No. 21-1271

In the

Supreme Court of the United States

TIMOTHY K. MOORE, in his Official Capacity as Speaker of the North Carolina House of Representatives, *et al.*
Petitioners,

v.

REBECCA HARPER, *et al.*
Respondents.

On Writ of Certiorari to the North Carolina Supreme Court

BRIEF OF *AMICUS CURIAE* THE CLAREMONT INSTITUTE'S CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONERS

JOHN C. EASTMAN
Counsel of Record
ANTHONY T. CASO
CONSTITUTIONAL COUNSEL GROUP
174 W. Lincoln Ave, #620
Anaheim, CA 92805
(714) 943-9983
jeastman@ccg1776.com

Counsel for Amicus Curiae

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INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life. The Center has previously appeared before this Court in several cases addressing core constitutional principles of federalism and separation of powers, similar to those at issue in this case. *See, e.g.*, *Gundy v. United States*, 139 S.Ct. 2116 (2019); *Arizona v. The Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1 (2013). Its affiliated scholars have likewise written extensively about the Constitution's federalism and separation-of-powers principles, including in the context of the Elections Clause at issue here. *See*, *e.g.*, John C. Eastman, *Open to Merit of Every Description? An Historical Assessment of the Constitution's Qualifications Clauses*, 73 Denver University Law Review (Fall 1995).

SUMMARY OF ARGUMENT

The Constitution contains two provisions related to the "manner" of conducting federal elections. The first, Article I, § 4, cl. 1 (the "Elections Clause"), assigns to the "Legislature" of each State the power to direct the "time, place, and manner" for conducting elections to members of the House of Representatives. The second, Article II, § 1, cl. 2 (the "Electors Clause"),

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[1] Pursuant to this Court's Rule 37.3(a), this amicus brief is filed with the consent of the parties. Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than Amicus Curiae, its members, or its counsel made a monetary contribution to fund the preparation and submission of this brief.

similarly assigns to the "Legislature" of each State the power to direct the "manner" of choosing presidential electors. The latter authority is "plenary," as is the former with respect to the division of authority within the State, though it is subject to an override by Congress.

This Court's decisions in *State of Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916), *Smiley v. Holm*, 285 U.S. 355 (1932), and *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787 (2015), misconstrued the Constitution's clear assignment of authority to the "legislature" to instead mean "the legislative authority," wherever it is vested by a state's own constitution. But when performing *federal* functions, the legislatures of the several states are not operating pursuant to *state* authority, but rather pursuant to *federal* authority, and cannot be constrained by anything in state law or even a state constitution to the contrary.

This case moves the needle even further from the explicit text of Article I (and the parallel text in Article II). There is simply no plausible argument that the judicial branch of the states is in any way exercising a *legislative authority*. Instead, the court below, contrary to the Constitution's unambiguous assignment of power to the state legislature, set the "manner" for conducting congressional elections itself, thereby removing the power over elections from the most accountable branch of government (the legislature) to the least accountable branch of government (the judiciary).

ARGUMENT

I. The Power Conferred on the State "Legislatures" by the Elections Clause, Like That Conferred by the Electors Clause, Is Plenary.

The Elections Clause, U.S. Const. Art. I, § 4, cl. 1, assigns to the "Legislature" of each State the power to direct the "time, place, and manner" for conducting elections to members of the House of Representatives. The Electors Clause, U.S. Const. Art. II, § 1, cl. 2, similarly assigns to the "Legislature" of each State the power to direct the "manner" of choosing presidential electors.

In *McPherson v. Blacker*, 146 U.S. 1, 25 (1892), this Court recognized that the power assigned to the state legislatures under the Article II Electors Clause to direct the "manner" of choosing presidential electors—a provision parallel in text and purpose to the Elections Clause at issue here—was "plenary." "[T]he whole subject" of the appointment of electors "is committed" to the Legislature, the Court held. *Id.* "The constitution does not provide that the appointment of electors shall be by popular vote," it added. "It recognizes that the people act through their representatives in the legislature, and leaves it to the legislature *exclusively* to define the method of effecting the object." *Id.* (emphasis added).

Significantly, the *McPherson* Court also recited with approval a lengthy passage from an 1874 report made by Senator Oliver Morton, Chairman of the Senate Committee on Privileges and Elections. In that report, Senator Morton noted that, under Article II,

"[t]he appointment of these electors is thus placed absolutely and wholly with the legislatures of the several states." *Id.* at 34 (quoting Senate Rep. 1st Sess. 43d Cong. No. 395). "This power is conferred upon the legislatures of the states by the constitution of the United States," the report continued, "and cannot be taken from them or modified by their state constitutions any more than can their power to elect senators of the United States." *Id.* at 35. "Whatever provisions may be made by statute, or by the state constitution, to choose electors by the people, there is no doubt of the right of the legislature to resume the power at any time, for it can neither be taken away nor abdicated." *Id.* The Court also noted that the words "in such manner as the legislature thereof may direct" "operat[e] as a limitation upon the State in respect of any attempt to circumscribe the legislative power…." *Id.* at 24 (citing Art. II, § 1, cl. 2).

In *Bush v. Palm Beach Cnty. Canvassing Bd.*, 531 U.S. 70, 76 (2000) (*per curiam*), this Court unanimously approved of that latter language from *McPherson* and remanded to the Florida Supreme Court to clarify whether that court's prior decision had failed to heed *McPherson*'s admonition but instead "saw the Florida Constitution as circumscribing the legislature's authority under Art. II, § 1, cl. 2." Then, in *Bush v. Gore,* this Court referred to the holding in *McPherson* "that the state legislature's power to select the manner of appointing electors is plenary," and reiterated that "there is no doubt of the right of the legislature to resume the power at any time, for it can neither be taken away nor abdicated." *Bush v. Gore*, 531 U.S. 98, 104 (2000) (*per curiam,* quoting *McPherson*, 146 U.S. at 35 (cleaned up)). Chief Justice Rehnquist,

joined by Justices Scalia and Thomas, wrote a separate concurring opinion to note as an additional ground for the decision what had been explained in *McPherson*: "Art. II, § 1, cl. 2 'convey[s] the broadest power of determination' and 'leaves it to the legislature exclusively to define the method of appointment." 531 U.S. at 113 (Rehnquist, C.J, concurring) (quoting *McPerson*, 146 U.S. at 27). Accordingly, the Florida Supreme Court's departure from the election code adopted by the Legislature "impermissibly distorted" the Legislature's election laws "beyond what a fair reading required, in violation of Article II." *Id*.

Following the contested 2020 election, a number of legal commentators have denigrated this constitutional assignment of authority to the "Legislatures" of the states as a "novel," "unprecedented," "fringe," even "unconstitutional" "independent state legislature theory." *See, e.g.*, Carolyn Shapiro, *The Independent State Legislature Theory, Federal Courts, and State Law*, 90 U. Chi. L. Rev. __ (forthcoming 2023)[2]; Vikram David Amar and 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 (2021); Richard Blaustein, *Fringe No More? Independent State Legislature Theory*, Washington Lawyer (Sept./Oct. 2022). It is anything but. *See, e.g.*, Michael T. Morley, *The Intratextual Independent 'Legislature' and the Elections Clause*, 109 Nw. U. L. Rev. Online 131, 138 (Jan. 19, 2015) (describing the "independent state legislature doctrine" as "longstanding"). Contrary to the policy preferences of these commentators, the framers of the

[2] Available at https://ssrn.com/abstract=4047322.

Constitution quite explicitly and deliberately assigned these important political tasks to the branch of state government most directly accountable to the people.

Professors Vikram Amar and Akhil Amar have also contended that in the passages cited in both the *Bush v. Gore* majority *per curiam* opinion and the concurrence by Chief Justice Rehnquist, *McPherson* did not actually mean what it said. This, they claim, because the *McPherson* Court elsewhere stated that "[t]he legislative power is the supreme authority *except as limited by the constitution of the State*." Amar, *supra*, at 31. Read in context, that quotation means exactly the opposite of what the Amars claim. Here's the full passage:

> The state does not act by its people in their collective capacity, but through such political agencies as are duly constituted and established. The legislative power is the supreme authority, except as limited by the constitution of the state, and the sovereignty of the people is exercised through their representatives in the legislature, unless by the fundamental law power is elsewhere reposed. The constitution of the United States frequently refers to the state as a political community, and also in terms to the people of the several states and the citizens of each state. What is forbidden or required to be done by a state is forbidden or required of the legislative power under state constitutions as they exist. *The clause under consideration does not read that the people or the citizens shall appoint, but that 'each state shall;' and if the words, 'in such manner as the legislature thereof*

> *may direct,' had been omitted, it would seem that the legislative power of appointment could not have been successfully questioned in the absence of any provision in the state constitution in that regard. Hence the insertion of those words, while operating as a limitation upon the state in respect of any attempt to circumscribe the legislative power, cannot be held to operate as a limitation on that power itself.*

McPherson, 146 U.S. at 25 (emphasis added). This Court expressly noted that if the federal Constitution had only authorized the "state" to determine the manner for appointing electors, it would be the legislature that would do the work in the absence of provisions in the state constitution directing otherwise. But the insertion of the words, "in such manner as the legislature thereof may direct," the Court noted, operates as a "limitation upon the state in respect of any attempt to circumscribe the legislative power." *Id.* In other words, because the *federal* Constitution clearly assigns the authority to the state legislature as a body, the power so delegated to the state legislature could not be constrained even by the *state's* own constitution—exactly what the *McPherson* Court stated later in the opinion in the passages cited by the *Bush v. Gore* majority and concurring opinions. *See id.* at 35 ("This power is conferred upon the legislatures of the states by the constitution of the United States, and cannot be taken from them or modified by their state constitutions any more than can their power to elect senators of the United States.") (quoting Senate Rep. 1st Sess. 43d Cong. No. 395)).

Several state courts have drawn the same conclusion from the Constitution's text as did the *McPherson*

Court. In *In re Plurality Elections,* 8 A. 881, 882 (R.I. 1887), for example, the Supreme Court of Rhode Island addressed whether members of Congress could be elected by a plurality, as specified by an Act of the Legislature, or could only be elected with a majority vote, as specified in the state's constitution. It held that the majority requirement in the state constitution was of "no effect" with respect to federal elections because it would "impose a restraint upon the power of prescribing the manner of holding such elections which is given to the legislature by the constitution of the United States without restraint, so long as and to the extent that congress refrains from making regulations in the same manner." *Id.* at 882.

In *State ex rel. Beeson v. Marsh*, 34 N.W.2d 279 (Neb. 1948), the Nebraska Supreme Court reached a similar conclusion with respect to the Electors Clause. It rejected a bid by electors for the Progressive Party to be placed on the ballot under a state constitutional provision requiring that "[a]ll elections shall be free." Following *McPherson*, it held that the provision in the state constitution "may not operate to 'circumscribe the legislative power' granted by the Constitution of the United States." *Id.* at 246 (quoting *McPherson*).

Other state courts have reached the same conclusion. In *In re Opinion of Justices*, 45 N.H. 595 (1864), the New Hampshire Supreme Court upheld an act of the legislature permitting absent civil war soldiers to vote from their military location despite a provision in the state constitution to the contrary. "The authority of the State legislature" under the Elections Clause "is derived from the … Constitution of the United States," it held, and "is not an exercise of their general legislative authority under the Constitution of the

State, but of an authority delegated by the Constitution of the United States." "The constitution and laws of this State are entirely foreign to the question." *Id.* at 601. *See also Commonwealth ex rel. Dummit v. O'Connell*, 181 S.W.2d 691, 692, 695 (Ky. Ct. App. 1944) (upholding a similar absentee voter law allowing World War II soldiers to vote in congressional and presidential elections despite the right to vote absentee "being denied by the State Constitution").

Congress, too, has recognized that under the Elections Clause, the legislature of a state can allow for votes to be cast in *federal* elections in a manner that would be prohibited by the state constitution for *state* elections. In *Baldwin v. Trowbridge*, the House upheld the validity of votes cast in a congressional election pursuant to a state law that authorized voting by military members who were absent from their districts on Election Day, despite a state constitutional provision requiring that all votes be cast in person. D.W. Bartlett, Digest of Election Cases, H.R. Misc. Doc. No. 41-152, at 46-47 (1870) (cited in Morley, *supra*, at 150). And the U.S. Senate Committee on Privileges and Elections likewise concluded that a state legislature's power under the Electors Clause to regulate presidential elections cannot be:

> [T]aken from [state legislatures] or modified by their State constitutions any more than can their power to elect Senators of the United States. Whatever provisions may be made by statute, or by the State constitution, to choose electors by the people, there is no doubt of the right of the legislature to resume the power at any time, for it can neither be taken away nor abdicated.

121 S. Rep. No. 43-395, at 9 (1874) (cited in Morley, *supra*, at 150). *See also, e.g.*, Walter Clark, *The Electoral College and Presidential Suffrage*, 65 U. Pa. L. Rev. 737, 741 (1917) ("[T]he exercise of such power [to regulate presidential elections] is given to the state legislature subject to no restriction from the state constitution."); Richard D. Friedman, *Trying to Make Peace with* Bush v. Gore, 29 Fla. St. U. L. Rev. 811, 835 (2001) ("Suppose, then, that the state constitution forbade felons to vote. If the legislature, operating under the authority granted it by Article II rather than by the state constitution, decided that this limitation should not apply in voting for presidential electors, the legislative choice should prevail.").

McPherson's analysis with respect to the plenary power of the state legislatures under the Electors Clause of Art. II, § 1, cl. 2, as well as those of the several state courts and of Congress discussed above, is persuasive. And because the text of the Elections Clause is nearly identical to that of the Electors Clause (albeit subject to a congressional override in the former), the analysis is equally persuasive with respect to the power of the state legislatures under the Elections Clause. It is a plenary power granted to the *Legislatures* of the states, "and cannot be taken from them or modified by their state constitutions any more than can their power to elect senators of the United States." *McPherson.* 146 U.S. at 35.

II. Properly Understood, the Constitution's Assignment of Authority to the "Legislature of the State" Is Not An Assignment to *Legislative Authority* of the State, as Prior Decisions of this Court Have Suggested.

Chief Justice Roberts correctly noted in the Appendix to his dissenting opinion in *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n* that the federal Constitution assigns to the *Legislatures* of each state numerous specific tasks:

- Art. I, § 3, cl. 1: "The Senate of the United States shall be composed of two Senators from each State, *chosen by the Legislature thereof*, for six Years; and each Senator shall have one Vote." (Emphasis added, modified by Amdt. 17);

- Art. I, § 3, cl. 2: "… if Vacancies happen by Resignation, or otherwise, during the Recess of the *Legislature* of any State, the Executive thereof may make temporary Appointments until the next Meeting of the *Legislature*, which shall then fill such Vacancies." (Emphasis added, modified by Amdt. 17);

- Art. I, § 4, cl. 1: "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." (Emphasis added);

- Art. I, § 8, cl. 17: "Congress shall have power … to exercise like Authority [i.e., exclusive jurisdiction] over all Places purchased by the Consent of the *Legislature of the State* in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings...." (Emphasis added);

- Art. II, § 1, cl. 2: "Each State shall appoint, in such Manner *as the Legislature* thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector." (Emphasis added);

- Art. IV, § 3, cl. 1: "New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the *Legislatures of the States* concerned as well as of the Congress." (Emphasis added);

- Art. IV, § 4: "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on *Application of the Legislature*, or of the Executive (when the Legislature cannot be convened), against domestic Violence." (Emphasis added);

- Art. V: "The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, *on the Application of the Legislatures* of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when *ratified by the*

> *Legislatures* of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; …." (Emphasis added);

- Art. VI, cl. 3: "The Senators and Representatives before mentioned, and the Members of the several State *Legislatures*, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; …." (Emphasis added).

See Arizona, 576 U.S. at 850 (Roberts, C.J., dissenting; Appendix).

Leaving aside for the moment the Article I Elections Clause at issue here (and the parallel Electors Clause in Article II), the Legislatures of the several states act unilaterally in each case, without their decisions being subjected to a gubernatorial veto, or popular referendum, or any other constraints in their respective *state* constitutions. *See, e.g.*, *State of Rhode Island v. Palmer* [*Nat'l Prohibition Cases*], 253 U.S. 350, 386 (1920) ("The referendum provisions of state constitutions and statutes cannot be applied, consistently with the Constitution of the United States, in the ratification or rejection of amendments to it."); *Leser v. Garnett*, 258 U.S. 130, 137 (1922) ("the function of a state Legislature in ratifying a proposed amendment to the federal Constitution, like the function of Congress in proposing the amendment, is a federal function derived from the federal Constitution; and it transcends any limitations sought to be imposed by the people of a state."); *Hawke v. Smith*, 253 U.S. 221,

227-28 (1920) (noting that, prior to the 17th Amendment, Senators were chosen by "the legislature" pursuant to Article I, Section 3, whereas members of the House of Representatives were chosen "by the people" pursuant to Article I, Section 2); A Const. Convention Not the Legislature of A State., 12 U.S. Op. Atty. Gen. 428 (1868) ("A cession of jurisdiction over land purchased by the United States by a constitutional convention of a State is not a consent to the purchase by the legislature of the State within the sense of [Article I, § 8, cl. 17 of] the Constitution")[3]; *Ft. Leavenworth R. Co. v. Lowe*, 114 U.S. 525, 541 (1885) (noting that, in the settlement of a boundary dispute between the United States and Great Britain over territory within the jurisdiction of the States of Maine and Massachusetts, it was deemed necessary to obtain the consent of the Legislatures of those States, which was accomplished in Maine by Commissioners "appointed by her legislature," and in Massachusetts by Commissioners appointed "by her governor, under the authority of an act of her legislature"); Act for the Admission of W. Virginia into the Union., 10 U.S. Op. Atty. Gen. 426, 428 (1862) ("The consent required by [Art. IV, § 3, cl. 1 of] the Constitution [for the formation of new States out of the territory of existing States] is not the consent of the State generally, nor of its governor, nor its

[3] To be sure, state legislatures frequently provide their "consent" for the transfer of "exclusive" legislative authority to the federal government by way of statute, *see, e.g.*, Cal. Gov't Code § 111, cited in *Paul v. United States*, 371 U.S. 245, 266 n.33 (1963); *see also McPherson*, 146 U.S. at 29-32 (citing numerous state statutes), but none of the cases mentioning that fact that we have identified address whether a statute (complete with approval of the Governor) rather than a joint resolution was required. *See infra* at 19.

judiciary, nor its convention, but 'the consent of the legislatures of the States concerned.'")[4]; Act of Feb. 28, 1795, 1 Stat. 424, 3rd Cong., Sess. II, Ch. 36, cited in *Luther v. Borden*, 48 U.S. 1, 43 (1849) (authorizing the President to call forth the militia in response to domestic violence "upon the application of the legislature or of the executive" (as provided in Art. IV, § 4)).

The 1862 opinion of the Attorney General with respect to the legislature's "consent" to allow for the formation of West Virginia is instructive. In that opinion, the Attorney General expressly equated the unilateral authority given to the Legislatures of the states in Article IV, Section 3, Clause 1 to decide whether to "consent" to the creation of new states from within their territory to two other clauses: the power given to the legislatures under Article I, Section 3 to "choose the Senators *absolutely*;" and the power of the state legislatures under Article II to "direct the manner in which the electors of President and Vice-President shall be chosen." 10 U.S. Op. Atty. Gen. at 428. "[T]hese are constitutional functions which cannot be exercised by

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[4] The Attorney General was of the view that the new State of West Virginia could not be formed based on the consent of a "legislature" convened only in the counties that refused to secede from the union, but that the consent of the legislature of the whole state was required. The Supreme Court ultimately disagreed and recognized the creation of West Virginia in *State of Virginia v. State of W. Virginia*, 78 U.S. 39 (1870). The case of West Virginia is somewhat *sui generis*, of course, given the overlapping jurisdictional confusion arising from the attempt by Virginia to secede from the Union, but the Attorney General's opinion nevertheless confirms that it is the *legislature*, and not any other body of state government, which must give consent to the formation of a new state.

substitute, nor usurped by any other functionary," the Attorney General wrote. *Id.*

A century-old decision of this Court is believed to have held otherwise with respect to the Elections Clause. *State of Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916), was decided at the advent of the progressive era and involved one of that era's signature reforms, the referendum. The actual holding of the case centered on an Act of Congress, which purported to authorize that the "manner" of conducting congressional elections could be set by popular referendum rather than by the legislature itself, as the text of Article I explicitly provides. Here's the critical discussion from that opinion:

> Congress, in 1911, *in enacting the controlling law* concerning the duties of the states, through their legislative authority, to deal with the subject of the creation of congressional districts, expressly modified the phraseology of the previous acts relating to that subject by inserting a clause plainly intended to provide that where, by the state Constitution and laws, the referendum was treated as part of the legislative power, the power as thus constituted should be held and treated to be the state legislative power for the purpose of creating congressional districts by law.

Id. at 568 (emphasis added). Accordingly, the case should rightly be viewed as one involving Congress's supervisory power under Article I, § 4 to "make or alter" the time, place, and manner regulations established by the state legislature. Although the Court did

not confront the serious non-delegation and commandeering problems presented by the Act,[5] it held that action by referendum, as authorized by Congress, did not run afoul of the Article IV Republican Guaranty Clause. Whether the case can also be interpreted as *holding* that the assignment of power in the Elections Clause to the state legislatures is to be interpreted more broadly as the *legislative power* is a lot murkier. *See, e.g.*, Morley, *supra*, 109 Nw. U. L. Rev. Online at 143 ("the *Hildebrant* Court failed to recognize that a distinct Elections Clause claim existed, and instead transmuted the plaintiff's claim under that provision into a nonjusticiable Guarantee Clause argument").

Two other decisions of this Court are less murky, however. In *Smiley v. Holm*, this Court explicitly held that "the exercise of the authority [given to the Legislature by the Elections Clause] must be in accordance with the method which the state has prescribed for legislative enactments." 285 U.S. at 367. It distinguished the numerous other federal constitutional provisions assigning unilateral authority to the state legislatures as involving something other than a lawmaking power—as an "electoral body" when choosing Senators under article I, § 3 (prior to adoption of the 17th Amendment); as a "ratifying body" in the case of

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[5] *See, e.g.*, *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935) ("Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested"); *New York v. United States*, 505 U.S. 144, 166 (1992) ("even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts.").

proposed amendments to the Constitution under article V; or as a "consenting body," as in relation to acquisition of lands by the United States under article 1, § 8, cl. 17. Because the Elections Clause, in contrast, authorized the legislatures to do a quintessentially lawmaking thing, then the procedural requirements for ordinary lawmaking contained in the State's own constitution, including being subject to gubernatorial veto, should control, the Court held. 285 U.S. at 367.

There are several problems with the *Smiley* decision that we believe render it erroneous, or at least inapplicable to the dispute at issue here. Most importantly, the Court reasoned that because Congress itself, pursuant to its override authority, could only "make or alter" time-place-manner restrictions with the approval of the President (or, if vetoed, by overriding the veto), then the same must be true for the state legislatures' authority as well. *Id.* But the critical phrase which compels that conclusion for congressional override, "by law," does not exist in the clause granting authority to the state legislatures. The *Smiley* Court held that its appearance in the latter clause implied a similar constraint in the former, but the opposite is true as a textual matter. That the "by law" constraint is imposed on Congress but not on the state legislatures strongly indicates that the legislatures were given authority to act unilaterally, just as they were given authority to act unilaterally in the half dozen other instances where the Constitution uses nearly identical phrasing.

Another significant shortcoming of the *Smiley* decision is that it does not address at all the compelling language in *McPherson* asserting that when acting pursuant to the parallel Electors Clause (which, by

authorizing the state legislature to direct the "manner" of choosing presidential electors, is every bit as much an exercise of "lawmaking" authority, under the *Smiley* Court's reasoning, as that Court held to be authorized by the Elections Clause), the legislature's authority is *plenary* and cannot be constrained even by the State's own constitution. *See supra,* pp. 3-4.

Third, the *Smiley* Court also found compelling that through much of the nation's history, the state legislatures had submitted their time-place-manner election bills to their governors for approval. *Smiley*, 285 U.S. at 369-70; *see also* Hayward H. Smith, *History of the Article II Independent State Legislature Doctrine*, 29 Fla. St. Univ. L. Rev. 731, 759-61 (2001) (noting that legislative acts in 1788 by Massachusetts and New York were submitted to the Governor (in Massachusetts) and the Council of Revision (in New York) for approval). That historical evidence is much less compelling than the *Smiley* Court believed, however. When the New York Legislature's bill "*prescribing the manner of holding Elections for Senators"* was vetoed by the Council of Revision and the attempt to override the veto was unsuccessful, the New York Legislature simply appointed senators by concurrent resolution. Smith, *History*, *supra*, at 761 (citing 3 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL ELECTIONS, 1788-90, at 513 (Merrill Jensen *et al*. eds., 1976). Moreover, the states would likely conform their *federal* election regulations to their *state* election regulations as a matter of convenience. *Cf.* Federalist 59, at 363 (Rossiter, ed., 1961) (recognizing that the assignment "in the first instance, to the local administrators" would, "in ordinary cases … be both more convenient and more satisfactory"). Because the latter (an exercise of *state* constitutional authority) would

require the Governor's signature in the examples cited by the *Smiley* Court, it should not be surprising that the *federal* regulations contained in the same bill, the enactment of which was pursuant to *federal* constitutional authority, would be submitted to the Governor as well. But that tells us nothing about the necessity of doing so, only the convenience of doing so. "The prescription of the written law cannot be overthrown because the states have laterally exercised, in a particular way, a power which they might have exercised in some other way." *McPherson*, 146 U.S. at 36.

Fourth, if the State constitutions are to have any role at all, it would be in determining just what the "legislature" of the State is. The Minnesota Constitution at issue in *Smiley* was at the time (and remains) rather explicit and clear: "The legislature consists of the senate and house of representatives." Minn. Const. art. IV, § 1. Although the *Smiley* Court mentioned this provision in passing, it focused on another provision that gave a veto power to the Governor of the State. *Id.* art. IV, § 11. But that clause does not identify the Governor as a part of "the legislature"; he is instead identified as an "Executive officer." *Id.* art. V, § 1.

To be sure, a state constitution might well define "legislature" differently. Nebraska, for example, defines it as "one chamber." Neb. Const. art. III, § 1. Although the people of Nebraska have, since 1912, reserved to themselves the power to propose and enact laws directly and to approve or reject laws adopted by the legislature ("initiative" and "referendum), *id.,* they don't thereby become part of the "one chamber" legislature.

It might be contended that state constitutional provisions requiring the submission of bills to the Governor for approval or veto make the Governor a part of the legislative process, just as the "King-in-Parliament" is (or at least was) treated as a third component of the English legislature. *See* Matthew Hale, THE HISTORY OF THE COMMON LAW OF ENGLAND 2 (London, J. Nutt 1713)[6] (describing that the "Statute Laws, or Acts of Parliament," are "a Tripartite Indenture, between the King, the Lords, and the Commons; for without the concurrent Consent of all those Three Parts of the Legislature, no such Law is, or can be made."); *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 462 (1793) (Wilson, J.) ("The constituent parts of the Parliament are the King's majesty, the Lord's Spiritual, the Lord's Temporal, and the Commons"). But the medieval role of English monarchs as a third component of the English Parliament is distinctly different from the role of American presidents at the national level or governors at the state level. It is much more accurate to describe the latter two cases as providing a limited "check" on the legislature, not as actually being a part of the legislature. *See* Federalist 69, at 417 ("The qualified negative of the President differs widely from this absolute negative of the British sovereign"); Federalist 73, at 442-43 (noting that the qualified veto "establishes a salutary check upon the legislative body," both to protect the executive branch against encroachments by the legislature and to protect the community against the effects of faction); *see also* U.S. Const. Art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United

[6] Available at http://perma.cc/9T49-HRQB.

States, which shall consist of a Senate and House of Representatives").

Fifth, *Smiley*'s holding, to the extent it treats the legislatures of the states as exercising reserved powers defined by the state constitutions, is simply incompatible with this Court's subsequent decision in *Term Limits v. Thornton*, 514 U.S. 779 (1995). In that case, this Court rejected attempts by the people of Arkansas to impose term limits on their own members of Congress, holding that the power to add qualifications for *federal* office was "not within the 'original powers' of the States, and thus not reserved to the States by the Tenth Amendment." *Id.* at 800. The same is true of the Elections (and Electors) Clauses. The power to set the "time, place, or manner" of elections for *federal* congressional office, or to direct the "manner" of choosing the electors for the *federal* office of the President, is no part of the original powers of the states.

Sixth, *Smiley* overlooked numerous examples of State courts and of Congress itself recognizing that the plenary power afforded to the state Legislatures by Article I, § 4 could not be constrained by the state constitution. *See supra* at 7-9.

As problematic as the decisions in *Smiley* and *Hildebrant* are, the Court's decision in *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787 (2015), was a major leap beyond those holdings. Instead of merely allowing that a state constitution could require an additional step before the legislature could act (subjecting legislative bills to a referendum in *Hildebrant* or to a governor's veto in *Smiley*), *Arizona* allowed the "legislative authority" of the people to eliminate the "Legislature" of the state from the "time, place, and manner" process altogether. *Id.*

at 793. That holding simply cannot be squared with the text of Article I's Elections Clause (or Article II's Electors Clause), which quite unambiguously assign the power to set the "manner" for federal elections to the "legislature" of the state, not the people exercising their reserved "legislative authority" or anyone else. Indeed, when the framers wanted to assign power to the people of the state or some other entity rather than the "legislature," they knew how to do so. *See* U.S. Const. Art. I, § 2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States"); Art. I, § 3, cl. 2 ("if Vacancies [in the Senate] happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature"); Art. IV, § 4 ("The United States … shall protect each [State] against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence").

In sum, the several decisions holding (or appearing to hold) that the Constitution's explicit assignment of authority to the "Legislatures" of the States must instead be read as an assignment to the "legislative authority" of the state, even when that is not the actual "Legislature," simply cannot be sustained by the Constitution's controlling text. Those decisions should therefore be revisited.

III. At the Very Least, *Hildebrant, Smiley,* and *Arizona* Should be Cabined to the Methods for Lawmaking Contained in State Constitutions, Not to Substantive Constraints Contained Therein.

This case moves the needle even further from the explicit text of Article I (and the parallel text in Article II). There is simply no plausible argument that the judicial branch of the states are in any way exercising a concurrent *legislative authority* (as was the case in *Smiley* with respect to a gubernatorial veto), or a reserved *legislative authority* (as was the case in *Hildebrant* with respect to a referendum power), or even a substitute *legislative authority* (as was the case in *Arizona* with respect to a separate reapportionment commission). Instead, what the North Carolina Supreme Court did in the case below is substitute itself, in its exercise of *judicial* authority, for the "legislature" of the state, in its exercise of *legislative* authority, as the body assigned to determine the "time, place, and manner" for conducting federal elections. That removes the power over elections from the most accountable branch of government (the legislature) to the least accountable branch of government (the judiciary), contrary to both the explicit language and deliberate democratic intent of the Constitution and its framers. *Cf.*, *e.g.*, 1 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 48 (1911) (statement by James Mason supporting election by the people for members of the House of Representatives, which "was to be the grand depository of the democratic principle of the Govt").

Thus, even if the holdings of *Hildebrant, Smiley*, and *Arizona* are not to be revisited at this time, those cases should at the very least be cabined to address only the method by which the lawmaking power of the legislature is exercised under the constitutions of the several states, not other substantive constrains (particularly broad, amorphous constraints) contained in those state constitutions. Otherwise, the power given

to the "legislatures" of the states by the Elections and Electors Clauses would be instead exercised by the judicial branch of the states, using provisions of *state* constitutions to constrain the powers delegated to the state legislatures by the *federal* constitution. Such a result is simply not compatible with the actual text of the Elections and Electors Clauses.

CONCLUSION

The Elections Clause of Art. I, § 4, cl. 1 (and the parallel Electors Clause of Art. II, § 1, cl. 2) unambiguously assign to the "Legislatures" of the States the power to determine the manner for conducting federal elections. That power is "plenary," and because it is conferred by the *federal* constitution, it cannot be constrained by anything in *state* law or *state* constitutions to the contrary. The decision of the North Carolina Supreme Court below, substituting is "manner" of congressional apportionment for the "manner" adopted by the legislature of the State, should therefore be reversed.

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JOHN C. EASTMAN
Counsel of Record
ANTHONY T. CASO
CONSTITUTIONAL COUNSEL GROUP
174 W. Lincoln Ave, #620
Anaheim, CA 92805
(714) 943-9983
jeastman@ccg1776.com

Counsel for Amicus Curiae
The Claremont Institute's
Center for Constitutional Jurisprudence