

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 RETIRED FOUR-STAR ADMIRALS
AND GENERALS, AND FORMER SERVICE
SECRETARIES OF THE ARMED FORCES AS
AMICI CURIAE IN SUPPORT OF
RESPONDENTS**

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INTEREST OF AMICI CURIAE¹

Amici are retired four-star admirals and generals, and former service secretaries of the U.S. armed forces. *Amici* are deeply interested in this case because adoption of the independent state legislature theory threatens to undermine election integrity and poses a profound threat to national security. *Amici* are also concerned that adoption of the independent state legislature theory would result in the disenfranchisement of active duty military service members and their families by unduly restricting mail-in voting. *Amici's* submissions are based on their collective experience serving in and leading our military, and on their collective interest in safeguarding national security and the votes of active duty service members. *Amici's* short biographies listed below only begin to describe their distinguished service to our country.

Admiral Steve Abbot, United States Navy (Retired): Admiral Abbot graduated from the United States Naval Academy in 1966, deployed to Vietnam, and began a career of over 35 years with the United States Navy. He was chosen to study at Oxford as a Rhodes Scholar, and he completed U.S. Air Force Test Pilot School. He is an accomplished commander, overseeing the aircraft carrier USS Theodore Roosevelt (CVN 71) during Operation Desert Storm, commanding the Theodore Roosevelt battle group

¹ No counsel for a party authored this brief in whole or in part. No person other than *amici* or their counsel made a monetary contribution to this brief's preparation or submission. All parties have given either blanket consent or have specifically consented to the participation of *amici curiae*.

Carrier Group EIGHT, and the Sixth Fleet from 1996-1998. His final active duty tour was as deputy commander in chief, U.S. European Command from 1998 to 2000. He retired with the rank of 4-star Admiral and his awards include the Legion of Merit and a Bronze Star. Following his retirement in 2000, Admiral Abbot served as Deputy Homeland Security Advisor to President George W. Bush from 2001 to 2003, and then served for sixteen years as president of the Navy-Marine Corps Relief Society, a non-profit organization assisting sailors, Marines, and their families.

Admiral Thad Allen, United States Coast Guard (Retired): Admiral Thad Allen retired in 2010 as the 23rd Commandant of the US Coast Guard. He retired as an Executive Vice President (2017) and senior executive advisor (2021) at Booz Allen Hamilton. He serves on several federal advisory committees. He chairs the Space-Based Positioning, Navigation, and Timing Advisory Board, is a member of the Board of Visitors to the National Intelligence University, and a member of the Comptroller General's Advisory Board. Admiral Allen led the federal responses to Hurricanes Katrina and Rita and the Deepwater Horizon oil spill. He led Atlantic Coast Guard forces in response to the 9/11 attacks and coordinated the Coast Guard response to the Haitian Earthquake. He is a 1971 graduate of the US Coast Guard Academy and holds master's degrees from George Washington University and the MIT Sloan School. He is a recipient of 5 Honorary Doctorate degrees and held the James Tyler Distinguished Chair of Leadership at the Loy Institute of Leadership at the Coast Guard Academy from 2014 to 2021.

Former Secretary of the United States Army Louis Caldera: Louis Caldera graduated from the United States Military Academy at West Point in 1978 and served in the Army on active duty from 1978 to 1983. After obtaining a J.D./M.B.A. degree from Harvard in 1987, Caldera practiced law and was elected to serve as a California State Assemblyman for the 46th State Assembly district from 1992 to 1997. He served in two Senate-confirmed positions in the Clinton Administration, including as Secretary of the Army, and in the Obama White House as an Assistant to the President and Director of the White House Military Office. Louis Caldera served as President of The University of New Mexico and has taught law in California, New Mexico and Washington D.C., most recently, from 2018 to 2021, as a Distinguished Adjunct Professor of Law at American University Washington College of Law. He serves on numerous nonprofit and public company boards and has served on a number of educational, foreign policy and national security commissions, task forces, and study groups.

Former Secretary of the United States Air Force Deborah Lee James: Deborah Lee James served as the 23rd Secretary of the Air Force, appointed by President Obama in 2013. Before this appointment, Ms. James worked as an assistant to the Assistant Secretary of Defense for Legislative Affairs, before being appointed by President Clinton and confirmed by the Senate in 1993 to work in the Pentagon as the Assistant Secretary of Defense for Reserve Affairs. Ms. James has 30 years of senior homeland and national security experience not only in the federal government but in the private sector as well, including President

of Science Applications International Corporation's Technical and Engineering Sector, Executive Vice President and Chief Operating Officer at Business Executives for National Security, and Vice President of International Operations and Marketing at United Technologies. Ms. James now serves as a board member of various companies and works as an author, speaker, and strategic advisor.

General Craig McKinley, United States Air Force (Retired): After 38 years in the Air Force, General Craig McKinley retired as a four-star general in November 2012. His last assignment was as the Chief of the National Guard Bureau, where he also served as a member of the Joint Chiefs of Staff. In this capacity, he was a military adviser to the President, the Secretary of Defense, and the National Security Council, and he was the Department of Defense's official channel of communication to the Governors and to State Adjutants General on all matters pertaining to the National Guard. Gen. McKinley was elected Chairman of the ANSER Board of Directors in November 2020. He completed his tenure as National Chair of Employer Support of the Guard and Reserve on November 14, 2019. General McKinley retired as the President and CEO of the National Defense Industrial Association (NDIA) on June 30, 2017. Gen. McKinley came to NDIA from the Air Force Association (AFA) where he had served as President since October 1, 2012.

Former Secretary of the United States Navy Sean O'Keefe: Sean O'Keefe began his public service career in 1978 with the Department of Defense and the United States Senate staff until appointment as

the Department of Defense Comptroller and Chief Finance Officer in 1989, serving until 1992 when President George H. W. Bush named him the 69th Secretary of the Navy. Sean O’Keefe also served in President George W. Bush’s administration, as Deputy Director of the Office of Management and Budget in 2001 and 10th Administrator of NASA from 2001-2005. Following these Senate confirmed Presidential appointments, O’Keefe then served as Chancellor of the Louisiana State University and later as chairman and CEO of the U.S. subsidiary of the Airbus Group, the global aerospace corporation. He is a Fellow of the National Academy of Public Administration and serves on the board of directors of the Partnership for Public Service in addition to other non-profit and corporate boards. He is presently a member of the Syracuse University faculty at the rank of University Professor and the Howard and Louise Phanstiel Endowed Chair in Leadership at the Syracuse University Maxwell School of Citizenship and Public Affairs. Concurrently, he is a Distinguished Senior Adviser at the Center for Strategic and International Studies (CSIS), a partner institution with the Syracuse Maxwell School in Washington, D.C.

General George Casey, United States Army (Retired): General George W. Casey, Jr., enjoyed a 41-year career in the US Army following his graduation from Georgetown University’s School of Foreign Service in 1970. He is an accomplished soldier and an authority on strategic leadership. During his tenure as the Army Chief of Staff, he is widely credited with restoring balance to a war-weary Army and leading the transformation to keep it relevant in the

21st Century. Prior to this, from July 2004 to February 2007, he commanded the Multi-National Force – Iraq, a coalition of more than 30 countries where he guided the Iraq mission through its toughest days. Currently, he lectures internationally on leadership to the leaders of national and multinational corporations and at other business schools. He also lectures on International Relations at the Korbel School, University of Denver and serves on several corporate boards and numerous boards of organizations that support our servicemen and women, our veterans, and their families.

General John Jumper, United States Air Force (Retired): General John P. Jumper is an accomplished Air Force Fighter Pilot, Instructor, and Commander, who served as the 17th Chief of Staff of the United States Air Force from 2001 to 2005. General Jumper began his military career as a distinguished graduate of Virginia Military Institute's ROTC program in 1966. He has commanded a fighter squadron, two fighter wings, a numbered Air Force, and U.S. Air Forces in Europe and Allied Air Forces Central Europe, and served as Commander of the Air Combat Command at Langley Air Force Base, VA. General Jumper went on to serve at the Pentagon as Deputy Chief of Staff for Air and Space Operations, as the Senior Military Assistant to two secretaries of defense, and as Special Assistant to the Chief of Staff for Roles and Missions before becoming the Chief of Staff of the United States Air Force. His tour as Chief of Staff has spanned operations Enduring Freedom and Iraqi Freedom. Following his retirement in 2005, General Jumper joined the Board of Directors of Science Applications International Corporation in

2007, where his tenure has been marked by the company's sustained growth, strong position in key markets, innovation, and strong customer affinity.

General Tony Zinni, United States Marine Corps (Retired): General Zinni joined the Marine Corps' Platoon Leader Class program in 1961 and was commissioned an infantry second lieutenant in 1965 upon graduation from Villanova University. He held numerous command and staff assignments that included platoon, company, battalion, regimental, Marine Expeditionary Unit, and Marine Expeditionary Force command. His staff assignments included service in operations, training, special operations, counter-terrorism, and manpower billets. General Zinni's 23 personal awards include the Defense Distinguished Service Medal with Oak Leaf Cluster; the Distinguished Service Medal; the Defense Superior Service Medal with two Oak Leaf Clusters; the Bronze Star with Combat "V" and Gold Star; the Purple Heart, and more. From 2017 to 2019, General Zinni agreed to reenter public service as a special envoy to resolve disputes in the Persian Gulf region.

Admiral James Loy, United States Coast Guard (Retired): Admiral James Loy led a 45-year career in public service, graduating from the Coast Guard Academy in 1964, retiring from the U.S. Coast Guard in 2002 having served as its Commandant since May 1998. Prior to his position as Commandant, Admiral Loy served as Coast Guard Chief of Staff from 1996 to 1998, and Commander of the Coast Guard's Atlantic Area from 1994 to 1996. Admiral Loy left the Coast Guard in 2002 to become the first Administrator in charge of the newly created Transportation Security

Administration (TSA). In 2003, President George W. Bush nominated Admiral Loy to the position of U.S. Deputy Secretary of Homeland Security, where he served until his resignation in 2005.

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SUMMARY OF ARGUMENT

Petitioners advocate adoption of a profoundly destabilizing and undemocratic approach to election administration. The independent state legislature theory would undermine election integrity and diminish public confidence in electoral outcomes. Centralizing authority over federal elections in the hands of state legislatures would result in election chaos by undermining professional nonpartisan election administrators and undoing hundreds of laws enshrined in state constitutions, adopted by voter referenda, or implemented through administrative rules. Moreover, the jettisoning of judicial review and state constitutional limitations greenlights extreme partisan gerrymandering and removes any constraint on voter suppression in federal elections. The predictable outcome is severe damage to election integrity and public faith in election legitimacy.

The weakening of election integrity creates serious threats to national security. Civil unrest resulting from public mistrust of electoral outcomes engenders calls for military intervention. As former military leaders, *Amici* are greatly concerned that politicization of the military will tarnish its reputation and decrease public support for the military. Public mistrust of electoral outcomes also increases political polarization, demoralizes election workers, and leaves the democratic institutions they support vulnerable to foreign interference. It further creates opportunities for our enemies to sow division and reap the benefit of a fragmented and divided nation. And because elections are a cornerstone of democracy, declining faith in our own elections diminishes the influence and

standing of the United States to advocate for democracy throughout the world.

The independent state legislature theory also threatens to disenfranchise military voters. Without the important checks and balances imposed by state constitutions, judiciaries, and executives, state legislatures would be free to pass restrictive legislation designed to constrain the accessibility of mail-in voting. These restrictions pose a particular risk to active duty service members and their families who rely on the availability of mail-in voting to cast their ballots and participate in the democracy they serve and protect.

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ARGUMENT

I. Adoption of the Independent State Legislature Theory Would Undermine Election Integrity and Harm National Security.

The independent state legislature theory advanced by petitioners undermines election integrity and exacerbates both domestic and foreign threats to national security. State constitutions and judicial review safeguard the fundamental right of citizens to vote and choose who will represent them through free and fair elections. Removing these protections and granting state legislatures unilateral and unreviewable power over federal elections would destabilize election administration and have foreseeable domestic and foreign negative implications for national security.

A. The Independent State Legislature Theory Will Damage Public Faith in Elections.

One of the most important features of American democracy is the system of checks and balances among the legislature, executive, and judiciary. Our founders recognized that “[t]he accumulation of all powers, legislative, executive and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.” *The Federalist No. 47*, at 301 (James Madison) (Clinton Rossiter ed., 1961). This is a hallmark of our federal government, but it is an important and longstanding feature of state government as well. Saikrishna B.

Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. Chi. L. Rev. 887, 929–939, 933 n.169 (2003) (describing the rise of state judicial review and collecting examples of such review in the pre-constitutional period).

State constitutions also play a role in constraining state legislatures. See *Arizona State Legislature v. Arizona Indep. Redistricting Comm’n (AIRC)*, 576 U.S. 787, 817–818 (2015) (“Nothing in [the Elections] Clause instructs, nor has this Court ever held, that a state legislature may prescribe regulations on the time, place, and manner of holding federal elections in defiance of provisions of the State’s constitution.”). States’ constitutions may go “above and beyond” in protecting the rights of individual citizens. *Amer. Legion v. Amer. Humanist Ass’n*, 139 S. Ct. 2067, 2094 (2019) (Kavanaugh, J., concurring).

These safeguards are especially important in the context of federal elections and impact a citizen’s fundamental right to vote. Yet, adoption of the independent state legislature theory would grant state legislatures plenary authority to regulate federal elections, unchecked by state-level constraints—including state constitutions, state courts, citizen ballot initiatives, and in extreme versions of the theory, gubernatorial veto.

Stripping away established state-level protections undermines election integrity by destroying the longstanding expectation and understanding of voters and state election officials. Hundreds, if not thousands, of election laws could be nullified by the independent state legislature theory. Moreover, many

of the laws protecting election integrity were adopted by voters through referenda, incorporated into state constitutions, or have been relied upon for decades to safeguard both state and federal elections. But under the independent state legislature theory, voters may find these protections discarded and swept aside by state legislatures unilaterally seeking to pass restrictive voting laws.² Without state constitutional restraints, state legislatures may also interfere in the nonpartisan administration of elections and thereby undermine public confidence in election outcomes.³

Moreover, if control over federal congressional elections is centralized in the hands of the state legislatures, election officials and state courts would be constrained in their ability to interpret ambiguous state statutes to make election administration workable within the compressed timeframe that often

² The threat of state legislatures seeking to restrict voting access is more than theoretical. See, e.g., Brennan Center for Justice, Voting Laws Roundup (May 2022), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-may-2022> (cataloguing restrictive voting laws already proposed by state legislatures).

³ See, e.g., States United Democracy Center, *Democracy Crisis in the Making: How State Legislatures are Politicizing, Criminalizing, and Interfering with Election Administration* (June 2021 Rpt. & Aug. 2022 Update), <https://statesuniteddemocracy.org/resources/democracy-crisis-in-the-making-how-state-legislatures-are-politicizing-criminalizing-and-interfering-with-elections/#section-2> (reporting on measures that “represent a dangerous trend: efforts to increase the ability of partisan actors to subvert the will of the voters”).

apply.⁴ State election officials could also be required to oversee two sets of potentially conflicting rules—one governing federal elections and another governing state elections.⁵ Vote counting may be opened up to challenge if federal ballot tallies differ from state ballot tallies, as may happen when applying conflicting rules. For example, the same ballot could be ruled insufficient for federal election purposes but sufficient for state election purposes.⁶ Requiring election officials to administer simultaneous state and federal elections governed by different rules and separate ballots engenders uncertainty that will undermine the fair and effective administration and regulation of federal elections. *The Independent State Legislature Theory and Its Potential to Disrupt Our Democracy: Hearing Before the H. Com. on H. Admin.*, 117th Cong., 1 (Jul. 28, 2022) (written testimony of Carolyn Shapiro).

The independent state legislature theory seeks to diminish (or eliminate) the essential and historic role of the state judiciary in resolving conflicting interpretations of election law and in adjudicating disputes arising under that law. Meanwhile, if stripped of the long-standing means of resolving

⁴ Genevieve Nadeau and Helen White, *Independent State Legislatures and Presidential Elections: Addressing Misconceptions About Current Law and Prospects for Reform*, Just Security (Aug. 16, 2022), <https://www.justsecurity.org/82685/independent-state-legislatures-and-presidential-elections-addressing-misconceptions-about-current-law-and-prospects-for-reform/>.

⁵ States United Democracy Center, *A Democracy Crisis in the Making* 9–10 (Aug. 2022), <https://statesuniteddemocracy.org/wp-content/uploads/2022/08/DCIM-August2022.pdf>.

⁶ *Ibid.*

disputes through judicial review, minimal precedent exists for how disputes over the validity, interpretation, or application of state election law would be resolved by a state legislature. To allow unchecked action by a single branch defies the fundamental principle of separation of powers, because: “there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator.” C. Montesquieu, *The Spirit of the Laws* 152 (T. Nugent trans. 1949) (1748).

The potential chaos of such a system will inevitably undermine the integrity of federal elections. Eliminating long-established pathways for judicial review of election law and election disputes would result in confusion that would make it easier to claim election fraud and cast doubt on election outcomes.⁷ These problems will exacerbate the growing problem of partisanship in election administration.⁸

The protections provided by state constitutions and state judicial review also strengthen confidence in electoral outcomes where they limit the excesses of extreme partisan gerrymandering. Gerrymandering is anti-majoritarian and deeply undemocratic because it allows politicians to entrench themselves by

⁷ Helen White, *The Independent State Legislature Theory Should Horrify Supreme Court’s Originalists*, *Just Security* (Jun. 30, 2022), <https://www.justsecurity.org/81990/the-independent-state-legislature-theory-should-horrify-supreme-courts-originalists/>.

⁸ *A Democracy Crisis in the Making*, *supra* note 5, at 9.

drawing unfair electoral districts. See *AIRC*, 576 U.S. at 824 (gerrymandering violates “the core principle of republican government, namely, that the voters should choose their representative, not the other way around”) (citation and quotation omitted). See also Miriam Seifter, *Countermajoritarian Legislatures*, 121 Colum. L. Rev. 1733, 1762–1767 (2021) (describing how gerrymandering, as a countermajoritarian tendency of state legislatures, can lead to outright minority-party control). Protections at the state level are the only feasible way to ensure that congressional districts are fairly drawn. See *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019) (acknowledging that state courts applying state statutes and state constitutions are well-placed to protect against partisan gerrymandering).

The independent state legislature theory would grant the state legislatures unreviewable power to draw congressional districts and would destroy any attempt by the States to rein in partisan gerrymandering. Gerrymandering undermines the public’s faith in elections. Indeed, “[i]ntelligent voters, regardless of party affiliation, resent this sort of political manipulation of the electorate for no public purpose.” *Davis v. Bandemer*, 478 U.S. 109, 127 (1986) (Powell, J., concurring in part and dissenting in part), overruled by *Vieth v. Jubelirer*, 541 U.S. 267 (2004). Contemporary polls show that voters across party lines have unfavorable views of gerrymandering.⁹ And yet because the result of gerrymandering is to

⁹ Campaign Legal Center, *New Bipartisan Poll on Gerrymandering and the Supreme Court* (Jan. 25, 2019), <https://campaignlegal.org/sites/default/files/2019-01/CLC%20Bipartisan%20Redistrictig%20Poll.pdf>.

entrench the incumbent legislators, the legislative branch is particularly ill-suited to address or ameliorate the problems partisan gerrymandering presents. Accordingly, *Amici* foresee public loss of faith in radically gerrymandered elections as a predictable consequence of the independent state legislature theory.

B. A Lack of Election Integrity Threatens the Military's Ability to Operate Effectively.

Amici believe the lack of election integrity and loss of public faith that would result from adopting the independent state legislature theory has foreseeable negative implications for national security. The public's trust in elections is essential to the military's continued success as an apolitical entity above the fray of partisan politics.

As an institution subject to civilian control, it is critically important for the military to remain, and be perceived, as apolitical and outside of the political realm. Civilian control of the military places decision-making in the hands of democratically elected leadership. Such leadership, if it is to govern effectively, must have confidence in the nonpartisan nature of the military. But election instability leaves the military vulnerable to the pulls of partisan politics.

In some recent elections, political actors from both parties suggested military intervention was needed to quell civilian unrest in the aftermath of elections. Because of such calls, a coalition of Former Secretaries of Defense and Former Chairmen of the Joint Chiefs of Staff signed an open letter reaffirming that the military has no role to play in elections and must be

kept separate from partisan political activity.¹⁰ *Amici*, who are former military leaders, anticipate that calls for military intervention will only increase in the wake of further disruption to the election system that would result from adoption of the independent state legislature theory.

Amici further believe that even the perception of politicization would have devastating consequences for the military's effectiveness. And a lack of election integrity may cause politicization of the military even when the military appropriately decides not to involve itself in the election process. When large swaths of voters view an election as illegitimate, necessary statements by military leaders reaffirming that the military has no role to play in election outcomes may be viewed as political acts.

Amici are also gravely concerned that National Guard units may be called to quell civil disturbances engendered by a lack of confidence in electoral outcomes, which would further politicize and undermine support for the military. When federalized, State National Guard units are responsive to the President as commander in chief. But when in their state roles, they act at the direction of State Governors who are partisan elected officials and who could deploy them to quash constitutionally protected speech and demonstrations against electoral rules and outcomes

¹⁰ Open Letter from Former Secretaries of Defense and Former Chairmen of the Joint Chiefs of Staff, *To Support and Defend: Principles of Civilian Control and Best Practices of Civil-Military Relations*, War on the Rocks (Sep. 6, 2022), <https://warontherocks.com/2022/09/to-support-and-defend-principles-of-civilian-control-and-best-practices-of-civil-military-relations/>.

that favor one party's fortunes. This role is anathema for the military of a democratic society, and the mere perception of military involvement would further damage the military's standing.

A politicized military is unable to operate effectively. The U.S. armed forces, as an all-volunteer military of a constitutional democracy, rely on the popular support of the American people for the financial and other resources needed for the nation's defense. The U.S. armed forces are one of the most trusted institutions and seen as deserving of such support, precisely because they conduct themselves above partisan politics and are solely dedicated to defending the nation against foreign and domestic threats.

The military also depends on its ability to recruit a force from across the political spectrum and deploy those forces in operations that put service members' lives at risk. *Amici's* experience leading the armed forces enables them to understand the unique recruitment needs of the military. They are concerned that increased politicization of the military will erode the public's perception of the apolitical nature of the military and diminish the military's continued ability to field the most qualified force to protect the nation.

Public trust in free and fair elections is therefore critical to the military's continued success at staying above the fray of partisan politics. The independent state legislature theory will increase the public's disillusionment with the electoral process and risk drawing the military into the political arena.

C. A Lack of Election Integrity Exacerbates Threats to National Security.

Amici believe that a lack of election integrity poses a profound threat to national security. Election instability weakens our standing and influence around the world. And extreme polarization emboldens our adversaries and demoralizes our allies. *Amici* also recognize that public distrust of elections and election officials creates opportunities for foreign and antidemocratic actors to subvert elections.

Elections present the most visible display of our democratic process and constitutional safeguards. Harm to this pillar of U.S. democracy compromises efforts at foreign diplomacy and degrades the nation's standing as a leader for freedom and self-governance on the world stage. Ultimately, loss of faith in American democracy destabilizes our world thereby increasing threats to our national security.

The military's greatest strength stems from its position as an organ of American democracy. Around the world, democracy is in retreat, authoritarianism is on the rise, and for the first time in almost two decades, the number of non-democratic countries outnumber that of democratic countries.¹¹ At home and abroad, respect for American democracy as a model for the world is waning. A recent Pew Research Center report shows 72% of Americans and 57% of the median survey responses from citizens of 16 advanced

¹¹ Freedom House, *Freedom in the World 2022: The Global Expansion of Authoritarian Rule* (Feb. 2022), <https://freedomhouse.org/report/freedom-world/2022/global-expansion-authoritarian-rule>.

democracies say the United States used to be, but is no longer, a good model of democracy.¹²

During a time when authoritarian governments are becoming alarmingly powerful and prevalent, it is critical that the United States stand as an exemplar of a well-functioning democracy. The degradation of faith in election integrity directly impacts this ability because the United States cannot promote the value of democracy abroad without public confidence that its own elections are free and fairly administered. And without such ability, the march of authoritarianism will continue with predictable harmful consequences for the security of the United States and other democracies.

The public's lack of faith in elections would also create opportunities for foreign actors to further inflame domestic tensions and create significant long-term threats to our security. As recent events have shown, extreme political polarization is a predictable consequence of undermined elections. Partisan polarization makes us more vulnerable to disinformation campaigns designed to fracture the country and make it more difficult to respond to, and defend against, foreign adversaries.

Distrust in elections has also increasingly subjected election officials to harassment and intimidation. The Brennan Center for Justice recently

¹² Richard Wike, et al, *What People Around the World Like – and Dislike – About American Society and Politics*, Pew Research Center (Nov. 1, 2021), <https://www.pewresearch.org/global/2021/11/01/what-people-around-the-world-like-and-dislike-about-american-society-and-politics/>.

reported that one in three election officials felt unsafe because of their job and nearly one in five said their lives were threatened due to their work on elections.¹³ Moreover, nearly one in three local election officials know at least one election worker who has left the job, partly because of safety concerns, increased threats, or intimidation.¹⁴ The Bipartisan Policy Center reports that election workers have recently experienced a “barrage of threats” “in what had traditionally been a very low threat environment.”¹⁵ Many state election officials facing such increased hostility are considering quitting their jobs, and the field is already losing election officials at an alarming rate. *Emerging Threats to Election Administration: Hearing before S. Comm. on Rules and Admin.*, 117th Cong. (Oct. 26, 2021) (Testimony of Matthew Masterson).

The loss of experienced election officials leaves our electoral systems vulnerable at a critical time for American democracy. In the past few elections, bad faith foreign actors have attempted to interfere with our electoral systems.¹⁶ Those efforts have largely

¹³ Brennan Center for Justice, *Local Elections Official Survey* (Apr. 2021), <https://www.brennancenter.org/our-work/research-reports/local-election-officials-survey>.

¹⁴ Brennan Center for Justice, *Local Elections Official Survey* (Mar. 2022), <https://www.brennancenter.org/our-work/research-reports/local-election-officials-survey-march-2022>.

¹⁵ Bipartisan Policy Center, *Deterring Threats to Election Workers* (July 2022), <https://bipartisanpolicy.org/report/detering-threats-to-election-workers/>.

¹⁶ See, e.g., Howard et al., *Defending Elections: Federal Funding Needs for State Election Security*, Brennan Center for Justice (July 18, 2019), <https://www.brennancenter.org/our-work/research-reports/defending-elections-federal-funding-needs-state-election-security> (discussing attempts to interfere with the 2016

been unsuccessful due to the diligence and expertise of election workers. The loss of experienced election workers would leave our election systems susceptible to foreign interference and divert attention from ensuring the security of election platforms.¹⁷

At this important juncture, nothing is more important to the promotion of democracy globally than regaining the public's trust in U.S. elections. Adoption of the independent state legislature theory would serve only to destabilize our election system and further erode the nation's trust in electoral outcomes. The predictable consequences of such a decision is the politicization of the military, the weakening of

general election); Kevin Johnson, *Russian Hackers Target U.S. Computer Systems; Feds Say Elections Data Not Compromised*, USA Today (Oct. 22, 2020), <https://www.usatoday.com/story/news/politics/elections/2020/10/22/election-2020-new-wave-russian-hacking-efforts-detected-officials/3735228001/> (discussing attempts to interfere with the 2020 general election); Nicole Perlroth and David E. Sanger, *Ransomware Attacks Take On New Urgency Ahead of Vote*, New York Times, (Nov. 16, 2020), <https://www.nytimes.com/2020/09/27/technology/2020-election-security-threats.html>; Scott Ikeda, *Iranian Hackers Indicted over 2020 US Election Interference*, CPO Magazine (Nov. 23, 2021), <https://www.cpomagazine.com/cyber-security/iranian-hackers-indicted-over-2020-us-election-interference-used-confidential-voter-information-to-send-targeted-misinformation-and-threats/>.

¹⁷ See *Letter From Former High-Ranking National Security Officials To Congress: Election Subversion Poses National Security Threat*, Medium (Nov. 9, 2021), <https://medium.com/@FormerU.S.NatSecOfficials/letter-from-former-high-ranking-national-security-officials-to-congress-election-subversion-poses-69a269962ac>.

American democracy, and the enhancement of threats to the nation's security.

II. The Independent State Legislature Theory Will Disenfranchise Active Duty Military Service Members and Their Families.

Beyond the grave national security threats that are posed by the independent state legislature theory, it also creates a unique threat to the votes of active duty military service members. Centralized power over congressional elections in the hands of state legislatures poses a concrete threat to the mail-in vote of active duty military service members. At least 405 restrictive voting bills have been proposed in 39 state legislatures during 2022.¹⁸ Many of those bills are designed to make mail-in voting more difficult, sometimes based on the specious argument that mail-in voting is less reliable. These restrictions will have a significant, negative impact on military service members and their families who overwhelmingly rely on mail-in voting to participate in elections.

Americans today trace their ability to vote by mail to soldiers voting far from home during the Civil War. For the estimated three-quarters of the 1.4 million military service members stationed away from their legal voting residence, mail and absentee voting

¹⁸ Brennan Center for Justice, *State Voting Laws, Overview* (2022), <https://www.brennancenter.org/issues/ensure-every-american-can-vote/voting-reform/state-voting-laws>.

remain an area of critical concern.¹⁹ In every election, active duty troops and their families cast their ballots from wherever they are stationed, all across the globe. Nearly half of military members voted in 2020, and 75% of military members are eligible to vote absentee.²⁰ For military members, the most common method of voting is by mailing in their ballots.²¹ In 2020, 84% of military voters who returned an absentee ballot did so by mail.²² The high rate of ballots returned by mail can be explained by the fact that many states do not accept ballots electronically, and mail return is the only ballot option for military absentee voters from these states.²³ Indeed, in 40% of states, mail-in voting is the only allowed transmission method of absentee ballots.²⁴

The independent state legislature theory advanced by petitioners risks imposing greater restrictions on mail-in voting to the detriment of military members who rely on it. Mail-in voting already faces significant hurdles. For a mail-in ballot to be counted, military members must comply with deadlines by which their

¹⁹ Federal Voting Assistance Program, *State of the Military Voter*, <https://www.fvap.gov/info/reports-surveys/StateoftheMilitaryVoter>.

²⁰ *Ibid.*

²¹ *Ibid.*

²² Federal Voting Assistance Program, *Post-Election Voting Survey: Active Duty Military Technical Report 2020*, 23, https://www.fvap.gov/uploads/FVAP/Reports/FVAP_ADM-Technical-Report-2020_FINAL_20210831.pdf.

²³ *Ibid.*

²⁴ Federal Voting Assistance Program, *State of the Military Voter*, *supra* note 19.

ballots must be postmarked and received.²⁵ Because active duty military members are becoming more aware of the need to return their mail-in ballots on time, an increasing number of service members opt to take advantage of states' early voting periods to return their ballots.²⁶

Nonetheless, for military members voting by mail, missing the deadline was the most common reason why states rejected their 2020 general election mail-in ballots.²⁷ During the 2020 election, many active duty service members were located in areas where postal service was delayed or suspended because of the COVID-19 pandemic.²⁸ Therefore, setting aside post-2020 proposed restrictions on mail-in voting, the 2020 election cycle demonstrated how structurally difficult

²⁵ Generally, military mail-in ballots must be postmarked in advance of Election Day. As to the deadline by which the ballot must be received, in approximately one-third of states, a military member's 2020 general election ballot had to have been received by Election Day. In the remaining two-thirds of states, the deadline ranged from two to 20 days after Election Day. See U.S. Election Assistance Commission to the 117th Congress, *Election Administration and Voting Survey 2020 Comprehensive Report*, 74 (Aug. 2021), https://www.eac.gov/sites/default/files/document_library/files/2020_EAVS_Report_Final_508c.pdf.

²⁶ *Active Duty Military Technical Report 2020*, *supra* note 22, at 20.

²⁷ Of the mail-in ballots that were rejected in the 2020 general election, 44.7% were rejected for missing the deadline, and another 23.9% were rejected because of verification and signature issues. *Election Administration and Voting Survey 2020 Comprehensive Report*, *supra* note 25, at 186.

²⁸ Federal Voting Assistance Program, *2020 Post-Election Report to Congress*, <https://www.fvap.gov/info/reports-surveys/2020-report-to-congress>.

it is for military votes to be properly counted given military members' service in remote locations.

The difficulties faced by mail-in voting would only increase if the power over elections were centralized in the hands of the state legislatures without any judicial oversight. Although federal law provides some protection for military mail-in voting, such as requiring absentee military voters to automatically receive their ballots 45 days before Election Day, federal law does not entirely insulate military voters from the requirements of state law. Military voters who return their ballots by mail must still comply with state deadlines for postmarking and receiving ballots, as well as state signature and witnessing requirements.

State legislatures are attempting to narrow the window during which absentee ballots must be received to be counted. Such efforts include shortening the early voting period, moving up the deadline by which ballots must be postmarked, moving up the deadline by which ballots must be received, and eliminating discretion to count ballots received later than three days after Election Day.

Similarly, there have been attempts by state legislatures to make it harder to satisfy witnessing and signature requirements by requiring mail-in ballots to be notarized. The independent state legislature theory advanced by petitioners would place such voting restrictions beyond challenge by the persons impacted by them. Without the important limitations imposed by states' constitutions and judiciary, these restrictions and requirements will

have devastating effects on military voters who already struggle with ballot rejection due to missed deadlines and verification issues.²⁹

Where the legislature, executive, and judiciary play their traditional roles in a three-branch system of government, military service members stand a much better chance of being able to exercise their constitutional right to vote. For example, during the COVID-19 pandemic, the Alaska judiciary suspended the requirement that voters who submitted a mail-in absentee ballot have a witness sign their ballot return envelope. *See State v. Arctic Village Council*, 495 P.3d 313, 325–326 (Alaska 2021). Such continued interplay between the different branches of government is necessary if the mail-in vote of active duty military service members is to remain protected.

“The uniform of our country must not be the badge of disfranchisement for the man or woman who wears it.” *Carrington v. Rash*, 380 U.S. 89, 97 (1965). The voting rights of active duty military voters and their families are particularly deserving of protection. These service members volunteer to serve far from home and to endure the risks of being put in harm’s way. The nature of their service requires them to vote by mail, and our nation owes them a debt to ensure their votes are counted. The independent state legislature theory would create new barriers to military service members’ participation in the democracy they

²⁹ *Election Administration and Voting Survey 2020 Comprehensive Report*, supra note 25, at 186.

seek to defend. And for this reason, it should be rejected.

CONCLUSION

The independent state legislature theory will harm election integrity and weaken public faith in elections. Its adoption poses threats to national security and will also serve to disenfranchise military voters. For these reasons, the Court should reject the independent state legislature theory and affirm the decision below.

Respectfully submitted,

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