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

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

The Constitution compels the "Legislature" of each State to prescribe "[t]he Times, Places and Manner of Holding Elections for Senators and Representatives." U.S. CONST. art. I, § 4, cl. 1. A State cannot impose substantive limits on the exercise of this federal function any more than Congress can reallocate executive power to itself, *Bowsher v. Synar*, 478 U.S. 714, 726 (1986), or alter this Court's constitutionally-assigned original jurisdiction, *Marbury v. Madison*, 1 Cranch (5 U.S.) 137, 174–75 (1803).

Respondents' arguments founder on this structural logic. They contend that the Elections Clause was enacted against the backdrop assumption that "state-court judicial review" would remain available, Non-State Br. 23, and that North Carolina's legislature has "assign[ed] state courts the responsibility to review congressional maps for constitutional compliance," State Br. 20. But the question is not *whether* judicial review is available, but rather *what substantive rule of decision* applies: that found in the *federal* Constitution and laws alone or also that found in the *state*'s constitution. The text of the Elections Clause provides the answer: it assigns *state legislatures* the federal function of regulating congressional elections. As Joseph Story recognized, because this directive is supreme over state law, the States may not limit the legislature's discretion. *See Bush v. Palm Beach Cnty. Canvassing Bd.*, 531 U.S. 70, 76 (2000).

ARGUMENT

I. This Court Has Jurisdiction.

Respondents argue that the validity of the remedial maps imposed below is not properly before this

Court. Non-State Br. 69.[1] But the North Carolina Supreme Court decided that the Elections Clause permits state courts to draft their own remedial maps. That decision is a final judgment over which this Court has jurisdiction. *See* 28 U.S.C. § 1257(a).

In its February 14 order, the North Carolina Supreme Court "reverse[d] the trial court's judgment and remand[ed] this case to that court to oversee the redrawing of the maps by the General Assembly *or, if necessary, by the court*." Pet.App.142a (emphasis added). The court reached that decision after deciding Petitioners' Elections Clause claim on the merits. *See also* Pet.App.232a. Accordingly, it is a final judgment as to the *federal law* issues related to the remedial maps. Respondents point to ongoing proceedings in the North Carolina Supreme Court, but those proceedings concern state-law issues related to the remedial maps. *See Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 477 (1975).

The North Carolina Supreme Court's February 23 denial of a stay was also a final judgment over which this Court has jurisdiction. The stay denial caused the court-drawn remedial maps to take effect for the 2022 election cycle. *See National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977). The issue is not moot because "the challenged action is in its duration too short to be fully litigated prior to cessation or expiration." *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 462 (2007). And there is "a reasonable expectation that the same

[1] This argument does not affect jurisdiction to review invalidation of the initial congressional map, which is final and live. *See* Cert. Reply 1–2, 3.

complaining party will be subject to the same action again," *id*., because North Carolina will need to set maps for 2024 and beyond.[2]

II. The Elections Clause Does Not Allow States To Circumscribe the Legislative Power To Regulate Federal Elections.

A. The Constitution Assigns State Legislatures the Exclusive Duty to Regulate the Time, Place, and Manner of Congressional Elections.

The Elections Clause assigns the duty to regulate federal elections to "the Legislature" of each State. U.S. CONST. art. I, § 4, cl. 1. This assignment includes "districting the state for congressional elections." *Smiley v. Holm*, 285 U.S. 355, 373 (1932). Respondents advance a variety of arguments designed to shift the burden onto *Petitioners* to come forward with "exceptionally clear historical evidence" for our reading of the Elections Clause. State Br. 3; *see also* Non-State Br. 2. That historical evidence is present, but the burden is the opposite: because the Clause's text is "clear and distinct," *Respondents* must provide "irresistible" justification for departing from that text's "plain and obvious" allocation of authority. *Martin v. Hunter's Lessee*, 1 Wheat. (14 U.S.) 304, 338–39 (1816). Respondents' justifications are not persuasive.

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[2] In a footnote, Respondents renew their argument that Petitioners forfeited their Elections Clause argument in state court, constituting "an adequate and independent ground of decision barring review in this Court." State Br. 7 n.1. Petitioners did not forfeit the Elections Clause argument for the reasons we explained (at 4-5) in our certiorari-stage Reply.

1. Respondents' principal textual argument is that legislatures are "bound by constraints in the constitutions that empower them to make laws." Non-State Br. 21. Accordingly, the Founding-Era definition of "legislature" implicitly assumed that "judiciaries would counterbalance legislatures by enforcing constitutional limits." State Br. 29. But the very nature and justification of judicial review—"that every act of a delegated authority, contrary to the tenor of *the commission under which it is exercised*, is void" THE FEDERALIST NO. 78, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis added)—establishes that the Framers' assumptions about the availability of judicial review cannot justify application of *state*-constitutional limits against state legislatures' *federally* assigned authority to regulate federal elections.

While the "fundamental principles of our society" imply that "a legislative act contrary to the constitution is not law," *Marbury*, 1 Cranch (5 U.S.) at 177, this reasoning extends only to *those constitutions that apply* to the legislative act in question—"the commission under which it is exercised," THE FEDERALIST NO. 78, *supra*, at 467. Because the North Carolina legislature's authority to regulate federal elections is commissioned *by the federal* Constitution, it is no more subject to the limits in North Carolina's constitution than to those in California's. The result is neither the creation of "plenary lawmaking authority," State Br. 32, nor a license for legislatures "to violate their own state constitutions," Non-State Br. 1, 32. State legislatures are limited by *constitutional restraints that apply* (those in the federal Constitution), and they cannot "violate" constitutional restraints *that do not apply* (those in a state constitution).

The question in this case is essentially one of choice-of-law. When a state legislature exercises this federally assigned function, what are the *rules of decision* that apply to a reviewing court: those set forth in the state constitution or in the federal Constitution? The logic of our federalist system, and the nature of judicial review itself, supply the answer.

When a court invalidates a legislature's federal election regulations on *state*-constitutional grounds, it does something other than "say what the law is." *Marbury*, 1 Cranch (5 U.S.) at 177. It *circumscribes* the power assigned by the Elections Clause to state legislatures *on the basis of inapplicable law*. That circumscription violates the Elections Clause and is void under the Supremacy Clause.

Respondents invoke the "parallel lawmaking roles" that the Elections Clause assigns to "both state legislatures and Congress," State Br. 31, but that comparison clinches the point. "Prescribing regulations to govern the conduct of the citizen, under the first clause, and making and altering such rules by law, under the second clause, involve action of the same inherent character." *Smiley*, 285 U.S. at 367. Because these actions have "the same inherent character," they are subject to the *same constitutional limits*: those set forth in the U.S. Constitution.

A contrary conclusion would mean that the *same election regulation* could be invalid if enacted by a state legislature but valid if reenacted by Congress. Respondents invoke Congress's power, under our federalist structure, to "require compliance with laws that a State could not enact under its own constitution." Non-State Br. 57. But that is not analogous,

since it involves the exercise of two *different* authorities, allocated and governed by *different* constitutions.

Our structural argument was not "considered and rejected" by *Smiley*. Non-State Br. 56. *Smiley* held that the authority to pass regulations under the Elections Clause "must be in accordance with the method which the state has prescribed for legislative enactments." 285 U.S. at 366, 367. The Clause does not create state legislatures, set the procedures that constitute the process of legislation, or "attempt to endow the Legislature of the state with power to enact laws in any manner other than that in which the Constitution of the state has provided that laws shall be enacted." *Smiley*, 285 U.S. at 368. Accordingly, for purposes of determining the lawmaking process that applies, the Elections Clause takes state legislatures as it finds them. We do not dispute that rule.

Smiley does not hold, however, that the federal function assigned state legislatures by the Elections Clause may be *substantively limited* by state-constitutional restrictions. To be sure, *Smiley* distinguished *Leser v. Garnett*, 258 U.S. 130 (1922) and *Hawke v. Smith*, 253 U.S. 221 (1920), which held that a state legislature's role in ratifying amendments under Article 5 may not be subjected to invalidation by referendum. But *Leser* and *Hawke* were based on two conclusions: (1) that "the function of a state Legislature in ratifying a proposed amendment to the federal Constitution ... is a federal function" that "transcends any limitations sought to be imposed by the people of a state," *Leser*, 258 U.S. at 137; and (2) that the federal Constitution's treatment of this function forecloses the application of state *procedural* rules because

"ratification by a state of a constitutional amendment is not an act of legislation," *Hawke*, 253 U.S. at 229, 230.

Smiley concluded that the second of these propositions does not apply in the context of the Elections Clause, because a state legislature acting under that Clause acts as "a lawmaking body" rather than "as a ratifying body." 285 U.S. at 363, 365. But nothing in *Smiley* casts any doubt on the *first* proposition, that a state legislature's exercise of a federal function "transcends any limitations sought to be imposed by the people of a state." *Leser*, 258 U.S. at 137.

The structural arrangement established by the Elections Clause is not a novelty. For example, a similar arrangement has obtained in our legal system since the adoption of the Constitution. Every day across the Nation state courts employ their standard procedures to adjudicate federal claims. Just as state courts must look to substantive federal law to adjudicate those claims, state legislatures fulfilling their duties under the Elections Clause—and courts reviewing their enactments—must look to federal law to determine the substantive scope of their authority to regulate congressional elections.

2. Respondents concede that federal supremacy limits a state's ability to reallocate the Elections Clause's distribution of power by guaranteeing to state legislatures a "first-mover" status. On that theory, state legislatures must retain "primacy" over regulating elections, Non-State Br. 24; *see also* State Br. 57, but a state constitution could authorize other entities, such as courts, to both nullify and redraw the

legislature's work, presumably on whatever substantive basis the state's constitution sees fit to require.

This interpretation has no basis in the Constitution's text, and it renders Respondents' theory self-contradictory. The Elections Clause's text does not give state legislatures a "primary" role in regulating congressional elections, nor does it say that they get to take the first crack at setting the "Times, Places and Manner of holding Elections for Senators and Representatives." U.S. CONST. art. I, § 4, cl. 1. When the Framers wished to establish a "first-mover" regime, they knew how to do so. *See id.* art I, § 7, cl. 1.

Respondents' "primacy" argument renders their interpretation of the Elections Clause self-refuting. If the Clause's reference to state legislatures means "a representative body constrained by the constitution that created it," Non-State Br. 21, and if those constraints may include "substantive limits," *id.* at 51, then there is no principled reason why a state constitution could not impose a "substantive limit" requiring that all congressional districts be drawn *entirely* by the governor or the state courts.

Conversely, if Respondents' concessions are to be believed, then their main theory of the Elections Clause cannot be right. Once Respondents admit that the Clause assigns *some* measure of authority to state legislatures that their constitutions cannot reallocate, then Respondents' reliance on the background constraining force of substantive state-constitutional limits falls apart, and the only question left is *what* authority the Elections Clause assigns to state legislatures. And the answer to that question is the authority to prescribe "[t]he Times, Places and Manner of

holding Elections for Senators and Representatives," full stop. U.S. CONST. art. I, § 4, cl. 1.

3. Respondents claim that our acknowledgment that courts may "hear federal constitutional challenges to state election laws" is in tension with our interpretation of the Elections Clause as barring substantive *state* constitutional challenges, since "[t]he Clause does not mention" judicial review under the federal constitution. Non-State Br. 25–26, 57 (cleaned up). There is no tension. Because of the backdrop assumption that federal judicial review would be available to enforce *federal* limits on the exercise of federal functions, judicial enforcement of those federal limits does not disturb the federal Constitution's allocation of power or improperly limit the legislature's discretion.[3]

Our position is consistent with the Supremacy Clause. The reason a state legislature's election regulations are not subject to substantive state-constitutional limits is not that *those regulations* are "superior to state constitutions," Non-State Br. 28, it is that the

[3] Respondents' puzzlement at the "arrangement requiring state courts to hear challenges to state legislation under federal law but prohibiting them from doing the same under the State's own law," and their invocation of *Printz v. Unites States*, 521 U.S. 898 (1997), are even further afield. *See* Non-State Br. 57. That "arrangement" is the one obtains with respect to *all other* exercises of federal functions, such as state- and federal-court judicial review of laws enacted by Congress. *See Tafflin v. Levitt*, 493 U.S. 455, 458–59 (1990); *Printz*, 521 U.S. at 907.

state-constitutional restrictions are *inconsistent with the Elections Clause itself*.[4]

Finally, Respondents argue that our reading of the Elections Clause is contrary to "[t]he federalism principles embodied in the Tenth Amendment." Non-State Br. 27 (citing *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)). True, a State has wide latitude to structure its government how it chooses for the exercise of *state* functions. But when the federal Constitution "imposes a duty or confers a power on a particular branch of a State's government," *Bush v. Gore*, 531 U.S. 98, 112 (2000) (Rehnquist, C.J., concurring), its allocation of that federal function "transcends any limitations sought to be imposed by the people of a state," *Leser*, 258 U.S. at 137. None of the Respondents dispute that principle, *see* State Br. 33; Non-State Br. 22, 56, and that is the beginning and end of their Tenth Amendment argument.

B. History Confirms that States Cannot Circumscribe Elections Clause Authority.

1. Respondents cite the Articles of Confederation provision giving "the legislature of each state" authority to direct the "manner" in which delegates to the Confederation Congress were appointed, ARTICLES OF CONFEDERATION art. V (1777), and they point out that "10 of the 11 States with constitutions in effect under

[4] *McCulloch* cannot be brushed aside as dealing with "a federal entity" rather than "entities established ... by state constitutions." Amicus Br. of Sen. Daniel Blue 8 (Oct. 26, 2022). What is supreme over state law in this context is not the state legislature as an entity, or the legislation it passes, but the Constitution's own allocation of power over federal elections.

the Articles limited legislatures' power to appoint delegates to Congress," Non-State Br. 29. But this argument fails to appreciate the fundamental structural change wrought by ratification of the Constitution. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 803 (1995). A central part of the new national system was the Supremacy Clause's declaration that each provision in the federal Constitution "shall be the supreme Law of the Land"—not an unenforceable treaty. U.S. CONST. art. VI, cl. 2. The "pre-ratification practice" of imposing state-constitutional limits on the appointment of congressional delegates, Non-State Br. 29 n.3, only illustrates that the Articles of Confederation's allocation of power was not binding in any meaningful sense.

The change in practice after ratification of the Constitution *confirms* Petitioners' interpretation. *Every State* that had imposed a constitutional restriction on the appointment of delegates under the Articles *abandoned* the practice. *No* state constitution explicitly regulated the appointment of Senators to the new national Congress for decades thereafter. *See* Pet'rs' Br. 32–33 & n.7.

Respondents say our claim is "false," based on five state-constitutional provisions—from Georgia (1795), Pennsylvania (1790), Kentucky (1799), Louisiana (1812), and Alabama (1819). Non-State Br. 39–40 & nn.15–16. But the Georgia and Louisiana provisions merely dictated the use of ballots in "all elections" by the legislature—including, for example, those for the Speaker of the House or the State Treasurer, *e.g.*, LA. CONST. art. II, § 7; art. IV, § 9 (1812)—without any reference to the appointment of federal Senators. Pet'rs' Br. 33 n.7. The provisions requiring

viva voce votes in Kentucky, Pennsylvania, and Alabama's constitutions were similar. KY. CONST. art. VI, § 16 (1799); PA. CONST. art. III, § 2 (1790); ALA. CONST. art. VI, § 6 (1819).[5] Accordingly, for several decades after Ratification, no state constitution erected substantive restrictions that applied specifically to the appointment of Senators—in clear contrast to the state constitutions before Ratification, of which *ten out of eleven* included specific rules governing by name the appointment of "Delegates ... to the Congress of the United States of America." *E.g.*, DEL. CONST. art. XI (1776).

Respondents argue that this striking change of state behavior is not "relevant," Non-State Br. 39, because the "function of 'choosing' a senator is entirely distinct from 'prescrib[ing]' regulations for congressional elections." State Br. 43. That misunderstands the relevant comparison, which is between (a) prescribing regulations governing the choice of representatives and (b) *prescribing regulations governing* the choice of Senators—not the act of choosing Senators itself. Both types of regulatory roles are lawmaking functions expressly governed by the Elections Clause.

Finally, Respondents attempt to wave away the legislative decisions in New York and Massachusetts, after Ratification, to cast aside the pre-Ratification rules governing the appointment of delegates, based in part on the Elections Clause. *See* Pet'rs' Br. 32–35.

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[5] Respondents claim that in Georgia, Pennsylvania, Kentucky, and Louisiana "state legislatures adhered to these mandates in selecting senators," State Br. 43–44, but the sources they cite do not suggest that any of these legislatures believed that they were *bound* to do so.

In New York, Respondents claim that the pre-Ratification rules "simply no longer applied." State Br. 44. But while some legislators took that view, others invoked "the clause of the national constitution respecting the time, place, and manner of choosing senators," 3 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL ELECTIONS 1788–1790 at 338 (Gordon DenBoer ed., Univ. Wis. Press 1986) (remarks of Rep. Harrison), which rendered "the constitution of the state ... out of the question with respect to this business," *id.* at 382 (remarks of Sen. Schuyler). Similarly, the recognition in Massachusetts that the state legislature was " 'defined' by its 'state constitution,' " Non-State Br. 41, tracks our theory. The state legislatures are "defined" by the state constitution's *lawmaking process*; but when determining the *substance* of federal election regulations state constitutions cannot provide governing law.

2. The Elections Clause's drafting history provides further confirmation of our understanding of the provision. That history reveals that the textual choice to assign authority over federal elections to state *legislatures*—rather than the States generally—was deliberate.

The Virginia Plan contained no analogue to the Elections Clause, but the "Pinckney Plan" did. That Plan was proposed by Charles Pinckney on May 29, 1787, 1 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 23 (1911), and knowledge of its contents comes principally from two sources: (1) a version of the Plan that Pinckney drafted from his personal notes and papers and sent to John Quincy Adams in 1818, *see id.* at vol. 3, p. 595, and (2) a contemporaneous outline of the Plan written by James

Wilson during the Convention, *see id.* at vol. 2, p. 134. *Both* confirm that the Pinckney Plan included a provision governing "The Time of the election of the Members of the H[ouse of] D[elegates]," *id.* at 135, though only Pinckney's 1818 version relates its language.

Respondents do not mention Wilson's outline. But they rail against Pinckney's 1818 version, arguing that it "is almost certainly a fake," Non-State Br. 35, and that it "has been so utterly discredited that no instructed person will use it," State Br. 35 (quoting John Franklin Jameson, *Studies in the History of the Federal Convention of 1787*, 1 ANN. REP. AM. HIST. ASS'N 87, 117 (1903)). That would come as a surprise to Chief Justice Taft, who relied upon the 1818 version of the Plan in *Myers v. United States*, 272 U.S. 52, 85 n.86 (1926), as well as to the four Justices who dissented in *Arizona State Legislature v. Arizona Independent Redistricting Comm'n*, and who cited the Plan to make *the same point as Petitioners*. 576 U.S. 787, 835–36 (2015).

These Justices were justified in citing the Pinckney Plan. The dispute over the authenticity of the Plan is ultimately inconsequential, because other (undisputed) documentary evidence establishes that the language in the Elections Clause singling out state *legislatures* was added by the Committee of Detail. But there is *zero* historical support for Respondents' claim that the document is "almost certainly a fake." Non-State Br. 35. The document is not "a fake": it is *undisputed* that Pinckney submitted a Plan on May 29, 1787; and it is *undisputed* that the 1818 version was written by Pinckney himself and published by Adams as an authentic historical document. S. Sidney

Ulmer, *James Madison and the Pinckney Plan*, 9 S.C. L. REV. 415, 419 (1957).

To be sure, the version of the plan that Pinckney wrote in 1818 was not the original parchment from 1787; Pinckney, in the cover letter he sent responding to Adams's request for a "*copy* of the draught proposed," never claimed that it was. *Id.* at 419–20 (emphasis added). And it is also true that at the turn of the Twentieth Century, the historical consensus—based largely on James Madison's campaign, after Pinckney's death, to diminish the significance of his role at the convention—was that the version of the Plan Pinckney sent Adams in 1818 differed in certain respects from the version proposed in 1787. *See id.* at 421–32. But there is *no doubt* that the original Plan included a progenitor of the Elections Clause: (1) no analogue to the Clause is contained in any of the other extant plans submitted to the convention, and (2) *James Wilson's independent contemporaneous outline* of Pinckney's plan, written in 1787, *confirms* that it contained a version of the Clause. *See* 2 FARRAND, *supra*, at 134.

Because Wilson's outline does not contain the provision's wording, the only real question is whether Pinckney's original version of the Clause indeed assigned the power to regulate the time and manner of congressional elections to "Each State" generally. And here again, undisputed historical evidence indicates that the answer is likely yes. For we know independently, from Edmund Randolph's handwritten markup of the Committee of Detail's early draft constitution, that the Committee's initial version of the Elections Clause assigned the regulation of the time and manner of Senate elections to the States

generally. *See* Pet'rs' Br. 16–17. Because Pinckney's Plan appears to have been the only one submitted to the Committee that contained a version of the Elections Clause, it stands to reason that that Plan was the source of the wording in the Committee's initial draft.

Respondents do not dispute the authenticity of Randolph's draft from the Committee of Detail, nor do they dispute that the edits made in Randolph's hand changed the draft to assign the power to regulate Senate and House elections to the *legislature* of each State. *See* Non-State Br. 36. They claim that the change does not "bear[ ] on the meaning of the Elections Clause." *See id*. But the Framers' textual choices cannot so easily be set aside. The Constitution's "language specifies a particular organ of a state government, and we must take that language seriously." *Moore v. Harper*, 142 S. Ct. 1089, 1090 (2022) (Alito, J., dissenting from the denial of application for stay).

3. The first four decades of practice under the new Constitution confirm Petitioners' interpretation. Petitioners are unaware of *any* state-court decision invalidating a state legislature's congressional map on state-constitutional grounds *until 1932*, and Respondents and their many amici do not identify any earlier example. Nor do Respondents dispute the reason for the absence of any such decision in the Founding or Early Republic periods: *no state constitution contained* any provision purporting to govern congressional districting. Two States (Pennsylvania and Massachusetts) *considered and rejected* such proposals in the decades immediately following Ratification. And Massachusetts did so after Justice Joseph Story objected that the proposal violated the Elections Clause.

Respondents claim that Justice Story's objection "relied on a far narrower understanding of the Clause," State Br. 48, which merely protects the state legislature from being "entirely cut out of the redistricting process," Non-State Br. 38. But Justice Story's objection was that the proposal purported to "bind [the legislature] not to choose representatives *in any manner that the constitution of the U. States allows*." JOURNAL OF DEBATES AND PROCEEDINGS IN THE CONVENTION OF DELEGATES, CHOSEN TO REVISE THE CONSTITUTION OF MASSACHUSETTS 59, 60 (Boston Daily Advertiser 1821) (emphasis added). The Elections Clause, Story explained, vested state legislatures with "an *unlimited discretion* in the subject." *Id.* at 59 (emphasis added).

Respondents also suggest that perhaps the convention voted the proposal down for reasons unrelated to Justice Story's constitutional concerns. State Br. 48. But *the amendment's sponsor* acknowledged that Justice Story's views "upon all questions of law ... came with that authority that was apt to crush all opinions that came from a humbler source." JOURNAL OF DEBATES AND PROCEEDINGS, *supra,* at 58.

It was not until 1830 that a state-constitutional provision governing congressional districts appeared: Virginia's "abhorrent 'three-fifths' provision." Non-State Br. 37. Respondents place little weight on that provision, and for good reason. The historical record indicates that those Virginia delegates who considered the constitutionality of that provision, under the Elections Clause, *opposed* it—and those delegates who *supported* it were motivated by pro-slavery sentiment. As Madison (who voted for the three-fifths position) later explained, "the case of our colored

population" had so "infected the proceedings throughout" that "[e]very concession of private opinion, not morally inadmissible, became necessary in order to prevent an abortion [of the convention], discreditable to the Body & to the State, and inflicting a stain on the great cause of Self Government." *James Madison to Marquis de Lafayette* (Feb. 1, 1830), in FOUNDERS ONLINE, NATIONAL ARCHIVES, https://bit.ly/3SToJo7.

The handful of state-constitutional provisions Respondents cite from the late 1840s, *see* Non-State Br. 37 & n.14, come too late to overcome the weight of earlier evidence and the Elections Clause's plain text. *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2137 (2022).

4. Provisions purporting to regulate other aspects of the time, place, and manner of federal elections do not improve Respondents' situation. The vast majority of States—21 out of 24—did not enact *any* state-constitutional provisions during the first four decades of the Republic expressly regulating federal elections. Respondents claim that "[b]etween 1789 and 1821, 20 States adopted or amended their constitutions, and 16 of those States—*more than three quarters*—regulated congressional elections." Non-State Br. 31. But they include provisions that do not meaningfully support their position.

First, Respondents include seven provisions generically requiring "all elections" to be conducted either by ballot or *viva voce*.[6] These are best read, in

[6] GA. CONST. art. IV, § 2 (1789); *accord* GA. CONST. art. IV, § 2 (1798); PA. CONST. art. II, § 2 (1790); KY. CONST. art. III, § 2 (1792); *accord* KY. CONST. art. VI, § 16 (1799); TENN. CONST. art.

context, as governing "all elections" for offices that *those state constitutions established*. Other state-constitutional provisions governing "all elections," or "elections" simpliciter, obviously only apply to state elections—including North Carolina's own provision directing that "elections shall be often held." N.C. CONST. art. I, § 9. Respondents rejoin that " 'all' means all," Non-State Br. 33, but an expansive word like "all" "can and does mean different things depending on the setting." *Nixon v. Missouri Mun. League*, 541 U.S. 125, 132 (2004); *see also Gutierrez v. Ada*, 528 U.S. 250, 254–57 (2000).

The Bill of Rights repeatedly speaks in expansive, universal language—including the word "all." *See* U.S. CONST. amend. VI ("all criminal prosecutions"); *see also id.* at amend. IV ("no Warrants shall issue"), amend. V ("No person shall be held"). Yet before the enactment of the Fourteenth Amendment, it was understood that its "limitations on power, if expressed in general terms, are naturally, and, we think, necessarily, applicable to the government created by the instrument." *Barron v. City of Baltimore*, 32 U.S. (7 Pet.) 243, 247 (1833). So too with "all elections" provisions. State Respondents claim (at 42) that *Barron*'s rule favors them because state constitutions "*do* 'create' the state-government institutions that regulate and administer federal elections." But those *state* institutions are exercising a *federal* function when they partake of that role. And the *elections*

III, § 3 (1796); OHIO CONST. art. IV, § 2 (1803); LA. CONST. art. VI, § 13 (1812); N.Y. CONST. art. II, § 4 (1821). Alabama's 1819 Constitution contained a similar provision requiring voting by ballot in "all elections," though it allowed the legislature to direct a different manner. ALA. CONST. art. III, § 7 (1819).

themselves are for offices *created by the federal Constitution*, so *Barron*'s interpretive principle still applies.

State Respondents also argue that "when drafters of early state constitutions wanted to limit constitutional restrictions to state, rather than federal, elections, they did so expressly," based on the provisions in some state constitutions singling out elections for State offices. State Br. 41–42. But as the Delaware and Maryland constitutional provisions (discussed further below) from 1792 and 1810 show, these drafters *also* knew how to write provisions expressly regulating *both* state and federal elections, so Respondents' inference from what the "all elections" provisions *could* have said goes nowhere.

Respondents' other evidence is unavailing. They cite an 1804 anecdote where William Findley, a Pennsylvania lawmaker who "helped draft Pennsylvania's 1790 constitution" and later served in Congress, supposedly "explained that the Pennsylvania Constitution's command that 'all elections shall be by ballot' applied to congressional elections." State Br. 40–41. But Findley merely mentioned this state constitutional provision as part of a laundry list describing all of the federal and state laws that governed elections for federal and state office in Pennsylvania; he never asserted that the "by ballot" provision applied to both types of elections. *See* 8 ANNALS OF CONGRESS 849–50 (1804). Similarly, Respondents cite a 1789 decision from the Georgia Executive Council concluding that the state-constitutional provision requiring citizens to vote "in the county where such person resides," GA. CONST. art. XI (1777), applied to congressional elections, 2 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL ELECTIONS 1788–1790 at 465 (Gordon

DenBoer ed., Univ. Wis. Press 1984). Such provisions were generally understood as regulating *the qualifications* of voters—a subject that the Constitution entrusts to the states, *see* U.S. CONST. art. I, § 2, cl. 1, not the time, place, or manner of elections. *See* 2 COLLECTED WORKS OF JAMES WILSON 840–43 (Kermit L. Hall ed., 2007).

Nor is the issue illuminated by the fact that several States that enacted "*all* elections" provisions thereafter enacted statutes providing that congressional elections would follow the same rules. *See* Non-State Br. 33–34. Respondents cite no evidence that the state statutes they rely on were enacted because state constitutions were understood to require them, rather than because of practical or policy reasons. Indeed, in Pennsylvania, Kentucky, Tennessee, and Louisiana, the legislatures first passed statutes prescribing the constitutionally-designated voting rule for *state* elections (which, in the case of Pennsylvania and Tennessee, explicitly invoked the state constitution),[7] and *then* passed *separate* statutes providing that congressional elections would be conducted in the same manner (which *did not* invoke the state constitution).[8] This process suggests that these legislatures *did not* view their respective state-constitutional

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[7] Act of Sept. 13, 1785, § XXVI, 1785 PA. STAT. 25, 44; Act of June 24, 1792, ch. IV, § 6, 1792 Ky. Acts 5, 6; Act of Apr. 23, 1796, ch. IX, § 3, 1796 Tenn. Acts 79, 80; Act of Jun. 4, 1806, ch. XIX, §§ 4, 7, Acts of Territory of Orleans 78, 80, 82.

[8] Act of Mar. 16, 1791, ch. XIII, § II, 1791 PA. STAT. 20, 21; Act of June 26, 1792, ch. V, § 4, 1792 Ky. Acts 7, 7; Act of Apr. 20, 1796, ch. X, § 2, 1796 Tenn. Acts 81, 82; Act of Sept. 5, 1812, ch. XI, § 3, 1812 La. Acts 42, 44.

provisions as governing state and federal elections in lock-step.

Second, two of the remaining nine States are included in Respondents' count based solely on constitutional provisions "requiring 'all' elections to be 'free.' " Non-State Br. 32–33.[9] Because these provisions applied to "all elections," they suffer from the same problem as the provisions just discussed. Indeed, language in Vermont's provision confirms that it was limited to state-elections, since it went on to direct that "all freemen ... have a right to ... be elected into office," *e.g.*, VT. CONST. ch. I, art. 8, a requirement that constitutionally *cannot* apply to federal offices, *see U.S. Term Limits*, 514 U.S. at 827.

Further, these provisions were understood as regulating the *qualifications* of voters, not the "manner" of elections. *See* 2 COLLECTED WORKS OF JAMES WILSON, *supra*, 838–39; *An Address of the Council of Censors to the People of Vermont* (1800), *in* RECORDS OF THE COUNCIL OF CENSORS OF THE STATE OF VERMONT 155, 156 (Gillies and Sanford eds., 1991); Amicus Br. of Honest Elections Project 8–10 (Sept. 6, 2022).

The subtraction of these provisions reduces Respondents' tally to seven.

Third, Respondents count another five States that enacted constitutions, when they first transitioned out of territorial status to statehood, that included rules for the first elections conducted in the new State—including for the new state governor and

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[9] N.H. CONST. pt. I, art. XI (1792); VT. CONST. ch. I, art. 8, ch. II, § 34 (1793).

legislators.[10] But until this first election was held in each such State, there *was no state legislature* in these now-former territories, and the Elections Clause's assignment of authority to the legislature of each State *had not yet kicked in*. And once the State *did have* a legislature, the provisions expired of their own force.

Fourth, Respondents therefore are left with just two States, Delaware and Maryland, both of which enacted early constitutions effectively requiring congressional elections to be conducted by ballot. *See* DEL. CONST. art. IV, § 1, art. VIII, § 2 (1792); MD. CONST. art. XIV (1810). While these two provisions regulated congressional elections, any evidence they provide of the Elections Clause's original meaning is limited. As an initial matter, "[o]ne may properly question the extent to which the States' own practice is a reliable indicator of the contours of restrictions that the Constitution imposes on States." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 823 (1995). Further, both restrictions were relatively minor, neither State appears to have even considered their constitutionality, and neither provision appears to have ever been judicially enforced against the State's legislature. The Court should not "stake [its] interpretation" of the Elections Clause on two outlier provisions "that contradict[ ] the overwhelming weight of other evidence" and the plain constitutional text. *District of Columbia v. Heller*, 554 U.S. 570, 632 (2008).

5. Evidence from the second half of the nineteenth century and later is less probative. *See Bruen*,

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[10] MISS. CONST. sched., § 7 (1817); IND. CONST. art. XII, § 8 (1816); ILL. CONST. sched., § 9 (1818); ALA. CONST. sched., § 7 (1819); MO. CONST. sched., § 9 (1820).

142 S. Ct. at 2136. Yet even this evidence supports Petitioners.

Most of the evidence arises out of controversies over absentee voting by soldiers. A handful of States adopted state-constitutional amendments authorizing soldiers to vote absentee. State Br. 45–46. This evidence hardly weighs unequivocally in Respondents' favor, since these States may have taken the view such provisions concerned the *qualifications* of voters, not the *manner* of voting. *See In re Opinion of the Justices*, 113 A. 293, 298 (N.H. 1921).[11]

Further, those courts that *did* view the absentee-voting issue to concern the "manner" of elections held that state constitutions could not control the legislature's authority over the issue under the Elections Clause. As Thomas Cooley's "massively popular" treatise explained, *Heller*, 554 U.S. at 616, statutes allowing absentee voting "would not be invalid" as applied to federal elections because "the State constitutions cannot preclude the legislature from prescribing the 'times, places, and manner of holding' the same." THOMAS COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 754 (6th ed. 1890); *see In re Opinions of Justices*, 45 N.H. 595, 601 (N.H. 1864); *Commonwealth ex rel. Dummit v. O'Connell*, 181 S.W.2d 691, 694 (Ky. Ct. App. 1944); *Opinion of Judges*, 37 Vt. 665

[11] That distinction also disposes of Respondents' reliance on post-bellum federal legislation "*requir[ing]* ex-confederate States to include in their new constitutions" provisions guaranteeing the franchise to ex-slaves. State Br. 46, as well as their argument that "Petitioners themselves ... proposed an amendment to North Carolina's constitution requiring citizens to present photo identification to vote," *id.* at 47. Both pertained to voter *qualifications*.

(1864). The New Hampshire Supreme Court later called a portion of its 1864 decision into doubt, but that was because it subsequently thought absentee voting could arguably be viewed as a matter of voter *qualifications*. *In re Opinion of the Justices*, 113 A. at 298.

Respondents point to two decisions that, they say, "invalidated state laws regulating congressional elections as inconsistent with the state constitution." Non-State Br. 50 n.18. But *People ex rel. Twitchell v. Blodgett*, 13 Mich. 127 (Mich. 1865), concerned only *state elections*. *See id.* at 136, 143; *Dummit*, 181 S.W.2d at 695. And Congress later concluded that Michigan's state-constitutional provision could not limit the state legislature's authority under the Elections Clause. *Baldwin v. Trowbridge*, H.R. REP. NO. 39-13 (1866). And *State et rel. Schrader v. Polley* held that the referendum procedure could be applied to congressional districting because that procedural mechanism was part of the "constitutional lawmaking machinery of the state." 127 N.W. 848, 850 (S.D. 1910). That is consistent with Petitioners' theory.

Congressional practice from this period also supports Petitioners. Respondents argue that *Baldwin* was based on the theory that "the state law and the state constitution were aligned," State Br. 49, but the Committee Report's *entire argument* was based on the premise that it was faced with "an unmistakable conflict of authority. The constitution plainly prohibits what the legislature as plainly permits." H.R. REP. NO. 39-13, at 2.

Respondents also note that other congressional decisions from this period went the other way, State

Br. 47, but many decisions also followed *Baldwin*, *see* Amicus Br. of Restoring Integrity 20–21 (Sept. 2, 2022), and in any event, we have never staked our interpretation of the Elections Clause on a consistent course of Congressional practice during this period. Because *all* of the evidence of this vintage "come[s] too late to provide insight into the meaning of the Constitution in 1787," *Bruen*, 142 S. Ct. at 2137 (cleaned up), we note it to make two points: (1) the weight of the evidence from this later era provides further "confirmation" of what the early history has "already ... established," *id.*, and (2) Petitioners' interpretation is not "novel," State Br. 3.

C. This Court's Precedent Is in Accord.

1. Respondents rely on the line of cases holding that state legislatures are subject to various state-constitutional *procedural* requirements when enacting federal election regulations—including the veto, *Smiley*, 285 U.S. 355; *Koenig v. Flynn*, 285 U.S. 375 (1932); *Carroll v. Becker*, 285 U.S. 380 (1932), and referendum, *State of Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916). But these cases merely hold that state legislatures must exercise their federally-assigned function consistent with "the *method* which the state has prescribed for legislative enactments." *Smiley*, 285 U.S. at 367 (emphasis added).

Smiley's reasoning strongly supports Petitioners. The premise was that if the veto power was *not* part of "the method which the state has prescribed for legislative enactments" because it was "repugnant to the grant of legislative authority," then the veto power *could not* constitutionally be applied. *Id*. at 367–68.

Respondents assail this distinction as "wholly atextual," Non-State Br. 51, but that is not so. The textual basis for applying state *procedural* rules that define how a legislature legislates is the Elections Clause's direction that election regulations are to be prescribed "by Law"—which, though it textually pertains "to the action of the Congress," also applies to the action of state legislatures, since the actions share "the same inherent character." *Smiley*, 285 U.S. at 367. But *no* language in the Elections Clause purports to subject state legislatures to *substantive* state-constitutional restraints when they exercise their federally-assigned function.

Respondents argue that the "distinction between procedure and substance is also incoherent," Non-State Br. at 52, because the gubernatorial veto, for example, can be exercised "on substantive grounds," State Br. 53. But officials exercising *any* procedural mechanism can do so based on a variety of reasons. Nothing would prevent the President from vetoing a bill because he viewed it as out of step with the constitution of New York—or of Germany, for that matter. That does not mean that these sources of law actually apply, and it does not render the veto a substantive limit rather than a procedural one.

2. Petitioners' interpretation is not foreclosed by *Arizona*. That case concerned a dispute over whether "[t]he exercise of the initiative" could also qualify as part of "the State's prescriptions for lawmaking," alongside "the referendum and the Governor's veto." 576 U.S. at 808. The Court's statement that a state legislature may not "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, must be read in reference to the only issue before it.

Arizona did not concern the extent to which a state constitution may impose *substantive* limits on the regulation of federal elections. Respondents note that the "constitutional provisions creating" the Arizona commission at issue "imposed substantive constraints," Non-State Br. 53, but these constraints were never raised in *Arizona*, and the Court did not bless their constitutionality.

3. The Court's Electors Clause precedents strongly support our interpretation. *McPherson v. Blacker* explained that the Electors Clause "leaves it to the legislature exclusively to define the method of effecting the object" and "operat[es] as a limitation upon the State in respect of any attempt to circumscribe the legislative power." 146 U.S. 1, 25, 27 (1892). Earlier language notes that a State's "legislative power is the supreme authority, except as limited by the constitution of the state," *id.* at 25, but that passage was discussing the state's *ordinary* legislative power, not the legislature's exercise of federal functions.[12]

Respondents argue that *McPherson*'s interpretation of the Electors Clause as foreclosing state-constitutional restrictions was dicta, but it was part of the Court's holding in *Palm Beach County*, 531 U.S. at 76. There, the Court explained that state legislation

[12] Respondents also note that the state court below had also "consider[ed] state constitutional claims" and that this Court did not suggest that doing so was improper, Non-State Br. 46, but this is irrelevant given that the state court "ruled ... adversely" to those claims, *McPherson*, 146 U.S. at 23.

regulating "the selection of Presidential electors" is enacted "by virtue of a direct grant of authority made under Article II, § 1, cl. 2, of the United States Constitution," and it cited *McPherson* for the proposition that this clause "operat[es] as a limitation upon the State in respect of any attempt to circumscribe the legislative power." *Id.*

Respondents claim that this decision "declined to decide any federal question at all." Non-State Br. 47 (cleaned up). But the Court's decision to remand was based on the conclusion that a state court *cannot apply* a substantive state constitutional provision to "circumscrib[e] the legislature's authority" under the Electors Clause. *Palm Beach County*, 531 U.S. at 78. Because there is no reason to interpret the Elections Clause and the Electors Clause differently in this context, that principle, squarely endorsed by this Court, resolves this case.

Chief Justice Rehnquist again defended this view in his concurrence in *Bush v. Gore*, 531 U.S. 98 (2000). Respondents say that this opinion "stands for the unremarkable proposition that state courts' authority to interpret state law is not *itself* unchecked by federal constitutional constraints." Non-State Br. 48, 49. But the *reason* federal courts must scrutinize "state courts' authority to interpret state law" in this context, *id.* at 48, is that if a state "court has actually departed from the statutory meaning," then it has unconstitutionally interfered with "the constitutionally prescribed role of state *legislatures*," *Bush*, 531 U.S. at 115. Here, the North Carolina courts *openly proclaimed* that they were shouldering the state legislature to the side, based on "the state constitution." Pet.App.121a.

4. Respondents intone the Court's statement in *Rucho v. Common Cause* that "Provisions in state statutes and state constitutions can provide standards and guidance for state courts to apply" in partisan gerrymandering cases, 139 S. Ct. 2484, 2507 (2019), but that statement did not purport to definitively resolve the question presented here. As *Rucho* itself explained: "*[w]e express no view on any of these pending proposals*." *Id*. at 2508 (emphasis added). And several strategies cited by *Rucho*—such as creating redistricting commissions—are consistent with our theory.

Similarly, *Wesberry v. Sanders*'s conclusion that *federal* constitutional constraints govern Congress's authority to "make or alter" a state legislature's election regulations under the Elections Clause has no relevance here. 376 U.S. 1, 6 (1964). Those same federal constitutional constraints *also* govern *state legislatures* when they exercise the federal function assigned to them by the Clause. For that reason, *Growe v. Emison*, 507 U.S. 25 (1993), and other cases establishing that state courts, as well as federal courts, may review congressional districts for compliance with *federal constitutional standards* are also irrelevant.[13]

D. Respondents' Policy Arguments Are Unpersuasive.

Respondents' policy concerns provide no reason to refrain from adhering to the interpretation of the

[13] Respondents characterize *Growe* as concerning a "congressional plan [that] violated malapportionment provisions in the state constitution," Non-State Br. 52, but the case also involved a federal Equal Protection claim, 507 U.S. at 27.

Elections Clause that is supported by its text and history.

Many relate to the concern that officials will be forced "to run, simultaneously, two elections with different rules." Non-State Br. 75. But the *Purcell* principle, *see Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam), and traditional equitable factors safeguard against Respondents' concerns about massive disruption "on the eve of an election," Non-State Br. 78. Outside of that context, state and local officials concerned about the "havoc" caused by holding federal and state elections under different rules, State Br. 56, can present those concerns *to state legislatures*—the appropriate forum for these types of public-policy arguments.[14] State legislatures have had the authority to impose different federal and state election regimes since the Founding but have generally declined to do so; Respondents provide no reason for thinking that will suddenly change.

Respondents also contend that enforcing the Elections Clause would prevent voters from responding to political gerrymandering. Non-State Br. 77–78. But States would retain a variety of means for dealing

[14] Some of Respondents' amici make the scurrilous suggestion that Petitioners' interpretation would enable state legislatures to change the result of a Presidential election by replacing popularly chosen electors with their own slate. *See* Amicus Br. of Richard Hasen 27–30 (Oct. 25, 2022). But that result plainly *would not* follow from adoption of Respondents' interpretation. As those very amici admit, any such maneuvering is barred by *federal* statutory and constitutional protections. *Id.* at 28; *see also* Amicus Br. of Republican National Committee 22–30 (Sept. 6, 2022). This Court should not allow inflammatory claims about an issue that *is not* before it affect its decision in this case.

with partisan gerrymanders, including the gubernatorial veto, popular referenda, independent redistricting commissions, and appeals to Congress's authority to make or alter state election regulations.

Respondents ignore the problematic implications of *their* theory. The result of Respondents' approach is to create another choke-point—state constitutions, enforced by state judges—that States could exploit to frustrate the election of congressional representatives. That is contrary to Respondents' own articulation of the Elections Clause's core purpose. *See* Non-State Br. 30. Moreover, the people who draft and ratify state constitutions cannot be trusted to always act from pure motives any more than state lawmakers, and Respondents' interpretation of the Clause would enable state-constitution-makers to adopt all manner of anti-democratic restrictions on congressional elections—from barring absentee voting to entrenching partisan gerrymanders in the state constitution (both of which have happened). And the more general consequence of Respondents' approach is to vest state courts with virtually unlimited discretion to decide every policy question raised by the conduct of federal elections under the guise of ensuring a "fair" election.

Respondents argue that enforcing the Elections Clause will "create uncertainty over what executive officials can do," Non-State Br. 76, upending the "ubiquitous practice" of vesting non-legislative elections officials with authority to hammer out the details of such matters as "the site of every polling place" or the adjustment of "polling hours" in cases of emergency, State Br. 56. But a decision in Petitioners' favor would not cast doubt on these types of delegations. We merely ask for the application of *ordinary non-*

delegation principles, which allow legislatures to vest executive officials with substantial implementing discretion, so long as the legislature has set an "intelligible principle." *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019).[15]

If the Court were concerned about the implications of fully embracing our position, it could decide this case on narrower, alternative grounds. Even if *some* substantive state-constitutional restrictions could be validly enforced, the Elections Clause does not allow state courts to enforce judicially undiscoverable and unmanageable state-constitutional standards that "ask the courts to make their own political judgment about how much representation particular political parties *deserve*." *Rucho*, 139 S. Ct. at 2499. For that task is "legislation" by definition, and it cannot lie within the province of the courts on any plausible interpretation of the Clause. Respondents argue that this distinction is indeterminate, but it is the same distinction that this Court's Political Question jurisprudence has drawn for over sixty years. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

Alternatively, if (and only if) the Court rejects our first two alternatives, it could hold that the Elections Clause does not allow state courts to *draw their own maps*. That at least would prevent states from seizing redistricting *entirely* from the legislative process.

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[15] For that reason, our interpretation of the Elections clause is not "inconsistent with the overwhelming historical evidence" that Founding-Era "state legislatures repeatedly empowered other government officials to prescribe" the details of congressional elections. State Br. 55 n.11.

Finally, Respondents contend that adopting Petitioners' interpretation would engender litigation and require the federal courts to draw difficult lines. But Respondents *acknowledge* that federal courts can restrain "state courts' authority to interpret state law" when they "obstruct federal rights," Non-State Br. 48–49, so their theory would lead to the same "affront to ... judicial federalism," *id.* at 78, that they decry—which in reality is no affront at all, since this federal role "does not imply a disrespect for state *courts* but rather a respect for the constitutionally prescribed role of state *legislatures*," *Bush*, 531 U.S. at 115.

Moreover, Respondents' interpretation creates greater difficulties of judicial administration. Our theory of the case is a simple one: while state law governs the *process* by which state legislatures exercise the power assigned them by the Elections Clause, only *federal* law can limit the *substance* of the election regulations they pass. That is a distinction grounded in text, history, and precedent: as *McPherson* explained, a state constitution may not "circumscribe the legislative power," 146 U.S. at 25—or as Justice Story put the point, a State may not "limit" or "control" a legislature's "unlimited discretion" or "power of choice." JOURNAL OF DEBATES AND PROCEEDINGS, *supra,* at 59–60. If a provision relating to the "the method which the state has prescribed for legislative enactments," *Smiley*, 285 U.S. at 367, leaves the legislature free to exercise its power of choice to adopt whatever election regulation it sees fit, so long as it jumps through the necessary hoops, then the Elections Clause has not been violated. But if a state-constitutional provision bars state legislatures from choosing a particular time, place, or manner of voting *no matter what*

process they follow, then it impermissibly "circumscribe[s] the legislative power" and it cannot be enforced. *McPherson*, 146 U.S. at 25.

Respondents, by contrast, would have the courts enforce the Elections Clause by ensuring that legislatures are allowed to play "a central role" in the process, State Br. 57, and that they retain "primacy over other state actors," Non-State Br. 24. It is difficult to imagine a more hopeless task than "inventing, from scratch, an entire jurisprudence," *id.* at 78, designed to determine whether state-constitutional restrictions leave the legislature with sufficient "primacy" over election regulation.

III. Neither Federal nor State Law Vests the North Carolina Courts with Authority To Impose Substantive State-Constitutional Limits on the Authority Assigned State Legislatures by the Elections Clause.

A. No State Law Justified the Actions of the State Courts Below.

1. Respondents abandon any argument that the state statutes they rely upon are "delegations," now arguing instead that they are *authorizations* that "merely provide that state courts will play their traditional judicial role in the redistricting context." State Br. 12, 17. But no one disputes that the North Carolina courts have "the power to review laws for constitutionality." Non-State Br. 62. Indeed, they would have that power *even if the statutes at issue were never enacted*. The question in this case is not whether state courts may engage in judicial review; the question is what *rules of decision* apply when they do. The

statutes at issue would answer *that* question only if they vested the state courts with substantive power to articulate and enforce standards that otherwise would not apply "of their own force," *id.* at 58—a reading that Respondents nowhere defend.

Respondents' analogy to the Administrative Procedure Act proves the point. *See* Non-State Br. 59. Yes, 5 U.S.C. Section 702 "authoriz[es] review" of agency action, *id.*, and Section 706 authorizes certain remedies. But these provisions do not establish the *substantive limits* that govern federal agencies; those are set forth elsewhere, such as in the federal constitution, each agency's organic statute, and the substantive requirements of the APA. Reading the North Carolina statutes at issue as analogous to the APA's judicial review provisions—and thus as merely "confirm[ing] 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," State Br. 20—does not answer the question of *which* constitutional requirements the legislature is bound to respect in this context.

2. On their face, none of the statutes cited by Respondents purport to authorize state courts to enforce substantive rules of decision that would otherwise not apply.[16]

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[16] Respondents disclaim the "delegation" label, but that is precisely what such an authorization of substantive lawmaking would amount to. So even if the state statutes at issue could be interpreted in this way, they would run headlong into the non-

a. N.C. GEN. STAT. Sections 1-267.1, 120-2.3, and 120-2.4 establish the judicial review process—directing the venue where redistricting challenges "shall be heard and determined" and governing the content of any "orders or judgments declaring redistricting maps unconstitutional." State Br. 14–15 (cleaned up). Nothing in these provisions purports to establish the rule of decision that applies in these challenges, or to give state courts the *substantive* power to enforce state-constitutional restrictions that would not apply "of their own force," Non-State Br. 58.

Respondents invoke the *Stephenson* line of cases, but the North Carolina Supreme Court's interpretation of the statutes at issue in *Stephenson precisely tracks* our view. These provisions, *Stephenson III* explained, were enacted in the wake of the *Stephenson I* and *II* decisions invalidating the legislature's 2001 state-legislative maps on state-constitutional

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delegation doctrine. Just as Article I, Section 1's vesting of legislative power in *Congress* precludes Congress from delegating that power away, the Elections Clause's assignment of power to *state legislatures* entails the same limitations. And it is well settled that legislatures may not "delegate *to the Courts*, or to any other tribunals, powers which are strictly and exclusively legislative." *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42–43 (1825) (emphasis added).

For similar reasons, a past General Assembly could not "commit[ ] to enacting [state] constitutionally compliant maps," State Br. 11, in a way that purports to *bind* future legislatures to follow substantive state-constitutional limits—and to subject their actions "to judicial review" to enforce those restraints, *id.* at 1. For such a maneuver would, again, circumscribe and reallocate the authority assigned state legislatures by the Elections Clause.

grounds, to "set out a workable framework for judicial review that reduces the appearance of improprieties." *Stephenson v. Bartlett (Stephenson III)*, 595 S.E.2d 112, 120 (N.C. 2004). The legislature did so by regulating "matter[s] of procedure." *Id.* at 118. Nothing in any of the *Stephenson* decisions supports the view that these provisions conferred any *substantive* authority over the *rules of decision* that apply in redistricting challenges. To the contrary, the court upheld the provisions under the General Assembly's "constitutional authority to establish rules of procedure for the Superior Court Division." *Id.*

Because these state statutes merely govern judicial review of redistricting challenges under *whatever constitutional rule of decision applies*, their reference to "State legislative or congressional districts" being invalid under "the North Carolina Constitution or federal law," N.C. GEN. STAT. § 1-267.1(c), does not support Respondents. This language is consistent with the rule, required by the Elections Clause and principles of federal supremacy, that "State legislative" districts may violate the "North Carolina Constitution or federal law," but "congressional districts" are only subject to the latter. *Id.* This interpretation does not "mock[ ] the statutory text," Non-State Br. 61, it merely recognizes that, while the statute contemplates state-court judicial review of both state and federal maps, it *leaves in place* the background rules governing *which rules of decision* apply to *which types of maps*.

For the same reason, nothing in the *Stephenson* litigation, or in *Pender County v. Bartlett*, 649 S.E.2d 364 (N.C. 2007), is contrary to Petitioner's interpretation of these provisions. Yes, those cases involved

"state-constitutional claims," State Br. 16, but both cases were limited to *state legislative districts*. *See Stephenson III*, 595 S.E.2d at 114; *Pender Cnty.*, 649 S.E.2d at 365.[17]

b. Respondents also point to the General Assembly's 1969 proposal of the state constitution. Non-State Br. 64. But assuming that the substantive limits in the constitution do not restrict the legislature's Elections Clause authority by their own force—which is the premise of Respondents' argument at this stage, Non-State Br. 58—then the fact the constitution was proposed by the legislature cannot change the analysis. For that document was not *effective* until ratified by North Carolina's voters.

Respondents say this is "a distinction without a difference," because *Hildebrant* holds that giving the popular referendum a role in the legislative process does not "offend the Elections Clause." *Id.* at 65. But *Hildebrant* upheld the use of the referendum there because state-constitutional procedural rules established that it is *part of the state legislative process*. 241 U.S. at 568. The proposal and ratification of North

[17] Respondents also point to language in the 2022 remedial plan providing that it would be "effective contingent upon its approval or adoption by the Wake County Superior Court." Non-State Br. 61 (emphasis omitted). That provision, enacted in direct compliance with the state supreme court's February 4 Order and February 14 Opinion, does not indicate acquiescence in the state court's conclusion that substantive state-constitutional restrictions apply in this context. Indeed, the *same section* of the statute provides that the General Assembly's *original* congressional map will once again be effective if this Court reverses the North Carolina Supreme Court's decision invalidating it. *See* 2022 N.C. Sess. Laws 3, § 2.

Carolina's 1971 constitution, by contrast, was not an exercise of the State's *legislative* power, it was an exercise of *higher*-lawmaking, *superior* over ordinary legislation. *See* N.C. CONST. art XIV, § 4. The difference is easy to see: if the North Carolina constitution really did apply to congressional districts, then the General Assembly *would not be free to depart from* its limits through the ordinary legislative process. Respondents' argument thus takes us outside of the realm of "authorization" and into the realm of binding restrictions on the power assigned to the legislature by the Elections Clause. Such restrictions violate the Elections Clause for all the reasons discussed above.

B. Congress Has Not Vested State Courts with the Authority To Regulate the Time, Place, and Manner of Federal Elections.

Finally, Respondents also argue that through the enactment of two federal statutory provisions, "Congress has exercised its power under the second part of the [Elections] Clause to require that state legislatures *comply* with state constitutions in redistricting." Non-State Br. 65. But neither of the statutory provisions Respondents point to "require[s] that state legislatures *comply* with state constitutions in redistricting." *Id.*[18]

Respondents cite 2 U.S.C. § 2c, which generally requires all congressional maps "established by law" to provide for single-member-district elections. In

[18] Congress can no more reallocate the authority assigned to state legislatures by the Clause than the *States themselves* can. Any federal statute purporting to do so would thus be unconstitutional under the nondelegation principles noted above.

Branch v. Smith, the Court interpreted this phrase to embrace not only a state legislature's redistricting decisions, but also congressional districts established "by state and federal courts." 538 U.S. 254, 272 (2003). But the *constitutional violation* that the court-imposed plans discussed in *Branch* are designed to remedy is a *federal* constitutional violation: a State's "failure to redistrict constitutionally," in violation of the Equal Protection Clause's one-person, one-vote rule. *Id.* at 270. We have never disputed that state courts may prescribe congressional maps to remedy federal Equal Protection violations. All *Branch* says is that when they do so, they are governed by Section 2c's single-member-district requirement.

Respondents also rely on 2 U.S.C. § 2a(c), which provides in certain circumstances that a State's representatives shall be elected "from the State at large" "[u]ntil [the] State is redistricted in the manner provided by the law thereof." 2 U.S.C. § 2a(c)(5). A plurality in *Branch* interpreted Section 2a(c)'s reference to the "manner provided by the law thereof" to include "redistricting by courts as well as by legislatures." 538 U.S. at 274. This portion of *Branch* does not help Respondents either, and for the same reason: the "redistricting by courts" adverted to in *Branch* is redistricting to remedy a *federal* constitutional violation.

Respondents point out that Section 2a(c)'s language was changed in 1911, to replace the previous reference to redistricting by "the legislature of such state" with the current reference to redistricting in "the manner provided by the law thereof." Non-State Br. 65; *see also Branch*, 538 U.S. at 274. But as this Court explained in *Hildebrant* and again in *Arizona*, this amendment was "plainly intended to provide that

where, by the state Constitution and laws, the referendum was treated as part of the legislative power, the power as thus constituted should be held and treated to be the state legislative power for the purpose of creating congressional districts by law." *Hildebrant*, 241 U.S. at 568; *see also Arizona*, 576 U.S. at 810–11. Respondents identify *no* evidence that the amendment was intended to require state legislatures to comply with *substantive* state-constitutional restrictions when drawing congressional districts.

Finally, Respondents point to the *Branch* plurality's conclusion that when redistricting pursuant to Section 2c courts are to account for the "policies and preferences of the State, as expressed in statutory and constitutional provisions or in the reapportionment plans proposed by the state legislature," as well as "[f]ederal constitutional prescriptions, and federal statutory commands." 538 U.S. at 274–75 (plurality). This passage from *Branch* concerns factors that are to guide federal courts in exercising their equitable discretion when drawing remedial maps. It therefore does not "reaffirm that state legislatures must comply with their state constitutions." Non-State Br. 66; *see also* Amicus Br. of U.S. 15 (Oct. 26, 2022). *Branch* did not have before it, and thus could not have resolved, the question whether substantive state-constitutional restrictions bind state legislatures when drawing congressional districts. Indeed, the *Branch* plurality explained that courts *should not* follow any state "statutory and constitutional provision[ ]" that "detracts from the requirements of the Federal Constitution." 538 U.S. at 275 (cleaned up). And for all the reasons explained above, a substantive state-constitutional provision *would* detract from federal constitutional

requirements if it purported to limit the authority assigned state legislatures by the Elections Clause.

CONCLUSION

The Court should reverse the decisions below invalidating and replacing the General Assembly's duly-enacted congressional map.

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