No. 23-719

IN THE
Supreme Court of the United States

DONALD J. TRUMP,
*Petitioner*,

v.

NORMA ANDERSON, ET AL.,
*Respondents*,

On Writ of Certiorari
to the Colorado Supreme Court

# BRIEF OF BRENNAN CENTER FOR JUSTICE, PROTECT DEMOCRACY, CAMPAIGN LEGAL CENTER, AND LEAGUE OF WOMEN VOTERS AS AMICI CURIAE IN SUPPORT OF NEITHER PARTY



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## INTEREST OF AMICI CURIAE[1]

The Brennan Center for Justice at NYU School of Law is a nonprofit, nonpartisan public policy and law institute that works to strengthen, revitalize, and defend our systems of democracy and justice. Founded in 1995, the Brennan Center seeks to honor the extraordinary contributions of United States Supreme Court Justice William J. Brennan, Jr. to American law and society. The Brennan 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 Brennan Center frequently appears as amicus or counsel on democracy and election-related matters before this Court, including in *Moore* v. *Harper*, 600 U.S. 1 (2023).

Campaign Legal Center is a nonpartisan, nonprofit whose mission is to advance democracy through law by advocating for every American's right to meaningfully participate in the democratic process. To advance that mission, Campaign Legal Center



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[1] No counsel for a party authored this brief in whole or in part and no person or entity other than amici, their members, or their counsel made a monetary contribution to its preparation or submission. This brief does not purport to convey the position of the New York University School of Law.

regularly serves as counsel or amicus curiae in election-related litigation in this Court, including *Shelby County* v. *Holder*, 570 U.S. 529 (2013), *Gill* v. *Whitford*, 138 S. Ct. 1916 (2018), *Rucho* v. *Common Cause*, 139 S. Ct. 2484 (2019), *Allen* v. *Milligan*, 599 U.S. 1 (2023), and *Moore* v. *Harper*. Campaign Legal Center has a longstanding and demonstrated interest in preserving the proper functioning of our democratic process to ensure that it is free and fair for all voters.

The Protect Democracy Project (Protect Democracy) is a nonpartisan, nonprofit whose mission is to prevent our democracy from declining into a more authoritarian form of government. As part of that mission, Protect Democracy engages in advocacy aimed at ensuring secure, accessible, and accurate elections systems that foster public confidence in the fact that elections are fair, free, and secure. Protect Democracy has regularly appeared as an amicus or counsel in election-related matters before federal courts, including before this Court in *Moore* v. *Harper*. That advocacy has included efforts to caution the federal courts against interfering in state court determinations of state election law in all but the most extreme circumstances so as to avoid creating a system where state and federal elections are governed by separate—and potentially competing—rules because the result would be uncertainty and confusion for election officials, voters, and courts, all at a time when our election system can least afford it.

The League of Women Voters (the League) is a nonpartisan, grassroots organization committed to protecting voting rights, empowering voters, and

defending democracy. Founded in 1920 as an outgrowth of the struggle to win voting rights for women, the League now has more than 500,000 members and supporters and is organized in more than 750 communities, all 50 states, and the District of Columbia. The national League includes the League of Women Voters of the United States and the League of Women Voters Educational Fund. The League works to ensure that all voters—including those from traditionally underrepresented or underserved communities, such as first-time voters, non-college youth, new citizens, communities of color, the elderly, and low-income Americans—have the opportunity and the information they need to exercise their right to vote. The League is dedicated to ensuring that voters have the clarity they need before an election. The League often appears before this Court as amicus in democracy-related matters, including in *Moore* v. *Harper*.



Amici write to explain the legal errors in Petitioner's reading of *Moore* v. *Harper* and the threats that erroneous reading presents to free, fair, accessible, and workable elections. Moreover, Petitioner's request that this Court second-guess state supreme courts' interpretations of state law would sow chaos in election administration, undermining voting rights and election integrity nationwide.

## SUMMARY OF ARGUMENT

In *Moore* v. *Harper*, this Court rejected the argument that the Elections Clause vests exclusive authority in state legislatures to set the rules regarding federal elections.[2] The Court reaffirmed the traditional role of state courts as the final arbiters of state law. It made clear that federal courts should not routinely review state court interpretations of state law regulating federal elections. Yet, Petitioner now invokes *Moore* to ask this Court to second-guess the Colorado Supreme Court's interpretation of Colorado law.[3] Amici take no position on the ultimate



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[2] *Moore* addressed the Constitution's *Elections* Clause, U.S. Const. Art. I, § 4, cl. 1, which regulates elections for the U.S. House of Representatives and U.S. Senate. See *id.* Petitioner's argument invokes the *Electors* Clause, U.S. Const. Art. II, § 1, cl. 2, which governs presidential elections. Petitioner's theory does not distinguish between the two clauses, and the analysis in *Moore* applies equally to the Electors Clause. See *Moore* v. *Harper*, 600 U.S. 1, 27 (2023) (noting similarity between the Elections and Electors clauses); see also *id.* at 32 (noting this Court "ha[s] found historical practice particularly pertinent when it comes to the Elections and Electors Clauses"); *Ariz. State Legislature* v. *Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 839 (2015) (Roberts, C.J., dissenting) (noting the provisions share "considerable similarity"); *Foster* v. *Love*, 522 U.S. 67, 69 (1997) (describing the Electors Clause as the Elections Clause's "counterpart for the Executive Branch"); *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 804–05 (1995) (finding that the states' "duty" under the Elections Clause "parallels the duty under" the Electors Clause).

[3] Amici here respond to arguments raised in Petitioner's petition for certiorari. Any similar arguments Petitioner may

outcome of this case. They write in support of neither party, but only to highlight Petitioner's flawed invocation of *Moore* and to ask this Court to refrain from using this case as a vehicle to wreak the havoc this Court avoided just a few months ago when it rejected the so-called independent state legislature theory.

*Moore* reaffirmed the longstanding principle that "[s]tate courts are the appropriate tribunals . . . for the decision of questions arising under their local law, whether statutory or otherwise." *Moore* v. *Harper*, 600 U.S. 1, 34 (2023) (ellipsis in original) (quotation marks omitted). This Court observed that state courts' interpretations of state election law may be subject to federal court review only in an extremely limited circumstance: when state courts "transgress the ordinary bounds of judicial review such that they arrogate to themselves the power vested in state legislatures to regulate federal elections." *Id.* at 36.

Petitioner does not now invoke *Moore* because the Colorado Supreme Court transgressed the ordinary bounds of judicial review. Petitioner instead disagrees with the state high court's interpretation of Colorado law. Indeed, Petitioner does not point to anything non-judicial in the Colorado Supreme Court's interpretation of the relevant laws. Nor could he: The Colorado Supreme Court used ordinary methods of statutory interpretation to conclude that

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raise in his briefing on the merits should be rejected on similar grounds.

the case was properly brought and the district court properly adhered to the statutory deadlines under state law. Instead, Petitioner merely opines on the reasonableness of that interpretation and invites this Court to do the same.

Acceptance of Petitioner's invitation to second-guess the Colorado Supreme Court's ordinary act of interpreting Colorado election law raises a host of serious problems. It would upend longstanding federalist principles. It would create substantial uncertainty about what the law is. It could force states to develop a two-tiered election system where at least some state court interpretations of the law apply only to state elections, not federal ones. This would cause tremendous confusion for election officials and voters. It would call into question long-standing practices, destabilizing the election system. It would usher in a flood of disruptive election litigation. And it would cast this Court as referee of state election law for federal elections, politicizing the Court and sowing further distrust in the electoral system. All this explains the Court's sound recent reasoning in *Moore* v. *Harper*.



The Court can rule on this case in any number of ways. Whatever approach is taken, it should not revive the recently rejected independent state legislature theory.

## ARGUMENT

Buried in Petitioner's brief is an effort to resuscitate a dangerous interpretation of the Electors and Elections Clauses that would upend longstanding federalist principles. Purporting to rely on this Court's decision last term in *Moore* v. *Harper*, 600 U.S. 1 (2023), Petitioner asks this Court to hold that the Colorado Supreme Court violated the Electors Clause of the United States Constitution because it adopted an interpretation of Colorado election law with which Petitioner disagrees. See Cert. Pet. at Section V.

This Court's reasoning in *Moore* fatally undermines Petitioner's argument. *Moore* expressly affirmed that state court review of state election laws is part of a multi-century history of judicial review and instructed that federal courts should intervene in only the rarest circumstances. Those circumstances do not exist here and Petitioner does not even make an effort to show as much.

Amici further ask this Court to refuse Petitioner's invitation to transform *Moore* into a license for federal courts to routinely second-guess state court determinations of state law. Petitioner's reading of *Moore* would risk many of the dangers threatened by the independent state legislature theory—which this Court rejected just last term. By making nearly every state court election dispute a potential federal question, Petitioner's theory would unleash an avalanche of emergency litigation in

federal courts and create massive uncertainty for election officials and voters.

## I. *Moore* v. *Harper* is not an invitation to transform ordinary state court interpretation of state election law into a federal constitutional issue for this Court to police

Time and again, "[t]his Court . . . has held that state courts are the ultimate expositors of state law." *Mullaney* v. *Wilbur*, 421 U.S. 684, 691 (1975). Under well-established federalist principles, "the highest court of the state is the final arbiter of what is state law." *West* v. *Am. Tel. & Tel. Co.*, 311 U.S. 223, 236 (1940); see also *Montana* v. *Wyoming*, 563 U.S. 368, 377 (2011) (same).

This Court's decision in *Moore* reaffirmed that state legislatures are subject to the traditional system of checks and balances supplied by their coordinate branches of state government and their state constitutions, even when regulating federal elections. When a state court interprets state election law, ordinary deference applies. The Constitution does not give federal courts a free-wheeling license to second-guess those interpretations.

### A. Moore *reaffirmed the longstanding, basic principle that state election laws are subject to judicial review by state courts*

As this Court explained in *Moore*, the Elections Clause did not carve out an exception to the "basic principle" that state courts may exercise judicial

review over state laws. 600 U.S. at 22. Indeed, the Court situated state court review of state laws governing federal elections within a multi-century tradition of those courts superintending the work of legislatures. As the Court explained, the concept of judicial review first announced in *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803), was "not fashion[ed] out of whole cloth." 600 U.S. at 20. Instead, this "fundamental principle[] of our society," was "long and well established" by 1803 because of a tradition of state court practice. *Id.* at 22 (quoting *Marbury*, 1 Cranch at 176). Numerous state courts had reviewed and "invalidated state or local laws under their State constitutions before" the 1787 Constitutional Convention, *id.* at 21 (quotation marks omitted), and well before this Court "proclaimed [its] authority to invalidate laws that violate the Federal Constitution," *id.* at 20. This "basic principle" of checks and balances already present in the states served as a foundational concept in the federal design. *Id.* at 22.



*Moore* followed a long line of Supreme Court cases holding that "[s]tate courts are the appropriate tribunals . . . for the decision of questions arising under their local law, whether statutory or otherwise." *Moore*, 600 U.S. at 34 (quoting *Murdock* v. *City of Memphis*, 87 U.S. (20 Wall.) 590, 626 (1874)); see also *Johnson* v. *Fankell*, 520 U.S. 911, 916 (1997) (collecting cases) ("Neither [the United States Supreme] Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the State.").

It is "fundamental to our system of federalism," *Fankell*, 520 U.S. at 916, that the authority to review state legislative acts remains the predominant purview of state courts given both historical practice and this Court's longstanding respect for state constitutional design. See also *United States* v. *Taylor*, 596 U.S. 845, 859 (2022).[4]

The specific issue in *Moore* was "whether the Elections Clause insulates state legislatures from review by state courts for compliance with state law." 600 U.S. at 19. This Court rejected the theory



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[4] Numerous doctrines hold that federal courts should refrain from determining state law in all but the most extraordinary circumstances. See *R.R. Comm'n of Tex.* v. *Pullman Co.*, 312 U.S. 496, 499–501 (1941) (under *Pullman* abstention, federal courts should decline to hear cases about the constitutionality of state law if the relevant state law is unclear and would benefit from state court interpretation); *Burford* v. *Sun Oil Co.*, 319 U.S. 315, 318 (1943) (under *Burford* abstention, federal courts show "proper regard for the rightful independence of state governments in carrying out their domestic policy"); *Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64, 80 (1938) (requiring federal courts to apply state law when a case presents no federal question); *Younger* v. *Harris*, 401 U.S. 37, 41 (1971) (doctrine that requires federal courts generally to abstain from taking jurisdiction over federal constitutional claims that call into question ongoing state proceedings); *Exxon Mobil Corp.* v. *Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005) (the *Rooker-Feldman* doctrine bars "cases brought by state[]court losers complaining of injuries caused by state[]court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments").

that "the Elections Clause vests state legislatures with exclusive and independent authority when setting the rules governing federal elections." *Id.* at 26.

Invoking the Framers, *Moore* emphasized that state legislatures are "creatures of the State Constitutions, and cannot be greater than their creators." 600 U.S. at 27 (quoting 2 Records of the Federal Convention of 1787, at 28 (M. Farrand ed. 1911)). Accordingly, this Court "ha[s] long rejected the view that legislative action under the Elections Clause is purely federal in character, governed only by restraints found in the Federal Constitution." *Id.* at 30.

In short, state courts, by nature of state constitutional design and longstanding federalist principles, remain "the appropriate tribunals . . . for the decision of questions arising under their local law," including state legislation governing federal elections. 600 U.S. at 34 (quotation marks omitted).



### B. Moore *made clear that federal judicial review of state court interpretation of state law is appropriate only under very narrow circumstances*

While reaffirming the respect due to a state high-court's interpretation of state law, this Court in *Moore* recognized its "obligation to ensure that state court interpretations of that law do not evade federal law." *Moore*, 600 U.S. at 34; accord *Mullaney*, 421 U.S. at 691 n.11 ("On rare occasions the Court has re-

examined a state[]court interpretation of state law when it appears to be an obvious subterfuge to evade consideration of a federal issue." (internal quotation marks omitted)). This Court made clear that the federal courts' role in this regard is limited to the extraordinary instances in which a state court "transgress[es] the ordinary bounds of judicial review such that [it] arrogate[s] to [itself] the power vested in state legislatures to regulate federal elections." *Moore*, 600 U.S. at 36.

Absent a threshold showing that a state court is evading the traditional limitations on judicial review, *Moore* leaves no room for a federal court to reconsider a state court interpretation of state law. *Moore*, 600 U.S. at 37 (rejecting the idea that federal courts should be in the business of second-guessing state courts engaged in the "ordinary judicial review" associated with interpreting state laws).

Petitioner's Electors Clause argument, however, theorizes that any disagreement with a state court's interpretation of state law could support the conclusion that a state court is failing to proceed in the manner directed by the state legislature. Cert. Pet. at 29–31. Petitioner challenges the underlying opinion of the Colorado Supreme Court as "flouting the statutes governing presidential elections," specifically state statutes. *Id.*at 29 (capitalization and emphasis omitted). Yet, Petitioner never articulates why interpretation of a state statute by the state's highest court falls outside of the bounds of ordinary judicial review or how the justices of the Colorado Supreme Court "arrogat[ed] to themselves" the state

legislature's power. *Moore*, 600 U.S. at 36. Petitioner only opines that he would have decided the case differently. *Moore* does not support such sweeping federal judicial oversight of state court interpretation of state election law, and such a role should not be invented for this case. The Elections and Electors Clauses do not provide a back door for flouting state court authority over the interpretation of state law.

## II. The Colorado Supreme Court's interpretation of Colorado law was well within the ordinary bounds of judicial review

In issuing the decision below, the Colorado Supreme Court acted well within "the ordinary bounds of judicial review" and nowhere did the court "arrogate to [itself] the power vested in state legislatures to regulate federal elections." *Moore*, 600 U.S. at 36.[5] Ruling otherwise would be untenable and dangerous.

### A. *The Colorado Supreme Court engaged in ordinary statutory interpretation to analyze state law*

The Colorado Supreme Court read the plain language of Colorado election law to reach two



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[5] For all Petitioner's references to purported state law issues, his argument under *Moore* boils down to a disagreement with the Colorado Supreme Court over an issue of federal law. Specifically, Petitioner contends that removing him for violating Section 3 of the federal Fourteenth Amendment is a "wrongful act" because he disagrees with that court's interpretation of

holdings under state law. *First*, the court held that Respondents' claim that the Secretary of State should have denied former President Trump access to the ballot was actionable under Colorado law, reasoning that the Secretary would "commit a breach or neglect of duty or other wrongful act" if she allowed him to appear on the ballot. Pet. App. 26a ¶ 44 (analyzing Colo. Rev. Stat. § 1-1-113). It reached that conclusion primarily because state law only allows "qualified" candidates to participate in Colorado's presidential primary. Pet. App. 33a–34a ¶ 62 (interpreting Colo. Rev. Stat. § 1-4-1203(2)(a)). Although that provision does not define "qualified," the court held that the term encompasses federal constitutional qualifications. Pet. App. 34a–35a ¶ 63.

*Second*, the Colorado Supreme Court held that the district court's litigation schedule was proper under Colorado law. Pet. App. 41a–44a ¶¶ 79–85. It found that the schedule "substantially complied" with relevant statutory deadlines and it was appropriate under Colorado law to extend the schedule to allow the parties a fair opportunity to litigate. *Id.* The state supreme court reached this conclusion in response to Petitioner's complaint that the district court moved *too* quickly, Pet. App. 41a ¶ 79 (though he now argues the opposite).



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Section 3. This Court is already reviewing that federal question and should not drag questions of state law and procedure into the calculus.

The Colorado Constitution and statutes (passed by the legislature) empower the state supreme court to interpret Colorado law. The Colorado Constitution vests its court with the "judicial power of the state." Colo. Const. Art. VI, § 1. Paralleling the federal system, Colorado grants its appellate courts review of "every final judgment." *Id.* § 2; 28 U.S.C. § 1291. Importantly here, the plain language of the Colorado's election code states that the Colorado Supreme Court has the authority to "review[]" the "proceedings," Colo. Rev. Stat. § 1-1-113(3), of "any controversy aris[ing] between any official charged with any duty or function under this code." *Id.* § 1-1-113(1).



Reading the plain language of various provisions of state law to interpret how they work together is the epitome of ordinary judicial review. The Colorado Supreme Court simply used the traditional tools of statutory interpretation to interpret state law. *See Orellana-Leon v. People*, 530 P.3d 636, 638 (Colo. 2023) ("To ascertain the intent of the legislature, we look to the entire statutory scheme in order to give consistent, harmonious, and sensible effect to all of its parts, and we apply words and phrases in accordance with their plain and ordinary meanings." (internal quotation marks omitted)); *Food Mktg. Inst.* v. *Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019) ("In statutory interpretation disputes, a court's proper starting point lies in a careful examination of the ordinary meaning and structure of the law itself.").

Indeed, the Colorado Supreme Court's own explanation of its interpretive methods in this case

reveals the ordinariness of its approach. For example, when interpreting the meaning of "qualified" candidates under state law, it explained that it "[r]ead[] the Elections Code as a whole," looked to "nearby provisions regarding write-in candidates," and considered the extent to which Petitioner's alternative interpretation would undermine the Election Code's chief purpose: "to secure the purity of elections." Pet. App. 33a–35a ¶¶ 62–63. Such methods are mainstays of statutory interpretation in Colorado. See, *e.g.*, *City & Cnty. of Denver* v. *Expedia, Inc.*, 405 P.3d 1128, 1133 (Colo. 2017) ("Because, however, terms frequently have more than one ordinary meaning, or at least more than one shading or nuance of meaning . . . the precise meaning intended by an undefined term often must be determined by reference to other considerations, like the context in which it is used and the apparent purpose for its use" (citations omitted)); *R.E.N.* v. *City of Colo. Springs*, 823 P.2d 1359, 1364 n.5 (Colo. 1992) ("*In pari materia* is a rule of statutory construction which requires the various portions of the statute to be read together with all the other statutes relating to the same subject or having the same general purpose so that the legislature's intent may be ascertained." (quotation marks omitted)); *Frohlick Crane Service, Inc* v. *Mack*, 510 P.2d 891, 892–93 (Colo. 1973) ("No court should interpret a statute in such a manner as to frustrate the intent of the legislature."). Petitioner's characterization of this normal interpretive act as "transform[ing]" the statutory language is just a rhetorical obfuscation. Cert. Pet. at 30.

Similarly, the Colorado Supreme Court reasoned that the district court properly managed the case by balancing section 1-1-113's quick proceedings with opportunities for the parties to be sufficiently heard on the substantive issues. Pet. App. 42a–44a ¶¶ 82–85. Such case management decisions sit squarely within the discretion Colorado law leaves to trial courts. See, *e.g.*, *Burchett* v. *South Denver Windustrial Co.*, 42 P.3d 19, 21 (Colo. 2002) ("This court supports the principle that trial courts, not attorneys, should closely control the management of dockets and cases."); *Jackson* v. *Unocal Corp.*, 262 P.3d 874, 882 n.5 (Colo. 2011) ("In fact, case management decisions are generally left to the discretion of the trial court.").

Because the Colorado Supreme Court engaged in ordinary interpretation of its state statutes, Petitioner's demand that this Court second-guess that analysis is improper. *Moore* asks whether a "state court[] . . . transgress[ed] the ordinary bounds of judicial review such that they arrogate[d] to themselves the power vested in state legislatures to regulate federal elections." 600 U.S. at 36. The answer here is no.

The state court's ruling would no more violate the Electors Clause applied to the facts of this case than it would as applied to the disqualification of a twenty-two-year-old presidential candidate. In that case, as here, the Colorado Supreme Court would ask the same question—"is the candidate qualified?"—and apply the same interpretive methods to answer it.

Presidential candidates have been disqualified in prior election cycles for failing to meet federal constitutional standards. See, *e.g.*, *Hassan* v. *Colorado*, 495 Fed. Appx. 947, 948 (10th Cir. 2012) (affirming the district court's determination that Colorado Secretary of State properly excluded presidential candidate from the ballot because he was not a natural-born citizen); *Socialist Workers Party of Ill.* v. *Ogilvie*, 357 F. Supp. 109, 113 (N.D. Ill. 1972) (affirming Illinois State Electoral Board's decision to exclude presidential candidate from the ballot because she was 31). States have similarly excluded statewide candidates who fail to meet state-imposed eligibility requirements. See, *e.g.*, *State ex rel. Kristof* v. *Fagan*, 504 P.3d 1163, 1176 (Or. 2022) (affirming the Oregon Secretary of State's decision to exclude gubernatorial candidate from the ballot because he failed to meet the state's three-year residency requirement); *Bysiewicz* v. *Dinardo*, 6 A.3d 726, 751 (Conn. 2010) (reversing the lower court to hold that an attorney-general candidate and then-Connecticut Secretary of State was ineligible to appear on the ballot because she did not meet the statutorily-required 10 years of law practice).



In short, while the underlying facts that prompted Petitioner's disqualification are extraordinary, the statutory interpretation methods that the state supreme court applied to disqualify Petitioner are not.

### B. *Petitioner's reading of* Moore *is untenable and dangerous*

Far from demonstrating that the Colorado Supreme Court departed from "the ordinary bounds of judicial review," *Moore*, 600 U.S. at 36 (or was otherwise not acting as a court), Petitioner merely challenges the reasonableness of the Colorado Supreme Court's interpretation of Colorado law. See Cert. Pet. at 29–31. Not only is this insufficient under *Moore*, accepting such a low bar for federal court review of a state court's interpretation of its own election law would upend fundamental principles of federalism and inject chaos into elections.

*First*, Petitioner's theory would generate substantial uncertainty about what the law is. Under the theory, seemingly every state court decision affecting federal elections could be challenged as beyond the state court's authority. After a state court decision, state and local election officials could be forced to determine whether that ruling applies to federal elections. It is unclear what authority these officials would consult in deciding whether a state court's ruling hewed closely enough to the legislature's interpretation.

Election officials emphatically do not want this responsibility. Nor do they have the capacity to undertake it.

Similarly, second-guessing from federal courts will undermine the finality of both recent and longstanding state court rulings. Election officials

might have to pause their work as they wait to see whether a state court ruling challenged in federal court will stand. That would undermine their ability to plan their operations and act swiftly in response to state court rulings. Confusion will result.

*Second,* because the Electors Clause and the Elections Clause refer only to federal elections, Petitioner's theory could result in state election laws being invalid for federal elections—under a federal court's interpretation of state law—but valid and mandatory for simultaneous state elections—under the state court's controlling and final interpretation of that same state law. See, *e.g.*, Amicus Brief of The Brennan Center for Justice, at 30–31, *Moore* v. *Harper*, No. 21-1271 (U.S. Oct. 26, 2022), 2022 WL 16552948; Amicus Brief of League of Women Voters of the United States, et al. at 9–10, *Moore* v. *Harper*, No. 21-1271 (U.S. Oct. 26, 2022), 2022 WL 16555946.

The resulting "two-tier" rules for elections would be especially problematic because state and federal elections often occur at the same time using the same ballots. Cf. *Arizona* v. *Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 41 (2013) (Alito, J. dissenting) (explaining that it is "very burdensome" for states to maintain separate processes for state and federal elections). Voters could register to vote, use certain ballot types, and appear at a particular polling place for purposes of one election but not the other. Polling places may be required to remain open on different dates and different times for state and federal elections. Voters might have statutory limits on the amount of time they can spend in the voting

booth for federal but not state elections. See, *e.g.*, *Stuart* v. *Anderson Cnty. Election Comm'n*, 300 S.W.3d 683, 690 (Tenn. Ct. App. 2009) (excusing technical violation of state election law setting time limit in voting booth). "Even worse, with more than one system of rules in place, competing candidates might each declare victory under different sets of rules." *Republican Party of Pa.* v. *Degraffenreid*, 141 S. Ct. 732, 734 (2021) (Thomas, J., dissenting from denial of cert). Even just a small number of problems like this would be enough to incapacitate a state's election system. Petitioner's theory threatens to raise them all over the country in many different situations.

*Third*, the consequences of federal courts routinely second-guessing state interpretation of state election law would be "so far-reaching and destabilizing that it would call into question practices that have been settled for a century or more." Nathaniel Persily et al., *When is a Legislature not a Legislature? When Voters Regulate Elections by Initiative*, 77 Ohio St. L.J. 689, 708 (2016).

The theory threatens not just longstanding electoral practices, but also longstanding judicial practices. Indeed, adopting Petitioner's view would force this Court into a thicket of difficult questions, many of which would have to be answered in an emergency posture, including:

- Would a federal court deciding whether a state court properly interpreted state law apply or ignore that state's rules of statutory interpretation? Would a

federal court consider and apply legislative history in a way that differs from the way federal courts currently interpret federal statutes to conform to the dominant approach in the relevant state's courts?

- How would federal courts analyze and evaluate state court invocations of the doctrine of constitutional avoidance when federal courts are not the dispositive interpreters of state constitutions? For example, could a federal court tell a state court that it wrongly interpreted a state statute because it wrongly interpreted a relevant state constitutional provision?

- Would federal courts defer to state agencies' interpretations of state law in states where that is the common practice? Would the level of deference vary state-by-state, resulting in the federal courts applying *Chevron*-like deference in cases arising from some states and *Skidmore*-like deference in cases arising from others, depending on each state's administrative law traditions? Would deference vary between states whose constitutional designs embrace strong legislatures and weak executives and states that have weak legislatures and strong executives? Or would federal courts be required to ascertain the correct interpretation of

state statutes without reference to state agencies' interpretations of state law?

None of these questions will be easy, and the wrong answers will risk chaos and confusion. As prominent election lawyer Benjamin Ginsberg cautioned last term in *Moore*, attempting to apply a uniform federal approach on "fifty separate states—particularly when the federal courts are typically kept out of refereeing interstate separation of powers disputes by the Eleventh Amendment—will not be the sort of legal question on which election officials and states will have clear guidance." Amicus Brief of Benjamin L. Ginsberg, *Moore* v. *Harper* at 13, No. 21-1271 (U.S. Oct. 26, 2022), 2022 WL 16555981 (footnote omitted).

*Fourth*, Petitioner's theory would threaten "a flood of new federal litigation" from election lawyers seeking a second bite at the apple by radically expanding the range of state court decisions subject to federal review. Cf. Amicus Brief of Richard L. Hasen at 2, *Moore* v. *Harper*, No. 21-1271 (U.S. Oct. 25, 2022), 2022 WL 16110517 (explaining the consequences of a ruling that would permit courts "frequently to second-guess state administrative and judicial interpretation and implementation of state election laws"); Amicus Brief of Conference of Chief Justices at 28, *Moore* v. *Harper*, No. 21-1271 (U.S. Sept. 6, 2022), 2022 WL 4117470 (warning that unless federal review is "rare and extraordinarily deferential," "this Court[] will be flooded with requests to second-guess state court decisions interpreting and applying state election laws during every election cycle, infringing on state sovereignty").

This could empower federal judges to overrule state courts willy-nilly even though the original Constitution was in part "designed to protect states against federal interference (including interference from federal courts)." Vikram D. Amar & Akhil R. Amar, *Eradicating Bush-League Arguments Root and Branch: The Article II Independent-State-Legislature Notion and Related Rubbish*, 2021 Sup. Ct. Rev. 1, 18 (2022). This system would draw the Court beyond its traditional role and make it the referee of a plethora of state election law disputes, often in an emergency posture. This is precisely the sort of "extraordinary and unprecedented role" in elections that concerned this Court in *Rucho* v. *Common Cause*, 139 S. Ct. 2484, 2507 (2019).

This flood of last-minute strategic litigation risks politicizing both the state and federal courts, as well as confusing voters; such litigation would further erode confidence in our elections and in our court system. "Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." *Purcell* v. *Gonzalez*, 549 U.S. 1, 4 (2006). A doctrine that invites regular clashes between federal and state courts on routine interpretations of state election law risks undermining that faith in our system. This Court should hesitate before opening the door to a new series of unnecessary and unwarranted challenges that would, inevitably, occur every two years at our country's most divided moments.

## CONCLUSION

Amici take no position on whether former President Donald Trump is ineligible for the Colorado ballot under Section Three of the Fourteenth Amendment. Whatever the decision in this case, however, this Court should not encourage federal courts to police ordinary state court interpretation of state election law. This Court declined to do so when the issue was front-and-center in *Moore* v. *Harper*, and it should decline to do so when raised as a tertiary matter in this case.

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