the independent state legislature theory threatens to raise them all over the country in many different situations.



## CONCLUSION

Petitioners have never offered any compelling practical reason *why* their theory should be adopted. That is because they cannot. In any of its various

forms, the independent state legislature theory promises chaos.

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

Respectfully submitted,

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