

No. 21-1271

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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.*

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**ON WRIT OF CERTIORARI TO THE  
UNITED STATES SUPREME COURT OF NORTH CAROLINA**

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**BRIEF OF THE NATIONAL ASSOCIATION OF COUNTIES,  
THE NATIONAL LEAGUE OF CITIES, THE U.S.  
CONFERENCE OF MAYORS, THE INTERNATIONAL  
CITY/COUNTY MANAGEMENT ASSOCIATION, AND THE  
INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS  
*AMICI CURIAE* IN SUPPORT OF RESPONDENTS**

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## **INTEREST OF AMICI CURIAE<sup>1</sup>**

The National Association of Counties (“NACo”) is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation’s 3,069 counties through advocacy, education, and research.

The National League of Cities (“NLC”) is dedicated to helping city leaders build better communities. NLC is a resource and advocate for 19,000 cities, towns, and villages, representing more than 218 million Americans.

The U.S. Conference of Mayors (“USCM”), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes more than 1,200 cities at present. Each city is represented in USCM by its chief elected official, the mayor.

The International City/County Management Association (“ICMA”) is a nonprofit professional and educational organization of more than 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA’s mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

The International Municipal Lawyers Association (“IMLA”) has been an advocate and resource for local government attorneys since 1935. Owned solely by its

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<sup>1</sup> This brief was prepared by counsel for amici curiae and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief. All parties have given written consent to the filing of this brief.

more than 2,500 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters.

Here, NACo, NLC, USCM, ICMA, and IMLA offer their perspective on why the rule sought by Petitioner would be impractical and would harm county and city governments.

### **INTRODUCTION AND SUMMARY OF ARGUMENT**

Amici agree fully with the contentions made in part III of the State Respondents Brief and part IV of the Non-State Respondents Brief. *See* State Resp. Br. at 55-57 (“Petitioners’ Reading of the Elections Clause Would Upend Elections Nationwide.”); Non-State Resp. Br. at 73-79 (“Petitioners’ Theory Would Upend Election Administration Nationwide And Embroil Federal Courts In State-Law Disputes.”). Amici write separately to provide their perspective, as longtime representatives of local governments, on the practical and harmful effects on election administration of a ruling in favor of Petitioners.

Elections are conducted at the local level, where county election boards and city officials have numerous responsibilities during an election cycle and between elections. This brief describes the many duties of local election boards, using the most recent election in North Carolina as an example. Local election boards can ill afford to have their work made much more complex than it already is.

Unfortunately, the independent state legislature theory asserted by Petitioners would seriously complicate the work of local election boards. If embraced by a majority of this Court, the theory

would lead to a two-tier system of election administration in some states, where some laws passed by state legislatures in the future would apply only to voting for federal offices while other state laws including state constitutions would continue to apply to voting for state offices. Such a two-tier system would make the job of local election boards exceedingly difficult.

A two-tier system would affect the processing of ballots, including mail-in ballots and ballot recounts. A two-tier system would also wreak havoc on voting procedures, by threatening local control over such things as choice of voting system and polling locations, and by allowing legislatures to require something such as photo identification for federal elections even where the state constitution does not allow it for state elections. Finally, by giving sole power over federal election administration to the legislature, the independent state legislature theory proposed by Petitioners could prevent other state actors from responding to the various emergencies that can arise during an election.

### **ARGUMENT**

If this Court adopts the independent state legislature theory, election administration at the local level will be disrupted. In part I, this brief first describes election administration at the county level, using North Carolina as an example, and at the city level. This brief next explains in part II why the independent state legislature theory would lead to a two-tier system of administering state and federal elections that would produce numerous practical challenges--including coordinating procedures related to ballots and mail-in ballots, operating voting

systems, establishing polling locations, and using photo identification—and invite constitutional violations. Finally, in part III this brief will explain how the independent state legislature theory would hinder state actors, including governors and election boards, from protecting voting during emergencies. For all these reasons and others discussed by the State Respondents and Non-State Respondents, this Court should reject the independent state legislature theory and affirm the North Carolina Supreme Court’s decision.

### **I. Elections are administered at the local level.**

The administration of a national election is a significant undertaking that is largely the responsibility of local Boards of Election in the nation’s 3,143 counties or county equivalents and cities. *See States, Counties, and Statistically Equivalent Entities*, Census.gov, <https://www2.census.gov/geo/pdfs/reference/GARM/Ch4GARM.pdf> (last visited Oct. 9, 2022). Using North Carolina as an example, this section details the many tasks these local boards and their staffs must accomplish each election cycle.

The North Carolina State Board of Elections (“NCBOE” or “state board”) “is the state agency charged with overall responsibility for administration of the elections process. . . . The agency’s duties are to promote consistent administration and equal application of all election” laws. Kim Strach, *Strategic Plan and Information and Technology Plan FY 2017 - 2019*, NCBOE 1 (Dec. 5, 2016), [https://files.nc.gov/ncosbm/documents/files/2017-19\\_Strategic\\_Elections.pdf](https://files.nc.gov/ncosbm/documents/files/2017-19_Strategic_Elections.pdf). The governor appoints the five members of the state board “from

a list of nominees submitted . . . by the [s]tate party chair of each of the two parties having the highest number of registered affiliates. Not more than three members of the State Board shall be members of the same political party.” *About*, NCBOE, <https://www.ncsbe.gov/about> (last visited Oct. 18, 2022).

The State’s 100 county Boards of Election are tasked with “administering elections and related laws” at the local level, “certifying election results, certifying and maintaining voting systems, conducting outreach and education activities, voter registration, absentee voting, and legal matters.” *Id.* The county boards are also “responsible for implementing voting policies and procedures, and guidance of Election Day workers.” *Id.* Like the state-wide NCBOE, each county board is composed of five members. *County Boards of Election*, NCBOE, <https://www.ncsbe.gov/about-elections/county-boards-elections> (last visited Oct. 9, 2022). Two Republicans and two Democrats are appointed by the NCBOE upon the recommendation of the respective state party chair, while the fifth member, the chair of the county board, is appointed by the governor. *Id.*

In practice, county boards are required to:

- Make and issue rules, regulations, and instructions necessary for the guidance of election officers and voters.
- Appoint chief judges, judges, assistants, and other election officials, and determine where they will serve. The county board also removes officials if the need arises.

- Investigate irregularities, nonperformance of duties, and violations of laws by election officers and other persons, and report violations to the State Board.
- Contract for the printing of ballots and other supplies used in registration and elections; and provide for the delivery of ballots, pollbooks, and other required papers and materials to voting places.
- Buy and maintain voting booths, ballot boxes, registration and pollbooks, maps, flags, cards of instruction, and other forms, papers, and equipment used in elections.
- Count absentee and provisional ballots and other official ballots required to be counted.
- Certify results in all ballot items on the official ballot in the county.
- Order a recount in any ballot item where necessary to complete the canvass.
- Conduct any recount ordered by the county board or State Board.
- Conduct hearings on election protests.

*Duties of County Boards of Elections*, NCBOE, <https://www.ncsbe.gov/about-elections/county-boards-elections> (last visited Oct. 9, 2022); *see also* N.C. Gen. Stat. § 163-33 (2021) (further delimiting powers of county boards of election); N.C. Gen. Stat. § 163-182.17(c) (2021) (same); N.C. Gen. Stat. § 163-166.1 (2021) (same).

**A. A county election board has numerous duties during an election.**

The most recent election—the primary held on May 17, 2022—offers an example of how many responsibilities a county election board has.

On February 4, the first step in operating the primary election was providing official notice of the election, which had to be provided “not later than 100 days before a regularly scheduled election.” N.C. Gen. Stat. § 163-258.16(a) (2021).

On February 18, the next step was to adopt a one-stop implementation plan for the primary (a schedule detailing when early voting would be held in each county), which had to be transmitted to the NCBOE no later than five weeks before the start of absentee voting. *Past Events*, NCBOE, <https://www.ncsbe.gov/past-sbe-events> (last visited Oct. 17, 2022).

By March 18, ten business days after candidate filing ended, the county boards received any challenges to candidacies. N.C. Gen. Stat. § 163-127.2 (2021).

On March 28, fifty days prior to primary Election Day, absentee ballots were available in all 100 counties and absentee voting was underway, as required by N.C. Gen. Stat. § 163-227.10 (2021).

During the period between when absentee ballots became available and early in-person voting begun, the county boards focused heavily on publicizing notice of the election, as well as on disseminating information regarding deadlines and methods for voter registration. *See* N.C. Gen. Stat. § 163-33(8) (2021).

During this same period, and by April 1 (no fewer than forty-five days before Election Day), county boards made final decisions involving creation, alteration, or discontinuation of voting places or precincts. N.C. Gen. Stat. § 163-128 (2021).

Beginning on April 12, the fifth Tuesday before the election, county boards began meeting weekly to determine whether absentee ballots received to that point had been properly submitted. N.C. Gen. Stat. § 163-230.1(f) (2021).

On April 14, fourteen days before early voting began, the NCBOE requested that each county undertake a mock election, to ensure the functionality of, and to increase familiarity with, voting equipment. *Past Events, supra.*

By April 15, county boards were required to provide public notice of the buffer zones<sup>2</sup> that would be used at polling locations. N.C. Gen. Stat. § 163-166.4(c) (2021).

Also, by April 15, county boards were required to notify voters of any decisions to move the location of any polling place. N.C. Gen. Stat. § 163-128(a) (2021).

On April 22, twenty-five days before the election, the voter-registration deadline occurred. N.C. Gen. Stat. § 163-82.6(d)(1) (2021).

On April 28, the third Thursday before primary Election Day, early voting began. N.C. Gen. Stat. § 163-227.2(b) (2021). County party officials were required to submit lists of poll observers to the county

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<sup>2</sup> Buffer zone is the term used to denote the area outside of which electioneering and campaigning is allowed at one-stop and Election Day voting places.

board five days before an observer was to begin observation. N.C. Gen. Stat. § 163-45(b) (2021).

On May 10, one week before Election Day, the deadline passed for requesting absentee ballots by mail. N.C. Gen. Stat. § 163-230.1(a) (2021).

By May 12, county party officials were required to submit their list of poll observers for election day voting places. N.C. Gen. Stat. § 163-45 (2021).

On May 14, the Saturday preceding Election Day, early voting concluded at 3:00 pm. N.C. Gen. Stat. § 163-227.2(b) (2021).

By May 16, the day before Election Day, the NCBOE requested that each county board upload the most recent voter registration data into the tabulation software. *Past Events, supra*.

On May 17, the primary election was conducted. Polling places opened at 6:30 am and remained open until 7:30 pm. N.C. Gen. Stat. § 163-166.01 (2021). While voting was ongoing, at 10:00 am, 2:00 pm, and 4:00 pm, poll workers made available to the county boards and observers a list of all who had voted in the precinct up to that time. 8 N.C. Admin. Code 10B.0103 (2022). Beginning at noon and ending at 5:00 pm on Election Day, county boards began accepting voter challenges to absentee ballots. N.C. Gen. Stat. § 163-89 (2021). At 5:00 pm on Election Day, the deadline for returning civilian absentee ballots in person lapsed. N.C. Gen. Stat. § 163-231(b)(1) (2021). At that time, the county boards began counting absentee ballots, with results announced after polls closed at 7:30 pm. N.C. Gen. Stat. § 163-234 (2021). At 7:30 pm, the county boards distributed an Election Day Absentee Abstract to the

NCBOE. N.C. Gen. Stat. § 163-234(7) (2021). Many county boards also hosted election return watches on Election Day, where poll workers, candidates, and the public came to watch the returns come in.

On May 18, the day after the election, the county boards randomly selected a precinct within each county to conduct a sample audit. N.C. Gen. Stat. § 163-182.1(b)(1) (2021). During this audit, a hand-to-eye count of the paper ballots from that precinct was conducted on a single statewide ballot item. *Id.* The next day, the county boards submitted provisional ballot totals to the NCBOE for each method of voting, via a Provisional Survey. N.C. Gen. Stat. § 163-166.11(5) (2021).

On May 20, the deadline for civilian absentee ballots arriving by mail passed at 5:00 pm. N.C. Gen. Stat. § 163-231(b)(2) (2021).

By May 23, the county boards were required to initiate any challenges to ineligible absentee or one-stop ballots. Karen Brinson Bell, *County Board Challenges to Absentee Ballots*, Numbered Memo 2022-05, NCBOE (May 12, 2022), [https://s3.amazonaws.com/dl.ncsbe.gov/sboe/numbermemo/2022/Numbered%20Memo%202022-05\\_Absentee%20Voter%20Challenges%20by%20County%20Board.pdf](https://s3.amazonaws.com/dl.ncsbe.gov/sboe/numbermemo/2022/Numbered%20Memo%202022-05_Absentee%20Voter%20Challenges%20by%20County%20Board.pdf).

On May 27, the deadline passed for voters or candidates to file protests regarding tabulation of vote counting. N.C. Gen. Stat. § 163-182.9 (2021). That same day, at 11:00 am, counties conducted “canvass.” N.C. Gen. Stat. § 163-182.5 (2021). Canvass refers to the “process of determining that the votes have been counted and tabulated correctly, culminating in the authentication of the official election results. The

board of elections conducting a canvass has authority to send for papers and persons and to examine them and pass upon the legality of disputed ballots.” *Id.*

On May 31, the deadline for candidates to request a recount passed. N.C. Gen. Stat. § 163-182.7(b) (2021). The next day, the protest deadline passed, except for protests relating to tabulation irregularities, and the county boards submitted final abstracts to the NCBOE. N.C. Gen. Stat. § 163-182.9 (2021); N.C. Gen. Stat. § 163-182.6 (2021). The NCBOE completed its state canvass on June 9, finalizing the results of the 2022 primary. N.C. Gen. Stat. § 163-182.5 (2021).

The schedule of events outlined above is consistent for general elections, though in a general election the number of recounts and protests may be higher, given North Carolina’s relatively equal partisan divide and history of close election results.

**B. A county election board has continuing duties between elections.**

County boards also have ongoing responsibilities. In North Carolina, for example, each county board must update its National Voting Rights Act Survey Report by the seventh day of each month. N.C. Gen. Stat. § 163-82.20 (2021). By the fifteenth day of each month, the county board must conduct standard maintenance on its voter registration roll, which entails removing ineligible voters (e.g., inactivity, deaths, felony convictions). N.C. Gen. Stat. § 163-82.14 (2021). Additionally, county board members are required to review legal updates and numbered guidance memos frequently, and to attend periodic trainings and conferences in which the NCBOE

instructs the county board members on changes in the law.

The county boards also serve a critical educational function, in ensuring that the citizenry remains informed about the election process. *See Combating Misinformation*, NCBOE, <https://www.ncsbe.gov/about-elections/election-security/combating-misinformation> (last visited Oct. 23, 2022). An informed citizenry is key to confronting—and halting—the spread of disinformation. *See id.*

In sum, county boards of election do an admirable job at administering elections and have more than enough to do, without the confusion discussed in part II below that would be caused by Petitioners' independent state legislature theory.

### **C. Cities also administer elections and partner with county election boards.**

City officials are uniquely positioned to support election infrastructure, as they are “at the center of civic engagement.” Dana Watters & Sara Boukdad, *What are Cities Doing to Prepare for Safe Elections and Building Trust in 2020?*, NLC, <https://www.nlc.org/article/2020/11/02/what-are-cities-doing-to-prepare-for-safe-elections-and-building-trust-in-2020> (last visited Oct. 22, 2022).

There is no federal mandate requiring the states to run elections in any particular way; indeed, states may elect election administrators at the local level; operate elections via a city, county, or state elections board; or operate elections through a Secretary of State's office. *Election Administration at State and Local Levels*, National Conference of State Legislatures (Feb. 3, 2020), <https://www>.

[ncsl.org/research/elections-and-campaigns/election-administration-at-state-and-local-levels.aspx](https://www.ncsl.org/research/elections-and-campaigns/election-administration-at-state-and-local-levels.aspx).

States throughout the Midwest and several northeastern states have opted for city control of election administration. *Id.* In addition to their administrative role, cities also work to increase voter participation. See Snarski et al., *Cities Vote: Municipal Action Guide*, NLC 23, <https://www.nlc.org/wp-content/uploads/2021/02/MunicipalActionGuideonRaceEquityinVoting.pdf> (last visited Oct. 22, 2022) (noting that “[c]ities that administer elections can proactively enfranchise voters”). For example, in the 2020 election, the City Council of Kalamazoo, Michigan, “opted to expand access beyond the minimum requirements set by Michigan state law and extend voting hours, add locations for in-person voter registration and to issue and receive absentee ballots, and provide first-class postage for all absentee ballots.”<sup>3</sup> *Id.* Cities may also hold events, such as Madison, Wisconsin’s, “Democracy in the Park,” where poll workers “accept[] absentee ballot applications, voter registration forms, and answer[] questions about [the] election.” *Id.* at 20.

Furthermore, city leaders partner with counties to protect voters against both physical and cyber

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<sup>3</sup> Michigan has divided election administration among an elected Secretary of State, county clerks, county election commissions, city clerks, and city election commissions. *Election Administration at State and Local Levels*, NCL, <https://www.ncsl.org/research/elections-and-campaigns/election-administration-at-state-and-local-levels.aspx> (last visited Oct. 22, 2022). In Kalamazoo, the City Clerk’s office administers elections. *Elections*, City of Kalamazoo, <https://www.kalamazoocity.org/Residents/Elections> (last visited Oct. 22, 2022).

threats. See Dana Watters et al., *Managing and Mitigating Threats & Harassment Against Local Officials*, NLC 8, <https://www.nlc.org/wp-content/uploads/2022/07/Keeping-Election-Officials-Safe-Brief--Resources.pdf> (last visited Oct. 22, 2022). One way city leaders protect voters is by “work[ing] with local law enforcement to provide protection and respond to threats, including establishing and maintaining an open line of communication as situations change.” *Id.* Moreover, city officials provide cybersecurity by “inventorying, securing, and training staff on . . . [election] technology.” *Id.* The importance of these responsibilities cannot be overstated, given that “[e]ven the appearance of vulnerability can feed into a culture of distrust.” *Id.* at 9.

City officials operate much like “first responders in times of crisis,” as they can implement creative solutions to unprecedented challenges, such as the COVID-19 pandemic. Watters & Boukdad, *supra*. For instance, during the 2020 election, some city leaders held “Facebook Live and podcast panels to address voting questions and key issues . . . host[ed] a voting site open house . . . [and] deploy[ed] a voting trailer to local sites.” *Id.* The City Clerk for Muskegon, Michigan, purchased a “16-foot MTI concession trailer.” Justin Potts, *Muskegon Voting Trailer Providing Increased Voting Accessibility for Residents*, Advantage Trailer (Oct. 14, 2020), <https://www.advantagetrailer.com/blog/p.201014000/muskegon-voting-trailer-providing-increased-voting-accessibility-for-residents/>. Those tasked with “working the trailer [were] able to issue absentee ballots, collect ballots, register voters, and answer questions.” *Id.* This type of innovation helps to “create

a vibrant culture of voter engagement in even the most difficult times.” Watters & Boukdad, *supra*.

## **II. Adoption of the independent state legislature theory would lead to an impractical two-tier system of election administration.**

The independent state legislature theory only applies to state legislative decisions regarding federal elections. Therefore, if this Court embraces the theory, then there could be different rules for federal and state elections, creating a two-tier system. If county boards and city officials must administer elections with different requirements for federal offices than for state or local offices, then there would be many practical problems.

A two-tier system would create confusion surrounding ballots themselves, including procedures for mail-in ballots, regulations for administering recounts, and the information that can be printed on a ballot. Also, basic voting procedures, such as the testing and certification of voting machines, management of polling locations, and enforcement of voter identification requirements, would become extremely burdensome for local officials. Finally, a two-tier system may infringe upon the Due Process Clause of the Fourteenth Amendment.

### **A. A two-tier system would be created in some states.**

The Elections Clause of the federal Constitution applies only to federal elections. U.S. Const. art. 1, § 4, cl. 1 (addressing “Elections for Senators and Representatives” to the federal Congress). If this Court agrees with Petitioners that only state

legislatures may regulate procedures regarding federal elections, state constitutions and state court decisions would still apply to state elections. Therefore, adoption of the independent state legislature theory “could result in a two-track system where state and federal elections take place on the same day and on the same ballot, but are governed by separate sets of sometimes-conflicting rules.” 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/>.

If the Court determines that *only* state legislatures may decide “[t]he Times, Places, and Manner of holding Elections for Senators and Representatives,” U.S. Const. art. 1, § 4, cl. 1, then the laws passed by state actors other than legislators could be invalidated for federal elections. State and county boards of election administer elections and “[m]ake and issue rules, regulations, and instructions necessary for the guidance of election officers and voters.” Strach, *supra*. In North Carolina, for example, the governor appoints the state board’s members and the county boards’ members are appointed by the state board and the governor. *Id.* The state legislature does not directly oversee the NCBOE. Under the theory that only the state legislature has the power to make rules regarding federal elections, the NCBOE’s rules would be invalid.

Additionally, state legislatures might enact rules applicable to votes for federal offices that would

conflict with rules applicable to votes for state offices, because state constitutions and state court decisions would still govern state elections. *See, e.g., Akhil Reed Amar, Bush, Gore, Florida, and the Constitution*, 61 Fla. L. Rev. 945, 954 (2009) (“It is absolutely clear that the Florida Constitution does apply to [state] elections. It is equally clear that this Court—the Florida Supreme Court—is broadly empowered to protect the fundamental state constitutional right to vote in these state elections . . .”).

**B. A two-tier system would affect the processing of ballots.**

A two-tier system would produce many challenges regarding ballots. First, mail-in ballots would pose numerous problems as local officials would have to monitor such ballots carefully if there were different times and manners in which they might be accepted. Second, different standards for state and federal elections vote recounts would complicate the job of local officials. Third, local officials would be forced to spend additional money producing different state and federal ballots if there were different requirements for what must be printed on them.

**1. Different rules for mail-in ballots would necessitate new tabulation programs or waste resources in hand counts.**

In the 2016 election, “[t]hirty-two (32) million individuals cast their ballots by mail, that is either using a by-mail absentee ballot or voting in a ‘vote-by-mail’ precinct.” Stacy Nakintu & Jonathan Harris, *New NACO Data Release Highlights the Key Role of Counties in Elections*, NACo (Nov. 2, 2020), <https://www.naco.org/blog/new-naco-data-release->

highlights-key-role-counties-elections. In the 2020 election, in part due to the pandemic, 67% of people who cast an early vote did so using mail ballots. *Id.*

In 2020, the Pennsylvania Supreme Court held that the Free and Equal Elections Clause of the Pennsylvania Constitution required mail-in ballots to be counted if they were received within three days of Election Day if they were postmarked by 8:00 pm on Election Day. *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 369–72 (Pa. 2020).

If a state court could not make such a decision regarding ballots for federal offices as well as state offices, and the state legislature disagreed, then under the independent state legislature theory some mail-in ballots would count only for state elections and not for federal elections. Not only would local officials have to verify when the ballot was received, they would have to separate the ballots that could be counted only for state elections. They would either need to count those ballots by hand or somehow ensure that the voting machines did not recognize and record the votes for federal offices, which would be difficult because races for both state and federal offices are on the same ballot. Hand recounts can last days, if not weeks, which not only requires additional resources, but also allows time for disinformation to spread. See Daniel Funke, *Fact Check: No Evidence of Fraud in Georgia Election Results*, USA Today (June 1, 2021, 1:30 PM), <https://www.usatoday.com/story/news/factcheck/2021/06/01/fact-check-georgia-audit-hasnt-found-30-000-fake-ballots/5253184001/> (noting there was no evidence of fraud in the 2020 election, but “[a]nother review of ballots in Georgia's most populous county

has inspired a rash of misinformation about the results of the 2020 presidential election”).

In North Carolina, absentee balloting is governed by a combination of statutory requirements and supplemented by the NCBOE’s statutory authority to make rules implementing the statutes. *See* §§ N.C. Gen. Stat. 163-229 to -230 (2021). There are several rules for mail-in ballots, including when a voter can request one, how many witnesses are needed, how to return the ballot, how a blind or visually impaired voter can vote by mail, and how a person in a hospital or nursing home can receive assistance to vote by mail. *Vote by Mail*, NCBOE, <https://www.ncsbe.gov/voting/vote-mail#HowmanywitnessesdoIneedwhenImarkmyabsenteeballot-1901> (last visited Oct. 15, 2022). If the legislature adopted new procedures for mail-in ballots that violated the North Carolina Constitution, then county boards might have to send out two separate mail-in ballots, one for state elections and one for federal elections. If the ballots were due on different days, then election workers would need to be extra vigilant to ensure that the timely votes were counted while the late votes were not. In addition to the extra expense of having to send out twice as many mail-in ballots and the cost of having to train extra workers to compensate for the increased workload, there would be a greater chance of some ballots being counted when they should not have been or vice versa.

Voters need reassurance that election procedures produce accurate results. *See Combating Misinformation, supra*. The more complicated and complex the system is, the more voters will question an election’s integrity. *Trust in America: Do Americans trust their elections?*, Pew Research

Center (Jan. 5, 2022), <https://www.pewresearch.org/2022/01/05/trust-in-america-do-americans-trust-their-elections/> (“One consistent pattern that we’ve seen is that Americans have more trust in their local system that they’re familiar with. And contributing to that is, surely, the complexity of the overall system when you piece it all together.”). Having different federal and state requirements for mail-in ballots would not only be infeasible for local officials, it also would be likely to undermine public confidence in the election system.

**2. Different rules for inferring the intent of voters in recounts would burden local officials and undermine public confidence in election results.**

In North Carolina, “voters use paper ballots, marked either by hand or with a ballot-marking device, providing a paper trail of all votes cast that can be audited or recounted by elections officials.” *Voting Equipment*, NCBOE, <https://www.ncsbe.gov/voting/voting-equipment> (last visited Oct. 15, 2022). Recounts are often done with machine tabulators, but “partial or stray marks on the ballot may be counted differently the second time. This may result in counts that are marginally different from the initial count, by roughly a couple votes per 100,000 ballots cast.” *5 Facts About the Recount Process in North Carolina*, NCBOE, (Nov. 19, 2020, 12:00 AM), <https://www.ncsbe.gov/news/press-releases/2020/11/19/5-facts-about-recount-process-north-carolina>.

Under the independent state legislature theory, if a state legislature decided after an election that ballots had to be recounted by hand, but the state courts decided that for state elections recounting by

hand would not be feasible, local officials would need to have two different processes to recount federal versus state elections. If a state legislature enacted rules for federal elections to decide whether a bubble was fully filled in or a voter did not intend to mark a certain candidate that contradicted what the state constitution would allow, then election workers would have different criteria to apply to recounts for federal elections as opposed to state elections.

Election officials sometimes must decide if a bubble that is not completely filled in counts as a vote, if an X over a filled in bubble nullifies that vote, or if circling a candidate's name counts as a vote. *See, e.g., "Double Bubble" Ballot Trouble Goes On*, Daily News (Aug. 29, 2017, 1:52 AM), <https://www.dailynews.com/2008/02/13/double-bubble-ballot-trouble-goes-on/> (reporting that the Los Angeles County board could not count thousands of votes "because some of the bubbles on the ballot correspond to more than one presidential candidate, and . . . [the] office could [not] clearly determine which candidates people had voted for"). If there were different procedures to determine whether votes counted for federal and state elections, there would be an increase in time and money spent to recount and a decrease in public confidence that the election results were accurate.

Additionally, in North Carolina and other states, individual counties bear the cost of recounting ballots. *5 Facts About the Recount Process in North Carolina, supra*. For the recount of the state supreme court chief justice election in 2020, it was estimated that in Wake County alone the recount would cost more than \$110,000 and take more than 100 people to work on it. *Id.* The cost of recounts, both monetarily and in the

number of hours needed to complete it, would increase significantly if recounts had different rules for federal and state elections.

Recounts in the same jurisdiction for both state offices and federal offices occur. In 2018, for example, Florida initiated a recount for both the gubernatorial race between Ron DeSantis and Andrew Gillum and the United States Senate race between Rick Scott and Bill Nelson. Abigail Abrams, *Florida's Vote Counting Controversy Spells Trouble for 2020*, Time (Nov. 10, 2018, 2:45 AM), <https://time.com/5450501/florida-recount-2018/>. The margin for the Senate race was within .25%, which required a hand recount under Florida law. *Id.* The gubernatorial race only required a machine recount because it was within .44%. *Id.* If, however, both races had required a manual recount and there were different procedures regarding state and federal elections, some votes may have counted in the gubernatorial race that did not in the Senate race or vice versa.

Counties may have a difficult time paying the increased expense and finding additional workers to perform the recounts. *See Careers in Elections*, NCBOE, <https://www.ncsbe.gov/about-elections/careers-elections> (last visited Oct. 17, 2022). Recounts are burdensome enough without county boards having to cope with the different rules that could apply under Petitioners' independent state legislature theory.

### **3. Different rules for ballot content would require separate ballots for federal and state offices.**

In North Carolina, the NCBOE determines the contents of ballots. N.C. Gen. Stat. § 163-22(e) (2021). The top of the ballot lists the county and the date of the election. *Sample Ballot*, New Hanover County Board of Elections, [https://elections.nhcgov.com/wp-content/uploads/2022/08/NEW\\_HANOVER-20221108-SAMPLE-E-B0001-GEN.pdf](https://elections.nhcgov.com/wp-content/uploads/2022/08/NEW_HANOVER-20221108-SAMPLE-E-B0001-GEN.pdf) (last visited Oct. 15, 2022). The ballot also contains general instructions for filling in the ovals corresponding to the candidate the voter wishes to vote for. *Id.* Under the independent state legislature theory, if the state legislature wanted different information on ballots for federal elections than what the state constitution permits for state elections, two separate ballots would have to be printed.

California, for example, “requires that county elections officials provide a translated facsimile ballot and related instructions in a conspicuous location in precincts where 3% or more of the voting-age residents are members of a single language minority and lack sufficient skills in English to vote without assistance,” while Section 203 of the Voting Rights Act only requires election materials to be in the language of a minority group when there are “more than 10,000 or 5% of all total voting-age citizens who are members of a single language minority group, have depressed literacy rates, and do not speak English very well.” *Language Requirements for Election Materials*, California Secretary of State, <https://www.sos.ca.gov/elections/voting-resources/language-requirements> (last visited Oct. 15, 2022).

If the state legislature decided to follow the federal guidelines, but the state courts concluded that the state constitution required the 3% rule, then some counties would need to have ballots in other languages only for state elections. Election officials would have to know which language groups could receive ballots in another language for state elections but only ballots in English for federal elections. Some voters would be harmed when they would have a ballot in their language for state elections but not for federal elections.

**C. A two-tier system would result in chaotic voting procedures.**

If this Court were to adopt the independent state legislature theory, then the administration of basic voting procedures—such as the testing and certification of voting machines, management of polling locations, and enforcement of voter identification requirements—would become highly burdensome to local officials.

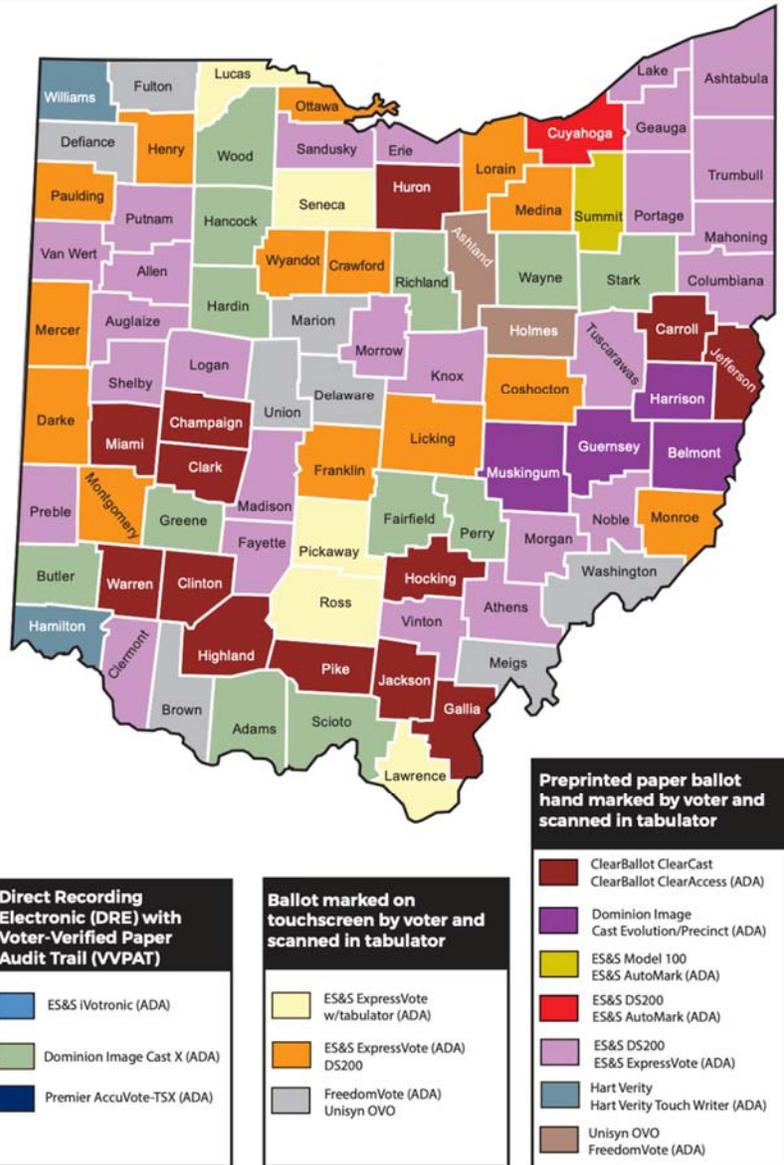
**1. Local control of voting systems and polling locations would be threatened.**

It is clear that “[v]oting machines have an integral role in ensuring the integrity of elections, and thus of protecting democracy.” *Voting System Standards, Testing and Certification*, National Conference of State Legislatures (Nov. 5, 2021), <https://www.ncsl.org/research/elections-and-campaigns/voting-system-standards-testing-and-certification.aspx>.

In many states, county boards determine which voting system to use. After a demonstration that particular systems adhere to state (and, sometimes,

federal) standards, “[l]ocal jurisdictions select and purchase voting systems.” *Id.*; see also *Voting Equipment, supra* (noting that “[e]ach of the 100 county boards of election, in conjunction with their county board of commissioners, decides which approved voting system will best serve their voters”); *Chapter 12: Voting Systems*, Ohio Secretary of State 352, <https://www.ohiosos.gov/globalassets/elections/directives/2022/eom/dir2022-16-ch12.pdf> (last visited Oct. 23, 2022) (stating that “[e]ach county selects the voting system for the county to use in all elections”); W. Va. Code § 3-4A-3 (2022) (providing that a county may adopt an approved electronic voting machine by a majority vote of the county commission).

Local control of voting systems may increase public confidence in the election process because local governments are in the best position to gauge the needs and desires of their citizenry. See Michelle Bachelet, *Cities, Local and Regional Governments and Human Rights*, United Nations Human Rights Office of the High Commissioner (Sept. 30, 2019), <https://www.ohchr.org/en/about-us/what-we-do/partnership/local-governments> (noting that “local governments are in contact with people in the most direct way”). Such control can also lead to significant variation in voting systems within a single state. For instance, the map below demonstrates the different voting systems used in Ohio:



*Voting Systems for Ohio's 88 Counties,*  
Ohio Secretary of State (Oct. 2021),  
<https://www.ohiosos.gov/globalassets/elections/maps/votingsystems.pdf>.

Under Petitioners' independent state legislature theory, however, local officials might be forced to operate two separate voting systems for state and federal elections. A state legislature could decide that only electronic voting machines would be permitted for federal elections, while some counties in that state might continue to use a paper ballot system for local elections, such as in a jurisdiction where voters place greater confidence in paper ballots. This type of scenario would inevitably lead to disorganized elections, as local officials would be required to shift between different systems, and would foster distrust of the election process.

Similarly, local officials are accountable for “managing polling locations, [and] ensuring the accessibility, integrity and efficiency of the polling process.” Eryn Hurley, *All Elections are Local: The County Role in the Elections Process*, NACo (Nov. 6, 2018), <https://www.naco.org/resources/featured/all-elections-are-local-county-role-elections-process>. Their responsibilities as to polling locations include choosing appropriate locations, “enlist[ing] local law enforcement to conduct security sweeps[,] . . . hir[ing] and train[ing] poll workers[, and] . . . prepar[ing] for a wide range of ‘hard security’ challenges at polling locations.” *Id.*

Under a two-tiered election system, the effective management of polling locations by local officials would be compromised. A state legislature would be more likely to limit or micromanage local management of polling locations. A state legislature might superimpose polling location procedures applicable only to elections for federal offices,

requiring local officials to comply with two sets of rules.

**2. Voter identification rules would become unclear.**

Another flaw of the two-tiered system that would result from Petitioners' independent state legislature theory is that it would cause disorder regarding voter identification laws. In Missouri, for example, the state supreme court held that a photo identification requirement violated the Missouri Constitution because it, unlike the federal Constitution, expressly protects the right to vote. *Weinschenk v. State*, 203 S.W.3d 201, 221–22 (Mo. 2006). If the independent state legislature theory were to be adopted, then Missouri's state legislature could require photo identification for federal elections even though such a requirement would violate the state constitution for state elections. The same thing could happen in other states.

Confusion would reign, as local officials would have to protect an individual's state constitutional right to vote for state offices without having to provide photo identification while also applying the photo identification requirement to the same citizen's attempt to vote for federal offices. This bizarre outcome would not only cause confusion for local officials, poll workers, and voters, it would also prohibit some individuals from voting in federal elections even though they could in state elections.

**D. A two-tier system would result in constitutional violations.**

This Court has long held that the Fourteenth Amendment's Due Process Clause protects the right to vote. *See, e.g., Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964) (“Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.”); *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) (“Article [I] gives persons qualified to vote a constitutional right to vote and to have their votes counted. Not only can this right to vote not be denied outright, it cannot, consistently with Article I, be destroyed by alteration of ballots, or diluted by stuffing of the ballot box. . . . Other rights, even the most basic, are illusory if the right to vote is undermined.”); *United States v. State of Tex.*, 252 F. Supp. 234, 250 (W.D. Tex. 1966) (“When . . . examined in the light of Supreme Court pronouncements describing it as our most ‘precious’ right, and as the ‘essence of a democratic society,’ it cannot be doubted that the right to vote is one of the fundamental personal rights included within the concept of liberty as protected by the due process clause.”), *aff’d*, 384 U.S. 155.

The orderly administration of elections is crucial to ensuring that the right to vote can be exercised. “If a citizen's vote is lost, changed, or even accidentally left out of a final tallying, that citizen's constitutional right has been violated, just as it would be if she were prevented from casting any vote at all.” Sarah Milkovich, Note, *Electoral Due Process*, 68 Duke

L.J. 595, 613 (2018). When election procedures are made more complex, there is a greater likelihood that votes will not be counted due to administrative error, in violation of voters’ due process rights. *See Hunter v. Hamilton Cnty. Bd. of Elections*, 635 F.3d 219, 243 (6th Cir. 2011) (stating, in regard to the categorical treatment by state law of votes cast in the wrong precinct due to poll-worker error, “[t]o disenfranchise citizens whose only error was relying on poll-worker instructions appears to us to be fundamentally unfair”).

If local officials must apply different rules to state and federal elections, there is more opportunity for human error and an increased probability that votes will be missed or miscounted. If some votes are counted for state elections but not for federal elections or vice versa—because of differences, for example, in rules for mail-in ballots, recounting ballots, or photo identification—it will be more likely that some votes will not be counted at all and those voters’ constitutional right to vote will have been violated. The independent state legislature theory would therefore not only lead to challenges in administering elections, but also to constitutional violations as the increased complexities result in citizens’ votes not being counted.

### **III. Adoption of the independent state legislature theory could complicate efforts of state actors to respond to emergencies affecting voting.**

The independent state legislature theory is also problematic because it would prevent “Governors, Secretaries of State, Boards of Election, and courts . . . [from] be[ing] able to protect voters

when an emergency arises.” Joshua A. Douglas, *Undue Deference to States in the 2020 Election Litigation*, 30 Wm. & Mary Bill Rts. J. 59, 84 (2021). Emergencies affecting an election can arise from public health crises, floods, hurricanes, earthquakes, fires, power outages, active shooter situations, and other events. *Election Emergencies*, National Conference of State Legislatures (Sept. 1, 2020), <https://www.ncsl.org/research/elections-and-campaigns/election-emergencies.aspx>.

Many states delegate authority to certain government actors in times of crisis during an election. *See, e.g.*, W. Va. Code § 3-1A-6(e)(1) (2022) (providing that during an election the Secretary of State may “implement emergency procedures . . . in the event of natural disaster . . . terrorist attack, war or general emergency”); N.C. Gen. Stat. § 163-27-1(a) (2021) (providing that the Executive Director of the NCBOE “may exercise emergency powers to conduct an election”); Ky. Rev. Stat. Ann. § 39A.100 (West 2022) (authorizing the Governor “[u]pon recommendation of the Secretary of State, to declare by executive order a different time or place for holding elections in an election area for which a state of emergency has been declared”).

These types of emergency powers are necessary when an emergency occurs on or near Election Day, which is not unusual. For example, “[t]he Atlantic Hurricane Season runs from June 1 to November 30.” *Hurricanes*, Ready NC, <https://www.readync.gov/stay-informed/north-carolina-hazards/hurricanes> (last visited Oct. 13, 2022). The “incident period” for Hurricane Sandy as defined by FEMA lasted from October 27, 2012, until November 8, 2012. *See Historic Disasters*, FEMA,

<https://www.fema.gov/disaster/historic> (last updated Jan. 4, 2022).

An emergency may affect an entire state or only part of a state. *See Election Emergencies, supra*. For instance, Florida’s governor recently issued an emergency order that “ease[s] election rules for three counties that were the hardest hit by Hurricane Ian.” Neil Vigdor, *DeSantis Eases Election Rules for Three Hurricane-Ravaged Counties*, N.Y. Times (Oct. 13, 2022), <https://www.nytimes.com/2022/10/13/us/politics/desa-ntis-election-rules-hurricane-ian.html>. The order addresses the continued aftermath of the hurricane, such as “the displacement of voters, a shortage of poll workers and disruptions to telecommunications and other utility services.” *Id.*

Of course, hurricanes are not the only emergency that can occur near Election Day. “[T]he deadliest and most destructive fire in California history,” the Camp Fire, erupted on November 8, 2018. *Cal Fire News Release*, California Department of Forestry and Fire Protection (May 15, 2019), [https://www.fire.ca.gov/media/5121/campfire\\_cause.pdf](https://www.fire.ca.gov/media/5121/campfire_cause.pdf). It is therefore clear that appropriate government actors in the executive branch or the judicial branch must be able to respond when an emergency affects election administration.

Under Petitioners’ independent state legislature theory, however, a state legislature could override the efforts of other government actors to respond to emergencies affecting voting for *federal* offices, exercising unitary power to control the manner of federal elections. But emergency actions as to voting for state offices would still be subject to state

constitutional law and ultimately reviewable by the courts. Emergency actions to protect voting in times of crisis should apply equally to votes for federal offices and votes for state offices, without this additional possibility of confusion that the independent state legislature theory would create.

In sum, the need for action during emergencies that applies equally to federal and state voting is another reason that Petitioners' independent state legislature theory should be rejected.

### CONCLUSION

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

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