No. 21-248

IN THE

Supreme Court of the United States

PHILIP E. BERGER, et al.,

Petitioners,

v.

NORTH CAROLINA STATE CONFERENCE OF THE NAACP, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF *AMICUS CURIAE* HONEST ELECTIONS PROJECT IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Honest Elections Project is a nonpartisan organization devoted to supporting the right of every lawful voter to participate in free and honest elections. Through public engagement, advocacy, and public-interest litigation, the Project defends the fair, reasonable measures that legislatures put in place to protect the integrity of the voting process. The Project supports commonsense voting rules and opposes efforts to reshape elections for partisan gain. It has a significant interest in this case, as it implicates the legislature's preeminent role in setting the rules for elections.

INTRODUCTION & SUMMARY OF ARGUMENT

The Constitution gives states a special role in regulating federal elections. But rather than vesting that power in "each state as an entity," the Constitution vests it in "a particular organ of state government"—the state *legislature*. Michael T. Morley, *The Independent State Legislature Doctrine*, 90 Fordham L. Rev. 501, 503 (2021). Sometimes known as the independent state legislature doctrine, Article I's Elec-

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[1] Pursuant to this Court's Rule 37.6, counsel for *amicus curiae* certify that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus curiae* or its counsel has made a monetary contribution to the preparation or submission of this brief. The parties have consented to its filing.

tions Clause and Article II's Electors Clause grant authority to each state's "Legislature" to regulate the "Manner" of conducting congressional elections and appointing presidential electors. *See* U.S. Const. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the *Legislature* thereof." (emphasis added)); *id.* at art. II, § 1, cl. 2 ("Each State shall appoint, in such Manner as the *Legislature* thereof may direct, a Number of Electors" to select the president. (emphasis added)). The Constitution thus makes state legislatures the key constitutional actors in this space.

In addition to the constitutional text, both history and this Court's precedents confirm this view. While the Court briefly revisited the independent state legislature doctrine last Term, it has yet to "make it clear" that the doctrine is our law. *Republican Party of Pa. v. Degraffenreid*, 141 S. Ct. 732, 735 (2021) (Thomas, J., dissenting from denial of certiorari).

It should do so here. Given its "direct grant of authority under the United States Constitution," "only the [North Carolina] Legislature ... has plenary authority to establish the manner of conducting" federal elections in North Carolina. *Carson v. Simon*, 978 F.3d 1051, 1060 (8th Cir. 2020) (per curiam) (quoting *Bush v. Palm Beach Cnty. Canvassing Bd.*, 531 U.S. 70, 76 (2000)). The state legislature exercised that authority in 2018 by passing a new voter ID law, S.B. 824, and it seeks to defend that exercise of authority here.

The legislature's interest is evident. And Petitioners are uniquely well suited to defend North Carolina's voter ID law. As Judge Wilkinson explained below, "The North Carolina photo ID law provides a clear example of prescribing the "Manner of holding Elections." Pet. App. 53-54 (Wilkinson, J., dissenting). And the "important task" of "prescrib[ing]" the "Manner of holding Elections" was not delegated to state government in general but to state legislatures in particular." *Id.* Allowing the North Carolina legislature to intervene and defend its law thus honors the principles underlying the Elections and Electors Clauses and the independent state legislature doctrine.

The Court should allow the North Carolina state legislature to intervene. The decision below should be reversed.

ARGUMENT

The Fourth Circuit held that the legislature could not intervene because the executive was an adequate representative. In an ordinary case, state executives may or may not adequately defend state law. But cases challenging state election laws are not ordinary cases. In election cases, the Constitution speaks to who the state is, whose interests are most implicated, and who is best served to speak for the State and its citizens: the state legislature.

Under the independent state legislature doctrine, state legislatures have a preeminent role over state election laws. That special constitutional status

should have led the lower courts to grant Petitioner's intervention.

I. The Constitution Vests State Legislatures With Plenary Authority Over Federal Elections.

Elections are "of the most fundamental significance under our constitutional structure." *Ill. Bd. of Elections v. Socialist Workers Party,* 440 U.S. 173, 184 (1979). Rather than vesting the power to regulate elections to "each state as an entity," the Constitution vests it in "a particular organ of state government"—the state *legislature*. Morley, 55 Georgia L. Rev. at 503. Article I's Elections Clause and Article II's Electors Clause grant authority to each state's "Legislature" to regulate the "Manner" of conducting congressional elections and appointing presidential electors. *See* U.S. Const. art. I, § 4, cl. 1; *id.* at art. II, § 1, cl. 2. With these delegations of power, the Constitution vests state legislatures with "plenary" authority over federal elections. *Bush v. Gore*, 531 U.S. 98, 104 (2000) (per curiam).

The Constitution clearly makes state legislatures the key constitutional actors when it comes to regulating elections. Indeed, "this vested authority" over elections "is not just the typical legislative power exercised pursuant to a state constitution. Rather, when a state legislature enacts statutes governing presidential elections, it operates 'by virtue of a direct grant of authority' under the United States Constitution." *Carson*, 978 F.3d at 1060. That direct grant of authority over election rules necessarily bars other state officials from second-guessing the legisla-

ture's actions. *See McPherson v. Blacker*, 146 U.S. 1, 25 (1892) ("[T]he legislature possesses plenary authority to direct the manner of appointment[.]"); *id.* at 27 (power belongs "to the legislature exclusively"). "In fact, a legislature's power in this area is such that it 'cannot be taken from them or modified' even through "their state constitutions.*"* *Carson*, 978 F.3d at 1060 (quoting *McPherson*, 146 U.S. at 55); *see also Bush v. Gore*, 531 U.S. at 112-13 (Rehnquist, J., concurring); *Palm Beach*, 531 U.S. at 76-77.

History confirms this reading. "[This] Court, several state supreme courts, and both chambers of Congress employed [the independent state legislature] doctrine during the nineteenth century." Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, 55 Georgia L. Rev. 1, 9 (2020). Indeed, "[a]s early as the Massachusetts Constitutional Convention of 1820, it was understood that state constitutions were legally incapable of limiting the state legislature's power over congressional and presidential elections." *Id.* at 38. When a delegate introduced a provision attempting to "limit" the state legislature's "exercise of [] discretion" in redistricting, another delegate—Justice Joseph Story—explained that the Convention had no "right to insert in [the state] constitution a provision which controls or destroys a discretion ... which must be exercised by the Legislature, in virtue of powers confided to it by the constitution of the United States." *Id.* at 40 (quoting *Journal of Debates and Proceedings in the Convention of Delegates, Chosen to Revise the Constitution of Massachusetts* 3 (Boston Daily Advertiser, rev. ed. 1853)). The

amendment was subsequently defeated on that basis. *Id.* Michigan Supreme Court Justice Thomas Cooley's 1890 treatise ascribed to the view: "So far as the election of representatives in Congress and electors of president and vice president is concerned, the State constitutions cannot preclude the legislature from prescribing the 'times, places, and manner of holding' the same, as allowed by the national Constitution." *Id.* at 9 (citing Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 754 n.1 (6th ed. 1890)). Those examples are just the tip of the iceberg. *See id.* at 37-92.[2]

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[2] Moreover, the term "legislature" was not "'of uncertain meaning when incorporated into the Constitution.'" *Smiley v. Holm*, 285 U.S. 355, 365 (1932) (quoting *Hawke v. Smith*, 253 U.S. 221, 227 (1920)). "This Court has accordingly defined 'the Legislature' in the Elections Clause as '*the representative body* which ma[kes] the laws of the people.'" *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 825 (2015) (Roberts, C.J., dissenting) (quoting 285 U.S. at 365). And "every state constitution from the Founding Era that used the term legislature defined it as a distinct multimember entity comprised of representatives." *Id.* at 828 (quoting Michael T. Morley, *The Intratextual Independent "Legislature" and the Elections Clause*, 109 Nw. U. L. Rev. Online 131, 147, & n. 101 (2015)). "Indeed, [this] Court adopted this interpretation of the term for purposes of Article V of the Constitution, which empowers the "Legislature" of each state to ratify constitutional amendments." Morely, 90 Fordam L. Rev at 550. Accordingly, "from a plain meaning, original understanding, and intratextual approach, a state's institutional legislature is the only state entity that may regulate federal elections without relying on a

This Court's precedents also confirm this reading. "For more than a century, this Court has recognized that the Constitution 'operat[es] as a limitation upon the State in respect of any attempt to circumscribe the legislative power' to regulate federal elections." *Republican Party* of *Pa.*, 141 S. Ct. at 733 (Thomas, J., dissenting from denial of certiorari) (quoting *McPherson,* 146 U.S. at 25). This Court has confirmed time and again that "these provisions delegate sweepingly broad authority" to state legislatures. Morley, 55 Georgia L. Rev. at 16. For example, the Election Clause's "comprehensive words":

> embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, *prevention of fraud and corrupt practices*, counting of votes, duties of inspectors and canvassers, and making and publication of elec-

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statutory delegation of authority." *Id.* And in any event, North Carolina's legislative power is vested in the North Carolina Legislature. *See* N.C. Const. art. II, § 1; *see also* N.C. Gen. Stat. § 1-72.2 ("[i]t is the public policy of the State of North Carolina that ... the General Assembly, jointly through the Speaker of the House of Representatives and the President Pro Tempore of the Senate, constitutes the legislative branch of the State of North Carolina); *N.C. Tpk. Auth. v. Pine Island, Inc.*, 265 N.C. 109, 114 (1965).

> tion returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.

Id. (quoting *Smiley*, 285 U.S. at 366 (cleaned up)).

In *McPherson v. Blacker*, this Court considered a challenge to a Michigan law that apportioned presidential electors by district. 146 U.S. at 1. Specifically, the Court addressed whether the "state legislature, as a body of representatives, could divide authority to appoint electors across each of the State's congressional districts." *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. at 839-40. The Court rejected the challenge and upheld the law, emphasizing that "the plain text of the Presidential Electors Clause vests the power to determine the manner of appointment in 'the Legislature' of the State." *Id.* "That power, the Court explained, '*can neither be taken away nor abdicated*.'" *Id.* (quoting *McPherson*, 146 U.S. at 35; emphasis added). Indeed, the Court concluded that the Electors Clause "leaves it to the legislature exclusively to define the method of effecting the object." *McPherson*, 146 U.S. at 27.

The Court unanimously affirmed that principle in *Palm Beach*, which considered a ruling by the Florida Supreme Court governing the 2000 presidential recount. 521 U.S. at 72-76. The Court reaffirmed *McPherson* and expressed the concern that the Florida Supreme Court may have "construed the Florida Election Code without regard to the extent to which

the Florida Constitution could, consistent with Art. II, § 1, cl. 2, 'circumscribe the legislative power.'" *Id.* at 76-77 (quoting *McPherson*, 146 U.S. at 25). Because the Florida Supreme Court's application of the Elections Code prescribed by the state legislature may have been tainted by consideration of the state constitution, this Court vacated the state-court ruling and remanded. *Id.* at 78.

The Court has more recently grappled with this issue too. At least four members of this Court recognized the independent state legislature doctrine just last Term:

- "The Constitution gives to each state legislature authority to determine the 'Manner' of federal elections. Yet both before and after the 2020 election, nonlegislative officials in various States took it upon themselves to set the rules instead." *Republican Party of Pa.*, 141 S. Ct. at 732-33 (2021) (Thomas, J., dissenting from denial of certiorari) (cleaned up)); *see also id.* at 733 ("Because the Federal Constitution, not state constitutions, gives state legislatures authority to regulate federal elections," the lower court's decision "violated the Constitution by overriding 'the clearly expressed intent of the legislature.'" (quoting *Bush v. Gore*, 531 U.S. 98, 120 (2000) (Rehnquist, C. J., concurring)));

- "The provisions of the Federal Constitution conferring on state legislatures, not state courts, the authority to make rules governing

federal elections would be meaningless if a state court could override the rules adopted by the legislature simply by claiming that a state constitutional provision gave the courts the authority to make whatever rules it thought appropriate for the conduct of a fair election." *Republican Party of Pa. v. Boockvar*, 141 S. Ct. 1, 2 (2020) (Alito, J., concurring in denial of motion to expedite);

- "[U]nder the U.S. Constitution, the state courts do not have a blank check to rewrite state election laws for federal elections." *Democratic Nat'l Comm. v. Wis. State Legis.*, 141 S. Ct. 28, 34 n.1 (2020) (Kavanaugh, J., concurring in denial of application to vacate stay); *see also id.* ("the text of the Constitution requires federal courts to ensure that state courts do not rewrite state election laws");

- "The Constitution provides that state legislatures—not federal judges, not state judges, not state governors, not other state officials—bear primary responsibility for setting election rules." *Id.* at 29-30 (Gorsuch, J., concurring in denial of application to vacate stay).

But the full Court has yet to "make it clear" that these are the rules. *Republican Party of Pa.*, 141 S. Ct. at 734 (Thomas, J., dissenting from denial of certiorari).

II. The Independent State Legislature Doctrine Should Have Led The Lower Courts to Grant Petitioner's Intervention.

This Court should reaffirm the independent state legislature doctrine in this case. The doctrine affects how each of the intervention factors should be weighed in cases, like this one, that involve challenges to democratically enacted election laws. It means that, "'by virtue of a direct grant of authority under the United States Constitution,' 'only the [North Carolina Legislature ... has plenary authority to establish the manner of conducting the presidential election in [North Carolina].'" *Carson*, 978 F.3d at 1060 (quoting *Palm Beach*, 531 U.S. at 76). The North Carolina Legislature exercised that authority in 2018 by passing a new voter ID law, S.B. 824, and it seeks to defend that authority here.

The state legislature's interest in defending this law is evident. And Petitioners are uniquely well suited to defend North Carolina's voter ID law. As Judge Wilkinson noted below, "The North Carolina photo ID law provides a clear example of prescribing the 'Manner of holding Elections.'" Pet. App. 53-54 (Wilkinson, J., dissenting). And the "important task" of "prescrib[ing]" the "Manner of holding Elections" was "not delegated to state government in general but to state legislatures in particular." *Id.* Allowing the North Carolina legislature to intervene and defend its law thus honors the principles underlying

the Elections and Electors Clauses and the independent state legislature doctrine.[3]

This principle is especially important where, as in North Carolina, a state has divided government. Indeed, in such a state, "the danger that the executive or judicial branches may seek to override the constitutionally prescribed legislative role is more than theoretical." *Id.* at 54. Here, Petitioners and the State Board Respondents have "differing perspectives" as a "product of their different relationships to the State." Pet. Br. at 48-49. While "Petitioners hail from the state legislature and thus seek to focus entirely on defending the constitutionality of the law the legislature passed," the State Board Respondents "are responsible for overseeing elections and have made obtaining readily implemented guidance from the courts a primary focus of their litigation conduct." *Id.* Because of this, the state legislature's unique interest "cannot be adequately represented in Petitioners' absence." *Id.* Moreover, North Carolina

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[3] Aside from the state legislature clearly meeting the common law criteria for intervention, North Carolina law expressly provides that the state legislature "shall be necessary parties" in any action where "the validity or constitutionality of an act" of the legislature is challenged (including a challenge to a provision of the State Constitution). *See* N.C. Gen. Stat. § 120-32.6(b). Additionally, the state legislature shall also be lead counsel and have "final decision-making authority" when defending such actions in conjunction with other state actors. *Id.* at (b), (c).

"state law further authorizes the General Assembly to retain counsel of its own choosing and not necessarily the Attorney General, thus contemplating that the General Assembly might find the Attorney General's counsel inadequate or otherwise undesirable." App. 65 (Niemeyer, J., dissenting) (citing N.C. Gen. Stat. § 1-72.2(b)). This "confluence of factors" counsels towards recognizing a right to intervene here. App. 54 (Wilkinson, J., dissenting).

* * *

In the end, "[c]onfidence 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) (per curiam). But "unclear [election] rules threaten to undermine [our constitutional] system." *Republican Party of Pa.*, 141 S. Ct. at 734 (Thomas, J., dissenting from denial of certiorari). "They sow confusion and ultimately dampen confidence in the integrity and fairness of elections." *Id.* Disputes over "who has authority to set or change those rules"—or who has the power to defend them—are chief among them. *Id.* As explained, the constitutional text, history, and precedent show that the authority to regulate federal elections rests with state legislatures. This Court should "make [that] clear" now by reaffirming the independent state legislature doctrine and allowing Petitioners to intervene. *Id.*

CONCLUSION

For these reasons and more, the Court should reverse the decision below.

Respectfully submitted,

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