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 BY STATE RESPONDENTS

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QUESTIONS PRESENTED

1. Does the Elections Clause bar a state legislature from prescribing rules that authorize state courts to exercise judicial review of election regulations for compliance with the state constitution?

2. When a state legislature regulates under the Elections Clause, may it pass laws that violate its state constitution?

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INTRODUCTION

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." U.S. Const. art. I, §4, cl.1. In the 233 years since North Carolina ratified the Constitution, the state legislature has never before claimed the power that its current leaders assert here: the power to prescribe federal-election regulations that violate the State's constitution and are immune from judicial review. That is for good reason. The Constitution's text and structure, overwhelming evidence of historical practice, bedrock principles of federalism and the separation of powers, and more than a century of this Court's precedent categorically foreclose Petitioners' extreme and dangerous reading of the Elections Clause.

At the outset, this case presents no occasion to consider Petitioners' principal contentions. In North Carolina, the General Assembly has exercised its lawmaking authority to prescribe a redistricting process that requires plans enacted by the legislature to conform to the State's constitution, and subjects those plans to judicial review. Because the legislature has *chosen* to carry out its redistricting responsibilities in this manner, the question whether state constitutions *independently* constrain state legislatures when they prescribe federal-election regulations has no bearing on the outcome of this case.

Petitioners attempt to rescind this legislative choice by contending that it amounts to an

impermissible delegation of lawmaking authority, in violation of the Elections Clause. That argument is misconceived. The authorizations in the redistricting statutes do not delegate legislative power. Rather, they assign to the courts their traditional *judicial* role: enforcing the state constitution and providing equitable remedies when necessary to rectify a constitutional violation.

The redistricting statutes accomplish this second objective by empowering the state courts to draw remedial maps—to be used for one election cycle only—if the legislature enacts an unconstitutional map and then fails to fix it. Petitioners take particular issue with this aspect of the redistricting scheme, despite this Court's many precedents confirming that courts may take precisely this kind of last-resort, remedial action.

But even if this Court believed that *legislatively authorized* judicial map-drawing somehow posed Elections Clause concerns, this appeal would not raise that issue. Petitioners' appeal of the trial court's map is *currently* pending before the North Carolina Supreme Court. That pending state-court appeal deprives this Court of jurisdiction.

Apart from their spurious delegation argument, Petitioners have not identified any reason why the General Assembly cannot choose to discharge its Elections Clause responsibilities in the way that it has. Were they to try, they would run headlong into the fundamental principles of federalism on which the Constitution is premised. The Constitution seeks to

preserve the States' sovereignty to the greatest extent possible, including their right to "define[themselves] as sovereign[s]" by establishing fundamental laws and regulating the power and structure of their instrumentalities. *Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991). It is inconceivable that the founding generation would have understood the Elections Clause to *forbid* state legislatures from authorizing state courts to enforce the state constitution and remedy proven violations.

If this Court chooses to look past this decisive issue and consider Petitioners' novel reading of the Elections Clause, the answer is equally straightforward. Those who drafted, debated, and ratified the Constitution understood the term "Legislature" to refer to a lawmaking body that draws its legitimacy from, and is constrained by, the constitution that creates it. The idea that state legislatures could "prescribe[ ]" "Regulations" that violate their own founding charters would have been anathema to the founding generation, whose great innovation was a constitutional government of separated powers that included judicial review as a core feature.

Given that the premise of Petitioners' argument is so discordant with the bedrock commitments of the founding generation, one would need exceptionally clear historical evidence to accept it. But history refutes the claim. Petitioners fail to identify anyone who espoused their reading of the Elections Clause during the ratification debates. The history at the state level is even clearer. Both before and after

ratification of the Constitution, nearly every State regulated federal elections through its constitution.

This Court, moreover, has always rejected claims that the Elections Clause frees state legislatures to violate state-constitutional requirements. Indeed, just three years ago, in a case involving a challenge to North Carolina's congressional districts, every member of this Court agreed that partisan congressional gerrymandering claims were not doomed to "echo into the void" because "state constitutions can provide standards and guidance for state courts to apply." *Rucho v. Common Cause*, 139 S.Ct. 2484, 2507 (2019). It is striking that Petitioners, who themselves *prevailed* in *Rucho* based in part on that assurance, now ask this Court to abandon it.

At bottom, Petitioners' reading of the Elections Clause clashes irreconcilably with the foundational constitutional principles on which our republic was built. This Court should reject it and affirm the decision below.

STATEMENT OF THE CASE

A. The North Carolina Supreme Court holds that the State's new congressional map violates the state constitution.

In November 2021, the North Carolina General Assembly enacted new districting maps. *See* S.L. No. 2021-173; S.L. No. 2021-174; S.L. No. 2021-175. The maps were to apply for the first time in the 2022 elections, beginning with the State's March primaries. *See* N.C. Gen. Stat. §163-1(b).

Individual voters and voting-rights groups—together, the Private Respondents—sued to enjoin use of the maps. Private Respondents alleged that the maps were extreme partisan gerrymanders that violated four provisions of the North Carolina Constitution, including the State's Free Elections Clause. Pet.App.257a-59a; *see* N.C. Const. art. I, §10 ("All elections shall be free."). State Respondents took no position on the merits of these claims.

The General Assembly has enacted a statutory scheme that governs legal challenges of this kind. Specifically, actions "challenging the validity" of redistricting maps are heard by special three-judge panels. N.C. Gen. Stat. §267.1(a). If a court concludes that a map is "unconstitutional," it must issue an order describing "every defect found" and give the legislature at least two weeks to "remedy [those] defects." *Id.* §120-2.3,-2.4(a). If the legislature fails to do so, "the court may impose an interim districting plan for use in the next general election only." *Id.* §120-2.4(a1). Consistent with these statutes, the Chief Justice of the North Carolina Supreme Court appointed a three-judge panel to preside over the case. *Id.* §1-267.1(a),(b).

The trial court declined to preliminarily enjoin the maps. The court reasoned that Private Respondents were unlikely to establish standing and that their claims were nonjusticiable political questions. Pet.App.261a-62a, 267a.

Private Respondents then sought relief in the North Carolina Supreme Court. That court granted a

preliminary injunction, delayed the State's primary election until May, and remanded the case for expedited trial proceedings. Pet.App.250a-51a.

After discovery and a trial, the trial court made "factual findings confirm[ing] … that each of the three enacted maps were 'extreme partisan outliers' and the product of 'intentional, pro-Republican partisan redistricting.'" Pet.App.24a; *see also* Pet.App.43a-47a. Nevertheless, because the trial court again believed that "claims of extreme partisan gerrymandering present [nonjusticiable] political questions," it upheld the maps. Pet.App.48a, 57a.

The North Carolina Supreme Court reversed. Pet.App.224a-233a. The court first held that, under state law, Private Respondents had standing, and that their claims were justiciable. Pet.App.60a-62a, 120a-21a.

Then, based on the trial court's factual findings, the state supreme court held that the General Assembly had violated the state constitution. Pet.App.11a-12a. As the court recognized, North Carolina's charter vests all "political power" in "the people." Pet.App.86a; N.C. Const. art. I, §2. To make good on that promise, the State's framers "adopted into [its] Declaration of Rights" specific language promoting "equality" and "popular sovereignty"—including a provision requiring "free" elections. Pet.App.87a, 91a; N.C. Const. art. I, §10. The court held that, under the General Assembly's maps, elections would "not [be] free and [would] not serve to effectively ascertain the will of the people," because

the maps were "highly non-responsive" to changes in public opinion. Pet.App.9a, 96a-97a. The maps thus violated voters' rights "to cast votes that matter equally." Pet.App.11a-12a.

The court briefly considered Petitioners' argument that the federal Elections Clause barred review of the congressional map. Pet.App.312a-15a. The court held that Petitioners had waived this argument because it "was not presented in the trial court." Pet.App.121a. In dicta, however, the court noted its view that Petitioners' Elections Clause argument was "repugnant to the sovereignty of states, the authority of state constitutions, and the independence of state courts." Pet.App.121a.[1]

Ultimately, the state supreme court reversed the trial court's judgment and remanded the case for remedial proceedings. Pet.App.142a. Consistent with state law, the court provided the General Assembly "the opportunity to submit new congressional and state legislative districting plans that satisfy all

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[1] As State Respondents explained in their opposition to certiorari, *see* BIO.33-35, the state supreme court found a waiver because Petitioners failed to raise the Elections Clause as an affirmative defense in their answers or otherwise pursue that defense at trial. *See* Pet.App.22a-23a, 121a. Under state law, appellate-preservation rules require parties to raise in the trial court "a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make." N.C.R.App.P.10(a)(1). The court below's waiver holding "constitutes an adequate and independent ground of decision barring review in this Court." *Michigan v. Tyler*, 436 U.S. 499, 512 n.7 (1978).

provisions of the North Carolina Constitution." Pet.App.142a, 232a; *see* N.C. Gen. Stat. §120-2.4(a).

This Court granted certiorari before the state-court remedial proceedings concluded. *See* BIO.36-38.

B. Remedial proceedings continued in the state courts and remain ongoing.

In response to the state supreme court's decision, the General Assembly enacted three new maps and submitted them to the trial court for review. Pet.App.275a. The trial court held that the legislature's new state House and Senate maps complied with the state constitution, but that the congressional map did not. Pet.App.291a-92a.

The trial court then followed the statutory procedure for "remedy[ing]" the "defects" in the congressional map. N.C. Gen. Stat. §120-2.4(a1). Specifically, the court adopted a "modified version of the proposed remedial congressional plan submitted by" Petitioners for use in the 2022 elections. Pet.App.292a-93a, 301a. The court emphasized that, as required by statute, it had adjusted Petitioners' map only to the extent necessary "to bring it into compliance" with the state constitution. Pet.App.292a.

Both Petitioners and Private Respondents appealed and sought temporary stays of the trial court's order in the North Carolina Supreme Court. Private Respondents challenged the trial court's decision to adopt the General Assembly's remedial state-legislative maps. Petitioners challenged the

trial court's decision to reject the General Assembly's remedial congressional map and to instead adopt an interim map for the 2022 election cycle. The state supreme court denied all parties' stay motions. Docket, *Harper v. Hall*, No. 413PA21 (N.C.), https://bit.ly/3MlqRUa.

The State held its primary elections on May 17 under the interim congressional map at issue here.

The parties' appeals from the trial court's order on the remedial maps remain pending before the North Carolina Supreme Court. Petitioners and Private Respondents have briefed the merits of their respective appeals. In that briefing, Petitioners did not argue that the trial court's actions violated the Elections Clause. The court heard oral argument on October 4, with a decision expected later this year. Petitioners, meanwhile, have also filed a motion to dismiss their appeal, which some Private Respondents opposed. That motion also remains pending.

SUMMARY OF THE ARGUMENT

This case need not be as complicated as Petitioners make it. While Petitioners' main arguments are meritless from every perspective, this case can be resolved without reaching them. No one disputes that state legislatures have the authority to prescribe election rules. In North Carolina, the legislature has prescribed a detailed statutory scheme authorizing judicial review of congressional redistricting to ensure that it complies with state-constitutional requirements. Everything the state courts did here

fell within that explicit grant of statutory authority. For that reason, this Court need not engage the sweeping arguments that Petitioners raise about the scope of legislative authority under the Elections Clause.

If this Court chooses to address those arguments, it should reject them. Text, history, and precedent all show that the Elections Clause does not free state legislatures from the requirements of their state constitutions.

The Clause's text directs state legislatures and Congress to make laws regulating federal elections. At the founding, the word "legislature" was universally understood to mean a body created and constrained by its constitution. Thus, like Congress, when state legislatures make laws regulating federal elections, they are bound by their constitutions and subject to ordinary limits on legislative power, including judicial review.

History removes any doubt that the Elections Clause does not empower state legislatures to act contrary to their own constitutions. Nearly every State that adopted or amended its constitution in the twenty-five years after ratification included a provision that directly regulated the "manner" of federal elections. And in the two centuries that followed ratification, States continued to frequently regulate federal elections through their constitutions.

This Court has also consistently held that state legislatures are bound by their constitutions when they prescribe regulations under the Clause.

Petitioners have not come close to sustaining their burden to overrule over a century of precedent.

Finally, adopting Petitioners' theory would create serious election-administration problems. States have crafted their election regimes in reliance on this widely shared understanding of the Elections Clause. Upending the States' time-tested systems would cause confusion, spawn protracted litigation, and possibly require States to conduct separate state and federal elections. Nothing in the Clause compels this anomalous result.

ARGUMENT

I. The North Carolina Legislature Authorized the Courts' Actions Below, So No Elections Clause Violation Occurred.

Everyone agrees that the Elections Clause directs a State's legislature to prescribe election rules. In North Carolina, the General Assembly has chosen to prescribe a redistricting scheme that commits the legislature to following the state constitution and empowers the state courts to review and—when absolutely necessary—remedy the legislature's maps.

Because this decision belonged to the legislature—that is, because the General Assembly *itself* committed to enacting constitutionally compliant maps—the question of whether North Carolina's constitution *independently* constrains the legislature is not implicated here. The only question is whether the Elections Clause *forbids* legislatures from

choosing constitutional compliance. It plainly does not.

Petitioners' only rejoinder is to warn that the Elections Clause precludes state legislatures from delegating their lawmaking authority to state courts. But this argument misconceives North Carolina's regime. Everything the courts are empowered to do under the state statutes falls squarely within their core judicial powers.

A. The General Assembly has committed to following the state constitution and authorized the courts to enforce compliance.

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." U.S. Const. art. I, §4, cl.1. In North Carolina, the General Assembly has exercised its power under this Clause to enact a statutory scheme addressing legal challenges to redistricting maps. S.L. No. 2003-434, §§7(a)-11(b), 2003 N.C. Sess. Laws 1313, 1415-17. Passed two decades ago, the legislation was enacted after redistricting litigation caused some 2002 elections to take place under court-drawn maps. *See Stephenson v. Bartlett*, 582 S.E.2d 247, 304 (N.C. 2003).

These statutes authorize North Carolina state courts to behave exactly as the courts below did in this case:

First, actions "challenging the validity" of state-legislative or congressional maps must be filed in Wake County Superior Court and heard by three-judge panels. N.C. Gen. Stat. §§1-81.1, 1-267.1(a).

Second, if the trial court concludes that "any act" of the General Assembly that "apportions or redistricts State legislative or congressional districts" is "unconstitutional," the court must issue an "order or judgment" that includes "all facts supporting" the declaration of unconstitutionality; "conclusions of law"; and "every defect found by the court, both as to the plan as a whole and as to individual districts." *Id.* §120-2.3.

Third, state courts may draw redistricting maps as a last resort. The courts must first give the legislature at least two weeks to "remedy any defects" in its original map. *Id.* §120-2.4(a). If the legislature "does not act to remedy any identified defects to its plan within that period of time, *the court may impose an interim districting plan for use in the next general election only*." *Id.* §120-2.4(a1) (emphasis added). The court's "substitute plan" may "differ from the districting plan enacted by the General Assembly only to the extent necessary to remedy any defects identified by the court." *Id.*

Together, these statutes prescribe the legislature's intended process for carrying out its Elections Clause responsibilities in the redistricting context. By design, that process prioritizes ensuring that the people vote under *constitutional* maps.

The courts below scrupulously complied with the legislature's prescriptions: A three-judge panel reviewed the congressional map for compliance with several provisions of the state constitution. After finding that the map did not comply with these provisions, the courts made the requisite findings of fact and law, and then afforded the legislature the opportunity to remedy the violations. Only when the legislature failed to do so did the trial court draw its own remedial map. Nothing about this process violates the Elections Clause.

This conclusion is reinforced by the fact that the courts were interpreting constitutional provisions that originated with the legislature itself. All of the provisions that the courts applied were proposed by the General Assembly in 1969, before being approved by voters in 1971. Ch. 1258, §1, 1969 N.C. Sess. Laws 1461, 1461-62. The legislature specifically proposed revisions to the Free Elections Clause, amending the language from "[a]ll elections *ought* to be free" to "[a]ll elections *shall* be free." N.C. Const. art. I, §10 (emphasis added); *see* Pet.App.95a-96a.

Unable to come to terms with what these statutes actually say, Petitioners attempt to rewrite them. They claim that these laws "do no more than govern the *procedure* that applies in whatever districting challenges may be authorized by other, substantive provisions of law." Br.47. That reading cannot survive an encounter with the statutes' text. One provision specifically provides that "[a]ny action challenging the validity of … congressional districts" "*shall be heard and determined*" by a three-judge panel. N.C. Gen.

Stat. §1-267.1 (emphasis added). Another makes clear that the panel may issue "order[s] or judgment[s] declaring [redistricting maps] unconstitutional." *Id.* §120-2.3. And another empowers state courts to "impose interim districting plan[s]." *Id.* §120-2.4(a1). These are not mere procedures.

Petitioners alternatively argue that these statutes authorize only challenges under the *federal* constitution. Br.48. That is wrong for at least three reasons.

First, Petitioners' argument ignores the statutory text. Section 1-267.1 authorizes "*any* action" challenging congressional maps to be heard in state court, not just actions involving federal claims. And §120-2.3 provides that state courts can declare maps "unconstitutional," making no distinction between state and federal claims. Notably, Petitioners do not claim that §120-2.3 bars state courts from reviewing *state-legislative* maps for compliance with the state constitution. Petitioners thus would presumably concede that the word "unconstitutional" in §120-2.3 necessarily encompasses at least some claims under the state constitution.

Second, Petitioners' atextual reading runs counter to state-court precedent and practice. Last year was the third time that the General Assembly has drawn new congressional maps since it passed these statutes. All three times, plaintiffs have challenged those maps on state-constitutional grounds. And all three times, state courts have allowed those claims to proceed to the merits. Pet.App.19a-22a, 141a-43a;

Harper v. Lewis, 19-CVS-012667, 2019 N.C. Super. LEXIS 122 (N.C. Super. Ct. Oct. 28, 2019); *Dickson v. Rucho*, 781 S.E.2d 404, 493 (N.C. 2015).

North Carolina legislators have understood the statutes in the exact same way. Until their briefing to this Court, neither Petitioners—nor any other prior legislators—had argued that §120-2.3 applies only to federal claims.

Third, the context in which these statutes were passed undermines Petitioners' reading. The laws were a direct response to *Stephenson*, a redistricting suit that raised *state*-constitutional claims. *See supra* pp.12-13. It strains credulity that the General Assembly would react to a lawsuit exclusively involving *state*-constitutional claims by passing laws that address only *federal*-constitutional claims.

B. The state statutes do not impermissibly delegate lawmaking power over redistricting to the courts.

Petitioners also assert that these statutes violate the Elections Clause by "delegat[ing] quintessentially legislative power" over redistricting to courts. Br.44-47.[2] This argument misconceives both these statutes

[2] Petitioners maintain a calculated ambiguity about their delegation theory, never clarifying whether the alleged limits on delegation in the Elections Clause context should be borrowed from federal or state law. *Compare* Br.44 (quoting the North Carolina Constitution), *with* Br.45 (citing *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935)). If state-law principles apply, then Petitioners' delegation argument presents state-law questions that are not fit for this Court's review.

and the role that they assign courts. These laws are not "delegations" at all. "Delegations" confer legislative power. That is not what these laws do. They merely provide that state courts will play their traditional *judicial* role in the redistricting context.

1. Authorizing state-court judicial review does not violate separation of powers.

In North Carolina, as in the federal system, the courts exercise judicial power. N.C. Const. art. IV. More than a decade before *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), North Carolina's highest court exercised that power to review state laws for compliance with the State's constitution. *Bayard v. Singleton*, 1 N.C. 5 (1787). In so doing, the court delineated the "limits on the powers of the branches of government created by [the state] Constitution." *Comm. To Elect Dan Forest v. Emps. Pol. Action Comm.*, 853 S.E.2d 698, 705 (N.C. 2021).

Yet while "those who apply [a legal] rule to particular cases[ ] must of necessity expound and interpret that rule," that judicial obligation is categorically distinct from legislative power. *Marbury*, 5 U.S. at 177. "[S]ay[ing] what the law is," in other words, is different from *making* law. *Id.*

Mullaney v. Wilbur, 421 U.S. 684, 691 (1975). At the same time, applying the *federal* nondelegation doctrine to state governments makes little sense. *See Mayor of Phila. v. Educ. Equal. League*, 415 U.S. 605, 615 n.13 (1974) ("The Constitution does not impose on the States any particular plan for the distribution of governmental powers.").

This distinction—between judging and legislating—does not change in the redistricting context. This case itself proves the point: Petitioners have asked this Court to construe the Elections Clause to place an implicit constraint on state courts that has never before been recognized. What this Court says may decide what congressional maps in North Carolina look like. But that does not make the Justices of this Court "legislators."

What North Carolina's courts did below is no less an exercise of judicial power merely because they interpreted what Petitioners call "open-ended guarantees." Many of the most important constitutional protections—state and federal—are stated in broad terms. *E.g.*, U.S. Const. amend. I ("Congress shall make no law ... abridging ... the right of the people peaceably to assemble"); N.C. Const. art. I, §6 ("The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other."). The breadth of those provisions often necessitates further explication and clarification by courts. *See, e.g.*, *Ams. for Prosperity Found. v. Bonta*, 141 S.Ct. 2373 (2021) (First Amendment bars States from requiring tax-exempt charities to disclose major donors). But to call that judicial decisionmaking "legislating" or "policymaking" is not just inaccurate—it also maligns the judicial branch for exercising its most central constitutional duty. *See Marbury*, 5 U.S. at 177-78.

Below, the North Carolina Supreme Court used classic judicial tools—text, history, and precedent—to interpret clauses that are no more "open-ended" than

those cited above. *See* Pet.App.91a-121a. For example, in discerning what it means for "[a]ll elections [to] be free," the court methodically traced the history of the State's Free Elections Clause. Pet.App.91a-95a. That provision "derived from a clause in the English Bill of Rights of 1689" meant to curb royal efforts to manipulate parliamentary elections. Pet.App.91a. North Carolina's Free Elections Clause, the court held, "was also intended for that purpose." Pet.App.92a-93a.

To further illuminate the Clause's meaning, the court examined surrounding constitutional text. Pet.App.92a-93a. The North Carolina Constitution declares that "all government of right originates from the people" and "is founded upon their will only." N.C. Const. art. I, §2. It further guarantees that elections be "[f]requent" as well as "free." *Id.* art. I, §§9-10. And through those elections, the people are meant to find a meaningful opportunity for "redress of grievances" and for "amending and strengthening the laws." *Id.* art. I, §9. Reading all these provisions together bolstered the court's conclusion: The purpose of the Free Elections Clause was to ensure that "those in power shall not attain 'electoral advantage' through the dilution of votes." Pet.App.93a.

The court then looked to three other provisions of the state constitution—the Free Speech, Freedom of Assembly, and Equal Protection Clauses—and conducted a similar analysis under each. Pet.App.97a-106a. Based on text, history, and precedent, the court held that they, too, prohibited excessive partisan gerrymandering. Pet.App.102a, 106a.

This careful interpretation of North Carolina's constitutional protections by the State's highest court was not "legislation" or "policymaking," as Petitioners claim. Rather, it was precisely the kind of rigorous and careful legal analysis for which this Court's opinions serve as a blueprint.

Petitioners' argument also highlights further incoherence within their broader theory. Petitioners concede that state courts can evaluate congressional maps for compliance with the *federal* constitution, and they offer the Equal Protection Clause as an example. Br.23, 48. Yet Petitioners cannot explain why state courts may permissibly apply the *federal* Equal Protection Clause—an indisputably "general" provision—but may not apply the state analogue without engaging in "lawmaking."

In assigning state courts the responsibility to review congressional maps for constitutional compliance, the General Assembly did not delegate *legislative* authority. It confirmed that, in the redistricting context, state courts should play their traditional *judicial* role by reviewing the legislature's actions to ensure that they conform to the constitutional requirements that the legislature bound itself to respect. Petitioners' argument to the contrary fundamentally misperceives the nature of judicial review.

2. By authorizing state courts to draw remedial maps, the General Assembly did not impermissibly delegate lawmaking power.

Petitioners also devote significant attention to the fact that the trial court drew a remedial map. Br. 49-50. Implicit in this focus is the suggestion that even if state courts can invalidate redistricting plans, state legislatures cannot allow courts themselves to draw remedial maps.

In making these arguments, Petitioners have highlighted an issue that is irrelevant to this appeal. The state-court order that is before this Court *does not involve a court-drawn map*. This Court therefore lacks jurisdiction over any questions related to the remedial map.

In any event, Petitioners' argument fails. This Court has repeatedly made clear that drawing remedial maps is a permissible exercise of a court's equitable power.

a. This Court lacks jurisdiction over the trial court's remedial map.

The proceedings below transpired in two distinct phases. The first—the "liability" phase—addressed the constitutionality of the legislature's *original* congressional map. That phase was resolved by the state supreme court's decision invalidating the map. Pet.App.130a. The second phase—the "remedial" phase—encompasses the trial court's evaluation of the

legislature's *second* congressional map and the court's decision to draw a remedial map under §120-2.4(a1).

This second, remedial phase—involving the court-drawn map—has not reached final judgment. The state supreme court declined to stay the map immediately after it was entered, but that court has not yet decided the merits, having just heard argument on October 4th.

Because there has been no final judgment regarding the remedial phase, this Court lacks jurisdiction over any questions related to it. Congress has limited this Court's jurisdiction to "[f]inal judgments" "rendered by the highest court of a State." 28 U.S.C. §1257(a). The trial court's decision to draw a remedial map plainly does not meet this requirement. That decision is *currently* subject to a pending appeal in the state supreme court.

As a result, this Court currently lacks jurisdiction over any challenge to the remedial map—and it may never secure it. After this Court granted certiorari, Petitioners *moved to dismiss* their appeal challenging the court-drawn map. Legislative Defendants' Mot. To Dismiss Appeal at 3, *Harper*, No. 413PA21 (N.C. July 13, 2022). If granted, that motion will foreclose any prospect of a "[f]inal judgment[ ] ... by the highest court of [North Carolina]" regarding the remedial phase. 28 U.S.C. §1257(a).

Since there has been no final judgment regarding the court-drawn remedial map, Petitioners' arguments about the propriety of such maps are purely academic.

b. Courts may constitutionally draw remedial maps under their equitable powers.

Even if this Court had jurisdiction to consider Petitioners' challenge to the remedial map, that challenge would fail. Petitioners claim that, by empowering the state courts to draw remedial maps, the state legislature has impermissibly delegated the authority to prescribe the manner of congressional elections. Br.49-50. Again, Petitioners are wrong.[3]

First, Petitioners again mischaracterize the North Carolina scheme. Throughout the redistricting process, the state legislature retains the right to prescribe redistricting plans. The legislature draws the initial maps. The legislature has the first opportunity to draw remedial maps, if their original maps are unconstitutional. And even in the limited circumstances where an impending election requires a court to draw a temporary remedial map, the legislature retains the authority to redistrict again immediately following the election.

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[3] To the extent Petitioners are arguing that §120-2.4 poses a deeper separation-of-powers problem, they are incorrect. Court-drawn maps pose no problem under the separation of powers mandated by the North Carolina Constitution: Both the state supreme court and the legislature have expressly approved of them. *Stephenson v. Bartlett*, 562 S.E.2d 377, 385, 392 (N.C. 2002); Pet.App.232a (similar). In fact, Petitioners themselves have argued in support of §120-2.4 *in this case*. Legislative Defendants-Appellees' Br.193, *Harper v. Hall*, 868 S.E.2d 499 (N.C. 2022) (No. 413PA21) (calling the remedial process described in §120-2.4 "eminently reasonable," and one that "correctly honors the State's separation of powers").

Yes, as Petitioners note, if the legislature twice fails to draw a constitutional map, the legislature has authorized courts to use their traditional equitable authority to draw an interim remedial map. When that happens, however, the courts are not exercising delegated lawmaking power. Rather, they are employing quintessential *judicial* power—the power to remedy a proven constitutional violation.

This Court has proved that point in case after case, repeatedly affirming judicial authority to draw maps using equitable remedial powers. In *Growe v. Emison*, for example, this Court went so far as to call the district court's failure to recognize the legitimacy of state *judicial* redistricting "clear error." 507 U.S. 25, 33-34 (1993). Additional examples abound. *E.g.*, *Perry v. Perez*, 565 U.S. 388, 392-97 (2012) (per curiam) (providing guidance on how courts should draw remedial maps); *Abrams v. Johnson*, 521 U.S. 74, 101 (1997) (approving court-drawn maps, after the legislature was "unable to reach a solution"); *Scott v. Germano*, 381 U.S. 407, 409 (1965) (per curiam) ("The power of the judiciary of a State ... to formulate a valid redistricting plan has not only been recognized by this Court but ... has been specifically encouraged.").

These many holdings reflect the basic principle that "[t]he essence of equity jurisdiction" is the "power ... to mould each decree to the necessities of the particular case." *Hecht Co. v. Bowles*, 321 U.S. 321, 329-30 (1944); *see also Mahan v. Howell*, 410 U.S. 315, 333 (1973) (grounding the court's authority to draw redistricting maps in its equitable remedial powers).

Exercise of this equitable authority is sometimes unavoidable if constitutional districts are to be in place in time for elections. Elections cannot be delayed indefinitely, and legislatures do not always devise constitutional solutions, either in the first instance or as part of a remedial effort. In those circumstances—for instance, when proceeding with a legislatively drawn map would violate "one person, one vote"—courts are "left with the unwelcome obligation of performing in the legislature's stead." *Connor v. Finch*, 431 U.S. 407, 415 (1977). And there is no reason that responsibility should fall to federal courts alone. Indeed, it would be odd, given the Constitution's commitment to federalism, to read the Elections Clause to deny state courts the same remedial authority that federal courts possess in parallel circumstances.

To be sure, court-drawn remedial maps should be the exception, not the rule. *Id.* at 414-15. Courts "should make every effort" not to encroach upon the legislature's prerogative to redistrict. *Wise v. Lipscomb*, 437 U.S. 535, 539 (1978).

That is precisely the kind of last-resort regime that North Carolina has established. By statute, the state courts may draw a remedial map only if the legislature has twice failed to draw constitutional districts, and even then for "use in the next general election only" and "only to the extent necessary to remedy any defects identified by the court." N.C. Gen. Stat. §120-2.4(a1).

The General Assembly's decision to authorize the state courts to exercise their traditional remedial powers—in a carefully cabined manner—raises no issue under the Elections Clause and is in accord with the consistent holdings of this Court.

* * *

At bottom, there is simply nothing to Petitioners' argument that the Elections Clause *forbids* state legislatures from adopting a scheme like North Carolina's, where legislators pledge to abide by the constitution in redistricting and empower state courts to enforce compliance. Our entire constitutional system was designed to preserve for the States "a residuary and inviolable sovereignty." The Federalist No. 39, at 245 (James Madison) (C. Rossiter ed. 1961). Against this backdrop, it is implausible that the Framers would have *stripped* state legislatures of the discretion to rely on their state courts' traditional role as enforcers of the state constitution.

II. The Elections Clause Does Not Allow State Legislatures To Violate Their Own Constitutions.

If this Court decides to consider Petitioners' Elections Clause argument, the Court should reject it. Text, history, and precedent all show that state legislatures must comply with their constitutions when they carry out the responsibilities assigned to them by the Elections Clause. Petitioners therefore have not come close to carrying their burden to show that the Clause's original public meaning supports their radical and unprecedented reading.

A. Petitioners' theory is incompatible with constitutional text and structure.

The Elections Clause directs "the Legislature" of each State to "prescribe[ ]" laws regulating congressional elections. U.S. Const. art. I, §4, cl.1. The Clause's text and structure show that state legislatures must enact election laws just as they would any other law: subject to the limitations of their constitutions.

1. Petitioners' argument cannot be squared with the Elections Clause's text.

The founding generation believed that legislatures were, by definition, limited by the charters that created them. Samuel Adams, for example, argued that because a legislature derives its "Power & Authority from the Constitution," its enactments "cannot overleap the Bounds of it without destroying its own foundation." Gordon S. Wood, *Foreword: State Constitution-Making in the American Revolution*, 24 Rutgers L.J. 911, 921 (1993) (quoting 1 *The Writings of Samuel Adams* 185 (Harry A. Cushing ed., 1904)). George Mason also argued at the Constitutional Convention that state legislatures are created by constitutions "and cannot be greater than their creators." 2 *The Records of the Federal Convention of 1787*, at 88 (Max Farrand ed., 1911). Alexander Hamilton similarly explained during the public ratification debates that most "State governments" were structured under state constitutions that required statutes "to give place to" those constitutions

whenever there was "an evident opposition" between them. The Federalist No. 81, *supra*, at 482.

Notably, James Wilson, who drafted the precursor to the Elections Clause, understood these principles as well. *See* 2 Farrand, *supra*, at 152 n.14, 155, 165. Wilson explained that if a government sought to free itself from its constitution's "direct[ion] and control[ ]," it would "destroy the foundation of its own authority." 1 *Collected Works of James Wilson* 712 (Kermit L. Hall & Mark David Hall eds., 2007).

The Founders feared that legislatures would stray beyond their constitutional authority. Hamilton lamented the "propensity of the legislative department to intrude upon the rights and to absorb the powers" of other branches. The Federalist No. 73, *supra,* at 442. Madison similarly warned that "everywhere" "the legislative department" was "extending the sphere of its activity and drawing all power into its impetuous vortex." The Federalist No. 48, *supra*, at 309.

This distrust arose, in large part, from the Framers' experience with state legislatures during the Articles of Confederation period. In the years before the Convention, state legislatures had often tried to violate the "fundamental principles that led the people to create their constitutions in the first place." Wood, *supra*, at 922; *see* Gordon S. Wood, *The Creation of the American Republic 1776-1787*, at 403-09 (2d ed. 1998).

To counteract this threat, the Founders' chief innovation was a system of checks and balances. If the

governmental "departments [were] … give[n] each a constitutional control over the others," the Founders believed that "the degree of separation" so "essential to a free government" would follow. The Federalist No. 48, *supra*, at 308.

Judicial review was key to this careful balance. Based on their experience in their respective States, the Framers expected that judiciaries would counterbalance legislatures by enforcing constitutional limits. As Hamilton explained, judicial review "not only serves to moderate the immediate mischiefs of those [laws] which may have been passed," but "operates as a check upon the legislative body in passing them." The Federalist No. 78, *supra*, at 470.

Indeed, before ratification, courts in at least seven States had already declined to give effect to statutes that transgressed "a fundamental charter" or "other species of higher law." Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. Chi. L. Rev. 887, 933 (2003). In Rhode Island, for example, a court declined to enforce a statute that denied a defendant his jury-trial right. *Id.* at 933 n.171. His counsel argued that the legislature could not enact such a law "without destroying the foundation of their authority." William M. Meigs, *The Relation of the Judiciary to the Constitution* 70-71 (1919). The Framers specifically discussed these rulings at the Constitutional Convention. Prakash & Yoo, *supra*, at 934-35. And they repeatedly expressed their view that legislatures had no power to pass unconstitutional

laws—a limit enforced through judicial review. *Id.* at 940-41.

North Carolina's early history mirrors this broader national experience. In 1776, North Carolinians elected delegates to draft the State's first constitution. Delegates were directed to ensure that "the power of making laws" would be subject to "limitations and restraints." 10 *Colonial and State Records of North Carolina* 870h (William L. Saunders ed., 1886). And they were specifically instructed to adopt "a bill of rights" that could "never be infringed in any future time by the law-making power." *Id.* at 870a. The delegates followed these instructions, adopting a declaration of rights that was "part of the Constitution" and therefore could not "be violated." N.C. Const. of 1776, §XLIV.

North Carolina's highest court enforced these constitutional limits even before the State ratified the federal constitution. In 1787, the court considered a state law that violated the right to "trial by jury" under the state constitution. *Bayard*, 1 N.C. at 7. Striking down the law, the court held that when the legislature passes a law that conflicts with its constitution, it "*destroy[s] [its] own existence as a Legislature*." *Id.* (emphasis added). The court also recognized the power and necessity of judicial review, without which legislators could entrench themselves in office as "Legislators of the State for life." *Id.*

In reaching its holding in *Bayard*, the court was persuaded by the arguments of James Iredell, who played a key role in North Carolina's ratification of

the U.S. Constitution and later served as one of this Court's founding Justices. 1 *Life and Correspondence of James Iredell* 39-40, 279 (Griffith J. McRee ed., 1857). Iredell explained that North Carolina *did not* have a legislature independent from constitutional limits on its lawmaking power, unlike "the British Parliament," which had "absolute and unbounded authority." *Id.* at 146. Rather, because the General Assembly is itself "a *creature* of the constitution," its legislation is necessarily "limited and defined by the constitution." *Id.*

2. Petitioners' arguments also collide with the Constitution's structure.

The parallel lawmaking roles that the Elections Clause assigns to the federal and state legislatures further confirm that ordinary constitutional constraints apply. Congress cannot ignore the limitations imposed by the Constitution when it exercises its Elections Clause authority. Nothing in the Clause suggests that a different rule applies to state legislatures.

The Elections Clause invokes the lawmaking powers of both state legislatures and Congress. Specifically, the Clause requires state legislatures to "prescribe[ ]" "Regulations" for federal elections that Congress may "make or alter." U.S. Const. art. I, §4, cl.1. The Constitution consistently uses this language to confer lawmaking authority on Congress. *E.g.*, *Id.* art. IV, §1 (Congress "may by general Laws *prescribe*" Full Faith and Credit legislation (emphasis added)); *id.* art. I, §8, cl.3 (Congress has the power to "*regulate*

Commerce" (emphasis added)); *id.* art. III, §2, cl.2 (this Court has appellate jurisdiction "under such *Regulations* as the Congress shall *make*" (emphasis added)).

No one disputes that when Congress passes laws, including under the Elections Clause, it must abide by constitutional constraints. *See Wesberry v. Sanders*, 376 U.S. 1, 6 (1964) ("nothing in the language" of the Clause gives Congress "exclusive authority," unconstrained by judicial review). The Clause's text does not call this well-established principle into question. If anything, the text only reinforces that the normal constraints on lawmaking apply: it specifically requires that Congress act only "by Law." U.S. Const. art. I, §4, cl.1.

Because the Elections Clause confers parallel lawmaking power on Congress and state legislatures, one would expect both to be bound in parallel by their constitutions. This expectation arises, in part, from the Clause's text: its language contains no signal that the Framers intended to exempt state legislatures from usual lawmaking norms or judicial review, yet retain those checks for Congress. But it also arises from the Framers' wary view of legislatures: they were exceedingly concerned about that branch's ability to accrete power, and so favored a system of checks and balances. *See generally* The Federalist No. 51. Petitioners' position requires this Court to believe that—on this one occasion in the entire Constitution—the Framers cast aside their oft-voiced concerns and conferred plenary lawmaking authority on a legislature, *all without saying a word*. Surely not.

Petitioners make two feeble arguments to support their idiosyncratic reading. Neither works.

First, Petitioners argue that because the Elections Clause grants a *federal* power—regulating congressional elections—the *federal* constitution alone can constrain that power. Br.22. Constitutions, Petitioners say, can limit only functions that they themselves assign. *Id.* But this argument ignores the dual nature of the power that state legislatures exercise when they regulate congressional elections. Petitioners are right that this Court has held that the Clause is an "express delegation[ ]" of federal power. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 805 (1995). But to exercise that power, state legislatures still must pass *state laws*, and their authority to do that arises from their state constitutions.

This principle distinguishes election regulation from other functions that state legislatures fulfill, like ratifying amendments. U.S. Const. art. V; *cf. Hawke v. Smith*, 253 U.S. 221, 229 (1920) (ratification "is not an act of legislation within the proper sense of the word"). When state legislatures take an up-or-down vote on a proposed amendment, they are not piggybacking on any power granted them under their state constitutions, but rather are acting pursuant to the federal constitution alone.

Second, Petitioners argue that the Framers intended for Congress to serve as the only check on overreach by state legislatures. Br.18. But by providing this check, the Clause's text reflects distrust of—not deference to—state legislatures. Suspicious of

state legislatures, the Framers would not have freed them from state-constitutional limits on their authority, especially without saying so expressly. Were they freed in that way, legislatures could assign themselves the power to enforce and adjudicate their own election laws—an accumulation of powers the framers viewed as "the very definition of tyranny." The Federalist No. 47, *supra*, at 301. Ordinarily, moreover, the Constitution's imposition of one check on an actor's authority does not silently nullify all other limits on that authority. *See, e.g.*, U.S. Const. art. I, §7, cl.2 (checking Congress's power to legislate with the President's veto). It does not do so here.[4]

3. Petitioners' contrary "evidence" cannot support their novel theory.

As this discussion illustrates, freeing state legislatures from their constitutions would have been antithetical to the core commitments of the founding generation. One would expect such a dramatic departure to have been accompanied by extensive discussion and debate during ratification.

Yet Petitioners can point to *nothing* of this kind. They cannot even identify a single person who, during the drafting or ratification of the Constitution, ever

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[4] Congress's role does bear on the analysis in this case, however. As Private Respondents explain in more detail, Congress *has* used its power under the Elections Clause to require compliance with state constitutions in redistricting. *See* Private Resps' Br.II.B (explaining that, under 2 U.S.C. §2a(c), States must redistrict "in the manner provided by the law thereof," including substantive rules in state constitutions).

argued that the Elections Clause freed state legislatures from their constitutions. *See* Br.13-39. Their failure to do so is particularly notable, given how extensively the Framers debated Congress's role under the Clause. *E.g.*, 2 Farrand, *supra*, at 239-42; The Federalist Nos. 59-61; *see* Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, 55 Ga. L. Rev. 1, 32 (2020) (conceding that the Clause's drafting and ratification history does not show that "the Framers or the greater public intended or understood" it to create independent legislatures).

Lacking any direct evidence, Petitioners seek to draw inferences from the so-called Pinckney Plan. Br.15-17. According to Petitioners, Charles Pinckney first proposed assigning States, not legislatures, the authority to regulate elections. *See id.* at 15 (citing 3 Farrand, *supra*, at 597). Petitioners assert that after Pinckney's proposal was referred to the committee of detail, the committee edited Pinckney's clause to confer this power on state legislatures, not States more generally. *Id.* at 15-16. In Petitioners' view, this change shows that the committee meant to free legislatures from their constitutions when they made federal-election rules. *Id.*

But Pinckney's "so-called draft has been so utterly discredited that no instructed person will use it." John Franklin Jameson, *Studies in the History of the Federal Convention of 1787*, 1 Ann. Rep. Am. Hist. Ass'n 87, 117 (1903). This plan first appeared in the historical record three decades *after* the Convention, when Pinckney submitted it for inclusion in the

Convention's records. *See* 3 Farrand, *supra*, at 595. After reviewing it, the few still-living Convention delegates, including Madison, were "perplexed" by the submission and "perfectly confident" that the plan's particulars "could not have been contained in the original draft." *See id.* at 479, 602. In fact, Pinckney himself "never asserted that its terms were those contained in his plan as actually introduced into the Convention." William M. Meigs, *The Growth of the Constitution in the Federal Convention of 1787*, at 14 (1900). Nor is it plausible that Pinckney would have proposed such a plan: he had vociferously opposed popular congressional elections and never would have proposed them to the Convention. 1 Farrand, *supra*, at 132. Historians have thus concluded that it is "absolutely conclusive" that the plan "cannot possibly" be the original. Meigs, *Growth*, *supra*, at 14. Petitioners' strongest "evidence" for independent state legislatures is thus no evidence at all.

Petitioners next turn to Hamilton's statement in Federalist No. 59 that Elections Clause authority "must either have been lodged wholly in the national legislature, or wholly in the State legislatures, or primarily in the latter and ultimately in the former." Br.20. Petitioners note that Hamilton failed to list "any role for the judiciary," and insist this omission confirms legislatures' independence. But Hamilton's statement hardly proves that point. Hamilton also said nothing about *federal* judicial review, yet Petitioners concede that federal courts may review Elections Clause legislation under the federal constitution. *Id.* at 23; *see Wesberry*, 376 U.S. at 6. And

as noted, Hamilton elsewhere recognized that state legislatures could not pass laws that violate state constitutions. The Federalist No. 81, *supra*, at 482.

At bottom, Petitioners' case depends on an inference that is so out of tune with the tenor of the founding era as to be utterly implausible. "The Framers of the Federal Constitution … viewed the principle of separation of powers as the absolutely central guarantee of a just Government." *Morrison* v. *Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting); *see id.* ("Without a secure structure of separated powers, our Bill of Rights would be worthless"). Yet Petitioners ask this Court to infer that when it came to the manner in which federal elections would be conducted—an area the founding generation surely knew created enormous opportunities for mischief, partisan and otherwise—the Framers deliberately chose to cut state legislatures loose from the core separation-of-powers constraints that the constitutions of every founding-era State had in place.

One would need the clearest of clear statements before accepting such an ahistorical and dangerous reading of the Elections Clause. Yet Petitioners fail to "cite any evidence suggesting that" state-constitutional regulation of federal elections "has ever been widely considered offensive" to the Constitution. *See Houston Cmty. Coll. Sys. v. Wilson*, 142 S.Ct. 1253, 1259 (2022). That failure should end this case.

B. Petitioners' theory ignores founding-era practice.

Historical evidence from the time of the founding also refutes Petitioners' reading of the Elections Clause. Nearly all state constitutions regulated national elections before the Constitution's ratification. The Elections Clause did not change this practice. In fact, many States adopted constitutional provisions regulating federal elections in the years immediately after ratification. And contemporaneous practice shows that the Clause was not understood to displace these provisions.

As a precursor to the Elections Clause, the Articles of Confederation provided that "delegates" to the Confederation Congress be "appointed in such manner as the legislature of each state shall direct." Articles of Confederation of 1781, art. V, para. 1. Thus, the Articles, like the Elections Clause, allowed legislatures to pass laws on the "manner" for choosing congressional representatives.

After the Articles were drafted, however, nearly every State ratified a constitution that governed how delegates were chosen. *See* Hayward H. Smith, *Revisiting the History of the Independent State Legislature Doctrine*, 53 St. Mary's L.J. 476-80 & n.152 (2022). This "experience[ ]" with the Articles properly informs the original public meaning of the Elections Clause. *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 406-07 (1819); *see Smith v. Turner*, 48 U.S. 283, 355-56 (1849). Had the Framers found this "existing rule" inappropriate, they could have drafted

the Elections Clause to make clear that state legislatures did not have to comply with their state constitutions. *U.S. Term Limits*, 514 U.S. at 899-900 (Thomas, J., dissenting). They did not do so.

This trend continued after the U.S. Constitution was ratified. In the ensuing twenty-five years, *ten* of the eleven States that enacted or amended their constitutions adopted constitutional provisions that regulated federal elections, including some provisions that were drafted or voted for by the same people who drafted and debated the U.S. Constitution. *Cf. District of Columbia v. Heller*, 554 U.S. 570, 584 (2008) (looking to "state constitutional provisions written in the 18th century or the first two decades of the 19th" to discern original meaning).

The Delaware Constitution of 1792, for instance, required the State's representatives "in Congress" to be "voted for ... in the same Manner" as state legislators—specifically, "by ballot," rather than voice vote. Del. Const. of 1792, art. VIII, §2; *id.* art. IV, §1. The convention that adopted this provision was led by John Dickinson, one of the Framers of the U.S. Constitution. *See* Smith, *supra*, at 484-85.[5]

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[5] Petitioners suggest that Delaware's Constitution should be disregarded because its regulation of federal elections in fact served only as a "restraint of the legislature's authority to regulate *state* elections." Br.36. They are incorrect. Delaware's Constitution prescribed specific rules for state elections, then required that federal elections be conducted in lockstep with those state-elections rules. Del. Const. of 1792, art. IV, §1.

Maryland similarly amended its Constitution in 1810 to require that elections "for Representatives [to] the Congress of the United States" be conducted "by ballot." Md. Const. of 1776, art. XIV (1810).[6]

Six States also adopted constitutional provisions requiring "all elections" to be held either by ballot or voice vote.[7] Meanwhile, five States adopted provisions requiring "all elections" to be "free."[8] And still others adopted constitutions that indirectly limited the way their legislatures regulated federal elections by, for example, barring legislatures from administering their own laws. *See, e.g.*, N.H. Const. of 1792, art. XXXVII.

If Petitioners were right, all of these provisions would have violated the Elections Clause. Instead, they are powerful evidence that Petitioners' interpretation of that Clause cannot be correct.

Contemporaneous practice confirms the point. In 1804, for example, a congressman who had helped

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[6] Petitioners also suggest that Maryland's constitution is irrelevant because its legislature could amend its charter by statute. Br.36-37. They are mistaken. That state constitution could be amended only by the vote of *two successive* legislatures, allowing voters to dismiss legislators who voted for unpopular proposed amendments. *See* Md. Const. of 1776, art. LIX.

[7] Ga. Const. of 1789, art. IV, §2; Pa. Const. of 1790, art. III, §2; Ky. Const. of 1792, art. III, §2; Tenn. Const. of 1796, art. III, §3; Ohio Const. of 1803, art. IV, §2; La. Const. of 1812, art. VI, §13.

[8] N.H. Const. of 1792, art. XI; Del. Const. of 1792, art. I, §3; Ky. Const. of 1792, art. XII, §5; Vt. Const. of 1793, ch.2, §34; Tenn. Const. of 1796, art. XI, §5.

draft Pennsylvania's 1790 constitution oversaw the U.S. House's resolution of an election contest that arose from his State. *See* Smith, *supra*, at 488-89. In doing so, he explained that the Pennsylvania Constitution's command that "all elections shall be by ballot" applied to congressional elections. Pa. Const. of 1790, art. III, §2; *see* 8 Annals of Cong. 849-50 (1804).

Georgia officials also applied state-constitutional provisions to federal elections. Georgia's first constitution required votes to be cast "in the county where such person resides." Ga. Const. of 1777, art. XI. In 1789, a House candidate argued to Georgia's Executive Council that this provision did not apply in his congressional election. 2 *Documentary History of the First Federal Elections 1788–1790*, at 462-63 (Merrill Jensen & Robert A. Becker eds., 1976). The Council disagreed, concluding that the case "comes within ... the State Constitution." *Id.* at 465.

Petitioners offer several arguments to blunt the force of this overwhelming historical record. None has any merit.

Petitioners first assert that state-constitutional provisions that regulated "*all* elections" did not in fact apply to all elections—just state elections. Br.38-39. Not so. The meaning of the word "all" was as clear at the founding as it is today: It meant "every one" or the "whole quantity." *All*, Samuel Johnson, *A Dictionary of the English Language* (10th ed. 1792). In contrast, in those limited instances when drafters of early state constitutions wanted to limit constitutional

restrictions to state, rather than federal, elections, they did so expressly. *E.g.*, Conn. Const. of 1818, art. VI, §7 ("In all elections of officers *of the State* or members *of the General Assembly*, the votes of the electors shall be by ballot." (emphasis added)).

Petitioners resist this straightforward conclusion by arguing that constitutional limits apply only "to the government created by the instrument." Br.39 (quoting *Barron v. City of Baltimore*, 32 U.S. (7 Pet.) 243, 247 (1833)). But this rule hurts Petitioners. State constitutions *do* "create" the state-government institutions that regulate and administer federal elections. Br.24. As a result, any "limitations on power" in state constitutions "naturally" apply to them. *Barron*, 32 U.S. (7 Pet.) at 247.

Petitioners next speculate that these provisions were viewed as purely aspirational. Br.37-38. They offer no evidence to support that astonishing argument, and the historical evidence refutes it. In *Vanhorne's Lessee v. Dorrance*, for instance, Justice William Paterson explained that Pennsylvania's legislature "[s]urely" had no authority to end "elections by ballot," because Pennsylvania's constitution mandated that "*all* elections ... shall be by ballot, free and voluntary." 2 U.S. (2 Dall.) 304, 309 (C.C.D. Pa. 1795) (emphasis added). Paterson—who had helped draft the U.S. Constitution—did not qualify this statement in any way. *E.g.*, 2 Farrand, *supra*, at 664.

Petitioners try to minimize these many examples of early state constitutions regulating federal

elections, implying that whether voting would be by ballot or other means was of little importance. Br.36. That contention is profoundly ahistorical. How voting would occur was a major issue of the day. *See* Smith, *supra*, at 490-41. When Madison explained at the Constitutional Convention the type of rules that fell under the Elections Clause, his first example was "[w]hether the electors should vote by ballot or viva voce." 2 Farrand, *supra*, at 240. Thus, shortly after the founding, many state constitutions addressed what Madison regarded as the *quintessential* regulation under the Elections Clause.

As a last gasp, Petitioners contend that the way States elected *senators* during this period supports their view. Br.31-35. It does not. Before the Seventeenth Amendment, a State's U.S. senators were "chosen by the Legislature thereof." U.S. Const. art. I, §3, cl.1. This function of "choosing" a senator is entirely distinct from "prescrib[ing]" regulations for congressional elections—as the latter describes a lawmaking role. But even assuming the selection of senators bears on the meaning of the Elections Clause, Petitioners' arguments do not help them.

After ratification, several States adopted constitutions that *did* regulate the manner in which their legislatures would choose senators. Georgia's 1789 constitution, for example, prescribed that "[a]ll elections by the general assembly" be conducted "by joint ballot." Ga. Const. of 1798, art. IV, §2; *see also* Pa. Const. of 1790, art. III, §2 (viva voce); Ky. Const. of 1799, art. VI §16 (viva voce); La. Const. of 1812, art. VI, §13 (ballot). And history shows that state

legislatures adhered to these mandates in selecting senators. H.R. Journal at 26 (Ga. 1800); S. Journal at 139-41 (Pa. 1793); H.R. Journal at 29-31 (Ky. 1804); H.R. Journal, 1st Leg., 1st Sess., at 80-81 (La. 1812). Petitioners' claim that no State imposed such restrictions simply misstates the history. Br.31-32.

To rescue this flawed line of argument, Petitioners assert that two States—New York and Massachusetts—endorsed their reading of the Elections Clause when they made rules for selecting senators. Br.32-35. In support, Petitioners note that those States diverged from rules in their constitutions that had previously governed the selection of delegates for the *old* Congress *under the Articles of Confederation*.

The historical record does not support Petitioners' claim that those States changed their practices because the *Elections Clause* freed them from outdated state-constitutional rules. *See, e.g.*, 1 Jensen, *supra*, at 497-98; 3 Jensen, *supra*, at 538-39. Instead, because those rules applied only to delegates under the defunct Articles, it was not clear as a matter of *state law* that the rules remained in force at all. Mass. Const. of 1780, ch. IV; N.Y. Const. of 1777, §XXX.

In New York, for example, proponents of adopting a new procedure argued that, given the radically different nature of the new Senate compared to the old Congress, the old constitutional rules simply no longer applied. *See, e.g.*, 3 Jensen, *supra*, at 224, 229, 270, 281. And even during these politically driven debates, legislators on both sides acknowledged that *if* the New

York Constitution provided rules for choosing senators, then those rules would be "binding" on the legislature. *Id.* at 229; *see also id.* at 263-64, 270, 280, 313.

In sum, the weakness of Petitioners' historical arguments only confirms the novelty of their theory. At the founding, it was broadly accepted that state constitutions created—and thus constrained—state legislatures. Petitioners have not shown otherwise.

C. Petitioners' theory disregards post-founding historical practice.

Post-founding historical practice that is "[l]ong settled and established" carries "great weight" in interpreting constitutional provisions. *Wilson*, 142 S.Ct. at 1259 (citation and internal quotes omitted). Here, "our whole experience as a Nation" refutes Petitioners' extreme and unprecedented view of the Elections Clause. *Chiafolo v. Washington*, 140 S.Ct. 2316, 2326 (2020) (quoting *NLRB v. Noel Canning*, 573 U.S. 513, 557 (2014)).

From the 1820s onward, new and revised state constitutions continued to require that "all elections" be "by ballot." N.Y. Const. of 1821, art. II, §4; *see also* R.I. Const. of 1842, art. VIII, §2. Other States later adopted constitutional provisions regulating congressional districting. *See* Cal. Const. of 1849, art. IV, §30 (barring divided counties during congressional redistricting); Iowa Const. of 1846, art. IV, §32 (same).

When the Civil War threated to disenfranchise Union soldiers, three States amended their

constitutions to allow Union soldiers to vote absentee in federal elections. Conn. Const. of 1818, art. XIII (1864); Md. Const. of 1864, art. XII, §11; R.I. Const. of 1842, art. IV (1864). Pennsylvania later added a similar provision. Pa. Const. of 1874, art. VIII, §6. Michigan, meanwhile, already had a provision to that effect. Mich. Const. of 1850, art. VII, §1. The constitutions of two States admitted to the Union during the Civil War—West Virginia and Nevada—included provisions governing the manner of federal elections as well. *See* Nev. Const. art. II, §5 (adopted 1864) (requiring elections to be conducted by ballot); W.V. Const. of 1863, art. III, §2 (same); *id*. art. XI, §6 (requiring compact congressional districts).

Federal legislation during Reconstruction further shows that state constitutions were understood to constrain state legislatures' Elections Clause authority. In the Reconstruction Act of 1867, Congress *required* ex-confederate States to include in their new constitutions a provision guaranteeing the franchise to all "male citizens ... twenty-one years old and upward, of whatever race, color, or previous condition, who have been resident in said State for one year." Ch. 153, §5, 14 Stat. 428, 429.[9] Additionally, the Act

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[9] It is true that the Qualifications Clause contemplates state-constitutional regulation of voter qualifications for *congressional* elections. *See* U.S. Const. art. I, §2, cl.1. But there is no Qualifications Clause for presidential elections, and Petitioners have argued that the Elections and Electors Clauses *both* allow legislatures to bypass state constitutions. Br.40-43. Congress, however, squarely rejected that reading of the Electors Clause when it *required* North Carolina and nine other States to

required the constitutions of States seeking readmission to "conform[ ] with the Constitution of the United States." *Id.* Congress clearly did not think that state constitutions regulating the manner of congressional elections violated the Constitution: Congress expressly approved several constitutions with such provisions. *E.g.*, Fla. Const. of 1868, art. XIV, §5 ("[I]n all elections by the people the vote shall be by ballot."); N.C. Const. of 1868, art. VI, §3 (same).

Congress's understanding of the Elections Clause was consistent throughout the late-nineteenth and early-twentieth centuries as well. During that time, the House frequently relied on state constitutions to resolve disputed elections. Michael Weingartner, *Liquidating the Independent State Legislature Theory*, 46 Harv. J.L. & Pub. Pol'y (forthcoming 2023) (manuscript at 56-58), https://bit.ly/3yAuIXM (collecting cases). And it afforded great deference to state supreme court decisions interpreting state constitutions to resolve these disputes. *Id.* at 58-59.

More recently, Petitioners themselves have accepted this longstanding practice. In 2018, for example, Petitioners proposed an amendment to North Carolina's constitution requiring citizens to present photo identification to vote in state and federal elections. *See* S.L. No. 2018-144, 2018 N.C. Sess. Laws 824.

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regulate the franchise in their constitutions as a condition on their readmission to the Union.

In vivid contrast, Petitioners' account of post-founding historical evidence is "one of anomalies only." *Chiafalo*, 140 S.Ct. at 2328. Petitioners first point to Joseph Story, who opposed a proposal that the Massachusetts Constitution require districts for congressional elections. He did so in part based on the argument that such a requirement would violate the Elections Clause. Br.3.

This episode does little to support Petitioners' interpretation of the Elections Clause. First, Story's objection relied on a far narrower understanding of the Clause than Petitioners offer. Story simply believed that the state constitution could not "compel[ ]" legislators "to surrender all discretion" in regulating federal elections, not that the Clause wholly displaced state constitutions. *Journal of Debates and Proceedings in the Convention of Delegates Chosen to Revise the Constitution of Massachusetts* 59-60 (1821). Second, Story had other reasons for rejecting the proposal: he feared that congressional districts would result in a divided—and therefore weakened—Massachusetts delegation. *Id.* at 59. Notably, this latter objection was the only one Story discussed in his later writings. 3 Joseph Story, *Commentaries on the Constitution of the United States* §§812-26, 1466 (1833). Finally, no other delegates spoke in support of Story's argument. Daniel Webster did agree with Story that the convention should reject the provision, but Webster took no position on Massachusetts's "right" to adopt it. *Id.* at 60-61.

Petitioners also point to a contested election in the Civil War era, *Baldwin v. Trowbridge*, H.R. Rep. No.

39-13, at 1-3 (1866). Br.43. Trowbridge received the most votes to represent a Michigan district in Congress, thanks to a state statute permitting absentee voting by soldiers. Trowbridge's opponent argued that the Michigan Constitution prevented absentee voting and that, as a result, those votes should not be counted.

The House voted to seat Trowbridge. Petitioners contend that this vindicates their theory, because doing so required siding with the state statute over the state constitution. That is incorrect. The House majority's primary rationale for seating Trowbridge—the same rationale he himself advanced—was that the state law and the state constitution were aligned. *See Id.* at 3 ("[T]here is no conflict between the law and the constitution, and the argument is at an end."); *see also* Cong. Globe, 39th Cong., 1st Sess. 840 (1866) (statement of Rep. Trowbridge).

* * *

In sum, text and history show that the Elections Clause has been widely understood to allow state constitutions to constrain how state legislatures regulate federal elections. Petitioners' sweeping arguments to the contrary find no support in the historical record and would upend centuries of settled state and federal practice.

D. Petitioners' theory contradicts longstanding precedent.

Precedent confirms what the Elections Clause's text and history teach: the Clause does not permit

state legislatures to ignore state constitutions. While Justices have disagreed about the meaning of "legislature," none has ever suggested that the legislature—however defined—may disregard its state constitution. To the extent Petitioners urge the Court to overrule precedent, they offer no "special justification" for doing so. *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 456 (2015).

This Court first held that the Elections Clause did not displace state constitutions over a century ago in *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916). There, the Court held that the Clause allows voters to reject a state legislature's congressional-districting plan through a referendum authorized by the state constitution. *Id.* at 566-67. Hildebrant argued that the Clause's reference to "legislature" allowed the state legislature to bypass the state constitution. *Id.* at 568-69. This Court unanimously rejected that argument as "plainly without substance." *Id.* at 569.

This Court held the same in *Smiley v. Holm*, 285 U.S. 355 (1932). There, the Court considered whether Minnesota's governor could exercise his state-constitutional authority to veto the legislature's congressional-districting plan. *Id.* at 363-64. The Minnesota Supreme Court held that the veto violated the Elections Clause, but this Court unanimously reversed. *Id.* at 364, 375. Redistricting, the Court held, "involves lawmaking in its essential features and most important aspect." *Id.* at 366. The Clause does not permit state legislatures to escape any "check in the legislative process" imposed by state constitutions. *Id.* at 368.

Recent precedent, too, holds that the Elections Clause does not excuse state legislatures from complying with their state constitutions. In *Arizona State Legislature v. Arizona Independent Redistricting Commission*, for example, this Court held that an Arizona constitutional amendment tasking an independent commission with congressional districting did not violate the Clause. 576 U.S. 787, 792-93 (2015) (*AIRC*). "Nothing in the [Elections] Clause instructs," this Court declared, "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." *Id.* at 817-18.[10]

And while some Justices disagreed with the majority that the Elections Clause permitted Arizona to *wholly* exclude the legislature from the redistricting process, all nine agreed that state constitutions bind state legislatures when they exercise their Elections Clause authority. *See id.* at 841, (Roberts, C.J., dissenting) (Under the Elections Clause, the legislature "may be required to [prescribe election regulations] within the ordinary lawmaking process, but may not be cut out of that process.").

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[10] In a footnote, Petitioners suggest that this Court overrule *AIRC*. Br.40 n.9. But Petitioners do not explain why overturning *AIRC* is warranted. They make no attempt, for example, to show that *AIRC* is unworkable, or that its doctrinal underpinnings have eroded in the short time since it was decided. *See Kimble*, 576 U.S. at 458.

Then, just three years ago in *Rucho*, this Court pledged that it was not consigning concerns about excessive partisan gerrymandering "to echo into a void." 139 S.Ct. at 2507. The Court could offer that assurance, it explained, because "[p]rovisions in state statutes and state constitutions can provide standards and guidance for state courts to apply" in evaluating partisan-gerrymandering claims, including claims involving congressional districting. *Id.*; *see also id.* at 2524 (Kagan, J., dissenting).

Petitioners seem to understand that this Court's precedents cannot be reconciled with their position but strive mightily nonetheless. Relying primarily on *Smiley*, they invent an exception to their theory. Br.24. They concede that *procedural* state-constitutional rules can restrain state legislatures, but claim that "substantive" rules cannot.

Petitioners' unprincipled distinction finds no support in the Clause's text, historical practice, or this Court's precedents. The Clause's text certainly draws no such line. And, as discussed above, since ratification, state constitutions have consistently included *substantive* provisions regulating congressional elections. *See supra* pp.38-49. As for this Court's precedents, none of them recognize such a distinction, and several appear to reject it. *Rucho*, for example, favorably cites several *substantive* state-constitutional provisions governing federal elections. 139 S.Ct. at 2507-08 (citing Fla. Const. art. III, §20(a), which prohibits intentional partisan gerrymandering, and Mo. Const. art. III, §3, which requires fair and competitive districts). *AIRC*, meanwhile, explicitly

held that the Elections Clause prohibits a state legislature from adopting federal-election regulations "in defiance of *provisions of the State's constitution*." 576 U.S. at 817-18 (emphasis added). This unqualified holding is irreconcilable with Petitioners' proposed substance-procedure distinction.

It is also impossible to square with Petitioners' concession that gubernatorial vetoes are permissible checks on legislative authority. Br.24. A veto might fairly be characterized as "procedural." But the veto pen can also be wielded on substantive grounds—including to address legislation's constitutionality. Indeed, George Washington's very first veto was based on substantive constitutional "objections." President's Veto Message on Apportionment Bill (April 5, 1792), https://bit.ly/3Seahqm. And in North Carolina, governors routinely veto bills that, in their view, violate the state constitution. *E.g.*, Governor's Veto Message on House Bill 482 (June 27, 2011), https://bit.ly/3CKe60M (vetoing bill thought to be "in clear violation" of "[t]he North Carolina Constitution, as interpreted by our Supreme Court"). Why a governor's policing of the state constitution always qualifies as "procedural," but a state supreme court's review is "substantive," is entirely unclear.

Petitioners next turn to decisions of this Court interpreting the *Electors* Clause—which is not at issue in this case. Br.40-43. But even assuming those decisions bear on the *Elections* Clause's meaning, they do not help Petitioners. In *McPherson v. Blacker*, 146 U.S. 1 (1892), for example, this Court explained explicitly that "legislative power," even when invoked

under the federal constitution, is "limited by the constitution of the state." *Id.* at 25.

And in *Bush v. Palm Beach County Canvassing Board*, this Court declined even to review the question presented. 531 U.S. 70,77-78 (2000) (declining review in part because of concerns that the Florida Supreme Court had not considered the electoral college safe-harbor statute).

That leaves Chief Justice Rehnquist's concurrence in *Bush v. Gore*, 531 U.S. 98 (2000). But, as Chief Justice Rehnquist explained, "[i]n any election but a Presidential election," this Court would afford its traditional deference to a state supreme court's interpretation of its own state constitution. *Id.* at 114.

Petitioners cite several state supreme court decisions as well. Yet those cases serve them no better. Some do not even interpret the Elections Clause. *See State ex rel. Beeson v. Marsh*, 34 N.W.2d 279 (Neb. 1948); *Parsons v. Ryan*, 60 P.2d 910 (Kan. 1936). Others decline to reach a decision about the Elections Clause. *Kentucky ex rel. Dummit v. O'Connell*, 181 S.W.2d 691 (Ky. 1944); *In re Opinions of Justices*, 45 N.H. 595 (1864). Petitioners' reliance on *In re Plurality Elections,* 8 A. 881 (R.I. 1887), meanwhile, is misplaced in light of a subsequent decision by the Rhode Island Supreme Court. *See In re Opinion to the Governor,* 103 A. 513, 514-15 (R.I. 1918) (explaining that the Elections Clause does not allow the legislature to regulate elections "entirely unrestrained by the limitations of the state Constitution").

III. Petitioners' Reading of the Elections Clause Would Upend Elections Nationwide.

Finally, Petitioners' position would have grievous practical consequences for elections across the country. Petitioners take the baffling position that state legislators *alone* can set the rules governing congressional elections and, thus, that they are powerless even to authorize other state actors to do so. Br.11 ("[T]he power to regulate federal elections lies with state legislatures *exclusively*."); Br.44-45 (state legislatures "surely" cannot "delegate away" any of their authority). This cannot be correct.[11]

Today, *not a single State* uses an elections regime in which the state legislature alone sets the rules governing congressional elections. *See* Brief of *Amici Curiae* State Secretaries of State, Appendix. North Carolina law currently includes at least forty delegations of authority to set rules governing

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[11] Like their broader arguments, Petitioners' delegation theory is inconsistent with the overwhelming historical evidence. At the founding, state legislatures repeatedly empowered other government officials to prescribe rules related to the time, place, and manner of congressional elections. *See generally* Mark S. Krass, *Debunking the Nondelegation Doctrine for State Regulation of Federal Elections*, 108 Va. L. Rev. 1091, 1112-29 (2022). Historical practice in North Carolina was no different. *E.g.*, Ch. 82, 1805 N.C. Sess. Laws 34 (allowing commissioners to choose election sites in Wake County); Ch. 93, §5, 1805 N.C. Sess. Laws 42, 43 (authorizing candidates or their representatives to agree to end a congressional election before sunset on election day); Ch. 18, 1832 N.C. Sess. Laws 16 (empowering county courts to "alter, fix, establish, discontinue, or create anew" polling places whenever "expedient").

congressional elections. *See generally* N.C. Gen. Stat. §§163-1 to -335; Title 8, N.C. Admin. Code (rules for election protests, ballot arrangement, and recounts, among others).

This ubiquitous practice is a function of necessity. "Running elections state-wide is extraordinarily complicated and difficult," requiring elections officials to navigate "significant logistical challenges." *Merrill v. Milligan*, 142 S.Ct. 879, 880 (2022) (Kavanaugh, J., concurring in grant of stay applications). How could North Carolina—or any other State—successfully hold federal elections if all legislative delegations are unconstitutional? Must the General Assembly name the site of every polling place? Are legislators from across North Carolina required to return to Raleigh to pass laws adjusting polling hours every time a hurricane hits close to an election? Surely not.

The havoc would not end there. Like most States, North Carolina's election laws rarely distinguish between state and federal elections. Under Petitioners' theory, when a court strikes down an election law under the state constitution, its judgment applies to state, but not federal, elections. This outcome would put election administrators in an impossible situation.

Consider a law imposing a signature-matching requirement for absentee ballots. If a state court invalidated the law on state-constitutional grounds, local elections boards would be forced to count ballots with mismatched signatures for state elections, but not federal ones. Or say a state court ruled that a voter

ID law violated the state constitution. Voters who showed up without an ID would have their votes count only in state races, but not congressional races.

These and many other complexities could extend to all manner of elections logistics—voting hours, polling locations, and so forth. Voters will suffer confusion, delay, and possibly disenfranchisement. And sorting through this morass may well require elections officials to endure costly litigation. The problem could become so severe that elections officials are forced to hold entirely separate state and federal elections.

That a ruling in Petitioners' favor would cause such nationwide disruption underscores again just how extreme their position is. For 230 years, States have never interpreted the Elections Clause the way that Petitioners read it here, and the elections regimes that they have devised reflect that fact. Petitioners offer no compelling reason to upend States' tested and proven election-administration systems.

* * *

State Respondents do not dispute that the Elections Clause reserves a central role for state legislatures, as defined by their state constitutions, in regulating congressional elections. A State could not, for example, assign the governor or the state supreme court exclusive authority over redistricting.

But the Elections Clause does not convert state legislatures into unaccountable sovereigns either. As

the Framers repeatedly declared, a "Legislature" acting outside of its constitutional limits is no legislature at all.

Here, North Carolina's legislature has chosen to commit to a redistricting scheme that allows the state courts to review the legislature's actions for constitutional compliance. The Elections Clause does not forbid such a choice.

CONCLUSION

The decision of the North Carolina Supreme Court should be affirmed.

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October 19, 2022