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 OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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## INTEREST OF *AMICUS CURIAE*[1]

*Amicus* Constitutional Accountability Center (CAC) is a think tank and public interest law firm dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and to preserve the rights, freedoms, and structural safeguards that our nation's charter guarantees. CAC accordingly has a strong interest in this case and the questions it raises about the scope and meaning of the Elections Clause and the power of state courts to enforce state constitutional guarantees that protect the right to vote in congressional elections.

## INTRODUCTION AND SUMMARY OF ARGUMENT

American constitutionalism was born with the state constitutions of the Revolutionary-era. "The American revolutionaries virtually established the modern idea of a written constitution. . . . They showed the world how written constitutions could be truly fundamental and distinguishable from ordinary legislation." Gordon S. Wood, *Foreword: State Constitution-Making in the American Revolution*, 24 Rutgers L.J. 911, 917 (1993). Well before this Court's decision in *Marbury v. Madison*, 5 U.S. 137 (1803), state courts enforced state constitutional limits by striking down

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[1] The parties have consented to the filing of this brief. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

state legislative enactments. Indeed, "[t]he first use of the power [of judicial review] occurred in the state courts and arose under the state constitutions." Jeffrey Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* 13 (2008). And just as state courts have long enforced provisions in their state constitutions, the North Carolina Supreme Court enforced a provision in its state constitution in this case, holding that the partisan gerrymander in the congressional maps enacted by the North Carolina legislature violated the Free Elections Clause of the North Constitution, a guarantee dating back to the state's 1776 Constitution.

Petitioners, however, insist that because the Elections Clause specifically delegates the power to regulate the time, place, and manner of congressional elections to state legislatures, "States may not impose substantive state-constitutional limits on their legislatures' exercise of this authority." Pet'rs Br. 12. According to Petitioners, state courts cannot protect voting rights enshrined in state constitutions to limit state regulation of the mechanics of federal elections. In their view, the federal Constitution forecloses state constitutional review of the acts of state legislatures, eliminating a crucial check on state legislative power that has existed since the beginning of our nation's history.

Petitioners' argument lacks any basis in the Constitution's text and history. Indeed, nothing in the text or history of the Elections Clause so much as suggests that state legislatures may disregard guarantees of individual rights contained in state constitutions. When the Framers gave state legislatures the power to regulate the time, place, and manner of congressional elections, they acted against the legal backdrop of a system of checks and balances, including the power of state

courts to declare that legislative acts taken in defiance of state constitutions were null and void. The Elections Clause does not disturb the fundamental principle that state constitutions spell out to state legislatures: "here is the limit of your authority; and, hither, shall you go, but no further." *Commonwealth v. Caton*, 8 Va. 5, 8 (1782). In our constitutional scheme, legislatures are creatures of the Constitution, not independent of it.

Indeed, the Framers of the Elections Clause were deeply concerned that state legislatures would abuse their powers to manipulate the electoral process for partisan gain. As the debates over the Clause reflect, the Framers feared that "[w]henever the State Legislatures had a favorite measure to carry, they would take care so to mould their regulations as to favor the candidates they wished to succeed." 2 *The Records of the Federal Convention of 1787*, at 241 (Max Farrand ed., 1911) [hereinafter *Farrand's Records*]. Worried that state legislative majorities "might make an unequal and partial division of the states into districts for the election of representatives" or "introduce [other] such regulations as would render the rights of the people insecure and of little value," 2 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 27 (Jonathan Elliot ed., 1836) [hereinafter *Elliot's Debates*], the Elections Clause gave Congress the whip hand, empowering Congress to override the state's chosen regulations or make its own. *See Arizona v. Inter Tribal Council*, 570 U.S. 1, 8-9 (2013).

Given these concerns, the Elections Clause cannot be reasonably read to confer on state legislatures a license to disregard state constitutional checks and balances in regulating the time, place, and manner of federal elections. Petitioners paper over the historical

record that demonstrates the Framers' deep concerns about giving unbounded authority to state legislatures to formulate rules setting the time, place, and manner of federal elections. Eliza Sweren-Becker & Michael Waldman, *The Meaning, History, and Importance of the Elections Clause*, 96 Wash. L. Rev. 997, 999 (2021) ("[S]uspicion of those very legislators suffuses the purpose and history of the Clause.").

Historical practice also dooms Petitioners' theory. Evidence from the Founding era confirms that the power conferred on state legislatures in the Elections Clause is subject to state constitutional limits. Numerous Founding-era state constitutions regulated congressional elections. No one in the Founding era suggested that these state constitutional provisions were unconstitutional because state legislatures possessed unchecked lawmaking power over the mechanics of federal elections. And "[s]ince the Founding, state constitutions have regulated nearly every aspect of federal elections, from voter registration and balloting to congressional redistricting and election administration." Michael Weingartner, *Liquidating the Independent State Legislature Theory*, 46 Harv. J.L. & Pub. Pol'y (draft at 3) (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4044138; Non-State Respondents Br. 31-35; State Respondents Br. 38-47. Our "whole experience as a Nation" refutes Petitioners' insistence that a state legislature need not obey checks contained in the state constitution when regulating federal elections. *NLRB v. Noel Canning*, 573 U.S. 513, 557 (2014) (quotation marks omitted).

Consistent with this history, this Court has repeatedly rejected the view 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." *Arizona State*

*Legislature v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787, 817-18 (2015). In rulings dating back more than a century, this Court has repeatedly held that a state legislature's power under the Elections Clause may be subject to a wide range of state constitutional checks and balances. *See Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565, 568 (1916) (holding that a state could subject its legislature's districting plan to a popular referendum because "the referendum constituted a part of the state constitution and laws and was contained within the legislative power"); *Smiley v. Holm*, 285 U.S. 355 (1932) (refusing to read the Elections Clause "to endow the Legislature of the state with the power to enact laws in any manner other than that in which the Constitution of the state has provided that laws shall be enacted"); *Arizona State Legislature*, 576 U.S. at 787 (state initiative). And it has explicitly recognized that "state constitutions can provide standards and guidance for state courts to apply" in constraining partisan gerrymandering—exactly what the North Carolina Supreme Court did in this case. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506-07 (2019).

Petitioners' radical theory, if accepted, would annul state constitutional protections adopted over the course of centuries to protect voting rights and ensure political equality, wreak havoc on electoral processes across the country, and turn principles of federalism on their head. Rather than respecting the authority of a state to choose "the structure of its government," *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991), Petitioners' theory would sanction federal court intrusion into state lawmaking processes, freeing state legislatures from the limits on their power prescribed in their states' constitutive charters. For good reason, Petitioners' claim has never been the law, and this Court

should again reject it now. The decision below should be affirmed.

## ARGUMENT

### I. The Elections Clause Does Not Prevent a State Court from Enforcing State Constitutional Limitations that Constrain a State Legislature's Authority Over Federal Elections.

The Elections Clause provides that "[t]he 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 language was "the Framers' insurance against the possibility that a State would refuse to provide for the election of representatives to the Federal Congress." *Inter Tribal Council*, 570 U.S. at 8. As Justice Scalia explained, "[u]pon the States it imposes the duty ('*shall* be prescribed') to prescribe the time, place, and manner of electing Representatives and Senators; upon Congress it confers the power to alter those regulations or supplant them altogether." *Id.*

The Elections Clause thus obliges state lawmakers to regulate the time, place, and manner of federal elections. *See Hawke v. Smith*, 253 U.S. 221, 227 (1920) (observing that the term "[l]egislature" meant "the representative body which made the laws of the people"); *The Federalist No. 75*, at 418 (Hamilton) (Clinton Rossiter ed., 1999) ("The essence of the legislative authority is to enact laws, or, in other words, to prescribe rules for the regulation of the society."). Petitioners, however, insist that the Elections Clause has far more radical consequences. They claim that, by virtue of the

Constitution's grant of power to state legislatures, "States may not impose substantive state-constitutional limits on their legislature's exercise of this authority." Pet'rs Br. 12. In their view, "the power to regulate federal elections lies with state legislatures *exclusively*," and no other state actor may intrude on the legislature's authority. *Id.* at 11. The Elections Clause, they claim, renders all state constitutional limits on the power of the legislature to regulate federal elections null and void. Thus, they insist, state legislatures need not respect state constitutional provisions that guarantee individual rights by limiting state regulation of federal elections. According to Petitioners, the Elections Clause jettisons all state constitutional checks and balances in favor of giving unbounded power to the state legislature. This is manifestly inconsistent with the Constitution's text and history.

First, judicial review by state courts to enforce rights guaranteed by state constitutions was part of the double security for liberty promised by our federalist system of government. Petitioners offer no evidence indicating that the Elections Clause upsets state judicial review, which the Founding generation celebrated as critical to rein in state legislative abuse of power. Second, far from reposing unbounded trust in state legislatures, the text and history of the Elections Clause demonstrates that the Framers were concerned that state legislatures would regulate the electoral process for partisan gain. Given that the debates over the Elections Clause are replete with the Founding generation's deep distrust of state legislatures, it beggars belief that the Clause stripped away all state constitutional checks and balances on state legislatures. Rather, the Constitution's text and history show that "the Elections Clause serves to impose additional

checks on state legislatures, not to remove existing ones." Weingartner, *supra*, at 33.

### A. State Judicial Review Under State Constitutions Provided the Legal Backdrop and Model for Federal Judicial Review.

The Elections Clause, merely by granting state legislatures the power to regulate the time, place, and manner of federal elections, did not cast aside the basic principle of American constitutionalism that state legislatures may not transgress limits on their power spelled out in their own constitutions and enforced by their own courts. Put another way, "[t]he Constitution was drafted and ratified against a backdrop of state constitutions that empowered and constrained state legislatures, and there is no indication the Framers sought to upset that balance of power within states." Weingartner, *supra*, at 26. Any other result would have done serious violence to the value of federalism the Framers championed.

Americans rebelled against English rule founded on the absolute, unconstrained power of Parliament. In rejecting this model, the revolutionaries insisted on written constitutions that contained checks on the power of the legislature. As Samuel Adams observed in 1768, "in all free States the Constitution is fixd; & as the supreme Legislative derives its Power & Authority from the Constitution, it cannot overleap the Bounds of it without destroying its own foundation." 1 *The Writings of Samuel Adams* 185 (Harry A. Cushing ed., 1904). Accordingly, "in 1776, when Americans came to frame their own constitutions for their newly independent states, they inevitably sought to make them fundamental and wrote them out explicitly in documents." Wood, *supra*, at 921; *Vanhorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 308 (C.C.P. 1795) (Patterson, J.) ("[I]n *England*, there is no written

constitution, no fundamental law, nothing visible, nothing real, nothing certain, by which a statute can be tested. In *America*, the case is widely different: Every State in the Union has its constitution reduced to written exactitude and precision." (emphasis added)).

Created in the name of the people, America's written constitutions of the 1770s and 1780s contained guarantees of individual rights to guard against legislative abuse of power. *See* Donald S. Lutz, *The States and the U.S. Bill of Rights*, 16 S. Ill. U. L.J. 251, 262 (1992) ("[T]he very idea of a written bill of rights attached to a constitution . . . developed first at the state level."). In these earliest constitutions, as future Supreme Court Justice James Iredell explained in a 1786 address, the Founding generation made plain that "the power of the Assembly is limited and defined by the Constitution. It is a *creature* of the Constitution." James Iredell, *To the Public* (1786), *reprinted in* 2 *Life and Correspondence of James Iredell* 145, 146 (Griffith J. McRee ed., 1858). Having experienced "in all its rigors the mischiefs of an absolute and unbounded authority," the makers of these first American constitutions made clear that "*unbounded legislative power* . . . our constitution reprobates." *Id.* at 146, 147-48. Accordingly, "an act of Assembly, inconsistent with the constitution is *void*, and cannot be obeyed, without disobeying the superior law to which we were previously and irrevocably bound." *Id.* at 148.

In the system of separation of powers, it was the role of the courts to enforce the state constitution's limits on the power of the legislature. Iredell explained that "judges . . . must take care at their peril, that every act of Assembly they presume to enforce is warranted by the constitution, since if it is not, they act without lawful authority." *Id.* State courts put these

principles into practice. Well before the delegates met in Philadelphia to draft a federal Constitution, state courts exercised the power of judicial review to strike down legislative enactments that conflicted with rights guaranteed by state constitutions. All told, "[s]tate courts in at least seven states invalidated state or local laws under their [s]tate constitutions before 1787." Sutton, *supra*, at 13. In these early cases, state courts explained that "no act" the legislature "could pass, could by any means repeal or alter the constitution, because if they could do this, they would at the same instant of time, destroy their own existence as a Legislature, and dissolve the government thereby established." *Bayard v. Singleton*, 1 N.C. 5, 7 (1787). Because "the judicial power was bound to take notice" of "the constitution" "as much as any other law whatever," *id.*, it was the job of judges to "point[] to the constitution" and instruct the legislature "here is the limit of your authority; and, hither, shall you go, but no further." *Caton*, 8 Va. at 8. As Justice William Patterson observed of the Pennsylvania Constitution, "What are legislatures? Creatures of the Constitution . . . . [A]ll their acts must be conformable to it, or else they will be void." *Vanhorne's Lessee*, 2 U.S. at 308; Non-State Respondents Br. 22-23; State Respondents Br. 29-31.

A number of America's first written constitutions guaranteed free elections, and courts invoked these provisions in expounding on the role of the courts in our constitutional system. In *Bayard*, the North Carolina Supreme Court observed that, without a written constitution that constrains the legislature, "members of the General Assembly" might "render themselves the Legislators of the State for life, without any further election from the people, from thence transmit the dignity and authority of legislation down to their male heirs forever." 1 N.C. at 7. The state Constitution "as

the fundamental law of the land" would make any such act "as abrogated and without any effect." *Id.* In *Vanhorne's Lessee*, Justice Patterson, riding circuit, quoted Pennsylvania's Declaration of Rights and asked "[c]ould the Legislature have annulled these articles, respecting religion, the rights of conscience, and elections by ballot. Surely no. . . . [I]f a legislative act oppugns a constitutional principle, the former must give way, and be rejected on the score of repugnance." 2 U.S. at 309.

Thus, "the state judiciaries had asserted, and were properly endowed with, the power to refuse to enforce unconstitutional statutes," Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. Chi. L. Rev. 887, 935 (2003), and debates over the federal Constitution took place against that backdrop. These state checks and balances would remain critical given the torrent of state legislative abuse of power documented by the Constitution's Framers. *See The Federalist No. 10*, *supra*, at 45 (Madison) ("Complaints are everywhere heard from our most considerate and virtuous citizens . . . that measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an overbearing majority."); *The Federalist No. 48*, *supra*, at 278 (Madison) (observing that "proofs" of state legislative abuse of power "might be multiplied without end" and detailed "from the records and archives of every state in the Union"); Letter from James Iredell to Richard Spaight (Aug. 26, 1787), *in* 2 *Life and Correspondence of James Iredell*, *supra*, at 173 ("In a republican Government . . . , *individual liberty* is a matter of utmost moment, as, if there be no check upon public passions, it is in the greatest danger. . . . These considerations . . . occasioned such express provisions for the personal liberty of each citizen, which the citizens,

when they formed the Constitution, chose to reserve as an unalienated right, and not to leave at the mercy of any Assembly whatever.").

Indeed, Alexander Hamilton's classic defense of judicial review in *Federalist 78* explicitly noted that "the right of the courts to pronounce legislative acts void, because contrary to the Constitution" has been "of great importance in all the American constitutions." *The Federalist No. 78*, *supra*, at 434, 435. Hamilton added that "the benefits of the integrity and moderation of the judiciary have already been felt in more States than one; and though they may have displeased those whose sinister expectations they may have disappointed, they must have commanded the esteem and applause of all the virtuous and disinterested." *Id.* at 438. During the debates in Philadelphia, Elbridge Gerry stressed that "[i]n some States the Judges had (actually) set aside laws as being agst. the Constitution. This was done too with general approbation." 1 *Farrand's Records* at 97. Rejecting proposals for a Council of Revision or a federal negative, the Framers turned to judicial review by an independent judiciary to police governmental abuses of power, building off the model of American judicial review developed by state courts enforcing state constitutional limits on legislative power. *See* 2 *Farrand's Records* at 28 ("A law that ought to be negatived will be set aside in the Judiciary departmt."); *The Federalist No. 81*, *supra*, at 452 (Hamilton) (arguing that Article III's creation of an independent judiciary "is but a copy of the constitutions of New Hampshire, Massachusetts, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia; and the preference which has been given to these models is highly to be commended"); Non-State Respondents Br. 23.

The original Constitution did not contain a Bill of Rights, as most state constitutions did. During the debates in Philadelphia, the delegates rejected the suggestion that a federal bill of rights was necessary. Roger Sherman argued that rights guaranteed by state constitutions remained in full force. "The State Declarations of Rights are not repealed by this Constitution; and being in force are sufficient." 2 *Farrand's Records* at 588. In the Virginia ratifying convention, Edmund Randolph stressed that state constitutions provided "sufficient security": if the "federal judiciary . . . will not do justice to persons injured, may they not go to our own state judiciaries and obtain it?" 3 *Elliot's Debates* at 468.

Antifederalists were not convinced. They argued that the Constitution was flawed because "[o]ur rights are not guarded. There is no declaration of rights," like those found in state constitutions, "to secure to every member of society those unalienable rights which ought not to be given up to any government. Such a bill of rights would be a check on men in power." 4 *id.* at 137; *see also* 2 *id.* at 401 ("[H]ere is no bill of rights, no proper restriction of power; our lives, our property, and our consciences are left wholly at the mercy of the legislature."). Antifederalists feared that "the Declaration of Rights in the separate States are no Security" because of the lack of a federal Bill of Rights and the power of Congress to supersede state law. George Mason, *Objections to the Constitution of Government Formed by the Convention* (1787), *reprinted in* 2 *The Complete Anti-Federalist* 11 (Herbert J. Storing ed., 1981).

Antifederalists successfully pushed to add a Bill of Rights to the federal Constitution, and before the ink was dry on the original Constitution, the American people adopted a federal Bill of Rights, drawn in large

measure from existing state constitutions, to provide a "double security" for "the rights of the people." *See The Federalist No. 51*, *supra*, at 291 (Madison); Lutz, *supra*, at 258 (observing that "Madison used the bill of rights attached to the state constitutions as his model"). As state courts had shown, judicial review promised to safeguard fundamental rights and ensure that lawmakers respected the limits on their authority. As Madison observed when introducing the Bill of Rights, "independent tribunals of justice will consider themselves in a peculiar manner the guardian of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or the executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights." 1 Annals of Cong. 457 (1789) (Joseph Gales ed., 1834).

In short, the notion that a state legislature is free to disregard constitutional limitations on its authority is foreign to the Constitution's text and history. State judicial review under state constitutions provided the legal backdrop and model for federal judicial review. The principle that state legislatures are not independent of the state's constitution, but creatures of it, is older than the Constitution itself.

### B. The Elections Clause Does Not Prevent State Courts from Enforcing State Constitutional Voting Rights Guarantees.

Petitioners argue that the Elections Clause made a deliberate choice to annul state constitutions that might limit a state legislature's regulation of congressional elections, vesting exclusive and unbounded power in state legislatures. The text and history of the Elections Clause offer no support for this far-reaching claim. On the contrary, the debates over the Elections Clause were replete with fears of state legislative

abuse of power, making clear that the Framers adopted the Clause not to empower state legislatures to act free of constitutional checks, but instead to do the opposite, providing a check against potential state legislative abuses.

The Elections Clause was adopted out of fear that states would undermine the federal government by refusing to hold elections for members of Congress. To the Founding generation, "an exclusive power of regulating elections for the national government, in the hands of the State legislatures, would leave the existence of the Union entirely at their mercy. They could at any moment annihilate it, by neglecting to provide for the choice of persons to administer its affairs." *The Federalist No. 59*, *supra*, at 331 (Hamilton). The Elections Clause generated fierce debate about whether Congress should have the final say over the rules for the time, place, and manner of federal elections. Ultimately, the Framers recognized that Congress needed the power to "intervene against acts of injustice within the states," Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 224 (1997), a reflection of their "distrust of the States regarding elections," *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 811 n.21 (1995).

During the debates over the Elections Clause at the Constitutional Convention, James Madison argued that a limit on state power was necessary because "[w]henever the State Legislatures had a favorite measure to carry, they would take care so to mould their regulations as to favor the candidates they wished to succeed." 2 *Farrand's Records* at 241. The Elections Clause gave "a controuling power to the Natl. legislature," *id.*, because "State Legislatures will sometimes fail or refuse to consult the common interest at the expense of their local conveniency or

prejudices," *id.* at 240. Madison observed that "[i]t was impossible to foresee all the abuses that might be made of the discretionary power," *id.*, noting that there were many ways—including districting—that state legislative majorities might manipulate the democratic process in order to "materially affect the appointments" of members of Congress, *id.* at 241.

The Founding generation's fears that state legislatures would pervert the electoral process for partisan gain pervades the ratification debates as well. For example, at the Massachusetts convention, Theophilus Parsons explained that the Elections Clause provided a remedy against state manipulation of the democratic process for partisan ends. "[W]hen faction and party spirit run high," Parsons warned, state legislative majorities "might make an unequal and partial division of the states into districts for the election of representatives" or "introduce [other] such regulations as would render the rights of the people insecure and of little value." 2 *Elliot's Debates* at 27. The Elections Clause, he argued, "provides a remedy," empowering Congress to "restore to the people their equal and sacred rights of election." *Id.*; *see Arizona State Legislature*, 576 U.S. at 815 ("The Clause was . . . intended to act as a safeguard against manipulation of electoral rules by politicians and factions in the States to entrench themselves or place their interests over those of the electorate.").

Opponents bitterly attacked the Elections Clause for giving Congress the final say, insisting that it "strike[s] at the state legislatures, and seems to take away the power of elections which reason dictates they ought to have among themselves." 4 *Elliot's Debates* at 51. In their view, "Congress ought not to have the power to control elections." 2 *id.* at 23. But the founding generation refused to give unbounded power to

state legislatures because they feared that "powerful factions within states would use unchecked control over elections to gerrymander districts and entrench their power." Sweren-Becker & Waldman, *supra*, at 1010. A congressional veto was necessary because state legislatures could not be trusted to "secur[e] to the people their equal rights of election." 2 *Elliot's Debates* at 26.

In contrast to the abundant evidence that the Framers feared potential abuses by state legislatures, not a shred of Founding-era evidence supports the idea that state legislatures, when regulating federal elections, would be free from state constitutional restraints that would otherwise apply to their enactments. On the contrary, the debates over the Constitution stressed that "[t]he State Declarations of Rights are not repealed by this Constitution." 2 *Farrand's Records* at 588. Given the important role state courts played in enforcing state constitutional limits on the abuse of power, it is unfathomable that the Elections Clause—by silent implication—eliminated state constitutional checks on the abuse of legislative power the Framers so feared. *Cf. The Federalist No. 83*, *supra*, at 464 (Hamilton) (rejecting the "surmise that a thing, which is only *not provided for*, is entirely abolished"). Nothing in the historical record supports the idea that the Founding generation sought to eliminate the only available judicial check on state abuse of power. *See* Dan T. Coenen, *Constitutional Text, Founding-Era History, and the Independent-State-Legislature Theory*, 57 Ga. L. Rev. (draft at 25) (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4223731 (explaining that, at the Founding, "state infringements of individual constitutional rights were to be guarded against, if at all, by state courts applying state constitutions" because "the

federal Constitution, except in rare cases, simply did not speak to that matter").

Petitioners suggest that the drafting history of the Elections Clause proves that "the legislature's possession of [the] authority [to regulate federal elections] is exclusive," Petr's Br. 17, pointing to the so-called "Pinckney Plan," which, they claim, was the "earliest reference to the regulation of congressional elections" and "would apparently have assigned that power to *each State* as a whole," *id.* at 15. The import of the "Pinckney Plan," according to Petitioners, is that the "change" to confer power on state legislatures "was a deliberate one." *Id.* at 16. There are multiple problems with this argument. To start, the historical record strongly suggests that the so-called "Pinckney Plan" is spurious: the only surviving copy dates from decades after the convention, and Madison and others expressed grave doubts that the copy truly represented what Pinckney had proposed in 1787. *See* 3 *Farrand's Records* at 601-02 (noting Madison's conviction that the printed version "was not the same as that originally presented by Pinckney in 1787"); *id.* at 602 (observing that "its provisions, in several important particulars, are directly at variance with Pinckney's opinions as expressed in the Convention"); *id.* (noting that "the document embodies several provisions that were only reached after weeks of bitter disputes—compromises and details, that it was impossible for any human being to have forecast accurately"). Indeed, Pinckney's supposed draft has long been "so utterly discredited that no instructed person will use it as it stands as a basis for constitutional or historical reasoning." John Franklin Jameson, *Studies in the History of the Federal Convention of 1787*, 1 Ann. Rep. Am. Hist. Ass'n 87, 117 (1903). This Court should ignore it.

And in any event, the fact that the Elections Clause, in final form, confers power on state legislatures does not, as Petitioners suppose, oust judicial review by state courts. Many provisions of the Constitution confer power on legislatures, both on state legislatures and on Congress, but those have never been understood to immunize legislative enactments from judicial review. *See Marbury*, 5 U.S. at 176 ("The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written."). Indeed, the Elections Clause itself grants the power to regulate the time, place, and manner of federal elections to state legislatures and to Congress, but it has never been understood that the grant of power comes with immunity from constitutional constraints. *See Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986) ("The power to regulate the time, place, and manner of elections does not justify, without more, the abridgment of fundamental rights, such as the right to vote . . . or . . . the freedom of political association."); *Wesberry v. Sanders*, 376 U.S. 1, 6 (1964) (observing that "nothing" in the Elections Clause "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"); Non-State Respondents Br. 25-27; State Respondents Br. 32. Petitioners cannot explain why a different rule should obtain when a state legislature transgresses limits contained in the state's own constitution. *See* Vikram David Amar & Akhil Reed Amar, *Eradicating Bush-League Arguments Root and Branch: The Article II Independent-State-Legislature Notion and Related Rubbish*, 2021 Sup. Ct. Rev. 1, 21 ("When *Congress* enacts an unconstitutional bill, its actions simply cease to have the force of law. The same first principles hold

true when a state legislature enacts a bill violative of its state constitution."). In both contexts, the legislature is a creature of the Constitution, not independent of it.

Thus, the Elections Clause does not strip the people of a state from exercising their sovereign prerogative to adopt a state charter that constrains the state legislature to safeguard democracy and popular sovereignty and gives the courts the power of judicial review to enforce those limits. On the contrary, the Guarantee Clause secures the people's right to structure state government along republican lines to constrain legislative abuse of power. *See The Federalist No. 43*, *supra*, at 243 (Madison) ("Whenever the States may choose to substitute other republican forms, they have a right to do so and to claim the federal guaranty for the latter."); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century,* 88 Colum. L. Rev. 1, 41 (1988) ("In order to ensure that state and local governments remain responsive to their constituents, those citizens must have the power to choose the governmental forms that work best for them. The guarantee clause, therefore, grants states control over their internal governmental machinery."); *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 612 (1937) ("How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself."); Non-State Respondents Br. 27-28.

In Petitioners' view, state judicial enforcement of state constitutional limitations on the power of the legislature is nothing less than a usurpation of the power the Elections Clause grants to the state legislature. Petitioners insist that "[w]hen a state legislature's elections regulations are nullified by a state court on state-constitutional grounds, the practical result is

that the State has *reallocated* a portion of the authority assigned specifically to its legislature by the federal Constitution and parceled it out instead to its courts." Pet'rs Br. 21. This fundamentally misunderstands the judicial role in enforcing a written constitution's limitations on the power of the legislature.

First, when a court strikes down the act of the legislature as unconstitutional, it is not usurping the legislature's power at all, but enforcing the basic principle of American constitutionalism that a legislative act contrary to the Constitution is null and void. *See The Federalist No. 78*, *supra*, at 434 ("Limitations [on 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. Without this, all the reservations of particular rights or privileges would amount to nothing."); *Marbury*, 5 U.S. at 177 ("Certainly all those who have framed written Constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be that an act of the Legislature, repugnant to the Constitution, is void."). This principle, first established in the context of state constitutions, "is of great importance in all the American constitutions." *The Federalist No. 78*, *supra*, at 435. By redefining judicial review as an illegitimate infringement on the prerogatives of the legislature, Petitioners' theory "would be giving to the Legislature a practical and real omnipotence" and declaring that "limits" contained in a state constitution "may be passed as pleasure." *Marbury*, 5 U.S. at 178.

Second, when a state court renders a state law null and void because it violates an individual right secured by the state constitution, the result is "to send

*the . . . legislature* back to the drawing board," hardly the transfer of power Petitioners claim. *Arizona State Legislature*, 576 U.S. at 840 (Roberts, C.J., dissenting). The legislature retains the power to regulate the time, place and manner of federal elections—as the Elections Clause provides—so long as it does so consistent with the limits on its authority spelled out in its own state constitution. In short, state court judicial review of state regulation is perfectly consistent with the Elections Clause's grant of power to state legislatures. This is particularly true here, given that the North Carolina legislature has explicitly authorized state courts to adjudicate and redress constitutional infirmities in legislatively-enacted congressional districting plans. *See* N.C.G.S. § 1-267.1(a); *id.* §§ 120-2.3, 120-2.4; Non-State Respondents Br. 58-61; State Respondents Br. 11-14.

## II. State Constitutions Have Consistently Regulated Federal Elections Since the Founding.

Petitioners' radical view that state constitutions may not regulate federal elections has never been the law. On the contrary, from the Founding on, state constitutions have done exactly that. Indeed, "our whole experience as a Nation," *Noel Canning*, 573 U.S. at 557 (quotation marks omitted), makes plain that the people of a state may adopt constitutional provisions that limit partisan manipulation of the electoral process by the legislative branch and give state courts the responsibility to declare legislative enactments to the contrary null and void. *See Chiafalo v. Washington*, 140 S. Ct. 2316, 2328 (2020) (stressing centuries-long practice that "here, We the People rule"); *cf. The Pocket Veto Case*, 279 U.S. 655, 689 (1929) ("Long settled and established practice" may have "great weight in a proper interpretation of constitutional provisions.");

*Smiley*, 285 U.S. at 369 (observing that "long and continuous interpretation in the course of official action" is particularly salient "in the case of constitutional provisions" such as the Elections Clause "governing the exercise of political rights"). The Elections Clause does not prevent state courts from curbing violations of state constitutions in regulating congressional elections, and that is all the North Carolina Supreme Court did in this case.

The history of state constitutional regulation of federal elections goes all the way back to the earliest days of our nation. State constitutions of the Founding-era enshrined voting rights and guaranteed "free and equal elections," expressing a "state constitutional commitment to political equality" among qualified voters. Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 Mich. L. Rev. 859, 892 (2021); *see* Del. Const. of 1792, art. I, § 3 ("All elections shall be free and equal."); Pa. Const. of 1790, art. IX, § 5 (providing that "elections shall be free and equal"); N.H. Const. of 1792, art. XI ("All elections ought to be free, and every inhabitant of the State having the proper qualifications has equal right to elect and be elected into office."); Ky. Const. of 1792, art. XII, § 5 ("[A]ll elections shall be free and equal."); Vt. Const. of 1793, ch. 1, art. VIII ("That all elections ought to be free and without corruption."); Tenn. Const. of 1796, art. XI, § 5 ("[E]lections shall be free and equal."). Revolutionary-era constitutions employed similar constitutional language, *see* N.C. Decl. of Rights of 1776, § 6; Va. Declaration of Rights of 1776, § 6; Mass. Const. of 1780, pt. I, art. IX, and this formulation proved an influential way to embed the ideal of "equal participation in shaping representative government" as a fundamental guarantee of state

declarations of rights, *see* Bulman-Pozen & Seifter, *supra*, at 890.

Founding-era state constitutions also addressed questions of election administration in federal elections. In doing so, they directly followed pre-1787 precedents. "Most of the state constitutions adopted between Independence and the adoption of the United States Constitution purported to regulate the selection of delegates to Congress." Hayward H. Smith, *Revisiting the History of the Independent State Legislature Doctrine*, 53 St. Mary's L.J. 445, 479 (2022); *see, e.g.*, S.C. Const. of 1778, art. XXII; Mass. Const. of 1780, ch. IV; N.H. Const. of 1784, pt. II, The Form of Government, Delegates to Congress; Non-State Respondents Br. 29; State Respondents Br. 38-39. These state constitutional constraints were "well known," *Smiley*, 285 U.S. at 368, at the time of the framing of the Elections Clause. The historical record shows that "more than half of the eleven states that ratified the Constitution in 1787-88 . . . had state constitutions that expressly regulated state legislatures in the context of federal elections in the 1780s and early 1790s." Amar & Amar, *supra*, at 24.

Following these precedents, "[f]our of the six state constitutions that were adopted or revised in the Constitution's earliest years of operation—George Washington's first term—regulated the manner of federal elections, and in so doing cabined the power of the state legislature." Amar & Amar, *supra*, at 22. Delaware's 1792 Constitution mandated that congressional elections be held "at the same places where representatives in the State legislature are voted for, and in the same manner," Del. Const. of 1792, art. VIII, § 2, while three other states required that "[a]ll elections shall be by ballot," not viva voce. *See* Ga. Const. of 1789; Pa. Const. of 1790, art. III, § 2; Ky. Const. of 1792, art. III,

§ 2. The issue of voting by ballot versus voting viva voce proved to be quite contentious. Later in the 1790s, Kentucky reversed course, amending its state charter to mandate the more raucous method of voting viva voce "in all elections by the people." Ky. Const. of 1799, art. VI, § 16. No one in the Founding-era suggested these state constitutions were unconstitutional because state legislatures had to possess unbounded authority over federal elections.

The trend of state constitutional regulation of federal elections continued in nineteenth-century America. Throughout the nineteenth century, state constitutions regulated the choice of ballot or voice voting in federal elections, *see, e.g.*, Ohio Const. of 1803, art. IV, § 2; La. Const. of 1812, art. VI, § 13; N.Y. Const. of 1821, art. II, § 4; Va. Const. of 1830, art. III, § 15; Mich. Const. of 1835, art. II, § 2; R.I. Const. of 1842, art. VIII, § 2; Cal. Const. of 1849, art. II, § 6; Minn. Const. of 1857, art. VII, § 6; the hours of voting, Ky. Const of 1850, art. VIII, § 16, and congressional districting, *see, e.g.*, Va. Const. of 1830, art. III, § 6; Iowa Const. of 1846, art. III, § 32; Cal. Const. of 1849, art. IV, § 30; W. Va. Const. of 1863, art. XI, § 6; Ala. Const. of 1867, art. VIII, § 6; Va. Const of 1870, art. V, § 13, among other things. Nineteenth-century state-constitution makers followed in the footsteps of the forebears from the Founding-era by embedding voting rights guarantees and safeguards for political equality in their state constitutions. By 1868, sixteen state constitutions contained guarantees that all elections be free; ten of these required that all elections, including those for members of Congress, be free and equal. *See* Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Were Deeply Rooted in American History and Tradition?*, 87

Tex. L. Rev. 7, 46-47 (2008); *see, e.g.*, Del. Const. of 1831, art. I, § 3; Md. Const. of 1867, Decl. of Rights, § 7; S.C. Const. of 1868, art. I, § 31; Ark. Const. of 1874, art. III, § 2.

In the twentieth century, through ballot initiatives and referenda, "states have adopted constitutional amendments concerning nearly every aspect of federal elections, including registration, primaries, ballots, voting machines, absentee voting, voter ID, and election integrity." Weingartner, *supra*, at 39-40. All told, through more than two centuries, state constitutional limitations on state regulation of elections, including federal elections, have been pervasive: "[e]very state constitution confers the right to vote"; "[t]wenty-six state constitutions declare that elections shall be 'free,' 'free and equal,' or 'free and open,'" Bulman-Pozen & Seifter, *supra*, at 870, 871, and state charters regulate congressional elections, including congressional districting, in a myriad of ways, *see Arizona State Legislature*, 576 U.S. at 823 (discussing the wide range of "[c]ore aspects of the electoral process regulated by state constitutions"). And there is a "rich history" of state courts enforcing voting rights guarantees enshrined in state constitutions "to strike down unfair or biased election laws," *see* Samuel S.H. Wang, Richard F. Ober, Jr., & Ben Williams, *Laboratories of Democracy Reform: State Constitutions and Partisan Gerrymandering*, 22 Penn. J. Const. L. 203, 236 (2019), and check the power of legislators to make themselves "Legislators of the State for life" and insulate themselves from "any further election of the people," *Bayard*, 1 N.C. at 7.

Rather than seriously grappling with this extensive record of state constitutional regulation of federal elections, Petitioners cherry-pick the history, highlighting the small handful of historical anomalies they

can cobble together. *See Chiafalo*, 140 S. Ct. at 2328 ("The history going the opposite way is one of anomalies only."). Next, they try to wipe away peoples' efforts to regulate federal elections in their state constitutions, offering the head-spinning argument that state constitutions that, by their terms, apply to "all elections" actually apply only to state elections. *See* Pet'rs Br. 39. Petitioners' argument, however, is at war with the language consciously chosen by the drafters of state constitutions and would deprive states of the obvious "convenience" of applying a single legal regime to "the elections for their own governments and the national government." *The Federalist No. 61*, *supra*, at 344 (Hamilton). In any event, there are numerous examples of state charters that regulated congressional elections in explicit terms. *See* Weingartner, *supra*, at 36-37; Smith, *supra*, at 484-87, 505-07, 525-28; Non-State Respondents Br. 31-33, 37; State Respondents Br. 39-41. The reality is that, for more than two centuries, state constitutions have regulated federal elections in a manner incompatible with Petitioners' flawed view that state legislatures possess exclusive constitutional authority.

In sum, our "whole experience as a Nation," *Noel Canning*, 573 U.S. at 557 (quotation marks omitted), accords with what the text and history of the Constitution show: "state peoples and state constitutions are masters of state legislatures," Amar & Amar, *supra*, at 20, even when those legislatures are exercising authority they possess under the Elections Clause. And "[n]othing in th[e Elections] Clause instructs . . . 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." *Arizona State Legislature*, 576 U.S. at 817-18.

## CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the court below.

Respectfully submitted,

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