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 Professor Richard L. Hasen as *Amicus Curiae* Supporting Respondents

NATHANIEL L. BACH
MANATT, PHELPS & PHILLIPS, LLP
2049 Century Park East
Suite 1700
Los Angeles, CA 90067

MATTHEW F. BRUNO
TINA P. LAPSIA
MANATT, PHELPS & PHILLIPS, LLP
7 Times Square
New York, NY 10036

RICHARD L. HASEN*
Counsel of Record
UCLA School of Law
385 Charles E. Young Drive East
Los Angeles, CA 90095
hasen@law.ucla.edu
(310) 206-3103

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

OTHER AUTHORITIES

INTEREST OF *AMICUS CURIAE*[1]

Richard L. Hasen is Professor of Law at UCLA School of Law, where he directs the Safeguarding Democracy Project aimed at preserving free and fair elections in the United States. Hasen is an internationally recognized expert in election law, writing as well in the areas of legislation and statutory interpretation, remedies, and torts. He is co-author of leading casebooks in election law and remedies, and author of two books on disputes over election administration in the period since the disputed 2000 election, *The Voting Wars* (Yale Univ. Press 2012) and *Election Meltdown* (Yale Univ. Press 2020).

From 2001-2010, he served (with Professor Daniel Hays Lowenstein) as founding co-editor of the quarterly peer-reviewed publication, *Election Law Journal*. He is the author of over 100 articles on election law issues, published in numerous journals including the *Harvard Law Review*, *Stanford Law Review* and *Supreme Court Review*. He was elected to The American Law Institute in 2009 and serves as Co-Reporter (with Professor Douglas Laycock) on the Institute's law reform project, Restatement Third, Torts: Remedies.

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[1] No party or its counsel had any role in authoring this brief and no one other than *Amicus Curiae* and its counsel made any monetary contribution to fund the preparation or submission of this brief. All parties have consented to the filing of this brief and blanket letters of consent have been filed with the Clerk.

SUMMARY OF THE ARGUMENT

Petitioners' expansive interpretation of the Elections Clause—the so-called "independent state legislature" theory—likely will lead to a flood of new federal litigation that will further destabilize American elections and contribute to decreased public confidence both in the judiciary and in the fairness and integrity of the U.S. election system.[2] Were Petitioners' interpretation adopted, destabilization and loss of confidence would be inevitable as federal courts, especially this Court, would be called upon frequently to second-guess state administrative and judicial interpretation and implementation of state election laws. This confidence crisis would emerge regardless of how carefully and competently officials run elections, state courts interpret and apply state election laws, and federal courts review those decisions of state courts and election administrators.

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[2] Amicus agrees with Respondents' argument that under Article I, section 4 of the United States Constitution, state legislatures are bound to follow normal legislative processes and bound by normal state and federal constitutional rules in passing legislation regulating federal elections, just as Congress is bound to follow normal legislative processes and is bound by normal federal constitutional rules in passing legislation regulating federal elections under the same constitutional provision.

This brief expands upon the arguments in Respondents' briefs about the flood of election litigation and the uncertainty with respect to election administration that would arise if this Court adopted Petitioners' flawed interpretation of the Elections Clause. *See* Br. for Non-State Respondents at 73-79; Br. for State Respondents at 55-57.

Petitioners' theory permits no role for any state actors other than state legislatures in regulating federal elections. Petitioners write: "The text of the Constitution assigns to state legislatures *alone* the authority to regulate the times, places, and manner of congressional elections . . . ." Br. for Pet'rs at 11 (emphasis added); *see also id*. ("the power to regulate federal elections lies with state legislatures *exclusively*").

Petitioners' theory goes well beyond claims concerning deviations from a statute's clear text or language, and would reach ambiguities, gaps, and vague language in state election statutes. These features in state election statutes are ubiquitous, given the nature of lawmaking. This, in turn, makes the role of judicial and administrative interpretation and implementation unavoidable. In practice, state legislatures alone cannot "regulate" federal elections, because there is so much detail for conducting elections simply absent from statutory text.

Under Petitioners' far-reaching theory, each routine state judicial or administrative act of gap-filling or interpretation would become the basis for a federal constitutional lawsuit based upon some alleged discrepancy between the statutory text and the interpretation and implementation of that text. Worse, each time a state court decides if a state or local election administrator has gone too far, that ruling itself would—under Petitioners' theory—open the floodgates to new litigation in federal courts, framing these issues as a federal constitutional violation of the Elections Clause. In other words, Petitioners' theory would invent an entirely new

constitutional cause of action, significantly burdening federal courts.

Election litigation in the United States is already at record highs, up nearly 26 percent in the 2020 election period, compared to the 2016 period, and nearly tripling in the period since the disputed 2000 election culminating in this Court's decision in *Bush v. Gore*, 531 U.S. 98 (2000). *See* Part I.B, *infra*. An expansive interpretation of the Elections Clause surely will fuel much more litigation, placing a heavy burden on federal courts, and especially on this Court, as it will be asked to consider an ever-increasing number of time-sensitive, election-related motions on its emergency docket. The high number of election cases on the emergency docket will surge even further.

In a hyperpolarized atmosphere such as the one currently existing in the United States, candidates and political parties who may be on the losing end of a close election will have every incentive to file lawsuits in federal courts in an effort to second-guess the decisions of state courts and election administrators, even when those institutions have interpreted and implemented the applicable statutes competently and in good faith. Such lawsuits, whether successful or not, provide a basis for litigants to publicly assert that elections are being conducted "unlawfully" or "illegally," which can further undermine voter confidence in the fairness and integrity of elections.

These concerns are not hypothetical. Consider, for example, a dispute over whether state law permits the use of ballot "drop boxes" for voters to

return absentee ballots. Today, such litigation is handled as a matter of state law over the proper interpretation of state election statutes. *See*, *e.g.*, *Teigen v. Wis. Elections Comm'n*, 976 N.W.2d 519 (Wis. 2022). But under Petitioners' interpretation of the Elections Clause, this issue inevitably will reach federal courts as well, if not exclusively—with the aggrieved party to a state ruling attempting to relitigate the claim in federal court (or directly on a petition for writ of certiorari filed in this Court) under the guise of an Elections Clause lawsuit. Indeed, it is already happening. *Hotze v. Hudspeth*, 16 F.4th 1121, 1124, 1138 (5th Cir. 2021) (Oldham, J., dissenting); *see also Wise v. Circosta*, 978 F.3d 93, 104 (4th Cir. 2020) (en banc) (Wilkinson & Agee, JJ., joined by Niemeyer, J., dissenting). *See* Part I.B, *infra*.

Such a novel constitutional cause of action will force federal courts, and especially this Court, to constantly second-guess these state determinations and decide if a judicial or administrative statutory interpretation strayed too far from the words of the state law, thereby creating a federal constitutional violation. It also will lead to clashes between state and federal courts over the legality of election administrators' actions. Election disputes will be more commonplace, constantly thrusting this Court into the political thicket in the midst of highly contested elections. Increased federal judicial activity on such issues will promote confidence neither in the election system nor in the judiciary.

Such claims are especially dangerous in these polarized political times, when segments of the public (including candidates) conflate claims of

judicial or administrative technical "illegality" or "unconstitutionality" with unsubstantiated claims of widespread election fraud. At the extreme, the damage to confidence that these lawsuits will cause provides a pathway for election subversion as segments of the public become more willing to reject lawful election results.

In short, Petitioners' expansive theory would provide a pretext for creating new federal jurisdiction over decisions traditionally left to state courts and administrators when, as is common, state legislatures pass general, vague, or ambiguous election laws. It will lead to litigation that will further undermine voter confidence in election integrity and public confidence in a fair and impartial judiciary, as the nation is already in a delicate position. In the end, such a crisis in confidence threatens American democracy itself.

ARGUMENT

I. Petitioners' Expansive Reading of the Elections Clause Will Turn Commonplace State Judicial and Administrative Interpretation of State Election Laws into a Flood of Federal Lawsuits, Burdening Federal Courts, and Particularly This Court.

A. Ambiguities and Gaps are Ubiquitous in State Election Laws, and State and Local Election Administrators and State Courts Routinely Interpret and Implement Such Laws.

Ambiguities in state election laws are pervasive throughout the United States, and routinely arise when such laws are enacted and amended. When ambiguities appear, state and local officials—including election administrators, state attorneys general, and state courts—invariably must fill gaps and interpret such ambiguities, often in the form of advisory opinions. Such opinions and administrative directives attempt to remove uncertainty surrounding the implementation of election laws, thereby paving the way for the more orderly and fair administration of both state and federal elections.

For instance, state attorneys general and election administrators have been asked to opine on and clarify issues of voter registration and eligibility,[3] absentee voting,[4] mail-in-ballots,[5] prohibitions on

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[3] *See* Op. Ariz. Att'y Gen., No. I13-011 (Oct. 7, 2013) (discussing proof of citizenship requirements in light of *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1 (2013)), available at https://www.azag.gov/opinions/i13-011-r13-016; Op. Fla. Dir. Elections, No. DE 18-09 (June 19, 2018) (clarifying Florida's residency requirements for voter registration), available at https://files.floridados.gov/media/699707/de1809.pdf; Op. N.Y. Solicitor Att'y Gen., No. 2016-1 (Apr. 25, 2016) (discussing signature requirements for online voter registration), available at https://ag.ny.gov/sites/default/files/opinion/2016-1_pw.pdf.

[4] *See* Op. Ark. Att'y Gen., No. 2020-054 (Aug. 4, 2021) (discussing the process for verifying absentee ballot signatures and related issues), available at https://ag-opinions.s3.amazonaws.com/uploads/2020-054.html; Certif. Idaho Att'y Gen. (July 15, 2009) (opining on the Secretary of State's proposed revisions to Idaho legislation governing absentee ballots), available at https://www.ag.idaho.gov/content/uploads/2018/04/C071509.pdf; Op. Ill. Att'y Gen., No. 14-001 (Oct. 15, 2014) (clarifying the time period that absentee ballots must be counted), available at https://illinoisattorneygeneral.gov/opinions/2014/14-001.pdf; Op. S.C. Att'y Gen. (Sept. 14, 2021) (discussing whether unsigned written requests for absentee ballots are permitted under South Carolina law), available at https://www.scag.gov/media/4k3hkhwo/02714303.pdf.

[5] *See* Op. Fla. Dir. Elections, No. DE 21-03 (Nov. 5, 2021) (providing criteria to consider in determining whether to accepted a mail-in-ballot), available at https://files.floridados.gov/media/705112/de-21-03.pdf; Op. Tex. Att'y Gen., No. KP-0009 (Mar. 9, 2015) (discussing requirements to qualify as "disabled" for purposes of early mail-in voting), available at https://www.texasattorneygeneral.gov/sites/default/files/opinion-files/opinion/2015/kp0009.pdf.

electioneering,[6] and redistricting.[7] The issuance of advisory opinions on these fundamental election matters is both necessary to clarify ambiguities within a short time frame and to avoid burdening state and federal courts with the minutiae of election administration.

Just a few examples illustrate the diverse range of these administrative advisory opinions. Recently, the Director of Florida's Division of Elections issued an advisory opinion determining that a Florida statute requiring that a "public, tax-supported building" be made available as a location for voting on election day does not apply to early voting sites.[8] In doing so, the Elections Director observed a distinction between a Florida statute's references to a "polling place" and an "early voting site," finding that distinction "precludes using the statute governing polling places to procure an early voting site."[9]

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[6] *See* Op. Ky. Att'y Gen., No. 20-16 (Oct. 28, 2020) (clarifying how Kentucky's 100-foot electioneering ban is to be measured), available at https://ag.ky.gov/Resources/Opinions/Opinions/OAG%2020-16.pdf.

[7] *See* Op. S.C. Att'y Gen. (Apr. 28, 2022) (discussing how the recent passage of state legislation, reapportioning districts based upon the 2020 census, impacts the districts represented by sitting senators), available at https://www.scag.gov/media/spcjrumv/02970788.pdf.

[8] Op. Fla. Dir. Elections, No. DE 22-04 (Mar. 23, 2022), available at https://files.floridados.gov/media/705463/de-22-04-final-manatee-signed.pdf.

[9] *Id.*

In Minnesota, in light of the spike in requests for absentee ballots in the 2020 election, a question arose as to whether potential absentee-ballot vote challengers could participate in ballot board meetings, in a manner similar to ad hoc vote challenges that occur at polling places. Interpreting the relevant state statutes—which were silent on the issue—the Minnesota Attorney General issued an advisory opinion just a few weeks before the election, advising that vote challengers may not participate in or challenge the absentee ballot board process.[10]

And, during the 2016 presidential election cycle, the Oregon Attorney General issued an opinion to the Secretary of State's Election Division that the state electioneering statute (ORS 260.695(2)) restricts expressive conduct in a manner that likely violates the free speech guarantees of Oregon's constitution.[11]

These type of election-related advisory opinions and administrative determinations are legion given the ubiquity of ambiguities and gaps inherent in state election laws, including, as in the Oregon advisory opinion, how state election statutes interplay with state constitutions. Yet, if Petitioners' theory prevails, lawsuits over such nuts and bolts election issues are likely to invade the federal courts, because each such administrative interpretation of

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[10] Op. Minn. Att'y Gen., No. 182 (Oct. 16, 2020), available at https://www.ag.state.mn.us/office/opinions/182-20201016.pdf.

[11] Op. Or. Att'y Gen., No. 8292 (May 4, 2016), available at https://www.doj.state.or.us/wp-content/uploads/2017/06/op8292.pdf.

state laws would become fodder for a new claim that such action violates the Elections Clause.

State courts also routinely interpret the meaning of vague or ambiguous election statutes and consider the interplay of such statutes and state constitutional law. These, too, have the potential to morph or multiply into federal lawsuits.

During the 2020 election, the Supreme Court of Texas held that a Texas statute allowing voters with a "disability" to vote by mail did not apply to voters who feared contracting COVID-19 but were not infected by the disease. *In re State*, 602 S.W.3d 549 (Tex. 2020); *see also Mo. State Conference of the NAACP v. State*, 607 S.W.3d 728 (Mo. 2020) (en banc) (construing statute allowing absentee voting for person "confine[d] due to illness" as not applying to person not sick but who feared contracting COVID-19).

Also during the 2020 pandemic, the Ohio Secretary of State interpreted an Ohio election law to allow the installation of ballot drop boxes only at the offices of each county's board of elections. The Ohio Democratic Party challenged this interpretation and sought a preliminary injunction in state court, requiring the wider use of drop boxes. The Court of Appeals of Ohio closely examined Ohio's statute and concluded that the Secretary's reading of the statute was objectively unreasonable, as the statute was silent as to the number and location of drop boxes. But it further ruled that the Ohio Democratic Party was not entitled to a preliminary injunction because, given the statute's silence, the Secretary had discretion to determine

the location of and number of drop boxes. *Ohio Democratic Party v. LaRose*, 159 N.E.3d 1241 (Ohio Ct. App. 2020).

These administrative and state court decisions indicate two things. *First*, these bodies are perfectly capable of interpreting state laws, including election laws. *Second*, virtually every one of these administrative and judicial determinations could be second-guessed by federal courts under an Elections Clause challenge should Petitioners' expansive reading prevail.

B. Petitioners' Expansive Reading of the Elections Clause Would Open the Floodgates to Federal Lawsuits, Exacerbating Record Election Litigation Rates.

Election litigation rates in the United States have been rising over the last two decades, nearly tripling in the current period compared to the period before the disputed presidential election of 2000. *See* Richard L. Hasen, *Research Note: Record Election Litigation Rates in the 2020 Election: An Aberration or Sign of Things to Come?*, 21 Election L.J. 150, 151 (2022) ("Cases in the sample averaged 94 per year in the 1996–1999 period, compared to over 276 cases in the post-2000 period."). Election litigation rates were up nearly 26 percent during 2020 compared to 2016. *Id*. at 150.

Many factors help explain this rise in election litigation, including increased partisan competition between the Democratic and Republican parties and a closely divided electorate. The 2000 election,

culminating in this Court's controversial decision in *Bush v. Gore*, 531 U.S. 98 (2000), also taught political operatives that, particularly in close elections, the rules of the game matter and that those rules may be litigated to partisan advantage in some circumstances. *See* Richard L. Hasen, *The Voting Wars: From Florida 2000 to the Next Election Meltdown* 5 (2012) ("Florida mainly taught political operatives the benefits of manipulating the rules, controlling election machinery, and litigating early and often. Election law has become part of a political strategy."). Further, recent changes in federal campaign finance law also have allowed political parties to raise substantial sums specifically for litigation, and this new money appears to spur some of the increased litigation. *See* Derek T. Muller, *Reducing Election Litigation*, 90 Fordham L. Rev. 561, 563-67 (2021).

There is little doubt that Petitioners' interpretation of the Elections Clause would open a whole new arena for election disputes in federal courts. Right now, election cases primarily end up in federal court when a litigant raises an argument about the workings of a federal voting-related statute or claims a constitutional violation, such as of the Equal Protection Clause of the Fourteenth Amendment. Other cases end up in state court, such as when a candidate disagrees with state officials about how to interpret a state election statute.

If this Court accepts Petitioners' view, every dispute over how a state or local election administrator has interpreted a gap or ambiguity in such a statute, or has exercised discretionary authority in the implementation of such statutes,

can lead to constitutional litigation and potentially *two* lawsuits with possibly conflicting results. Specifically, a plaintiff who disagrees with an administrative interpretation may go straight to federal court, arguing that the administrator violated the Elections Clause. Or a plaintiff or another party may go to state court arguing that the administrator misinterpreted state law, violated the Elections Clause, or both. Either or both lawsuits could be the subject of emergency litigation in this Court.

State court interpretations of gaps or ambiguities in state election law applied to federal elections also can lead to emergency litigation and petitions for writ of certiorari in this Court alleging, as in this case, that the state court has violated the Elections Clause.

With every political incentive to sue—and plenty of funds available to do it—federal candidates and others with interests in federal elections will gladly open this new front in the voting wars. Indeed, beyond the prior example of how Petitioners' interpretation may multiply lawsuits, the potential for state and federal lawsuits to reach conflicting results may lead to even *more* lawsuits in various ways.

For example, imagine a state court holds that, under state law, drop boxes are permitted for the return of ballots. This Court then holds that the state court's interpretation of state law to allow drop boxes violates the Elections Clause as to federal elections. How will the state successfully implement its elections when drop boxes are found legal for the

state offices on the ballot, but unconstitutional for the *federal* offices?

The potential confusion and difficulty in election administration abound, likely leading to further state and federal litigation over how election administrators sort out the mess and which ballots should count and how. *See* Carolyn Shapiro, *The Independent State Legislature Theory, Federal Courts, and State Law*, U. Chi. L. Rev. (forthcoming 2023), available at https://bit.ly/3qhzYL3 (draft at 7) ("If, for example, a state court strikes down a state law governing elections as violating the state constitution, under the [independent state legislature theory], although that holding would apply to state elections, the law would still remain operational for federal elections, requiring two sets of election rules and causing confusion (at best) for election administrators and voters alike."); *cf. Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) ("Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase.").

The vicious cycle will continue in each case because of the potential for relitigation of state-law issues in federal court. Such federal follow-on litigation would not only destabilize confidence in election results, it also could delay elections themselves, the certification of results, and the subsequent staffing and operation of federal, state, and local levels of government.

Even where election administrators are merely implementing unambiguous state law or acting

within the discretion afforded them thereunder, challengers could interfere with this orderly election process by suing in federal court, baldly asserting that the administrator's actions were *ultra vires* and in violation of the Elections Clause.

The concern that every state election dispute will be made into a federal case is not mere conjecture—it is real. For example, in 2020, Harris County, Texas instituted "drive-thru" early voting amid the COVID-19 pandemic, allowing voters to pull up and vote from their cars, rather than enter a polling place. Some who opposed the county's use of "drive-thru" voting argued that the practice was not authorized by the state legislature's election statutes. But rather than simply sue in state court over the issue,[12] some litigants sued in federal court, arguing that the county's implementation of drive-thru voting violated the Elections Clause because it was allegedly inconsistent with provisions in Texas's elections code. The Fifth Circuit eventually considered the issue and held that the dispute was moot because the state of Texas had since clarified the law and barred drive-thru voting for future elections. *Hotze*, 16 F.4th at 1124. In his dissent, Circuit Judge Oldham disagreed with the majority's reasoning on mootness, and asserted it was

[12] Without written opinion, the all-Republican "Texas Supreme Court rejected a request by several conservative Republican activists and candidates to preemptively throw out early balloting from drive-thru polling sites in the state's most populous, and largely Democratic, county," likely because the request came too late. Jolie McCollough, *Texas Supreme Court Rejects Republican Effort to Throw Out Nearly 127,000 Harris County Votes*, Tex. Trib. (Nov. 1, 2020), *available at* https://bit.ly/3B8kBdh.

"straightforward" that Harris County's use of drive-thru voting violated the Elections Clause. *Id*. at 1128 (Oldham, J., dissenting).

Or, consider *Wise v. Circosta*, 978 F.3d 93 (4th Cir. 2020) (*en banc*). North Carolina election administrators, facing the pandemic and a constitutional lawsuit over ballot deadlines during the pandemic, unanimously and on a bipartisan basis, agreed, as part of a consent decree, to end that litigation by extending the deadline for the receipt of absentee ballots from three to nine days after election day. Hearing the matter *en banc*, the Fourth Circuit declined to issue an injunction pending appeal, restoring the three-day period. It cited several reasons, including *Pullman* abstention, while the same issue was pending in state court. *Id*. at 101-02. The court also held that under this Court's "*Purcell* principle," it was too late for federal courts to change state law. *Id*. at 98-99.

Three judges dissented, arguing that the six-day extension for the receipt (not mailing) of ballots, even to protect constitutional voting rights and as part of a case settlement, violated the Elections Clause. *Id.* at 104 (Wilkinson & Agee, JJ., joined by Niemeyer, J., dissenting). North Carolina legislators then sought an emergency injunction from this Court, which was denied without opinion. *Moore v. Circosta*, 141 S. Ct. 46 (2020).[13]

[13] Justices Gorsuch and Alito dissented and would have granted injunctive relief on Elections Clause grounds. *Id*. at 46-47 (Gorsuch, J., dissenting). Justice Thomas also dissented without opinion.

Hotze and *Wise* make it amply clear that the flood of litigation over Elections Clause issues, should Petitioners prevail here, will wash over the lower courts and flow straight to this Court's emergency docket.

C. The Flood of New Federal Lawsuits Will Place Special Burdens on This Court's Docket for Emergency Election-Related Motions.

The amount of emergency election-related litigation filed in this Court is already high. In the last dozen terms, there have been at least 65 emergency, election-related motions decided by this Court.[14] Because many of these disputes must be resolved, with finality, before an election or just after an election and before a winner is certified, litigants understandably come to this Court as the final arbiter of these questions. These cases are high pressure and often must be resolved on skimpy records given the exigent circumstances.

This is especially a concern in election years. In the 2016 term alone, this Court considered eleven emergency election-related petitions, and in the 2020 term there were fifteen. Most recently, there were seven in the 2021 term, a non-presidential election year.

If this Court accepts Petitioners' expansive theory of the Elections Clause, these already high numbers will undoubtedly continue to grow. The same incentives for increased litigation described in Part I.B, *supra*, apply especially to this Court. With

[14] A list of these cases may be found in this brief's Appendix.

ample resources for litigation, litigants would have no reason to resist bringing cases to this Court, either directly from state supreme courts or through collateral litigation in lower federal courts, asking this Court to wade into political matters in the heat of disputed and contentious election periods.

II. Petitioners' Expansive Interpretation of the Elections Clause Will Undermine Voter Confidence in Elections and in the Judiciary, Potentially Paving the Way for Election Subversion.

A. Petitioners' Expansive Interpretation Will Harm Voter Confidence in the Legitimacy of the U.S. Election System.

Despite great improvements in the machinery used to cast and count ballots and other improvements in election administration since the disputed 2000 presidential election,[15] voter confidence in the fairness and integrity of the election system has fallen steadily in the last two decades. Jesse T. Clark & Charles Stewart III, *The Confidence Earthquake: Seismic Shifts in Trust in the 2020 Election*, at 4, https://bit.ly/3COEgRP [https://perma.cc/UHH5-5E7H] (July 15, 2021)

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[15] That election revealed that the machinery used for voters to cast ballots and for election administrators to count them was flawed; an estimated one million voters had their votes lost to machine error. *See* The Caltech/MIT Voting Technology Project, *Residual Votes Attributable to Technology: An Assessment of the Reliability of Existing Voting Equipment* (Mar. 30, 2001), https://bit.ly/3ALLkfq [https://perma.cc/S8ML-HJBH]; *see also* Charles Stewart III, *Residual Vote in the 2004 Election*, 5 Election L.J. 158, 158 (2006).

("Among all voters, confidence in both one's own vote and in the nation's vote gradually declined in parallel in the years 2000 – 2016.").

Such confidence is partially tied to election results; those candidates and voters on the losing end of the election are much less likely to believe their votes are fairly and accurately counted than those whose preferred candidates prevailed. *Id*.; *see also* Michael W. Sances & Charles Stewart III, *Partisanship and Confidence in the Vote Count: Evidence from U.S. National Elections Since 2000*, 40 Electoral Stud. 176, 177 (2015).

The 2020 election season led to a sharp negative turn in voter confidence among Republican voters, with only 7.8 percent of Republicans having confidence in the fairness and accuracy of the 2020 election process. Clark & Stewart, *supra*, at 5 ("After rising from 44.4 percent in 2016 to 56.5 percent in 2018, Republican confidence in their own vote fell back down to 37.4 percent in 2020. Confidence in the country's vote was around 20 percent in both 2016 and 2018 before falling to 7.8 percent in 2020.").

This confidence crisis occurred even though the 2020 election, conducted under pandemic conditions, was one of the most secure and fair elections in American history. John Danforth, Sen., et al., *Lost, Not Stolen: The Conservative Case that Trump Lost and Biden Won the 2020 Presidential Election* (July 2022) [https://perma.cc/U2CG-4YR7]; Cybersecurity & Infrastructure Security Agency, Joint Statement from Elections Administrator Governing Council & the Elections Infrastructure Sector Coordinating Executive Committees (Nov. 12, 2020),

https://bit.ly/3fXP0UA [https://perma.cc/EF8E-NVQL] ("The November 3rd election was the most secure in American history."); Christina A. Cassidy, *Far Too Little Vote Fraud to Tip Election to Trump, AP Finds*, Associated Press, Dec. 14, 2021, https://bit.ly/3T6oG8Q ("An Associated Press review of every potential case of voter fraud in the six battleground states disputed by former President Donald Trump has found fewer than 475 — a number that would have made no difference in the 2020 presidential election."); Nathaniel Persily & Charles Stewart III, *The Miracle and Tragedy of the 2020 U.S. Election*, 32 J. Democracy 159, 159 (2021).

The cause for the crisis in confidence is no mystery: former President Donald Trump made relentless and unsubstantiated claims that the election was "rigged" or "stolen," and that President Joe Biden did not fairly win the election thanks, in large part, to the rise of voting by mail spurred by the pandemic. *See* Karen Yourish & Larry Buchanan, *Since Election Day, a Lot of Tweeting and Not Much Else for Trump*, N.Y. Times, Nov. 24, 2020 [https://perma.cc/LZN4-RUV2] ("In total, the president attacked the legitimacy of the election more than 400 times since Election Day, though his claims of fraud have been widely debunked."). Many Republican voters have believed these false claims, helping to trigger a decline in voter confidence. Clark & Stewart, *supra*, at 17, 20-22.

The judiciary played an important role in the 2020 election in attempting to shore up voter confidence. State and federal courts repeatedly examined the claims of Trump and his allies that the election was stolen and found the claims lacked

merit. As Judge Stephanos Bibas of the Third Circuit wrote in a unanimous opinion rejecting the Trump campaign's challenge to certain aspects of how the 2020 U.S. presidential election was conducted in Pennsylvania, "[f]ree, fair elections are the lifeblood of our democracy. Charges of unfairness are serious. But calling an election unfair does not make it so. Charges require specific allegations and then proof. We have neither here." *Donald J. Trump for President, Inc. v. Sec. of Pa.*, 830 F. App'x 377, 381 (3d Cir. 2020).

Despite important judicial pronouncements like these, increased litigation about the 2020 election in the period since President Biden took office has fueled renewed claims of rigged or stolen elections. And importantly for purposes of this case, some voters wrongly conflate determinations of technical illegality with claims of fraud or rigged elections.

Consider, for example, the dispute over whether absentee ballots may be returned by drop boxes and other means aside from the United States postal system in Wisconsin. That dispute has made it all the way to the Wisconsin Supreme Court twice since the 2020 election. First, in a post-election challenge brought by then-President Trump seeking to overturn the results of the 2020 election in Wisconsin, the court, on a 4-3 vote, declined to hold that allowing drop boxes in public parks to collect ballots violated state law and held that Trump's claim was barred by laches because it was not raised before the election—allowing the claim to proceed could have disenfranchised voters who had already voted under the rules in place. *Trump v. Biden*, 951 N.W.2d 568 (Wis. 2020). This past summer, the

same court, again on a 4-3 vote, held that the use of drop boxes in most circumstances is illegal under state law. *Teigen v. Wis. Elections Comm'n*, 976 N.W.2d 519 (Wis. 2022).[16]

Notably, *Teigen* did not involve any allegation that ballot drop boxes were used to commit election fraud, and there was no credible evidence presented that drop boxes in Wisconsin or anywhere else facilitated such fraud. *Id.* at 583 (Ann Walsh Bradley, J., dissenting) ("There is no evidence at all in this record that the use of drop boxes fosters voter fraud of any kind. None. And there certainly is no

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[16] Justice Hagedorn, the only Wisconsin Supreme Court justice to change sides in the two cases, explained his position:

> In *Trump v. Biden*, among other issues, we were asked whether ballots delivered to certified election inspectors at temporary events in Madison parks were valid. The court concluded this claim was barred by the doctrine of laches and rejected it on that basis. I authored a concurrence offering a preliminary review of the merits of the three claims rejected on the basis of laches, while recognizing that a "comprehensive analysis is not possible or appropriate in light of the abbreviated nature of this review and the limited factual record" in that case. Regarding the so-called "Democracy at the Park" events, I concluded those events were lawful "based on the record before the court and the arguments presented." With the benefit of more comprehensive briefing and careful study, I now conclude that the better reading of the statutory scheme is that ballots may only be returned to the clerk's office or a designated alternate site. To be clear, this conclusion would not have changed the court's decision in *Trump*.

Id. at 570 n.14 (Hagedorn, J., concurring) (citations omitted).

evidence that voters who used drop boxes voted for one candidate or party or another, tilting elections either direction."); *see also Trump*, 951 N.W.2d at 583 (Hagedorn, J., concurring) ("At the end of the day, nothing in this case casts any legitimate doubt that the people of Wisconsin lawfully chose Vice President Biden and Senator Harris to be the next leaders of our great country.").

Nonetheless, former President Trump seized on the Wisconsin Supreme Court's decision that election officials did not have authority under state law to authorize drop boxes to argue that the decision proved the election was illegal and that he actually "won" the election. He has repeatedly called for "decertifying" the 2020 presidential election in Wisconsin and elsewhere even though there is no such remedy in the Constitution. Trump wrote on Truth Social—a social media platform created by Trump Media & Technology Group—soon after the decision:

> Other States are looking at, and studying, the amazing Wisconsin Supreme Court decision declaring Ballot Boxes ILLEGAL, and that decision includes the 2020 Presidential Election. . . . Speaker Robin Vos has a decision to make! Does Wisconsin RECLAIM the Electors, turn over the Election to the actual winner (by a lot!), or sit back and do nothing as our Country continues to go to HELL? Brave American Patriots already have a Resolution on the Floor!

Molly Beck, *Trump Wants Wisconsin Ballot Drop Box Ruling to Apply to Past Elections. It Doesn't Work That Way*, Milwaukee J. Sentinel (last updated July 14, 2022) [https://perma.cc/SXP6-CX3Q] (quoting Trump).

Trump further accused the Speaker of the Wisconsin Assembly Robin Vos of colluding with Democrats to "get away with 'murder'" and of allowing "[a] Rigged & Stolen Election!" @realdonaldtrump, Truth Social, July 13, 2022, https://truthsocial.com/@realDonaldTrump/posts/108643627835350443 [https://perma.cc/885L-3WVZ].

This dynamic is sure to play out repeatedly should federal courts become involved in second-guessing state law questions about election administration in new Elections Clause litigation. These additional bites at the apple will give more chances for federal courts to declare election-related interpretations unconstitutional and more reason for spurious claims that technical wins on Elections Clause grounds are really statements by federal courts that elections are "rigged."

B. Petitioners' Expansive Interpretation Will Harm Public Confidence in the Judiciary.

Elections Clause cases under Petitioners expansive interpretation will be especially divisive and harm voter confidence in the judiciary. Rather than raising long-term, broadly applicable election law issues, these cases would generally arise in fast-moving disputes that must be resolved in real time on an emergency basis either just before or just after

an election, and can affect the outcome of ongoing elections. They will be seen by the public as the means for disgruntled litigants to forum shop in federal courts for a second chance to win their lawsuits.

There are no cases with more immediate political implications than these. *Cf. Gill v. Whitford*, No. 16-1161, Tr. Oral Arg. At 37: 11-12, 21-25 (Oct. 3, 2017) (comments of Roberts, C.J.) (the "intelligent man on the street" will think it is a "bunch of baloney" if courts use mathematical formulas to decide partisan gerrymandering cases. Instead, he will think rulings "must be because the Supreme Court preferred the Democrats over the Republicans. And that's going to come out [in] one case after another as these cases are brought in every state.").

The public increasingly will see new second-bite election-related decisions under Petitioners' interpretation of the Elections Clause through a partisan lens. These additional forays into the political thicket will increase public cynicism about the line between law and politics.

Opening up a new line of election cases will only exacerbate partisan splits in public opinion about the legitimacy of the actions of the judiciary. *See* Jeffrey M. Jones, *Confidence in U.S. Supreme Court Sinks to Historic Low*, Gallup, June 23, 2022, https://bit.ly/3ejhw2C [https://perma.cc/4K8N-4LDQ]; *see also* Pew Research Center, *Positive Views of Supreme Court Decline Sharply Following Abortion Ruling* (Sept. 1, 2022),

https://pewrsr.ch/3yv5TfL [https://perma.cc/KND3-43LK].

C. Petitioners' Expansive Interpretation May Pave the Way for Election Subversion.

Petitioners' Elections Clause theory not only threatens voter confidence in the integrity of the election process and in the judiciary; it also may pave the way for other efforts to subvert free and fair elections in the United States.

The events of January 6, 2021 that led to the storming of the U.S. Capitol were the culmination of a prolonged effort to reverse the results of the 2020 presidential election and maintain Trump's hold on the presidency. Those events were driven by then-President Trump's false claims that substantial fraud or irregularities in the conduct of the election occurred. These claims of irregularities were used to justify actions such as submitting fake slates of alternative electors—arguing that former Vice President Michael Pence had unilateral power to reject states' slates of electors by virtue of his role presiding over congressional counting of the Electoral College votes—as well as the violence at the Capitol itself. *See* Richard L. Hasen, *Identifying and Minimizing the Risk of Election Subversion and Stolen Elections in the Contemporary United States*, 135 Harv. L. Rev. F. 265, 266-82 (2022). The risk of election subversion in future elections remains real, especially given Trump's repeated insistence, even now, to "decertify" the 2020 election on grounds of supposed fraud.

The Elections Clause theory advanced by Petitioners raises the risk of election subversion in two ways. *First*, as noted in Part II.A, increased litigation in which aggrieved candidates and their supporters can make technical arguments about supposedly "illegal" election activities fuels popular conspiracy theories and disinformation that the election loser actually won, and that the winner's victory is illegitimate. These conspiracy theories provide grist for violent political actions such as the siege of the U.S. Capitol. *See, e.g.*, Richard L. Hasen, *Cheap Speech: How Disinformation Poisons Our Politics and How to Cure It* (2022).

Second, and particularly in the context of presidential elections,[17] this Court's potential embrace of an expansive "independent state legislature" theory could provide a pretext for state legislatures to submit alternative slates of electors should members of the legislature be unhappy with the choice of their state's voters for President. Although a legislature's attempt to appoint alternative slates of electors in these circumstances would violate both the Constitution and federal statutes,[18] those seeking to undermine free and fair

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[17] Although this case involves the Elections Clause under Article I, section 4, parallel arguments have been advanced about state legislators' power under the Electors Clause of Article II. *See, e.g., Republican Party of Pa. v. Degraffenreid*, 141 S. Ct. 732, 732 (2021) (Thomas, J., dissenting from denial of cert.); *id.* at 738 (Alito, J., joined by Gorsuch, J., dissenting from denial of cert.).

[18] As this Court explained in *Bush v. Gore*, 531 U.S. at 104, "When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed

elections in the United States would only be further emboldened by a decision of this Court embracing Petitioners' expansive view of state legislative power in federal elections.

In short, the risk of Petitioners' expansive reading of the Elections Clause is one not only of decreased public confidence in the United States election system, but in the state and federal judiciaries as well. At its extreme, Petitioners' theory could pave the way to subvert legitimate

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is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter." It would violate the Due Process Clause of the Fourteenth Amendment for a state legislature to seek to retroactively disenfranchise its own voters. *See Roe v. State of Ala.*, 43 F.3d 574, 580-81 (11th Cir. 1995); *see also* Justin Levitt, *Failed Elections and the Legislative Selection of Presidential Electors*, 96 N.Y.U. L. Rev. 1052, 1071 (2021) ("[T]he Due Process Clause would be implicated in any attempt to replace, after the election had begun, the popular election processes currently authorized by statute with another means of elector selection."); Edward B. Foley, *Due Process, Fair Play, and Excessive Partisanship: A New Principle for Judicial Review of Election Laws*, 84 U. Chi. L. Rev. 655, 731 (2017); Richard H. Pildes, *Judging "New Law" in Election Disputes*, 29 Fla. St. U. L. Rev. 691, 706–07 (2001).

In addition, a legislature's appointment of its own electoral slate after Election Day would violate 3 U.S.C. § 1, which establishes a uniform day for the appointment of electors on the first Tuesday after the first Monday in November. *See* National Task Force on Election Crises, *A State Legislature Cannot Appoint Its Preferred Slate of Electors to Override the Will of the People After the Election* 2 (last visited Sept. 2, 2022), https://bit.ly/3CPYI4M [https://perma.cc/X7B7-PNAS]. Nor may a state rely upon the "failed" elections provision contained in the Electoral Count Act in 3 U.S.C. § 2 once voters have voted on election day. *Id.* at 3-4.

election results, leading to election losers, rather than election winners, taking office.

Petitioners' expansive interpretation threatens American democracy itself.

CONCLUSION

For the foregoing reasons, this Court should reject Petitioners' expansive vision of the Elections Clause that would lead to a flood of new federal litigation, undermine voter confidence in the integrity of U.S. elections and in the judiciary, and potentially pave the way for election subversion.

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Respectfully submitted,

NATHANIEL L. BACH
MANATT, PHELPS & PHILLIPS, LLP
2049 Century Park E.
Suite 1700
Los Angeles, CA 90067

MATTHEW F. BRUNO
TINA P. LAPSIA
MANATT, PHELPS & PHILLIPS, LLP
7 Times Square
New York, NY 10036

RICHARD L. HASEN
UCLA SCHOOL OF LAW
Counsel of Record
385 Charles E. Young Drive East
Los Angeles, CA 90095
hasen@law.ucla.edu
(310)206-3103

Counsel for Amicus Curiae

Appendix to Brief of *Amicus Curiae* Richard L. Hasen in *Moore v. Harper*, 21-1271

Emergency Election Motions Considered by the Supreme Court*	
October Term 2010	
1.	*Respect Maine PAC v. McKee* (10A362)
2.	*Family PAC v. McKenna* (10A357)
3.	*Hamilton Cnty. Bd. of Elections v. Hunter* (10A989)
	Total: 3
October Term 2011	
4.	*Tennant v. Jefferson Cnty. Comm'n* (11A674)
5.	*Am. Tradition P'ship, Inc. v. Bullock* (11A762)
6.	*State of Ariz. v. Abeytia* (11A1189)
	Total: 3
October Term 2012	
7.	*Husted v. Obama for Am.* (12A338)
8.	*Lair v. Bullock* (12A395)
9.	*Voting for Am., Inc. v. Andrade* (12A266)
10.	*Libertarian Party of Mich. v. Johnson* (12A260)
	Total: 4
October Term 2013	
	None

* This is not intended to be a comprehensive list. There is no official listing of all election litigation heard on an emergency basis by the Supreme Court.

October Term 2014	
11.	*Husted v. NAACP* (14A336)
12.	*Frank v. Walker* (14A352)
13.	*North Carolina v. League of Women Voters of N.C.* (14A358)
14.	*Veasey v. Perry* (14A393)
	Total: 4
October Term 2015	
15.	*Akina v. Hawaii* (15A551)
16.	*McCrory v. Harris* (15A809)
17.	*Ravalli Cnty. Republican Cent. Comm. v. McCulloch* (15A911)
18.	*Veasey v. Abbott* (15A999)
	Total: 4
October Term 2016	
19.	*North Carolina v. N.C. Conference of NAACP* (16A168)
20.	*Libertarian Party of Ohio v. Husted* (16A181)
21.	*Ohio Democratic Party v. Husted* (16A223)
22.	*Johnson v. A. Philip Randolph Inst.* (16A225)
23.	*Ne. Ohio Coalition for Homeless v. Husted* (16A405)
24.	*Ariz. Sec'y of State's Office v. Feldman* (16A460)
25.	*Ohio Democratic Party v. Donald J. Trump for President* (16A461)
26.	*North Carolina v. Covington* (16A646)
27.	*Gill v. Whitford* (16A1149)

28-29.	*North Carolina v. Covington* (16A1202, 16A1203)
	Total: 11
October Term 2017	
30-31.	*Abbott v. Perez* (17A225, 17A245)
32.	*Rucho v. Common Cause* (17A745)
33.	*North Carolina v. Covington* (17A790)
34.	*Turzai v. League of Women Voters of Pa.* (17A909)
	Total: 5
October Term 2018	
35.	*A. Philip Randolph Inst. v. Johnson* (18A240)
36.	*Va. House of* Delegates *v. Bethune-Hill* (18A629)
37.	*Householder v. A. Philip Randolph Inst.* (18A1165)
38.	*Chabot v. A. Philip* Randolph *Inst.* (18A1166)
39.	*Mich. Senate v. League of Women Voters of Mich.* (18A1170)
40.	*Chatfield v. League of Women Voters of Mich.* (18A1171)
	Total: 6
October Term 2019	
41.	*Tex. Democratic Party v. Abbott* (19A1055)
42.	*Merrill v. People First of Ala.* (19A1063)
43.	*Raysor v. DeSantis* (19A1071)
	Total: 3

October Term 2020	
44.	*Republican Nat'l Comm. v. Common Cause R.I.* (20A28)
45.	*Scarnati v. Boockvar* (20A53)
46.	*Republican Party of Pa. v. Boockvar* (20A54)
47.	*Andino v. Middleton* (20A55)
48.	*Swenson v. Wis. State Legislature* (20A64)
49.	*Gear v. Wis. State Legislature* (20A65)
50.	*Democratic Nat'l Comm. v. Wis. State Legislature* (20A66)
51.	*Merrill v. People First of Ala.* (20A67)
52.	*Wise v. Circosta* (20A71)
53.	*Moore v. Circosta* (20A72)
54.	*Berger v. N.C. Bd. of Elections* (20A74)
55.	*Republican Party of Pa. v. Boockvar* (20A84)
56.	*Kelly v. Pennsylvania* (20A98)
57.	*Gohmert v. Pence* (20A115)
58.	*Texas v. Pennsylvania* (22O155)
	Total: 15
October Term 2021	
59.	*Merrill v. Milligan* (21A375)
60.	*Moore v. Harper* (21A455)
61.	*Toth v. Chapman* (21A457)
62.	*Grothman v. Wis. Elections Comm'n* (21A490)
63.	*Guillen v. Lulac* (21A756)
64.	*Ritter v. Migliori* (21A772)
65.	*Ardoin v. Robinson* (21A814)
	Total: 7
	Grand total: 65 orders