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.

&

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

v.

NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, INC., *et al.*,
Respondents.

On Writ of Certiorari to the North Carolina Supreme Court

BRIEF OF WILLIAM M. TREANOR AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

William M. Treanor is a legal scholar and historian whose work focuses on the founding. He has written extensively about the original understanding of judicial review, and this work includes unique analyses of records that shed light on the original understanding and meaning of judicial review.[2] He is interested in this case because the historical practice and nature of judicial review informs the meaning of the Elections Clause. *Amicus* respectfully urges the Court to consider the relevant history presented here in determining whether the Elections Clause precludes the North Carolina Supreme Court's decision in this case.

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[1] Pursuant to Rule 37.6, *amicus curiae* state that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and his counsel made a monetary contribution to its preparation or submission. The parties have filed blanket consents.

[2] *See* William M. Treanor, *The Genius of Hamilton and the Birth of the Modern Theory of the Judiciary*, in CAMBRIDGE COMPANION TO THE FEDERALIST (Jack Rakove & Colleen Sheehan eds., Cambridge University Press 2017); William M. Treanor, *Origins of Judicial Review* (Harvard University Doctoral Dissertation, History, 2010); William M. Treanor, *The Story of* Marbury v. Madison: *Judicial Authority and Political Struggle, in* FEDERAL COURTS STORIES 29-56 (Vicki C. Jackson & Judith Resnik eds., New York: Thomson Reuters/Foundation Press 2010); William M. Treanor, *Judicial Review Before* Marbury, 58 STAN. L. REV. 455 (2005); William M. Treanor, *The Case of the Prisoners and the Origins of Judicial Review*, 143 U. PENN. L. REV. 491 (1994); *see also* William M. Treanor, *Original Understanding and the Whether, Why, and How of Judicial Review*, 116 YALE L.J. POCKET PART 218 (2007).

SUMMARY OF ARGUMENT

State courts and lawyers practicing at the time of the founding understood that state constitutions represented a social compact among the People, by which they delegated authority to a legislative body to make laws and to a judiciary to review and apply them. This understanding grew out of the practice of law in the colonies and the nascent enterprise of forming state governments. These state governments were the descendants of colonial regimes under which laws were subject to review by a Privy Council in England. The newly independent States displaced the Privy Council, but not the understanding that the legislature exercised only delegated lawmaking power. The legislature was at all times subordinate to a higher authority—once the Privy Council, and now the States' constitutions.

After the signing of the Declaration of Independence, state courts and jurists soon recognized that if a state legislature enacted a law that conflicted with the People's compact—the state constitution—the court had a duty to declare the law was null and void. As agents of the People, also exercising delegated authority to carry out their will, courts ensured that legislatures did not overstep constitutional bounds or enlarge their authority at the People's expense.

The framers of the United States Constitution were leading participants in the adoption of their respective state constitutions and in the litigation that ensued thereunder. Their experience, arguments, and rulings inform the meaning of the Elections Clause at issue here. In particular, the framers drew on the

structure of government and the separation of powers to sort out whether the judiciary should have the last word. Their objective was to find a path that was most likely to maintain the sovereign system of government that the People had chosen.

The Elections Clause assigns to the legislature in each State the power to prescribe state laws governing the times, places, and manner of congressional elections. The historical evidence indicates that the framers and other legal thinkers of the era regarded these legislatures as creatures of the state constitution and fully subject to its constraints, including by way of judicial review. They certainly recognized that judicial review posed difficult questions. But rather than take those questions away from the States, the framers respected the States' sovereign capacity to make laws and resolve the constitutionality of those laws under their own systems of government. When the framers did abrogate state sovereignty and reserve issues for the federal government, they did so with clear language.

Contrary to petitioners' arguments in this case, nothing in Elections Clause's text or history shows that the Clause abrogates state sovereignty by requiring legislative supremacy at the state level in matters involving congressional elections. The Elections Clause does not dictate to States how they should ensure that their legislatures do not exceed or overstep state constitutional bounds. Nor does it require citizens of a State to accept laws that are unconstitutional as a matter of state law. The Elections Clause leaves those lawmaking matters, including judicial review of legislative enactments and

remedies required to ensure compliance with the state constitution, to the States. Accordingly, this Court should reject petitioners' argument that the Elections Clause precluded the North Carolina Supreme Court's decision in this case.

ARGUMENT

I. State Legislatures Have Always Exercised Delegated Lawmaking Authority, Subject to Review under State Constitutions

The framers inherited a legal tradition that regarded corporate entities as subordinate to a higher sovereign authority. After the Revolution, the People vested their sovereign authority in state constitutions. When early controversies required them to resolve conflicts between a legislative statute and the state constitution, lawyers and judges sought to find a resolution that would maintain the system of government that the People had established.

A. Privy Council Review of Colonial Law

As colonies of the British empire, early European settlers inherited and continued an English-law tradition. That tradition included a practice of reviewing certain laws or ordinances to ensure conformity with a higher law. During the fifteenth, sixteenth, and seventeenth centuries, corporations

exercised authority delegated to them by the Crown.[3] These corporations took the form of municipalities, universities, guilds, and trading companies, among others.[4] Such corporations had the power to issue bylaws and ordinances, but only to the extent such regulations were consistent with the King's laws.

By the end of the sixteenth century, common-law courts had declared that corporate bylaws could not be repugnant to the nation's laws.[5] Such bylaws and ordinances were null and void. This legal principle crossed the Atlantic when corporate entities settled North America. Corporate entities established early settlements in Massachusetts, Virginia, and others, ultimately founding seven of the original thirteen colonies.[6] Their corporate charters authorized them to govern their respective colonies, but colonial laws could not conflict with the laws of England.

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[3] Mary S. Bilder, *The Corporate Origins of Judicial Review*, 116 YALE L.J. 502, 516 (2006).

[4] *See id.* at 516-517 (citing R.H. Tawney & Eileen Power, *A Discourse of Corporations* (c. 1587-1589), in 3 TUDOR ECONOMIC DOCUMENTS 265, 273 (R.H. Tawney & Eileen Power eds., 1924); Henry Alworth Merewether & Archibald John Stephens, THE HISTORY OF THE BOROUGHS AND MUNICIPAL CORPORATIONS OF THE UNITED KINGDOM, at xxviii-xxix, xxxi (London, Stevens & Sons 1835)).

[5] *See id.* at 526 (citing William Shepheard, OF CORPORATIONS, FRATERNITIES, AND GUILDS 81 (London, H. Twyford, T. Dring, & J. Plate 1659)).

[6] Nikolas Bowie, *Why the Constitution Was Written Down*, 71 Stan. L. Rev. 1397, 1407 & n.47 (2019).

The 1611 Virginia charter, for example, required that its laws "be not contrary" to the law of England.[7] The 1629 Massachusetts Bay charter stated that its laws must "be not contrarie or repugnant."[8] Connecticut's and Rhode Island's charters similarly forbid those colonies to make contrary laws.[9] By the time of the American Revolution, all the colonies had a similar limitation.[10]

To ensure that the colonies did not exceed their authority, the charters of most colonies required them to send proposed legislation to the Privy Council of England for review.[11] Before the American Revolution, the colonies sent more than 8,500 laws to the Privy Council for review, and the Council disallowed 469 of

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[7] Bilder, *supra* note 3, at 536; The Third Charter of Virginia (1611-1612), in 7 FEDERAL AND STATE CONSTITUTIONS COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3802, 3806 (Francis Newton Thorpe ed., 1909) (hereinafter, "FEDERAL AND STATE CONSTITUTIONS").

[8] Bilder, *supra* note 3, at 537; The Charter of Massachusetts Bay (1629), in 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 7, at 1846, 1853.

[9] Bilder, *supra* note 3, at 537; Charter of Connecticut (1662), in 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 7, at 529, 533; Charter of Rhode Island and Providence Plantations (1663), in 6 FEDERAL AND STATE CONSTITUTIONS, *supra* note 7, at 3211, 3215.

[10] Bilder, *supra* note 3, at 538.

[11] Sharon Hamby O'Connor & Mary Sarah Bilder, *Appeals to the Privy Council before American Independence: An Annotated Digital Catalogue*, 104 LAW LIBRARY J. 83, 85 (2012).

them.[12] In addition, the Privy Council reviewed the decisions of the highest court in each colony, including by passing on the validity of colonial laws at issue.[13]

The practice of reviewing colonial legislation for repugnancy with a superior body of law did not disappear when the thirteen colonies declared and won their independence from the Crown and the Privy Council of England. Rather, as *amicus* and other scholars have shown, the founders continued to view the state legislature as exercising delegated authority. The key difference, of course, was that instead of exercising authority delegated by the Crown, the legislature would exercise authority delegated to it by the People, as reflected in the state constitution.[14]

B. Early State Constitutions

In 1775, governing officials in Massachusetts agreed to adopt the 1691 corporate charter of the Massachusetts Bay Trading Company as the first written constitution for what would become the Commonwealth of Massachusetts.[15] In April 1776,

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[12] *Id*.

[13] O'Connor & Bilder, *supra* note 11, at 85; Mary Sarah Bilder, *English Settlement and Local Governance*, in 1 THE CAMBRIDGE HISTORY OF LAW IN AMERICA 63, 90 (Michael Grossberg & Christopher Tomlins eds., 2008)

[14] Treanor, *Original Understanding*, *supra* note 2, at 222.

[15] Bowie, *supra* note 6, at 1494 (citing Minutes of the Third Provincial Congress (June 20, 1775), in JOURNAL OF THE MASSACHUSETTS IN 1774 AND 1775, AND OF THE COMMITTEE OF SAFETY 358, 358-59 (William Lincoln Ed., Boston, Dutton & Wentworth 1838)).

John Adams published a pamphlet entitled, "Thoughts on Government," in which he urged the colonies to institute independent governments with bicameral legislatures, an executive, and independent judiciary.[16] After the signing of the Declaration of Independence and the adoption of the Articles of Confederation, political leaders in the States followed Adams's advice in creating their own state constitutions.

The new state constitutions were the product of their history, continuing English legal tradition in some ways and breaking from it in others. As relevant here, early state constitutions made clear that their legislatures did not have any independent or unchecked power, but instead exercised only the powers provided in the constitution and vested in them by the People.

For example, in 1776, state leaders in Pennsylvania provided "[t]hat all power being originally inherent in, and consequently derived from, the people; therefore all officers of government, whether legislative or executive, are their trustees and servants, and at all times accountable to them."[17] Virginia's first constitution provided that "all power is vested in, and consequently derived from, the people" and expressly provided that "the legislative and

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[16] Bowie, *supra* note 6, at 1497 (citing John Adams, 3 THOUGHTS ON GOVERNMENT: APPLICABLE TO THE PRESENT STATE OF THE AMERICAN COLONIES, IN A LETTER FROM A GENTLEMAN TO HIS FRIEND, 11-16, 21-22 (Philadelphia, John Dunlap 1776)).

[17] PA. CONST., Decl. of Rights, art. IV (1776), in 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 7, at 3082.

executive powers of the State should be separate and distinct from the judiciary ...."[18] New York's first constitution, adopted in 1777, provided that "the good people of this State, doth ordain, determine, and declare that no authority shall, on any pretence whatever, be exercised over the people or members of this State but such as shall be derived from and granted by them."[19]

In 1780, Massachusetts became the first State in which the People ratified the state constitution by popular vote.[20] The 1780 constitution declares that "it is a social compact, by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good."[21] They sought "to provide for an equitable mode of making laws, as well as for impartial interpretation ... of them; that every man may, at all times, find his security in them."[22]

In State after State, the drafters of state constitutions used similar language to declare the sovereignty of the People, as reflected in the state

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[18] VA. CONST., Bill of Rights, §§ 2, 5 (1776), in 7 FEDERAL AND STATE CONSTITUTIONS, *supra* note 7, at 3813.

[19] N.Y. CONST., art. I (1777), in 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 7, at 2623, 2628.

[20] Bowie, *supra* note 6, at 1498.

[21] MASS. CONST., preamble (1780), in 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 7, at 1889.

[22] *Ibid.*

constitution.[23] They established a system of government in the States that preceded the federal government established by the 1787 Constitution of the United States. And they turned to their state constitutions and the purpose of those constitutions in grappling with early questions of judicial review and inter-branch conflict.[24] The arguments and reasoning of that period help to illuminate how the framers viewed state legislatures and their place within the States' constitutional scheme.

C. The *Case of the Prisoners* and Judicial Review in the States before the Constitutional Convention

Soon after the States declared their independence from England and adopted written constitutions or charters to govern, litigation testing the validity of acts of the newly constituted governments arose. The most revealing of these pre-ratification cases was contemporaneously known as the *Case of the*

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[23] *See also*, *e.g.*, N.H. CONST., Bill of Rights, art. I (1784), in 4 FEDERAL AND STATE CONSTITUTIONS, *supra* note 7, at 2453 ("all government of right originates from the people"); MD. CONST., Decl. of Rights, art. I (1776), in 3 FEDERAL AND STATE CONSTITUTIONS at 1686 ("all government of right originates from the people, is found in compact only, and instituted solely for the good of the whole"); N.C. CONST., Decl. of Rights, art. I (1776), in 5 FEDERAL AND STATE CONSTITUTIONS, at 2787 ("all political power is vested in and derived from the people only").

[24] *See* Jeffrey Sutton, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 13 (2008) ("The first use of the power [of judicial review] occurred in the state courts and under the state constitutions.").

Prisoners. The case warrants particular attention here because key drafters of the federal constitution and delegates to the Philadelphia Constitutional Convention participated in the case. Edmund Randolph was the Attorney General of Virginia and argued the case on behalf of the Commonwealth.[25] He went on to propose the Virginia Plan at the Convention and later became the first Attorney General of the United States.[26] Randolph maintained extensive notes bearing on judicial review, which he shared with James Madison.[27]

Two judges who sat on the panel that decided the *Case of the Prisoners*, George Wythe and John Blair, also served as Virginia delegates to the Convention. John Francis Mercer, who argued as amicus in the case, served as a delegate from Maryland.[28] Another lawyer arguing as amicus, St. George Tucker, became perhaps the most influential legal scholar of his time.[29]

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[25] Treanor, *Case of the Prisoners*, *supra* note 2, at 505.

[26] *See id.* at 494 (citing John J. Reardon, EDMUND RANDOLPH: A BIOGRAPHY 98-99, 189-91 (1974)).

[27] *See id.* at 506 (citing William T. Hutchinson & William M.E. Rachal, Letter from Edmund Randolph to James Madison (Mar. 7, 1783), in 6 THE PAPERS OF JAMES MADISON 318, 318-19 (William T. Hutchinson & William M.E. Rachal eds., 1969)).

[28] *See id.* at 496 (citing 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 587-90 (Max Farrand ed., rev. ed. 1937); BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, 1774-1989, S. Doc. No. 34, 100th Cong., 2d Sess. 1490-91 (1989)).

[29] *See id.* (citing Charles T. Cullen, ST. GEORGE TUCKER AND LAW IN VIRGINIA, 1772-1804 (1987); Mary Coleman, ST. GEORGE TUCKER: CITIZEN OF NO MEAN CITY (1938)).

Future Chief Justice John Marshall studied with one of the judges who decided the case. He was reportedly in the Virginia courtroom for argument and decision, and his journey towards expounding the power of judicial review in *Marbury v. Madison* may well have started in that courtroom.[30]

The case itself was about three prisoners, John Caton, James Lamb, and Joshua Hopkins, who assisted British troops.[31] In 1782, they were convicted of treason in Virginia courts and sentenced to death.[32] The prisoners sought a pardon from the Virginia House of Delegates, and the House voted in favor of a resolution to pardon them.[33] The House submitted its resolution to the Virginia Senate, which voted against the pardon.[34] This set up a legal question: did a pardon require the concurrence of both the House and the Senate, or did the House's resolution suffice? A legislative enactment, the Treason Act, and the 1776 Virginia Constitution arguably gave different answers.

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[30] *See id.* at 497 (citing Charles F. Hobson et al., *Introduction*, in 5 THE PAPERS OF JOHN MARSHALL, at xxiii, lvii-lviii (Charles F. Hobson et al. eds., 1974)).

[31] *See id.* at 501 (citing David J. Mays, EDMUND PENDLETON, 1721-1803: A BIOGRAPHY 188-89 (1952)).

[32] *See ibid.*

[33] *See ibid.* (citing Edmund Pendleton, *Pendleton's Account of 'The Case of the Prisoners*,' in 2 THE LETTERS AND PAPERS OF EDMUND PENDLETON, 1734-1803, at 416 (David J. Mays ed., 1967)).

[34] *See ibid.*

The Treason Act provided that the "general assembly"—*i.e.*, the House and the Senate—shall determine whether to pardon a convicted person,[35] whereas the Virginia Constitution could be construed to vest the pardon power solely in the House of Delegates. The Virginia court would ultimately avoid declaring the statute unconstitutional by adopting saving constructions. Before reaching that conclusion, however, the court heard argument and announced its views concerning the power of judicial review.

The presiding judge, Edmund Pendleton, directed the parties and other interested counsel to address whether a "Court of Law could declare an Act of the Legislature void …" and whether the treason statute was indeed contrary to the Virginia Constitution.[36] The court heard oral argument on October 31, 1782. The record of oral argument consists in part of notes that Edmund Randolph subsequently shared with James Madison, and were found in Madison's papers.[37]

Although Randolph offered a means of reconciling the statute and the constitution, he also confronted the question of judicial review.[38] If the court concluded a statute was contrary to the constitution, he argued,

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[35] *See id.* at 502 (citing An Act Declaring What Shall Be Treason, 1776 Va. Acts ch. III, *reprinted in* William W. Hening, THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE IN THE YEAR 1619, at 168 (1821)).

[36] *See id.* at 505.

[37] *See id.* at 506.

[38] *See id.* at 512.

then it must decide whether it had the power to declare the statute void. Randolph continued:

> Here let me pause.
>
> But why pause?
>
> Do I tremble at the decision of my own mind, that a law against the constitution may be declared void? or … do I dread the resentment of the court, when I bear testimony against their competency to pronounce the invalidity of the law?
>
> No! The revolution has given me a coat of mail for my defense, while I adhere to its principles. That bench too is reared on the revolution, and will arrogate no undue power.
>
> I hold then, that every law against the constitution may be declared void.[39]

Randolph derived his conclusion from his understanding of the constitution. It was a "compact" to which the People themselves were the sole parties.[40] That compact delegated authority to the state legislature (the general assembly), but also to the judiciary to ensure that the legislature did not overstep the boundaries that the People created for it. The judiciary was no less "reared on the revolution"

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[39] *See id.* (citing Edmund Randolph, Rough Draft of Argument in Respondent v. Lamb 9-11 (the *Case of the Prisoners*) (original in 91 James Madison Papers, Manuscript Division, Library of Congress, Washington, D.C.) (copy on file with *amicus*)).

[40] *See id.* at 513.

than the People's other agents of self-government, and had a co-equal role in maintaining that government.[41]

St. George Tucker also presented argument to the Virginia court, and his notes of argument are preserved. Tucker argued that the structure of government required judicial review, insofar as delegating authority to make and interpret the law to the same entity would invite tyranny. Thus, the judiciary is meant to check the legislature.[42] And as the entity applying the law, the judiciary must prefer the state constitution over legislative statutes, when the two conflict. Tucker declared, "I conceive the Constitution not lyable to any alteration whatsoever by the Legislative, without destroying that Basis and Foundation of Government."[43]

After hearing argument from Randolph, counsel for the prisoners, and amici, the court issued its decision in favor of the State and against the prisoners. The historical record as to the votes of all eight judges and their views is not entirely consistent, but the opinions of Virginia's leading jurists, George Wythe (a future delegate to the federal constitutional convention) and Edmund Pendleton, are reported.

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[41] *Id.* at 512.

[42] *See id.* at 522-523 (citing St. George Tucker, Notes of Oral Argument in the Case of the Prisoners 4 (original in Papers of St. George Tucker, Manuscripts Department, Earl Gregg Swem Library, College of William and Mary, Williamsburg, Virginia) (copy on file with *amicus*)).

[43] *See id.* at 523.

In Judge Wythe's opinion, he proclaimed that if the legislature "should attempt to overleap the bounds, prescribed to them by the people," he would point to the constitution and say, "here is the limit of your authority; and, hither, shall you go, but no further."[44] Judge Wythe held, however, that the Virginia Constitution itself required the Senate's concurrence before freeing a prisoner who had been convicted under laws that the Senate itself had, together with the House, enacted into law.[45] Therefore, there was no contradiction between the Treason Act and the Virginia Constitution to resolve.

Judge Pendleton agreed that Virginia's Constitution was a "social compact" from which the branches of government could not depart. Like Judge Wythe, he found no conflict between the statute and constitution. Unlike Judge Wythe, Judge Pendleton was "happy" to refrain from opining on the power of the judiciary to declare the nullity of legislative acts—a "deep, important, and I will add, a tremendous question, the decision of which might involve consequences to which gentlemen may not have extended their ideas."[46]

Although the *Case of the Prisoners* did not invalidate a statute, Judge Wythe's declaration that the court had the power of judicial review was important, as it was one of the few occasions on which state courts had an opportunity to make such

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[44] *Commonwealth v. Caton*, 8 Va. (Call) 5, 8 (1782).

[45] *Id.* at 10-11.

[46] *Id.* at 17.

declarations in advance of the Philadelphia Convention. Moreover, Wythe taught law, not only to John Marshall, but also to Thomas Jefferson, St. George Tucker, and Spencer Roane; his influence as a legal thinker was profound.[47]

In addition to the *Case of the Prisoners*, a handful of other cases from the period between the Declaration of Independence and the Philadelphia Convention also indicate that legal thinkers of the time understood the legislature to be constrained by the state constitution. The arguments, reasoning, and results in these cases are instructive here.

In 1780, in *Holmes v. Walton*, the New Jersey Supreme Court invalidated a state statute under the state constitution. The statute authorized seizure of loyalist property and provided that the question whether such seized property was "loyalist property" should be tried "by a jury of six men."[48] A six-man jury found that Walton properly seized loyalist property, but the state high court held that "this was not a constitutional jury."[49] The New Jersey court invalidated the state statute even though the state constitution did not specify how many jurors must sit on a jury. At the time, New Jersey's constitution provided only that "the inestimable right of trial by jury shall remain confirmed as a part of the law of this

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[47] Treanor, *Case of the Prisoners*, *supra* note 2, at 568.

[48] *State v. Parkhurst*, 9 N.J.L. 427, 444 (1802).

[49] *Id.*

Colony, without repeal, forever."[50] The New Jersey Supreme Court decided what the constitutional "right to trial by jury" required. The court invalidated the statute because it decided that, even though the constitutional text was open-ended, the constitution should be read to require a different jury trial right than the jury trial provided by the statute.[51]

In 1785, in the *Ten-Pound Cases*, the New Hampshire legislature enacted a statute providing that civil matters involving less than ten pounds would be tried before a justice of the peace and without a jury.[52] The New Hampshire courts held that the statute was unconstitutional under a provision requiring jury trials in all cases, except in cases "in which it has been heretofore otherwise used and practiced."[53] The New Hampshire courts, not the legislature, decided what had been "practiced" within the meaning of the state constitution.

In 1786, in *Trevett v. Weeden*, the Rhode Island legislature enacted a statute imposing a penalty on those who did not accept the State's paper money as equivalent to gold or silver. Although Rhode Island did not have a written constitution of its own, James Varnum argued, in defending a man accused of

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[50] N.J. CONST. art. XXII (1776), in 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 7, at 2598.

[51] *See Treanor*, *Judicial Review Before* Marbury, *supra* note 2, at 474-475.

[52] *See id.* at 475-476.

[53] N.H. CONST. art. XX (1784), in 4 FEDERAL AND STATE CONSTITUTIONS, *supra* note 7, at 2456.

violating the statute, that the statute was inconsistent with the State's unwritten constitution. He argued that "[t]he Judiciary have the sole power of judging of those laws [passed by the legislature], and are bound to execute them; but cannot admit any act of the Legislature as law, which is against the constitution."[54] As in the *Case of the Prisoners* and *Holmes v. Walton*, Varnum's arguments showed a Revolution-era willingness to reason based on broad constitutional principles, rather than text alone (an approach particularly crucial in *Trevett*, given that there was no text in that case).

The Rhode Island court ruled unanimously in favor of Varnum's client, defendant John Weeden, with little explanation. Three of five judges apparently stated that the statute was unconstitutional; one voted against "taking cognizance"; and the last gave no explanation at all. The Rhode Island legislature thereafter replaced four of the five, sparing only the judge who gave no explanation for his decision.[55] This episode stands in contrast with experiences in Virginia, New Jersey, and New Hampshire (where exercise of or declarations concerning judicial review occasioned no controversy). The *Trevett v. Weeden* case nevertheless tends to confirm that the framers embraced judicial review because they saw fit to

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[54] *See* Treanor, *Judicial Review Before* Marbury, *supra* note 2 at 477 (citing James M. Varnum, *The Case, Trevett v. Weeden*, in BERNARD SCHWARTZ, 1 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 423 (1971)).

[55] *See id.* at 478; Mary Sarah Bilder, THE TRANSATLANTIC CONSTITUTION: COLONIAL LEGAL CULTURE AND THE EMPIRE 190-191 (2004).

protect judges from removal from office "during good behavior."[56] The framers thus specifically thwarted, at the federal level, a repeat of the Rhode Island spectacle. Subsequent exercises of judicial review in Rhode Island in the early 1790s were uncontroversial, indicating acceptance of the practice.[57]

The last pre-Philadelphia Convention case considered here is one that the North Carolina Supreme Court mentioned in its decision under review here: *Bayard v. Singleton*. Echoing the *Case of the Prisoners*, it too offered a resounding declaration that legislatures were subordinate to the state constitution and could not alter its terms because, "if they could do this, they would at the same instant of time, destroy their own existence as a Legislature, and dissolve the government thereby established."[58] In effect, when the legislature exceeds its authority under the constitution, it is not acting as a "legislature" and its acts are therefore void. Accordingly, the North Carolina Supreme Court thus ruled that the statute at issue was a nullity.[59]

Consistent with the most prominent arguments and decisions concerning judicial review at the time of the Philadelphia Convention, the drafters of the

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[56] U.S. Const. art. III, § 2.

[57] *See* Treanor, *Judicial Review Before* Marbury, *supra* note 2, at 502-503.

[58] *Bayard v. Singleton*, 1. N.C. 5, 7 (1787).

[59] *See id.* Another pre-ratification case in which a state court exercised the power of judicial review is the *Symsbury Case*, 1 Kirby 444 (Conn. Super. Ct. 1785).

federal Constitution predominantly expressed support for judicial review. James Madison, James Wilson, and Gouverneur Morris, the three principal figures at the constitutional convention, all endorsed judicial review at the Convention,[60] and drafter Alexander Hamilton championed it in Federalist 78 and 81.[61]

But the richest source of evidence of post-Convention support of judicial review is founding-era case law, in which courts decided concrete cases and controversies.[62] Before and after the Convention, state courts repeatedly invalidated statutes under their respective state constitutions. Between the convening of the Convention and the decision in *Marbury* in 1803, state courts invalidated statutes in seventeen cases.[63]

Significantly, in *VanHorne's Lessee v. Dorrance*,[64] the most prominent pre-*Marbury* federal judicial review case,[65] while riding circuit, Supreme Court Justice Paterson observed in strong dicta that a court should invalidate a state statute if the state

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[60] Treanor, *Judicial Review Before* Marbury, *supra* note 2, at 469-471.

[61] *See* The Federalist Nos. 78, 81 (Alexander Hamilton).

[62] *See* Treanor, *Judicial Review Before* Marbury, *supra* note 2, at at 472.

[63] *See id.* at 497.

[64] 2 U.S. (2 Dall.) 304 (C.C.D. Pa. 1795).

[65] *See* Treanor, *Judicial Review Before* Marbury, *supra* note 2, at 522.

legislature had violated state constitutional provisions governing elections.

Justice Paterson, a leading participant in the Philadelphia Constitutional Convention, noted:

> In the thirty-second section of the [Pennsylvania] Constitution, it is ordained; "that all elections, whether by the people or in general assembly, shall be by ballot, free and voluntary."[66]

He then forcefully declared that courts should exercise judicial review to ensure that the state legislature did not violate this state constitutional provision:

> Could the Legislature have annulled these articles, respecting [other rights] and elections by ballot? Surely no. As to these points there was no devolution of power; the authority was purposely withheld, and reserved by the people to themselves. … The Constitution of a State is stable and permanent, not to be worked upon by the temper of the times, nor to rise and fall with the tide of events: notwithstanding the competition of opposing interests, and the violence of contending parties, it remains firm and immoveable, as a mountain amidst the

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[66] *VanHorne's Lessee*, 2 U.S. (2 Dall.) at 309.

> strife of storms, or a rock in the ocean amidst the raging of the waves.[67]

Justice Paterson then issued a classic statement of the need for judicial review:

> I take it to be a clear position; that if a legislative act oppugns a constitutional principle, the former must give way, and be rejected on the score of repugnance. I hold it to be a position equally clear and found, that, in such case, it will be the duty of the Court to adhere to the Constitution, and to declare the act null and void. The Constitution is the basis of legislative authority; it lies at the foundation of all law, and is a rule and commission by which both Legislators and Judges are to proceed. It is an important principle, which, in the discussion of questions of the present kind, ought never to be lost sight of, that the Judiciary in this country is not a subordinate, but co-ordinate, branch of the government.[68]

In view of the history of judicial review, when Chief Justice Marshall declared that is emphatically the province of the Judiciary to say what the law is, he was articulating extant understanding and well-

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[67] *Id.*

[68] *Id.*

established practice, not breaking new ground.[69] Indeed, Marshall's law professor, Judge Wythe, had embraced that principle a generation before *Marbury*. And, as Justice Paterson's opinion in *VanHorne's Lessee* made clear, that generally applicable principle provided a basis for judicial review of state statutes concerning laws regulating the "manner" of elections.

II. Petitioners' Interpretation of the Elections Clause Is Inconsistent with the History of Judicial Review

Petitioners contend that the Elections Clause eliminates the power of judicial review by state courts and that the North Carolina Supreme Court's decision to invalidate a redistricting plan under broadly-worded constitutional provisions amounts to prohibited lawmaking. They are wrong on all counts. The decision here was consistent with the historical practice of judicial review and the North Carolina court's interim plan did not offend the Elections Clause.

A. Because Judicial Review Was Established at the Time of the Founding, the Framers Would Not Have Eliminated It Without Using Clear Language

The Elections Clause provides that the times, places, and manner of congressional elections "shall be

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[69] *See* Treanor, *Judicial Review Before* Marbury, *supra* note 2, at 555-557.

prescribed in each State by the Legislature thereof ...."[70] Petitioners argue that because the Elections Clause identifies the "Legislature" as the prescribing entity, the Clause therefore eliminates judicial review by state courts and frees state legislatures from the substantive requirements of their respective state constitutions. Petitioners Br. 17-24. They are incorrect. The Elections Clause itself is silent as to whether a state court may invalidate a law prescribed by the legislature, just as it is silent as to whether the governor may veto such laws. But to construe that silence as abrogating the States' sovereign interest in exercising judicial review would make no sense, in light of the history of judicial review and the indisputable proposition that "'the States entered the federal system with their sovereignty intact.'"[71] If the framers had intended to override the States' constitutions by empowering state legislatures to enact unconstitutional laws, they would have said so. It is inconceivable that the framers would have eliminated judicial review for congressional election laws without a clear statement to that effect.

In assessing whether the framers acted in derogation of state sovereignty by eliminating judicial review, this Court should look to relevant history, among other sources.[72] The relevant history of judicial

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[70] U.S. Const. art. I, § 4, cl. 1.

[71] *Alden v. Maine*, 527 U.S. 706, 713 (1999) (quoting *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991)).

[72] *Cf. Alden*, 527 U.S. at 741 (in determining whether Article I gave Congress authority to abrogate States' immunity from suit, the Court considered whether "compelling evidence that this derogation of the States' sovereignty is inherent in the

review shows that lawmaking bodies in the States always exercised delegated authority, subject to review for substantive conformance with a higher law.[73] After the States declared their independence and adopted state constitutions, state courts took on the reviewing power that the Privy Council had previously exercised. In place of the law of England, the sovereign authority was the state constitution itself. Cases such as the *Case of the Prisoners*, *Bayard v. Singleton*, and *VanHorne's Lessee*, among others, showed that judicial review was a necessary component of self-governance under the People's social compact.

In view of the history, to hold that the framers eradicated judicial review by state courts in connection with election laws prescribed by the state legislature would be extraordinary. Nothing in the contemporaneous historical account suggests that the framers gave state legislatures a lawmaking power that, in this one area, was unrestrained by state constitutions as interpreted by state courts. To the contrary, as argued and explained in the Revolution-era cases, to allow a legislative act to contradict or undermine the state constitution would be destructive of the People's system of government. The framers did not act in derogation of state sovereignty by precluding judicial review of laws prescribed by the legislature under the Elections Clause. And the States

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constitutional compact" and discussed history, practice, precedent, and the structure of the Constitution (quotation marks omitted)).

[73] *See supra*, at pp. 10-23.

did not waive their right of self-government, which included judicial review, when they ratified the Constitution.

B. The Elections Clause Does Not Limit or Narrow the Traditional Power of Judicial Review

Petitioners state that "[t]he Elections Clause's allocation of authority to state legislatures would be emptied of meaning if state courts could seize on vaguely-worded state-constitutional clauses to replace the legislature's chosen election regulations with their own." Petitioners Br. 2. And they state that "[i]f the Elections Clause means anything, it must mean at least this: *inherently legislative* decisions about the manner of federal elections in a State are committed to 'the Legislature thereof.'" Petitioners Br. 4 (emphasis in original). Similarly, Justice Alito stated earlier in this case that the North Carolina Supreme Court's reliance on the "free elections" provision and its reasoning had "the hallmarks of legislation."[74]

The apparent theory underlying these statements is that a state court is not exercising the power of judicial review when it relies on a broadly-worded or general provision of the state constitution, but is instead legislating, in violation of the Elections Clause. This theory too is inconsistent with the history of judicial review at the time of the founding. As *amicus* has demonstrated, early state courts relied on

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[74] *Moore v. Harper*, 142 S. Ct. 1089, 1091 (Mar. 7, 2022) (Alito, J., dissenting).

broadly-worded constitutional provisions and the structure of government itself to ascertain whether the legislature had overstepped its bounds.[75]

The best example from the pre-1787 period is *Holmes v. Walton*, in which the New Jersey Supreme Court invalidated a state law based on a broadly-worded and general provision in the state constitution guaranteeing "the inestimable right of trial by jury …."[76] There was no textual conflict between the statute and the constitution, but the absence of a specific constitutional text did not limit the New Jersey court's authority to determine what the "right of trial by jury" required under the state constitution. Similarly, in the *Ten-Pound Cases*, the New Hampshire court decided whether a jury trial was customarily "used and practiced" in cases involving less than ten pounds. And in *Trevett v. Weeden*, John Varnum's argument that a statute was unconstitutional prevailed even though Rhode Island's constitution was then *unwritten*. Although *Trevett* triggered a legislative backlash, the protections for federal judges that followed in the wake of that decision, as well as acceptance of subsequent judicial review in Rhode Island, tends to confirm that the framers and the People accepted judicial review, even under broad provisions and understandings of a state constitution.

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[75] *See supra*, at pp. 17-20; *Treanor, Judicial Review Before* Marbury, supra note 2, at 474-480.

[76] N.J. CONST. art. XXII (1776), in 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 7, at 2598.

After 1787, state courts continued to review and regularly invalidated state statutes, particularly where those statutes affected courts or the right to jury trial.[77] The right to trial by jury was and is an individual right that entitled a defendant or civil litigant to decision-making by the People (the jury). It is a process-based right, not a substantive rule governing conduct outside of trial. The right to free and fair elections is analogous; it entitles citizens to decision-making by the People (the voters). It is a process-based right governing elections, not a substantive rule governing conduct outside of elections themselves.

Moreover, Justice Paterson's opinion in *VanHorne's Lessee* is powerful evidence that the founders believed courts should exercise judicial review to overturn state statutes that violated state constitutional protection of the electoral process.

Given that courts around the time of the founding guarded against legislative intrusions into the People's decision-making, the North Carolina Supreme Court's decision under its constitution's broad provisions in this case was consistent with historical practice.

C. A Statute Authorizing State Courts to Impose Interim Plans Does Not Offend the Elections Clause

Although judicial review raises difficult questions involving inter-branch conflicts, the presence of those

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[77] Treanor, *Judicial Review Before* Marbury, *supra* note 2, at 458.

questions did not lead the framers to give up on state-level solutions, federalize state legislatures, and wrench them out of the state constitutional context that created the legislatures in the first place. To do so would only place the States' most sensitive question of self-government—how to handle inter-branch conflict—in the hands of federal courts. At a minimum, this is not a case in which the federal courts should intervene because North Carolina has already resolved, by statute, how to handle cases in which the state courts exercise judicial review to invalidate congressional redistricting plans.[78] Here too, the *Case of the Prisoners* supports the validity of this legislative resolution and helps to show that North Carolina's statute is consistent with the Elections Clause.

In *Case of the Prisoners*, the question was whether the House and Senate, or alternatively, the House alone, should have the power to pardon convicted prisoners. Attorney General Edmund Randolph reasoned the Treason Act itself reflected the House's decision to involve the Senate in exercising its pardoning power under the Virginia Constitution. Randolph wrote:

> Shall the delegates be forbidden to call in assistance the judgment of the Senate? And if they have declared, that the pardon of treason is too important for their decision, what injury can arise from their admitting the Senate so far, as to

[78] *See* N.C. Gen. Stat. § 120-2.4(a1).

> say, that they will not pardon without their concurrence?[79]

Thus, as Randolph's question implies, even if Virginia Constitution assigned the pardon power to the House in the first instance, nothing in the Constitution prohibited the House from sharing that power with the Senate. The analogy to this case is evident: nothing "forbids" the North Carolina legislature from enacting a statute to govern the "interim" circumstance in which the state court declares a redistricting plan is unconstitutional. And no injury arises from the North Carolina legislature's decision to involve the state court in the interim remedial process.

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Edmund Pendleton was surely right when he commented that judicial review of legislative acts raises "tremendous" questions, "the decision of which might involve consequences to which gentlemen may not have extended their ideas."[80] This is an early expression of the idea that the framers could not have anticipated every circumstance in which the Constitution would apply when they drafted it. But the early legal thinkers would not have foreclosed and did not foreclose judicial review of legislative acts to secure conformance with the state constitution. Indeed, they saw judicial review as central to ensuring that the will of the People governed.

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[79] Treanor, *Case of the Prisoners*, *supra* note 2, at 510-511 (quoting Randolph's rough draft of oral argument).

[80] *Commonwealth v. Caton*, 8 Va. at 17.

CONCLUSION

The North Carolina Supreme Court's decision was consistent with the historical practice of judicial review and its interim plan did not violate the Elections Clause. Therefore, this Court should affirm.

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Respectfully submitted,

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