October 27, 2022

ATTORNEY GENERAL KWAME RAOUL LEADS COALITION OF 22 ATTORNEYS GENERAL BACKING STATES' ABILITY TO ENFORCE THEIR CONSTITUTIONS TO ENSURE FREE AND FAIR ELECTIONS

Raoul Builds on Strong Track Record of Protecting and Expanding Voting Rights, Ensuring All Eligible Americans Can Make Their Voices Heard

Chicago — Attorney General Kwame Raoul and District of Columbia Attorney General Karl Racine led a coalition of 22 attorneys general filing an amicus brief in Moore v. Harper, a case in which the U.S. Supreme Court will decide whether to adopt the "independent state legislature" (ISL) theory. The theory would give state legislators sole, unchecked authority to make election rules at the expense of voters and other state institutions. The coalition is supporting North Carolina, its voters and voting-rights organizations in their challenge.

The ISL theory, Raoul and the coalition explain, lacks any support in American history or precedent of the U.S. Supreme Court. The theory would unravel states' election processes and impede election officials' ability to administer free and orderly elections.

"The right to participate in our nation's democracy is one of the most fundamental rights we have as Americans," Raoul said. "The independent state legislature theory is a fringe concept with no basis in our history. If adopted, it would undermine free and fair local, state and federal elections and threaten voters' ability to choose their leaders."

The U.S. Constitution provides that a state's legislature may set rules governing federal elections. Historically, the Supreme Court has interpreted "legislature" flexibly to include any state actor or entity who exercises lawmaking power. The court has never questioned that a state court has the power to interpret election statutes and apply state constitutional provisions to those statutes. Consistent with this precedent, North Carolina's Supreme Court interpreted its state constitution to prohibit partisan gerrymandering and struck down North Carolina's gerrymandered congressional maps as violating the state constitution. A group of North Carolina state legislators are now arguing to the Supreme Court that only state legislators — not other actors like the state supreme court, executives or voters — can make election rules.

In their brief, Raoul and the coalition argue that adoption of the ISL theory would invalidate a large swath of state election law that does not come from the state legislature, such as state constitutions, court decisions and regulations. Elections would thus become unworkable and impossible to administer.

The attorneys general raise two main points:

- **State constitutions, courts, and officials historically played an integral role in regulating federal elections:** At and after the nation's founding, states employed various institutions of state government, including their constitutions, courts and executive officials, to set and implement the rules governing federal elections. The ISL theory thus calls into question what the nation's founders themselves practiced.
- **The ISL theory threatens states' ability to administer free and fair federal elections:** The states' historical practice continues today. Justifying their reputation as laboratories of democracy, contemporary state governments still use different branches of their government to conduct elections. The ISL theory threatens to wreak havoc and disrupt the states' established election practices.

The brief is a continuation of Raoul's efforts to protect and expand voters rights and ensure free and fair elections. The Attorney General's office assigns teams of assistant attorneys general and investigators to monitor polling places throughout the state on Election Day to ensure that voters' rights are protected and polling places are accessible. The office also offers a hotline for voters to report suspected improper or illegal activity. And Raoul has supported the right to vote in several cases throughout the country, including recent challenges to a North Carolina law that restricts the voting rights of formerly incarcerated people and a Florida election law that would make it more difficult for millions of Floridians to vote.

Raoul and Racine are joined by attorneys general from California, Colorado, Connecticut, Delaware, Hawaii, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Washington and Wisconsin.

August 18, 2022

ATTORNEY GENERAL RAOUL TAKES ACTION TO OPPOSE DISCRIMINATORY VOTING LAWS

Raoul Files Legal Briefs Opposing Efforts in North Carolina, Florida to Limit Voting Rights

Chicago — Attorney General Kwame Raoul joined two separate coalitions of attorneys general opposing discriminatory efforts to limit voting rights and access to the ballot box. Raoul filed legal briefs supporting a challenge to a North Carolina law that restricts the voting rights of formerly incarcerated people and contesting a Florida election law that would make it more difficult for millions of Floridians to vote.

"Limiting access to the ballot box reduces participation in our democracy and ultimately weakens faith in our government," Raoul said. "These actions disproportionally burden voters of color, older Americans and individuals with disabilities. States should be working to expand voter participation – not erecting frivolous roadblocks that disenfranchise large portions of the electorate."

Raoul joined a coalition of 15 attorneys general supporting a challenge to North Carolina's felon disenfranchisement law, which prohibits some formerly incarcerated people from voting until they have completed all the terms of their probation, parole or post-release supervision. According to Raoul and the coalition, this requirement deprives people with felony convictions of their right to vote well beyond the date of their release from incarceration. The attorneys general argue that this law disproportionately harms Black voters and that expanding the right to vote promotes civic engagement, improves public safety and benefits communities.

According to their brief, many states have begun moving away from broadly disenfranchising individuals with felony offenses and have restored the right to vote to felons. In the past six years, 16 states and the District of Columbia have restored the right to vote for those with felony convictions. Efforts to expand the right to vote illustrate a growing consensus that allowing formerly incarcerated people to vote benefits both the returning citizens and the communities they rejoin. An estimated 5.2 million people across the United States were barred from voting in the 2020 election and locked out of the democratic process because of state laws that disenfranchise individuals who were convicted of felony offenses.

Joining Raoul in filing the brief are the attorneys general of California, Connecticut, Delaware, the District of Columbia, Hawaii, Maine, Maryland, Massachusetts, Michigan, Nevada, New Jersey, New York, Rhode Island and Washington.

Raoul also joined a separate coalition of 17 attorneys general opposing a discriminatory Florida election law that would make it more difficult for millions of Floridians to vote. In their brief, Raoul and the coalition support a challenge to portions of a new Florida law that decreases voting opportunities by restricting the use of drop boxes for ballot collection. A lower court already struck down portions of the law, finding that it was enacted to unlawfully burden Black voters by limiting when drop boxes could be used and where they could be placed in a way that was intentionally discriminatory. The attorneys general filed their brief in support of the lower court's decision and argue that election security can be protected while increasing – not limiting – access to the ballot.

Raoul and the coalition argue that mail-in voting and the use of drop boxes are well-established practices in Florida and around the country, and neither has given rise to substantial fraud; states have a multitude of ways to protect election integrity without stripping voters of reliable and safe voting methods; voter confidence is a complex issue, which this new law does not actually address; and that the district court's decision was sound and should not be reversed.

Joining Raoul in filing the brief are the attorneys general of California, Connecticut, Delaware, the District of Columbia, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Mexico, New York, Oregon, Pennsylvania, Rhode Island and Washington.

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No. 21-1271

IN THE

Supreme Court of the United States

TIMOTHY K. MOORE, *et al.*,
Petitioners,
v.
REBECCA HARPER, *et al.*,
Respondents.

On Writ of Certiorari to the North Carolina Supreme Court

BRIEF OF THE DISTRICT OF COLUMBIA, ILLINOIS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, HAWAII, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, NEVADA, NEW JERSEY, NEW MEXICO, NEW YORK, OREGON, PENNSYLVANIA, RHODE ISLAND, VERMONT, WASHINGTON, AND WISCONSIN AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*

In our federalist system, the Constitution leaves to "States" the primary "power to regulate elections." *Shelby County v. Holder*, 570 U.S. 529, 543 (2013) (internal quotation marks omitted) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 461-62 (1991)). In carrying out that critical constitutional duty, an array of state actors work together to enable citizens to cast votes and states to count them. Legislatures pass and Governors sign election laws, courts interpret those laws, officials implement them, and at times voters directly enact election provisions.

According to petitioners, however, this cooperative system of election administration that states have relied on for decades to administer elections is constitutionally suspect. Based on an ahistorical reading of the Constitution's Elections Clause, petitioners theorize that election rules pass constitutional muster only when explicitly enacted by state legislatures. Pet'rs Br. 4. Perhaps balking at the breadth of this proposed rule, petitioners' *amici* take a different view, suggesting that the Elections Clause establishes a clear-statement rule for state election laws, Arkansas Br. 11, or requires federal oversight of state court decisions to ensure a "fair reading" of state law, Republican Nat'l Comm. Br. 19 (quoting *Bush v. Gore*, 531 U.S. 98, 115 (2000) (Rehnquist, C.J., concurring)). None of those approaches can be squared with either the history or present state of election administration, and each could result in insurmountable practical difficulties for states. Accordingly, the District of Columbia, and the States of Illinois, California, Colorado,

Connecticut, Delaware, Hawaii, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and Wisconsin ("*Amici* States") file this brief as *amici curiae* in support of respondents.

For *Amici* States, fundamental constitutional principles are at stake. The Constitution leaves to "States" the sovereign right "to structure themselves as they wish" and "conduct their affairs through a variety of branches, agencies, and elected and appointed officials." *Berger v. N.C. State Conf. of the NAACP*, 142 S. Ct. 2191, 2197 (2022). In exercising that power when carrying out their constitutional duty to regulate elections, *Amici* States have long administered elections through various organs of state government.

Amici States' experience regulating elections reveals how unsound petitioners' theory is from a historical perspective and how problematic the theory would be for states in practice. For one, the theory ignores a lengthy history of states relying on *all* institutions of state government—not just state legislatures—to issue and implement election rules. For another, the theory would undermine states' role in our federalist system by second-guessing state court rulings on state law and potentially re-ordering which state entities can oversee elections. Finally, the theory could destabilize state election administration by subjecting commonplace state election rules to constitutional challenge and creating an untenable scheme under which state and federal elections—which are usually held on the same days in

the same polling places using the same ballots—would operate under different rules. Because clear and consistent rules are vital to election administration, this Court should reject petitioners' invitation to upend settled state practices.

SUMMARY OF ARGUMENT

1. Petitioners seek a novel rule requiring states to regulate the time, place, and manner of federal elections using only one arm of state government—their legislatures. That proposal suffers from multiple flaws, including that it cannot be squared with the historical record. Indeed, since the Founding, states have employed a wide variety of institutions of state government, including state constitutions, state courts, and state executive officials, to set and implement the rules governing federal elections. Petitioners' theory would call into question centuries of established practice among the states.

2. Petitioners' theory is divorced not only from how states have run elections in the past but also how states run elections now. Today, different components of state governments—legislatures, executives, courts, election administrators, and commissions, among other state entities—all perform crucial roles in elections. Petitioners' theory would thus raise constitutional questions about large swaths of state election law. But even the somewhat narrower theories advanced by petitioners' *amici* threaten enormously disruptive consequences: federalism will be undermined, single elections will be governed by different rules for state and federal races, federal-court lawsuits in an emergency posture will

multiply, and courts and parties alike will struggle to manage unworkable legal standards. The Elections Clause should not be read to impose such damaging consequences on states and voters.

ARGUMENT

I. State Constitutions, Courts, And Officials Have Historically Played An Integral Role In Regulating Federal Elections.

Under our federal system, each state is entitled to order "the structure of its government" in the manner of its choosing. *Gregory*, 501 U.S. at 460. Petitioners' central claim is that the Elections Clause displaces that "fundamental" authority, *id.*, when a state regulates federal elections, requiring states to act in this area only by state statute, and to permit their legislatures to operate independently of any constraints imposed by state constitutions. That view cannot be squared with the historical record.

Indeed, states have historically regulated the "Times, Places and Manner" of holding elections for federal offices, U.S. Const. art. I, § 4, by employing many different institutions of state government—including the regulation of elections by state constitutions, judicial review of state legislative enactments by state courts, and the implementation of those enactments by election officers. The states' "[l]ong settled and established practice" refutes petitioners' principal claim that only state legislatures may act in this area, and, at the least, has "great weight in a proper interpretation of constitutional provisions." *Chiafalo v. Washington*, 140 S. Ct. 2316, 2326 (2020) (quoting *The Pocket Veto Case*, 279 U.S. 655, 689 (1929)); *see also Smiley v.*

Holm, 285 U.S. 355, 369 (1932) (relying on "the established practice in the states" to reject a version of petitioners' theory). The states' practice of dividing power among institutions is also consistent with the bedrock idea underlying our system of government: that absolute power concentrated in a single branch "may justly be pronounced the very definition of tyranny." The Federalist No. 47, at 324 (James Madison) (J. Cooke ed., 1961).

A. To start, state constitutions provided rules for federal elections both before and after the Founding. Before the Constitution was ratified, the Articles of Confederation, much like the Constitution, gave state "legislatures" a role in regulating federal elections, providing that state delegates to Congress would be "appointed in such manner as the *legislature* of each State shall direct." Articles of Confederation of 1781, art. V (emphasis added).

But the Articles' reference to "legislatures" in this context did not deprive states of their authority to set conditions on legislative power via state constitutions, as all states understood. The constitutions of this era make that clear. As petitioners concede (at 31-32), ten state constitutions expressly limited their legislatures' ability to regulate the manner in which those legislatures selected delegates for Congress (by providing, for instance, that legislatures must select delegates by "joint ballot").[1] At least in the years just before the

[1] *See* Del. Const. of 1776, art. XI; Md. Const. of 1776, art. XXVII; N.C. Const. of 1776, art. XXXVII; Pa. Const. of 1776, § 11; Va. Const. of 1776, Delegates; Ga. Const. of 1777, art. XVI;

ratification of the Constitution, then, it was broadly understood that a simple reference to state "legislatures," standing alone, did not deprive states of their authority to employ all institutions of state government to accomplish their ends.

The same was true after the ratification of the Constitution. In the forty years after ratification, at least ten states incorporated provisions in their state constitutions governing the manner of holding federal elections. Two—Delaware and Maryland—expressly established rules governing such elections, with Delaware requiring that elections for members of Congress be held "at the same places" and "in the same manner" as elections for state representatives, and Maryland requiring that all elections, state and federal, be held "by ballot." Del. Const. of 1792, art. VIII, § 2; Md. Const. of 1776, art. XIV (1810). Another eight state constitutions stated that "all elections" must be held by ballot or, in one case, by voice vote.[2] And in 1830, Virginia adopted a new

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N.Y. Const. of 1777, art. XXX; S.C. Const. of 1778, art. XXII; Mass. Const. of 1780, ch. IV (annulled 1788); N.H. Const. of 1784, pt. II, Delegates to Congress (repealed 1792).

[2] Ga. Const. of 1789, art. IV, § 2; Pa. Const. of 1790, art. III, § 2; Ky. Const. of 1792, art. III, § 2; Tenn. Const. of 1796, art. III, § 3; Ohio Const. of 1803, art. IV, § 2; La. Const. of 1812, art. VI, § 13; Ala. Const. of 1819, art. III, § 7; N.Y. Const. of 1821, art. II, § 4. States continued to incorporate provisions of this nature in their constitutions throughout the 1800s and beyond. *See* Hayward H. Smith, *Revisiting the History of the Independent State Legislature Doctrine*, 53 St. Mary's L.J. 445, 506-08 (2022); Michael Weingartner, *Liquidating the Independent State Legislature Theory*, 46 Harv. J.L. & Pub. Pol'y __ (forthcoming 2023) (manuscript at 37-40), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4044138.

constitution expressly stating that its Members of Congress should be "apportioned as nearly as may be, amongst the several counties, cities, boroughs, and towns . . . according to their respective numbers"—*i.e.*, proportionally. Va. Const. of 1830, art. III, § 6. States, in other words, continued even after the Constitution's ratification to provide rules for the manner of holding federal elections not merely by state statute, but also by state constitution.

Petitioners' objections to this account (at 25-39) are without foundation. Petitioners repeatedly assert that only a handful of states expressly regulated the manner of holding federal elections in the early years of the Republic, *e.g.*, Pet'rs Br. 32, 38, but that claim depends entirely on petitioners' belief that the state constitutional provisions cited above (providing that "all" elections should be conducted in some manner or other) should be read to apply only to *state* elections, *see id.* at 39. But "'[a]ll' means 'all,'" *In re Grand Jury Subpoena*, 912 F.3d 623, 628 (D.C. Cir. 2019)—*i.e.*, *all* elections, federal and state. And, indeed, shortly after one of these provisions—Pennsylvania's—was added to that state's constitution, it was invoked in a floor contest over the election of a Member of Congress, with one of the Pennsylvania constitution's drafters explaining that the "constitution . . . prescribe[d] the manner that citizens shall vote," *i.e.*, "by ballot." 14 Annals of Cong. 850 (1804); *see* Smith, *supra*, at 488-89 (recounting this episode). As this Court has explained, then, the Elections Clause did not "endow the Legislature of the state with power to enact laws" unencumbered by state constitutions, *Smiley*, 285 U.S. at 368; indeed, the historical record reflects that states continually exercised their authority in this

area to control their legislatures through state constitutions.

B. State courts, too, have for centuries played an integral role in shaping the rules that govern federal elections, primarily by interpreting and applying the state constitutional provisions described above. State courts exercised judicial review over state statutes even before the 1788 ratification of the Constitution. Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. Chi. L. Rev. 887, 933 (2003). And state courts continued to do so under the new Constitution, *id.* at 976, playing a profound role in shaping the legal order in the states.

Importantly, state courts exercised that authority in reviewing cases involving federal elections and the statutes that governed them. For instance, as petitioners' *amici* concede, Lawyers Democracy Fund Br. 10-11, several state courts struck down Civil War-era state laws regulating federal elections on the ground that they conflicted with state constitutions. *See, e.g.*, *In re Op. of Justs.*, 30 Conn. 591, 591-92 (1862); *Chase v. Miller*, 41 Pa. 403, 428-29 (1862); *People ex rel. Twitchell v. Blodgett*, 13 Mich. 127, 142-43 (1865).

And the Civil War cases were hardly outliers. In a range of nineteenth- and twentieth-century cases, state courts applied state constitutional provisions to review (and, in some cases, hold invalid) state laws regulating federal elections. *See* Weingartner, *supra*, at 40-43. After the advent of the modern two-party system in the late 1800s, for instance, state courts played an active role in reviewing the statutes passed by state legislatures regulating ballot access—

statutes that applied to federal and state elections alike. To take just one example, courts in at least seven states considered whether laws requiring candidates for office to pay fees to have their names placed on the ballot violated state constitutional provisions—often "free and equal" clauses of the kind the state courts applied here. State courts divided, with some courts striking down such laws and some upholding them.[3] But no court questioned its authority to review these statutes for compliance with state constitutional law in the first place.

Around the same time, state courts also applied state constitutional law to a range of other disputes regarding state statutes that regulated both federal and state elections. As just a few examples, state courts adjudicated cases challenging the constitutionality of laws limiting the placement of any candidate's name on a ballot to one party line,[4]

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[3] *Compare, e.g.*, *People ex rel. Breckton v. Bd. of Election Comm'rs of Chi.*, 221 Ill. 9, 23 (1906) (fee unconstitutional); *State ex rel. Adair v. Drexel*, 74 Neb. 776, 793 (1905) (same); *Ledgerwood v. Pitts*, 122 Tenn. 570, 611-12 (1909) (same); *Kelso v. Cook*, 184 Ind. 173, 202 (1916) (same), *with State ex rel. Thompson v. Scott*, 99 Minn. 145, 148 (1906) (fee constitutional); *State ex rel. Zent v. Nichols*, 50 Wash. 508, 520 (1908) (same); *Socialist Party v. Uhl*, 155 Cal. 776, 790 (1909) (same).

[4] *Compare, e.g.*, *Murphy v. Curry*, 137 Cal. 479, 486 (1902) (statute limiting candidates to one ballot line unconstitutional); *Hopper v. Britt*, 203 N.Y. 144, 158 (1911) (same), *with Todd v. Bd. of Election Comm'rs*, 104 Mich. 474, 487-488 (1895) (statute limiting candidates to one ballot line constitutional); *State ex rel. Bateman v. Bode*, 55 Ohio St. 224, 232 (1896) (same).

authorizing the use of voting machines,[5] requiring voters to register within certain periods of time,[6] and more. Again, these state courts reached different conclusions regarding the constitutionality of such laws, but they uniformly did so without questioning whether they could resolve the challenges in the first place.

Petitioners and their *amici* thus err in asserting that the North Carolina Supreme Court's opinion "resembles no state-court decision before 2018." Lawyers Democracy Fund Br. 6; *accord* Pet'rs Br. 25-26. They can make this claim only by describing the state court's opinion below in artificially narrow terms: by focusing on its invalidation of a congressional map based on North Carolina's "free and equal" provision. But petitioners offer no principled basis for limiting their proposed rule to that context, rather than to all cases in which state courts exercise judicial review over matters concerning federal elections. The result is that petitioners' rule, if adopted, would call into question state court opinions going back nearly two centuries and dramatically curtail the role that state courts

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[5] *Compare, e.g.*, *Nichols v. Minton*, 196 Mass. 410, 414 (1907) (statute allowing use of voting machines unconstitutional); *State ex rel. Karlinger v. Bd. of Deputy State Supervisors of Elections*, 80 Ohio St. 471, 490 (1909) (same), *with City of Detroit v. Bd. of Inspectors*, 139 Mich. 548, 557 (1905) (statute allowing use of voting machines constitutional); *Lynch v. Malley*, 215 Ill. 574, 582 (1905) (same).

[6] *E.g.*, *Morris v. Powell*, 125 Ind. 281, 291 (1890) (statute requiring all voters to re-register after absence of six months or more unconstitutional); *Perkins v. Lucas*, 197 Ky. 1, 14 (1922) (statute setting one day for voter registration unconstitutional).

have historically played in ensuring that state legislatures stay within the limits of the state constitutions that created them, for election law no less than any other area.

C. Finally, state and local executive-branch officials oversaw and administered elections for federal office for centuries, including during and immediately after the Founding. State officers and agencies have done so both using their inherent powers as executives and employing powers expressly shared with them by state legislatures. In doing so, state officers have exercised substantial discretion, playing a significant role in regulating federal elections.

To begin, state and local elections officials played key roles regulating federal elections at the Founding. It was election officials, not state statutes, for instance, that determined the "Places," U.S. Const. art. I, § 4, where voters would cast ballots in at least seven of the first thirteen states.[7]

Local officials likewise exercised significant power over when and how federal elections were held in the early years of the Republic. Officials in at least eight states had the authority to determine exactly when the polls would open and close, and officials in at least

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[7] *E.g.*, Act of Feb. 13, 1787, ch. 14, § 4, 1787 N.Y. Laws 316, 317 (directing election officials to select "the place. . . where such election . . . next shall be held"); Act of Jan. 3, 1800, ch. 50, § 1, 1799 Md. Laws 27 (directing election officials to "make choice of a place in each district, at which the elections shall be held"); *see* Mark S. Krass, *Debunking the Non-Delegation Doctrine for State Regulation of Federal Elections*, 108 Va. L. Rev. 1091, 1113-29 (2022) (canvassing historical sources).

four of those eight could "adjourn" elections, deciding at their discretion that polls would remain open until the following day.[8] And although some states chose to "specif[y]" by state statute "the procedures to be used at the polls in excruciating detail," others made the opposite choice, granting significant discretion to executive officials to decide not only where and when elections should be held, but also how—including, for instance, whether ballots would remain secret or not. Krass, *supra*, at 1127-29.

Petitioners' contention that the Elections Clause "does not allow a state legislature to delegate away the authority assigned to it," Pet'rs Br. 44-45, thus cannot be squared with the historical record. To the contrary, states have chosen, since the Founding, to make such delegations, consistent with their time-honored right to "structure themselves as they wish." *Berger*, 142 S. Ct. at 2197.

II. Petitioners' Theory Threatens States' Ability To Administer Federal Elections.

To conduct orderly, fair, and accurate elections, states rely on election rules implemented and interpreted by a variety of state institutions—including courts. Petitioners' argument that *only* state legislatures may regulate elections, however, would cast doubt on routine elements of election

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[8] *See, e.g.*, Act of Dec. 24, 1779, ch. 15, § 7, 1779 N.J. Acts 34, 37 (granting election officials "full Power . . . to close" polls when all voters had voted or "a reasonable time for that Purpose shall have been allowed"); Act of March 28, 1797, ch. 62, 1797 N.Y. Laws 441, 443 (authorizing officials to "continue[] elections by adjournment, if necessary, from day to day, not exceeding five days"); *see* Krass, *supra*, at 127-32.

administration. Even the alternative proposals of petitioners' *amici* could upend settled practices—undermining federalism, mandating different rules for state and federal elections, and subjecting states and federal courts to increased, last-minute emergency litigation governed by murky standards. That outcome would hamper states' ability to predictably manage the sensitive task of casting and counting ballots in federal elections.

A. State constitutions, courts, executive officials, and others routinely set rules governing elections.

What was true historically is still true today: legislatures are far from the only source of contemporary election law in the states. Justifying their reputation as laboratories of democracy, states variously rely on their constitutions, courts, executives, local administrators, and citizens to set election rules. Petitioners' theory, in its strongest form, could cast doubt on each of these practices.

1. State constitutions contain crucial election rules.

"Core aspects" of election law, like "voter registration, absentee voting, vote counting, and victory thresholds," can stem from state constitutions, not simply state legislation. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n* ("*AIRC*"), 576 U.S. 787, 823 (2015) (footnotes omitted); *see also Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019) (explaining that "state constitutions can provide standards and guidance" for addressing election issues including partisan gerrymandering). Stripping state constitutions of their election-law functions, as

petitioners propose, would thus threaten to create serious difficulties for states. For example, state constitutions often include fundamental election rules, like those establishing that votes must be cast by ballot, *e.g.*, Ind. Const. art. II, § 13; Md. Const. art. I, § 1, identifying who is eligible to vote, *e.g.*, N.J. Const. art. II, § 3; Tex. Const. art. VI, § 1, and restricting how voters can participate in the electoral process, *e.g.*, La. Const. art. XI, § 2 (banning proxy voting); Wyo. Const. art. VI, § 12 (prohibiting those who fail to register from voting). These provisions also include extremely specific election rules that leave legislatures little discretion, like those creating a nonpartisan primary system, Cal. Const. art. II, § 5, or specifying who may vote absentee, Pa. Const. art. VII, § 14. Put simply, state constitutions often resemble statutes in regulating elections at a granular level. *See* Weingartner, *supra*, at 36-40 (cataloguing detailed state constitutional provisions regulating elections).

These constitutional provisions, which apply to both state and federal elections, can bind state legislatures in the context of federal elections. Legislatures are themselves "the creature of the [state] Constitution, and the powers of the creature cannot under any circumstances rise above those of its creator." *Allen v. Scott*, 135 N.E. 683, 685 (Ohio 1922); *see also, e.g.*, *Coleman v. State ex rel. Race*, 159 So. 504, 507 (Fla. 1935); *City of Providence v. Moulton*, 160 A. 75, 77 (R.I. 1932). The notion that state constitutions cannot limit legislatures thus makes little sense. Indeed, state legislatures themselves often have a hand in establishing and amending constitutions. *See, e.g.*, S.C. Const. art. XVI, § 1. That

other actors may be involved in adopting such provisions makes no difference. As this Court recently recognized, state constitutional provisions adopted in processes that do not involve the legislature alone—like conventions or initiatives—remain valid under the Elections Clause. *AIRC*, 576 U.S. at 822-24.

2. State courts referee disputes over election law.

State courts are integral to the states' election apparatus. They review legislative acts for their constitutionality, construe laws whose meaning is disputed, and participate in redistricting as required by state law. Petitioners would jettison many, if not all, of these longstanding functions of state judiciaries. At the very least, petitioners and their *amici* would subject state judges to second-guessing by federal courts, undermining state sovereignty and disregarding the vital role state judges play in resolving state-law disputes.

State courts routinely review state election statutes for their compatibility with state constitutions. Through this judicial-review function, state courts enforce the boundaries of permissible election regulation set by the people in the state's foundational document. *See, e.g.*, *McLinko v. Dep't of State*, 279 A.3d 539, 565 (Pa. 2022) (reviewing universal vote-by-mail statute); *City of Memphis v. Hargett*, 414 S.W.3d 88, 101 (Tenn. 2013) (reviewing voter identification law); *Walsh v. Katz*, 953 N.E.2d 753, 759-60 (N.Y. 2011) (reviewing residency requirement); *Favorito v. Handel*, 684 S.E.2d 257, 262 (Ga. 2009) (reviewing adoption of an electronic voting

system). This judicial-review function, which is standard fare for the state courts, is at risk under any form of petitioners' theory. *See* Pet'rs Br. 49.

Because state constitutions and even statutes sometimes lack the specificity required to neatly address every election-related issue, their meaning is frequently contested. State courts thus also play an indispensable role as the final arbiter of what state election law means. *See, e.g.*, *Abbott v. Anti-Defamation League Austin, Sw., & Texoma Regions*, 610 S.W.3d 911, 918, 926 (Tex. 2020) (per curiam) (Blacklock, J., concurring) ("In an ideal world, we would look no further than the Election Code. As recent events vividly demonstrate, however, we do not live in an ideal world."); *State Election Bd. v. McClure*, 189 N.E.2d 711, 713 (Ind. 1963) ("Since the Indiana Election Code is not certain and specific . . . , it is incumbent upon the judiciary to interpret the statute."). By settling the meaning of broadly worded or disputed provisions, state courts provide clear and uniform rules for other branches, voters, and election workers to follow.

In the statutory context, state courts have resolved issues like whether COVID-19 qualifies as a "disability" entitling a voter to vote by mail, *In re State of Texas*, 602 S.W.3d 549, 550 (Tex. 2020), and whether a provision closing the polls at 6:00 p.m. refers to eastern or central time, *McClure*, 189 N.E.2d at 713. Regarding state constitutional provisions, state courts play a similar role, applying and interpreting constitutional provisions using state-specific interpretive methods. *See, e.g.*, *In re Interrogatories on Sen. Bill 21-247 Submitted by Colo.*

Gen. Assembly, 488 P.3d 1008 (Colo. 2021) (interpreting new amendments to Colorado's Constitution governing redistricting); *In re Sen. Joint Resol. of Legislative Apportionment 1176*, 83 So. 3d 597, 614 (Fla. 2012) (similar under Florida Constitution). In doing so, state courts give specific meanings to broadly worded—but important—constitutional guarantees, just as this Court "deduce[s]" specific rules from the Federal Constitution's "great outlines." *M'Culloch v. Maryland*, 17 U.S. 316, 407 (1819); *see* Conf. of Chief Justices Br. 17 (explaining how state and federal courts "have long crafted extensive and complex legal doctrines from . . . general language without . . . acting as legislators"). It is unclear, under petitioners' theory, to what extent state courts retain the authority to say what the law is.

Beyond these functions, state courts are sometimes responsible for the important role at issue in this very case—redistricting. *See* Michael C. Pollack, *Courts Beyond Judging*, 46 B.Y.U. L. Rev. 719, 751 (2021) ("In roughly half the states, judges play important roles in redistricting . . . that operate wholly outside the context of dispute resolution."). In some states, state constitutions direct courts to draft remedial maps when legislatures draw invalid ones. *See* Ark. Const. art. VIII, § 5; Fla. Const. art. III, § 16. In other states, judges serve as tiebreakers when other institutions cannot agree on a map. *See, e.g.*, Miss. Const. art. XIII, § 254. This Court long ago endorsed state courts' redistricting role, explaining that "[t]he power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this

Court but appropriate action by the States in such cases has been specifically encouraged." *Scott v. Germano*, 381 U.S. 407, 409 (1965). Petitioners' narrow view of the permissible role of state judges does not square with this well-established function. *See* Pet'rs Br. 20.

3. Election administrators set and implement rules necessary to conduct elections.

Election laws are not self-implementing. An array of election administrators—including governors, secretaries of state, state agencies, and local officials—work to conduct orderly elections. *See Democratic Nat'l Comm. v. Wis. State Legislature* ("*DNC*"), 141 S. Ct. 28, 31 (2020) (mem.) (Kavanaugh, J., concurring in denial of application to vacate stay) (explaining the importance of elections administrators). Given the on-the-ground contingencies that elections often entail, legislatures share considerable authority with election administrators, who put election laws into practice. *See, e.g.*, Nev. Rev. Stat. § 293.247 (giving secretary of state power to "provide interpretations and take other actions necessary for the effective administration of . . . elections"); Or. Rev. Stat. § 246.150 (giving secretary of state power to "adopt rules" to achieve "correctness, impartiality and efficiency in administration of the election laws"). A rule that puts election regulation solely in the hands of the legislature, with no ability for delegation to state and local administrators, would upset these existing (and necessary) arrangements.

In exercising their authority, election administrators routinely clarify and implement

election rules. For example, officials often interpret election codes and fill in statutory gaps. *See, e.g.*, *George v. Hargett*, 879 F.3d 711, 716 (6th Cir. 2018) (officials prescribed method of vote-counting based on their interpretation of state law). They promulgate rules, issue guidance, or take other actions that significantly affect elections. *See*, *e.g.*, Ariz. Rev. Stat. § 16-452(B) (requiring the secretary of state to issue an "official instructions and procedures manual"); Tex. Elec. Code § 31.004(a) (directing secretary of state to "advise all election authorities with regard to the application, operation, and interpretation of this code"); Cal. Gov't Code § 12172.5(d) (giving secretary of state authority to "adopt regulations"). Some of these administrative actions do not occur strictly in the confines of election law; for example, officials make decisions that indirectly affect elections, like issuing public health and safety rules. *See, e.g.*, *Libertarian Party of Pa. v. Wolf*, Civ. A. No. 20-2299, 2020 U.S. Dist. Lexis 124200, at *22-24 (E.D. Pa. July 14, 2020) (describing how the governor's generally applicable stay-at-home orders affected political parties' ability to gather signatures and qualify for the ballot), *aff'd*, 813 F. App'x 834 (3d Cir. 2020); *Stringer v. Whitley*, 942 F.3d 715, 719 (5th Cir. 2019) (describing Texas Department of Public Safety's online driver license renewal system that asked voter registration questions).

States differ in how they divide power among various elections administrators. Some states concentrate their authority in their secretaries of state. *E.g.*, Tex. Elec. Code § 31.004(a). Others diffuse power across local boards and officials. *E.g.*, *Zignego v. Wis. Election Comm'n*, 957 N.W.2d 208,

212-13 (Wis. 2021) (describing how Wisconsin distributes power between a "state election agency" and "a small army of local election officials"). This "variation" in election administration "reflects our constitutional system of federalism." *DNC*, 141 S. Ct. at 32 (Kavanaugh, J., concurring). Under petitioners' extreme theory, this variation too could be under threat.

4. Voters establish election rules through direct democracy.

Voters themselves exercise power over elections in direct ways that bypass legislatures. Petitioners' theory, in its strongest form, could jeopardize these methods of direct democracy. In many states, voters can adopt election rules through ballot initiatives. *See AIRC*, 576 U.S. at 822 (cataloguing examples); *see also, e.g.*, *Op. of Justs.*, 162 A.3d 188, 206-07 (Me. 2017) (describing how Maine adopted rank-choice voting by initiative); *Santa Clara Cnty. Local Transp. Auth. v. Guardino*, 902 P.2d 225, 253 (Cal. 1995) (en banc) (explaining that, in California, "the initiative is the constitutional power of the electors 'to propose statutes'" (quoting Cal. Const. art. II, § 8(a))). Through such initiatives, several states have created independent redistricting commissions. *See Rucho*, 139 S. Ct. at 2507 (noting recent examples). Voters may also hold a veto power over election regulations through statewide referenda. *E.g.*, S.J. Res. 48, 58th Leg., 2d Sess. (Okla. 2022) (ballot initiative proposing constitutional amendment requiring voter identification); Cal. Proposition 14 (2010) (constitutional amendment proposed by Legislature and approved by voters creating nonpartisan blanket

primary system); *see generally* Neb. Const. art. 3, § 1 (establishing "the power of referendum").

This Court has already approved these methods, explaining that the "Elections Clause . . . is not reasonably read to disarm States from adopting modes of legislation that place the lead rein in the people's hands." *AIRC*, 576 U.S. at 816; *see also Davis v. Hildebrant*, 241 U.S. 565, 569 (1916) (approving state's use of referendum on redistricting plan). Petitioners ask this Court to overrule that precedent in a footnote bereft of any stare decisis analysis. Pet'rs Br. 40 n.9. This Court should reject petitioners' invitation. Notably, this settled precedent illustrates why petitioners' central thesis—that only state legislatures may regulate the time, place, and manner of federal elections—cannot be right.

B. Petitioners' theory undermines state sovereignty and could upend existing election administration.

Petitioners' primary theory takes no account of the myriad state election practices that do not involve the legislature, and, if adopted, could seriously disrupt existing election practices. Even the alternative theories suggested by petitioners' *amici*—which include clear-statement rules for election-related constitutional provisions, Arkansas Br. 11, or federal-court intervention to ensure a "fair reading" of state law, Republican Nat'l Comm. Br. 19 (citation omitted)—would create confusion, call existing precedent into question, and inundate states with election-related litigation.

To begin, even a weakened version of petitioners' theory would undermine state sovereignty, with

federal courts routinely interfering with the functioning of state courts and state election law. For another thing, petitioners' approach could call into question longstanding rules governing elections. Perhaps most problematically, last-minute federal court decisions second-guessing state law could leave states with differing rules for state and federal elections occurring at the same time with little forewarning, placing them in an untenable position. And states would certainly face increased emergency litigation, forcing them to guess which state constitutional provisions and court decisions might be invalidated under the Elections Clause. Those practical problems counsel against the novel rules petitioners and their *amici* suggest.

1. Petitioners' theory would upset states' role in our federalist system.

Any version of petitioners' theory would intrude on state sovereignty. In our federalist system, states have long had the authority to adopt constitutions, establish governments, and enact laws. In doing so, "States retain broad autonomy in structuring their governments." *Shelby County*, 570 U.S. at 543. And when a state enacts laws or crafts a constitution, applying that law is generally the job of state courts. *See, e.g.*, *McKinney v. Arizona*, 140 S. Ct. 702, 708 (2020) ("[W]e may not second-guess the Arizona Supreme Court's characterization of state law."); *DNC*, 141 S. Ct. at 28 (Roberts, C.J., concurring) (allowing a state court's "modification of election rules" and citing "the authority of *state courts* to apply their *own constitutions* to election regulations") (emphasis added)).

Although regulation of federal elections is a federal power delegated to the states, "the Framers recognized that state power and identity were essential parts of the federal balance," so "the Constitution is solicitous of the prerogatives of the States, even in an otherwise sovereign federal province," like federal elections. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 841 (1995) (Kennedy, J., concurring). Accordingly, the Elections Clause takes state legislatures as it finds them, subject to state constitutions. *See AIRC*, 576 U.S. at 817-18 (rejecting notion that state legislatures can regulate elections "in defiance of provisions of the State's constitution"). Indeed, legislatures have no existence at all outside of the constitutions by which the people create, empower, and limit them. *Vanhorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 308 (C.C.D. Pa. 1795) (Patterson, J., riding circuit). Several states do not vest their legislative power solely in a legislature. *See, e.g.*, *AIRC*, 576 U.S. at 795-96, 814 (discussing Arizona); Or. Const. art. IV, § 1 (dividing "legislative power" between the Legislative Assembly and the people wielding the power of initiative and referendum). Out of respect for the differing ways states allocate the legislative power, this Court has "resist[ed] reading the Elections Clause to single out federal elections as the one area in which States may not" allocate power as they choose. *AIRC*, 576 U.S. at 817.

Petitioners' theory is hard to square with these federalist principles. Any theory reallocating power within state governments usurps states' authority to order themselves and "define[] [themselves] as a sovereign"—even if confined to the context of election

law. *Id.* (internal quotation marks omitted) (quoting *Gregory*, 501 U.S. at 460). This Court has never interpreted the Elections Clause "to justify disregard of the established practice in the states," *Smiley*, 285 U.S. at 369, or "to diminish a State's authority to determine its own lawmaking processes," *AIRC*, 576 U.S. at 824. Nor should it do so here.

Petitioners' theory presents additional federalism problems by requiring federal courts to superintend state institutions, potentially reviewing any election-related actions that are not directly issued by legislatures. At the very least, a ruling for petitioners would put federal courts in the business of second-guessing state courts' interpretation of state law. Yet this Court has long recognized that it should not "undertake to say" that a state court "had misunderstood" state law "and therefore erect itself into a tribunal which should correct such misunderstanding." *Elmendorf v. Taylor*, 23 U.S. 152, 159-60 (1825). The Elections Clause does not upend that settled principle. Indeed, "this Court has consistently rejected" a "vision of election administration" that gives a "green light to federal courts to rewrite dozens of state election laws around the country." *DNC*, 141 S. Ct. at 35 (Kavanaugh, J., concurring). It should reject that outcome here as well.

2. Petitioners' theory could destabilize elections.

The real-world consequences of petitioners' theory are potentially far-reaching, casting doubt on key election rules and threatening to place states in the untenable position of conducting simultaneous state

and federal elections with conflicting rules. States could also face multiplying federal-court litigation and be forced to defend against amorphous claims regarding whether their constitutions are "clear" or their state-court interpretations "fair." Put simply, petitioners' theory risks severe disruption if put into practice.

a. Petitioners' theory could deprive states of key rules and actors needed to administer elections.

Elections require "clear and settled" "rules of the road." *DNC*, 141 S. Ct. at 31 (Kavanaugh, J., concurring). But petitioners' theory could upend many of those settled rules. For instance, many states prescribe in their state constitutions exactly how citizens should register to vote and cast ballots. *See AIRC*, 576 U.S. at 823. Under petitioners' primary theory, however, states can set these rules only by statute, not by constitutional provision. If that theory prevails, states could face fundamental questions regarding how people should register and vote. State may also be forced to wrestle with "zombie requirements"—"statutes struck down by a state court" that "would suddenly be live" under petitioners' view. Justin Levitt, *Failed Elections and the Legislative Selection of Presidential Electors*, 96 N.Y.U. L. Rev. 1052, 1058 (2021). And it is little consolation that legislatures could reenact rules previously established by other branches or scrap unwanted "zombie" laws because "legislatures are often slow to respond and tepid when they do." *DNC*, 141 S. Ct. at 29 (Gorsuch, J., concurring).

Petitioners' theory, taken to its extreme, could also hamstring election administrators, who supply many crucial details regarding the manner of elections. For example, by statute, "[f]orty-eight states and one territory require local officials to designate polling locations." Nat'l Conference of State Legislatures, *Polling Places* (Oct. 20, 2020), https://tinyurl.com/38c7cvn9. In selecting polling places, these officials thus choose the "Places" of elections. U.S. Const. art. I, § 4, cl. 1. Yet under petitioners' theory, "the Elections Clause surely does not allow a state legislature to delegate away the authority assigned to it by the federal Constitution." Pet'rs Br. 44-45. It is not clear, in petitioners' view, whether this applies to even seemingly routine determinations while carrying out federal elections, such as choosing polling place locations. Petitioners' theory could thus require that legislatures pass statutes establishing the thousands of polling places required for American elections every cycle. *See* U.S. Election Assistance Commission, *Election Administration and Voting Survey 2020 Comprehensive Report* 19 (Aug. 16, 2021), https://tinyurl.com/b6jk77tm (reporting that states established 176,933 precincts and 132,556 polling places for the 2020 election). But that is hardly practical, and petitioners offer no answer to the necessity of delegating *some* election-related details.

Under petitioners' legislature-only theory, the problems for election administrators would be even worse when it comes to emergencies, which require quick action by officials operating in scenarios not contemplated by election codes. Consider the perennial emergency caused by hurricanes, which

often require moving voting locations or extending deadlines. *See, e.g.*, Fla. Exec. Order No. 19-262 (Nov. 29, 2019), https://tinyurl.com/5bj3se7c (Florida governor suspending election statutes, moving polling places, and changing early voting rules); *Wise v. Circosta*, 978 F.3d 93, 97 n.2 (4th Cir. 2020) (en banc) (noting that the North Carolina State Board of Elections "regularly extends its absentee ballot receipt deadlines in response to the hurricanes that befall us in the autumn"). Under petitioners' extreme reading of the Elections Clause, thousands—possibly millions—of voters could be deprived of an opportunity to vote when hurricanes, wildfires, or other natural disasters and unforeseen contingencies make it impossible to vote at the time or place prescribed by statute.

b. Petitioners' theory could require different rules for federal and state elections.

Petitioners' theory might also result in some state election laws being valid and mandatory for federal elections but *invalid* for simultaneous state elections. That is a problem because state and federal elections often occur at the same times and places using the same ballots. Disparate rules are likely because the Elections Clause refers only to *congressional* elections and thus does not affect states' regulation of elections for *state* offices. *AIRC*, 576 U.S. at 819.

Consider, for example, the factual context of this case—a state constitutional challenge to a state election statute enacted by the legislature. Under petitioners' theory, the Elections Clause would foreclose that challenge as applied to federal elections, requiring the state statute to be given

effect. But the *very same* statute may, per the state constitution, be *invalid* as applied to state elections, which typically occur at the same locations on the same day. *E.g.*, N.C. Gen. Stat. § 163-1(a), (c); Tex. Elec. Code § 43.001. Because state constitutions and election laws usually do not differentiate between state and federal elections, this would create novel problems. *See, e.g.*, Va. Const. art. 2, § 1 (listing "the qualifications of voters" in "elections by the people"); Ariz. Const. art. 7, § 7 (setting plurality of votes as victory threshold "[i]n all elections held by the people"); *Kuznik v. Westmoreland Cnty. Bd. of Comm'rs*, 902 A.2d 476, 490 (Pa. 2006) (describing a provision of the Pennsylvania Constitution that "does not differentiate between elections for federal and state office").

Applying two sets of rules for elections may well be practically impossible. Consider state practices regarding ballots. States usually craft one, unified ballot for both federal and state offices. *E.g.*, Minn. Stat. Ann. § 204D.11(1); *Crafts v. Quinn*, 482 A.2d 825, 831 (Me. 1984). But claims under petitioners' theory could force states to use separate ballots for federal and state offices, if, for example, a state court held that a certain statutory ballot requirement violated a state constitutional provision (and thus could not be applied in state elections) but the Elections Clause nonetheless mandated that the statute be given effect in federal elections. For election administrators, that could mean double the printing and counting, additional voter education, increased risk of error and fraud, confusion, and significant costs. *See Kuznik*, 902 A.2d at 506-07 (listing similar problems with court order resulting in

electronic voting systems for federal but not state elections). Further, in states where election regulations apply universally to state and federal elections—whether mandated by statute or state constitution—court orders to use separate ballots could make it impossible to comply with valid state laws. *See id.* at 491 ("Many provisions of the Code could not be fulfilled if we were to affirm the dual system that [a court] ordered.").

And dual ballots are only the beginning. Imagine, for example, rulings that might require polling places to remain open on different dates and times for state and federal elections. *Cf. In re Gen. Election-1985*, 531 A.2d 836, 839 (Pa. Commw. Ct. 1987) (holding that a court, pursuant to delegated authority, could order polls closed due to flooding and resume the election two weeks later). Or imagine a ruling making citizens eligible to vote in one election but not the other, when states are otherwise permitted to use a single ballot containing state and federal candidates. *Cf. Cmty. Success Initiative v. Moore*, No. 19 CVS 15941, 2020 WL 10540948, at *6 (N.C. Super. Ct. Sept. 4, 2020) (holding that felon disenfranchisement law violated state constitution). Or imagine a ruling that mandates counting late-mailed or late-received ballots, but only for state candidates. *Cf. Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 371 (Pa. 2020) (holding that the state constitution required extension of deadline for mail-in ballots), *cert. denied sub nom. Republican Party of Pa. v. Degraffenreid*, 141 S. Ct. 732 (2021). Such regimes would not only frustrate state election administrators, but could confuse or disenfranchise voters and introduce a higher risk of error in tabulating votes. And given the

emergency nature of much election litigation, it is highly unlikely that state legislatures could reliably intervene to rectify the disparities.

c. Petitioners' theory would subject states to increased, thorny litigation in the federal courts.

Petitioners' theory would threaten to "bring on a massive and destabilizing new crush of litigation" against states in federal courts. Joshua Perry & William Tong, *Protecting Voting Rights After 2020: How State Legislatures Should Respond to Restrictive New Trends in Election Jurisprudence*, 53 Conn. L. Rev. Online 1, 19 (2021). This Court has previously refused to recognize claims under the Constitution that would give federal courts "an extraordinary and unprecedented role" in elections. *Rucho*, 139 S. Ct. at 2507. Yet, were any form of petitioners' theory adopted, the Court would be recognizing a new claim under the federal Constitution. And it is impossible to estimate just how many new lawsuits states and the federal courts would face. This Court's own docket may well grow because any constitutional challenges to redistricting—which would include claims under petitioners' theory—are directly appealable. *See* 28 U.S.C. §§ 2284(a), 1253.

The volume of potential federal litigation is concerning—and so is its character. All claims under petitioners' theory involve elections, and thus "the most intensely partisan aspects of American political life" that federal courts generally seek to avoid. *Rucho*, 139 S. Ct. at 2507. Often, election-related claims will arise in an emergency posture and seek time-sensitive relief. Such litigation is taxing for

states and can result in consequential judgments without time and briefing for full deliberation. *See Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981) (explaining problems with preliminary injunction proceedings); *Merrill v. Milligan*, 142 S. Ct. 879, 887 (2022) (mem.) (Kagan, J., dissenting) ("serious and sustained consideration" is "impossible to give 'on a short fuse'" (quoting *Does v. Mills*, 142 S. Ct. 17, 18 (2021) (mem.) (Barrett, J., concurring))). Emergency cases could also strain federal resources.

Moreover, the remedies for successful claims could upend elections, with injunctions altering election rules and courts overturning election results. Such orders cause voter confusion while dampening "confidence in the fairness of the election." *DNC*, 141 S. Ct. at 31 (Kavanaugh, J., concurring). Although this Court has cautioned against altering election rules near an election, *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (per curiam), it also has not "fully spell[ed] out all of [*Purcell*'s] contours," *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring); *see, e.g.*, *Carson v. Simon*, 978 F.3d 1051, 1062 (8th Cir. 2020) (per curiam) (considering *Purcell* but nonetheless ordering district court to enter an injunction). And state supreme courts—whose decisions would suddenly be subject to additional federal review— are not bound by *Purcell* at all in adjudicating state constitutional challenges to state election laws, increasing the likelihood of claims arising close to elections. In short, petitioners seek "an unprecedented expansion of judicial power" over precisely the type of cases federal courts disfavor. *Rucho*, 139 S. Ct. at 2507.

d. There is no workable standard to implement petitioners' theory.

In addition to spawning new federal litigation, petitioners' theory would leave courts and parties searching for a workable standard to implement new Elections Clause claims. For example, petitioners suggest that the North Carolina Supreme Court exceeded its authority under the Elections Clause by engaging in "policymaking." Pet'rs Br. 46. But they do not explain the difference between "policymaking" and construing law. At other times, petitioners suggest that, consistent with the Elections Clause, state courts cannot identify "novel rule[s]" based on interpretions of "open-ended guarantees" in state constitutions. Pet'rs Br. 46-47. But they provide no principle to determine when a rule is "novel" or a guarantee "open-ended." That standard is plainly not tenable.

Trying to fill the gap left by petitioners, some *amici* propose their own standards. These proposals suggest that state courts may apply only "clear text," Arkansas Br. 11, or that federal courts should scrutinize state courts' decisions to determine if they offer a "fair reading" of state law, Republican Nat'l Comm. Br. 19 (quoting *Bush*, 531 U.S. at 115 (Rehnquist, C.J., concurring)). These proposals, too, suffer from fundamental flaws.

To start, clarity is often in the eye of the beholder. "Difficult ambiguities in statutory text will inevitably arise, despite the best efforts of legislators" to craft straightforward language. *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1170 n.5 (2021). And that is doubly true of constitutional provisions, which are often

written capaciously. Accordingly, "[r]easonable minds often disagree about how" election law provisions "may reasonably be construed." *In re State of Texas*, 602 S.W.3d at 563 n.8 (Guzman, J., concurring) (quoting *Worsdale v. City of Killeen*, 578 S.W.3d 57, 77 (Tex. 2019)) (interpretive dispute over election code). Imposing a clear-statement rule and abrogating longstanding constitutional or statutory provisions that do not meet this newly minted test could wipe decades of state-law precedent off the books. In an area like election law, where settled rules are particularly important, the Court should reject such a drastic move.

Even a "fair reading" approach would mire federal courts in complex disputes better left to state courts in the first instance. Reviewing state courts' interpretations for "fairness" would require considering state-specific precedent, history, and practices. *See, e.g.*, *Michigan v. Long*, 463 U.S. 1032, 1039-40 (1983) ("The process of examining state law is unsatisfactory because it requires us to interpret state laws with which we are generally unfamiliar . . . ."). And it is difficult to say when an interpretation of a novel or expansive state-law provision is "fair." *See, e.g.*, *Fay v. Merrill*, 256 A.3d 622, 650 (Conn. 2021) (stating that challenge to change to absentee ballot requirements presented state constitutional issue of first impression among all states). This is especially true for state constitutional provisions, which are often more broadly worded than statutes. Federal review of state courts' interpretations of those provisions will often come down to subjective disagreements. But "[i]f federal courts are to 'inject [themselves] into the most

heated partisan issues,'" "they must be armed with a standard that can reliably differentiate" between permissible and impermissible interpretations. *Rucho*, 139 S. Ct. at 2499 (quoting *Davis v. Bandemer*, 478 U.S. 109, 145 (1986) (O'Connor, J., concurring in the judgment)). Neither petitioners nor their *amici* identify such a standard.

CONCLUSION

This Court should affirm the judgment of the North Carolina Supreme Court.

Respectfully submitted,

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No. 331PA21 TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

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COMMUNITY SUCCESS INITIATIVE, et al., Plaintiffs, v. TIMOTHY K. MOORE, et al., Defendants.	)	From Wake County 19 CVS 15941 From Court of Appeals P22-153

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AMICUS BRIEF OF THE DISTRICT OF COLUMBIA AND THE STATES OF CALIFORNIA, CONNECTICUT, DELAWARE, HAWAII, ILLINOIS, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, NEVADA, NEW JERSEY, NEW YORK, RHODE ISLAND, AND WASHINGTON IN SUPPORT OF PLAINTIFFS-APPELLEES

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SUPREME COURT OF NORTH CAROLINA

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INTRODUCTION AND INTEREST OF AMICI STATES

Pursuant to North Carolina Rule of Appellate Procedure 28(i), the District of Columbia and the States of California, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Nevada, New Jersey, New York, Rhode Island, and Washington ("Amici States") submit this brief as amici curiae in support of Plaintiffs-Appellees.[1]

An estimated 5.17 million people across the United States were barred from voting in 2020 and locked out of the democratic process because of state laws that disenfranchise individuals who were convicted of felony offenses. *See* Christopher Uggen, et al., The Sentencing Project, *Locked Out 2020: Estimates of People Denied Voting Rights Due to a Felony Conviction* 4 (Oct. 30, 2020), https://tinyurl.com/locked-out-2020 (download PDF). By contrast, "restoration of voting rights provides a clear marker of reintegration and acceptance as a stakeholder in a community of law-abiding citizens." Christopher Uggen & Jeff Manza, *Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States*, 67 Am. Soc. Rev. 777, 794 (2002). Recognizing this, states have begun moving away from broadly disenfranchising former felons who have otherwise reintegrated into their

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[1] No counsel or party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

communities. Since 1997, 25 states and the District of Columbia, including several Amici States, have taken action to "expand[] voter eligibility and/or inform[] persons with felony convictions of their voting rights." Jean Chung, The Sentencing Project, *Voting Rights in the Era of Mass Incarceration: A Primer* 4 (July 28, 2021), https://tinyurl.com/voting-rights-primer (download PDF). Sixteen states and the District implemented such reforms in just the past six years. *Id.* These initiatives to expand the franchise illustrate a growing consensus that allowing former felons to vote benefits both the returning citizens and the communities they rejoin.

Although Amici States have reached different conclusions on how best to realize the benefits of felon re-enfranchisement, we have experience in how various methods of re-enfranchisement have benefitted our jurisdictions and are providing that information to the Court. North Carolina's felon disenfranchisement law, N.C.G.S. § 13-1, which conditions restoration of voting rights upon a former felon's satisfaction of all terms of his probation, parole, and legal financial obligations, is out of step with these important interests. Accordingly, Amici States urge this Court to affirm the ruling of the trial court.

ARGUMENT

I. N.C.G.S. § 13-1 Is Out Of Step With Recent Efforts By States To Expand The Franchise To Formerly Incarcerated Individuals.

Over the past 25 years, half of states, including several Amici States, "have changed their laws and practices to expand voting access to people with felony convictions." Uggen, et al., *Locked-Out 2020*, *supra*, at 4. As a result, the right to vote has been restored to more than one million people. *See* Morgan McLeod, The Sentencing Project, *Expanding the Vote: Two Decades of Felony Disenfranchisement Reform* 3 (Oct. 17, 2018), https://tinyurl.com/expanding-the-vote (download PDF) ("As a result of the reforms achieved during the period from 1997-2018, an estimated 1.4 million people have regained the right to vote."); Zach Montellaro, *States Moving Fast After Congress Failed to Expand Felon Voting Rights*, Politico (Feb. 2, 2022), https://tinyurl.com/3tdeay5s ("[T]he number of states automatically restoring voting rights has increased by 50 percent since after the 2018 election . . . ."); Chung, *supra*, at 4 ("Recent state voter restoration reforms have led to a nearly 15% decline in the number of people disenfranchised since 2016 . . . ."). These reform efforts include laws repealing lifetime disenfranchisement, allowing felons to vote while completing the terms of their probation or parole, eliminating requirements that condition re-enfranchisement on pre-payment

of court fines and fees, and providing information to returning citizens about their voting rights. *See* McLeod, *supra*, at 3-4.

At one point, it was common for states to permanently disenfranchise all those convicted of felonies. Over time, however, those rules disappeared, reflecting the elimination of assumptions that past felony convictions render a person unfit to participate in democratic processes. The handful of states that had continued to apply such a blanket rule by the end of last century have largely eliminated it in this century—and especially over the last five years. *See* Del. Code Ann. tit. 15, §§ 6102-6103 (repealing lifetime disenfranchisement except as to those convicted of felonies enumerated in Del. Const. art. V, § 2); Voting Restoration Amendment, Ballot Initiative 14-01 (Fla. 2018) (amending the state constitution to repeal lifetime disenfranchisement); Iowa Exec. Order No. 7 (Aug. 5, 2020), https://tinyurl.com/iowa-exec-order (ending permanent disenfranchisement for felons not convicted of homicide); S.B. 488, 2007 Reg. Sess. (Md. 2007) (replacing lifetime disenfranchisement with restoration upon completion of sentence); L.B. 53, 99th Leg., 1st Sess. (Neb. 2005) (repealing lifetime disenfranchisement and automatically restoring voting rights two years after completion of sentence); A.B. 431, 80th Sess. (Nev. 2019) (automatically restoring voting rights of all felons upon release from prison); S.B. 204, 2001 Reg. Sess. (N.M. 2001) (repealing lifetime disenfranchisement). Similarly, in the last five years, Kentucky and Wyoming lifted restrictions on

the ability of nonviolent felons to regain the right to vote after completing their sentences. Ky. Exec. Order No. 3 (Dec. 12, 2019), https://tinyurl.com/ky-exec-order (restoring voting rights for nonviolent felons upon completion of their sentences); H.B. 75, 64th Leg., 2017 Gen. Sess. (Wyo. 2017) (automatically restoring voting rights to all nonviolent felons).

Other states have restored the right to vote to some or all individuals living in their communities who are still under the supervision of the criminal justice system after their release from incarceration. California, Colorado, Connecticut, Maryland, New Jersey, New York, Rhode Island, and Washington restored the right to vote to citizens upon release from incarceration, regardless of any post-incarceration restrictions or obligations. *See* Cal. Const. art. II, §§ 2, 4 (as amended by California Proposition 17 on Nov. 3, 2020); H.B. 19-1266, 71st Gen. Assemb., 2019 Reg. Sess. (Colo. 2019); S.B. 1202, 2021 Gen. Assemb., June Special Sess. (Conn. 2021); H.B. 980, 2015 Reg. Sess. (Md. 2015); A.B. 5823, 2018-2019 Reg. Sess. (N.J. 2019); S.B. 830, 2021-2022 Reg. Sess. (N.Y. 2021); H.B. 7938, 2006 Gen. Assemb., Jan. Sess. (R.I. 2006); H.B. 1078, 67th Leg., 2021 Reg. Sess. (Wash. 2021). Louisiana and Virginia re-enfranchised parolees and probationers under certain conditions. *See* H.B. 265, 2018 Reg. Sess. (La. 2018) (restoring voting rights to felons, including those on parole or probation, who have not been incarcerated in the past five years); Off. of the Governor, Press Release, *Governor Northam Restores Civil*

Rights to Over 69,000 Virginians, Reforms Restoration of Rights Process (Mar. 16, 2021), https://tinyurl.com/northam-press-release (former Virginia governor announcing new eligibility criteria that would restore voting rights upon release from prison); Off. of the Governor, Press Release, *Governor Glenn Youngkin Announces the Restoration of Rights for Thousands of Virginians* (May 20, 2022), https://tinyurl.com/youngkin-press-release (current Virginia governor announcing that he will continue to restore voting rights to persons with felony convictions). Similarly, Arizona and Washington eliminated the requirement of paying all fines, fees, costs, and restitution before regaining the right to vote. H.B. 2080, 54th Leg., 1st Reg. Sess. (Ariz. 2019); H.B. 1517, 61st Leg., 2009 Reg. Sess. (Wash. 2009).

In fact, some jurisdictions have concluded that there is no reason to deny the vote to their incarcerated population. In 2020, the District became the first jurisdiction in the country to enfranchise incarcerated persons. *See* Comprehensive Policing and Justice Reform Second Emergency Act of 2020, 67 D.C. Reg. 9,148, 9,167-68 (July 31, 2020); Chung, *supra*, at 4. In doing so, the District joined Maine, Vermont, and Puerto Rico, which had never disenfranchised felons. Vann R. Newkirk II, *Polls for Prisons*, The Atlantic (Mar. 9, 2016), https://tinyurl.com/polls-for-prisons.

In addition, states like California, Illinois, New Jersey, New Mexico, New York, and Washington have enacted laws requiring state agencies to

notify felons of the process for seeking restoration of voting rights or provide information about their voting rights prior to or upon release from incarceration. *See* A.B. 1344, 2017-2018 Reg. Sess. (Cal. 2017) (requiring corrections officials to provide information about voting rights restoration online and in person to felons leaving prison); H.B. 2541, 101st Gen. Assemb. (Ill. 2019) (establishing civics program for soon-to-be released inmates to learn about, inter alia, voting rights); S.B. 2282, 2010-2011 Reg. Sess. (N.J. 2012) (requiring the commissioner of corrections to provide written information regarding a returning citizen's right to vote prior to release); H.B. 64, 2005 Reg. Sess. (N.M. 2005) (requiring the corrections department to notify a former felon of his ability to register to vote upon completion of his sentence); A.B. 9706, 2010 Assemb., Reg. Sess. (N.Y. 2010) (requiring the corrections department to notify a former felon of his right to vote and provide a voter registration application upon release); S.B. 5207, 66th Leg., 2019 Reg. Sess. (Wash. 2019) (similar). These measures reduce confusion among returning citizens by advising them of the process for restoration of rights and providing the information needed to register to vote when eligible. *See* Part III.B.2, *infra.*

In addition to legislative and executive action, courts have also required re-enfranchisement where state laws have run afoul of federal or state constitutional rights. *See, e.g.*, *Hunter v. Underwood*, 471 U.S. 222, 233 (1985) (holding that Alabama's felon disenfranchisement scheme violated the federal

Equal Protection Clause); *Williams v. Tyler*, 677 F.2d 510, 517 (5th Cir. 1982) (remanding for trial the question of whether Mississippi violated the federal Equal Protection Clause in selectively enforcing its felon disenfranchisement laws); *McLaughlin v. City of Canton*, 947 F. Supp. 954, 976 (S.D. Miss. 1995) (holding plaintiff's federal equal-protection rights were violated when he was disenfranchised on the basis of a misdemeanor conviction).

In total, nearly half of states restore voting rights to some or all parolees or probationers. And even many that do not have taken steps towards liberalizing the terms and conditions of their states' felon disenfranchisement systems. All told, these trends reflect a clear and growing consensus among states toward facilitating restoration and expanding the franchise, a consensus with which North Carolina's felon disenfranchisement system is out of step.

II. Expanding The Franchise Promotes Civic Participation And Improves Public Safety.

It is well established that individuals who engage in prosocial behavior when released from incarceration are more likely to reintegrate into their communities and desist from criminal activities. Christopher Uggen & Jeff Manza, *Voting and Subsequent Crime and Arrest: Evidence from a Community Sample*, 36 Colum. Hum. Rts. L. Rev. 193, 195-96 (2004). Indeed, studies observe that "attachment to social institutions such as families and labor markets increase the reciprocal obligations between people and provide

individuals with a stake in conforming behavior." *Id.* at 196. So allowing former felons to vote can foster prosocial behavior; participating in the political process "produces citizens with a generalized sense of efficacy, who believe that they have a stake in the political system," which, "in turn, fosters continued political participation." *Id.* at 198. When former felons vote, "they are doing what all voters do: actively endorsing the political system." Alec C. Ewald, *An "Agenda for Demolition": The Fallacy and the Danger of the "Subversive Voting" Argument for Felony Disenfranchisement*, 36 Colum. Hum. Rts. L. Rev. 109, 130 (2004) (emphasis omitted). In this way, civic restoration "communicates to the ex-felon that she or he is still part of the community and has a stake in the democratic process." *Restoring Voting Rights of Felons Is Good Public Policy, VCU Expert Says*, VCU News (Apr. 26, 2016), https://bit.ly/3pjGr6L. When individuals are excluded from this process, by contrast, they "express a feeling of being an 'outsider.'" Mark Haase, *Civil Death in Modern Times: Reconsidering Felony Disenfranchisement in Minnesota*, 99 Minn. L. Rev. 1913, 1926 (2015).

The experience of Amici States confirms that when a returning citizen is fully reintegrated into his or her community, including by regaining the right to vote, he or she can better transition into a new role as a law-abiding citizen. Accordingly, efforts by Amici States to expand the franchise embrace the idea that "restoring voting rights to ex-felons may facilitate reintegration efforts

and perhaps even improve public safety." Christina Beeler, *Felony Disenfranchisement Laws: Paying and Re-Paying a Debt to Society*, 21 U. Pa. J. Const. L. 1071, 1088 (2019) (internal quotation marks and citation omitted). For example, the New York Governor justified exercising his executive power to restore voting rights to parolees, in part, by recognizing that "research indicates a strong positive correlation between the civic engagement associated with voting and reduced rates of recidivism, which improves the public safety for all New Yorkers." N.Y. Exec. Order No. 181, at 1 (2018). The California Secretary of State launched an online tool for returning citizens, also, in part, because "[c]ivic engagement can be a critical piece in reintegrating formerly incarcerated Californians into their communities and reducing recidivism." Cal. Sec'y of State, Press Release, *Secretary of State Alex Padilla Launches 'Restore Your Vote' Tool to Help Californians with Criminal Convictions Know Their Voting Rights* (Oct. 17, 2018) (internal quotation marks omitted), https://bit.ly/3eNWFjI.

These actions reflected conclusions drawn from studies of former felons' voting behavior. Likewise, a report by the Florida Parole Commission noted a decrease in recidivism beginning in April 2007, when the Florida Executive Clemency Board amended its rules to automatically restore the voting rights of most nonviolent felons upon completion of their sentences. Fla. Parole Comm'n, *Status Update: Restoration of Civil Rights (RCR) Cases Granted 2009*

and 2010, at 6, 13 (2011), https://bit.ly/3neef36. The report found that between April 2007 and March 2011—the period during which the amended rules were in place—approximately 11% of former felons reoffended, as compared with 33% of individuals released before the new rules were adopted. *Id.* at 7, 13.

Another study found "consistent differences between voters and non-voters in rates of subsequent arrest, incarceration, and self-reported criminal behavior." Uggen & Manza, *Voting and Subsequent Crime and Arrest*, *supra*, at 213. This survey of 1,000 former high school students analyzed "the effects of voting participation in the 1996 election upon self-reported crime and arrest in the years from 1997 to 2000." *Id.* at 200. The study found that "[a]mong former arrestees, about 27% of the non-voters were re-arrested, relative to 12% of the voters." *Id.* at 205. These studies suggest that "[w]hile the single behavioral act of casting a ballot is unlikely to be the sole factor that turns felons' lives around, the act of voting manifests the desire to participate as a law-abiding stakeholder in a larger society." *Id.* at 213.

Many in the law enforcement community have endorsed this view by supporting states' efforts to restore voting rights. For example, a police officer testified before the Maryland Legislature that re-enfranchisement "promotes the successful reintegration of formerly incarcerated people, preventing further crime and making our neighborhoods safer." Erika Wood, Brennan Ctr. for Just., *Restoring the Right to Vote* 11 (May 2009), https://bit.ly/35l1E8b

(quoting *Voter Registration Protection Act: Hearing on S.B. 488 Before S. Comm. on Educ., Health & Env't Affairs*, 2007 Leg., 423d Sess. (Md. 2007) (written testimony of Ron Stalling, Nat'l Black Police Ass'n)). Similarly, a former city police chief in Rhode Island wrote that disenfranchisement "disrupts the re-entry process and weakens the long-term prospects for sustainable rehabilitation," whereas "[v]oting—like reconnecting with family, getting a job, and finding a decent place to live—is part of a responsible return to life in the community." Dean Esserman & H. Philip West, *Without a Vote, Citizens Have No Voice*, The Providence J. (Sept. 25, 2006), https://bit.ly/2IyxIMQ.

These facts have led state legislatures to recognize that restoring voting rights encourages former felons to rejoin society as productive members of their communities. In Colorado, for example, the legislature declared that restoring voting rights to parolees "will help to develop and foster in these individuals the values of citizenship that will result in significant dividends to them and society as they resume their places in their communities." H.B. 19-1266 § 1(c), 72nd Gen. Assemb., 1st Reg. Sess. (Colo. 2019). States have also recognized that restoring the franchise benefits their communities more broadly by promoting civic participation. According to the Rhode Island Legislature, "[r]estoring the right to vote strengthens our democracy by increasing voter

participation and helps people who have completed their incarceration to reintegrate into society." R.I. Gen. Laws § 17-9.2-2(a)(1).

Policymakers have also observed that by welcoming former felons back as full-fledged members of their communities, re-enfranchisement can improve overall public safety. Washington State legislators thus credited testimony that "restoration of the right to vote encourages offenders to reconnect with their community and become good citizens, thus reducing the risk of recidivism." H. Comm. on State Gov't & Tribal Affairs, Report on H.B. 1517, 2009 Reg. Sess., at 3 (Wash. 2009). The assemblyman who authored the recently passed amendment to the California Constitution also described restoring parolees' rights to vote as "good for democracy and good for public safety." Patrick McGreevy, *Prop. 17, Which Will Let Parolees Vote in California, Is Approved by Voters*, L.A. Times (Nov. 4, 2020), https://lat.ms/38A6O2s. And the New Jersey Legislature found that "[t]here is no evidence that denying the right to vote to people with criminal convictions serves any legitimate public safety purpose." N.J. Stat. Ann. § 19:4-1.1(f).

In addition, states have recognized the importance of restoring voting rights to returning citizens given the disparate impact of felon disenfranchisement laws on minority communities. Incarceration disproportionately impacts people of color, and "the disparities in incarceration rates by race ultimately become disparities in voting rights." Beeler, *supra*, at

1085. Consequently, as of 2020, over 6.2% of the Black voting age population in the United States could not vote, as compared with only 1.7% of the non-Black population. Uggen, et al., *Locked Out 2020*, *supra*, at 4. This racial disparity affects North Carolina. The trial court here found that "African Americans comprise 21% of North Carolina's voting-age population, but over 42% of those denied the franchise due to felony probation, parole, or post-release supervision from a North Carolina state court conviction alone." Record ("R.") 1093.

There is also evidence that felon disenfranchisement laws deter people of color from voting generally, including non-felons. As the trial court found, "a high level of communal denial of the franchise," like what occurs when a large portion of the Black community is disenfranchised due to N.C.G.S. § 13-1, "can discourage other young people from voting, because voting is a social phenomenon," i.e., people vote when they see others in their community voting. R. 1114. "A 2009 study found that eligible and registered black voters"—that is, those with a legal *right* to vote—"were nearly 12 percent less likely to cast ballots if they lived in states with lifetime disenfranchisement policies," as compared with white voters, who were only 1% less likely to vote. Erin Kelley, Brennan Ctr. for Just., *Racism & Felony Disenfranchisement: An Intertwined History* 3 (May 2017), https://tinyurl.com/intertwined-history (download PDF). Recent research also demonstrates that neighborhoods with higher proportions

of disenfranchised individuals can have lower voter turnout rates as compared to similar neighborhoods. *See* Kevin Morris, *Neighborhoods and Felony Disenfranchisement: The Case of New York City*, Urban Affs. Forum (Dec. 21, 2020), https://tinyurl.com/3jtmnnz2. Indeed, the trial court found here that "turnout among eligible voters is lower in communities with higher rates of denial of the franchise among people living in those communities." R. 1114. This indirect effect of felon disenfranchisement has greater impact on minority—and specifically Black—neighborhoods, diminishing the political power of these communities. Morris, *supra*.

States implementing measures to expand the voting rights of returning citizens have specifically referenced these harmful consequences of disenfranchisement on minority communities. *See, e.g.*, N.J. Stat. Ann. § 19:4-1.1(e) (finding that "[n]early half of those denied the right to vote because of a criminal conviction are Black, due to racial disparities in the criminal justice system"); N.Y. Exec. Order No. 181, at 1 (observing that "the disenfranchisement of individuals on parole has a significant disproportionate racial impact thereby reducing the representation of minority populations"); R.I. Gen. Laws § 17-9.2-2(a)(4) ("One in five (5) black men and one in eleven (11) Hispanic men are barred from voting in Rhode Island. By denying so many the right to vote, criminal disenfranchisement laws dilute the political power of entire minority communities."). Dismantling these laws is a step towards

fixing their damage to minority political power and representation. For example, an analysis of the impact of Florida's Amendment 4, which ended permanent disenfranchisement in the state, found that more than 44% of the formerly incarcerated individuals who registered to vote between January and March of 2019 identified as Black, while Black voters make up 13% of the overall voter population in Florida. Kevin Morris, Brennan Ctr. for Just., *Thwarting Amendment 4*, at 1 (May 9, 2019), https://tinyurl.com/thwarting-amendment-4 (download PDF). Current and historical evidence therefore underscores the substantial benefits of restoring the franchise to citizens upon return from incarceration.

III. N.C.G.S. 13-1 Does Not Further Criminal Justice Goals And Is Administratively Burdensome.

There is little evidence that extended disenfranchisement promotes any of the traditional goals of the criminal justice system or that it facilitates compliance with outstanding legal financial obligations. Moreover, the experience of states across the country illustrates that restoring the franchise upon release from prison results in fewer administrative problems and less confusion among both election officials and former felons about voter eligibility. These observations call into question the interest of states like North Carolina in continuing to disenfranchise felons once they have returned to their communities. Because felon disenfranchisement bans lack evidentiary

support, as other states' experiences show, North Carolina's law should not survive this Court's review. *See Dep't of Transp. v. Rowe*, 549 S.E.2d 203, 207 (N.C. 2001) (explaining that, under heightened scrutiny, the state must "prove" that a law has a sufficiently close nexus to a government interest).

A. Felon disenfranchisement laws like N.C.G.S. § 13-1 do not promote traditional criminal justice goals.

North Carolina contends that post-release disenfranchisement furthers certain goals of the criminal justice system. R. 1109 (identifying a proffered government interest in "requiring felons to complete all conditions of probation, parole, and post-trial supervision"). But, consistent with the trial court's findings here, the notion that felon disenfranchisement serves criminal justice goals lacks support. *See* R. 1109 (stating that the defendants "did not introduce facts or empirical evidence at trial supporting any assertion that section 13-1's denial of the franchise to people on felony supervision serves *any* legitimate governmental interest"). Courts have recognized four traditional goals of the criminal justice system: "incapacitation, deterrence, retribution, and rehabilitation." *Ewing v. California*, 538 U.S. 11, 25 (2003) (plurality op.). There is a growing consensus, however, that once felons have completed their terms of incarceration and returned to their communities, the penalty of continued disenfranchisement does not further any of these traditional goals.

First, post-release disenfranchisement will not ordinarily "incapacitate an ex-offender from committing future criminal offenses." Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate Over Felon Disenfranchisement*, 56 Stan. L. Rev. 1147, 1167 (2004). Moreover, there is no evidence that "people with felony convictions are prone to commit offenses affecting the integrity of elections," or that "people on probation and parole have a greater propensity for voter fraud" in the states where they can vote. Wood, *supra*, at 10.

Second, extended disenfranchisement does not deter criminal behavior. For one thing, it is highly "unlikely that an individual who is not deterred by the prospect of imprisonment or fines or other restrictions on his liberty will be dissuaded by the threat of losing his right to vote." Karlan, *supra*, at 1166. Indeed, as the trial court found, North Carolina's law "denies the franchise to people on felony supervision *regardless* of whether they are complying with court orders and the conditions of their supervision." R. 1110. For another, "the years of early adulthood in which criminal behavior is most likely are precisely the years in which political participation is at its lowest," such that many individuals "are likely to be disenfranchised before they have actually exercised the right to vote." Karlan, *supra*, at 1166.

Indeed, studies suggest that disenfranchisement may be *positively* correlated with recidivism. For example, a study of individuals released from

prison in fifteen states revealed that "individuals who are released in states that permanently disenfranchise are roughly nineteen percent more likely to be rearrested than those released in states that restore the franchise post-release." Guy Padraic Hamilton-Smith & Matt Vogel, *The Violence of Voicelessness: The Impact of Felony Disenfranchisement on Recidivism*, 22 Berkeley La Raza L.J. 407, 426 (2012). Further, the same study found that "[i]ndividuals released in states that permanently disenfranchise are roughly ten percent more likely to reoffend than those released in states that restore the franchise post-release." *Id.* at 427.

Third, disenfranchisement does not further retributive goals, as retribution typically involves an analysis of "the gravity of a defendant's conduct" relative to the "harshness of the penalty imposed." Karlan, *supra*, at 1167. "[A]ll felonies are not equally serious." *Id.* Yet post-release disenfranchisement laws like North Carolina's impose a uniformly severe punishment on all felons, despite "the assessment of the sentencing judge or jury and the corrections officials who, after careful review of each individual's circumstances," have deemed individuals "fit to re-enter society" once they have served their term of incarceration. Wood, *supra*, at 11.

Fourth, post-release disenfranchisement also "conflicts with the rehabilitative goals of the criminal justice system by discouraging civic participation." Beeler, *supra*, at 1087-88. Voting serves an important function,

as it "invests" convicted felons in "our democracy while reminding them of the reciprocal responsibilities that citizens share." Wood, *supra*, at 11. Denying returning citizens the "ability to participate in the political process" only "further isolates and segregates ex-felons re-entering into society." Hamilton-Smith & Vogel, *supra*, at 408. This extended exclusion, in turn, conveys the message "that ex-offenders are beyond redemption," Karlan, *supra*, at 1166, and can "cause[] many people to lose hope," R. 1118.

Finally, there is no evidence that disenfranchisement facilitates compliance with outstanding legal financial obligations ("LFOs"). *See* R. 1109 (finding no evidence that "withholding the franchise encourages completion of post-release and probationary conditions"), 1110 (finding no evidence that "the prospect of disenfranchisement results in higher rates of compliance with court orders"). For citizens who are willing but unable to pay, "[t]ying repayments to voting rights is unlikely to compel these individuals to pay their LFOs any more quickly than if the franchise was not so conditioned." Ryan A. Partelow, *The Twenty-First Century Poll Tax*, 47 Hastings Const. L. Q. 425, 463 (2020); *see Bearden v. Georgia*, 461 U.S. 660, 670 (1983) (reasoning that "[r]evoking the probation of someone who through no fault of his own is unable to make restitution will not make restitution suddenly forthcoming"); *Jones v. Governor of Fla.*, 975 F.3d 1016, 1088 (11th Cir. 2020) (en banc) (Jordan, J., dissenting) ("If Florida's interest is in felons repaying their full debts to society, requiring

indigent felons to pay LFOs before regaining the right to vote does not actually aid in collections."). States can ensure that former felons complete the terms of their sentences through courts' alternative means of enforcing judgments. There is no sound governmental interest, however, in distinguishing between former felons with the means to pay and those without in determining who regains the right to vote.

B. Systems that restore the franchise upon release from incarceration are less administratively burdensome, less confusing, and less error-prone than systems like North Carolina's.

At times in this case, North Carolina claimed that N.C.G.S. § 13-1 serves interests in "[s]implifying the administration" of voting rights restoration and "[a]voiding confusion among North Carolinians convicted of felonies as to when their rights are restored." R. 1108. But studies show that post-release disenfranchisement systems are in fact *more* difficult to administer than systems restoring the right to vote upon release from incarceration. Moreover, systems like North Carolina's create—rather than resolve—confusion among elections officials and voters about voter eligibility.

1. Systems that restore the franchise when felons leave prison are easier to administer than post-release disenfranchisement systems.

Post-release disenfranchisement systems often require returning citizens to apply for restoration of their civic rights, a process that can be

complicated, time-consuming, and resource-intensive for states. But in states that allow their citizens to vote upon release from prison, "[t]here is no longer any need to coordinate complicated data matches, administer convoluted eligibility requirements, or sort through thousands of restoration applications." Wood, *supra*, at 15.

Rhode Island recognized the benefit of shifting to a system of automatic restoration upon release when the state amended its felon disenfranchisement law in 2006. The Rhode Island General Assembly observed that "[e]xtending disenfranchisement beyond a person's term of incarceration complicates the process of restoring the right to vote." R.I. Gen. Laws § 17-9.2-2(a)(5). The state's prior system of post-release disenfranchisement had "require[d] the involvement of many government agencies in the restoration process." *Id.* The legislature explained that "[t]his bill would simplify restoration by making people eligible to vote once they have served their time in prison, thereby concentrating in the department of corrections the responsibility for initiating restoration of voting rights." *Id.* Further, lawmakers observed, the change to a "streamlined restoration process" would not only ease the administrative burden on state agencies but also "conserve[] government resources and save[] taxpayer dollars." *Id.*

Other states' experiences confirm that restoring the franchise automatically upon release from incarceration is a simple process. For

example, in California, as soon as an individual leaves prison, all he or she must do to regain his voting rights is re-register with the Secretary of State. Cal. Sec'y of State, *Voting Rights: Persons with a Criminal History*, https://tinyurl.com/cal-voting-rights (last visited Aug. 15, 2022). Other states similarly require only that a person returning from incarceration register to vote to regain the franchise. *See, e.g.*, Conn. Sec'y of State, *Voting Fact Sheet for Restoring Voting Rights*, https://tinyurl.com/ct-fact-sheet (last visited Aug. 15, 2022); Md. Bd. of Elections, *Restoration of Voting Rights in Maryland*, https://tinyurl.com/md-voting-rights (last visited Aug. 15, 2022); Nev. Sec'y of State, *Restoration of Voting Rights in Nevada*, https://tinyurl.com/nev-voting-rights (last visited Aug. 15, 2022). In these systems, the straightforward eligibility and registration requirements minimize the burden on corrections officers and elections officials while facilitating restoration of voting rights.

Post-release disenfranchisement systems, in comparison, can involve significant administrative difficulties. For example, a study of Alabama's voter restoration process found that of the 4,226 applications for restoration of voting rights received between December 2003 and October 2005, the Board of Pardons and Paroles processed only 8.5% of applications within the statutory time limits and took more than a year to process 530 of the applications. Ala. All. to Restore the Vote & Brennan Ctr. for Just., *Voting Rights Denied in Alabama* 3 (Jan. 17, 2006), https://tinyurl.com/voting-rights-alabama. These

processing delays deprived a total of 599 eligible voters of the right to vote in state and national elections in November 2004. *Id.* Further, although state law requires the Board to respond to every application, it closed 39 eligible applications and 59 ineligible applications without ever informing the applicants of their status. *Id.* These delays in processing and failures to respond to applications for restoration of voting rights illustrate just a few of the administrative problems of a system that continues to disenfranchise felons post-incarceration.

These administrative problems characterize North Carolina's voting rights restoration process as well. Following testimony from the Department of Public Safety and the State Board of Elections, the trial court found that confusion and error plague the process of re-enfranchisement. R. 1114-16. The Department of Public Safety, for example, provides informational documents about voting rights restoration to persons under felony supervision that "are not simple or clear" and "do not speak in plain English about the basic question of whether the person is permitted to vote." R. 1114-15. Similarly, the Executive Director of the State Board of Elections "made it clear that . . . denial of the franchise is very difficult to administer and leads to material errors and problems." R. 1116. For example, a 2016 audit found that the State Board misidentified individuals as ineligible voters at a rate of nearly 20%. R. 1116.

Thus, ease of administration is hardly a compelling interest furthered by laws like North Carolina's.

2. Restoring the franchise upon release from prison reduces confusion about how and when former felons become eligible to vote.

Post-release disenfranchisement systems like North Carolina's can also create "needless confusion" among election officials and returning citizens alike about restoration of voting rights. Wood, *supra*, at 13. In North Carolina, "[t]here is rampant confusion among persons on felony supervision about their voting rights," causing them to abstain from voting for fear of being rearrested. R. 1118-20. Streamlining these laws can reduce confusion for all parties involved.

For example, Washington State understood the benefit of simplifying restoration requirements when the state amended its felon disenfranchisement law in 2009. In the past, the state had required convicted felons to pay all legal financial obligations before they could regain the right to vote. Wash. Rev. Code § 29A.08.520(2) (repealed 2009). However, due to flaws in the state's system for tracking disenfranchised felons and confusion among felons about their loss of rights, over 100 felons voted improperly in the state's 2004 general election. *Scores of Felons Voted Illegally*, The Seattle Times (Jan. 23, 2005), https://tinyurl.com/seattle-felons. The secretary of state suggested that "the simplest way to fix confusion over tracking felons would be to

automatically restore voting rights when people are released from prison, regardless of whether they've paid all their court debts." *Id.* Washington did just that when it amended its disenfranchisement law in 2009. *See* Wash. H.B. 1517 (provisionally restoring the franchise when a former felon is no longer under the authority of the department of corrections). In support of the bill, the Washington House Report credited testimony that "[b]y creating a bright-line for the restoration of voting rights, [it could] simplify a complicated, costly and ineffective system." Report on H.B. 1517, *supra*, at 3.

Similarly, states that restore the franchise upon release from prison tend to have election officials who are "better informed on the law." Erika Wood & Rachel Bloom, ACLU & Brennan Ctr. for Just., *De Facto Disenfranchisement* 8 (2008), https://tinyurl.com/de-facto-disenfranchisement. In Oregon, for example, 100% of election officials correctly responded that individuals are eligible to vote as soon as they leave prison. *Id.* This data suggests that when the disenfranchisement law is "straightforward," there is significantly less room for confusion in its application. *Id.*

In post-release disenfranchisement systems, by contrast, lack of training about state felony disenfranchisement laws, insufficient "coordination or communication between election offices and the criminal justice system," "complex laws," and "complicated registration procedures" can result in "persistent confusion among election officials" about voter eligibility. *Id.* at 1.

One frequent source of confusion is which stages of the criminal justice system implicate loss of the franchise. *See, e.g.*, *id.* at 2-3 (53% of Kentucky county clerks interviewed in a 2005 study incorrectly responded that citizens with misdemeanor convictions are ineligible to vote or stated that they were unsure how to answer this question). Problems can also arise due to confusion over which documents, if any, the state requires to restore a citizen's voting rights. *See, e.g.*, *Voting Rights Denied in Alabama*, *supra*, at 3-4 (although residents convicted of felonies not involving "moral turpitude" never lost the right to vote, Alabama elections officials refused to register new voters with such convictions without proof of restoration of rights, which the Board of Pardons and Paroles declined to issue.).

As these examples illustrate, confusion about returning citizens' voting rights prevents many eligible, would-be voters from casting ballots. But misinformation can also have broader effects on former felons and their communities. One citizen who is told he cannot vote "may pass along that same inaccurate information to his peers, family members and neighbors, creating a lasting ripple of de facto disenfranchisement across his community." Wood & Bloom, *supra*, at 1. At worst, confusion over felon disenfranchisement laws can re-imprison individuals who did not know that they were ineligible to vote. *See, e.g.*, *Mason v. State*, --- S. W.3d, ----, ----, No. PD-0881-20, 2022 WL 1499513, at *2 (Tex. Crim. App. May 11, 2022) (Texas woman sentenced to five

years in prison for voting while on felony probation when she did not know she was ineligible to vote, notices about her ineligibility never reached her, and no one from the probation office told her she was ineligible to vote). Thus, the multiple sources of potential confusion in systems like North Carolina's counsel in favor of a less restrictive approach. Certainly, North Carolina's law, as the trial court found, does not further any interest in preventing confusion among former felons or election officials. R. 1114-17.

CONCLUSION

This Court should affirm.

Respectfully Submitted, this the 17th day of August, 2022.

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UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO

UNITED STATES OF AMERICA,

Plaintiff,

No. 1:22-cv-00329-BLW

v.

THE STATE OF IDAHO,

Defendant.

BRIEF FOR THE STATES OF CALIFORNIA, NEW YORK, COLORADO, CONNECTICUT, DELAWARE, HAWAI'I, ILLINOIS, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, NEVADA, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, OREGON, PENNSYLVANIA, RHODE ISLAND, WASHINGTON, AND WASHINGTON, D.C. AS AMICI CURIAE IN SUPPORT OF PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

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INTRODUCTION AND INTERESTS OF AMICI

Amici States of California, New York, Colorado, Connecticut, Delaware, Hawai'i, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, North Carolina, Oregon, Pennsylvania, Rhode Island, and Washington, and Washington, D.C. submit this brief in support of the federal government's request for a preliminary injunction against the enforcement of defendant Idaho's near total ban on abortion, to the extent the ban conflicts with the Emergency Medical Treatment and Labor Act (EMTALA), 42 U.S.C. § 1395dd.

Amici have a substantial interest in this case. As health care providers to millions of residents, amici are both subject to EMTALA and serve as regulators of health care: amici own and operate public hospital systems, employ individual health care personnel, and license and regulate the many other health care providers that operate within our jurisdictions. Amici thus have a strong interest in clear guidance regarding their obligations under EMTALA. Amici also have a strong interest in protecting the rights of their residents who may need emergency medical care while present as students, workers, or visitors in Idaho and other States that may attempt to prohibit emergency abortion care contrary to EMTALA's requirements. In addition, if patients in Idaho are denied necessary emergency abortion care, they may travel to nearby States (including amici Oregon and Washington) to receive the emergency care they need. These States would thus experience additional pressures on their already overwhelmed hospital systems, especially in the rural and underserved areas of Oregon and Washington that border on Idaho.

EMTALA, enacted in 1986, has long been a crucial tool in ensuring that all individuals who come to an emergency hospital department are afforded an appropriate medical screening to determine whether they have an emergency medical condition and that patients are not transferred or discharged until they receive medical treatment to stabilize any such condition. Amici submit

this brief to highlight that EMTALA has long been interpreted to include emergency medical conditions involving or affecting pregnancy for which necessary stabilizing treatment may include abortion care. That straightforward interpretation of EMTALA derives from the statute's text and ensures that individuals with pregnancy-related emergency medical conditions receive the care they need to prevent death or serious impairment.

Amici's experience as health care providers confirms that emergency abortion care is necessary to avoid serious harmful outcomes (including death) in numerous situations such as when a patient presents with an ectopic pregnancy, severe preeclampsia, complications from abortion including self-induced abortion, and other medical conditions for which immediate medical attention is needed. Amici States have long understood that abortion care is part of emergency care and their experience establishes that the failure to provide stabilizing abortion care when needed to address emergency medical conditions will cause serious patient harms and have spillover effects in other States. These harms provide a strong basis for the injunctive relief sought here.

ARGUMENT

I. EMTALA Has Long Been Interpreted to Require the Treatment of Pregnancy-Related Conditions That Need Emergency Abortion Care.

EMTALA applies to any hospital that operates an emergency department and participates in Medicare—criteria that are met by virtually every hospital in the United States.[1] Under EMTALA, if "any individual" presents at a hospital's emergency department for examination or treatment, the hospital must provide an appropriate medical screening to determine whether an emergency medical condition exists. 42 U.S.C. § 1395dd(a). If the screening indicates the patient has an emergency medical condition, the hospital cannot transfer or discharge the patient until it provides "treatment as may be required to stabilize the medical condition," unless the transfer is specifically authorized by the statute. *Id.* § 1395dd(b)-(c). The hospital may also admit the patient as an inpatient in good faith to stabilize the emergency medical condition. 42 C.F.R. § 489.24(d)(2)(i). An "emergency medical condition" is "a medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in" (i) placing the health of the individual in serious jeopardy, (ii) serious impairment to bodily functions, or (iii) serious dysfunction of any bodily organ or part. 42 U.S.C. § 1395dd(e)(1)(A). Stabilizing the patient involves providing "such medical treatment of the condition as may be necessary to assure, within reasonable medical probability, that no material deterioration of the condition is likely to result from or occur during the transfer of the individual." *Id.* § 1395dd(e)(3)(A). Nothing in EMTALA excludes any conditions or categories of medical care or treatment from the statute's requirements.

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[1] *See* Joseph Zibulewsky, *The Emergency Medical Treatment and Active Labor Act (EMTALA): What It Is and What It Means for Physicians,* 14 Baylor Univ. Med. Ctr. Proc. 339,
(*continued on the next page*)

Individuals may present at the emergency department with various emergency medical conditions relating to pregnancy that do not involve active labor (which is separately addressed in the statute, *see Id.* § 1395dd(e)(1)(B)).[2] Such conditions may include ectopic pregnancy, traumatic placental abruption (separation), hemorrhages, pre-labor rupture of membranes, placenta previa, amniotic fluid embolism, intrauterine fetal death, and hypertension.[3] EMTALA's obligations would be triggered if the individual presenting with these conditions is experiencing acute symptoms such that if immediate treatment is not provided, the medical condition would reasonably be expected to result in serious jeopardy to the individual's health, serious impairment to bodily functions, or serious dysfunction of any bodily organ. *See Id.* § 1395dd(e)(1)(A). And in such circumstances, EMTALA mandates that the individual cannot be transferred or discharged until required stabilizing treatment is provided, unless the patient seeks transfer or discharge or, under the circumstances, the medical benefits of transfer of the not yet stabilized individual outweigh the risks. *See id.* § 1395dd(b)-(c). Required stabilizing treatment is that which "'would prevent the threatening and severe consequence of' the patient's emergency medical condition

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340 (2001); Nathan S. Richards, *Judicial Resolution of EMTALA Screening Claims at Summary Judgment*, 87 N.Y.U.L. Rev. 591, 601 & n.52 (2012).

[2] The fact that EMTALA defines emergency medical condition to include a pregnant patient in labor when there is inadequate time to effect a transfer before delivery or the transfer otherwise poses a threat to the health of the patient or fetus, *see* 42 U.S.C. § 1395dd(e)(1)(B), does not mean that Congress intended stabilizing treatment to exclude abortion care. EMTALA makes clear that this part of the definition of emergency medical condition applies to situations where delivery of the child is the desired health outcome and does not risk the life or health of the pregnant person. *See id.* § 1395dd(e)(3)(A)-(B) (defining "to stabilize" and "stabilized" in reference to such patients as delivery).

[3] *See* Geoffrey Chamberlain & Philip Steer, *ABC of Labour Care: Obstetric Emergencies,* 318 BMJ 1342, 1342-45 (1999); Eric Nadel & Janet Talbot-Stern, *Obstetric and Gynecologic Emergencies*, 15 Emergency Med. Clinics of N. Am. 389, 389-97 (1997); Lisa A. Wolf, et al., *Triage Decisions Involving Pregnancy-Capable Patients: Educational Deficits and Emergency Nurses' Perceptions of Risk*, 52 J. Continuing Educ. Nursing 21, 21-29 (2021).

while in transit." *Battle ex rel. Battle v. Memorial Hosp. at Gulfport*, 228 F.3d 544, 559 (5th Cir. 2000) (quoting *Burditt v. U.S. Dep't of Health & Hum. Servs.*, 934 F.2d 1362, 1369 (5th Cir. 1991)).

For decades, the federal government and courts throughout the country have interpreted EMTALA to require treatment for emergency conditions relating to pregnancy that do not involve active labor and have concluded that stabilizing treatment may include emergency abortion care when necessary to treat an emergency condition. For example, in 2003, the Centers for Medicare and Medicaid Services (CMS) clarified that a hospital's labor and delivery department may qualify as a regulated "emergency department."[4] A decade ago, in 2011, the U.S. Department of Health and Human Services (HHS) acknowledged that EMTALA may require abortion care in appropriate circumstances in a rule implementing federal conscience-refusal laws that might otherwise allow a physician to refuse to perform an abortion.[5] And in September 2021, CMS issued guidance restating that emergency medical conditions include pregnancy-related conditions and describing required stabilizing treatment as including abortion care when medically indicated.[6] CMS and HHS's Office of Inspector General has also brought enforcement actions against hospitals for EMTALA violations involving pregnancy-related emergency medical conditions. *See Burditt v. U.S. Dep't of Health & Hum. Servs.*, 934 F.2d 1362, 1367-76 (5th Cir. 1991) (affirming

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[4] *Clarifying Policies Related to the Responsibilities of Medicare-Participating Hospitals in Treating Individuals With Emergency Medical Conditions*, 68 Fed. Reg. 53,222, 53,228, 53,229 (Sept. 9, 2003) (discussing new regulatory definition of "dedicated emergency department").

[5] *See Regulation for the Enforcement of Federal Health Care Provider Conscience Protection Laws*, 76 Fed. Reg. 9,968, 9,973 (Feb. 23, 2011).

[6] *See* Memorandum from Dirs., Quality, Safety & Oversight Grp. & Survey & Operations Grp., CMS, to State Survey Agency Dirs. (Sept. 17, 2021) (internet). (For sources available online, full URLs appear in the Table of Authorities. All URLs were last visited on August 15, 2022.)

enforcement action against hospital where pregnant individual presented with extreme hypertension).[7]

Courts throughout the country have consistently found pregnancy-related emergency conditions not involving active labor to fall within the scope of EMTALA. *See, e.g.*, *Morales v. Sociedad Española de Auxilio Mutuo y Beneficencia*, 524 F.3d 54, 55-62 (1st Cir. 2008) (ectopic pregnancy); *Morin v. Eastern Me. Med. Ctr.*, 779 F. Supp. 2d 166, 168-69, 185 (D. Me. 2011) (woman 16 weeks pregnant having contractions without fetal heartbeat); *see also McDougal v. Lafourche Hosp. Serv. Dist. No. 3*, No. 92-cv-2006, 1993 U.S. Dist. LEXIS 7381, at *1 (E.D. La. May 24, 1993) (pregnant patient presented with vaginal bleeding). Indeed, a pregnant patient may present at the hospital needing emergency care unrelated to, but affecting, the pregnancy. *Hammond v. St. Francis Med. Ctr., Inc.*, No. 3:06-cv-101, 2010 U.S. Dist. LEXIS 117734, at *2-3, 7-8 (W.D. La. Nov. 4, 2010) (describing such facts and dismissing EMTALA claim for lack of jurisdiction).

Courts have also consistently interpreted EMTALA as requiring abortion services when needed to stabilize an emergency medical condition. *See Ritten v. Lapeer Reg'l Med. Ctr.*, 611 F. Supp. 2d 696, 712-18 (E.D. Mich. 2009) (applying EMTALA's anti-retaliation provision to doctor who refused to transfer patient whose condition was not stable and who may have needed abortion); *see also New York v. United States Dep't of Health & Hum. Servs.*, 414 F. Supp. 3d 475,

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[7] *See also* HHS & Dep't of Just., *Health Care Fraud and Abuse Control Program Annual Report for Fiscal Year 2019*, at 45 (2020) (internet) (describing enforcement action involving pregnant individual suffering from preeclampsia); HHS, Off. of Inspector Gen., *Semi-Annual Report to Congress: April 1 – September 30, 2015*, at 37 (2015) (internet) (same, pregnant individual having symptoms of abdominal and lower back pain); HHS, Off. of Inspector Gen., *Semi-Annual Report to Congress: April 1, 2007 – September 30, 2007*, at 26 (2007) (internet) (same, symptoms of vaginal bleeding, cramps, and decreased fetal movement); HHS, Off. of Inspector Gen., *Semi-Annual Report to Congress: October 1, 1999 – March 30, 2000*, at 32-33 (2000) (internet) (same, symptom of sharp abdominal pain).

538 (S.D.N.Y. 2019) (holding that federal rule that allowed physicians to refuse to perform or assist with abortion was not in accordance with law as it would "create[], via regulation, a conscience exception to EMTALA's statutory mandate"), *appeal filed*, No. 20-41 (2d Cir. Jan. 3, 2020). Numerous courts have held that patients of physicians who perform abortions must be admitted to the emergency room under EMTALA regardless of whether the treating physician has admitting privileges at the hospital. *See, e.g.*, *Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 787-88 (7th Cir. 2013); *June Med. Servs. LLC v. Kliebert*, 250 F. Supp. 3d 27, 64 (M.D. La. 2017), *rev'd on other grounds sub nom. June Med. Servs. LLC v. Gee*, 905 F.3d 787 (5th Cir. 2018), *rev'd sub nom., June Med. Servs. LLC v. Russo*, 140 S. Ct. 2103 (2020); *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 951 F. Supp. 2d 891, 899-900 (W.D. Tex. 2013), *rev'd on other grounds*, 748 F.3d 583 (5th Cir. 2014). Under the reasoning of these decisions, if a patient presented at the emergency room with an incomplete abortion, EMTALA would require that the patient receive stabilizing emergency abortion care. *See June Med. Servs.*, 250 F. Supp. 3d at 62, 64.

Finally, courts have long interpreted EMTALA as protecting patients from "being turned away from emergency rooms for non-medical reasons." *Bryan v. Rectors & Visitors of the Univ. of Va.*, 95 F.3d 349, 351 (4th Cir. 1996). Thus, "courts have declined to read exceptions into EMTALA's mandate," including exceptions allowing transfers based on a physician's religious, moral, or ethical refusal to provide specified stabilizing treatment. *New York*, 414 F. Supp. 3d at 537 (collecting cases); *see In re Baby "K"*, 16 F.3d 590, 597 (4th Cir. 1994); *Cleland v. Bronson Health Care Grp., Inc.*, 917 F.2d 266, 272 (6th Cir. 1990) (observing that EMTALA's plain text prohibits a hospital from refusing treatment based on "political or cultural opposition"). Consequently, liability for the failure to provide stabilizing treatment is not dependent on the

physician's or hospital's motive. *Roberts v. Galen of Va., Inc.*, 525 U.S. 249, 253 (1999); *see Burditt*, 934 F.2d at 1373(same, failure to effect proper transfer).

II. FOR YEARS, STATES HAVE UNDERSTOOD THAT ABORTION CARE IS PART OF EMERGENCY CARE.

Hospitals in Amici States understand that providing abortion care to stabilize an emergency medical condition is an essential part of their obligation to provide stabilizing care under EMTALA. Hospitals in amici States regularly provide abortion care to stabilize many emergency medical conditions, including severe pregnancy complications, complications of early pregnancy loss or miscarriage, pre-labor rupture of membranes, ectopic pregnancy, emergent hypertensive disorders such as preeclampsia with severe features, and incomplete abortion. Often, pregnant patients face unforeseeable emergency medical conditions and need abortion care to protect their life and prevent severe and disabling injury to their health, regardless of whether they wanted and intended the pregnancy. As the American College of Obstetricians and Gynecologists has explained, pregnancy complications "may be so severe that abortion is the only measure to preserve a woman's health or save her life."[8]Accordingly, abortion care has regularly been provided by hospitals in amici States to stabilize emergency medical conditions. In New York in 2019, 3,000 abortions were performed for patients presenting at the emergency department, with 1,010 abortion procedures performed within the emergency department and 1,820 abortion procedures performed for persons during an inpatient stay after presenting to the emergency department. Illinois's state Medicaid program reported that out of slightly more than 23,000 pregnancies, there were 532 emergency situations involving significant heart conditions, 477

[8] Am. Coll. of Obstetricians & Gynecologists (ACOG), *Facts Are Important: Abortion Is Healthcare* (2022) (internet).

respiratory conditions (not including mild conditions), 35 kidney disorders, 33 ectopic pregnancies, 221 missed abortions (miscarriages), 68 incomplete spontaneous abortions, 91 cases of hemorrhaging, 40 cases of issues with the placenta, and 32 cases of sickle cell anemia.[9] Data from the Nevada Medicaid program, which covers abortions only to protect the pregnant patient's life or in cases of rape or incest, indicates that the program has paid for an average of 523 covered abortions per year from 2019 to 2021, totaling 1,540 abortions.

Provider accounts likewise demonstrate that abortion is a regular and critical part of emergency healthcare. A physician at Oregon's public academic health center, Oregon Health & Science University, described receiving transfers that require urgent or emergent pregnancy termination, including pregnant patients presenting with hemorrhage due to placenta previa and placental abruptions, peri-viable premature rupture of membranes with sepsis, peri-viable severe decompensating preeclampsia, acute leukemia, c-section scar ectopic pregnancies, cornual ectopic pregnancies, and hemorrhaging miscarriage, among other conditions. The Illinois Department of Public Health's Office of Women's Health and Family Services reported that a provider treated a 30-year-old in the emergency room who was 15 weeks pregnant, had significant bleeding, ruptured membranes, and a dilated cervix, but the fetus still had cardiac activity. The patient had lost one-third of her blood volume, and her vital signs were deteriorating. The hospital provided the necessary surgery to end the pregnancy. In another case, an Illinois provider treated a 32-year-old patient with placenta previa (where the placenta covers the cervix) who was 20 weeks pregnant and came to the hospital with vaginal bleeding and cervical dilation. Her bleeding increased rapidly and she developed low blood pressure, needing a blood transfusion and a uterine evacuation (i.e.,

[9] All of these conditions can necessitate abortion care as stabilizing treatment. *See, e.g.*, Reuters, *Fact Check – Termination of Pregnancy Can Be Necessary to Save a Woman's Life, Experts Say* (Dec. 27, 2021) (internet).

abortion) to stabilize her condition. Another Illinois patient who was 22 weeks pregnant was brought to the hospital after having a seizure and was found to have elevated blood pressure, preeclampsia, and HELLP (hemolysis, elevated liver enzymes, and low platelet count) syndrome, a life-threatening pregnancy complication. Despite multiple medications to control her blood pressure, her liver function was rapidly deteriorating, necessitating a surgical termination of the pregnancy. Other patients received emergency abortion care to treat severe preeclampsia with very elevated blood pressure that could not be controlled with medication and that presented the risk of stroke, evidence of a growing internal hematoma in a patient with a history of second trimester placental abruption, and previable preeclampsia with severe features that caused a seizure.

Providers at a state-owned hospital in New Jersey similarly reported the regular use of terminating a pregnancy in emergency settings to treat septic abortion (any type of miscarriage where the uterus is infected or at risk of infection), ectopic pregnancies, preeclampsia with severe features, and molar pregnancy (nonviable abnormally fertilized egg that can act like a malignancy and is at high risk of metastasizing) for which no other treatment is available. And in Washington, hospitals regularly provide abortion care to stabilize many emergency medical conditions. Indeed, some hospitals that do not regularly provide abortion care in non-emergency settings explicitly state that treatment of emergency conditions that would be required under EMTALA are permitted.[10]

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[10] *See, e.g.*, Wash. State Dep't of Health, *Hospital Reproductive Health Services for Ferry County Memorial Hospital*, at pp. 1-2 (Aug. 29, 2019) (internet) (hospital does not provide abortions in non-emergency settings, but "[t]reatment of miscarriages and ectopic pregnancy would fall under the EMTALA protocols"); Wash. State Dep't of Health, *Hospital Reproductive Health Services for Lourdes Hospital*, at p. 1 (Sept. 3, 2019) (internet) (hospital does not provide abortions in non-emergency settings, but "[o]perations, treatments, and medications that have as their direct purpose the cure of a proportionately serious pathological condition of a pregnant

(*continued on the next page*)

III. FAILURE TO PROVIDE EMERGENCY ABORTION CARE WHEN REQUIRED CAUSES SERIOUS HARMS TO PATIENTS AND LEADS TO SPILLOVER EFFECTS IN OTHER STATES.

A court should enter a preliminary injunction when the other criteria for an injunction are met and the equities and the public interest weigh in favor of such relief. "'Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.'" *Mercoid Corp. v. Mid-Continent Inv. Co.*, 320 U.S. 661, 670 (1944) (quoting *Virginia R. Co. v. Railway Employees*, 300 U.S. 515, 552 (1937)). Here, as Amici's experience demonstrates, an injunction against enforcement of Idaho's law to the extent it conflicts with EMTALA will help safeguard the health of patients in Idaho, avoid further pressuring the already overwhelmed capacity of hospitals in neighboring States, and protect the public health. The equities and public interest thus weigh in favor of such injunctive relief.

A. Prohibiting Physicians from Providing Emergency Abortion Care Egregiously Harms Pregnant Patients.

As the amici States' experience demonstrates, preventing hospitals from performing abortions needed to treat an emergency medical condition, as determined by a treating physician, threatens the lives and health of pregnant patients. As explained above, many pregnancy and miscarriage complications are emergency medical conditions requiring time-sensitive stabilizing

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woman (patient) are permitted when they cannot be safely postponed until the unborn child is viable, even if they will result in the death of the unborn child"); Wash. State Dep't of Health, *Hospital Reproductive Health Services for Virginia Mason Memorial Hospital*, at pp. 1-2 (Aug. 30, 2019) (internet) (provides surgical abortions to treat pregnancy complications or in pregnancies involving a congenital abnormality).

treatment that can include abortion. In an emergency, any failure to provide, or delays in providing, necessary abortion care puts the pregnant patient's life or health at risk.[11]

These situations can arise with a range of medical conditions. As one example, a physician explained that a clear sign of uterine infection can be life threatening "because there is an extremely high risk that the infection inside of the uterus spreads very quickly into [the patient's] bloodstream and she becomes septic. If she continues the pregnancy it comes at a very high risk of death."[12] Another observed that, "under certain conditions, continuing a pregnancy could significantly increase the morbidity risk for the pregnant person or even jeopardize their life. . . . [F]or people with certain cardiovascular disease conditions, like Eisenmenger's syndrome and pulmonary hypertension, carrying a pregnancy could cause as high as a 40% risk of maternal death."[13] While not all circumstances will necessarily require an abortion, abortion care is necessary to stabilize the patient in at least some of these circumstances.

Sadly, examples abound of patients suffering grave harm when they do not receive necessary emergency care. For example, since Texas passed its six-week abortion ban (S.B. 8) and the law took effect on September 1, 2021, pregnant people in Texas have been experiencing delays in treatment and corresponding harms to their health. Doctors in Texas reported postponing care "until a patient's health or pregnancy complication has deteriorated to the point that their life was

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[11] *See, e.g.*, Reuters, *Fact Check – Termination of Pregnancy*, *supra* (discussing, for example, that placental abruption presents a risk of hemorrhage, which if left untreated, threatens the pregnant person's life and that preeclampsia if not treated quickly can result in the pregnant person's death); ACOG, *Facts Are Important: Understanding Ectopic Pregnancy* (2022) (internet) (advising that "[a]n untreated ectopic pregnancy is life threatening; withholding or delaying treatment can lead to death").

[12] Reuters, *Fact Check – Termination of Pregnancy*, *supra.*

[13] Sarah Friedmann, *What a Medical Emergency for an Abortion Actually Means, According to OB/GYNs*, Bustle (June 6, 2019) (internet).

in danger, including multiple cases where patients were sent home, only to return once they were in sepsis."[14] As another example, a physician at an academic medical center described how a hospital asked her to accept a patient "who was already septic" after the transferring hospital, on conscience-refusal grounds, refused to perform the abortion needed to save the patient's life, instead transferring the patient in an unstable state because the fetus had cardiac activity.[15] The physician who treated the patient after the transfer reported the transferring hospital for violating EMTALA.[16]

Delaying life-saving emergency treatment is also gravely risky because physicians cannot easily predict at which point during a medical emergency a pregnant patient's death is imminent.[17] Lisa Harris, a professor of reproductive health at the University of Michigan, discussed that "there are many circumstances in which it is not clear whether a patient is close to death."[18] She explained, "It's not like a switch that goes off or on that says, 'OK, this person is bleeding a lot, but not enough to kill them,' and then all of a sudden, there is bleeding enough to kill them. . . .

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[14] Eleanor Klibanoff, *Doctors Report Compromising Care out of Fear of Texas Abortion Law*, Texas Trib. (June 23, 2022) (internet); *see also* Whitney Arey et al., *A Preview of the Dangerous Future of Abortion Bans—Texas Senate Bill 8*, 387 New England J. of Med. 388 (2022) (internet).

[15] Lori R. Freedman, et al., *When There's a Heartbeat: Miscarriage Management in Catholic-Owned Hospitals*, 98 Am. J. Pub. Health 1774 (2008) (internet).

[16] *Id.*

[17] *See* Tina Reed, *Defining "Life-Threatening" Can Be Tricky in Abortion Law Exceptions*, Axios (June 28, 2022) (internet). For example, Utah-based obstetrician Lori Gawron explained that if a pregnant patient experiences a ruptured membrane in the second trimester, there is a much greater risk of infection to the pregnant woman, and "[i]f the infection progresses to sepsis, the maternal life is absolutely at risk. But we can't say how long that will take or how severe the infection will get in that individual." *Id.*

[18] Aria Bendix, *How Life-Threatening Must a Pregnancy Be to End It Legally?*, NBC News (June 30, 2022) (internet).

It's a continuum, so even how someone knows where a person is in that process is really tricky.'"[19] A recent study of maternal morbidity at two Texas hospitals following the enactment of the Texas six-week ban found that when a pregnant patient presented at the hospital with specified pregnancy complications, and an expectant-management approach was used (observation-only care until serious infection develops or the fetus no longer has cardiac activity), the rate of serious maternal morbidity (57%) is almost double the rate that occurs when the treating physician follows the standard protocol of terminating the pregnancy to preserve the pregnant patient's life or health (33%).[20] In Illinois, a pregnant patient with an ectopic pregnancy died in 2018 after the hospital failed to timely provide her with the necessary care. While this tragedy was related to the hospital's failure to properly staff the emergency department and provide the patient with the required care, it illustrates the dangers to pregnant patients when hospitals do not meet their EMTALA obligation to provide stabilizing care for an emergency medical condition.[21]

Since the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), the mere uncertainty created by the flagrant disregard shown by states like Idaho for EMTALA's requirements has caused great confusion for doctors and created dangerous situations for pregnant people.[22] Determinations of when an abortion is allowed under these States'

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[19] *Id.* Dr. Harris also impressed that the confusion about where the medical emergency becomes life-threatening enough to warrant intervention under state law is a difficult point, stating "What does the risk of death have to be, and how imminent must it be? Might abortion be permissible in a patient with pulmonary hypertension, for whom we cite a 30-to-50% chance of dying with ongoing pregnancy? Or must it be 100%?" *Id.*

[20] Anjali Nambiar et al., *Maternal Morbidity and Fetal Outcomes Among Pregnant Women at 22 Weeks' Gestation or Less with Complications in 2 Texas Hospitals After Legislation on Abortion*, Am. J. Obstetrics & Gynecology (forthcoming 2022) (internet).

[21] *Id.*

[22] *See* Frances Stead Sellers & Fenit Nirappil, *Confusion Post*-Roe *Spurs Delays, Denials for Some Lifesaving Pregnancy Care*, Wash. Post (July 16, 2022) (internet).

laws have "become fraught with uncertainty and legal risk," forcing doctors to "significantly alter the care they provide to women whose pregnancy complications put them at high risk of harm."[23] For instance, a woman sought care in Michigan after being denied treatment for an ectopic pregnancy in her home State due to providers' worries that providing abortion care might violate state laws because the fetus still had cardiac activity.[24] In a hospital in Missouri, hospital administrators temporarily required pharmacist approval to dispense medications needed to stop post-partum hemorrhaging, leading to delays in access.[25] A pregnant patient in Wisconsin who experienced a miscarriage was bleeding in the hospital for ten days before the hospital would remove the fetal tissue because of confusion about the legality of doing so in that State.[26] These uncertainties could be remedied by a judicial ruling confirming that EMTALA provides a nationwide floor for emergency abortion care.

B. Prohibiting Physicians from Providing Emergency Abortion Care Harms Other States.

Allowing Idaho to ban abortion care, including in medical emergencies where it is required under EMTALA, risks significant effects in other States as well. Amici's experience demonstrates that state abortion restrictions force many women to travel out of State for care. A comprehensive study published earlier this year examined where women obtained abortion care in the United

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[23] J. David Goodman & Azeen Ghorayshi, *Women Face Risks as Doctors Struggle With Medical Exceptions on Abortion*, N.Y. Times (July 20, 2022) (internet).

[24] Sellers & Nirappil, *supra*; *see id.* ("many of the two dozen doctors interviewed by The Post about their experiences since the Supreme Court overturned the right to abortion were hesitant to describe details of individual cases for fear of running afoul of lawyers and hospital administrators, violating patient privacy or prompting a criminal investigation").

[25] *Id.*

[26] *Id.*

States in 2017. Overall, 8% of all women who received an abortion had to cross state lines to obtain care—but this number was vastly higher in States with significant restrictions on abortion.[27] In 2017, over 30% of all Idaho residents who received an abortion had to leave the State to do so, approximately 550 women in total.[28] Over 40% of women from Kentucky, South Dakota, and West Virginia had to cross state lines to receive care; and in Missouri, Mississippi, and South Carolina, the figure was over 50%.[29] When more severe abortion restrictions in many jurisdictions took effect after *Dobbs*, women from these and other states have crossed state lines in even greater numbers, crowding waiting rooms and leading to longer waiting times for the procedure.[30] In eastern Washington, clinics have already reported a massive influx of patients from Idaho: one clinic reported that 78% of its patients in July 2022 were from Idaho (almost double the rate from the prior year), and another clinic reported that it was already fully booked multiple weeks out due to increased demand. Likewise in Oregon, one clinic reported that the number of out-of-state patients seen in July and August was double the number seen during the prior 14 months.

If hospitals in States like Idaho fail to comply with their obligations under EMTALA, Amici States anticipate even further strain on their health systems. Emergency rooms in Oregon and Washington will inevitably need to absorb the out-of-state patient need for care that Idaho's

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[27] Mikaela H. Smith et al., *Abortion Travel Within the United States: An Observational Study of Cross-State Movement to Obtain Abortion Care in 2017*, 10 The Lancet – Reg'l Health: Americas art. 100214 (Mar. 3, 2022) (internet).

[28] *Id.*

[29] *Id.*

[30] *E.g.*, Angie Leventis Lourgos, *Abortions in Illinois for Out of State Patients Have Skyrocketed*, Chi. Trib. (Aug. 4, 2022) (internet) (reporting a 700% increase in the number of out-of-state patients served in Illinois); Matt Bloom & Bente Berkland, *Wait Times at Colorado Clinics Hit Two Weeks as Out-of-State Patients Strain System*, KSUT (July 28, 2022) (internet) (100% increase in wait times from before *Dobbs* was decided).

law will cause, at a time when the States continue to wrestle with an ongoing global pandemic and new public health crises. Emergency departments are already faced with overcrowding, long wait times, and staff shortages, especially in rural and underserved areas such as those parts of Oregon and Washington that share a border with Idaho.[31] An additional influx of patients needing urgent care to address an emergency medical condition will only add to these concerns. If hospitals in a particular state fail to meet their obligations under EMTALA, it will cause harm to other states and the patients whom EMTALA is designed to protect.

[31] *See generally* Stephen Bohan, *Americans Deserve Better Than 'Destination Hallway' in Emergency Departments and Hospital Wards*, STAT News (Aug. 1, 2022) (internet) (discussing increasing demands for in-patient and emergency hospital services).

CONCLUSION

Plaintiff's motion for a preliminary injunction should be granted.

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