No. 21-1271

IN THE

Supreme Court of the United States

TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of Representatives, *et al.*,

Petitioners,

—v.—

REBECCA HARPER, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE NORTH CAROLINA SUPREME COURT

BRIEF OF BENJAMIN L. GINSBERG AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF OF BENJAMIN L. GINSBERG AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE**

Benjamin L. Ginsberg is an expert in election law who has spent his career working in the trenches of Republican politics. Mr. Ginsberg practiced law for 38 years before retiring in 2020.

During that time, he represented numerous political parties, political campaigns, candidates, members of Congress and state legislatures, governors, and others in matters including federal and state campaign finance laws, redistricting, ethics and gifts rules, pay-to-play laws, election administration, government investigations, communications law, and election recounts and contests. He served as counsel to all three Republican national party committees and represented four of the past six Republican presidential nominees (including, through his former law firm, President Trump's 2020 Campaign). He also served as counsel to the Republican Governors Association. Mr. Ginsberg has extensive experience on the state legislative level through four decades of assisting with state and local campaigns, recounts and redistricting, including organizing Republican legal efforts as chief counsel to the Republican National Committee from 1989–1993 when Republicans put in place the maps that ended 40 unbroken years of Democratic control of the House of Representatives. He played a central role in the 2000 Florida recount

* No party or party's counsel authored or financially supported any part of this brief. The parties have consented to its filing.

(during which he fought Democrats' efforts to throw out thousands of ballots), as well as several dozen Senate, House, and state election contests. Mr. Ginsberg also co-chaired the bipartisan 2013 Presidential Commission on Election Administration.

Having spent his professional life in Republican politics and public service Mr. Ginsberg is a strong believer in the importance of protecting free and fair elections, ensuring that our elections are run in a manner that bolsters voter confidence and trust in the political process, and respecting states' roles in administering state laws free from unwarranted federal interference. He therefore has a strong interest in ensuring that elections are conducted in a manner consistent with these principles. Because Petitioners' proposed interpretation of the independent state legislature theory threatens to undermine these principles, Mr. Ginsberg submits this brief in support of Respondents in this case.

INTRODUCTION & SUMMARY OF ARGUMENT

Our democracy depends on a shared understanding that our leaders are chosen by the vote of the people through free and fair elections. If the American people lose faith in that core tenet of our democratic system, it places our entire system of governing and sense of ourselves as a country in peril. Unfortunately, because of ongoing and widespread efforts to sow distrust and spread disinformation, confidence in our elections is at a low ebb. The version of the independent state legislature (ISL) theory advanced by Petitioners in this case threatens to make a bad situation much worse, exacerbating the current moment of political polarization and further undermining confidence in our elections.

Amicus believes that the ISL theory as advanced by Petitioner is wrong as a matter of law, but writes here to emphasize the practical implications if adopted by this Court. In short, it would upset settled expectations and create untenable legal uncertainty around elections; cause confusion for election administrators and voters; increase the odds that state legislatures replace the popular vote with their own political preferences; and flip our system of state and local control of elections on its head by making *federal* courts resolve election disputes—many in an emergency posture—at an unprecedented scale; all at a time when our country can least withstand it.

ARGUMENT

Elections only work when citizens trust that they are fundamentally fair and that their votes and those of their fellow citizens determine their elected representatives. It is this trust that all the ballots will be counted fairly and that the results reflect that count that leads us to participate in elections and accept the final results. *See, e.g.*, *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 197 (2008) (opinion of Stevens, J.); *DNC v. Wisconsin State Legislature*, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J., concurring in denial of stay). That trust is difficult to build but easy to squander.

A critical component of building that trust is "clear and unambiguous rules for the conduct of the election established well in advance of Election Day" so that Americans can be "confident that the results of the election reflect their decision, not a litigated outcome determined by lawyers and judges." Report on the Commission on Federal Election Reform, *Building Confidence in U.S. Elections*, at 6 (Sept. 2005). As a

result, this Court has properly emphasized in recent years that election rules "must be clear and settled" in advance of the election, and that "[l]ate judicial tinkering" by federal courts must be avoided. *Merrill v. Milligan*, 142 S. Ct. 879, 880–81 (2022) (Kavanaugh, J., concurring).

The Court's recent work to ensure clear election rules and to extricate the federal courts from last-minute election disputes will be for naught should it adopt Petitioners' position. This Court has recognized that state constitutional rules and checks and balances properly constrain state legislatures when regulating federal elections. Reversing this, as Petitioners seek, would put this Court in precisely the position that the *Purcell* line of cases has sought to avoid: being the last-minute referee of election disputes under an unclear set of overlapping rules impossible to resolve without widespread voter confusion and decreased confidence in the fairness of our electoral system. *See generally Purcell v. Gonzalez*, 549 U.S. 1 (2006).

The possible consequences of injecting so much doubt and confusion into our electoral system are severe. Our democracy depends on trust in elections, and lingering distrust from the 2020 election is already pushing our system to a dangerous state of instability. And "[i]f the American people lose trust that our elections are free and fair, we will lose our democracy" because democracy does not work "when you drain all the trust out of the system.'"[1]

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[1] Sen. John Danforth et al., *Lost, Not Stolen The Conservative Case that Trump Lost and Biden Won the 2020 Presidential Election*, at 1 (July 2022), https://lostnotstolen.org/wp-content/uploads/2022/07/Lost-Not-Stolen-The-Conservative-Case-that-Trump-Lost-and-Biden-Won-the-2020-Presidential-Election-

Accordingly, *amicus* urges the Court to refuse Petitioner's attempt to re-write the constitutional framework governing the last century of election law. Now is a particularly tenuous time to launch a novel experiment with our democracy based on a novel reading of previously settled law.

I. Petitioners' proposed version of the independent state legislature theory would unsettle established elections practices

Over the past century, this Court has repeatedly recognized that state constitutions and state checks and balances constrain state legislatures even when state legislatures regulate federal elections. *See, e.g*, *Davis v. Hildebrant*, 241 U.S. 565 (1916) (redistricting power subject to referendum); *Smiley v. Holm*, 285 U.S. 355 (1932) (redistricting power subject to gubernatorial veto). Indeed, that principle has twice been reaffirmed by this Court in the past decade. *See Arizona State Legislature v. Az. Independent Redistricting Comm'n*, 576 U.S. 787, 808–09 (2015) (explaining that redistricting power is subject to voter initiative); *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019) (explaining the ability of state constitutional law to constrain state legislative action under Article I, Section 4 of the U.S. Constitution).

As a result of that consistent jurisprudence, federal elections are currently regulated by a combination of federal law, state constitutional law, state statutory law, and state regulatory law, and frequently tempered by state judicial interpretations. And, from

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July-2022.pdf; *see also Purcell*, 549 U.S. at 4–5 ("Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy.").

an elections administration standpoint, that system—while by no means perfect, and greatly strengthened by bipartisan efforts to improve the system after the 2000 election—fundamentally works to count every lawful ballot case in a fast, accurate, and verifiable manner. Last election, for example, this country's election officials counted the most ballots ever in a fair, transparent, and verifiable manner, even in the middle of an historic pandemic. The results from that election were repeatedly shown to be correct, notwithstanding an unprecedented number of unsuccessful efforts to discredit them. *See Lost, Not Stolen: The Conservative Case that Trump Lost and Biden Won the 2020 Presidential Election, supra*, at 1–6.

Petitioners' proposed new constitutional test would damage the integrity of our election system in at least three ways. First, by calling into question the now-accepted role of state constitutions, state regulations, state court decisions, and potentially even gubernatorial vetoes in governing the conduct of federal elections, Petitioners' test will introduce perpetual confusion as to what rules (and the proper interpretation of those rules) should be applied in federal elections. Second, Petitioners' test would greatly complicate election administration, because it would force many state and local election officials to regularly run two sets of elections—one for state elections (where all state laws and state court rulings would apply) and one for federal elections (where at least some state laws and state court rulings would not apply). And third, Petitioners' test will channel election litigators to the federal courts to unleash years—if not decades—of last-minute election litigation that will further increase voter confusion and distrust.

A. Adoption of the version of the ISL theory advanced by Petitioners would upend settled law governing federal elections and make the actual rules and procedures governing federal elections unclear, potentially for years

As noted, over a century of this Court's precedent has recognized that ordinary state checks and balances apply to state legislatures when they are regulating federal elections. As a result, state constitutional provisions regularly regulate federal elections, including:

- regulating mechanisms for picking a winner;[2]
- requiring public counting of ballots;[3]
- mandating or prohibiting that voters have particular voting options;[4]
- regulating voter registration and absentee voting;[5]
- mandating secret ballots;[6]

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[2] *See, e.g.*, Or. Const. art. II, § 16; Fla. Const. art. 6, § 1. Likewise, voter-initiated statutes can also play a similar role in regulating aggregation methods. *See, e.g.*, 2020 Alaska Laws Initiative Meas. 2, § 24 (I.M. 2) (amending Alaska St. § 15-15-350).

[3] *See, e.g.*, La. Const. art. XI, § 2; Va. Const. art. 2, § 3.

[4] *See, e.g.*, Mich. Const. art. 2, § 4(c) (requiring straight ticket voting option); Nev. Const., art. 2, § 1A (setting list of specific rights the voter has); Ohio. Const. art. V., § 2a (prohibiting straight ticket voting); Wyo. Const. art. 6, § 11 ("But no voter shall be deprived the privilege of writing upon the ballot used the name of any other candidate.").

[5] *See, e.g.*, Del. Const. art. 4, 4A, 4B; Mich. Const. art. 2, § 4(d)-(g); Miss Const. art. 12, § 251; Or. Const. art. 2, § 2(1)(c); Va. Const. art. 2, § 2; *cf.* La. Const. art. XI, § 2 ("[T]he legislature shall provide a method for absentee voting.").

[6] *See, e.g.*, Idaho Const. art. VI, § 1; Wis. Const. art. III, § 3.

- specifying ballot design;[7]
- regulating ballot access;[8]
- privileging electors from certain arrests;[9]
- permitting voting machines;[10]
- specifying voting locations;[11]
- creating electoral crimes;[12]
- requiring voter ID;[13] and
- regulating districting processes.[14]

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[7] *See, e.g.*, Mich. Const. art 2., § 4; Va. Const. art. 2, § 3; W. Va. Const. art. 4, § 3.

[8] *See, e.g.*, Fla. Const. art. 6, § 1 ("The requirements for a candidate with no party affiliation or for a candidate of a minor party for placement of the candidate's name on the ballot shall be no greater than the requirements for a candidate of the party having the largest number of registered voters.").

[9] *See, e.g.*, Del. Const. art 5 § 5; La. Const. art. XI, § 3; Va. Const. art. 2, § 9.

[10] *See, e.g.*, Ark. Const. amend. 50, *repealing* Ark. Const. art. 3, § 3.

[11] *See, e.g.*, Ore. Const. art. II, § 17.

[12] *See, e.g.*, Del. Const. art. 5, §§ 3, 7, 8.*Cf.* Pa. Const. art. 7, § 7 (" Any person who shall give, or promise or offer to give, to an elector, any money, reward or other valuable consideration for his vote at an election, or for withholding the same, or who shall give or promise to give such consideration to any other person or party for such elector's vote or for the withholding thereof, and any elector who shall receive or agree to receive, for himself or for another, any money, reward or other valuable consideration for his vote at an election, or for withholding the same, shall thereby forfeit the right to vote at such election."); Vt. Const. Ch. II, § 55 ("[A]ny elector who shall receive any gift or reward for the elector's vote, in meat, drink, moneys or otherwise, shall forfeit the right to elect at that time[.]").

[13] *See, e.g.*, Ark. Const. art. 3, § 1; Miss. Const. art. 12, § 249A.

[14] *See, e.g.*, Fla. Const. art. 3, § 20 ("No apportionment plan or individual district shall be drawn with the intent to favor or

And that's just a sampling: "[n]early all state constitutions have an article or section specifically governing elections, and most of these contain one or more original (unamended) provisions that implicate the Elections Clause." Nathaniel Persily et al., *When is a Legislature not a Legislature? When Voters Regulate Elections by Initiative*, 77 Ohio St. L.J. 689, 720 (2016).

The widespread nature of state constitutional provisions regulating federal elections means that adopting Petitioners' constitutional theory would have widespread collateral damage across our electoral system. Precisely because "multiple actors in the political system have, for some time, believed that the Elections Clause did not prevent these kinds of regulations" "the consequences of a restrictive reading of the Elections Clause would be so far-reaching and destabilizing that it would call into question practices that have been settled for a century or more." *Id.* at 708.

But the potential damage to our existing electoral system doesn't end there. Because state constitutions have been understood to regulate federal elections, state courts—as the definite expositors of state constitutions—have long been understood to have the power of judicial review over state election laws.[15]

disfavor a political party or an incumbent."); Idaho Const. art. III, § 2; N.J. Const. art. 2, § 2, para. 1; Va. Const. art. II, § 6.

[15] *See, e.g.*, *Albence v. Higgin*, No. 342, 2022, 2022 WL 5333790, at *1 (Del. Oct. 7, 2022) (striking down Delaware vote-by-mail and same-day registration statutes as conflicting with state constitution); *Harkenrider v. Hochul*, ___ N.E.3d ___, 2022 WL 1236822, at *11-13 (N.Y. 2022) (congressional maps violate state constitution); *Adams v. DeWine*, ___ N.E.3d ___, 2022 WL 129092, at *20 (Ohio 2022) (congressional map violates state constitution); *Priorities USA v. Missouri*, 591 S.W.3d 448, 455 (Mo. 2020) (affidavit requirement in state voter ID law violates state constitution); *Patterson v. Padilla*, 451 P.3d 1171, 1191 (Cal. 2019)

What would happen to those prior judicial decisions if this Court adopts Petitioners' version of the ISL

(statute governing ballot access for presidential candidates violates state constitution); *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737, 821 (Pa. 2018) (congressional map violates state constitution); *League of Women Voters of Fl. v. Detzner*, 172 So. 3d 363, 416–17 (Fla. 2015) (congressional map violates state constitutional map drawing rules); *Guare v. State*, 117 A.3d 731, 741 (N.H. 2015) (statutorily mandated language on state voter registration forms violates right to vote in state constitution); *Martin v. Kohls*, 444 S.W.3d 844, 852–53 (Ark. 2014) (voter ID law violates state constitution); *Applewhite v. Commonwealth*, No. 330 M.D. 2012, 2014 WL 184988, at *18 (Pa. Comm. Ct. 2014) (striking down voter ID requirement for violating state constitution's right to vote); *Nader for President 2004 v. Maryland State Bd. of Elections*, 926 A.2d 199, 201 (Md. 2007) (statutory provision unconstitutionally applied to invalidate 542 signatures on petition to be placed on presidential ballot); *Lamone v. Capozzi*, 912 A.2d 674, 697 (Md. 2006) (statute providing for early voting violates state constitution); *Weinschenk v. Missouri*, 203 S.W.3d 201, 221–22 (Mo. 2006) (voter ID law violates state constitution's equal protection guarantee); *Salazar v. Davidson*, 79 P.3d 1221 (Colo. 2003) (striking down redistricting as violating state constitution), *cert denied*, 541 U.S. 1093 (2004); *Michigan State UAW Cmty. Action Program Council (CAP) v. Austin*, 198 N.W.2d 385, 390 (Mich. 1972) (voter purge statute violates state constitution); *McCall v. Automatic Voting Mach. Corp.*,180 So. 695, 697 (Ala. 1938) (law providing for use of voting machines violates guarantee of uniform elections in state constitution); *Moran v. Bowley*, 179 N.E. 526, 531–32 (Ill. 1932) (congressional districting violates state constitution); *Perkins v. Lucas*, 246 S.W. 150, 156–57 (Ky. 1922) (voter registration law that limited registration to a single day violated state constitution's guarantee of free and equal elections); *Whitney v. Findley*, 19 P. 241, 242–43 (Nev. 1888) (registration statute requiring voter oath that voter is not a member of Mormon Church violates state constitution); *Nevada v. Connor*, 34 N.W. 499, 502–03 (Neb. 1887) (statute requiring voter registration on one of four days violates state constitution); *White v. Cnty. Comm'rs of Multnomah Cnty.*, 10 P. 484, 487–88 (Ore. 1886) (voter registration statute violates state constitution); *Page v. Allen*, 58 Pa. 338, 350–51 (1868) (voter registration law violates state constitution).

theory? Would the invalidated (or in the case of constitutional avoidance, narrowed) provisions of state law become good law? *See, e.g.*, Jonathan F. Mitchell, *The Writ of Erasure Fallacy*, 104 U. Va. L. Rev. 933 (2018). What would be the result if a state legislature subsequently passed different election regulations in between? What set of rules would govern? These are just some of the many difficult questions that would need to be resolved should the Court adopt Petitioners' argument (and that is even before we consider what would happen to previously enacted referendums and vetoed legislative enactments were this Court to disavow either *Hildebrant* or *Smiley* on the grounds that neither referendums nor the governor constitute the "legislature").

Finally, Petitioners' rule would also destabilize the state administrative law of elections. In particular, Petitioners suggest that the Elections Clause imposes a federal non-delegation doctrine limiting a state legislature's ability to delegate responsibility for election administration.[16] It is difficult to overstate the potential impacts and confusion that would emanate from the adoption of such a rule. There is a long tradition dating back to even the early republic of delegating responsibility for the administration of elections to local election officials. *See* Mark S. Krass, *Debunking the Nondelegation Doctrine for State Regulation of Federal Elections*, 108 Va. L. Rev. 1091, 1096–97 (2022). Unsurprisingly then, numerous states have regulations governing the conduct of elections, and the legality of those delegations and resulting administrative actions has been judged traditionally under state constitutional and statutory

[16] Pet. Br. at 12 ("Any delegation of this legislative power would be itself unconstitutional under the Elections Clause").

frameworks governing state administrative law. *See id.* at 1098; n.24. The result is that state and local elections officials can be—and have been—vested with an enormous amount of discretion over a wide variety of issues.[17]

Moreover, the breadth of the statutory provisions potentially implicated by a new Elections-Clause-based non-delegation doctrine is equaled by the potential difficulty in articulating and applying such a doctrine. After all, the fifty states are not simply fifty mini-federal governments with identical divisions of roles, responsibilities, and powers; instead, they

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[17] *See, e.g.*, Ariz. Rev. Stat. § 16-452(A) ("The secretary of state shall also adopt rules regarding fax transmittal of unvoted ballots, ballot requests, voted ballots and other election materials to and from absent uniformed and overseas citizens and shall adopt rules regarding internet receipt of requests for federal postcard applications prescribed by section 16-543."); Kan. Stat. Ann. § 25-106 (election officials can keep polls open during any 12-hour period, starting at 6am and ending between 7pm and 8pm); N.C. Gen. Stat. § 163-128(a) (county board of elections may "establish, alter, discontinue, or create such new election precincts or voting places as it may deem expedient"); N.C. Gen. Stat. § 163-227.6 (county board of elections can establish voting locations for early voting); N.C. Gen. Stat. §163-227.2(h) (early voting occurs on weekdays during business hours, but local election officials may choose to also hold the elections on evenings or weekends); Nev. Rev. Stat.§ 293.3576(5) ("The hours that early voting will be conducted at each polling place for early voting may be extended at the discretion of the county clerk after the schedule is published pursuant to this section."); Utah Code Ann. § 20A-3a-602(1) ("Except as provided in [the section relating to emergencies], the election officer shall determine the times for opening and closing the polls for each day of early voting provided that voting is open for a minimum of four hours during each day that polls are open during the early voting period."); *see also* S.C. Code Ann. § 7-11-20(B)(1) (empowering the state committee of each party to set date for presidential primary elections).

have different administrative law traditions, no doubt partially traceable to the fact that states have varying constitutional structures and limitations on the powers of the relative branches based on their own founders' views of the best constitutional structures to protect liberty and promote the public good. Imposing a uniform body of federal law on fifty separate states—particularly when the federal courts are typically kept out of refereeing intrastate separation of powers disputes by the Eleventh Amendment[18]—will not be the sort of legal question on which election officials and states will have clear guidance.

In short, introducing a new federal non-delegation test for state election laws is a potential voter confusion disaster waiting to happen. Election laws need to be clear, consistent, and manageable. Introducing a new federal nondelegation test to determine the legality of election rules and administrative guidance risks confusion, chaos, and disenfranchisement. *See, e.g.*, Krass, 108 Va. L. Rev. at 1096–97 (highlighting risk of "havoc").

* * *

When the potential impacts of Petitioners' proposed new constitutional test are considered together, the threat to our elections system and faith in government becomes clear. For more than two centuries, federal elections have been understood by the public to be governed by state constitutions. Accordingly, states have created an intricate framework of election administration, shaped and constrained by the checks

[18] *See, e.g.*, *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984) ("[I]t is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law.").

and balances embodied in those state constitutions. And voters' understandings of their rights and expectations for the rules that govern ever-important elections reflect those state-level checks.

Adopting the ISL theory would, as already explained, drastically alter the rules governing federal elections in most states. But, even more importantly, this Court would be removing all state-level checks on state legislatures when they regulate federal elections. That stands in sharp contrast to the public's existing understanding that power over elections is not concentrated in one, often highly partisan body, but is instead checked by a multitude of state officials and the state constitution. Legislatures are inherently political and partisan bodies. That makes them likely both to be tempted to abuse their power to advantage their "team" and to be distrusted by swaths of the public out of fear they may do just that.

Those fears will only be magnified when the rules governing federal elections are unprecedentedly unclear and, for the first time in modern history, are entirely different from those governing state elections. Such a scheme of election administration makes even innocent mistakes far more likely. But it is also easy to see how that toxic brew of uncertainty, distrust, partisanship, and unchecked power leads to nightmare scenarios that all parties want to avoid: "competing candidates . . . declar[ing] victory under different sets of rules[;]" actual fraud; and false claims of it. *Republican Party of Pa. v. Degraffenreid*, 141 S. Ct. 732, 734 (2021) (Thomas, J., dissenting from denial of cert). *See also* Lost Not Stolen*: The Conservative Case that Trump Lost and Biden Won the 2020 Presidential Election*, *supra*, at 1 (noting risk "we will lose our democracy" if trust continues to degrade).

B. The independent state legislature theory urged by petitioners would also create voter confusion in state elections

Even though the ISL theory directly regulates only federal elections, it will also promote voter confusion in state elections and provide litigators for candidates and parties a blunt instrument with which to bludgeon the judicial system. After all, even if all the state constitutional provisions, regulations, and judicial decisions no longer apply to federal elections, they still would be binding in state elections.

That regime of potentially contradictory statutes and regulations for federal and state elections will create great difficulties for election administrators and voters alike while raising a plethora of legal attacks on elections by those who don't like the vote tallies. *See Arizona v. Inter-Tribal Council of Az.*, 570 U.S. 1, 41 (2013) (Alito, J., dissenting) (noting the "very burdensome" nature of potential requirement on states to maintain different state and federal electoral processes). To suggest just a few potential difficulties:

- Would a state court order extending polling hours on state constitutional grounds[19] result in the polls closing at one hour for federal races and another hour for state races? How could election officials effectively communicate that

[19] As Professor Joshua A. Douglas has noted, "state trial judges, when faced with an Election Day problem, often broadly interpret the right to vote so as to ensure that everyone has a reasonable chance to exercise that right on Election Day," and, further, that they do so "regularly . . . without facing reversal from appellate courts." Joshua A. Douglas, *State Judges and the Right to Vote*, 77 Ohio St. L.J. 1, 28–29 (2016).

rule to the public on election day? Moreover, unless they had the foresight to print out a set of state-candidate-only ballots on the chance that they might be subject to such an order, how could state election officials enforce such a closure by ensuring that no federal candidates were voted for without reviewing the voter's completed ballot? And would that emergency solution even be permissible in a state with a constitutional right to a secret ballot in state elections?

- Would a state court order ruling elements of the voter registration process unconstitutional on state law grounds[20] result in the need to maintain separate state and federal voter registration databases with some people being allowed to vote in only federal or state elections?

- Would a state court order striking down vote-by-mail on state constitutional grounds[21] mean that vote-by-mail would be permissible for federal but not state elections? If so, how could election officials effectively communicate to the voting population that selecting the voting-by-mail option would mean that they could only vote in federal races? Or would they have to create a separate, state-only ballot on election day for people who voted by mail? And if the vote tallies were significantly different for federal and state races due to the different legal

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[20] *See, e.g.*, *Higgin*, 2022 WL 5333790, at *1; *Guare*,117 A.3d at 741; *Mich. State UAW Cmty. Action Program*, 198 N.W.2d at 390; *Perkins*, 246 S.W. at 156–57.

[21] *See Higgin*, 2022 WL 5333790, at *1. *Cf. Capozzi*, 912 A.2d at 697) (holding that Maryland statute providing for early voting violates state constitution).

regimes in each election, wouldn't that divergence provide fertile ground for further legal challenges and baseless conspiracy theories?

- Would a state court order softened statutory time-limits in the voting booth[22] result in time-limits being mandatory in federal but merely aspirational in state elections? Again, how could state officials enforce such a rule, particularly without denying voters the ability to cast a secret ballot?
- Would a state court order permitting receipt of absentee ballots received after election day but postmarked by election day or early processing of received ballots on state constitutional grounds mean that there were different deadlines for voting in state and federal elections and different, mutually exclusive times when election officials are supposed to count the votes?
- Would a state court order limiting elements of a voter ID requirement on state constitutional grounds[23] mean that a voter could cast a ballot only for state and not federal candidates if they forgot their ID? How could election officials

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[22] *See, e.g.*, *Stuart v. Anderson Cnty. Election Comm'n*, 300 S.W.3d 683, 689–92 (Tenn. Ct. App. 2009) (excusing "clear[] . . . statutory violations" of Tennessee statute limiting time voters can spend in the voting booth on the grounds that they were not "a 'serious' statutory violation"). *Cf. Alcaraz v. Eu*, 861 F.2d 1101, 1101 (9th Cir. 1988) (reversing injunction against enforcement of since-repealed California statute placing time limits on time voter can spend in the voting booth on the grounds that "no evidence" that provision would be "enforced rigidly").

[23] *See, e.g.*, *Priorities USA*, 591 S.W.3d at 455; *Applewhite*, 2014 WL 184988, at *18.

police that rule in a jurisdiction that required secret ballots?

- If a legislature passed a voter ID bill, but a governor of an opposite party refused to sign it, would voter ID be required in federal but not state elections? Again, how could state election officials communicate such a requirement without significant voter confusion? How could they enforce it without having separate ballots?

- Would a supposedly improper delegation of the authority to open early voting locations result in votes cast in those locations being valid for state races but not federal ones? Would voters have to go to a different early voting location for federal races? Or might there be no early voting location at all for federal races, and voters have to go vote a federal only ballot on election day?

In short, even the previously straightforward administration of elections will soon become an uncontrollable mess as elections officials and volunteers are forced to deal with sometimes conflicting legal obligations under state and federal law. Clearly communicating and consistently applying those differing legal regimes to voters all across a state will be even harder. The inevitable result will be a self-inflicted wound resulting in an increase in voter distrust and doubt in our electoral system.

C. The doubt created by the uncertainty related to the content of federal and state election law would lead to an explosion in strategic election season litigation—particularly litigation in federal courts

Of course, election litigation is already a feature of our election system that seemingly increases every election season. *See, e.g.*, Richard L. Hasen, *Research Note: Record Election Litigation Rates in the 2020: An Aberration or Sign of Things to Come*, 21 Election L.J. 150 (2022). Election litigation will not go away regardless of how this Court disposes of this case.

Nonetheless, there is good reason to believe that adoption of Petitioners' view will make the amount of litigation exponentially greater. In particular, to the extent that a party wishes to bring a federal constitutional challenge to a change in law by a state court at present, that complaint generally sounds in either due process or equal protection.[24] And, unsurprisingly, federal courts have made clear that

[24] *See, e.g.*, *Bush v. Gore*, 531 U.S. 98, 110 (2000) (per curiam) (noting failure of court-ordered recount to comply with "the requirements of equal protection and due process"); *Roe v. Alabama*, 43 F.3d 574, 581 (11th Cir. 1995) (changing rules for counting absentee ballots after votes had been cast " implicate fundamental fairness and the propriety of the two elections at issue"); *Roe v. Alabama*, 68 F.3d 404, 408–09 (11th Cir. 1995) (restating conclusion that change in election rules after voting violates United States Constitution); *Griffin v. Burns*, 570 F.2d 1065, 1076 (1st Cir. 1978) (new state supreme court decision invalidating absentee ballots after election on basis of new legal interpretation violates due process because "we do not see how an election conducted under these circumstances can be said to be fair."). *Cf. Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 677–80 (1930); *Bouie v. City of Columbia*, 378 U.S. 347, 354–55 (1964).

such challenges to state court decisions must show more than just an error of interpretation by a state court in order to cabin the role of the federal courts and avoid federalizing the entirety of state law.[25]

But the ISL theory advanced by Petitioners—which goes far beyond unadopted prior versions of the theory positing a potential constitutional violation only when courts interpret statutes *after voting has been completed* in a way in which "no reasonable person" could support and "step[s] away from . . . established practice," *Bush*, 531 U.S. at 119–20 (Rehnquist, C.J., concurring)[26]—lacks the safeguards found in due process and equal protection jurisprudence to prevent every interpretation and implementation of state election law from becoming a federal question. Instead, under Petitioners' view, seemingly every instance where a state court or election official either (i) diverts from the narrowest reading of the statutory text or (ii) is delegated too

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[25] *See, e.g.*, *Engle v. Issac*, 456 U.S. 107, 121 n.21 (1982) ("We have long recognized that a mere error of state law is not a denial of due process. If the contrary were true, then every erroneous decision by a state court on state law would come to this Court as a federal constitutional question.") (quotations omitted); *Beck v. Washington*, 369 U.S. 541, 554–55 (1962) (same conclusion regarding the Equal Protection Clause); *see also Roe*, 43 F.3d at 580 ("Not every state election dispute, however, implicates the Due Process Clause of the Fourteenth Amendment and thus leads to possible federal court intervention. Generally, federal courts do not involve themselves in garden variety election disputes.") (quotation omitted); *Griffin*, 570 F.2d at 1077 ("The federal court is not equipped nor empowered to supervise the administration of a local election. If every election irregularity or contested vote involved a federal violation, the court would be thrust into the details of virtually every election[.]") (quotation omitted).

much authority under a new, heretofore unexplained Election Clause nondelegation doctrine will be not just a federal question but also a federal constitutional violation.

That result will be great for the billable hours of election lawyers. But it will be bad for everyone else. The best-case scenario would require wholesale updates to state election codes and regulations. The worst-case scenario—and perhaps more likely—would see separate laws and rules for federal and state elections and would lead to widespread confusion (and constant litigation) to determine which parts of which set of laws are unconstitutional. And election lawyers—aware of the new role of federal courts in policing intrastate separation of powers questions on previously routine questions of election law—would hunt every decision looking for one that might turn an election in their client's favor.

As this Court has previously recognized, that is the last thing we want or need if we want to continue as a functioning democracy. *See, e.g.*, *Purcell*, 549 U.S. at 4–5 ("Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy."); *Wisconsin State Legislature*, 141 S. Ct. at 31 (Kavanaugh, J., concurring in denial of stay) (noting importance of "orderly, efficient" election administration in giving "citizens (including the losing candidates and their supporters) confidence in the fairness of the election"); *Merrill*, 142 S. Ct. at 880–81 (Kavanaugh, J., concurring) (noting the importance of avoiding last-minute federal judicial intervention and having "the rules of the road . . . clear and settled"). One guaranteed casualty will be the erosion of the credibility of the electoral system, which would undoubtedly reduce voter participation and acceptance of results.

Moreover, even *Purcell* would not be able to save federal courts from being pulled headlong into the political thicket by election-law litigators. After all, *Purcell* is about federal courts preserving the status quo to avoid voter and election official confusion. But under the ISL theory advanced by the Petitioners, there will not be an accepted status quo because so many of the prior laws and regulations governing elections will either be (i) of questionable constitutionality or (ii) subject to change at the whims of a legislature—potentially not even constrained by any state constitutional checks and balances whatsoever. In such a world—with ever shifting rules and doubt as to the validity of others—voter confusion will be endemic, and federal courts will have no choice but to referee election law disputes—often in an emergency posture—that were previously handled by state courts and regulators, and articulate and apply the bounds of its this Court's new doctrine regulating the powers of the relative branches of state government. And each additional decision from this Court will set off a new round of reevaluation of what previously accepted laws, regulations, and practices are now constitutional or unconstitutional. Again, that's a recipe for chaos that makes the nightmare we all fear— "competing candidates . . . declar[ing] victory under different sets of rules," *Republican Party of Pa.*, 141 S.Ct. at 734 (Thomas, J., dissenting from denial of cert)—more likely.

II. Petitioners' theory would create confusion and uncertainty in our election system at a time when the system can least afford it

While the last election was extraordinarily well-run in difficult circumstances, trust in elections nonetheless remains unsustainably low. *See Lost, Not*

Stolen: The Conservative Case that Trump Lost and Biden Won the 2020 Presidential Election, *supra*, at 6. Notwithstanding all the recounts, audits, and failed legal challenges, thirty percent of the population simply believes—on the basis of no credible evidence yet presented—that Donald J. Trump won the last election. *Id.* at 1–6. And the very same baseless conspiracy theories that are driving that loss of trust are also spiraling into a barrage of death threats and security challenges for election officials.[27] The result: one-in-three election workers feel unsafe,[28] and one-in-five are contemplating leaving their jobs.[29]

Needless to say, that environment—in which it is difficult to simply run an election while trust in institutions and public officials is unsustainably

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[27] *See, e.g.*, Bob Bauer & Benjamin L. Ginsberg, *Election officials need our legal help against repressive laws and personal threats*, Wash. Post (Sep. 21, 2021, 6:04 PM), https://www.washingtonpost.com/opinions/2021/09/07/bauer-ginsberg-election-official-legal-defense-network/ ("Any American—whether Republican, Democrat or independent—must know that systematic efforts to undermine the ability of those overseeing the counting and casting of ballots on an independent, nonpartisan basis are destructive to our democracy. . . . If such attacks go unaddressed, our system of self-governance will suffer long-term damage."); Bob Bauer & Benjamin L. Ginsberg, *Intimidation of election officials in Wisconsin has to stop. It is corrosive to our democracy.*, Milwaukee J. Sentinel (Dec. 10, 2021, 11:38 AM), https://www.jsonline.com/story/opinion/2021/12/10/intimidation-wisconsin-election-officials-corrodes-democracy/6452887001/.

[28] *See* Brennan Center for Justice, *Local Election Officials Survey* (June 16, 2021), https://www.brennancenter.org/our-work/research-reports/local-election-officials-survey-june-2021.

[29] *See* Peter Eisler & Linda So, *One in five U.S. election workers may quit amid threats, politics*, Reuters (Mar. 10, 2022, 6:05 AM), https://www.reuters.com/world/us/one-five-us-election-workers-may-quit-amid-threats-politics-survey-2022-03-10/.

low—is a less-than-ideal one in which to require election officials to comply with and educate the public on the fundamental changes to election law and administration that would be required under Petitioners' proposed reading of the Constitution. In such a partisan environment, changes to election law in the event of this Court's revision of constitutional law are likely to be seen as politicians and lawyers stepping in to manipulate elections and deprive citizens' ability to vote. That's not the right way to increase voter confidence in our electoral system. It is, in fact, the perfect way to exacerbate distrust in our election system and fuel conspiracy theories.

CONCLUSION

For the foregoing reasons, the decision of the North Carolina Supreme Court should be affirmed.

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Respectfully submitted,

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