No. 21-1271

IN THE
Supreme Court of the United States

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

On Writ of Certiorari to the Supreme Court of North Carolina

BRIEF FOR NON-STATE RESPONDENTS

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RULE 29.6 DISCLOSURE STATEMENT

Respondent Common Cause has no parent company nor does any public company have a 10 percent or greater ownership in it.

Respondent North Carolina League of Conservation Voters, Inc. ("NCLCV") has no parent company, and no public company has a 10 percent or greater ownership in it.

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INTRODUCTION

Petitioners ask this Court to interpret our Constitution's Elections Clause in a manner that flouts that document's most fundamental premise—that a government's power derives from "We the People" and is limited by the constraints the people impose on their government. According to Petitioners, when the Elections Clause assigns authority to the state "Legislature," it authorizes those legislatures to violate their own state constitutions, as interpreted by their state courts. Every tool of constitutional interpretation demonstrates that Petitioners are wrong.

At the founding, as now, the word "Legislature" referred to a representative body that *the people* created, via a *constitution*, to *make laws*. State legislatures were thus bound by the organic charters to which they owed their existence. Contrary to Petitioners' claim, conferring power on the state "Legislature" to regulate congressional elections does not nullify state constitutional limits on that power any more than empowering "Congress" nullifies federal constitutional limits. And when state courts enforce state constitutions, they no more exercise "legislative" authority than do federal courts. As Alexander Hamilton emphasized in FEDERALIST NO. 78, unconstitutional laws are no laws at all, and courts (including state courts) may say so through judicial review.

Founding-era history confirms this conclusion. The Articles of Confederation provided for the selection of delegates in "such manner as the legislature * * * shall direct." ARTICLES OF CONFEDERATION of 1781, art. V. Under the Articles, *every State but one* had a

constitution limiting the legislature's authority to select delegates. When the Framers adopted the Constitution, they used nearly identical language in the Elections Clause. Petitioners' argument rests on the implausible claim that the Framers intended to depart from the settled understanding of the Articles, despite using the same text—all with nary a word of debate.

Post-ratification history cuts just as decisively against Petitioners. More than *three quarters* of the States that adopted or amended their constitutions in the years immediately after ratification constrained their legislature's regulation of congressional elections. Petitioners' theory would mean that a supermajority of the earliest constitutions violated the Elections Clause—even though many of the Framers who drafted that Clause returned home from Philadelphia to craft these state constitutions. Casting about for an originalist response, Petitioners cite the so-called "Pinckney Plan." But that "Plan" is a thoroughly discredited document concocted 30 years after the Convention (and does not help Petitioners in any event).

Precedent, too, forecloses Petitioners' position. Nearly a century ago, this Court unanimously rejected the argument that the Elections Clause endows state legislatures "with power to enact laws in any manner other than that in which the Constitution of the State has provided." *Smiley v. Holm*, 285 U.S. 355, 368 (1932). More recently, all nine Justices rejected the claim that state legislatures have "exclusive" redistricting authority immune from constitutional constraints. *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787, 806 (2015) (*AIRC*); *id.* at 841-42 (Roberts, C.J., dissenting). And

in *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019), every Justice agreed that "[p]rovisions in * * * state constitutions can provide standards and guidance for state courts to apply" to congressional redistricting.

That may be why Petitioners, midway through their brief, abandon any pretense of textualism. After insisting (at 11) that state legislatures' "exclusive[]" power nullifies state constitutional restrictions and precludes judicial review, Petitioners retreat. They acknowledge that federal-court review is permissible (while maintaining state-court review is not). They concede that courts may enforce "procedural" constraints (while insisting "substantive" constraints are different). And they suggest that judicial review may apply "specific" state constitutional provisions (but not "broadly worded" ones). These arguments share one thing: None can be squared with the Constitution's text.

In any event, Petitioners' interpretation of the Elections Clause would not help them *even if this Court adopted it*. North Carolina's legislature expressly authorized its state courts to adjudicate constitutional challenges to congressional maps and order narrowly tailored remedies. And Congress independently mandated that congressional districts must abide by state law and authorized state courts to remedy congressional plans that fail to do so. Petitioners never explain how the North Carolina Supreme Court could be usurping power that the legislature and Congress specifically gave it.

Rejecting the view that state legislatures may defy state constitutions would not preclude this Court from addressing lawless state-court decisions. But nothing

like that happened here. The North Carolina Supreme Court carefully reviewed the text, history, and purpose of the North Carolina Constitution, including its Free Elections Clause—a clause with no analogue in the Federal Constitution. Its decision was the product of the principled state-court judicial review that this Court embraced in *Rucho*.

Adopting Petitioners' interpretation, by contrast, would wreak havoc. Running elections is already "extraordinarily complicated and difficult." *Merrill v. Milligan*, 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurring in grant of stay application). Petitioners' theory could require state officials to run *two* elections simultaneously: one for state elections that are subject to the state constitution, and one for congressional elections that are not. Petitioners' theory would also call into doubt indispensable features of States' election apparatuses—which empower executive officials to administer elections and permit state courts to adjudicate election disputes. Perhaps worst of all, Petitioners' theory would require this Court to second-guess state-court interpretations of state constitutions, often in an emergency posture on the eve of an election—an intolerable affront to the principles of federalism.

It is rare to encounter a constitutional theory so antithetical to the Constitution's text and structure, so inconsistent with the Constitution's original meaning, so disdainful of this Court's precedent, and so potentially damaging for American democracy. This Court should reject Petitioners' theory and affirm the decision below.

STATEMENT OF JURISDICTION

The North Carolina Supreme Court invalidated Petitioners' 2021 congressional plan in a February 4, 2022 order and a February 14, 2022 opinion. Pet. App. 1a-242a. On February 23, 2022, the trial court rejected Petitioners' proposed remedial plan and modified that plan to bring it into compliance with the North Carolina Constitution. Pet. App. 269a-305a. Petitioners' appeal of that decision remains pending before the North Carolina Supreme Court. The petition for a writ of certiorari was filed in this Court on March 17, 2022, and granted on June 30, 2022. This Court's jurisdiction is contested. *Infra* pp. 69-70.

STATEMENT OF THE CASE

A. The North Carolina Legislature Authorized State Courts To Review And Remedy Unlawful Congressional Redistricting Plans.

North Carolina's legislature has expressly authorized its state courts to conduct judicial review of congressional redistricting plans. In 2002, the North Carolina Supreme Court invalidated the legislature's redistricting plans under the state constitution. *See Stephenson v. Bartlett*, 355 N.C. 354, 384-85 (2002) (*Stephenson I*); *Stephenson v. Bartlett*, 357 N.C. 301, 310 (2003) (*Stephenson II*). Thereafter, the legislature enacted "a workable framework for judicial review," sensitive to the "unique nature of these infrequent but potentially divisive cases." *Stephenson v. Bartlett*, 358 N.C. 219, 230 (2004) (*Stephenson III*).

Under that framework, the legislature prescribed that "action[s] challenging the validity of any act * * *

that apportions or redistricts State legislative or *congressional* districts" must be filed in the Superior Court of Wake County and "be heard and determined by a three-judge panel." N.C. Gen. Stat. § 1-267.1(a) (emphasis added); *see id.* § 1-81.1(a). The legislature specified that "[e]very order or judgment declaring *unconstitutional*" any such act "shall find with specificity all facts supporting that declaration [and] shall state separately and with specificity the court's conclusions of law." *Id.* § 120-2.3 (emphasis added). And the legislature required courts to give the legislature two weeks "to remedy any defects" in that plan. *Id.* § 120-2.4(a). If the legislature does not do so, "the court may impose an interim districting plan" for use only in the next general election that "may differ from the districting plan enacted by the [legislature] only to the extent necessary to remedy any defects identified by the court." *Id.* § 120-2.4(a1). The legislature barred the State Board of Elections from using any plan "other than a plan imposed by a court under this section or a plan enacted by the [legislature]." *Id.* § 120-2.4(b).

In the years since this framework was enacted, North Carolina's courts have repeatedly reviewed state legislative and congressional redistricting plans for constitutionality under both the federal and state constitutions—sometimes upholding them and sometimes invalidating them. That includes two 2019 decisions—in suits brought by Common Cause and the *Harper* group of North Carolina voters—in which a bipartisan trial-court panel invalidated North Carolina's state legislative and congressional maps as partisan gerrymanders that violated North Carolina's Free Elections, Equal Protection, Free Speech, and Free Assembly Clauses. *Harper v. Lewis*, No. 19-CVS-

012667, 2019 N.C. Super. LEXIS 122 (N.C. Super. Ct. Oct. 28, 2019) (three-judge court); *Common Cause v. Lewis*, No. 18-CVS-014001, 2019 WL 4569584 (N.C. Super. Ct. Sept. 3, 2019) (three-judge court). The legislature did not appeal those decisions, and the resulting remedial maps governed North Carolina's 2020 elections. *See also Pender County v. Bartlett*, 649 S.E.2d 364 (N.C. 2007), *aff'd sub nom. Bartlett v. Strickland*, 556 U.S. 1 (2009).

B. The Legislature Enacted Extreme Partisan Gerrymanders Violating The State Constitution.

On November 4, 2021, the North Carolina legislature enacted new redistricting plans for the state legislature and Congress, on strict party-line votes. Pet. App. 18a. Because North Carolina's constitution exempts districting plans from the gubernatorial veto, *see* N.C. CONST. art. II, § 22(5)(b)-(d), they became law.

Within two weeks, the North Carolina League of Conservation Voters, Inc. et al. ("NCLCV Respondents") and a group of North Carolina voters that included some of the 2019 plaintiffs ("the *Harper* Respondents") invoked North Carolina's statutory process for challenging these plans, arguing that they were extreme partisan gerrymanders violating the North Carolina Constitution. Both actions were assigned to a bipartisan three-judge panel designated by North Carolina's Chief Justice.

The panel denied Respondents' motions for a preliminary injunction, but the North Carolina Supreme Court reversed. It issued a preliminary injunction, postponed the primary election, and remanded for an

expedited trial. Respondent Common Cause intervened.

After a nearly week-long trial, the panel unanimously concluded that all three maps were extreme partisan gerrymanders. They reflected "intentional, pro-Republican partisan redistricting," Pet. App. 24a, and constituted "extreme partisan outliers," Pet. App. 9a, 24a, that were "designed [to] safeguard[] Republican majorities in any plausible election outcome, including those where Democrats win more votes by clear margins," Pet. App. 37a.

The congressional plan, in particular, was "intentionally and carefully designed to maximize Republican advantage." Pet. App. 44a, 128a. The plan was more advantageous to Republicans than 99.9999% of alternative maps. Pet. App. 35a. And the plan was "highly non-responsive to the changing opinion of the electorate." Pet. App. 29a. It all but guaranteed Republican candidates ten of 14 seats even when Republicans lost the statewide vote. Pet. App. 36a-37a. These results could not "be explained by North Carolina's political geography." Pet. App. 35a. Rather, the plan achieved this skew by subordinating "traditional redistricting criteria" to "partisan advantage." Pet. App. 45a.

The panel nonetheless held that the state constitution provides no remedy for extreme partisan gerrymandering, Pet. App. 49a-53a, in conflict with the 2019 decisions reaching the opposite result.

Respondents appealed, and the North Carolina Supreme Court reversed. The court "adopted in full the extensive and detailed factual findings of the trial

court," Pet. App. 125a, concluded that the congressional and legislative maps were "unconstitutional beyond a reasonable doubt," and "enjoin[ed] the[ir] use." Pet. App. 228a.

Consistent with *Rucho*'s guidance that "[p]rovisions in state statutes and state constitutions can provide standards and guidance for state courts to apply," 139 S. Ct. at 2507, the court held that partisan-gerrymandering claims are justiciable under the North Carolina Constitution. Pet. App. 72a. The court reviewed the text, structure, history, and purpose of the state constitutional provisions at issue—which the legislature itself had enacted in 1969, before putting those provisions before the voters in 1971—and held that the plans violated the Free Elections, Equal Protection, Free Speech, and Free Assembly Clauses. Pet. App. 141a-142a.

The court first examined the North Carolina Constitution's Declaration of Rights, including its guarantee that "[a]ll elections shall be free." N.C. CONST. art. I, § 10. That language, the court explained, derives from an English Bill of Rights provision "adopted in response to the king's efforts to manipulate parliamentary elections by diluting the vote in different areas to attain 'electoral advantage.'" Pet. App. 91a. After canvassing history, text, and precedent, the court concluded that the state constitution's framers intended to prohibit "all attempts to manipulate the electoral process, especially through vote dilution on a partisan basis, as in the 'rotten boroughs' of England." Pet. App. 6a, 91a-95a. And the court noted that North Carolina had strengthened that provision in 1971. Pet. App. 95a-96a.

The court also addressed the state constitution's Equal Protection Clause, which offers "greater protections" than its federal counterpart and has long protected "the right to 'substantially equal voting power and substantially equal legislative representation.'" Pet. App. 99a (quoting *Stephenson I*, 355 N.C. at 382). This right, the court explained, is violated "when a districting plan systematically makes it more difficult for one group of voters to elect a governing majority than another group of voters of equal size" and the plan is not "narrowly tailored to a compelling governmental interest." Pet. App. 102a. The court reached similar conclusions as to the Free Speech and Assembly Clauses, which are also construed "more expansively" than their federal counterparts. Pet. App. 102a-106a.

In holding partisan-gerrymandering claims justiciable, the court noted that "federal cases" interpreting "[f]ederal justiciability doctrines" are "not controlling" in North Carolina's courts. Pet. App. 63a (quotation marks omitted). The court explained that North Carolina's "constitution 'is more detailed and specific than the federal Constitution'" in protecting its citizens' political rights, Pet. App. 72a (citation omitted), and the court identified "multiple reliable ways of demonstrating the existence of an unconstitutional partisan gerrymander," Pet. App. 110a.

The court rejected Petitioners' argument that the Elections Clause "forbids state courts from reviewing a congressional districting plan" that "violates the state's own constitution." Pet. App. 121a. The argument was forfeited because Petitioners had "not presented [it] at the trial court." *Id.* The court also held

that the argument failed on the merits: It was "inconsistent with nearly a century of precedent of the [U.S.] Supreme Court" and was "repugnant to the sovereignty of states, the authority of state constitutions, and the independence of state courts." Pet. App. 121a-122a.

C. The Bipartisan Trial-Court Panel Ordered A Limited Remedy.

Consistent with the legislature's statutory framework, the North Carolina Supreme Court gave the legislature an opportunity to enact new plans that complied with the state constitution. Pet. App. 232a-233a.

Within the two-week remedial period provided by statute, the legislature enacted remedial state legislative and congressional plans, conditioning the effectiveness of each "upon its approval or adoption by the Wake County Superior Court." *E.g.*, N.C. Sess. Laws 2022-3, § 2.

As the state statutes required, the trial-court panel assessed whether the plans "remed[ied the] defects" the North Carolina Supreme Court had identified. N.C. Gen. Stat. § 120-2.4(a1). The panel appointed as special masters a bipartisan group of respected jurists—two retired state supreme-court justices and one retired superior-court judge (one Republican, one Democrat, and one unaffiliated). Pet. App. 273a. The special masters appointed four expert assistants, including Professor Bernard Grofman—a leading redistricting expert whose work this Court has repeatedly cited. Pet. App. 273a-274a.

The trial-court panel approved the state House plan. It also approved the Senate plan. Giving "appropriate deference to the General Assembly," Pet. App. 278a-

279a, 299a-301a, the panel rejected Respondents' arguments that the Senate plan failed to fully remedy unlawful gerrymandering, Pet. App. 290a-293a; *see* Pet. App. 278a-279a.

As to the congressional plan, however, the panel ruled that, even "giving appropriate deference to the General Assembly," it was unconstitutional. Pet. App. 278a-279a, 301a. Using the legal test that Petitioners themselves had urged—that plans with a "mean-median difference of 1% or less" and an "efficiency gap of less than 7%" are presumptively constitutional—the panel found that the congressional plan "is not satisfactorily within the[se] statistical ranges." Pet. App. 280a.

The panel declined to adopt the alternative plans proposed by Respondents. Pet. App. 288a-289a, 292a-293a. Again tracking the state statute, N.C. Gen. Stat. § 120-2.4(a1), the panel emphasized that because the legislature possesses "ultimate authority * * * to draw redistricting maps," the "appropriate remedy is to modify the [legislature's] Remedial Congressional Plan." Pet. App. 292a. The special masters thus worked "to amend [the legislature's] plan" only as needed to achieve constitutional compliance. Pet. App. 302a.

The panel found that the special masters' amendments remedied the defects in the legislature's plan and, pursuant to statute, ordered this remedial plan to be used on an "[i]nterim" basis solely for the 2022 election, with the legislature to enact a new plan thereafter. Pet. App. 292a-293a.

D. Petitioners Have Abandoned Their Elections Clause Argument In Ongoing North Carolina Supreme Court Proceedings.

Petitioners appealed the panel's ruling to the North Carolina Supreme Court and sought a stay of the panel's order modifying the legislature's congressional map. The North Carolina Supreme Court denied the stay without dissent. Petitioners then asked this Court for an emergency stay, which was denied. 142 S. Ct. 1089. North Carolina's 2022 primary election proceeded under the legislature's plan as modified by the trial-court panel.

On June 30, 2022, this Court granted certiorari. 142 S. Ct. 2901.

Two weeks later, Petitioners moved to dismiss their state-court appeal—shortly after a filing by Respondents noting that the appeal would provide the North Carolina Supreme Court an opportunity to address the state statutes authorizing judicial review. That motion remains pending. Petitioners' challenge has now been fully briefed and argued in the North Carolina Supreme Court. Petitioners *did not raise* an Elections Clause challenge to the remedial districting plan before the North Carolina Supreme Court.[1] Thus, as to all remedial proceedings, Petitioners have forfeited their Elections Clause argument before the North Carolina Supreme Court.

[1] All filings are available from the North Carolina Supreme Court's online docket, https://bit.ly/3CHOC4p.

SUMMARY OF ARGUMENT

I. Petitioners' Elections Clause theory—that state legislatures may wield their power over federal elections to violate the very state constitutions that created them—is inconsistent with constitutional text, structure, history, and precedent.

First, the text of the Elections Clause makes clear that it does not abrogate state constitutional constraints on state legislatures or preclude state courts from enforcing those constraints. The Framers understood a "Legislature" to be a lawmaking body constrained by the constitution that created it through a grant of power from the people. Anything else would have been antithetical to the Framers' fundamental political philosophy—that "the people are the only legitimate fountain of power." THE FEDERALIST NO. 49, at 313 (James Madison) (Clinton Rossiter ed., 1961). The Elections Clause then authorizes these legislatures to enact "Regulations," which the Framers likewise understood as exercises of the lawmaking function, subject to the constraints imposed on that function by state constitutions.

When legislatures transgressed their constitutional limits, the Framers understood that courts had a duty to step in and "to declare all acts contrary to the manifest tenor of the Constitution void." THE FEDERALIST NO. 78, *supra*, at 466 (Alexander Hamilton). Even before the Constitution, state courts regularly invalidated state statutes that violated state charters. The Framers lauded these exercises of judicial review, and they crafted the Elections Clause understanding that state courts would undertake that same review to ensure conformance with state constitutions.

Second, the Constitution's structure confirms that the Elections Clause does not upend fundamental principles of judicial review. Just as the term "Congress" in the second half of the Elections Clause does not immunize Congress from judicial review, *see Wesberry v. Sanders*, 376 U.S. 1 (1964), so too for state "Legislature[s]" under the first half of the Elections Clause. The Tenth Amendment further confirms that the Elections Clause did not destroy a foundational feature of state sovereignty by abrogating States' authority to structure their governments.

Third, founding-era history forecloses Petitioners' position. The Articles of Confederation vested power to appoint delegates in the "legislature"—and the constitutions of every State at the time (except one) constrained its legislature in doing so. When the Framers drafted the Elections Clause using nearly identical language, they did not intend this language to yield the *opposite* result, as Petitioners implausibly claim. Post-ratification history confirms this conclusion. Of the States that adopted or amended constitutions during the three decades following ratification, more than *three quarters* regulated congressional elections. This early state practice is powerful evidence of original understanding. And it is utterly incredible to posit, as Petitioners do, that all these States violated the Elections Clause—particularly because many of these early state charters were drafted by the Framers themselves.

Fourth, Petitioners' position contravenes a century of precedent. In *Smiley*, this Court rejected the same argument Petitioners assert, holding that the Elections Clause does not "render[] inapplicable the conditions which attach to the making of state laws," 285

U.S. at 365, including "restriction[s] imposed by state Constitutions upon state Legislatures when exercising the lawmaking power," *id*. at 369. *AIRC* reaffirmed that "[n]othing in [the Elections] Clause instructs, nor has this Court ever held, that a state legislature may prescribe regulations on the time, place, and manner of holding federal elections in defiance of provisions of the State's constitution." 576 U.S. at 817-18. The *AIRC* dissent agreed that when the legislature "prescribes election regulations," it "may be required to do so within the ordinary lawmaking process." *Id.* at 841 (Roberts, C.J., dissenting). Most recently, in *Rucho*, 139 S. Ct. at 2507, all nine Justices agreed that state courts could apply substantive provisions in state constitutions to congressional redistricting.

Fifth, Petitioners retreat from their principal argument with a series of concessions that demonstrate just how untenable their position is. Petitioners concede that legislatures must follow "procedural" constitutional constraints but posit that the Elections Clause frees them from "substantive" limits. And Petitioners suggest that state courts may enforce "specific" rules but not "open-ended" ones. These arguments have no basis in text, structure, history, or precedent. Instead, they show that not even Petitioners believe their claim that the Elections Clause's text resolves this case in their favor. As to Petitioners' argument that enacting regulations governing congressional elections is "a *federal* function" limited only by the Federal Constitution, this Court rejected that exact argument in *Smiley*.

II. Even if (counterfactually) the Elections Clause generally nullified state constitutions, Petitioners could not prevail.

First, North Carolina's legislature exercised its Elections Clause power to authorize—specifically and expressly—judicial review of congressional districting plans. Just as this Court has recognized that Congress can "invest[]" the "judicial department * * * with jurisdiction" over particular cases, *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 22 (1825), so too can state legislatures. North Carolina's legislature did just that when it created a specific procedure authorizing judicial review of congressional redistricting plans under the state constitution and authorized state courts to adopt interim plans when the legislature fails to remedy a constitutional violation. The North Carolina judiciary cannot have usurped power that the legislature explicitly gave it.

Second, Congress has also independently exercised its own Elections Clause authority to ensure that congressional plans adhere to state constitutional requirements. Under 2 U.S.C. § 2a(c), States must be "redistricted in the manner provided by the law thereof." That mandate encompasses a State's "substantive 'policies and preferences' for redistricting, as expressed in a State's statutes [and] constitution." *Branch v. Smith*, 538 U.S. 254, 277-78 (2003) (plurality op.).

III. Petitioners cannot prevail by insisting that the North Carolina Supreme Court erred under North Carolina law. It is for state courts, not this Court, to interpret state constitutions. Nor do the decisions below remotely approach the type of lawless conduct that could warrant a departure from that bedrock

rule. *See* Br. of Amicus Curiae Conference of Chief Justices at 19. The North Carolina Supreme Court deployed the normal tools of judicial interpretation—including examining text, history, and purpose—to reach exactly the conclusion this Court in *Rucho* contemplated state courts might reach. 139 S. Ct. at 2507. As to the North Carolina trial court's remedial redistricting plan, this Court lacks jurisdiction to review it. And regardless, the remedial orders comported with the North Carolina courts' judicial role under North Carolina law, including the procedures the legislature itself prescribed.

IV. Finally, Petitioners' position would upend election administration nationwide. It could nullify countless state constitutional provisions, force election officials to administer a dual track of state and federal elections simultaneously, and potentially eliminate any judicial forum for ensuring that state actors follow state election laws—while requiring legislatures to regulate even the most minute election details. Petitioners' backup theory—allowing state courts to hear challenges under "procedural" and "specific" constitutional provisions, but not "substantive" or "open-ended" ones—would mire federal courts in endless disputes about "state laws with which [they] are generally unfamiliar," *Michigan v. Long*, 463 U.S. 1032, 1039 (1983), flipping bedrock principles of federalism on their head.

This Court should reject Petitioners' novel and untenable interpretation of the Elections Clause and affirm the North Carolina Supreme Court's judgment.

ARGUMENT

I. CONSTITUTIONAL TEXT, STRUCTURE, HISTORY, AND PRECEDENT DEMONSTRATE THAT STATE LEGISLATURES MUST ABIDE BY STATE CONSTITUTIONS WHEN REGULATING CONGRESSIONAL ELECTIONS.

Petitioners claim that when the Elections Clause vests authority in the state "Legislature," it nullifies restrictions in the state constitutions that created those legislatures and defined their powers. Every tool of constitutional interpretation shows that Petitioners are wrong.

A. The Text Of The Elections Clause Refutes Petitioners' Theory.

The Elections Clause provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. CONST. art. I, § 4, cl. 1. This text does not authorize state legislatures to violate their own constitutions or foreclose state courts from enforcing those constitutions. To the contrary, it embraces the ordinary constraints that have applied to state legislatures since the founding.

1. The Elections Clause requires the "Legislature" "in each State" to prescribe laws regulating congressional elections. *Id.* As Petitioners acknowledge, the word "Legislature" at the founding meant "the representative body which ma[kes] the laws of the people." Pet'rs' Br. 14 (quoting *Hawke v. Smith*, 253 U.S. 221, 227 (1920)); *see* 2 SAMUEL JOHNSON, A DICTIONARY OF

THE ENGLISH LANGUAGE (1755) ("legislature" is the representative body with "[t]he power that makes laws"); 2 NOAH WEBSTER, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) ("legislature" is the "body of men in a state or kingdom, invested with power to make and repeal laws"). This definition recognizes a crucial point: A "legislature" is a body empowered by the people to make *laws*.

The Elections Clause's reference to legislatures reaffirmed—and did not abrogate—the founding-era understanding of a legislature as a lawmaking body constrained by the constitution that created it. During the Constitutional Convention, James Madison recognized that a "law violating a constitution established by the people themselves, would be considered * * * null & void." 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 93 (James Madison) (Max Farrand ed., 1937). George Mason agreed that state legislatures are "mere creatures of the State Constitutions, and cannot be greater than their creators." *Id.* at 88. And in FEDERALIST NO. 78, Alexander Hamilton confirmed that "[t]here is no position which depends on clearer principles than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void." THE FEDERALIST NO. 78, *supra*, at 467.

Members of this Court, too, recognized that state constitutions constrained state legislatures in making laws. Justice James Iredell—a framer of North Carolina's constitution before ascending to this Court—explained that the "legislature" is "a *creature* of the constitution," and its "power" necessarily "is limited and defined by the constitution." James Iredell, *To the Public* (Aug. 17, 1786), *in* 2 GRIFFITH J. MCREE, LIFE

AND CORRESPONDENCE OF JAMES IREDELL 146 (1857). Justice William Paterson—a delegate to the Constitutional Convention before President Washington nominated him to this Court—agreed, noting that legislatures are "[c]reatures of the Constitution; they owe their existence to the Constitution: they derive their powers from the Constitution: It is their commission; and, therefore, all their acts must be conformable to it, or else they will be void." *VanHorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 308 (C.C.D. Pa. 1795).

All these sources thus recognize that a legislature is a representative body constrained by the constitution that created it.

2. The word "Regulations" confirms that state legislatures remain bound by constraints in the constitutions that empower them to make laws. The Elections Clause requires state legislatures to "prescribe" the "Times, Places and Manner" of holding federal elections. U.S. CONST. art. I, § 4, cl. 1. It then identifies these prescriptions, when altered by Congress, as "Regulations" made "by Law" through the legislative process. *Id*. Petitioners do not appear to dispute this point, describing (at 24-25) state legislatures' power under the Elections Clause as "lawmaking." Indeed, this Court has held that when state legislatures regulate congressional elections under the Elections Clause, they "exercise * * * the lawmaking power." *Smiley*, 285 U.S. at 372-73.

Many other provisions of the Constitution use the word "regulate" or "Regulation" to refer to Congress's power to act through the normal lawmaking process. *See, e.g.*, U.S. CONST. art. I, § 9, cl. 6 ("No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another");

id. § 8, cls. 3, 5 (granting authority "[t]o regulate Commerce" and "[t]o coin Money, [and] regulate the Value thereof"); *id.* art. III, § 2, cl. 2 (this Court's jurisdiction subject to "such Regulations as the Congress shall make"). Regulations enacted by Congress pursuant to those clauses are not exempt from compliance with Congress's organic charter or immune from judicial review. The same logic applies to regulations enacted by state legislatures under the Elections Clause.

The Elections Clause thus vests state legislatures with the power to make laws regulating congressional elections, subject to ordinary constraints on lawmaking. State legislatures occasionally act in a different capacity, such as an "electoral" or "ratifying" capacity. *Smiley*, 285 U.S. at 365-66. And in those contexts, different constitutional constraints may apply. But when legislatures operate in their traditional legislative capacity, they are subject to the constraints that state constitutions impose on the legislative function.

The Framers understood that when legislatures overstepped their powers by enacting a void law, courts have a duty to say so. As Hamilton wrote, "a limited Constitution * * * which contains certain specified exceptions to the legislative authority" can "be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void." THE FEDERALIST NO. 78, *supra*, at 466. Judicial review would be among "the bulwarks of a limited Constitution against legislative encroachments." *Id.* at 469.

The Framers understood this principle to apply to state courts as well as federal courts. "In as many as eight cases across seven states" during the 1780s,

"state courts deemed a state statute to violate a fundamental charter (or other species of higher law)." Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887, 933 (2003) (footnotes omitted); *see id.* at 933 n.169 (collecting cases). One of these cases arose in North Carolina, where the State's highest court held that the legislature could not by statute "repeal or alter the constitution"—an act that would "destroy their own existence as a Legislature." *Bayard v. Singleton*, 1 N.C. (Mart.) 5, 7 (1787). Instead, under "the constitution," which is "the fundamental law of the land," the statute must "stand as abrogated and without any effect." *Id.*

The Framers celebrated state-court judicial review. During the Constitutional Convention, Madison praised the Rhode Island "[j]udges who refused to execute an unconstitutional law." 2 RECORDS OF THE FEDERAL CONVENTION, *supra*, at 28 (James Madison). Elbridge Gerry likewise lauded States whose "Judges had (actually) set aside laws as being agst. the Constitution." 1 RECORDS OF THE FEDERAL CONVENTION, *supra*, at 97 (James Madison). All told, "[m]ore than a dozen Philadelphia delegates discussed judicial review in almost two dozen different instances." Prakash & Yoo, *supra*, at 940. Hamilton observed that the "benefits of the integrity and moderation of the judiciary have already been felt in more States than one." THE FEDERALIST NO. 78, *supra*, at 470. And he explained that because judicial review derives "from the general theory of a limited Constitution," it "*is equally applicable to most if not to all the State governments*." THE FEDERALIST NO. 81, *supra*, at 482 (emphasis added).

The Elections Clause's assignment of authority to state "Legislature[s]" to prescribe "Regulations" thus does not abrogate constitutional constraints on those legislatures or preclude courts from enforcing those constraints through judicial review.

3. Petitioners assert (at 11, 21) that "the power to regulate federal elections lies with state legislatures *exclusively*" and that when state courts enforce state constitutions, "the State has reallocated a portion of the authority assigned specifically to its legislature * * * and parceled it out instead to its courts." But even if the state legislature's power were "exclusive," *but see AIRC*, 576 U.S. at 841-42 (Roberts, C.J., dissenting) ("the state legislature need not be exclusive"), it would not be free from constitutional constraints. And when courts enforce those constraints, they do not exercise legislative authority. Judicial review "[i]s a check on the Legislature's power," not a usurpation of it. *Nixon v. United States*, 506 U.S. 224, 233 (1993). It does not "by any means suppose a superiority of the judicial to the legislative power" but rather "supposes that the power of the people is superior to both." THE FEDERALIST NO. 78, *supra*, at 467-68 (Alexander Hamilton). This Court recognized this principle in *Marbury v. Madison* itself. *See* 5 U.S. (1 Cranch) 137, 177 (1803).

Enforcing state constitutions through judicial review does not, as Petitioners claim (at 21), deprive the term "Legislature" of meaning. Assigning the power to regulate congressional elections to the "Legislature" prohibits state constitutions from reassigning that power to a non-legislative actor and reflects a choice to give the legislature primacy over other state actors, such as the state executive. *Cf.* U.S. CONST.

art. I, § 2, cl. 4 (authorizing state executives to issue writs of election to fill congressional vacancies); Zachary D. Clopton & Steven E. Art, *The Meaning of the Seventeenth Amendment and a Century of State Defiance*, 107 NW. U. L. REV. 1181, 1202-03 (2013) (describing common-law system of writs of election issued by the executive); MD. CONST. art. III, § 5 (governor establishes state legislative map, but not congressional map, unless the legislature passes a joint resolution to override that map). But that assignment does not abrogate constraints in the constitutions creating state legislatures or diminish the rule that the legislature's regulation of congressional elections must be "in accordance with the method which the State has prescribed for legislative enactments." *AIRC*, 576 U.S. at 807 (quoting *Smiley*, 285 U.S. at 367).

B. The Constitution's Structure Refutes Petitioners' Theory.

The Constitution's structure confirms that the Elections Clause does not authorize state legislatures to act in defiance of their organic charters.

1. That structural evidence starts with the Elections Clause itself. The Clause does not mention *this Court's* power to review the constitutionality of state laws that regulate the times, places, and manner of elections. Yet there is no doubt that this Court has authority to do so. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 783 (1995); *Smiley*, 285 U.S. at 373. And after empowering "the Legislature" of each State to regulate congressional elections, the Elections Clause provides that "the Congress" may alter those regulations. Again, the Elections Clause does not specifically provide for *this Court's* review of

laws enacted by Congress. But as this Court has recognized, that omission does not call into doubt that Congress remains constrained by the Constitution, as interpreted by this Court. *See Wesberry*, 376 U.S. at 6.

The Elections Clause is hardly unique in this regard. The Constitution repeatedly vests authority in the federal "Congress." But the Constitution's enumeration of the areas in which "Congress shall have Power" to regulate—including the power to "regulate Commerce" and "promote the Progress of Science and useful Arts," U.S. CONST. art. I, § 8, cls. 3, 8—does not suggest that Congress exercises those powers unconstrained by constitutional limits. *See, e.g.*, *United States v. Lopez*, 514 U.S. 549, 551 (1995); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 630 (1999). To the contrary, the Framers understood that Congress's legislative authority would be subject to judicial review, even though the Constitution never expressly provides for it. THE FEDERALIST NO. 81, *supra*, at 482 (Alexander Hamilton) (there "is not a syllable in the plan under consideration which *directly* empowers the national courts to construe the laws according to the spirit of the Constitution").

Petitioners concede (at 11) that judicial review is a "background assumption of the American constitutional system." When the Framers intended to deviate from that background principle, they did so unmistakably through "a textually demonstrable constitutional commitment of the issue to a coordinate political department." *Nixon*, 506 U.S. at 228; *see, e.g.*, U.S. CONST. art. I, § 2, cl. 5 ("The House of Representa-

tives * * * shall have the sole Power of Impeachment."). Petitioners do not come close to establishing that the Framers in the Elections Clause intended to depart from the background principle that state legislatures are constrained by state constitutions as interpreted by state courts.

2. The federalism principles embodied in the Tenth Amendment underscore that the Elections Clause does not override restrictions in state constitutions. The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. The Framers "split the atom of sovereignty" to ensure that "our citizens would have two political capacities, one state and one federal, each protected from incursion by the other." *Saenz v. Roe*, 526 U.S. 489, 504 n.17 (1999).

Among the powers the Tenth Amendment reserves to States is the power to decide for themselves "the structure of [their] government[s]." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). "Within wide constitutional bounds, States are free to structure themselves as they wish." *Berger v. N.C. State Conf. of the NAACP*, 142 S. Ct. 2191, 2197 (2022). States "unquestionably" retain this sovereign authority except to the extent the Constitution has "divested them of their original powers and transferred those powers to the Federal Government." *Thornton*, 514 U.S. at 801-02 (citation omitted).

The Elections Clause did not abrogate the limits the people imposed on their state legislatures' regulation of congressional elections—and certainly did not do so with the clarity required to effect so fundamental a

transformation in the relationship between the federal government and the States. To the contrary, the Framers "intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections." *Shelby County v. Holder*, 570 U.S. 529, 543 (2013) (citation omitted).

3. The Supremacy Clause confirms that state laws regulating congressional elections remain constrained by state constitutions. The Supremacy Clause provides that "[t]his Constitution," "the Laws of the United States," and "all treaties" made under United States authority, "shall be the supreme Law of the Land," "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2. This text enumerates three, and only three, categories of law superior to state constitutions: (1) the Federal Constitution, (2) the laws of the United States, and (3) federal treaties. Had the Framers intended to elevate a fourth category—state statutes regulating congressional elections—they would have so provided.

C. Founding-Era Practice And The Convention Debates Refute Petitioners' Theory.

Founding-era state practice and the debates at the Constitutional Convention confirm the Framers' understanding that state constitutions would constrain state legislatures' regulation of congressional elections—evidence that merits great weight when assessing the Constitution's meaning. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401 (1819); *NLRB v. Noel Canning*, 573 U.S. 513, 524 (2014); *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008).

1. The Articles of Confederation provided that delegates to the Confederation Congress "shall be annually appointed in such manner as *the legislature* of each state shall direct." ARTICLES OF CONFEDERATION of 1781, art. V (emphasis added). Even though the Articles granted this appointment power to the "legislature," 10 of the 11 States with constitutions in effect under the Articles limited legislatures' power to appoint delegates to Congress.[2] This near-uniform practice makes clear that just before the Elections Clause's adoption, assigning power to the "legislature" *did not* abrogate state constitutional restrictions on the legislature.[3]

2. At the Convention, the Framers understood that States should have authority over congressional elections, just as they had under the Articles. That principle "occasioned no debate." *AIRC*, 576 U.S. at 816.

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[2] *See* VA. CONST. of 1776 (appointment in both houses by "joint ballot"); DEL. CONST. of 1776, art. 11 (same); MD. CONST. of 1776, art. XXVII (same); MASS. CONST. of 1780, pt. 2, ch. IV (same); S.C. CONST. of 1778, art. XXII (appointment in both houses "jointly, by ballot"); PA. CONST. of 1776, § 11 (choice of delegates "by ballot"); N.C. CONST. of 1776, art. XXXVII (same); GA. CONST. of 1777, art. XVI (same); N.Y. CONST. of 1777, art. XXX (nominations by each chamber then appointment of delegates "by the joint ballot"); N.H. CONST. of 1784, pt. II, *Delegates to Congress* (separate votes by each house).

[3] Petitioners attempt to distinguish (at 31) this pre-ratification practice on the theory that the Articles of Confederation granted each State the power "to recall its delegates." ARTICLES OF CONFEDERATION of 1781, art. V. But this was a *separate* power from the power to appoint delegates; it does not shed light on the meaning of the word "legislature" in the Articles, nor suggest that the Framers intended to authorize state legislatures to violate state constitutions.

Debate instead focused on whether the federal government should also have a role. The Elections Clause "reflected a compromise," which gives state legislatures primary authority over the times, places, and manner of elections but allows Congress to make laws altering such regulations. *Id.* at 837 (Roberts, C.J., dissenting). No one suggested that "legislature" meant "legislature unconstrained by its constitution."

It is inconceivable that the Framers intended to depart from the Articles' settled meaning by adopting a provision with nearly identical language—and to do so without a word of debate. Indeed, that theory is even more incredible given that multiple delegates warned of giving "undue influence" over federal elections to state legislatures. 1 RECORDS OF THE FEDERAL CONVENTION, *supra*, at 358-60 (James Madison). The Framers worried that state legislatures might devise "subversive" elections laws. *Id.* at 359. And they insisted that "State Constitutions" were essential "to check legislative injustice and incroachments." 2 RECORDS OF THE FEDERAL CONVENTION, *supra*, at 587 (James Madison). Those widespread concerns refute any suggestion that the Framers understood their compromise to free state legislatures from state constitutions.

More than that: Empowering state legislatures to act contrary to their own constitutions would have marked a radical departure from the most fundamental principles of the very constitution the Framers had convened to write. *Supra* Part I.A-B. Had the Framers contemplated eliminating constraints on state legislatures that are so fundamental to the constitutional structure and that existed under the Articles of Confederation, someone would have said something.

Their silence "is most instructive." *Alden v. Maine*, 527 U.S. 706, 741 (1999).

3. Early state practice confirms that the founding generation did not share Petitioners' interpretation. Immediately after the Constitution's ratification, state constitutions continued to constrain the power of state legislatures to establish the times, places, and manner of congressional elections. Between 1789 and 1821, 20 States adopted or amended their constitutions, and 16 of those States—*more than three quarters*—regulated congressional elections.[4]

Seven of those States adopted or amended their constitutions to regulate congressional elections *specifically*. Delaware's 1792 constitution stated that congressional representatives "shall be voted for at the same places where representatives in the State legislature are voted for, and in the same manner," and that all elections must "be by ballot." DEL. CONST. of 1792, art. VIII, § 2; *id.* art. IV, § 1. Maryland amended its constitution in 1810 specifically to regulate the manner of voting in elections for "Representatives of this State in the Congress of the United States," requiring voting by ballot. MD. CONST. of 1776, art. XIV (ratified 1810). Mississippi's 1817 Constitution regulated the times and places for elections for a "Representative to the Congress of the United

[4] This Court has looked to "state constitutional provisions written in the 18th century or the first two decades of the 19th" as bearing on the Constitution's original meaning. *Heller*, 554 U.S. at 584. And by any count, founding-era practice cuts decisively against Petitioners. During George Washington's presidency, seven out of eight state constitutions regulated congressional elections. And during the first 25 years after the founding, 10 out of 11 state constitutions regulated congressional elections. *See infra* pp. 31-33.

States," and superseded state election law regarding the State's first federal election: It specified that the election in one county "shall be held at the courthouse, instead of the place provided by law." MISS. CONST. of 1817, sched., § 7.[5] Four other early state constitutions—Indiana (1816), Illinois (1818), Alabama (1819), and Missouri (1820)—expressly regulated the times of elections for Representatives to the "Congress of the United States."[6]

In addition, nine other States adopted constitutions to regulate the manner of voting in *all* elections, including congressional elections. Seven States—Georgia in 1789, Pennsylvania in 1790, Kentucky in 1792, Tennessee in 1796, Ohio in 1803, Louisiana in 1812, and New York in 1821—adopted constitutions requiring that votes in "[a]ll elections" be "by ballot."[7] Two of those States—Georgia in 1798 and Kentucky in 1799—subsequently adopted new constitutions to require voting *viva voce* in "all" elections.[8] Two more States—New Hampshire in 1792 and Vermont in 1793—adopted constitutions requiring "all" elections

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[5] *See Wilmington Tr. Co. v. Baldwin*, 195 A. 287, 290 (Del. Super. Ct. 1937) ("[T]he schedule having been adopted as a part of the Constitution, its provisions are equally binding with it.").

[6] IND. CONST. of 1816, art. XII, § 8; ILL. CONST. of 1818, sched., § 9; ALA. CONST. of 1819, sched., § 7; MO. CONST. of 1820, sched., § 9.

[7] 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; N.Y. CONST. of 1821, art. II, § 4.

[8] GA. CONST. of 1798, art. IV, § 2; KY. CONST. of 1799, art. VI, § 16.

to be "free."[9] And five of the seven States with constitutions that specifically regulated congressional elections provided additional rules in their state constitutions regulating "all" elections, including congressional elections.[10]

Petitioners attempt to dismiss these provisions by claiming (at 38-39) that they excluded congressional elections. But "all" means all—today, and at the founding. *See* 1 NOAH WEBSTER, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) ("all" means "[e]very one" or the "whole quantity, extent, duration, amount, quality, or degree"). Confirming as much, the seven States with constitutions requiring voting by ballot in *all* elections promptly enacted statutes requiring ballot voting in *congressional* elections.[11] Then, when Georgia and Kentucky ratified new constitutions switching from ballot to *viva voce*

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[9] N.H. CONST. of 1792, pt. I, art. XI; VT. CONST. of 1793, ch. I, art. 8, ch. II, § 34; *see also* KY. CONST. of 1799, art. X, § 5.

[10] *See* DEL. CONST. of 1792, art. I, § 3; IND. CONST. of 1816, art. VI, § 2; ILL. CONST. of 1818, art. II, §§ 27-28, art. VIII, § 5; ALA. CONST. of 1819, art. III, § 7; MO. CONST. of 1820, art. XIII, § 6.

[11] Georgia: Act of Dec. 8, 1790, 1790 Ga. Acts 17. Pennsylvania: Act of Mar. 16, 1791, ch. XIII, § II, 1790 Pa. Acts 15, 16; *see* Act of Sept. 13, 1785, ch. CCXXI, § XIV, 1784 Pa. Acts 335, 345-46. Kentucky: Act of June 26, 1792, ch. V, § 4, 1792 Ky. Acts 7, 7; *see* Act of June 24, 1792, ch. IV, § 6, 1792 Ky. Acts 5, 6. Tennessee: Act of Apr. 20, 1796, ch. X, § 2, 1796 Tenn. Acts 81, 82; *see* Act of Apr. 23, 1796, ch. IX, § 3, 1796 Tenn. Acts 79, 80. Ohio: Act of Apr. 15, 1803, ch. XXIV, §§ 1, 13, 1803 Ohio Acts 76, 76, 80. Louisiana: Act of Sept. 5, 1812, ch. XI, §§ 1, 3, 1812 La. Acts 42, 42, 44; *see* Act of Jun. 4, 1806, ch. XIX, §§ 4, 7, Acts of Territory of Orleans 78, 80, 82. New York: Act of Apr. 17, 1822, ch. CCI, § 1, 1822 N.Y. Laws 267, 267.

voting in *all* elections, both States passed new statutes mandating that switch in *congressional* elections.[12]

These early state constitutions are especially significant because they were drafted by many of the same Framers who drafted the Federal Constitution.[13] John Dickinson, for example, drafted the provision in the Articles vesting appointment authority in "the legislature." Then, as a member of the Committee of Unfinished Parts at the 1787 Convention in Philadelphia, Dickinson drafted Article II's Presidential Electors Clause (which similarly vested authority in "the Legislature"). Finally, Dickinson returned home to Delaware and presided over the state convention that adopted the 1792 state constitution restricting the legislature's authority over federal elections.

If the Elections Clause prohibited States from imposing constitutional constraints on state legislatures' regulation of congressional elections, then a supermajority of the early state constitutions contained provisions that were unconstitutional. The States' "regular course of practice" should "settle the meaning of" the Elections Clause. *Chiafalo v. Washington*, 140 S. Ct. 2316, 2326 (2020) (quoting *Letter to S. Roane* (Sept. 2,

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[12] Act of Feb. 11, 1799, § 1, 1799 Ga. Acts 91, 91; Act of Dec. 21, 1799, ch. LXXV, §§ 3, 14, 1800 Ky. Acts 154, 155-56, 168-69.

[13] *See* Hayward H. Smith, *Revisiting the History of the Independent State Legislature Doctrine*, 53 ST. MARY'S L.J. 445, 455, 484-85 (2022) (John Dickinson led Delaware constitutional convention); Joseph S. Foster, *The Politics of Ideology: The Pennsylvania Constitutional Convention of 1789-90*, 59 PA. HIST. 122, 129 (1992) (James Wilson served on primary drafting committee at Pennsylvania constitutional convention).

1819), *in* 8 WRITINGS OF JAMES MADISON 450 (G. Hunt ed. 1908)).

4. Petitioners offer no plausible historical defense of their theory.

First, straining for originalist support for their position, Petitioners emphasize the so-called "Pinckney Plan." They declare (at 2) that this plan would have left it up to "each State" to regulate federal elections, and that this language was later deliberately changed.

But the Pinckney Plan is almost certainly a fake. The historical evidence suggests that Charles Pinckney created the plan as late as 1818, more than *three decades* after the Convention, to create the impression that the plan he proposed at the Convention (which is lost to history) resembled the Constitution as ratified. *See* 3 RECORDS OF THE FEDERAL CONVENTION, *supra*, at 601-02 (Appendix D). James Madison declared that the so-called Pinckney Plan "certainly is not the draft originally presented to the convention by Mr. Pinckney," and that he was "perfectly confident that" this plan contained elements "not * * * contained in the original draft." *Id.* at 479-80. Even the passage Petitioners cite makes clear the document "was not the same as that originally presented by Pinckney in 1787" and Pinckney's views at the Convention "differ[ed] radically" from the "Pinckney Plan" he later produced. *Id.* at 602. Pinckney's "so-called draft has been so utterly discredited that no instructed person will use it" to evaluate the Constitution's original meaning. John Franklin Jameson, *Studies in the History of the Federal Convention of 1787*, 1 ANN. REP. AM. HIST. ASS'N 87, 117 (1903).

Absent genuine evidence that Pinckney's initial draft of the Elections Clause referred to States rather than state legislatures, Petitioners have no support for their assertion (at 2) that "the Committee of Detail deliberately changed" this language. Petitioners claim (at 16) that Edmond Randolph added "the legislature" to a draft of Article I, Section 3, but they cite nothing to suggest that this supposed change bears on the meaning of the Elections Clause. And even if the Elections Clause was changed, that change at most suggests that the Framers returned to the approach adopted by the Articles—which did *not* prevent state constitutions from constraining legislatures' regulation of congressional elections.

Second, Petitioners offer an incomplete and inaccurate account of the early state constitutions. Petitioners entirely ignore five States—Mississippi, Indiana, Illinois, Alabama, and Missouri—that specifically regulated congressional elections. As to Delaware and Maryland, Petitioners (at 37) brush off their restrictions as "minor." But the choice between ballots and *viva voce* elections was "an important issue" at the founding that was "actively contested." Smith, *supra*, at 490. Indeed, Madison described this choice as the archetypal "manner" regulation. *See* 2 RECORDS OF THE FEDERAL CONVENTION, *supra*, at 240-41 (James Madison). And if the Elections Clause truly overrode state constitutional restrictions, as Petitioners insist, it would not matter whether a restriction was major or minor.

Third, unable to overcome the founding-era evidence that state constitutions permissibly limited the *manner of voting* in congressional elections, Petitioners contend (at 25-30) that state constitutions did not

limit *the manner of congressional districting*. But that ad hoc distinction is inconsistent with Petitioners' own textual theory—that the Elections Clause entirely nullifies state constitutional restrictions concerning federal elections. Indeed, the Framers understood the "Manner" of voting to encompass both the ballot-versus-*viva-voce* choice and districting rules. *See* Eliza Sweren-Becker & Michael Waldman, *The Meaning, History, and Importance of the Elections Clause*, 96 WASH. L. REV. 997, 1026-29 (2021).

Moreover, as Petitioners recognize (at 29), Virginia's 1830 constitution regulated the apportionment of the Commonwealth's congressional districts through an abhorrent "three-fifths" provision. *See* VA. CONST. of 1830, art. III, § 6. James Madison and John Marshall voted in favor of this provision, underscoring the Framers' recognition that state constitutions can constrain legislatures in congressional districting. *See* Smith, *supra*, at 485-86. In the first half of the 1800s, several other state constitutions regulated congressional districting.[14]

Fourth, Petitioners invoke two failed proposals to amend state constitutions to regulate redistricting. Neither helps their cause.

Petitioners contend (at 38) that Pennsylvania "affirmatively rejected" a proposed constitutional restriction on congressional districting. It did not: The proposal was withdrawn without debate. JOHN S. WIESTLING, THE PROCEEDINGS RELATIVE TO CALLING THE CONVENTIONS OF 1776 AND 1790, at 374 (1825). That does not shed light on the Elections Clause's

[14] *See* IOWA CONST. of 1846, art. 3, § 32; WIS. CONST. of 1848, art. XIV, § 10; CAL. CONST. of 1849, art. IV, § 30.

original meaning. *Cf. Bostock v. Clayton County*, 140 S. Ct. 1731, 1747 (2020) (failed proposals are a "particularly dangerous" ground for interpreting meaning).

Petitioners also cite (at 27-28) a proposed 1821 amendment to the Massachusetts Constitution that would have required the creation of districts for congressional elections. But Justice Story's constitutional objection turned on his belief that the amendment would require the Legislature "to surrender *all* discretion" over redistricting. JOURNAL OF DEBATES AND PROCEEDINGS IN THE CONVENTION OF DELEGATES, CHOSEN TO REVISE THE CONSTITUTION OF MASSACHUSETTS 60 (1821) (emphasis added). In Justice Story's view, the state legislature could not be entirely cut out of the redistricting process—which is consistent with the conclusion that States may impose some constitutional constraints on legislatures enforceable through judicial review. *See AIRC*, 576 U.S. at 841 (Roberts, C.J., dissenting) (maintaining that States may "*supplement* the legislature's role in the legislative process" but may not "*supplant* the legislature altogether").

More importantly, Justice Story *also* argued that electing representatives in districts would be "wholly inexpedient" because it "would neutralize" Massachusetts' votes "and place us in the same position as if we had no vote." JOURNAL OF DEBATES, *supra*, at 59-60. Daniel Webster likewise opposed the amendment on political grounds, and made clear that he did not wish to "enter into the argument on the question of our right to make such a provision." *Id.* at 60. James Austin, who introduced the amendment, disagreed with

Justice Story's constitutional argument and maintained that the "people possess the supreme power—they have the right to impose this restriction upon the Legislature." *Id.* at 58. But Austin conceded the political point, acknowledging that his amendment could "destroy[]" Massachusetts' "influence in the Union." *Id.* at 61.

Political considerations carried the day. And whatever weight this Court accords to Justice Story's view that the Elections Clause prohibits States from *entirely* supplanting the legislature's role over congressional elections, *see Thornton*, 514 U.S. at 856 (Thomas, J., dissenting) (noting that Justice Story's views were often "more nationalist than the Constitution warrants"), Justice Story's remarks, made thirty years after ratification, do not support Petitioners' assertion that state legislatures are entirely insulated from state judicial review.

Fifth, Petitioners (at 30-35) seek support in early state practice as to the election of *Senators* (who, before the Seventeenth Amendment, were chosen by legislatures). Petitioners' arguments lack merit even assuming—counterfactually—that state legislatures' exercise of this "elective" function is relevant to their different function of "lawmaking" for congressional elections. *See Smiley*, 285 U.S. at 365 (distinguishing these functions); *AIRC*, 576 U.S. at 806 (endorsing this aspect of *Smiley*); *id.* at 833 (Roberts, C.J., dissenting) (same).

Petitioners focus on the state legislatures' choice between electing Senators by "joint ballot" or by "concurrent resolution." They assert (at 31) that "*not a single State*" constitutionalized this choice in the Republic's

first 40 years. But as Petitioners later admit in a footnote (at 33 n.8), that is false. Georgia amended its constitution in 1795 to provide that "[a]ll elections to be made by the general assembly, shall be by joint ballot of the senate and house of representatives." GA. CONST. of 1789, art. II (amended in 1795). Georgia retained a similar provision in its 1798 constitution. GA. CONST. of 1798, art. IV, § 2. Three other early state constitutions also provided that, in elections for Senators, legislators were to vote *viva voce*.[15] Another required such elections to be "by ballot."[16] Petitioners are simply wrong that state constitutions did not address voting rules for choosing Senators.

Petitioners fare no better in attempting to identify (at 33-35) examples of lawmakers "departing" from state constitutions when regulating Senate appointments. Petitioners (at 34) cite a debate in the New York legislature. But that debate concerned whether a *pre-ratification* provision of the state constitution addressing the appointment of delegates to the Continental Congress applied to the appointment of Senators *after* the Constitution's ratification. 3 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL ELECTIONS 1788-1790, at 281 (Merrill Jensen & Robert A. Becker eds., 1976). The New York Council of Revision vetoed the legislation based on Article I, Section 3, which provided that Senators must be "chosen * * * by" state legislatures; the veto had nothing to do with the Elections Clause. *See id.* at 538-39. New York's legislators even acknowledged that the word "legislature" depended on the "constitution of

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[15] PA. CONST. of 1790, art. III, § 2; KY. CONST. of 1799, art. VI, § 16; ALA. CONST. of 1819, art. VI, § 6.

[16] LA. CONST. of 1812, art. VI, § 13.

this state," *id.* at 281, which contradicts Petitioners' core theory. Petitioners try to chalk the contrary view up to two different lawmakers, but get even that detail wrong, as both of Petitioners' quotations are from the same lawmaker. *See id.* at 286-87 (General Schuyler); *id.* at 382 (General Schuyler).

Petitioners also cite (at 33) a newspaper article about a debate in the Massachusetts legislature—which Petitioners claim shows that the legislature departed from the state constitution in choosing Senators. But for one thing, this article admits to giving "merely a hasty sketch" of the debate. 1 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL ELECTIONS, *supra*, at 498. For another, this "sketch" suggests that the legislature understood it had to act as "defined" by its "state constitution," *id.* at 497—again refuting Petitioners' position.[17]

D. A Century Of Precedent Refutes Petitioners' Theory.

Precedent confirms that the Elections Clause does not empower state legislatures to act in defiance of state constitutions or disable state courts from enforcing those constitutions. Accepting Petitioners' theory,

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[17] Petitioners invoke (at 43) *Baldwin v. Trowbridge*, a 1866 contested-election case for a Michigan seat in the House of Representatives. *See* 2 Bartlett Contested Election Cases, H.R. Misc. Doc. No. 152, at 46-54, 41st Cong., 2d Sess. (1866). But in that case, which arose nearly 80 years after ratification, the House's vote did not necessarily rest on the conclusion that the Michigan legislature could regulate congressional elections unconstrained by the state constitution. *See* Smith, *supra*, at 522-23. And the House had decisively rejected a similar argument just five years earlier, *id.* at 509, refuting Petitioners' assertion (at 43) that Congress "endorsed" their theory.

by contrast, would require overruling precedents spanning a century.

1. In *Smiley*, this Court directly addressed whether the Elections Clause "endow[s] the Legislature of the State with power to enact laws in any manner other than that in which the Constitution of the State has provided." 285 U.S. at 368. The Court answered no, in a unanimous opinion by Chief Justice Hughes. *Id.* The Elections Clause, *Smiley* held, does not "render[] inapplicable the conditions which attach to the making of state laws," *id*. at 365, including "restriction[s] imposed by state Constitutions upon state Legislatures when exercising the lawmaking power," *id*. at 369.

The Court rejected Petitioners' interpretation of the word "legislature." The Court permitted a Governor to participate in "legislative" matters because "the question * * * is not with respect to the 'body' as thus described, but as to the function to be performed." *Id.* at 365. Viewed that way, "in providing for congressional elections, and for the districts in which they were to be held, these Legislatures were exercising the lawmaking power, and thus subject, where the state Constitution so provided, to the veto of the Governor as a part of the legislative process." *Id.* at 369. *Smiley* thus held that a congressional redistricting plan passed by the state legislature but vetoed by the governor was invalid under the state constitution and "cannot be sustained by virtue of any authority conferred by the Federal Constitution." *Id.* at 373.

That holding accorded with *State of Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565, 568 (1916), in which Chief Justice White's unanimous opinion held that Ohio's constitution could empower voters to reject congressional redistricting legislation via popular refer-

endum. Ohio could do so, *Hildebrant* explained, because state legislatures may not enact laws under the Elections Clause that are invalid "under the Constitution and laws of the State." *Id.* Again and again, this Court has recognized the same point. *See Koenig v. Flynn*, 285 U.S. 375, 379 (1932) (holding that state courts have authority to strike down congressional redistricting legislation that violates "the requirements of the Constitution of the State in relation to the enactment of laws"); *Carroll v. Becker*, 285 U.S. 380, 381-82 (1932) (same).

Those holdings resolve the case. If a gubernatorial veto or popular referendum comports with the Elections Clause because it is a "restriction imposed by [the] state Constitution[]," *Smiley*, 285 U.S. at 369, so do other state constitutional restrictions enforced by state courts. Compliance with state constitutional restrictions is a "condition[] which attach[es] to the making of state laws." *Id.* at 365.

Contrary to Petitioners' assertion (at 39-40), *Smiley* did not hold that the Elections Clause permits other state actors to play a role only if they are "making" law. The sentence on which Petitioners rely simply observes that States can choose "[w]hether" a governor will participate in making state law. *Smiley*, 285 U.S. at 368. The reason *why* the Elections Clause allows that choice, *Smiley* explains in the next sentence, is that a State's decision to provide a "check in the legislative process[] cannot be regarded as repugnant to the grant of legislative authority." *Id.* "[J]udicial review," too, is a "check on the Legislature's power." *Nixon*, 506 U.S. at 233. Just as the Framers who drafted and ratified the Elections Clause contemplated that the "qualified negative of the President upon the acts or resolutions of the two houses of the legislature" would "furnish[] an additional security

against the enaction of improper laws," THE FEDERALIST NO. 73, *supra*, at 442-43 (Alexander Hamilton), they understood that "the courts of justice" exercising judicial review would be "the bulwarks of a limited Constitution against legislative encroachments," THE FEDERALIST NO. 78, *supra*, at 469 (Alexander Hamilton).

2. *Wesberry* confirms that allocating redistricting power to a legislative body does not preclude judicial review. *Wesberry* rejected the argument that the second half of the Elections Clause—which allows Congress to "make or alter" "Regulations" governing congressional elections—"had given Congress 'exclusive authority' to protect the right of citizens to vote for Congressmen" and thereby precluded judicial review. 376 U.S. at 6. *Wesberry* emphasized "that *nothing in the language of that article* gives support to a construction that would immunize state congressional apportionment laws which debase a citizen's right to vote from the power of courts to protect the constitutional rights of individuals from legislative destruction." *Id.* (emphasis added).

Wesberry thus disposes of Petitioners' argument (at 21) that allowing judicial review would "empty" the Elections Clause's "assignment of election-regulating authority to state legislatures." The Elections Clause provides the same authority to state legislatures that it provides to Congress. And if "nothing" in the allocation of lawmaking power to "Congress" suggests that its authority is unreviewable by federal courts, *Wesberry*, 376 U.S. at 6, then allocation of *the same authority* to state legislatures *in the same clause* cannot mean that the state legislature's enactments are unreviewable by state courts under state constitutions.

Petitioners ignore *Wesberry* entirely. They contend more generally (at 22-23) that the availability of federal judicial review of congressional enactments is irrelevant because it may be required by other parts of the Constitution, apart from the Elections Clause. But *Smiley* already held that the term "Legislature" in the Elections Clause allows States to impose the same types of checks that exist in the Federal Constitution: The idea "[t]hat the state Legislature might be subject to [a veto] limitation" is "necessarily implied" by the inclusion of "the veto power of the President, as provided in article I, § 7." 285 U.S. at 368-69. The Elections Clause, *Smiley* continued, does not "exclude * * * restrictions imposed by state Constitutions upon state Legislatures" that are "similar" to those in the Federal Constitution. *Id.* at 369.

3. The Court reaffirmed in *AIRC* that "[n]othing in [the Elections] Clause instructs, nor has this Court ever held, that a state legislature may prescribe regulations on the time, place, and manner of holding federal elections in defiance of provisions of the State's constitution." 576 U.S. at 817-18. The dissent agreed that when the legislature "prescribes election regulations, [it] may be required to do so within the ordinary lawmaking process" and "need not be exclusive in congressional districting." *Id.* at 841-42 (Roberts, C.J., dissenting); *see id.* (under this Court's precedents, States may "supplement the legislature's role in the legislative process"). The Court split only on the separate question whether a State could vest redistricting authority in an independent commission. Here, North Carolina has simply applied its "ordinary lawmaking process," which since 1787 has included compliance with the state constitution as construed by the state supreme court. *See Bayard*, 1 N.C. (Mart.) at 5.

Overruling *AIRC*—as Petitioners urge in a one-sentence footnote (at 40 n.9)—thus would not help Petitioners.

Petitioners cannot square *AIRC*'s majority or dissent with their theory that the Elections Clause authorizes state legislatures to defy state constitutions. And it is bizarre to claim, as Petitioners do (at 24), that States' "prescriptions for lawmaking" exclude state constitutions. The whole point of a constitution is to set prescriptions for lawmaking.

4. Most recently, in *Rucho*—a case about North Carolina's 2016 congressional plan—every Justice agreed that state courts could apply substantive provisions in state constitutions to congressional redistricting. *See* 139 S. Ct. at 2507 ("Provisions in * * * state constitutions can provide standards and guidance for state courts to apply" in partisan-gerrymandering challenges.); *id.* at 2524 (Kagan, J., dissenting). As an example of state courts' power, the Court cited a Florida state-court decision invalidating the state's legislatively enacted congressional plan under state constitutional constraints prohibiting partisan gerrymandering. *Id.* at 2507 (majority op.) (citing *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363 (Fla. 2015)). Indeed, this point was essential to the Court's holding and to its promise that "complaints about districting" would not "echo into a void." *Id.*

5. No precedent supports Petitioners' radical view that the Elections Clause nullifies state constitutions. *McPherson v. Blacker*, 146 U.S. 1 (1892), concerned the Presidential Electors Clause, not the Elections Clause, and did not involve a state constitutional challenge. This Court nowhere suggested that the Michigan Supreme Court acted improperly in considering state constitutional claims. Quite the opposite: This Court

"accepted" the state court's conclusions that the legislature's prescribed method for appointing electors *complied* with the state constitution. *Id.* at 23. Contrary to Petitioners' assertions (at 41), *McPherson*'s observation that legislative appointment authority "cannot be taken from them or modified," 146 U.S. at 35, did not implicate ordinary judicial review for compliance with a state constitution—which, again, *happened* without any apparent objection in *McPherson* itself. *See AIRC*, 576 U.S. at 840-41 (Roberts, C.J., dissenting) (describing pre-*AIRC* precedents including *McPherson* as establishing that a state constitution may "constrain[]" the legislature but not "depos[e] it entirely").

Petitioners rely heavily on *Bush v. Palm Beach County Canvassing Board*, 531 U.S. 70 (2000) (*Bush I*) (per curiam), and *Bush v. Gore*, 531 U.S. 98 (2000) (*Bush II*) (per curiam). But neither case suggested that the Presidential Electors Clause (let alone the Elections Clause) prohibits state courts from reviewing election-related statutes for compliance with state constitutions.

Bush I, far from "reaffirm[ing]" anything about the Electors Clause as Petitioners claim (at 41), "decline[d]" to decide any federal question at all. 531 U.S. at 78 (quotation marks omitted). Indeed, *Bush I* reaffirmed that "'[i]t is fundamental that state courts be left free and unfettered * * * in interpreting their state constitutions.'" *Id.* (quoting *Minnesota v. National Tea Co.*, 309 U.S. 551, 557 (1940)). *Bush I* then remanded to the state court to clarify, among other issues, the extent to which its statutory interpretation was motivated by state constitutional concerns. *Id.* Because the answer was not at all, no further analysis proved necessary. *See Palm Beach Cnty. Canvassing*

Bd. v. Harris, 772 So. 2d 1273, 1281 n.7, 1282-92 (Fla. 2000) (per curiam).

In *Bush II*, the Court decided nothing about the Electors Clause and instead rested its decision on the Equal Protection Clause. 531 U.S. at 103-11. Indeed, no Justice in *Bush II* suggested that state legislatures, even as to the Electors Clause, are unconstrained by state-court judicial review. And while Chief Justice Rehnquist pointed to prior cases in which this Court had reinterpreted state *statutes*, he cited no instance where this Court held that a state court misinterpreted its own *constitution*. *See id.* at 114 (Rehnquist, C.J., concurring) ("[T]he general coherence of the legislative scheme may not be altered by judicial interpretation so as to wholly change the statutorily provided apportionment of responsibility among these various bodies.").

In any event, the *Bush II* concurrence simply stands for the unremarkable proposition that state courts' authority to interpret state law is not *itself* unchecked by federal constitutional constraints. *See id.* at 113 ("A significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question."). The Court has applied that principle in a variety of situations, not limited to federal elections. *See id.* at 114 (Rehnquist, C.J., concurring) ("Though we generally defer to state courts on the interpretation of state law * * * there are of course areas in which the Constitution requires this Court to undertake an independent, if still deferential, analysis of state law."). Chief Justice Rehnquist cited, for instance, *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 456-57 (1958), where this Court exercised jurisdiction to review an Alabama Supreme Court holding that was irreconcilable with prior Alabama

precedent. He also cited *Bouie v. City of Columbia*, 378 U.S. 347, 361-62 (1964), where this Court "concluded that the South Carolina Supreme Court's interpretation of a state penal statute had impermissibly broadened the scope of that statute beyond what a fair reading provided, in violation of due process." *Bush II*, 531 U.S. at 115 (Rehnquist, C.J., concurring); *see id.* at 115 n.1 (identifying cases involving property law and federal treaty guarantees).

Rejecting Petitioners' Elections Clause theory thus does not require this Court to accept that a state court's authority is unlimited. Federalism requires this Court to accord great deference to state-court decisions interpreting state law. *See id.* at 114 (Rehnquist, C.J., concurring). And that rule is at its apex when state courts interpret state constitutions. *See id.*; *see also Bush I*, 531 U.S. at 78. This Court, however, always has jurisdiction to intervene in rare cases where state courts act lawlessly to obstruct federal rights. Chief Justice Rehnquist stated that this Court may reject a state court's interpretation of state law that is so grievously wrong as to "significantly depart[]" from the well-established meaning of state law and thus render it "absurd," "inconceivable," and beyond what any "reasonable person" could conclude. *Bush II*, 531 U.S. at 119 & n.4; *see also* Br. of Amicus Curiae Conference of Chief Justices at 19 (federal courts may intrude only where "there exists no plausibly defensible basis for the [state] court's determination and the decision infringes a clear federal interest"). But Petitioners have not even tried to satisfy that stringent standard. Nor could they, as the North Carolina Supreme Court's carefully reasoned, historically grounded interpretation of its constitution does not remotely warrant federal intervention under the

"deferential" standard Chief Justice Rehnquist employed. *Infra* Part III.

Hence, none of Petitioners' cases—*McPherson*, *Bush I*, and *Bush II*—held that a state legislature was free to violate its state constitution when regulating federal elections. Instead, every time this Court has addressed state constitutional restraints on state legislatures' regulation of congressional elections—in *Smiley*, *Koenig*, *Carroll*, *Hildebrant*, and *AIRC*—it has upheld the state constitutional restriction. To reverse course now would require overruling multiple foundational precedents spanning over a century, all in service of a constitutional theory that has never been the law of our land. This Court should reject Petitioners' invitation to upend that settled law.[18]

E. Petitioners' Remaining Arguments Are Meritless.

1. Petitioners all but concede that their principal argument is indefensible—by abandoning it midway

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[18] Petitioners string-cite (at 42-43) state-court decisions that long postdate the founding. But some of these cases did not even involve the Elections Clause. *See State ex rel. Beeson v. Marsh*, 34 N.W.2d 279 (Neb. 1948); *Parsons v. Ryan*, 60 P.2d 910 (Kan. 1936). Others were long ago called into doubt. *See In re Plurality Elections*, 8 A. 881 (R.I. 1887) (called into doubt by *In re Opinion to the Governor*, 103 A. 513, 516 (R.I. 1918)); *In re Opinions of Justices*, 45 N.H. 595 (1864) (called into doubt by *In re Opinion of the Justices*, 113 A. 293, 298-99 (N.H. 1921)). And Petitioners ignore the state-court decisions that invalidated state laws regulating congressional elections as inconsistent with the state constitution. *See, e.g.*, *People ex rel. Twitchell v. Blodgett*, 13 Mich. 127 (1865) (invalidating state legislation allowing soldiers to cast out-of-state votes as inconsistent with state constitution's in-person voting requirements); *State ex rel. Schrader v. Polley*, 127 N.W. 848, 851 (S.D. 1910) (rejecting state law establishing congressional districts contrary to state constitutional requirement).

through their brief. Petitioners concede (at 24) that "each State's constitution may properly govern" "procedural questions," but insist "substantive" questions are off limits. Alternatively, Petitioners suggest (at 46) that the Elections Clause permits judicial enforcement of "specific and judicially manageable standards, such as contiguousness and compactness requirements," but not "open-ended guarantee[s]" like those "of 'free' or 'fair' elections." These made-up distinctions find no footing in constitutional text, precedent, or principle.

First, Petitioners' distinction between procedure and substance is wholly atextual. If the Elections Clause permits state courts to enforce procedural limitations (as Petitioners concede), there is no textual basis to distinguish the substantive limits that Petitioners insist are unenforceable. Petitioners' concession that state courts may enforce limitations such as a governor's veto refutes their assertion (at 1) that the "text of the Constitution directly answers the question presented in this case" in their favor.

Precedent also forecloses Petitioners' invented distinction between procedure and substance. The reason *Smiley* upheld state constitutional restraints on legislation is not because these restraints were procedural. It is because the Elections Clause does not grant state legislatures "power to enact laws in any manner other than that in which the Constitution of the state has provided that laws shall be enacted." *Smiley*, 285 U.S. at 367-68. Thus, in *Koenig*, which Petitioners do not cite, this Court affirmed a state-court decision invalidating a legislatively enacted congressional plan because it violated "the requirements

of the Constitution of the state in relation to the enactment of laws." 285 U.S. at 379. And in *Growe v. Emison*, 507 U.S. 25 (1993), after a state court declared that State's congressional plan violated malapportionment provisions in the state constitution, this Court held that federal courts were required to "defer" to the state court's remedial determinations. *Id.* at 29, 33-34. Writing for a unanimous Court, Justice Scalia explained that the state court's "issuance of its plan (conditioned on the legislature's failure to enact a constitutionally acceptable plan in January), far from being a federally enjoinable 'interference,' was precisely the sort of state judicial supervision of redistricting we have encouraged." *Id.* at 34.

Rucho likewise approved of state constitutional provisions that "outright prohibited partisan favoritism in redistricting"—provisions that are undeniably substantive. 139 S. Ct. at 2507-08. Petitioners' argument cannot be squared with these precedents.

Petitioners' distinction between procedure and substance is also incoherent. Petitioners argue that a gubernatorial veto is "procedural." But governors often veto legislation on the ground that it violates *substantive* state constitutional restrictions. As early as 1792, New York legislation regulating congressional elections was vetoed as "repugnant to the Constitution." ALFRED B. STREET, THE COUNCIL OF REVISION OF THE STATE OF NEW YORK 300 (1859). In *Smiley*, Minnesota's Governor vetoed the legislature's congressional plan on *substantive* grounds—concluding that the districts were malapportioned. Transcript of Record at 6-7, *Smiley*, 285 U.S. 355 (No. 617). Petitioners never explain how the Elections Clause could permit state

governors to proscribe legislation on substantive constitutional grounds but prohibit state courts from doing the same thing.

Petitioners' contention (at 24) that the independent redistricting commission in *AIRC* imposed only "procedural" constraints is even farther afield. Not only was the commission tasked with the substantive responsibility of crafting a congressional plan in the first instance, but the constitutional provisions creating that commission imposed substantive constraints on congressional districting as well. *See, e.g.*, ARIZ. CONST. art. IV, pt. 2, § 1(14)(E) (requiring commission to begin "the mapping process" with equipopulous districts arranged in a "grid-like pattern across the state," and then make changes "as necessary" to accommodate specified "goals"); *id.* § 1(14)(F) (favoring "competitive districts").

Second, Petitioners fare no better with their argument (at 46) that "specific" state constitutional provisions are enforceable but "open-ended" provisions are not. No text in the Constitution, and certainly not in the Elections Clause, classifies state constitutional provisions based on clarity or specificity. Nor does the permissibility of judicial review turn on whether constitutional provisions are specific or general.

The Federal Constitution, like many state constitutions, marks "only its great outlines." *McCulloch*, 17 U.S. (4 Wheat.) at 407. This Court for centuries has reviewed legislation under provisions Petitioners would contend are open-ended, including the Due Process Clause, the Equal Protection Clause, and the First Amendment. Just as this Court engages in a permissible judicial function when it enforces these broad guarantees, *see, e.g., Buckley v. Am. Const. L.*

Found., Inc., 525 U.S. 182 (1999) (invalidating state election regulation under the First Amendment); *Bush II*, 531 U.S. at 98 (invalidating state election regulation under the Equal Protection Clause), state courts similarly engage in a permissible judicial function when they enforce comparable state-law guarantees. *See, e.g.*, *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1908-09 (2021) (Alito, J., concurring in the judgment) (collecting cases where state courts have required exemptions to generally applicable restrictions on religious practice under state free-exercise protections).

Petitioners' double standard would contravene the most basic principles of federalism and invite unprecedented intrusions by federal courts into the structure of state government. The meaning and enforceability of state constitutional provisions is a matter of state law, to be determined by state courts. *See Nat'l Tea Co.*, 309 U.S. at 557. But Petitioners would install federal courts as overseers, second-guessing state courts' interpretations of their own state constitutions. And Petitioners would empower these federal overseers to discard state constitutional provisions that they view as insufficiently detailed—measured against a standard that neither Petitioners nor any court has ever articulated.

Petitioners' invocation of *Rucho* (at 46, 49) does not help them. *Rucho* applied the *federal* "political question" doctrine to decide whether "Article III of the Constitution" permits suits to enforce federal constitutional guarantees against excessive political gerrymandering in "federal courts." 139 S. Ct. at 2493-94. Of course, "the constraints of Article III do not apply to state courts." *ASARCO Inc. v. Kadish*, 490 U.S.

605, 617 (1989); *see also id.* (emphasizing that "state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law"). And far from suggesting that the Elections Clause restricts state-court judicial review, *Rucho* endorsed the proposition that "state statutes and state constitutions can provide standards and guidance for state courts to apply" to constrain partisan gerrymandering of congressional districts. 139 S. Ct. at 2507-08. If anything would violate Article III, it is Petitioners' proposal to require federal courts to evaluate every state constitutional provision governing congressional elections and decide whether it is "specific" or "open-ended." Petitioners do not attempt to set forth judicially discernable and manageable standards to guide that unprecedented endeavor.

2. Even as Petitioners insist that state legislatures' regulation of congressional elections is immune from state constitutional constraints, they concede that the same regulation is subject to *federal* constitutional constraints. Petitioners defend their theory (at 22) on the ground that regulating congressional elections is "a *federal* function governed and limited by the *federal* Constitution" and that supposedly "*only the federal constitution* can limit the federal function of regulating federal elections."

This argument is pure *non sequitur*. The question is not whether the Federal Constitution *could* free state legislatures from state-court judicial review, but whether it *did*—a question the "federal function" label does not answer but that constitutional text, structure, history, and precedent do. And all those sources

speak with one voice in reaffirming that state legislatures carry out their function under the Elections Clause via an "exercise of the law-making power" of the State, *Smiley*, 285 U.S. at 372-73, and therefore remain subject to the constraints that state constitutions impose on that power. *Supra* Part I.A-D. Indeed, even Petitioners agree (at 25) that a state legislature is a "lawmaking institution that is a creature of state law."

In fact, this Court has already considered and rejected Petitioners' argument that regulating elections is a federal function subject only to federal constraints. In *Smiley*, the Minnesota Supreme Court had adopted Petitioners' theory almost verbatim, maintaining that the Minnesota legislature "in districting the state" is not acting "as a lawmaking body" under state law, "but is acting as representative of the people of the state under the power granted by" the Elections Clause. 285 U.S. at 364. Unanimously reversing the state court's judgment, this Court held that the term "Legislature" refers to the process "of making laws for the state" and "that the exercise of the authority *must be in accordance with the method which the state has prescribed for legislative enactments*." *Id.* at 367-68 (emphasis added).

Petitioners assert (at 18) that their position is supported by the Framers' decision to allow Congress to override state laws regulating the times, places, and manner of congressional elections. But the opposite is true. The Elections Clause authorizes federal involvement in what might otherwise be deemed a purely state prerogative. That grant of federal authority does not imply that the Framers authorized state legislatures to transgress their own state constitutions.

If anything, the Framers' decision to impose this "check against any potential abuse" by state legislatures undermines Petitioners' claim (at 18) that the Framers intended to nullify the checks that state constitutions already provided. *Supra* p. 30.

Equally wrong is Petitioners' suggestion (at 24) that rejecting their position would yield an incongruous result. It "would mean," Petitioners observe, "that after a state court struck down a state legislature's election regulations on state constitutional law grounds, Congress could enact *the exact same law* and apply it to the State." That result is entirely unremarkable. As in any area of concurrent state and federal authority, the Supremacy Clause means that Congress may require compliance with laws that a State could not enact under its own constitution.

Indeed, Petitioners' theory turns principles of federalism upside down. Petitioners concede (at 48) that state courts "are open to hear *federal* constitutional challenges" to state election laws. Petitioners cite no precedent for an arrangement requiring state courts to hear challenges to state legislation under federal law but prohibiting them from doing the same under the State's own law. *Cf. Printz v. United States*, 521 U.S. 898, 907 (1997). It is entirely implausible to ascribe to the Framers a system so at odds with basic federalism principles.

II. EVEN UNDER PETITIONERS' THEORY, BOTH STATE AND FEDERAL LAW INDEPENDENTLY AUTHORIZE THE DECISIONS BELOW.

Statutes enacted by the North Carolina legislature and by Congress foreclose any conceivable contention that the North Carolina courts violated the Elections

Clause. Thus, even under Petitioners' novel Elections Clause theory, Petitioners still cannot prevail.

A. The North Carolina Legislature Specifically Authorized Judicial Review Of Congressional Redistricting Plans.

1. Petitioners' claims fail because the North Carolina legislature specifically and expressly authorized its state courts to conduct judicial review of congressional districting maps. Even if the Elections Clause disabled state constitutions from applying of their own force, *but see* Part I, nothing in the Elections Clause prevents the North Carolina legislature from exercising its authority over congressional elections by authorizing judicial review.

The Elections Clause provides that state legislatures may "prescribe" rules for congressional elections. And to "prescribe" means "to order" or "direct." 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1755); *see* N. BAILEY, AN UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY (20th ed. 1763) ("prescribe" means "to order or appoint"). Just as Congress may "prescribe" regulations by authorizing other entities to act,[19] state legislatures may "prescribe[]" regulations permitting courts to exercise their centuries-old power of reviewing statutes for constitutional compliance and remedying noncompliance.

Authorizing state courts to exercise judicial review in particular ways does not delegate "legislative

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[19] *Compare, e.g.*, U.S. CONST. art. I, § 8, cl. 16 (authorizing Congress to "prescribe[]" "the discipline" governing state militias), *with, e.g.*, 32 U.S.C. § 110 (exercising that authority by conferring authority on the President); *see also* 10 U.S.C. § 10202.

power," as Petitioners claim (at 45-47). It simply directs those courts to do what they have long done. Indeed, this Court since the founding has recognized that Congress has authority to "invest[]" the "judicial department * * * with jurisdiction" over "certain specified cases." *Wayman*, 23 U.S. (10 Wheat.) at 22. Congress has continued to exercise that authority ever since, including authorizing review of laws and regulations for constitutionality. *E.g.*, 5 U.S.C. §§ 702, 706.

Nothing in the Elections Clause forbids state legislatures from likewise authorizing other state organs to act. Scholars have documented how legislatures since the founding broadly authorized executive officials "to determine the times, places, and manner of [federal] elections." Mark S. Krass, *Debunking the Nondelegation Doctrine for State Regulation of Federal Elections*, 108 VA. L. REV. 1091, 1139 (2022). Non-legislative officials set poll opening and closing times, decided to adjourn elections to alternative days, and determined polling places. *Id.* at 1118-27.

Zero evidence suggests the Framers understood the Elections Clause to preclude state legislatures from likewise authorizing state courts to exercise their quintessentially judicial function.

2. In North Carolina, the legislature exercised its Elections Clause authority by permitting North Carolina's courts to conduct judicial review under the state constitution.

First, the legislature provided that "action[s] challenging the validity of any act * * * that apportions or redistricts * * * *congressional districts* shall be filed in" a particular court—and unambiguously directed that the action "*shall be heard and determined* by a

three-judge panel" of that court. N.C. Gen. Stat. § 1-267.1(a) (emphases added).

Next, the legislature required the court to "find with specificity all facts supporting [a] declaration" of unconstitutionality, and to "state separately and with specificity the court's conclusions of law"—and endorsed "judgment[s] declaring *unconstitutional* * * * any act" that "apportions or redistricts * * * *congressional districts*." *Id.* § 120-2.3 (emphases added).

Then, the legislature authorized a remedial process that limited, but affirmed, courts' power to redress constitutional violations. Courts must "first give[] the [legislature] a period of time to remedy any defects identified by the court." *Id.* § 120-2.4(a). But if the legislature "does not act to remedy any identified defects" within that period, courts "may impose an interim districting plan." *Id.* § 120-2.4(a1). This plan may govern "in the next general election only" and "may differ from" the legislature's plan "only to the extent necessary to remedy any defects identified by the court." *Id.*

Finally, the legislature barred the Board of Elections from using "any plan apportioning or redistricting * * * *congressional districts* other than *a plan imposed by a court under this section* or a plan enacted by the General Assembly." *Id.* § 120-2.4(b) (emphases added).

The legislature thus endorsed the review that the state courts undertook here. The legislature enacted these provisions in 2003, in the wake of state constitutional challenges to districting plans. *See supra* p. 5. And the legislature amended, but did not repeal, these provisions in 2018—during the pendency of a lawsuit challenging districting plans as partisan gerrymanders violating the state constitution. N.C. Sess.

Laws 2018-146, § 4.7; *see Lewis*, 2019 WL 4569584, at *1 (three-judge court). Rather than attempting to prevent judicial review, the legislature enacted statutes that expressly and specifically authorize state courts to *review* and *remedy* unconstitutional congressional districting plans. Indeed, when the legislature enacted its proposed remedial plan on February 17, 2022, it provided that the plan would be "effective *contingent upon its approval or adoption by the Wake County Superior Court*." N.C. Sess. Laws 2022-3, § 2 (emphasis added).

3. Petitioners do not dispute (at 44-45) that legislatures may generally exercise their power by authorizing other state organs to act. And Petitioners' attempts to distinguish North Carolina's authorizations fail.

First, Petitioners deny (at 48) that the legislature authorized state courts to adjudicate and remedy "state constitutional" challenges to congressional redistricting plans. They say (at 47-48) these state statutes "are best read as merely laying out the procedures" and venue for "a *federal* constitutional challenge" "authorized by other * * * provisions of law."

This argument mocks the statutory text. The relevant provisions expressly apply to *all* actions seeking to "declar[e] unconstitutional" congressional districting plans. N.C. Gen. Stat. § 120-2.3. "General terms are to be given their general meaning" and "are not to be arbitrarily limited." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 101 (2012). And the text expressly directs that such actions "shall be heard and determined" by state courts. N.C. Gen. Stat. § 1-267.1(a). That mandatory "shall" creates "an obligation," "im-

pervious to judicial discretion," and requires the designated court to hear and decide both federal- and state-law challenges. *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998).

North Carolina's Supreme Court, moreover, has rejected Petitioners' reading. In considering a *state* separation-of-powers challenge, the court explained that "[i]n passing these statutes, the General Assembly has * * * set out a workable framework for judicial review." *Stephenson III*, 358 N.C. at 230. The North Carolina Supreme Court then applied this framework to a *state* (not federal) constitutional challenge. *Id.*; *see Pender County*, 649 S.E.2d at 376. And ever since, North Carolina's courts—including the North Carolina Supreme Court in this very case—have applied this framework to all districting claims, including state constitutional challenges to congressional maps. *E.g.*, *Lewis*, 2019 WL 4569584 (three-judge court); *Harper*, 2019 N.C. Super. LEXIS 122 (three-judge court).[20]

Second, Petitioners mischaracterize what North Carolina's legislature did. They say (at 45) the legislature "delegated" "quintessentially legislative power" and that legislatures may not "delegate [such] power *to courts*, as opposed to executive officials." But again, the power to review laws for constitutionality is quintessentially *judicial,* and has been since the founding. *Supra* pp. 22-25. Likewise, remedying constitutional

[20] Given the express terms of these statutes, Petitioners' demand (at 47) for "clear language" is easily met. Nor does *West Virginia v. EPA*, 142 S. Ct. 2587 (2022)—which Petitioners cite (at 47)—support the rule of construction they urge. These statutes do not effect a "momentous" or unusual "delegation." *Id.* They authorize state courts to do what they have long done.

violations is a core judicial function. Indeed, as Justice Scalia wrote for a unanimous Court in *Growe*, the "power of the judiciary of a State to * * * formulate a valid redistricting plan has not only been recognized * * * but appropriate action by the States in such cases has been specifically encouraged" by this Court. 507 U.S. at 33 (quoting *Scott v. Germano*, 381 U.S. 407, 409 (1965) (per curiam)).

That same point defeats Petitioners' argument (at 46) that authorizing judicial review "exceeds the limits of permissible delegation." Petitioners cannot mean that this authorization violates the state separation of powers. The whole point of Petitioners' Elections Clause theory is that state constitutional limits do not bind state legislatures. Petitioners, moreover, identify no state constitutional rule that the legislature could have violated—and the decisions below authoritatively rejected Petitioners' state separation-of-powers arguments. Pet. App. 63a-121a, 227a-228a.

Nor do Petitioners have any colorable federal nondelegation argument. To begin, federal nondelegation principles protect the federal separation of powers. But the "separation of powers embodied in the United States Constitution is not mandatory in state governments." *Sweezy v. State of New Hampshire ex rel. Wyman*, 354 U.S. 234, 255 (1957). And even if the Elections Clause imposed on States the nondelegation limits applicable to Congress (a proposition that is essential to Petitioners' argument but that they nowhere defend), those principles get Petitioners nowhere: Federal nondelegation principles are no barrier to legislatures authorizing judicial review. *Wayman*, 23 U.S. (10 Wheat.) at 22. Such authorizations do not delegate legislative authority but merely empower courts to exercise judicial authority.

That conclusion accords with the rule that federal nondelegation constraints are even "less stringent" when the entity exercising "authority itself possesses independent authority over the subject matter." *United States v. Mazurie*, 419 U.S. 544, 556-57 (1975) (citing *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319-22 (1936)). Thus, Congress "may delegate to the Judicial Branch" even "nonadjudicatory functions * * * that are appropriate to the central mission of the Judiciary." *Mistretta v. United States*, 488 U.S. 361, 388 (1989). Even Justices who have urged more stringent nondelegation limits agree that "when a congressional statute confers wide discretion to the executive, no separation-of-powers problem may arise if 'the discretion is to be exercised over matters already within the scope of executive power.'" *Gundy v. United States*, 139 S. Ct. 2116, 2137 (2019) (Gorsuch, J., dissenting) (citation omitted). So, too, when state legislatures authorize state courts to exercise judicial review.

4. Petitioners' Elections Clause claims also fail because the legislature "prescribe[d]" the substantive standards the courts below applied—by approving the relevant state constitutional provisions. Unlike many constitutions that were created by independent conventions, the North Carolina Constitution was enacted by the legislature itself, before being submitted to voters for approval. 1969 N.C. Sess. Laws 1461, 1461-62. That constitution contained all the provisions the courts below applied, including the Free Elections Clause (which that constitution strengthened, Pet. App. 95a) and the Equal Protection Clause (which that constitution added for the first time, Pet. App. 97a-98a). It also vested jurisdiction in North Carolina's courts, N.C. CONST. art. IV, and provided that any law held "in conflict with this Constitution

shall [not] continue in force," *id.* art. XIV, § 4. A state constitution like North Carolina's drafted by the State's legislature "reflects both the considered judgment of the state legislature that proposed it and that of the citizens" who approved it. *Gregory*, 501 U.S. at 471.

Petitioners have no adequate answer. They say (at 48) that the legislature's 1969 enactment is irrelevant because the constitution "was not effective until it was ratified by voters." *Hildebrant*, however, establishes that this is a distinction without a difference. There, too, the legislature enacted regulations governing federal elections that were not effective unless "the people" "approve[d]" them by referendum. 241 U.S. at 566. If "allowing a State to supplement the legislature's role" in this manner did not offend the Elections Clause in *Hildebrant*, *see AIRC*, 576 U.S. at 841 (Roberts, C.J., dissenting) (emphasis omitted), the same mechanism cannot do so here.

B. Congress Has Mandated That Congressional Redistricting Plans Abide By State Law.

Even if the first part of the Elections Clause permitted state legislatures to ignore state constitutions in redistricting, Congress has exercised its power under the second part of the Clause to require that state legislatures *comply* with state constitutions in redistricting. And when state legislatures fail to do so, Congress has authorized state courts to adopt remedial congressional plans. This is an independent reason to affirm.

First, under 2 U.S.C. § 2a(c), States must be "redistricted in the manner provided by the law thereof." As Justice Scalia explained for the plurality in *Branch*,

this phrase encompasses a State's "substantive 'policies and preferences' for redistricting, as expressed in a State's statutes, constitution, proposed reapportionment plans, or a State's 'traditional districting principles.'" 538 U.S. at 277-78 (citations omitted). In § 2a(c), Congress thus exercised its Elections Clause authority to reaffirm that state legislatures must comply with their state constitutions. *See Hildebrant*, 241 U.S. at 568-69 (holding that 2 U.S.C. § 2a's predecessor statute validly required state constitutional requirements to be treated as "part of the legislative power" under the Elections Clause). In fact, Congress amended § 2a(c) to replace a reference to the state "legislature" with a reference to "the manner provided by [state] law"—confirming that a State could redistrict in any way provided for by its constitution. *AIRC*, 576 U.S. at 809-11.

Second, Congress has authorized state courts to establish remedial congressional districting plans (though Petitioners have forfeited any Elections Clause challenge to the remedial proceedings here, *infra* pp. 69-70). Under 2 U.S.C. § 2c, courts may "remedy[] a failure" by the state legislature "to redistrict constitutionally," and the statute "embraces action by state and federal courts." *Branch*, 538 U.S. at 270, 272 (majority op.). Section 2a(c) similarly recognizes state courts' power to adopt congressional plans: Its default procedures apply "[u]ntil a State is redistricted in the manner provided by [state] law"—which includes redistricting by a "court, state or federal, * * * pursuant to § 2c." *Id.* at 274 (plurality op.) (quotation marks omitted); *see AIRC*, 576 U.S. at 812.

III. THE DECISION BELOW DOES NOT WARRANT FEDERAL INTERVENTION.

Petitioners repeatedly suggest that this Court should intervene because they believe the North Carolina Supreme Court got North Carolina law wrong (*e.g.*, Pet'rs' Br. 6, 25, 46, 48). But state-court interpretations of state law are generally "considered as final by this court." *Green v. Neal's Lessee*, 31 U.S. (6 Pet.) 291, 298 (1832). And this case provides no cause to depart from that bedrock principle: The North Carolina Supreme Court acted pursuant to specific statutory authorization, *supra* Part II, and engaged in principled judicial review to reach the very result *Rucho* endorsed. Particularly given the deference owed to a state supreme court's interpretation of its own constitution, *see supra* p. 49, the decisions below do not represent the sort of lawlessness that could justify federal-court intervention.

1. The North Carolina Supreme Court did what state courts interpreting state constitutions routinely do: It assessed the constitutionality of the legislature's congressional map pursuant to long-settled state rules of interpretation—evaluating text, structure, history, purpose, and precedent.

The court first analyzed the North Carolina Constitution's Free Elections Clause, which states that "[a]ll elections shall be free." Pet. App. 91a. The court emphasized that this provision "has no analogue in the federal Constitution" and instead traces its origins to the English Bill of Rights of 1689, which "was adopted in response to the king's efforts to manipulate parliamentary elections by diluting the vote in different areas to attain 'electoral advantage.'" Pet. App. 91a-92a. After examining this history alongside text, structure,

and purpose, the court concluded that the Free Elections Clause "reflects the principle of the Glorious Revolution that those in power shall not attain 'electoral advantage' through the dilution of votes and that representative bodies—in England, parliament; here, the legislature—must be 'free and lawful.'" Pet. App. 93a.

The North Carolina Supreme Court also analyzed the state Equal Protection Clause, which the legislature enacted in 1969—a time when courts were grappling with concerns about partisan gerrymandering. *See, e.g.*, *Kirkpatrick v. Preisler*, 394 U.S. 526, 538 (1969) (Fortas, J., concurring); *Burns v. Richardson*, 384 U.S. 73, 88-89 & n.14 (1966); *Sincock v. Gately*, 262 F. Supp. 739, 800-21, 828-33 (D. Del. 1967) (three-judge court). The North Carolina Supreme Court explained that this clause has long been understood to sweep more broadly than the federal Equal Protection Clause and to guarantee "substantially equal voting power and substantially equal legislative representation." Pet. App. 124a (quotation marks omitted); *see* Pet. App. 98a-102a, 104a-105a. And the court found that this guarantee renders unlawful districting plans that are designed to make "it harder for one group of voters to elect a governing majority than another group of voters of equal size." Pet. App. 102a. Throughout, the court adhered to its longstanding canon of granting the North Carolina Constitution "a liberal interpretation in favor of its citizens with respect to those provisions which were designed to safeguard the liberty and security of the citizens." Pet. App. 90a (quotation marks omitted); *see also* Pet. App. 104a-106a (finding violations of North Carolina's Free Speech and Free Assembly Clauses based on North

Carolina Declaration of Rights provisions dating back to 1776).

In reaching these conclusions, the North Carolina Supreme Court acted well within its judicial role under North Carolina's constitution and state statutes. And that remains true whether or not this Court would interpret the Federal Constitution (or the North Carolina Constitution) the same way. After all, state courts—not this Court—are the proper arbiters of state law. *See Calder v. Bull*, 3 U.S. (3 Dall.) 386, 392-93 (1798) (opinion of Chase, J.); *accord Green*, 31 U.S. (6 Pet.) at 298. As Judge Sutton has emphasized, it "makes no sense" for state and federal courts to provide identical interpretations where the state court's traditional "method of interpretation" differs from federal courts' method. Jeffrey S. Sutton, *51 Imperfect Solutions: State and Federal Judges Consider the Role of State Constitutions in Rights Innovation,* 103 JUDICATURE 33, 45 (2019). That principle applies with double force where, as here, state courts interpret provisions with *no* federal counterpart.

2. Petitioners suggest (at 49) that the North Carolina courts "compounded" their error at the remedial phase. But the remedial proceedings are not properly before this Court. Even if they were, those proceedings also reflect principled judicial review.

First, Petitioners' remedial-phase claims are outside this Court's jurisdiction, which is limited to "[f]inal judgments or decrees rendered by the highest court of a State." 28 U.S.C. § 1257(a). Only the trial court has reached a final judgment on Petitioners' remedial-phase claims. Petitioners' remedial appeal remains

pending in the state supreme court—where Petitioners have abandoned any Elections Clause argument. *Supra* p. 13. This Court may not review decisions of state trial courts, nor federal issues abandoned in state court. *See, e.g.*, *Illinois v. Gates*, 462 U.S. 213, 221 (1983).[21]

This Court likewise has no jurisdiction over the North Carolina Supreme Court's interlocutory decision declining to stay the trial court's remedial order. That decision at one time may have had finality because it "finally determined" the map for the 2022 election. *Nat'l Socialist Party of Am. v. Village of Skokie*, 432 U.S. 43, 44 (1977). But any dispute over that decision is now moot. The stay-stage decision will not decide what map will govern elections after 2022; the pending state-court appeal will address that question. And due to Petitioners' litigation choice to abandon their Elections Clause argument in that appeal, the state court will do so entirely on state-law grounds. *Cf. Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 480 (1975); *Yeshiva Univ. v. Yu Pride All.*, No. 22A184, 2022 WL 4232541, at *1 (U.S. Sept. 14, 2022).[22]

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[21] Even in the trial court, Petitioners never raised their current argument: They told the trial court that adopting one of *Respondents*' proposed remedial plans would violate the Elections Clause. Pet. App. 329a. Petitioners never argued that it would violate the Elections Clause for the court to modify Petitioners' *own* remedial plan.

[22] Respondents argued at the certiorari stage that this Court lacks jurisdiction entirely. *See* Common Cause Opp. 33; Harper Opp. 11-15; NCLCV Opp. 17-20. The jurisdictional defect discussed above arose *after* this Court granted review.

Second, the remedial orders in any event comported with the North Carolina courts' judicial role under North Carolina law. The North Carolina Supreme Court applied North Carolina General Statute § 120-2.4(a) and directed the state legislature to submit to the trial court "new congressional and state legislative districting plans that satisfy all provisions of the North Carolina Constitution." Pet. App. 232a. That decision fully complied with the procedures the *legislature itself prescribed* and did not exclude the legislature from redistricting. *Id.*

In response, Petitioners submitted their proposed remedial plans to the trial court, which reviewed the plans under the guideposts established by the North Carolina Supreme Court. Pet. App. 290a-291a. The trial court concluded that Petitioners' proposed congressional map, unlike their proposed legislative maps, was unconstitutional. Pet. App. 291a-292a. In accordance with North Carolina General Statute § 120-2.4(a1), the court then "modif[ied]" Petitioners' proposed map "to bring it into compliance" with the state constitution. *Id.*

The trial court thus adhered to the statutory framework enacted by the North Carolina legislature, and its decision was well within its judicial authority. *See Growe*, 507 U.S. at 34. Indeed, in accordance with state law, the state court provided that the modified map would apply for only one election cycle and that the legislature would enact a new congressional map for elections in 2024 and beyond—further demonstrating the court's modest, deferential approach.

3. This case does not remotely warrant federal-court intervention. Petitioners cannot credibly contend that

the North Carolina courts' decisions "significantly depart[ed]" from prior state-court precedent in a way that rendered those decisions "absurd," "inconceivable," or beyond what any "reasonable person" would do. *Bush II*, 531 U.S. at 119 & n.4 (Rehnquist, C.J., concurring). Indeed, although state courts, like federal courts, are free to break from past constitutional interpretations in appropriate circumstances, the decision here followed from past precedent. A century and a half ago, the North Carolina Supreme Court invalidated a districting plan, declaring it "too plain for argument" that the denial of the right to participate equally in the political process "is a plain violation of fundamental principles." *People ex rel. Van Bokkelen v. Canaday*, 73 N.C. 198, 223 (1875). Two decades ago, the court held that North Carolina's Equal Protection Clause mandates that redistricting plans afford "substantially equal voting power and substantially equal legislative representation" to all voters. *Stephenson I*, 355 N.C. at 382. And in 2019, two years before this litigation even commenced, a North Carolina three-judge trial court unanimously held that the state constitution's Free Elections, Equal Protection, Free Speech, and Free Assembly Clauses prohibit extreme partisan gerrymandering. *Harper*, 2019 N.C. Super. LEXIS 122. Far from abandoning prior state-court precedent, the North Carolina Supreme Court's decision faithfully followed it.

Nor is interpreting the relevant provisions of the state constitution to restrict partisan gerrymandering "absurd," "inconceivable," or beyond what any "reasonable person" would do. *Bush II*, 531 U.S. at 119 & n.4 (Rehnquist, C.J., concurring). Indeed, all nine Justices of this Court agreed in *Rucho* that extreme

partisan gerrymandering "is 'incompatible with democratic principles,'" 139 S. Ct. at 2506 (citation omitted); *id.* at 2512 (Kagan, J., dissenting), and four Justices would have held that it violates the Federal Constitution, *see id.* at 2509-25 (Kagan, J., dissenting). Likewise, all nine Justices in *Vieth v. Jubelirer*, 541 U.S. 267 (2004), agreed with Justice Scalia's conclusion that "an *excessive* injection of politics [in districting] is *un*lawful." *Id.* at 293 (plurality op.); *id.* at 316 (opinion of Kennedy, J.); *see id.* at 362 (Breyer, J., dissenting). The North Carolina Supreme Court simply applied longstanding principles of state constitutional interpretation, consistent with an explicit grant of authority from the state legislature, to reach the very conclusion *Rucho* presaged.

IV. PETITIONERS' THEORY WOULD UPEND ELECTION ADMINISTRATION NATIONWIDE AND EMBROIL FEDERAL COURTS IN STATE-LAW DISPUTES.

For all the reasons given above, rejecting Petitioners' arguments will leave the law where it has been for centuries. By contrast, adopting any of Petitioners' arguments—broad or narrow—would wreak havoc on election administration nationwide, and embroil federal courts in endless state-law disputes.

Petitioners' broadest theory (at 11)—that state constitutions can impose *no* limits on state legislatures' regulation of congressional elections—threatens at least five untenable consequences.

First, this theory will nullify, as to federal elections, numerous state constitutional provisions. State constitutions have long regulated "[c]ore aspects of the electoral process" for federal elections. *AIRC*, 576 U.S. at 823. Michigan's constitution, for example,

guarantees voters the right "to a 'straight party' vote option on partisan general election ballots," and the right "to vote an absent voter ballot without giving a reason." MICH. CONST. art. II, § 4. Other state constitutions regulate secret ballot guarantees and candidate access to the ballot,[23] and "[n]early all state constitutions" regulate congressional elections.[24] Many of these constitutions were adopted without the legislature's involvement. And under Petitioners' theory, none can apply to congressional elections.

Second, nullifying all these provisions for *only* federal elections will upend election administration. Virtually all States have integrated election systems for state *and* federal offices, so the same rules govern both.[25] *Cf.* U.S. CONST. art. I, § 2, cl. 1 (persons eligible to vote in state house elections are eligible to vote for congressional Representatives). Thus, for example, when a voter arrives at the polls, a single rule guides the election workers confirming the voter's identity.[26] By harmonizing the rules, this approach ensures that administrators can *actually administer* elections and that voters can *understand* the rules. As

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[23] *E.g.*, MT. CONST. art. IV, § 1; ARIZ. CONST. art. VII, § 14; *accord AIRC*, 576 U.S. at 823.

[24] Nathaniel Persily et al., *When Is a Legislature Not a Legislature? When Voters Regulate Elections by Initiative,* 77 OHIO ST. L.J. 689, 720 (2016).

[25] *See AIRC*, 576 U.S. at 819 (noting "convenience" of harmonizing state and federal elections). While some States have separate voter-registration forms, all States are required to accept and use the federal form under the National Voter Registration Act. *See Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 20 (2013).

[26] *See, e.g.*, MISS. CONST. art. XII, § 249-A (setting requirements for voter identification at the polls).

Justice Kavanaugh recognized, "[r]unning elections state-wide is extraordinarily complicated and difficult," and "elections require enormous advance preparations * * * and pose significant logistical challenges." *Merrill*, 142 S. Ct. at 880 (concurring in grant of stay application).

Petitioners' theory could yield untold disruption by forcing officials to run, simultaneously, two elections with different rules.[27] Under Petitioners' theory, for example, election officials in Michigan would be left to wonder whether the state constitutional guarantees of straight-ticket and no-excuse absentee voting apply with equal force to state and federal elections on the same ballot. Voters may have to be informed of the possibility that their straight-ticket vote will be effective for nonfederal offices, but ineffective for federal offices. Voters would also need to be instructed that they can vote absentee without an excuse for state offices, but may not be able to do so for federal offices. Election officials, in turn, may need to create separate absentee ballots excluding federal offices, and special in-person ballots with only federal offices. Poll workers, finally, would have to track that some citizens (lacking a valid excuse) may have voted absentee for state offices but are still entitled to vote in person on Election Day using a special ballot—solely for federal offices. One could hardly design a better recipe for confusion.

Third, Petitioners' broad theory creates enormous uncertainty over exactly what, if anything, state

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[27] *See* Carolyn Shapiro, *The Independent State Legislature Theory, Federal Courts, and State Law*, 90 U. CHI. L. REV. __ (forthcoming 2023) (manuscript at 49), *available at* http://bit.ly/3OMpuOP.

courts can do in federal elections. Suppose voters believe election administrators have misinterpreted state election statutes and sue in state court. Were it true that the Elections Clause "place[s] the regulation of federal elections in the hands of state legislatures, Congress, *and no one else*" (Pet'rs' Br. at 4) (emphasis added), it is far from clear that state courts could resolve this dispute.[28] If state courts decide such a dispute but the legislature (in a State with a gubernatorial veto) disagrees and passes a concurrent resolution (not signed by the governor) purporting to reject that interpretation, whose interpretation governs? Petitioners' theories will raise those questions and more.

Fourth, Petitioners' arguments would similarly create uncertainty over what executive officials can do. Petitioners' lead position (at 4)—that "no one else" besides state legislatures and Congress may set rules for federal elections—would require legislatures to dictate every detail of election administration. Petitioners conspicuously refrain (at 45) from conceding that any "amount of implementing discretion may be 'delegated.'" And Petitioners' brief leaves hopelessly unclear how Petitioners' (unspecified) Elections Clause nondelegation principles would apply in practice. Only litigation—often on election eve—will answer those questions. The result could be countless emergencies in which *no* law applies, because the legislature has not spoken to a particular question and no one else in the State has the power to address it.

That danger is not hypothetical, as a recent lawsuit illustrates. As is common, North Carolina's legislature has authorized the bipartisan State Board of

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[28] *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984), precludes federal courts from ordering state officials to conform their conduct to state law.

Elections to "make such reasonable rules and regulations with respect to the conduct of primaries and elections as it may deem advisable so long as they do not conflict with" legislation. N.C. Gen. Stat. § 163-22(a). Hence, the Board has crafted dozens of election rules and regulations, such as requirements for voting systems; procedures for counting ballots; guidelines for determining voter intent on cast ballots; and procedures for recounting ballots. *E.g.*, 8 N.C. Admin. Code 4.0301, 6B.0105, 9.0107, 9.0109.

For the upcoming election, the Board determined that because "the deadline for the return of postmarked absentee ballots falls on a holiday"—Veterans Day—and because the state election code does not expressly address that scenario, "the deadline moves to the next business day, pursuant to G.S. § 103-5(a)," which is a state law postponing some legal deadlines that fall on days when public offices are closed. Plaintiffs filed suit claiming that this "unilateral action" by the Board "directly usurps the General Assembly's authority" under the Elections Clause. Compl. ¶ 85, *Deas v. N.C. State Bd. of Elections*, No. 22CV011290 (N.C. Super. Ct. Sept. 9, 2022). Unless state legislatures start attending to every detail of election administration, Petitioners' theory will invite similar challenges to every decision state election officials make.

Fifth, Petitioners' broad theory would yield just the result *Rucho* rejected and "condemn complaints about" partisan gerrymandering, and myriad other dysfunctions, "to echo into a void." *Rucho*, 139 S. Ct. at 2507. As *Rucho* emphasized, voters in many States have attempted—via constitutional amendment, ballot initiative, and so on—to curb the worst partisan shenanigans in elections. *See id.* Voters, for example, are tired of the "burden [that] arises through [their] placement in a 'cracked' or 'packed' district." *Gill v.*

Whitford, 138 S. Ct. 1916, 1931 (2018). Yet Petitioners would condone those excesses and thwart voters' efforts to address them.

Petitioners' backup positions—that state courts can enforce "procedural" and "specific" constitutional provisions, but not "substantive" or "open-ended" ones (at 46-47, 50)—will likewise cause chaos. Such a standard would not avoid the disruption that Petitioners' broadest theory could inflict, including potentially requiring election officials to run two separate sets of elections governed by different rules. And Petitioners' backup positions would thrust upon federal courts the additional duty of inventing, from scratch, an entire jurisprudence categorizing state constitutional provisions based on whether they govern "procedure" or "substance" and whether they are "specific" or "open-ended."

Because those categories are incoherent, *supra* pp. 50-55, that task will be endless. And because the task requires "examining state law," it would impel federal courts to do just what this Court has instructed federal courts *not* to do: "interpret state laws with which we are generally unfamiliar," often in an emergency posture on the eve of an election. *Long*, 463 U.S. at 1039. Worse yet, by setting up federal courts as continuing arbiters of state law, Petitioners would effectively put state courts into receivership in election-law cases, in an unprecedented affront to the judicial federalism the Constitution embodies. *See generally* Br. of Amicus Curiae Conference of Chief Justices. Voters and election administrators alike will suffer, as will public confidence in election integrity.

Only by rejecting Petitioners' position can this Court "protect[] the State's interest in running an orderly,

efficient election and in giving citizens (including the losing candidates and their supporters) confidence in the fairness of the election." *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J., concurring in denial of stay application). And only by rejecting Petitioners' positions can this Court avoid a flood of litigation turning every local political dustup into a federal constitutional case.

CONCLUSION

For the foregoing reasons, the judgment of the North Carolina Supreme Court should be affirmed, and the Petition should be dismissed for lack of jurisdiction as to all remedial proceedings.

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