No. 21-1271

IN THE

Supreme Court of the United States

TIMOTHY K. MOORE, IN HIS OFFICIAL CAPACITY AS THE 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 *AMICI CURIAE* BIPARTISAN CURRENT AND FORMER ELECTION OFFICIALS DONETTA DAVIDSON, TRACY HOWARD, NEAL KELLEY, ROXANNA MORITZ, HELEN PURCELL, AL SCHMIDT, DEFOREST SOARIES, AND JANICE WINFREY, IN SUPPORT OF RESPONDENTS

MARK A. PACKMAN
Counsel of Record
LELIA F. PARKER
GILBERT LLP
700 Pennsylvania Avenue SE
Suite 400
Washington, DC 20003
(202) 772-2320
packmanm@gilbertlegal.com

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INTEREST OF *AMICI CURIAE*[1]

This brief is filed on behalf of Donetta Davidson, former Secretary of State of Colorado; Tracy Howard, Elections Administrator for the City of Radford, Virginia; Neal Kelley, former Registrar of Voters of Orange County, California; Roxanna Moritz, former Auditor & Commissioner of Elections for Scott County, Iowa; Helen Purcell, Former Recorder, Maricopa County, Arizona; Al Schmidt, Former City Commissioner of Philadelphia; DeForest "Buster" Soaries, former Secretary of State of New Jersey; and Janice Winfrey, Detroit City Clerk. All *amici* have extensive experience administering and overseeing state and federal elections. This bipartisan group of current and former election officials has served at every level of election administration – federal, state, and local – including in smaller jurisdictions with less than two hundred thousand voters and in several of the nation's largest voting jurisdictions covering millions of people. They offer their expertise to shed light on how disruptive Petitioners' theory would be for elections nationwide if this Court endorsed it.

[1] The position *amici* take in this brief has not been approved or financed by petitioners, respondents, or their counsel. *See* Sup. Ct. R. 37.6. Neither petitioners, respondents, nor their counsel had any role in authoring, or in making any monetary contribution to fund the preparation or submission of, this brief. All parties have consented to the filing of this brief; blanket letters of consent have been filed with the Clerk of the Court.

SUMMARY OF THE ARGUMENT

Petitioners' interpretation of the Elections Clause would render state and federal elections practically impossible to administer.

Managing elections is complicated task. To manage elections effectively, election officials must know and follow state laws, rules, and regulations while also exercising discretion when it is necessary. These laws, rules, and regulations touch virtually *every* aspect of elections, from voter registration and vote counting to countless, detailed subject matters in between. This comprehensive approach to running elections has served our country well for decades.

Petitioners' theory, however, would jeopardize this layered system that many of us have crafted and implemented in our jurisdictions across the country. Based on our collected decades of experience administering elections, we see several major problems that would arise if the Court endorsed Petitioners' reading of the Elections Clause.

First, if Petitioners' theory were applied in actual elections, election officials would essentially be forced to administer elections with their hands tied behind their backs. Given the complexity of elections, problems are bound to occur, and we have experienced many in our collective years of election administration. Water mains at polling sites break. Entrances to the polls are locked because workers oversleep. Police and other emergency works block

off streets leading to polling sites because of floods, fires, and accidents. Major weather events and security emergencies strike on election day. But Petitioners' theory would essentially prohibit election officials from exercising the discretion necessary to address these common, but unpredictable problems.

Second, Petitioners' interpretation would create an unmanageable "two-track" elections system, requiring election officials to implement two separate sets of procedures, one for state elections and one for federal elections. Voters and poll workers alike would have to consider two sets of guidelines because any rules, regulations, and policies created by state actors, other than legislatures, would no longer apply to federal elections. This two-tier voting system would have to include two sets of guidelines and regulations for absentee voting, ballot structure, polling locations, and precinct boundaries, among many others. Election officials, who are already facing mounting costs to run elections and dwindling numbers of workers to staff polling locations, would bear this burden that would be difficult, if not impossible, for them to shoulder.

Finally, Petitioners' interpretation of the Elections Clause would lead to chaotic and confusing elections for both election officials and voters. Election officials could no longer rely on state regulations and state court decisions for guidance in federal elections. And voters and candidates would be incentivized to file rafts of federal litigation based on election officials' allegedly improper deviation

from state statute. The result: federal elections, or at least the certification of federal election results, would effectively be halted due to mounting litigation in which every election official's decision could be called into question.

Under Petitioners' theory, elections would become more cumbersome, confusing, and costly—to the point of unworkability. For these reasons, *amici* urge this court to reject Petitioners' theory and affirm the decision below.

ARGUMENT

I. THE ADMINISTRATION OF ELECTIONS, INCLUDING FEDERAL ELECTIONS, IS COMPLEX AND REQUIRES STATE AND LOCAL ELECTION OFFICIALS TO EXERCISE DISCRETION.

As election officials, *amici* have overseen many elections that included federal races. These elections reflect one of the nation's biggest public workers projects involving millions of actors working simultaneously and cooperatively to allow Americans to select their representatives—a feat made more remarkable because they are undertaken every two years. In our experience, the success of federal elections depends on layers of infrastructure, legal checks and balances, administrative creativity, and managerial discretion. State and local election officials play essential roles putting into practice the laws legislatures create, so that federal elections are fair,

free, accessible, and secure, and that the results are trustworthy.

State and local election officials administer, and often establish, the detailed procedures and practices that are necessary to run elections. Their responsibilities include nearly every aspect of elections, from voter registration to vote counting, and everything in between, including cybersecurity, contingency planning, and providing administrative and technical support for local election officials.

For example, in most states, including those in which we have managed elections, state and local officials determine the boundaries of election precincts and the location of polling places. As election officials, we are often tasked with making key decisions when election laws or regulations are silent, such as determining the hours of voting, the process of voter registration, the processes for voter list maintenance, the policies for determining what ballots will count and how to count them, and election security practices – among many other aspects of election administration.

Election administration requires a level of flexibility and practical maneuvering when state election laws are broadly worded and deliberately leave room for interpretation. As state and local election officials, we have, through interpretation and practice, filled in those gaps. For example, under California's state election code, if a regulation did not include the word shall, election officials are given discretion to interpret the codes. In exercising discretion, one member of the *amici* made the

decision to allow voters to update their addresses on provisional envelopes. This process of updating addresses increased efficiency at the voting center, and created a seamless experience for voters. These sorts of discretionary acts, although often needed, would not be permissible under Petitioners' theory for federal races.

As this Court has recognized, "state and local election officials need substantial time to plan for elections. Running elections state-wide is extraordinarily complicated and difficult. Those elections require enormous advance preparations by state and local officials, and pose significant logistical challenges." *Merrill v. Milligan*, 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurring). In our experience, substantial planning time does not obviate the need for real-time decision-making. As election officials, we have often had to deal with unanticipated situations by making creative adjustments during elections and by creating policies that ensure that elections follow the law and proceed accordingly. Examples range from the mundane, such as polling place parking to catastrophic, such as polling place safety issues, unexpected staffing shortages at polling sites, malfunctioning voting machines, cybersecurity threats, and wildfires and hurricanes that threaten the entire voting process. For most extreme situations, such as natural disasters and other emergency situations, state laws affirmatively give election officials authority to alter election policies or procedures during these emergencies. Governors, Secretaries of State, and local officials use this

authority regularly, and the system depends on it. But officials also have broad discretion to make adjustments in other situations. Their exercise of discretion, grounded in technical and local expertise, is critical to making elections succeed—elections cannot work without it.

This flexibility allows local officials to tailor election administration to satisfy the needs of their constituents, within the bounds of each state's statutory framework. Election administrators thus ensure that voters can have uniform and equal access, even when voters are differently situated within a state.

II. PETITIONERS' THEORY WOULD PREVENT ELECTION OFFICIALS FROM MAKING COMMONPLACE DISCRETIONARY DECISIONS THAT ALLOW ELECTIONS TO RUN.

In every state in the country, election officials exercise power that has been expressly delegated to them by the legislature. This power often covers nearly every step of the election process, from voter registration processes to voter list maintenance, mail voting, election security, and ballot counting procedures.[2] Taken to its logical conclusion,

[2] S*ee, e.g.*, Ariz. Rev. Stat. Ann. § 16-452(A) (2019) ("the secretary of state shall prescribe rules to achieve and maintain the maximum degree of correctness, impartiality, uniformity and efficiency on the procedures for early voting and voting, and of producing, distributing, collecting, counting, tabulating and storing ballots."); Colo. Rev. Stat. Ann. § 1-1-107 (2022)

Petitioners' theory could prohibit this kind of delegation. That would make it impossible to run elections.

For example, in 2018, Florida Governor Rick Scott used his emergency power to permit eight counties particularly affected by Hurricane Michael to extend early voting days and designate more early voting locations.[3] Just a few weeks ago, Florida Governor Ron DeSantis used his emergency power to extend early voting deadlines, to suspend secure ballot intake requirements, and to suspend the requirements for vote-by-mail ballot requests for counties that were devasted by Hurricane Ian.[4]

In 2020, forest fires threatened election operations in Orange County, California. These fires broke out a few days before the voting centers were set to open, and over five drop boxes, which

("the secretary of state has the following duties to supervise the conduct of primary, general, congressional vacancy, and statewide ballot issue elections in this state; to enforce the provisions of the [election] code; and with the assistance and advice of the attorney general, to make uniform interpretations of the [election code].") (cleaned up); Md. Code Ann., Elec. Law § 2-102(b) (2022) ("In exercising its authority under this article and in order to ensure compliance with this article and with any requirements of federal law, the State Board shall . . . adopt regulations to implement its powers and duties.").

[3] State of Florida Exec. Order No. 18-283 (Oct. 18, 2018), https://www.flgov.com/wp-content/uploads/orders/2018/EO_18-283.pdf.

[4] State of Florida Exec. Order No. 22-234 (Sept. 28, 2022), https://www.flgov.com/wp-content/uploads/2022/10/EO-22-234.pdf.

were already open and containing ballots, were in the fires' burn zone. Election officials had to act swiftly to establish multiple contingencies, which included exercising discretionary authority to increase the frequency of drop box pickup with the help of fire and police personnel. Election officials, recognizing the real threat to voter safety, also changed voting center locations and offered mobile voting solutions for evacuated voters.

There was also the incident in which an election official encountered a bomb threat at a polling location. Thanks to his ability to exercise discretion, he was able to act swiftly to close that polling location and others surrounding it and to direct voters to mobile voting options. This same quick and discretionary decision-making had to be made when an election official had to shut down a voting center after an unrelated shooting occurred close to the voting center.

Election officials would also be prohibited from acting swiftly in matters concerning physical security during elections. For example, in the instances of public riots, threats of voter intimidation at polls, and terrorists' threats or attacks, election officials would be barred from implementing practices, such as changing polling sites and voting hours to ensure voter safety. For example, under Petitioners' theory, Governor Pataki's suspension of voting mid-day on September 11, 2001 would have been deemed an impermissible exercise of power over federal elections.

The need for this discretionary power does not arise only in the face of a once-in-a-decade hurricane or a sui generis terrorist event. Something goes wrong on every election day, in every jurisdiction. Examples include the following: the person assigned to unlock the polling place oversleeps, a watermain breaks, or an area is blocked off because it is a crime scene. These everyday occurrences require local election officials to exercise their discretionary authority to ensure that voters can cast their ballots safely, and that every eligible voter has an equal opportunity to do so across the state.

As election officials we are not only concerned about the safety of voters and poll workers, but we are also tasked with ensuring voting system accuracy. Under Petitioners' theory, election officials' ability to ensure this accuracy would be severely limited in federal races. Take the incident in Dekalb, Georgia, for example, in which the Dekalb County Election Board made the decision to count votes manually after voting machines that were programed improperly showed no votes for the county commissioner candidate in her own precinct where she voted for herself. Decisions like these are often necessary, but would not be allowed under Petitioners' theory for the purpose of federal elections.

This would also be the case if election officials learned of potential voting machine tampering. Currently, election officials could act swiftly to update voting machine software to mitigate the risks in state and federal races. Under Petitioners' theory, however, if state statute placed limits on

when such software updates could be implemented, the governor or election officials would be unable to patch the vulnerability, rendering voting results unreliable due to the threat of tampering.

If Petitioners' argument were to prevail, this demonstration of real-time decision-making would be rendered impermissible for federal elections, making elections practically impossible to run and manage. This discretionary power is critical for election officials to ensure that voter rolls are accurate, to implement policies like automatic voter registration, and to protect the security of voting machines. Petitioners' theory would strip state and local election officials of discretion to make decisions in emergencies and "normal" times alike that are necessary to ensure smooth and safe elections. Many such decisions need to be made the day of elections. This real-time guidance would in fact be impossible if a legislature is not in session at the time of the election. And even if the legislature were in session, it would need to have the knowledge and adequate context necessary to decide on these issues—on election day, and before polling sites closed. There is also the question whether a majority would need to be reached before a decision could be rendered. The issues that could arise are endless.

III. PETITIONERS' THEORY WOULD CREATE AN UNMANAGEABLE TWO-TRACK ELECTION SYSTEM.

As election officials, we rely on and create rules that take into consideration factors that go

beyond that which is enumerated in state law. These rules include state constitutional provisions, court rulings, gubernatorial vetoes, and, of course, policies, procedures, rules, and regulations. Petitioners' theory would strip away all but statutes, upending our current election system and making it unmanageable. Making the state legislature the only authority on elections would open the door for voters, candidates, and campaigns to question every rule, regulation, policy, interpretation, standard, or exercise of discretionary authority by state and local officials. Any step an election official, poll worker, or administrator did or did not take could become a litigated issue in federal courts before, during, and after an election.

A. State Court Rulings Would Apply Only to State Elections.

Under Petitioners' theory, state court decisions, upon which we have often relied in managing elections, would not provide any guidance for federal elections. For instance, a state court could strike down a voter ID law as unconstitutional. But this would mean that in state elections, voters would not be required to show identification to vote, but in federal elections, voter identification could still be required. This "two-track" system of rules would cause massive confusion on election day for polling staff who would have to determine whether voters must furnish voting identification.

Election administrators would be put in an impossible position in which they would not know what law to apply on Election Day. Because state

courts would be stripped of their power to interpret state statutes as they apply to federal elections, election administrators would have no way of knowing if state court decisions regarding voting would apply in federal elections. This all assumes, of course, that election officials could even reliably determine what the law is. But Petitioners' theory would create significant uncertainty on that front, leading to further chaos and confusion. Would only state court decisions that are inconsistent with statutes passed by state legislatures be rejected? Election officials should not be forced to decide which state court decisions are "wrong" or are inapplicable to federal elections, and can therefore be disregarded, or which state court decisions must be followed in connection with federal elections. Further, election officials would lack clarity on what the law is without the help of state courts interpreting ambiguous provisions in election laws.

Moreover, election officials could not rely on longstanding regulations or even gubernatorial vetoes, both of which Petitioners' theory would strip of legal meaning. Under Petitioners' theory, non-legislative regulations and policies would not apply to the administration of federal elections.

Election officials would be forced to administer a two-tiered system, under which entirely different policies would apply for state and federal elections. For example, many states authorize election officials to create regulations and standards for what constitutes a vote. If these rules and regulations applied only for state elections, that would make it incredibly difficult to manage the vote

counting process. It could require a single ballot to be counted under two sets of rules. And if election officials could not set standards for what counts as a vote in federal elections beyond the broad standards enumerated in statutes, that could leave ballot counters or local officials with broad discretion to determine which ballots count, which would jeopardize the accuracy of the counting.

There is also the issue of electronic signatures. Under many state administrative rules, electronic signatures are acceptable on absentee ballot applications. N.C. Gen. Stat. Ann. § 163-230.3(b) (2020) ("The State Board shall establish a secure Internet Web site to permit individuals . . . to submit an online request for absentee ballots," and to establish a website that requires voters to verify their information and electronically sign their absentee ballot application); N.Y. Elec. Law § 8-408 (2022) (requiring the state board of elections to maintain an electronic absentee ballot application system capable of receiving and processing electronic absentee ballot applications, including, but not limited to, electronic signatures). If a federal court, applying Petitioners' theory, decided that the state administrative rule did not apply to federal elections, then voters who submitted an absentee ballot with an electronic signature would have to receive different ballots that excluded federal candidates. These voters could mail in their state ballots and then arrive at the polling place to vote in person for federal candidates, but there would be no way of keeping track of the voter's state absentee ballot and their federal ballot, which would hinder

accurate voter tracking, and raise the likelihood of double voting.

These problems, and others like them, would replicate themselves across countless areas of election administration. Election officials cannot run safe, secure, accurate, and fair elections under these conditions. Further, any step an election official, poll worker, or administrator did or did not take could become a litigated issue in federal courts before, during, and after an election.

B. The Already Burdensome and Expensive Task of Managing Elections Would Become Even More Burdensome and Expensive.

The two-track system would essentially call for a duplication of many, already limited, resources. For instance, consider what would happen if an election official extended a state voter's registration deadline due to malfunctions in its voting registration system on the eve of the deadline. This extension would not be permissible for purposes of federal races. This would result in the need for election officials to cull through voter registrations to determine if they were made before or after the statutory deadline. They would next need to bifurcate the registrations such that voters who registered before the deadline could vote in federal races. This means that two separate ballots would need to be printed. And if there were not enough time to print separate ballots, election officials would need to create a method for separating ballots cast in federal races by voters who registered after

the deadline so that those votes could be discarded. This would not only be extremely frustrating and taxing for election officials, but also very confusing for voters who wished to participate in both state and federal elections.

Moreover, implementing both sets of rules simultaneously would stretch already limited staff and resources, making mistakes and oversights more likely, and leaving less capacity to detect and respond to vulnerabilities. Currently, many jurisdictions are scrambling to find enough poll workers to staff election sites, as many poll workers (many of whom over the age of 60) are starting to "retire" from the work. This shortage would be further exacerbated by the need for twice as many workers to implement the "two-track" voting system.

Outside of the multitude of questions raised concerning the running of separate state and federal elections, there is also the question of funding. To implement this "two-track" system would cost each state or locality millions of dollars. State and local officials are already struggling to run elections due to the underfunding of basic election requirements, such as maintaining secure elections and ensuring the physical safety of election workers and voters.[5]

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[5] Lawrence Norden & Edgardo Cortés, *What Does Election Security Cost?*, Brennan Ctr. For Justice (Aug. 15, 2019), https://www.brennancenter.org/our-work/analysis-opinion/what-does-election-security-cost; Derek Tisler & Lawrence Norden, *Estimated Costs for Protecting Election Workers from Threats of Physical Violence*, Brennan Ctr. For Justice (May 3, 2022), https://www.brennancenter.org/our-

These costs and the total administrative costs of elections would surely skyrocket if states were required to oversee two elections simultaneously.

CONCLUSION

The *amici* respectfully submit that this Court should reject Petitioners' interpretation of the Elections Clause which would necessitate the need for a two-track election system that would lead to chaotic and confusing elections, and render state and federal elections practically impossible to administer.

October 26, 2022

Respectfully submitted,

MARK A. PACKMAN
Counsel of Record
LELIA F. PARKER
GILBERT LLP
700 Pennsylvania Avenue, SE
Suite 400
Washington, DC 20003
(202) 772-2320
packmanm@gilbertlegal.com

Counsel for Amici Curiae

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