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 LEAGUE OF WOMEN VOTERS OF THE UNITED STATES AND LEAGUES OF WOMEN VOTERS REPRESENTING 50 STATES AND THE DISTRICT OF COLUMBIA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

The League of Women Voters (the "League") is a nonpartisan, grassroots organization committed to protecting voting rights, empowering voters, and defending democracy. The League works to ensure that all voters—including those from traditionally underrepresented or underserved communities, such as first-time voters, non-college youth, new citizens, communities of color, the elderly, and low-income Americans—have the opportunity and the information they need to exercise their right to vote.

Founded in 1920 as an outgrowth of the struggle to win voting rights for women, the League now has more than 500,000 members and supporters and is organized in more than 750 communities, all 50 states, and the District of Columbia. The national League includes the League of Women Voters of the United States and the League of Women Voters Educational Fund. The national League is joined here by the Leagues of Women Voters of Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Northern Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio,

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[1] No counsel for any party authored this brief in whole or in part, and no person other than *amici* or their counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming, and the District of Columbia, which share a common mission, values, and vision for democracy. Each affiliated organization works to encourage informed and active participation in government, to increase understanding of major public policy issues, and to influence public policy through grassroots activism, education, and advocacy.

State and local Leagues support voters in their communities throughout the election process. They register individuals to vote; maintain the VOTE411 online resource that allows voters to access ballot information (such as whether the individual is registered to vote and where to vote); and equip individuals with information to create their voting plan, whether in person, early, or by mail. Many League members serve as poll workers and poll observers to ensure the electoral process runs smoothly and lawfully.

To perform its work assisting voters, the League tracks election rules and changes at the local, state, and federal levels, particularly the rules and deadlines relating to voter registration, early voting, voting on election day, absentee voting, and how voters can confirm their ballots were counted. When the rules are unclear, the League has worked with state Attorneys General and Secretaries of State to clarify new or existing laws that impact voters and, when necessary, litigated in state and federal courts

to ensure that voters have the clarity they need before an election.

The League is dedicated to ensuring that voters have information that is straightforward and comprehensive so that voting rules and procedures are accessible and clear. The national League and Leagues representing all 50 states and the District of Columbia are participating as *amici* to underscore to the Court how a decision in favor of petitioners in this case would be a devastating disruption to the electoral process on the ground, harming voters and election workers alike.

SUMMARY OF ARGUMENT

Since the founding, state courts have played a critical and unquestioned role applying the mandates of their state constitutions to state election laws. Today's election law landscape—and our democratic process as we know it—results from two centuries of this system at work. The "independent state legislature" theory ("ISLT") proposes a radical departure from this traditional framework, and adopting it would throw election law and administration into disarray.

A rule that state courts may not review state legislative action bearing on federal elections would immediately fracture state electoral systems. ISLT, if it became doctrine, would not be confined to redistricting plans, applicable to only particular offices or legislative bodies. Most state election laws and most state court rulings on election laws concern *all* elections—federal, state, and local. Adopting petitioners' theory would open the door to the

retroactive abrogation of all state court rulings that have invoked state constitutional grounds to strike down state statutes—but *only* as to federal elections. Simply discerning which rules apply in which elections in this bifurcated scheme would become complex. And even assuming voting rules could be sorted into clear "state and local" and "federal" buckets, the consequences would be burdensome, chaotic, and confusing for election officials and voters alike. Invalidating state court judgments to the extent they apply in federal elections would make it harder for officials and poll workers to administer our elections and harder for voters to participate in them.

By destabilizing settled election rules and our longstanding system for establishing them, ISLT would also sow distrust in the democratic process. A healthy democracy depends on trust in electoral outcomes and on voters' faith in the integrity and fairness of our elections. A decision adopting petitioners' theory would undermine those values at a time when voters' confidence in our institutions of government is particularly fragile. The Court should decline to abruptly overhaul the framework that has made our country one of the most successful democracies in the world.

ARGUMENT

I. STATE COURTS HAVE HISTORICALLY SHAPED OUR DEMOCRATIC SYSTEM.

Today's electoral system is the product of two centuries of work. From our country's beginnings, state courts have played a critical role interpreting

state election laws and enforcing state constitutional requirements in the election context. Their efforts have strengthened our democracy: State courts have protected and expanded the franchise; ensured the integrity of our elections; and safeguarded the democratic process when elected officials have tried to insulate their positions of power. Petitioners ask the Court to upend this 233-year-old feature of American federalism.

"[O]ne of the happy incidents of the federal system" is "that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932). Those experiments include the guarantees and restrictions on legislative power that a state's citizens enshrine in their constitution. Petitioners' theory asserts that state legislatures operate unchecked by their own state constitutions when it comes to regulating federal elections. Petitioners ignore state courts' pioneering role in matters of election law throughout our country's history.

A survey of American suffrage movements in the nineteenth century reveals that many state courts drove the development of democratic norms by applying their state constitutions in rulings that governed *all* elections.[2] For example, some state

[2] *See, e.g.*, Lynn Eisenberg, *States as Laboratories for Federal Reform: Case Studies in Felon Disenfranchisement Law*, 15 N.Y.U. J. Legis. & Pub. Pol'y 539, 575–76 (2012) ("Historically, the federalist system has been a crucial element in expansion of the franchise, from the slow elimination of

courts began to dismantle racial disenfranchisement well before the passage of the Reconstruction Amendments. In 1842, the Ohio Supreme Court explained that a "clearly settled" interpretation of the state constitution granted some citizens of color the right to vote. *Jeffries v. Ankeny*, 11 Ohio 372, 375 (1842); *Anderson v. Millikin*, 9 Ohio St. 568 (1859) (same). In 1857, the Supreme Court of Maine declared in response to a Senate inquiry that the state constitution's grant of suffrage to "every male citizen of the United States" included Black Americans. *Opinion of Judge Appleton*, 44 Me. 521 (1857). And in 1866, the Supreme Court of Wisconsin decided that an 1849 ballot question had in fact extended the right to vote to Black voters in compliance with the state constitution's requirements. *Gillespie v. Palmer*, 20 Wis. 544, 547 (1866).

Later on, state courts also struck down discriminatory measures that treated naturalized U.S. citizens differently from native-born U.S. citizens. *See, e.g.*, *State ex rel. Williams v. Moorhead*, 96 Neb. 559, 570–72 (1914) (holding that affidavit confirming details of naturalization sufficed to rebut challenge to citizenship); *Attorney General v. City of Detroit*, 78 Mich. 545, 561–64 (1889) (striking down documentary proof of citizenship requirement for naturalized voters); *see also Kineen v. Wells*, 144 Mass. 497, 503 (1887) (holding that 30-day moratorium on voter registration for naturalized

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property requirements to the national attainment of women's suffrage. In both instances, national voting norms changed and national laws were enacted to reflect experiments in local voting norms." (footnotes omitted)).

citizens violated state constitution's equal protection clause).

State courts have also always performed an important function resolving state constitutional and statutory interpretation questions about the mechanics of registration, voting, and vote-counting. As this Court has long recognized, state courts have greater institutional competence and knowledge when it comes to resolving disputes about state election laws that do not raise federal questions. *See Jackson v. Ogilvie*, 401 U.S. 904, 904 (1971) (Douglas, J., concurring) ("[F]ederal courts are usually less able than state courts to work their way through a maze of state electoral laws. If federal courts take the laboring oar in these so-called 'emergency' cases involving local electoral laws, they must make quick decisions on local law issues that are often tangled with matters of local construction and administration.").

To be sure, there have been instances when state courts obstructed our democracy's progress. *See, e.g.*, *Travia v. Lomenzo*, 86 S. Ct. 7, 9 (1965) (collecting cases in which state courts had failed to redress malapportionment of districts); *Dixon v. State*, 74 Miss. 271, 277–80 (1896) (upholding Jim Crow literacy and constitutional understanding tests). Federal protections and courts have also been vital to securing and defending access to the ballot. But state courts have nevertheless played a crucial historical role in shaping this country's electoral infrastructure—a role they still play today.

ISLT threatens to upend the important check state courts have exercised on state legislative power and the vital, if at times uneven, role they have played

in fostering democratic progress in this country. Eliminating this guardrail would profoundly destabilize the nation's electoral infrastructure at a moment when it most needs to be reinforced.

II. ISLT WOULD SOW CHAOS IN ELECTION ADMINISTRATION AND CAUSE WIDESPREAD VOTER CONFUSION.

Elections have to work for democracy to work. States have a strong interest in "stability and certainty" in administering election laws. *Berger v. N.C. State Conf. of the NAACP*, 142 S. Ct. 2191, 2205 (2022). "Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls." *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006). ISLT would undermine these interests and wreak havoc on the ground. Forcing states to administer federal and state elections under different—often conflicting—rules would burden election officials, confuse voters, and instill mistrust in the electoral system. At a time when six in ten Americans of all political stripes "believe U.S. democracy is 'in crisis and at risk of failing,'"[3] imposing a system that is much more difficult to administer and understand is not a risk our democracy can afford.

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[3] Joel Rose & Liz Baker, *6 in 10 Americans Say U.S. Democracy Is in Crisis as the 'Big Lie' Takes Root*, NPR, Jan. 3, 2022, https://www.npr.org/2022/01/03/1069764164/american-democracy-poll-jan-6.

A. ISLT would bifurcate the rules for federal and state elections.

Because the Elections Clause does not apply to state and local elections, ISLT would block state courts from issuing state constitutional rulings only as to *federal* elections. That would, in turn, bifurcate the development and enforcement of election rules.[4] Bifurcation of election rules would occur in two ways. First, state courts would continue to review state election statutes for compliance with state constitutions, but their rulings would be given prospective effect *only* in state and local elections.[5] Second, ISLT could retroactively abrogate prior state court rulings invalidating state election laws, but *only* as to federal elections.

The difficult questions that would immediately emerge are clearer than their answers. State and local election officials across the country would have to identify which laws govern which elections. Where long-enjoined laws remain on the books, there may be confusion about whether those laws have been revived as to federal elections by the retroactive

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[4] *See* Carolyn Shapiro, *The Independent State Legislature Theory, Federal Courts, and State Law*, 90 U. Chi. L. Rev. (forthcoming 2023) (draft manuscript at 55) (arguing that "ISLT would hang, like the sword of Damocles, over settled state election law"), https://bit.ly/3OMpuOP.

[5] And of course, whatever the outcome of this case, state and federal courts alike will continue to be able to enforce the U.S. Constitution and federal statutes.

application of a decision adopting ISLT.[6] Election officials and their counsel would have to conduct a painstaking review of every state court decision that has struck down an election law that, by its terms, governs all elections, as well as any injunctions in pending lawsuits that are not yet final. This process would surely prompt waves of new litigation over the scope of ISLT—lawsuits that would in turn raise new questions of their own, including which courts could hear them or decide particular issues.

While this litigation played out, states would need to create new, dual-track election systems for full-ballot voters and restricted-ballot voters who could vote only in federal elections or only in state and local elections. While some laws would apply to both sets of voters, others would not. And as detailed below, implementing this dual-track system would cause thorny logistical problems, increase election administration burdens and costs, and slow down what can already be an inefficient process. Split enforcement of voting rules would also pose an unprecedented voter education challenge for the League and similar organizations.

B. ISLT would impose overwhelming administrative burdens on election administrators and confuse voters.

The voting rules that ISLT would revive or insulate would apply to federal primary, general, and

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[6] Even if the challenged statute had been formally repealed, a state legislature that was so inclined could simply reenact it, so long as it applied only to federal elections.

special elections,[7] but not to state and local elections. This bifurcation of federal and state election rules would inject chaos into every corner of election administration.

Because many elections involve only state and local races, certain voting laws would switch on and off from election to election. A voter in Pennsylvania, for example, would have to comply with a photo ID law that was previously blocked by the state's courts, *Applewhite v. Commonwealth*, 2014 WL 184988, at *18 (Pa. Commw. Ct. Jan. 17, 2014), to vote in this year's congressional races, but not in next year's state and local elections. The alternation of voting rules would occur both from year to year and also within a year.[8] In 2019, North Carolina held six elections, four with federal races on the ballot and two without.[9] This constant alternation of election rules would

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[7] Special elections, used to fill vacancies in the U.S. House of Representatives following a death or resignation, occur frequently and are scheduled throughout the year. There have been 30 over the last five years. *See* U.S. House of Representatives, *Vacancies & Successors, 1997 to Present*, https://history.house.gov/Institution/Vacancies-Successors/115/.

[8] State and local election officials administer myriad elections, some with federal, state, and local races on the same ballot and others with only local races or a special federal election. In 2020, Wisconsin held a primary election for state supreme court and congressional races in February; a general state supreme court election and the presidential primary in April; a special congressional general election in May; and then primary and general elections for federal and state offices in August and November, respectively. Wis. Elections Comm'n, *Election Results Archive*, https://elections.wi.gov/elections/election-results/results-all#accordion-866.

[9] N.C. State Bd. of Elections, *Election Results Dashboard*, https://www.ncsbe.gov/results-data/election-results.

confuse poll workers and voters alike and invite errors, such as enforcing a particular rule when it is not actually in effect. It would also slow down voter registration and the processing of absentee ballot applications as well as in-person voter intake and vote counting for already-overburdened state and local election officials.

In elections with both state and federal races on the ballot, election administrators would either need to provide different ballots to different voters or count certain voters' ballots differently. This process would be required for all balloting systems, including electronic voting machines. Since ballots vary by districts and precincts and accordingly include different state and local races, officials opting to provide state-and-local-only ballots would need to double an already significant number of unique ballots. Otherwise, officials would need to figure out a way to exclude votes cast in federal elections by state-and-local-only voters—say, voters who appeared that day without the ID required to vote in a federal election, or voters who could validly register on the same day for state and local elections but not for the federal races. And the reverse would be necessary where a state court has invalidated a same-day voter registration law such that same-day registrants can only vote in federal elections.

All of these paths would require a reconfiguration of most states' voting technology. Optical scan, direct-recording electronic, and other voting and vote-tabulation machines would need to be reprogrammed to accommodate both full ballots and restricted federal-only or state-and-local-only ballots.

Aside from choosing between those options for restricted voting, states would need to navigate countless additional steps in the process. In states with split enforcement of voter ID requirements, administrators would have to furnish state-and-local-only voters without the necessary ID with a separate provisional ballot for federal elections only.[10] For states with split enforcement of same-day voter registration laws, voters could register at polling places for federal elections but not state and local elections, *see Albence v. Higgin*, 2022 WL 5333790, at *1 (Del. Oct. 7, 2022), or vice versa, *see Mont. Democratic Party v. Jacobsen*, 2022 WL 4362513, at *10–12 (Mont. Sept. 21, 2022). *See infra* at 19–21. Election officials would need to develop systems for recording different registration statuses and ensuring that voters who registered on election day either received restricted ballots or had their votes in certain races excluded. Poll workers in Delaware would need to explain to same-day registrants that they could not vote for governor or school board in that election but that they would be able to vote in state and local races in the future; in Montana, poll workers would need to explain the same regarding federal races. These would be confusing messages to deliver or receive.

A parallel set of issues would arise for absentee ballots. Where an absentee voter failed to comply with certain technical requirements required for one set of races but not the other, that ballot would either need

[10] Voter ID laws typically permit voters without ID to cast a provisional ballot that can be cured by presenting valid voter ID and/or signing an affidavit at the local election office. *See, e.g.*, 25 Pa. Stat. Ann. §§ 3050(a.2)(1), 3050(a.4)(5).

to be partially counted via machine or "re-made"[11] by hand so that only valid votes were counted. Alternatively, state election officials could mail restricted federal-only or state-and-local-only ballots to certain absentee voters. This would likely require them to distribute enough state-and-local-only ballots to polling places so that absentee voters restricted to federal-only ballots who subsequently showed up in person to vote in state and local elections would be able to exercise their right to do so.

Any approach to limiting state court rulings to state and local contests would be burdensome, costly, and confusing, and officials may lack the resources to accommodate additional complexity. Researchers have observed that "[i]n one-party dominant states, passing election law changes is often much easier than administering those laws effectively."[12] This is especially true where those changes "come in the form of unfunded mandates," *i.e.*, where states "fail to provide funds to administer the changes."[13] There is no guarantee that states would respond to bifurcation of their voting rules with additional funding to support accurate administration of the laws. A bifurcated electoral system would undermine the "strong public interest in smooth and effective administration of the voting laws." *Summit Cnty.*

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[11] Duplication or "re-making" of ballots is a process by which election workers copy the votes from a defective ballot, *e.g.*, one that is damaged, to a new ballot so that it can be scanned properly and counted.

[12] Scot Schraufnagel, Michael J. Pomante II & Quan Li, *Cost of Voting in the American States: 2022*, 21 Election L. J. 220, 226 (2022).

[13] *Id.*

Democratic Cent. & Exec. Comm. v. Blackwell, 388 F.3d 547, 551 (6th Cir. 2004).

Because "running a statewide election is a complicated endeavor" requiring "thousands of state and local officials and volunteers [to] participate in a massive coordinated effort," it is imperative that "the rules of the road … be clear and settled." *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J., concurring in denial of application to vacate stay). Adopting ISLT would do just the opposite: magnify complexity and the risk of error in an already complex area; unsettle the law where the need for stability is most critical; and burden the people on the ground—officials, volunteers, and voters—who election after election make our democracy work.[14]

C. ISLT would create split enforcement of voting laws.

Adopting petitioners' theory would create chaos at every stage of the voting process: eligibility, registration, and voting itself, especially absentee voting.

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[14] To vindicate the rights of voters under certain specific federal statutes like the National Voter Registration Act, federal courts occasionally must order relief that results in a bifurcation of rules. Such remedies, however, are a far cry from a theory that would cause widespread, permanent splits in the enforcement of voting rules and the disruption of settled state court precedents across the country.

1. Voter Identification and Eligibility

As discussed, adopting ISLT would create two tiers of voters in many states: those eligible to vote in all elections, and those eligible to vote either only in state and local elections or only in federal elections.

One way this would occur is through the bifurcation of voter ID laws. The last decade has seen a sharp rise in the enactment of voter photo ID requirements—most of which apply only to in-person voters—and a corresponding swell in litigation.[15] As a result, a number of state courts have invalidated voter ID laws on state constitutional grounds. In 2014, for example, the Pennsylvania Commonwealth Court permanently enjoined a photo ID law under the state constitution's "free and equal" elections clause. *Applewhite*, 2014 WL 184988, at *18; Pa. Const. art. I, § 5 ("Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage."). Though voters have not had to show photo ID to vote in Pennsylvania for the past eight years, this law has not been repealed. 25 Pa. Stat. Ann. §§ 3050, 3146.2, 2602(z.5).

In North Carolina, after the Fourth Circuit struck down the General Assembly's first attempt at enacting a photo ID law as intentionally racially discriminatory, *see N.C. State Conf. of NAACP v.*

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[15] Nat'l Conf. of State Legislatures, *Voter ID Laws*, https://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx.

McCrory, 831 F.3d 204, 215 (4th Cir. 2016), the legislature enacted a new photo ID law with modifications, 2017 N.C. Sess. Laws 2018-144 (S.B. 824) (Dec. 9, 2018). This time, North Carolina courts enjoined the law. *Holmes v. Moore*, No. 18 CVS 15292 (Wake Cnty., N.C. Super. Ct. Sept. 17, 2021).[16]

Additionally, a recent decision in Montana struck down on state constitutional grounds a law that made the state's voter ID requirement more restrictive. *See Mont. Democratic Party*, 2022 WL 4362513 (affirming preliminary injunction); *Mont. Democratic Party v. Jacobsen*, Consol. Case No. 21-0451 (Mont. 13th Dist. Ct., Yellowstone Cnty., Sept. 30, 2022) (judgment following bench trial); Mont. Code Ann. § 13-13-114, *as amended by* 2021 Mont. Laws Ch. 254 (S.B. 169), § 2.

Finally, a state court in Arkansas struck down a state statute that eliminated the identity affidavit alternative to the state's photo ID requirement. *League of Women Voters of Arkansas v. Thurston*, No. 60CV-21-3138, slip op. at 76–79 (Pulaski Cnty. Cir. Ct., 6th Judicial Dist., Mar. 24, 2022). If upheld on appeal, this ruling on state constitutional grounds would not cover federal elections under ISLT.

In all four of these states, adopting petitioners' theory would mean that voter ID requirements would be enforced in different ways for different elections.

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[16] This case has been appealed to the Supreme Court of North Carolina, where oral argument was recently heard. Docket Sheet, *Holmes v. Moore*, No. 342PA19-2 (N.C.), https://appellate.nccourts.org/dockets.php?court=1&docket=1-2019-0342-002&pdf=1&a=0&dev=1.

Voters in these states would be sorted into two classes, one with full access to elections and one with only partial access.[17]

Voter-eligibility rules may also be impacted should ISLT subsequently be extended to voter qualifications. In recent years, state legislatures, state courts, and voters have been rethinking rules around felony disenfranchisement and rights restoration. In *Mixon v. Commonwealth*, 759 A.2d 442 (Pa. Commw. Ct. 2000), *aff'd*, 783 A.2d 763 (Pa. 2001), for example, the Commonwealth Court of Pennsylvania reviewed a state law that precluded people with felony convictions from voting for five years after their release from incarceration if they had not been registered to vote before they were incarcerated. The court held that the law violated the Pennsylvania Constitution. *Id.* at 452. Applying ISLT

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[17] Missouri courts have twice blocked voter ID laws in whole or in part. In 2006, the Supreme Court of Missouri held that the state's photo ID law violated the Missouri Constitution's requirement that "all elections shall be free and open; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." *Weinschenk v. State*, 203 S.W.3d 201, 211 (Mo. 2006) (en banc) (quoting Mo. Const. art. I, § 25). In 2020, that court affirmed a permanent injunction, again on state constitutional grounds, blocking a revised voter ID law's affidavit requirement for voters using alternative non-photo forms of identification. *Priorities USA v. State*, 591 S.W.3d 448, 451–55 (Mo. 2020), *reh'g denied* (Jan. 30, 2020). Had ISLT been in effect, the affidavit requirement would have remained in force for federal elections, notwithstanding the state supreme court's decision. The General Assembly has enacted yet another photo ID requirement (H.B. 1878 (Mo. 2022)), which is being challenged in state court once again. *Missouri NAACP v. Missouri*, No. 22AC-CC04439 (Cole Cnty. Cir. Ct. Oct. 12, 2022).

to *Mixon* would require election officials to determine which people with felony convictions had been registered pre-conviction and to restrict all others to state-and-local-only ballots for five years. Forcing election administrators to engage in such tasks is a waste of time and resources.

2. Voter Registration

Adopting ISLT would also create chaos in the voter registration process. Registration deadlines are set by the states (with a maximum number of days in advance of election day established by the National Voter Registration Act of 1993 ("NVRA"), *see* 52 U.S.C. § 20507(a)). States may also opt—as approximately half of them have—to allow voters to register up to and on election day.[18]

State courts have taken different views of same-day voter registration laws. Just last month, the Montana Supreme Court affirmed a preliminary injunction blocking the repeal of the state's longstanding election-day registration law. *Mont. Democratic Party*, 2022 WL 4362513, at *10–12. Then, following a bench trial, the district court entered final judgment. *Mont. Democratic Party v. Jacobsen*, Consol. Case No. 21-0451 (Mont. 13th Dist. Ct., Yellowstone Cnty., Sept. 30, 2022). In a mirror image of *Montana Democratic Party*, the Delaware Supreme Court recently enjoined the state's same-day

[18] Nat'l Conf. of State Legislatures, *Same Day Voter Registration*, https://www.ncsl.org/research/elections-and-campaigns/same-day-registration.aspx.

registration law on state constitutional grounds. *Albence*, 2022 WL 5333790, at *1.

And in Maine, voters in 2011 used a people's veto (effectively a referendum) to restore a same-day registration statute that the legislature had repealed after four decades of use. Me. Pub. L. 2011, c. 399, § 3 (2011), *repealed by* Question 1: People's Veto (Nov. 8, 2011). If ISLT called into question direct democracy powers such as ballot initiatives and referenda—a delegation of legislative authority to decision-makers other than legislators—this repeal of a state law would also be implicated. *Cf. Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 813–24 (2015) (narrowly rejecting Elections Clause challenge to voter-initiated state constitutional amendment reassigning state legislature's redistricting powers to independent commission).

Adopting ISLT could give Montana and Maine voters the opportunity to same-day register in state and local but not federal elections, and Delaware voters the reverse. Administrators would need to announce whether each upcoming election would allow same-day registration—and if same-day registration would allow voters to participate in some races but not others.

Election officials would also have to establish new rules for processing would-be voters who are already registered in a particular state but need to update their addresses when voting. Some states that do not offer same-day registration for new voters do offer already-registered voters who have moved within the state the opportunity to update their addresses when

they vote.[19] In states with same-day registration, these voters can update their addresses at their polling place. But if that opportunity were limited to state and local elections, these states would need to create a new parallel process just for federal elections, one that would likely require new paperwork and technological fixes.

The enforcement of other voter-registration laws could also be fractured by type of election. For example, the New Hampshire Supreme Court recently invalidated on state constitutional grounds a state law requiring documentary evidence of domicile, *League of Women Voters of N.H. v. N.H. Sec'y of State*, 174 N.H. 312, 381 (2021), though the law remains on the books, N.H. Rev. Stat. § 654:7. ISLT would bifurcate this ruling, resulting in different proof requirements for federal elections and state and local elections. Once again, poll workers would need to administer two distinct rules that would dictate which elections voters could participate in and what kinds of ballots administrators would need to create.

3. Absentee Voting

Finally, ISLT would bifurcate rules concerning the manner and mechanics of voting itself, most notably absentee voting. Voters across the country rely on absentee or mail-in voting to exercise their right to vote when they cannot show up to the polls due to travel, business, military service, sickness, disability,

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[19] Certain opportunities to make local updates are required by the NVRA. *See* 52 U.S.C. § 20507(e)(2).

or in many states simply because they prefer it.[20] ISLT will disrupt these well-established routines by partially abrogating state court orders relating to absentee voting laws.

Just this month and weeks before the 2022 midterm elections, the Delaware Supreme Court ruled that a law permitting voters to cast a mail-in ballot without an excuse conflicted with the state's constitution. *Albence*, 2022 WL 5333790, at *1. Many Delaware voters had already applied for no-excuse absentee ballots, and the Department of Elections had to send these voters a letter explaining that they would need to vote in person or reapply for an absentee ballot with a qualifying excuse.[21] Voter-education organizations like the League have been left scrambling to ensure voters receive accurate information about their options.

ISLT would create even more confusion around absentee voting in Delaware and any similarly situated state.[22] Voters could vote by mail in federal elections without an excuse but would still need to provide one of the six excuses listed in the state's prior

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[20] Nat'l Conf. of State Legislatures, *Voting Outside the Polling Place: Absentee, All-Mail and Other Voting at Home Options*, https://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx.

[21] Del. Dep't of Elections, *Vote by Mail Not Permitted* https://elections.delaware.gov/services/voter/votebymail/ (last visited Oct. 13, 2022).

[22] Pennsylvania legislators mounted a similar challenge to their state's no-excuse absentee voting law, but it was rejected by the state supreme court. *McLinko v. Dep't of State*, 279 A.3d 539, 579–80 (Pa. 2022).

vote-by-mail statute to vote in state and local elections. *See Higgin v. Albence*, 2022 WL 4239590, at *4 (Del. Ch. Sept. 14, 2022) (citing 82 Del. Laws ch. 245, § 1 (2020)), *aff'd in relevant part*, 2022 WL 5333790.[23] Failing that, voters would need to vote in person or split their votes between the two methods, causing serious administrative problems.

Other state courts have considered laws related to third-party collection of mail-in ballots. The Montana Supreme Court recently affirmed a preliminary injunction of a state law that would have banned individuals from receiving payment to collect and deliver mail-in ballots for absentee voters. *Mont. Democratic Party*, 2022 WL 4362513. If ISLT reinstated this law as to federal elections, ballot collection would effectively cease because Montana lists federal, state, and local races on the same ballot and paid collectors could not lawfully collect and deliver a ballot with federal races on it. The more restrictive rule would prevail, nullifying the state court's ostensible power to rule as to state and local elections.

Signature-matching processes for absentee voting have also been scrutinized by state courts. For example, this year, an Arkansas court invalidated the signature verification requirement for absentee voters without compliant identification. *League of*

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[23] The nonprofit organization that represented the *Higgin* plaintiffs, the Public Interest Legal Foundation, submitted an *amicus* brief urging the Court to adopt ISLT in this case, Brief of the Public Interest Legal Foundation as *Amicus Curiae* in Support of Petitioners, but such a result would invalidate the relief it secured as to federal elections.

Women Voters of Ark., slip op. at 79–81 . Under ISLT, a state using a single ballot for federal and state elections would need to offer voters a means to comply with the verification requirement and cure a perceived non-matching signature for their federal votes to count.

Another contested aspect of absentee voting concerns ballot return deadlines. During the 2020 election, as vastly larger numbers of voters opted to cast their ballots by mail due to the pandemic, some state courts extended mail-in ballot receipt and processing timelines. *See, e.g.*, *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 362–72 (Pa. 2020) (granting relief for claim that "strict enforcement of [absentee ballot return] deadline, in light of the … COVID-19 pandemic and alleged delays in mail delivery by the USPS, [would] result in extensive voter disenfranchisement in violation of the Pennsylvania Constitution's Free and Equal Elections Clause"). This year, an Arkansas court struck down a law that moved the deadline for in-person return of absentee ballots from the Monday to the Friday before election day. *League of Women Voters of Ark.*, slip. op. at 81–83. ISLT would reverse these changes as to federal elections, compelling voters to return their ballots by the earlier deadline for their federal votes to count. Local election officials would need to identify and segregate ballots received after the earlier deadline but before the judicially extended deadline in Pennsylvania or preexisting deadline in Arkansas and figure out a way to count only the state and local votes on these ballots. This would entail reprogramming certain tabulation

machines or re-making the ballots by hand, *see supra* at 14 & n.11, adding further time and complexity to the ballot tabulation and certification process.

Should ISLT be extended in a future case to ballot initiatives concerning federal elections, *see supra* at 20, other vote-by-mail provisions would also be implicated. This November, for example, Michigan voters will decide whether to approve Proposal 2, which would amend the state's constitution to give voters the rights to be placed on a permanent absentee voting list and to use absentee ballot drop boxes.[24] If voters approve Proposal 2 and this Court adopts and later expands ISLT to reach it, Michigan voters would be entitled to automatically receive mail-in ballots and use drop boxes only for state and local elections. Absentee voters might ultimately have to apply for a full ballot in every election and avoid drop boxes altogether, effectively nullifying constitutional provisions that would have been duly adopted under state law. In this way, ISLT, which purports to vindicate state autonomy, would actually work to undermine it.

Countless other mail-in voting logistics could be snarled by the adoption of ISLT. To name just a few, election administrators and voters might have to navigate two different receipt and postmark deadlines, two different secrecy sleeve procedures,

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[24] Mich. Bureau of Elections, *Proposal 22-2*, https://www.michigan.gov/sos/-/media/Project/Websites/sos/BSC-Announcements/Proposal/Proposal-22-2-Ballot-Language.pdf ("A proposal to amend the state constitution to add provisions regarding elections").

and two different sets of requirements for a return envelope's voter and witness certifications. The mechanics of absentee voting are already complex; switching the rules on and off based on the type of races in the election would make them infinitely more difficult to administer.

III. ISLT WOULD FURTHER ERODE VOTER PARTICIPATION AND TRUST IN AMERICAN DEMOCRACY.

ISLT would have a grave impact not just on election administrators but also on voters and the American democratic system. Research shows that every additional barrier to voting acts as another deterrent to voter participation.[25] Complexity is its own barrier. For example, voters "initially decide whether to vote based on just the increased search costs imposed by changed polling places."[26] The dual election systems ISLT would create would require voters to spend more time deciphering and following separate voting rules for state and federal elections. Some voters would need to vote in person in one set of elections, when they could otherwise have voted by mail. Other voters might need to make extra trips to

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[25] *See* Schraufnagel et al., *supra* n. 12, at 223; John H. Aldrich, *Rational Choice and Turnout*, 37 Am. J. Pol. Sci. 246, 262 n.17 (1993) (noting that "even low costs may be an effective barrier to voting for the poor"); Henry E. Brady & John E. McNulty, *Turning Out to Vote: The Costs of Finding and Getting to the Polling Place*, 105 Am. Pol. Sci. Rev. 115, 128 (2011) ("[T]he substitution of absentee voting for a reduction in polling place voting is greatest among people of middle age and older, whereas younger people are more inclined to simply not vote at all.").

[26] Brady & McNulty, *supra* n. 26, at 126.

their local election office to correct a registration or ballot defect they mistakenly overlooked because it was required by only one set of election rules. These sorts of barriers "create confusion … perplex voters and possibly discourage voter turnout."[27] They would impact even the most seasoned voters but would especially undermine participation by new voters.

In this way, the administrative confusion caused by ISLT would undermine the goal of election officials in every democracy: "giving citizens (including the losing candidates and their supporters) confidence in the fairness of the election." *Democratic Nat'l Comm.*, 141 S. Ct. at 31. As this Court has acknowledged, "public confidence in the integrity of the electoral process has independent significance." *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 197 (2008). This is true both because it "encourages citizen participation in the democratic process," *id.*, and because it strengthens public confidence in electoral outcomes. This Court should avoid an extreme change that would severely corrode voters' trust in our elections.

CONCLUSION

For the foregoing reasons, the Court should affirm the decisions below.

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[27] Schraufnagel et al., *supra* n. 12, at 226.

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